Before Mr. Justice Tudball and Mr. Justice Chamier.

1910
June 8.

BALWANT SINGH AND ANOTHER (DEFENDANTS) *v.* AMAN SINGH (PLAINTIFF).*

Hindu Law—Joint Hindu family—Sons' liability for father's debts—Mortgage—Suit for sale—Sons not made parties—Property sold in execution of decree for sale—Act No. IV of 1882 *(Transfer of Property Act), section* 85*—Purchase by mortgagee decree-holder.*

In execution of a decree for sale upon a mortgage of joint family property executed by the head of a Hindu joint family certain property was brought to sale and purchased by the mortgagees. A member of the family (great grandson of the original mortgagor) sued the mortgagees for redemption upon the ground that the mortgagees at the date of the suit had been aware of his existence and had not impleaded him. *Held* that the plaintiffs' suit would not lie on this ground alone, and that his position was not affected by the fact that the mortgagee had himself purchased the mortgaged property. *Debi Singh* v. *Jia Ram* (1) followed. *Ram Prasad* v. *Man Mohan* (2) dissented from. *Lal Singh* v. *Pulandar Singh* (3) referred to.

THIS was a suit by the respondent for redemption of a mortgage made by his great-grandfather, Pirthi Singh, in favour of the appellants. The latter brought a suit upon the mortgage, impleading as defendants his son and grandsons, including the father of the respondent, and they obtained a decree for sale, in execution of which they purchased the property themselves. The respondent based the present suit on the allegations that he was born before the appellants instituted their suit; that they were aware of his existence; that they should have impleaded him as a defendant, and as they failed to do so, his right to redeem the mortgage was still subsisting. The appellants contended that the respondent had no right to sue for redemption of the mortgage. The first court dismissed the suit on the ground that it was barred by the proceedings in and consequent upon the suit upon the mortgage. The lower appellate court reversed that decision and remanded the suit for trial on the merits. The defendants have appealed.

Dr. *Tej Bahadur Sapru*, for the appellants :—

The question in this case is whether a great-grandson can bring a suit for redemption after the mortgaged ancestral property has been sold in execution of a decree to which he was not a party,

* First Appeal No. 119 of 1909 from an order of L. Marshall, District Judge of Mainpuri, dated the 15th of July, 1909.

(1) (1903) I. L. R., 25 All., 214. (2) (1908) I. L. R., 30 All., 256.
(3) (1905) I. L. R., 28 All., 182.

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and purchased by the mortgagee. I submit he cannot. The ruling in the case of *Bhawani Prasad* v. *Kallu* (1) was much modified by subsequent rulings. Now the son or grandson, who has not been made a party to the mortgage suit, only gets an opportunity to show that the debt was not of such a character as would be binding upon him in Hindu Law ; *Debi Singh* v. *Jia Ram* (2). In the present case the binding nature of the debt is admitted, and the sole ground of the plaintiff's suit is that he ought to have been made a party to the mortgage suit. The mere ground that he was not impleaded is no longer held, by itself, sufficient to entitle him to any relief. The fact that in the present case the plaintiff is willing to redeem does not take the case out of the rule laid down in the case of *Debi Singh* v. *Jia Ram*. The case of *Lal Singh* v. *Pulandar Singh* (3) which followed the case just referred to was a suit for redemption like the present suit. A similar case to that in I. L. R., 25 All., was that of *Chattarpal Singh* v. *Natha* (4). The case of *Jhabba Lal* v. *Chhaju Mal* (5) and *Ram Prasad* v. *Man Mohan* (6) have gone back again from the rule laid down in *Debi Singh* v. *Jia Ram* and subsequent cases cited above. The case of *Ram Prasad* v. *Man Mohan* is in the teeth of the ruling in *Debi Singh's* case and in direct conflict with *Lal Singh* v. *Pulandar Singh*. I rely also on S. A. No. 711 and 712 of 1905 ; and L. P. A. No. 110 and 111 of 1907, decided on 6th December, 1907.

