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Court : Allahabad

Decided On : Jan-12-1922

Reported in : 66Ind.Cas.618

Judge : Ryves and ;Gokul Prasad, JJ.

Appellant : Mohan Lal

Respondent : Premraj and ;hari Singh and ors.

Judgement :

1. This appeal arises out of a suit for sale on a mortgage. It appears that there were two brothers, Ramji Lal and Baldeo, who owned a 1/12th share each in a certain property. Baldeo died leaving two eons, Bahadur and Nathu. Ramji Lal applied for mutation of names in plate of Baldeo and obtained an order in his favour; and on the 5th of December 1995, he mortgaged with possession the whole share, that is, 1/6th, belonging to his deceased brother and himself. On the 15th of June 1906, he executed a simple mortgage of the 1/6th share in favour of the plaintiff Premraj.

2. One Hari Singh, who is a defendant in the suit, had two simple money-decrees against Ramji Lal and Baldeo separately. He brought to sale the 1/12th share of each of the two brothers in execution of his decrees and purchased them himself. He purchased the share of Ramji Lal subject to the plaintiff's encumbrance of the 5th of December 1905. On the 4th of March 1907 Premraj sued the mortgagor

Ramji Lal, Hari Singh and Bahadur and Nathu the sons, of Baldeo on his mortgage of the 5th of December 1905 and obtained a decree for sale.

3. On the 16th of August 1911 Hari Singh mortgaged the property purchased by him to Beopar Shahayak Bank and paid off the decree of Premraj.

4. On the 22nd of December 1911 Hari Singh mortgaged the property to Mohan Lal defendant and with the money so taken paid off the mortgage of Beopar Shahayak Bank.

5. The plaintiff Premraj now sues for sale of the whole property on his mortgage of 1906. Mohan Lal contended inter alia that Ramji Lal had no authority to mortgage the whole of the property and his half share, that if, a 1/12th, only could be sold, He also claimed priority to the extent of the amount due on the mortgage of 1905 which he had satisfied.

6. The Munsif same to the conclusion that Ramji Lal was not competent to mortgage the whole of the property in the presents of Baldeo's two sons, but could mortgage only his 1/12th share. He decreed the claim subject to the payment of Rs. 1,157 the principal and interest on the mortgage of 1905 to the defendant Mohan Lal.

7. The plaintiff went up in appeal, and the learned Judge of the lower Appellate Court same to the conclusion that Hari Ram, Bahadur and Nathu were made parties to the previous suits, as legal representatives of Ramji Lal and could not be heard to say that the mortgage by Ramji Lal of the whole of the family property was incompetent. He then went on to say that the mortgage security became extinguished as soon as Premraj obtained the decree for sale on his mortgage of the 5th of December 1905 and, therefore, no right of subrogation could be claimed by Hari Singh. On these findings he modified the decree of the Court of first instance by giving the plaintiff an unconditional decree for sale of the whole of the property.

8. The defendant Mohan Lal tomes here in second appeal and contends that (1) it was open to him to contend that Ramji Lal was not the owner of the entire property

but of half, (2) that he was not the legal representative of Ramji Lal, (3) that Ramji Lal was not competent to mortgage the share of his brother Baldeo, and (4) that haying satisfied jibe plaintiff's own mortgage of 1905 be was entitled to priority to that extent.

9. As to the first contention urged on behalf of the appellant, we do not think that it baa any forte, Hari Singh was made a defendant in the previous suit by the plaintiff as he had purchased the property which was already mortgaged to the plaintiff. The Court had found in that case that the mortgage given by Ramji Lal was partly on account of the debts owing by bath Ramji Lal and his brother Baldeo.

10. As to the second and third points raised which are connected with the first, we are of opinion that the appellant who had purchased the whole of the family property in execution of a simple money-decree was the legal representative of both the brothers Ramji Lal and Baldeo. In the previous snit of Premraj the Court decided in effect that Ramji Lal was competent to mortgage the share of his brother Baldeo also We do not think the defendants can now go behind that finding.

11. The fourth contention, namely, that the defendant-appellant having satisfied the plaintiff's first mortgage of 1905 was entitled to bold it up as a shield, has been hotly contested on both sides. It was argued by Mr. Durga Charan Binerji, the learned Advocate for the appellant, that according to the doctrine of subrogation the defendant-appellant was entitled to do so. On the other hand, Dr. S(sic)n, the learned Advocate for the respondents contended that the doctrine of subrogation as applied in India was confined to the provisions of Section 74 of the Transfer of Property Act (IV of 1882) and referred only to a subsequent mortgagee redeeming the next prior mortgage. In our opinion this argument cannot be accepted. The Transfer of Property Act does not purport to consolidate the law relating to mortgages in India but only defines and amends certain parts of the law (see the Preamble to the Act and paragraph 10 of Dr. Gour's Law of Transfer in British India). Furthermore, their Lordships of the Privy Council have applied the principle in the case of purchasers also see Gokaldas Gopaldas v. Puranmal Premsukh 10 C. 1035 at p. 1044 : 11 I. A. 126 : 8 Ind. Jur. 396 : 4 Sar. P. C. J. 543 : 5 Ind. Dec.

(n. s.) 692 (P. C.).

12. Another contention of Dr. Sen is that, where there are two mortgages in favour of the same person, no question of subrogation can arise because a creditor can claim no subrogation against himself. No authority has been cited before us in support of this contention and we do not think that on principle there is any difference between the case where a purchaser pays off a prior mortgage in favour of a third person and the case where he pays off a prior mortgage against the same creditor against whom he claims the right of subrogation. We are of opinion that the contention of the appellant on this point is correct.

13. We, therefore, allow, the appeal, set aside the decree of the Court below and in lieu thereof pass a decree in favour of the plaintiff for sale of half the mortgaged property un-conditionally and for sale of the remaining half if the sale proceeds of the former does not prove to be sufficient, subject to his paying Rs. 1,157 to the defendant-appellant Mohan Lal. The defendants must pay the amount due to the plaintiff within six months from this date. In case of their failure to do so the plaintiff will be entitled to recover his money by sale of half the mortgaged property. In case his mortgage is not satisfied by such sale and he wants to sell the remaining half he will have to pay Rs. 1,157 to the appellant Mohan Lal within six months of the sale of the former half and he will then be entitled to sell the remaining half of the property also to recover the balance due to him and the amount of Rs. 1,157 so paid to Mohan Lal. The plaintiff is entitled to half his costs in all Courts and the defendant-appellant Mohan Lal will get half his costs in all Courts from the plaintiff. Costs in this Court will include fees on the higher scale.