1906
December 12.

*Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Sir William Burkitt.*

GAYA DIN AND OTHERS (PLAINTIFFS) *v.* KASHI GIR (DEFENDANT).*

*Mortgage—Property mortgaged not at date of execution belonging to the mortgagor—Effect of subsequent acquisition by the mortgagor of such property.*

The plaintiff in a pre-emption suit, in order to procure funds for the prosecution of his suit, executed a mortgage comprising certain property of which he was the owner and also the property the subject-matter of the suit for pre-emption. The suit for pre-emption was successful. *Held* that the mortgage took effect as regards the property the subject of the pre-emption suit from the time when the plaintiff mortgagor obtained possession by virtue of his decree in the suit. *Holroyd* v. *Marshall* (1), *Collyer* v. *Isaacs* (2) and *Bansidhar* v. *Sant Lal* (3) referred to.

THIS was a suit for sale on a mortgage executed under the following circumstances. The mortgagor, in order to pre-empt a share in a village in which he was himself a co-sharer, required an advance of money. He borrowed Rs. 3,000 from the mortgagees, and to secure repayment mortgaged, as well as property of which he was already owner, the share which he was seeking to pre-empt. The mortgagor succeeded in his suit for pre-emption, and subsequently the mortgagees sued to recover their money seeking to bring to sale the pre-empted property. The Court of first instance (Subordinate Judge of Banda) gave the plaintiffs a decree for sale of the other property but excluded the pre empted property upon the ground that the stipulation in the deed of mortgage that the pre-empted property should be considered as pledged and hypothecated as security for the mortgage debt could not amount to an actual mortgage nor could it create any charge upon the property in favour of the plaintiffs. The plaintiffs appealed to the High Court.

The Hon'ble Pandit *Sundar Lal* and Munshi *Gokal Prasad*, for the appellants.

Munshi *Gulzari Lal*, for the respondent.

STANLEY, C.J., and BURKITT, J.—This appeal arises out of a suit for sale on a mortgage. The mortgagor, Kashi Gir was co-sharer in a village, and being desirous of pre-empting a sale of another share in the same village, required for that purpose an

* First Appeal No. 308 of 1904, from a decree of Rai Chandi Prasad, Subordinate Judge of Banda, dated the 22nd of September 1904.

(1) (1861) 10 H. L., at p. 210. (2) (1881) 19 Ch. D., 342.
(3) (1887) I. L. R., 10 All., 133.

1906

GAYA DIN v. KASHI GIR.

advance of money. He applied to the plaintiffs appellants for a loan of Rs. 3,000, and obtained this loan on the security of a mortgage on the 1st of March 1895. In this mortgage Kashi Gir hypothecated shares in two villages of which he was already owner and the document contained the following provision:—"Should I succeed in the pre-emption suit (that is, the suit which he had brought to pre-empt the share to which we have referred) and get possession of the 8 anna zamindari share sold, bearing a jama of Rs. 145 and situate, etc., etc., it shall also be considered to be pledged and hypothecated as security for this debt." Then follows an undertaking on the part of the mortgagor not to transfer or mortgage the share so sought to be pre-empted so long as the mortgage security subsisted. The mortgagor succeeded in his pre-emption suit. To raise the amount of the mortgage debt, the suit out of which this appeal has arisen was brought for sale of all the properties mentioned in the mortgage, including the share which was pre-empted. The learned Subordinate Judge gave a decree in respect of the properties of which the mortgagor was owner at the date of the mortgage, but refused to include in the decree the pre-empted property. The grounds which he assigns for this decision are that the stipulation in the deed providing that the pre-empted property should be considered as pledged and hypothecated as security for the mortgage debt, cannot amount to an actual mortgage, nor can it create any charge in favour of the plaintiffs upon the share in question.