Dr. *Satish Chandra Banerji*, for the respondent :—

I rely upon the latest ruling of our Court, viz., the case in I. L. R., 30 All., already cited, which, I submit, lays down the correct law. A Hindu son born after the family property has been mortgaged takes, by his birth, an interest in the equity of redemption which is the property then left to the family. The case is analogous to that of a second mortgagee, who is interested in the equity of redemption of the prior mortgage. The interest which the plaintiff had in the equity of redemption, that is to say, his right to redeem, has never been lost and still subsists. I take my stand on section 85 and section 91 of the Transfer of Property Act. In the case of *Debi Singh* v. *Jia Ram* the plaintiff did not

(1) (1895) I. L. R., 17 All., 537.
(2) (1903) I. L. R., 25 All., 214.
(3) (1905) I. L. R., 28 All., 182.
(4) (1900) 3 A. L. J. 38.
(5) (1907) 4 A. L. J. 787.
(6) (1908) I. L. R., 30 All., 256.

seek to redeem ; it was the case of a Hindu son who wanted the court to entirely ignore the sale and restore the property without any payment. In that case the mortgage was not admitted. The observations of the Chief Justice in *Bhawani Prasad's* case in I. L. R., 17 All., are not touched by the case of *Debi Singh* v. *Jia Ram*, which did not overrule the former case but only distinguished it.

I also rely upon the case of *Khairaj Mal* v. *Daim* (1), where a distinction was drawn between the case of the mortgagee himself becoming the purchaser and that of a third person being the purchaser.

Dr. *Tej Bahadur Sapru* was not heard in reply.

CHAMIER, J. :—This was a suit by the respondent for redemption of a mortgage made by his great-grandfather, Pirthi Singh, in favour of the appellants. The latter brought a suit upon the mortgage, impleading as defendants his son and grandsons, including Mulayam Singh, the father of the respondent, and they obtained a decree for sale, in execution of which they purchased the property themselves. The respondent based the present suit on the allegations that he was born before the appellants instituted their suit ; that they were aware of his existence ; that they should have impleaded him as a defendant, and as they failed to do so, his right to redeem the mortgage still subsists. The appellants contended that the respondent had no right to sue for redemption of the mortgage. The first court dismissed the suit on the ground that it was barred by the proceedings in and consequent upon the suit upon the mortgage. The lower appellate court reversed that decision and remanded the suit for trial on the merits. The defendants have appealed.

We have been referred to a large number of cases bearing more or less on the point at issue. The first case to which I think it necessary to refer is that of *Bhawani Prasad* v. *Kallu* (2), in which it was held by five Judges (BANERJI, J., dissenting) that if a mortgagee institutes a suit for sale upon a mortgage made by a father in a joint undivided Hindu family without joining as defendants the sons of whose interests in the property he has

(1) (1904) I. L. R., 32 Calc., 296. (2) (1895) I. L. R., 17 All., 537.

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notice, and obtains a decree and an order absolute for sale against the father alone, the sons may obtain a declaration that the mortgagee, decree-holder, is not entitled to sell the interests of the sons in the mortgaged property in execution of his decree, although the sole ground of their suit is that they were not parties to the suit brought by the mortgagee. The next case is that of *Debi Singh* v. *Jia Ram* (1). There the sale had taken place before the sons brought their suit, and it was held by a Bench of three Judges that in such circumstances the sons could not succeed merely upon the ground that they had not been made parties to the suit by the mortgagee, but must establish some ground which under the Hindu law would free them from liability as sons to pay their father's debts. Both the learned Chief Justice (with whom KNOX, J., concurred) and BANERJI, J., pointed out that all that was held in the case of *Bhawani Prasad* v. *Kallu* was that before a sale has taken place the sons may have their interests excluded from the sale simply on the ground that the mortgagee who had brought the suit had notice of their interests and omitted to implead them as defendants. The decision of the Court in the case of *Debi Singh* v. *Jia Ram* is avowedly based upon certain decisions of their Lordships of the Privy Council, and in particular it would seem upon the following well-known passage in the judgement in the case of *Nanomi Babuasin* v. *Modhun Mohun* (2), namely,—"It appears to their Lordships that sufficient care has not always been taken to distinguish between the question how far the entirety of the joint estate is liable to answer the father's debt, and the question how far the sons can be precluded by proceedings taken by or against the father from disputing the liability. If his debt was of a nature to support sale of the entirety, he might legally have sold it without suit, or the creditor might legally procure the sale of it by suit. All that the sons can claim is that not being parties to the sale or execution proceedings, they ought not to be debarred from trying the fact or the nature of the debt in a suit of their own." The only differences between the case of *Debi Singh* v. *Jia Ram* and the case now before us are that in that case the plaintiffs sought to recover their shares in the family property without

