

APPELLATE CIVIL.

1902
June 20.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Banerji.

BALBHADDAR NATH AND OTHERS (PLAINTIFFS) *v.* SHEODIHAL
AND OTHERS (DEFENDANTS).*

*Pre-emption — Mortgage — Mortgage money fraudulently over-stated—
Claim of pre-emptor decreed at a lower figure—Suit by mortgagees
against mortgagor to recover the difference.*

Din Bandhu mortgaged to Sheodihal and others certain property, and the mortgagor and the mortgagees for purposes of their own fraudulently agreed to over-state the consideration for the mortgage. One Shuhrat Singh then brought a pre-emption suit against the parties to the mortgage, and obtained a decree, which allowed him to take over the rights of the mortgagees upon payment of a sum much less than the consideration stated in the bond, which was found by the court to have been largely fictitious. The mortgagees, after the success of Shuhrat Singh's suit, sued the representatives of the mortgagor to recover from them the difference between the price paid by Shuhrat Singh and the consideration mentioned in the deed of mortgage. They based their suit mainly upon a stipulation in the deed, to the effect that if the mortgage money due to the mortgagees was in any way jeopardized, the mortgagees would be entitled to realize it with interest at 9 per cent. per annum, and partly upon general grounds of equity. *Held* that from no point of view were the plaintiffs entitled to succeed. The stipulation in the bond above referred to enured to the benefit of the pre-emptor, and since the plaintiffs had joined with the defendants in misrepresenting the amount of the consideration for the mortgage, they could not be allowed to take advantage of their own wrong.

THE facts of this case sufficiently appear from the judgment of the Court.

Babu *Durga Charan Banerji*, for the appellants.

Pandit *Sundar Lal*, for the respondents.

STANLEY, C. J. and BANERJI, J.—This appeal has been preferred from the decree of the Additional Subordinate Judge of Gorakhpur, by which he has dismissed the suit brought by the plaintiffs appellants under the following circumstances:—Din Bandhu Pande, the father of the defendants respondents, executed a mortgage in favour of the plaintiffs on the 18th March, 1892, the amount of consideration set forth in the mortgage-deed being Rs. 904. One Shuhrat Singh, a co-sharer

* Second Appeal No. 790 of 1900 from a decree of Babu Ramdhan Rai, Officiating Additional Subordinate Judge of Gorakhpur, dated the 18th of April 1900, reversing a decree of Babu Kalika Singh, Munsif of Bansi, dated the 29th July 1899.

in the village in which the mortgaged property was situate, brought a suit for pre-emption in respect of the mortgage. He alleged that the actual amount of consideration for the mortgage was Rs. 525, and not Rs. 904 as specified in the mortgage-deed. The court found in favour of the then plaintiff, and made a decree for pre-emption conditional upon the payment of Rs. 525. That amount has been received by the plaintiffs; and they now bring the present suit to recover from the defendants Rs. 379, the difference between the amount received by them and the amount of consideration mentioned in the mortgage-deed. The claim was decreed by the court of first instance, but has been dismissed by the lower appellate Court. The plaintiffs have preferred this appeal.

The claim as laid in the plaint was founded upon a stipulation contained in the mortgage-deed, executed by Din Bandhu, to the effect that if the mortgage money due to the mortgagees was in any way jeopardized, the mortgagees would be entitled to realize it with interest at 9 per cent. per annum. The lower appellate Court held that, as it was not through any act of the defendants' father that the present plaintiffs lost the pre-emption suit, the plaintiffs were not entitled to succeed in their claim upon the basis of the stipulation to which we have referred. We are, however, of opinion that the covenant in the mortgage deed enures in favour of the pre-emptor, who has stepped into the shoes of the mortgagee. If he, as mortgagee, is damnified in any way, he would be entitled to avail himself of the covenant. The plaintiffs, in our opinion, are not entitled to take advantage of it.

It is next urged that as the defendants' father received the full amount of the mortgage, and as the plaintiffs have recovered from the pre-emptor only a portion of it, they are equitably entitled to the balance of the amount advanced by them. This might perhaps have been a valid contention had the full amount of the mortgage money been advanced by the plaintiffs; but the facts of this case show that they did not do so. The consideration for the mortgage consisted of a sum of Rs. 230 paid in cash, and Rs. 674 alleged to have been due by the mortgagor upon a bond executed by him in favour of the plaintiffs in 1837. A

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part of the consideration for the bond of 1887 consisted of money which had been left in the hands of the plaintiffs, the obligees of that bond, for the discharge of a debt due to Shuhtrat Singh upon a mortgage executed by Din Bandhu. It appears that Shuhtrat Singh brought a suit to recover the amount due to him under the void mortgage, and in that suit it was pleaded that the present plaintiffs had, in compliance with the terms of the mortgage deed of 1887, paid off the amount of Shuhtrat Singh's mortgage. The court found that plea to be untenable, and held that Shuhtrat Singh's mortgage had not been discharged by the present plaintiffs. In the pre-emption suit brought by Shuhtrat Singh, to which we have referred, he relied on the fact of the non-payment of the above amount in order to show that the consideration for the mortgage of 1892 had been falsely exaggerated in the mortgage-deed. The present plaintiffs in answer to that contention alleged that they had paid off the amount of Shuhtrat Singh's mortgage. The Court repelled that contention and found against them. It is thus clear that the present plaintiffs and the defendants' father joined together in fraudulently representing that the consideration for the mortgage was Rs. 904, and not Rs. 525, the sum found by the Court in the pre-emption suit to be the actual amount of consideration. The plaintiffs and the defendants' father having thus joined together in perpetrating a fraud for the purpose of defeating the rights of pre-emptors, the plaintiffs cannot take advantage of that fraud and maintain the present claim against the defendants. Upon this ground also the plaintiffs' suit was bound to fail.

We therefore affirm the decree of the lower appellate Court, though not for the reasons upon which that decree is founded, and dismiss the appeal with costs.

Appeal dismissed.