We are unable to agree in the view which the learned subordinate Judge took upon this question. It appears to us that when the mortgagor acquired by pre-emption and got possession of the pre-empted property, equity treating that as done which ought to be done, gave the mortgagee a charge by way of mortgage upon the pre-empted share, and in fact, placed the plaintiffs as regards that property in the position of mortgagees. The principle which is applicable to a case of this kind is to be found in the well known case of *Holroyd* v. *Marshall* (1). That was the case of a mortgage of personal chattels, but the principle which is enunciated by their Lordships is of general application. Lord Westbury, L.J., observes (at pp. 210 and 211):—"It is quite true that

(1) (1861) 10 H. L., at p 210.

a deed which professes to convey property which is not in existence at the time is as a conveyance void at law simply because there is nothing to convey. So in equity a contract which engages to transfer property which is not in existence cannot operate as an immediate alienation because there is nothing to transfer. But if a vendor or mortgagor agrees to sell or mortgage property, real or personal, of which he is not possessed at the time and he receives the consideration for the contract and afterwards becomes possessed of property answering the description in the contract, there is no doubt that a court of equity would compel him to perform the contract and that the contract would in equity transfer the beneficial interest to the mortgagee or purchaser immediately on the property being acquired. This of course assumes that the supposed contract is one of that class of which a court of equity would decree the specific performance. If it be so, then immediately on the acquisition of the property described the vendor mortgagor would hold it in trust for the purchaser or mortgagee, according to the terms of the contract." In *Collyer* v. *Isaacs* (1) Jessel, M. R., upon the same subject observes:—"The creditor had a mortgage security on existing chattels and also the benefit of what was in form an assignment of non-existing chattels which might be afterwards brought on to the premises. That assignment in fact constituted only a contract to give him the after acquired chattels. A man cannot in equity, any more than at law, assign what has no existence. A man can contract to assign property which is to come into existence in the future, and when it has come into existence equity treating as done that which ought to be done, fastens upon that property, and the contract to assign thus becomes a complete assignment." The principle enunciated in these cases was adopted by a Bench of this Court in the case of *Bansidhar* v. *Sant Lal* (2). In that case there was an hypothecation of future indigo produce and it was held that the hypothecation of the indigo became complete when the crop was grown and the produce realized. The principle is, in our opinion, equally applicable to the case of immovable as of movable property. We, therefore, hold that so soon as the defendant Kashi Gir obtained possession, under his pre-emption

(1) (1881) 19 Ch. D., 342. (2) (1887) I. L. R., 10 All., 133.

1906

GAYA DIN v. KASHI GIR.

decree, of the share of the property which he agreed to include in the mortgage, the mortgagees became entitled to the full benefit of the security of that share and to have an order for sale of it under the Transfer of Property Act in default of payment of the mortgage debt. We, therefore, allow the appeal, modify the decree of the Court below by including therein the 8 anna share in Rampur Tarhuan, which has been excluded by the Court below from the operation of the decree. The appellants will have their costs of the appeal from the defendant respondent.

*Decree modified.*

---

1906

*March* 28.

*Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Sir William Burkitt.*

BISHAMBHAR NATH (DEFENDANT), *v.* SHEO NARAIN (PLAINTIFF).*

*Hindu Law—Joint Hindu family—Ancestral family business—Liability of member of the family after severance of his connection with the family business.*

A member of a joint Hindu family carrying on an ancestral family business upon attaining the age of majority completely severed his connection with the family business, nor was it shown that he ever ratified any of the transactions entered into by the family firm. *Held* that such member could on the failure of the family business only be made liable for its debts to the extent of his interest in the joint family property. He could not be held personally liable.

THE facts of this case are fully stated in the judgment of the Court.

The Hon'ble Pandit *Sundar Lal*, Pandit *Moti Lal Nehru*, and the Hon'ble Pandit *Madan Mohan Malaviya* for the appellant.

Dr. *Tej Bahadur Sapru* and Pandit *Mohan Lal Nehru*, for the respondent.

STANLEY, C.J., and BURKITT, J.—This is an appeal against so much of a decree of the Subordinate Judge of Cawnpore, dated September 24th, 1903, as makes the appellant personally liable under a decree of that date passed against him and other defendants.

The appellant and other members of his family constituted a joint undivided Hindu family, owners as such of trading and

* First Appeal No. 314 of 1903 from a decree of Babu Bipin Bihari Mukerji, Subordinate Judge of Cawnpore, dated the 24th of September 1903.