(1) (1902) I. L. R., 25 All., 214. (2) (1885) I. L. R., 13 Calc., 21.

offering to redeem the mortgage, whereas in the case now before us the plaintiff admits the validity of the mortgage and seeks to redeem it, and that in that case the auction-purchaser was a stranger, whereas in the present case he was the mortgagee himself. The decision in *Debi Singh* v. *Jia Ram*, was followed by BANERJI, J., in *Banke Rai* v. *Raghubir* (1) (unreported), in which the property of the family had been put up for sale in execution of a decree upon a mortgage made by the father and *purchased by the mortgagee himself*. The son sued to redeem the mortgage on the ground that the mortgagee had had notice of his interest but had not made him a party to the suit upon the mortgage. It was therefore a case exactly like the one now before us. BANERJI, J., held that the son could not succeed merely upon the ground that the mortgagee had had notice of his interest and had not made him a party. To the same effect is the decision in the case of *Lal Singh* v. *Pulandar Singh* (2), where also the suit was brought by sons for redemption of their interests in the family property after it had been sold in execution of a decree based on a mortgage made by their father. In that case the auction-purchaser was a stranger to the mortgage and decree. That decision was followed by BANERJI, J., in the case of *Karan Singh* v. *Razi-ud-din* (3) (unreported), and an appeal against his decision under the Letters Patent was dismissed in December, 1907. That also was a suit for redemption after a sale had taken place in execution of a decree on a mortgage of joint family property made by the plaintiff's father. The auction-purchaser was a stranger, but had transferred the property to the mortgagee before the son brought his suit.

Thus in December, 1907, there was an undisturbed current of authority to the effect that after a sale of joint family property has taken place in execution of a decree passed upon a mortgage made by a father, his sons are not entitled to sue to recover their shares in the property merely upon the ground that they were not parties to the suit brought by the mortgagee and that they cannot sue to redeem the property or their interests in the property merely upon that ground. The same rule was followed whether the auction-purchaser was a stranger or was

(1) (1904) S. A. No. 641 of 1903. (2) (1905) I. L. R., 28 All., 182.
(3) (1907) S. A. No. 712 of 1905.

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the mortgagee. But in April, 1908, in the case of *Ram Prasad* v. *Man Mohan* (1), where joint family property had been foreclosed in execution of a decree passed upon a mortgage made by the father, AIKMAN and KARAMAT HUSAIN, JJ., held that the sons and grandsons were entitled to redeem the mortgage, inasmuch as the mortgagee who had purchased the property had been aware of the interests of the plaintiffs and should have impleaded them in the suit. They distinguished the case of *Debi Singh* v. *Jia Ram*, from the case before them on the ground that the former was a suit to get back from innocent purchasers the plaintiffs' share of the family estate, whereas in the case before them all that the plaintiffs asked was that they should be given an opportunity to redeem a mortgage which had been foreclosed by the defendants who knew of the plaintiffs' interests and yet did not make them parties to the suit on the mortgage. The circumstance relied upon by AIKMAN and KARAMAT HUSAIN, JJ., that it was owing to the defendants' failure, not the failure of a person not a party to the suit, to comply with section 85 of the Transfer of Property Act, that the plaintiffs did not have an opportunity to redeem the mortgage, was not, I think, a sufficient ground for not following the decision in *Debi Singh* v. *Jia Ram*. It is true that the learned CHIEF JUSTICE, with whom KNOX, J., concurred, laid stress on the fact that the defendants were strangers to the suit on the mortgage, but BANERJI, J., did not allude to this feature of the case, and in the later case of *Banke Rai* v. *Raghubir* he dismissed the son's suit for redemption against the mortgagee, who had purchased the property at the execution sale. In their judgement in *Lal Singh* v. *Pulandar Singh*, the learned CHIEF JUSTICE and BURKITT, J., refer with approval to the decision of BANERJI, J., in *Banke Rai* v. *Raghubir*, and quote the following passage from the judgement of their Lordships of the Privy Council in the case of *Girdharee Lall* v. *Kantoo Lall* (2):—"This case is an authority for these propositions, first, where joint ancestral property has passed out of a joint family either under a conveyance executed by a father in consideration of an antecedent debt or under a sale in execution of a decree for the father's debt, his sons by reason of their duty to pay their

