

1919
July, 15.

Before Justice Sir Pramada Charan Banerji and Mr. Justice Wallach.

DURGA PRASAD (PLAINTIFF) v. BHAJAN AND OTHERS (DEFENDANTS).*

Hindu law—Joint Hindu family—Sale by managing member of family of property subject to a mortgage executed by his father since deceased—Suit by purchaser for redemption—Mortgagee not competent to set up manager's alleged incapacity to sell.

The father of a joint Hindu family mortgaged some of the joint family property. He then died, leaving two sons. Subsequently one of the sons died, and the family then consisted of the surviving brother and his nephews, sons of the deceased brother. The uncle then, as managing member, sold the mortgaged property, and the purchasers of it brought a suit for redemption of the mortgage. *Held* that it was not open to the mortgagee in that suit to set up as a defence that there was no legal necessity for the sale and therefore the uncle was not competent to convey a good title to the plaintiff.

THE facts of this case were as follows :—

One Baiju executed a usufructuary mortgage in favour of the father of defendants nos. 1 and 2. Baiju died leaving two sons, Ram Din and Phunki. Phunki died leaving sons, who, together with Ram Din, were members of a joint Hindu family of which Ram Din was the head and manager. Ram Din executed a sale-deed of the mortgaged property to the plaintiff. The plaintiff brought a suit for redemption of the mortgage. The mortgagees pleaded, *inter alia*, that the sale by Ram Din not having been made for legal necessity was void and passed no rights to the plaintiff. The first court found that there was no legal necessity for the sale and that the plaintiff had purchased joint family property without making any inquiries as to the existence or otherwise of legal necessity. It held, therefore, that the sale was invalid, relying on the cases of *Chandradeo Singh v. Mata Prasad* (1) and *Muhammad Muzamil-ullah Khan v. Mithu Lal* (2) and dismissed the plaintiff's suit. On appeal, the lower appellate court confirmed the decision of the first court. The plaintiff appealed to the High Court.

Mr. *J. M. Banerji*, for the appellant, contended that it was not open to the mortgagees defendants to question the authority of Ram Din to sell the property to the plaintiff. Ram Din was the head and managing member of the joint family and as such

* Second Appeal no. 902 of 1917, from a decree of H. J. Ball, District Judge of Jhansi, dated the 16th of May, 1917, confirming a decree of Ganga Prasad Varma, Munsif of Orai, dated the 5th of March, 1917.

(1) (1909) I. L. R., 31 All., 176.

(2) (1911) I. L. R., 33 All., 783.

had a *prima facie* right to represent the family and execute a sale-deed or enter into any other transaction relating to the family and the family property. A question might be raised, as between Ram Din and the other members of the joint family, as to whether he was justified in law in making the alienation; but that question did not arise in the present suit. The mortgagees could not, in a suit for redemption, raise any such question in order to resist the claim for redemption which was based upon a *prima facie* valid and legal title. The rulings referred to by the lower courts, namely, *Chandradeo Singh v. Mata Prasad* (1), *Muhammad Muzamil-ullah Khan v. Mithu Lal* (2), and *Bishumbhar Dayal v. Parshadi Lal* (3), had no bearing on the present case; the case last, mentioned was, if relevant at all, in favour of the appellants.

Babu *Sital Prasad Ghosh*, for the respondents, contended that as the mortgage had been made, not by the plaintiff, nor by his vendor but by the latter's father, and as the mortgagees were in possession of the property, they were entitled to put any person seeking redemption to strict proof of his title, before they were ousted from possession at the instance of one who was not himself the mortgagor. The sale-deed showed that Ram Din did not purport to be acting as the head of a joint Hindu family. Even if he was the head of the family, there was no presumption in favour of the validity of all transactions that might be entered into by him in regard to joint family property. The *onus* was on him and on persons claiming through him to make out legal necessity for the alienation. The finding in this case was that there was no legal necessity for the sale to the plaintiff. The plaintiff could not go behind that finding, or ask the court to ignore it. The principle of the ruling in *Muhammad Muzamil-ullah Khan v. Mithu Lal* (2) applied to the present case. The case of *Bishumbhar Dayal v. Parshadi Lal* (3), was decided by CHAMBER J., sitting singly, who was a member of the Full Bench which decided the case mentioned above.

Mr. *J. M. Banerji*, was not heard in reply.

BANERJI and WALLACH, JJ. :—This appeal arises out of a suit for redemption of a mortgage made by one Baiju in favour of

(1) (1912) 10 A. L. J., 112. (2) (1911) I. L. R., 39 1, 783.

(3) (1912) A. L. J., 112.

1919

DURGA
PRASAD
V.
BHAJAN.

Jaman, the father of defendants nos. 1 and 2. Baiju is dead. He left two sons, Ram Din and Phunki. Phunki died leaving sons, who, together with Ram Din, have been found to be members of a joint family. Ram Din is the head of that family. He executed a sale-deed of the mortgaged property in favour of the plaintiff, and by virtue of this sale deed the plaintiff has instituted the present suit for redemption. The defendants are (1) the sons of the mortgagee and (?) Ram Din, the plaintiff's vendor. The court of first instance dismissed the suit on the ground that it had not been proved that there was legal necessity for the sale made by Ram Din. This decision has been affirmed by the lower appellate court. In our opinion the courts below have erred in dismissing the suit upon the ground mentioned above. Ram Din is the head of the family and apparently executed the sale-deed in favour of the plaintiff in that capacity. He represents the joint family, which has been found to consist of himself and his nephews. No question as to his authority to transfer the property arises in this case as between the mortgagees and the plaintiff. That is a question between him and his co-sharers. He has executed the sale-deed in the plaintiff's favour and that is not denied. He, being the head of the family, was competent to execute the sale, but whether, as between him and his nephews, the sale would be a valid and binding sale is not a question which arises in the present suit. The defendants mortgagees are not entitled to put it forward as an answer to the claim. In our opinion the suit ought to have been tried upon the merits. The rulings to which the courts below have referred do not seem to us to have any bearing on the present case. There is no question of non-joinder of parties, as Ram Din is the head of the joint family and represents that family and the members thereof. We allow the appeal, set aside the decrees of the courts below, and remand the case to the court of first instance with directions to re-admit the suit upon its original number in the register and try it on the merits. Costs here and hitherto will be costs in the cause.

Appeal is decreed and cause remanded.