

possession of two cultivatory holdings, namely, the whole of khata No. 32 and a fourth share in khata No. 50. The holding in khata No. 32 has been found to have been the non-occupancy holding of one Patipal Singh. The plaintiffs are the illegitimate sons of Patipal Singh. The defendants are his brothers. It has been found that Patipal Singh was the son of one Debi Singh who was a *Kshatriya*. Patipal Singh's mother was a *Sudra* and the question is—what was the status of Patipal Singh? If he was a *Sudra*, his illegitimate sons, the plaintiffs, would succeed to his holding. If he belonged to some higher caste, the illegitimate sons would have no right of succession. The point does not appear to have been decided by this Court, but it was considered in an elaborate judgment by the Madras High Court. In the case of *Brindavana v. Radhamani* (1) it was held that the illegitimate son of a *Kshatriya* by a *Sudra* woman is not a *Sudra* but was of a higher caste called "*Ugra*". This view is supported by the authorities cited in the judgment, and we have not been referred to any case in which a contrary view has been held. We think upon the authorities we should follow the view adopted by the Madras High Court. The result is that Patipal Singh belonged to a higher caste than that of a *Sudra*, and therefore his illegitimate sons would not succeed to the property which belonged to him. In this view the plaintiffs' claim failed and should have been dismissed. We allow the appeal, set aside the decree of this Court and of the courts below and dismiss the suit with costs in all courts.

Appeal allowed.

Before Sir George Knox, Acting Chief Justice, and Justice Sir Pramada Charan Banerji.

JAUHARI SINGH (PLAINTIFF) v. GANGA SAHAI AND ANOTHER
(DEFENDANTS).*

Act No. IV of 1882 (*Transfer of Property Act*), section 67—*Mortgage*—Suit by one mortgagee to recover his individual share in the mortgage debt—What amounts to a severance of the interest of the mortgagees.

Certain property was mortgaged by K to B and J. Then other property was mortgaged by G (K's brother) also to B and J. Subsequently K and G made a usufructuary mortgage of both properties in favour of B alone,

* Appeal No. 88 of 1917, under section 10 of the Letters Patent.

(1) (1888) I. L. R., 12 Mad. 72.

1919

JWALA
SINGH
v.
SARDAR.

1919
May, 14.

1919

JAUHARI
SINGH
v.
GANGA
SAHAI.

ostensibly in lieu of the former mortgages, and B purported to give the mortgagors a discharge of those mortgages.

Held that in these circumstances it was competent to J to sue the mortgagors for the recovery of his share in the mortgage debts due in respect of the two earlier mortgages, the action taken by B amounting in law to a severance of the interests of the mortgagees with the consent of the mortgagors. *Gobind Ram v. Sundar Singh* (1) distinguished.

THE facts of this case were as follows :—

On the 3rd of February, 1902, one Kashi Ram mortgaged certain property to Balwant Singh and his brother Jauhari Singh. On the 12th of April, 1902, Ganga Sahai, the brother of Kashi Ram, mortgaged certain other property also to Balwant Singh and Jauhari Singh. On the 30th of June, 1913, Kashi Ram and Ganga Sahai made a usufructuary mortgage of the whole of the property comprised in the mortgages of the 3rd of February, and the 12th of April, 1902, in favour of Balwant Singh alone, the consideration being the amount due under the two earlier mortgages, and Balwant Singh purported to give the mortgagors a discharge of the moneys that were due thereunder.

In these circumstances Jauhari Singh filed two suits against Kashi Ram and Ganga Sahai, impleading also his brother Balwant Singh, to recover his own half share of the amount due under the two earlier mortgages. Balwant Singh pleaded that the plaintiff had in fact no interest in the earlier mortgages, and upon this ground mainly the court of first instance dismissed the suits. On appeal, the lower appellate court found that the plaintiff was interested in the mortgages in suit to the extent of one half; but that court upheld the decree upon the ground that the plaintiff was not entitled to bring a separate suit for his share of the mortgage money. The plaintiff appealed to the High Court and his appeal, coming before a single Judge of the Court, was dismissed. The plaintiff thereupon appealed under section 10 of the Letters Patent.

