

Before Mr. Justice Ryves and Mr. Justice Piggott.

TOTA RAM (DEFENDANT) v. HARGOBIND AND ANOTHER (PLAINTIFFS) AND
KISHORE SINGH AND OTHERS (DEFENDANTS)*

1913
November, 4

Mortgage—Purchase of mortgaged property by mortgagee in execution of his decree for sale—Subsequent suit for sale by a prior mortgagee—Plea of incompetence of mortgagor raised by mortgagee purchaser—Estoppel.

Held that a mortgagee who, in execution of a decree for sale in his favour, had purchased the mortgaged property himself, could not be permitted in another suit on a prior mortgage of the same property in which he was arrayed as defendant to set up the defence that the mortgagor was incompetent to execute the mortgage in suit. *Bishumbhar Dayal v. Parshadi Lal* (1), *Bahushri Ram v. Liladhar* (2) and *Prayag Raj v. Sidhu Prasad Tewari* (3) referred to. *Radha Bai v. Kamod Singh* (4) distinguished.

THE facts of this case were as follows :—

One Kishore Singh made a mortgage of certain property in favour of one Tota Ram. The latter brought a suit on his mortgage, sold the property and purchased it in execution of the decree, which had been obtained against the mortgagor and his son. A prior mortgagee who had not been made a party to Tota Ram's suit, then brought this suit on his mortgage and Tota Ram defended the suit on the ground, among others, that Kishore Singh could not have made the mortgage, being at the time of the mortgage a member of a Hindu joint family consisting of himself, and his father, Kishore Singh was also made a defendant to the suit and he admitted the claim. The court of first instance dismissed the suit, but the lower appellate court reversed the decree holding that Tota Ram could not deny the validity of the mortgage now in suit being by reason of his mortgage and subsequent purchase a representative of Kishore Singh.

Tota Ram appealed to the High Court.

Mr. *Muhammad Raoof*, for the appellant.

Pandit *Shiam Krishna Dar*, for the respondents.

RYVES and PIGGOTT, JJ. :—The facts of this case are sufficiently stated in the judgement of the lower appellate court, and the point in issue before us is a very narrow one. We are now satisfied after

* Second Appeal No. 909 of 1912 from a decree of H. M. Smith, District Judge of Agra, dated the 24th of April, 1912, reversing a decree of Muhammad Mubarak Husain, Subordinate Judge of Agra, dated the 14th of December, 1911.

(1) (1912) 10 A. [L. J.] 112. (3) (1908) I. L. R., 35 Cal., 877.
(2) (1913) I. L. R., 35 All., 353. (4) (1907) I. L. R., 30 All., 38.

1913

TOTA RAM
v.
HARGOBIND.

examination of the documents produced in accordance with the order of this Court of the 14th of March, 1913, that the appellant Tota Ram took his mortgage from Kishore Singh and obtained his decree against Kishore Singh and his minor son, Bhagwan Singh. It seems clear to us that Kishore Singh would not have been permitted to challenge the validity of his own mortgage, which as a matter of fact he has not attempted to do. In our opinion Tota Ram cannot be allowed to do so either. We are content to refer as authorities on this point to *Bishumbhar Dayal v. Parshadi Lal* (1), considered in connection with a very recent case, that of *Bakhshi Ram v. Liladhar* (2). That Tota Ram is the representative in interest of Kishore Singh and cannot be permitted to challenge the mortgage, if Kishore Singh himself could not have done so, is apparent from this latter ruling as well as from the decision of the Calcutta High Court in *Prayag Raj v. Sidhu Prasad Tewari* (3). This case is clearly distinguishable from such a case as *Radha Bai v. Kamod Singh* (4), where the transfer was one expressly prohibited by law, and the contract entered into consequently against public policy was void under section 23 of the Indian Contract Act. We accordingly dismiss this appeal with costs.

Appeal dismissed.

(1) (1912) 10 A. L. J., 112.

(3) (1908) I. L. R., 35 Cal., 877.

(2) (1913) I. L. R., 35 All., 353.

(4) (1907) I. L. R., 30 All., 38.