APPELLATE CIVIL.

1899
January 26.

Before Sir Arthur Strachey, Kt., Chief Justice and Mr. Justice Knox.

RAM NATH RAI AND OTHERS (PLAINTIFFS) *v.* LACHMAN RAI AND OTHERS (DEFENDANTS).*

Act No IV of 1882 *(Transfer of Property Act), section* 85—*Hindu law—Joint Hindu family—Suit on a mortgage executed by a Hindu father—Sons not made parties—Notice—Burden of Proof.*

Where the sons in a joint Hindu family come into Court seeking to get rid of the effect, as against their interests in the joint family property, of a decree on a mortgage executed by their father obtained in a suit to which they were not made parties, the burden of proof lies on them to establish that the mortgagee when he brought his suit had notice of their interests in the mortgaged property.

THIS was a suit brought by the sons in a joint Hindu family against their father and his mortgagee to obtain a declaration that their interests in certain property which they alleged to be ancestral property were not liable to sale in execution of a decree obtained in a suit for sale on a mortgage against the father. The plaintiffs had not been made parties to the suit for sale against their father.

The defendant mortgagee pleaded that the property in suit was not ancestral, but the personal property of the father, to whom he advanced the loan in good faith.

The Court of first instance (Munsif of Muhammadabad) found that the defendant mortgagee had no notice of the property in question being ancestral or of the plaintiff's interest therein, and accordingly dismissed the suit.

The plaintiffs appealed. The lower appellate Court (District Judge of Azamgarh) found that the property was ancestral; but that the plaintiffs had failed to discharge the burden, which lay on them, of proving that the defendant mortgagee had notice of their interests in the property at the time when he brought his suit on the mortgage. That Court accordingly dismissed the appeal.

* Second Appeal No. 883 of 1896, from a decree of H. D. Griffin, Esq., Officiating District Judge of Azamgarh, dated the 5th June 1896, confirming a decree of Pandit Guru Prasad Dube, Munsif of Muhammadabad Gohna, dated the 24th March 1896.

1899

RAM NATH RAI v. LACHMAN RAI.

The plaintiffs appealed to the High Court.

Mr. *A. H. C. Hamilton*, for the appellants.

Pandit *Sundar Lal*, for the respondents.

STRACHEY, C. J.—We have come to the conclusion that the judgment of the lower appellate Court is correct. There is undoubtedly a clear finding of fact that the mortgagee had no notice of the interests of the present plaintiffs in the suit in which the mortgage decree was passed. There are, however, expressions in the judgment which indicate that in coming to that conclusion the learned Judge was influenced by his view that it was for the plaintiffs in this suit to establish that the mortgagee, when suing upon his mortgage, had notice of their interests, and that, as they were not made parties to that suit, the decree obtained under section 88 of the Transfer of Property Act would not affect them. We think that the learned Judge was right.

We think that it was for the plaintiffs—Hindu sons trying to prevent, so far as their interests were concerned, a sale of an ancestral property in execution of a mortgage decree against their father only—to prove that the sale would not under the circumstances affect their interests. The property was undoubtedly ancestral property. It is found as a fact that no evidence was given by the plaintiffs in support of their allegation that the mortgage was executed for immoral purposes. The only ground which remained for them to show that their shares were not liable to sale under the mortgage decree was that there had been a neglect to comply with the provisions of section 85 of the Transfer of Property Act, and that in consequence of such neglect, under the ruling in *Bhawani Prasad* v. *Kallu* (1) the sale could not affect their rights and interests. We think that, just as in the case of an allegation that the mortgage was executed for a debt tainted with immorality, the burden of proving that allegation and of showing that their interests were not liable to sale would rest on the plaintiffs, so the burden of proof

(1) (1895) I. L. R., 17 All., 537.

lies on them to establish the only other ground on which the effect of the sale against their rights and interests could be avoided. It was therefore for the plaintiffs to prove that the mortgagee had notice of their interests, and that his omission to make them parties to the former suit exempted their interests from liability to sale under the decree. This view is in keeping with the judgment of BANERJI and AIKMAN, JJ., in F. A. No. 213 of 1896, decided upon the 12th January, 1899.* That decision seems exactly in point, and we agree with it. We dismiss this appeal with costs.

Appeal dismissed.

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* The judgment in this case was as follows:—

BANERJI and AIKMAN, JJ.:—The respondents, Mewa Lal and Lachmi Narain, obtained a decree upon a mortgage, dated the 8th of February, 1886, executed by Ranbahadur Singh, the father of Bijai Bahadur Singh, plaintiff, Randhir Singh, the father of the other plaintiffs, and Hanwant Singh, a brother of Ranbahadur Singh and Randhir Singh. At the time of the suit Hanwant Singh was dead and his widow was made a defendant to the suit. The other defendants were Ranbahadur Singh and Randhir Singh. In execution of that decree, which is dated the 7th of December, 1892, Mewa Lal and Lachmi Narain caused the mortgaged property to be advertised for sale. Thereupon the present suit was brought on the 1st of February, 1896, for a declaration that the interests of the plaintiffs in the mortgaged property were not liable to sale. The sole ground upon which the suit was brought was that the plaintiffs had not been made parties to the mortgagees' suit. If the property was ancestral and the mortgagees had notice of the interests of the plaintiffs in the mortgaged property at the time they brought their suit upon the mortgage, the plaintiffs would, under the ruling of the majority of the Full Bench in *Bhawani Prasad* v. *Kallu* (I. L. R., 17 All., 537) be entitled to succeed. The Court below, however, has dismissed the suit upon the ground that it had not been established that the mortgagees had express or constructive notice of the interests which the plaintiffs claimed in the property. The learned Subordinate Judge, who has recorded a careful judgment in the case, was of opinion that it had not been proved that the mortgagees had any knowledge of the existence of the plaintiffs and that there had not been on the part of the mortgagees either wilful abstention from inquiry or gross negligence such as would bring the case within the definition of notice as given in section 3 of Act No. IV of 1882. The learned counsel who has appeared for the plaintiffs appellants has conceded that there was no express notice. He contends, however, that the mortgagees must be taken to have had constructive notice of the existence of the plaintiffs. We are of opinion that the reasons given by the learned Subordinate Judge for holding the contrary view are cogent. It has not been shown that any circumstances existed which ought to have put the mortgagees upon inquiry. The appeal is, in our opinion, untenable. We dismiss it with costs.