Babu *Piari Lal Banerji*, for the appellant.

Babu *Sarat Chandra Chaudhri* and *Benoy Kumar Mukerji*, for the respondents.

KNOX, A. C. J., and BANERJI, J. :—This and the connected appeal No. 89 of 1917 arise out of two suits brought by the

(1) Weekly Notes, 1892, p. 245.

1919

JAUHARI
SINGH
v.
GANGA
SAHAI.

plaintiff appellant on the basis of two mortgages. One of these mortgages was executed on the 3rd of February, 1902, by Kashi Ram in favour of the plaintiff, Jauhari Singh, and his brother, Balwant Singh. The other mortgage is dated the 12th of April, 1902, and was executed by Ganga Sahai, the brother of Kashi Ram, in favour of the same mortgagees. On the 30th of June, 1913, Balwant Singh alone took a usufructuary mortgage from the two mortgagors in respect of the whole of the property mortgaged by them and the consideration for the usufructuary mortgage was the amount of the two simple mortgages of 1902, mentioned above. Jauhari Singh alleged that he had a half share in the two mortgages and he brought these suits to recover his half share of the mortgage money. He made parties to the suit the mortgagors and his own brother, Balwant Singh. Balwant Singh's defence was that the amount of the two mortgages had been advanced by him alone and that Jauhari Singh had no interest in the mortgages. The court of first instance accepted this contention and on that ground, amongst others, dismissed the suit. The lower appellate court, on the other hand, found that the mortgages were made in favour of Jauhari Singh and Balwant Singh and that both of them owned the two mortgages and the share of Jauhari Singh was one half in each of the two mortgages. But the learned Judge upheld the decree of the court of first instance on the ground that one of two mortgagees could not bring a suit for his share of the mortgage money. This decree of the lower appellate court has been affirmed by a learned Judge of this Court. We are unable to agree with the learned Judge of this Court. When Balwant Singh took a usufructuary mortgage of the property of the mortgagors from both mortgagors in lieu of the amounts of the two mortgages, he gave them a discharge for the two mortgages. As Jauhari Singh has been found to have owned a half share in the two mortgages, that discharge could only operate in respect of the half share of Balwant Singh himself. The two mortgages were, therefore, in law discharged to the extent of one half and as they were discharged to that extent only, the portion of the mortgages which remained undischarged was the half share which belonged to Jauhari Singh.

1919

JAUHARI
SINGH
v.
GANGA
SAHAI

This Jauhari Singh is entitled to recover. Section 67 of the Transfer of Property Act, no doubt, provides that one of several mortgagees cannot seek to enforce the mortgage unless there has been a severance of the interests of the mortgagees. This provision in the section was clearly enacted for the benefit of the mortgagor. Balwant Singh can no longer put forward any claim against the mortgagors, and so far as his interests are concerned, there has been a severance of interests of the mortgagees and this has been effected with the consent of the mortgagors. It is true that the mortgagors in this case consented to obtain a full discharge from Balwant Singh; but the legal effect of that discharge was that it operated in respect of Balwant Singh's own share only. So that in law the act of the mortgagors and Balwant Singh amounted to a severance, with the consent of the mortgagors, of the interest of the mortgagees. The case of *Gobind Ram v. Sundar Singh* (1), has been relied on by the respondents and by the learned Judge of this Court. The facts of that case are not similar to those of the present. We have referred to the paper book in that case and find that what was alleged there was that one of the mortgagees, in collusion with the mortgagors, had given back the mortgage deed to the mortgagor. It was not asserted that a discharge had been given to the mortgagors by one of the mortgagees. We think that that case is no authority as against the appellant in the circumstances of the case before us. The result is that we allow the appeal, set aside the decrees of this Court and of the courts below and decree the plaintiff's claim with costs in all courts. The mortgagors will have six months from this date to pay off the amount of the decree. Interest will be paid at the contractual rate up to the date fixed for payment and thereafter at 6 per cent. per annum.

Appeal allowed.

(1) Weekly Notes, 1892, p. 246.