(1) (1908) I. L. R., 30 All., 256. (2) (1874) L. R., 1 I. A., 321; 22 W. R., 56.

father's debt cannot recover that property unless they show that the debts were contracted for immoral purposes and that the purchasers had notice that they were so contracted, and, secondly, that the purchasers at an execution sale being strangers to the suit, if they had no notice that the debts were so contracted, are not bound to make inquiry beyond what appears on the face of the proceedings." This passage shows that strangers who purchase at a sale in execution of a decree on a mortgage against a Hindu father may, if the debt was not originally binding on the son, have a stronger position than the mortgagees would have had if they had purchased; but it seems to afford no warrant for the view that a mortgagee who purchases is in any worse position than a stranger in a case where the debt is binding upon the son, or rather upon his interest in the property. The crucial question is whether the debt was of a nature to support a sale of the property. If it was, the son cannot recover his share of the property, and *a fortiori* he cannot redeem the property, for an offer to redeem involves an admission that the debt is binding on his interest in the property. AIKMAN and KARAMAT HUSAIN, JJ., seem to have treated the question as one not of the Hindu law but of procedure depending upon section 85 of the Transfer of Property Act, but this view was not admissible in force of the decision of three Judges in *Debi Singh* v. *Jia Ram*. The learned Chief Justice devoted a considerable portion of his judgement in that case to the question whether the decisions of the Privy Council as to the circumstances in which a son could recover his share of the family property had been superseded by section 85 of the Transfer of Property Act; and with the concurrence of KNOX, J., and in this matter of BANERJI, J., also, came to the conclusion that they had not been superseded and that once the property had been sold all that the sons could claim was an opportunity of "trying the fact or the nature of the debt in a suit of their own." AIKMAN and KARAMAT HUSAIN, JJ., refer to a passage in the judgement of BANERJI, J., in the case of *Bhawani Prasad* v. *Kallu*, where he expressed the view that a suit like the one before us could be maintained; but in the case of *Banke Rai* v. *Raghubir* BANERJI, J., considered himself bound by the decision in *Debi Singh* v. *Jia Ram* to dismiss such a suit.

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Dr. *Satish Chandra Banerji*, for the respondent, contended that his client was in a position analogous to that of a puisne mortgagee who has not been made a party to a suit by the first mortgagee against the mortgagor for sale of the property, but there appears to me to be an important distinction between the two cases. Generally speaking, a mortgagee is not bound by the acts of the mortgagor done after the mortgage and certainly cannot be deprived of his rights by the failure of the mortgagor to redeem the prior mortgage. A sale of the property out of court by Pirthi Singh would admittedly have been binding upon the respondent, and it seems to me impossible to hold that he is entitled to disregard the execution sale merely because he was not made a party to the suit on the mortgage. As pointed out by PONTIFEX, J., in *Pursid Narain Sing* v. *Honooman Sahay* (1), the mortgagee had a right validly acquired to have the property sold. The passage was cited with approval by the Privy Council in *Daulat Ram* v. *Mehr Chand* (2), and unless the law was altered by the enactment of section 85 of the Transfer of Property Act, the decision of their Lordships in the case last cited seems to be conclusive. The decision of the three Judges in the case of *Debi Singh* v. *Jia Ram* is a clear authority by which we are bound that the law was not altered by that section. I am of opinion that the decision of AIKMAN and KARAMAT HUSAIN, JJ., is inconsistent with the principle underlying the decision in *Debi Singh* v. *Jia Ram*, and therefore we are not bound to follow it. I would allow this appeal, set aside the decree of the lower appellate court and restore the decision of the court of first instance.

TUDBALL, J.—I concur.

BY THE COURT.—The appeal is allowed, the decree of the lower court is set aside and that of the court of first instance is restored. Appellant will have his costs here and in the lower court.

Appeal decreed.

(1) (1880) I. L. R., 5 Calc., 845, at p. 852. (2) (1887) I. L. R., 15 Calc., 70.