

Muhammad Inamullah Khan Vs. Aisha Bibi

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Court : Allahabad

Decided On : Apr-27-1926

Reported in : 96Ind.Cas.765

Judge : Grimwood Mears, C.J. and; King, J.

Appellant : Muhammad Inamullah Khan

Respondent : Aisha Bibi

Judgement :

1. One Samiullah was the owner of certain property, consisting of shares or specific plots, in two villages, namely, Mohiuddinpur and Rajapura.
2. On the 10th of January, 1910, he mortgaged the property in both villages for Rs. 3,200 to his daughter, Musammat Aisha, the plaintiff.
3. On the 18th of April, 1911, Samiullah mortgaged the same property in both villages to Musammat Munga Kunwar for Rs. 5,000. Out of the consideration a sum of Rs. 3,482-12-3 was left with the mortgagee for payment to Musammat Aisha the prior mortgagee. But Musammat Munga Kunwar, in fact paid nothing to the prior mortgagee.
4. On the 6th of June, 1912, Samiullah sold part of the mortgaged property, namely, the property in Mohiuddinpur to Mansa Ram, the husband of Musammat Munga Kunwar, for Rs. 9,000. Out of the purchase-money a sum of Rs. 7,765 was

left with the vendee for payment to Musammat Munga Kunwar, the second mortgagee.

5. The principal defendant, Inamullah, brought a suit against Mansa Ram for preemption, and his suit was decreed on the 24th of September, 1913, on payment of Rs. 6,393-3-0, out of which Rs. 3,482-12-3 was left with the pre-emptor for payment to Musammat Aisha, the prior mortgagee. On the 18th of August, 1913, Samiullah Bold the remaining mortgaged property, namely, the property in Rajapura, to Musammat Aisha, the prior mortgagee, for Rs. 1,500.

6. In April, 1921, Musammat Aisha brought a suit to recover the whole sum due on her mortgage of the 10th of January, 1910, amounting to Rs. 6,750 by sale of the Mohiuddinpur property. She explained in the plaint that she did not seek to bring the Rajapura property also to sale because that property had been sold to her.

7. Inamullah, the owner of the Mohiuddinpur property, raised an objection (the only objection with which we are concerned in appeal) to the effect that as the mortgagee had herself purchased the Rajapura property, she was not entitled to throw the whole burden of the mortgage-debt upon Mohiuddinpur but was bound to set off the proportionate amount which the Rajapura property was liable to contribute.

8. The learned Subordinate Judge did not accept the defendant's contention. His view was that as Mansa Ram had left with him the amount for satisfying both the mortgages, and as Inamullah, as pre-emptor, stood in the shoes of Mansa Ram, he had no right to claim that any part of the mortgage debt should be contributed by the Rajapura property. The plaintiff's claim was, therefore, decreed in full.

9. The defendant, Inamullah, appeals on the wound that he is entitled to claim rateable contribution from the Rajapura property and that the amount of such contribution should be deducted from the sum decreed to the plaintiff. The only question for our determination is whether Inamullah's claim is well-founded.

10. The appellant's claim is based upon the provisions of Section 82 of the Transfer of Property Act, which lays down that the different parts of the mortgaged

property are liable to contribute rateably in the absence of a contract to the contrary.

11. The respondent argues that in the present case there was a contract to the contrary, according to which Inamullah is bound to pay the whole of the mortgage-debt and is, not entitled to demand, contribution from the Rajapura property. The respondent points to the terms of the sale-deed executed by Samiullah in favour of Mansa Ram, and argues that they prove a contract under which Mansa Ram undertook liability for paying the full amount due upon both the mortgages.

12. At this stage it is necessary to note that Mansa Ram did not undertake to pay off Musammat Aisha's mortgage-debt. He only undertook to pay the full amount due to Musammat Munga Kunwar, but that amount included a sum which Munga Kunwar was bound to pay to Musammat Aisha. It should also be noted that the sum which was left with the vendee, Mansa Ram, for payment to Musammat Aisha through Musammat Munga Kunwar was insufficient to satisfy Musammat Aisha's mortgage-debt. The sum left with him was only Rs. 3,482-12-3 and this was not sufficient, at the date of the sale to Mansa Ram, to satisfy Aisha's mortgage-money together with interest.

13. But, for the purpose of deciding this appeal, we may put the respondent's case at its highest, and assume, for the sake of argument, that Mansa Ram did contract with Samiullah to discharge the full amount of both mortgage-debts. Nevertheless this contract will be of no assistance to Musammat Aisha. It has been held in *Ramabhadrachar v. Srinivasa Iyengar* 24 M. 85 that the 'contract to the contrary' referred to in Section 82 of the Transfer of Property Act, means a contract between the mortgagor and the mortgagee. This decision has been approved of recently by a Bench of this High Court in the case of *Charan Singh v. Ganeshi Lal* 94 Ind. Cas. 1018 : 24 A.L.J. 401 : A.I.R. 1926 All. 352.

14. In the present case the contract which purported to throw the whole burden of the mortgages upon the Mohiuddinpur property was not entered into between the mortgagor and the mortgagee, but between the mortgagor and his vendee, Mansa Ram. Hence the contract cannot affect the liability of the Rajapura property to contribute rateably to the mortgage-debt. The mortgagee Musammat Aisha is

claiming the benefit of a contract to which she was a stranger. It is clear that if the mortgagor and his vendee had purported to contract that the property sold should be exempted from the mortgage-debt, this contract would not bind the mortgagee. Similarly, if the mortgagor and his vendee purported to contract that the whole burden of the mortgage-debt should be thrown upon the portion of the mortgaged property which was sold, the mortgagee cannot claim the benefit of the contract. This principle, in its application to cases of this description, has been affirmed by their Lordships of the Privy Council, *Jamna Das v. Ram Autar Pande* 13 Ind. Cas. 304 : 34 A. 63 : 16 C.W.N. 97 : 11 M.L.T. 6 : 9 A.L.J. 37 : (1912) M.W.N. 32 : 15 C.L.J. 68 : 14 Bom. L.R. 1 : 21 M.L.J. 1158 : 39 I.A. 7 (P.C.) and by this High Court in the case of *Gharan Singh v. Ganeshi Lal* 94 Ind. Cas. 1018 : 24 A.L.J. 401 : A.I.R. 1926 All. 352, to which reference has already been made.

15. In our opinion it is clear that the mortgagee cannot claim the benefit of a contract to which she was not a party, and the principle of liability to rateable contribution, as laid down in Section 82, Transfer of Property Act, must be left to its full operation.

16. The respondent has further argued on the strength of a ruling, reported as *Muhammad Abbas v. Muhammad Hamid* 14 Ind. Cas. 179 : 9 A.L.J. 499 that the right to enforce contribution is essentially an equitable right and can be resisted on equitable grounds. He urges that as the vendee, Mansa Ram, who is now represented by Inamullah, did in fact contract with his vendor to pay of the whole of the mortgage-debt, it is only fair that, he should do so, and that he should not claim any contribution from the other mortgaged property.

17. The facts of the reported case differ in some important particulars from the facts of the case which we are now considering. In the present case the vendee never undertook to pay any sum to Musammata Aisha directly in satisfaction of her mortgage-debt. He only contracted to pay to Musammata Munga Kunwar, who might or might not pass on the amount due to Musammata Aisha. Secondly, the vendee did not retain, the whole sum which would be required for redeeming Aisha's mortgage. The amount left with him was, as already mentioned, insufficient for redeeming the mortgage even at the time of the sale in Musammata's favour. It

must also be observed that the terms of the mortgage, on which the present suit is based, were that the principal should not be paid within five years. So even if the sum left with the vendee had been tendered to Muiaamat Aisha in 1912, she would not have been bound to accept it and to permit the redemption of the property.

18. In the present case we consider that the mortgagee cannot resist the claim to contribution even on equitable grounds.

19. It is true that when the Rajapura property was sold to Musammat Aisha it was stated in the sale-deed that this property, was free from incumbrances, although in fact it was subject to her own incumbrances. This has been taken by the respondent as evidencing a contract between the mortgagor and the mortgagee that no part of the mortgage-money should be contributed by the Rajapura property. But, obviously no contract of this kind could bind Inamullah who was no party to it. At the date of the sale of Rajapura to Musammat Aisha, Samiullah had no further interest in the Mohiuddinpur property. In our opinion, therefore, the claim to rateable, contribution must succeed.

20. The materials on the record for ascertaining the value of the Rajapura property and the Mohiuddinpur property respectively, at the time of the mortgage, are somewhat scanty. So far as the Mohiuddinpur property is concerned we have the fact that in the pre-emption suit it was found that the real consideration was Rs. 6,393. We take it that at the time of the mortgage in suit the value, of this property was Rs. 6,000.

21. So far as the Rajapura property is concerned the various estimates of its value are very conflicting. According to the plaintiff's witness, Khan Bahadur Muhammad Naim Khan, the value of the property was only about Rs. 300 when it was mortgaged. According to the examples of the sales of land in, this village, which have been proved by the other side, the property would be worth about Rs. 4,000. Estimates, of this separate of little value. We must be guided by the fact that the property was sold to the plaintiff in 1913 for Rs. 1,500, and this sale purported to be free from all incumbrances. Also, there is the fact that the plaintiff has made a statement, to be found at page 5 of the printed record, to the effect that she is

prepared to sell this property for Rs. 900. Probably the real market value is somewhere between these two, figures, and for the purpose of contribution we fix the value at Rs. 1,000.

22. The plaintiff, therefore, must reduce her claim by one-seventh. The sum decreed in the plaintiff's favour, including interest up to the 30th of December, 1922, was Rs. 8,221-60. Deducting one-seventh, which comes-to Rs. 1,174, the defendant will have to pay Rs. 7,047 instead of Rs. 8,221-6-0.

23. The appeal is, therefore, allowed to this extent. The defendant-appellant has succeeded on the question of law raised but he valued his relief at Rs. 2,000, whereas it has been found that, the relief only amounts to Rs. 1,174. But as the appellant has succeeded in principle, we allow the appeal with costs on Rs. 2,000 claimed together with fees in this Court on the higher scale.

24. In allowing the appeal we modify the decree of the lower Court to the extent indicated. We do not disturb the order of the lower Court as regards costs.