

FULL BENCH

Before Sir Lal Gopal Mukerji, Acting Chief Justice, Mr.
Justice King and Mr. Justice Niamat-ullah.

JAGANNATH KUNWAR AND OTHERS (DEFENDANTS) v. 1933
January, 13
JAIPAL (PLAINTIFF)*

Redemption—Usufructuary mortgage—Subsequent loans—Further charge—Stipulation that subsequent loan must be paid before redemption of mortgage—Redemption by purchaser from some of the mortgagors—Integrity of mortgage being broken.

Certain zamindari property, owned by the descendants of seven brothers, was usufructuarly mortgaged by them in 1883 to H for Rs.600. In 1884 the descendants of one of the brothers borrowed Rs.99 from H on an unregistered bond, containing the stipulations (1) that the amount of the bond with interest would be paid first, when redeeming the mortgage of 1883, and then the amount due under that mortgage; and (2) that until the principal and interest of the bond were paid, the executants thereof would not mortgage or sell the aforesaid zamindari property. Three other similar bonds were executed in 1884 and 1885, for sums of money borrowed from H, by the descendants, respectively, of three other brothers. After the first three bonds were executed, the integrity of the mortgage of 1883 was broken, by reason of the mortgagee having purchased a share of the mortgaged property. Subsequently a suit for the redemption of the mortgage of 1883 was brought by the plaintiff, who had purchased the shares of the descendants of four of the brothers, and the question was whether they must also pay the amounts under the four bonds, and if so, to what extent.

Held that the four bonds created further charges on the property mortgaged in 1883. The stipulation in each subsequent bond that the executants should pay the amount due on that bond before they redeemed the original prior mortgage was an agreement to create a charge on the property previously mortgaged: *Aditya Prasad v. Ram Ratan Lal* (1)

*Second Appeal No. 767 of 1930, from a decree of Rup Kishan Ag, Additional Subordinate Judge of Allahabad, dated the 7th of February, 1930, modifying a decree of Ambika Prasad Srivastava, Additional Munsif of Allahabad, dated the 16th of March, 1929.

(1) (1930) I. L. R., 5 Luck., 335.

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followed. In addition, there was the further stipulation on the part of the executants that they would not mortgage or sell the property previously mortgaged till the money due on the subsequently executed bond had been paid; and this meant that the previously mortgaged property was made security for the payment of the money subsequently borrowed.

The integrity of the mortgage having been broken, the representatives in interest of each one of the seven brothers were entitled to redeem only their particular share of the mortgaged property on payment of one-seventh of Rs.600, together with the amount due on the subsequent bond, if any, executed by those representatives; and the plaintiff's rights and obligations were to be calculated on this basis.

This case was first heard by a Division Bench, which referred it to a Full Bench with the following referring order.

IQBAL AHMAD and KISCH, JJ.:—This is a defendant's appeal arising out of a suit for redemption of a mortgage. One Gobind Singh owned a 2 anna 8 pie share in certain villages. On his death each of his eight sons succeeded to a 4 pie share in the said property. On the 11th of April, 1883, the descendants of seven of the eight sons of Gobind Singh mortgaged their shares amounting to 2 annas 4 pies with possession to one Harmangal Singh for Rs.600. The mortgage was for a period of 15 years. The names of the seven sons of Gobind Singh whose descendants executed this mortgage were Ajit Singh, Ramghulam Singh, Dindayal Singh, Ramroshan Singh, Harnam Singh, Ahbaran Singh and Kalu Singh.

On the 16th of July, 1884, Mata Prasad Singh, grandson of Ajit Singh, borrowed a further sum of Rs.99 from Harmangal Singh, repayable on the 27th of June, 1885, with interest at 2 per cent. per mensem.

On the 6th of September, 1884, Deonarain Singh and another Mata Prasad Singh, grandsons of Harnam Singh and Ramghulam Singh, respectively, borrowed a further sum of Rs.85 from Harmangal Singh, repayable on the 27th of June, 1885, with interest at Rs.2 per cent. per mensem.

On the 11th of April, 1885, Bishnath Singh and Jageshar Singh, sons of Ramroshan Singh, borrowed a further sum of Rs.85 from Harmangal Singh, repayable on the 15th of May, 1886, with interest at Rs.2 per cent. per mensem.

On the 4th of September, 1885, Sheekumar Singh, son of Kalu Singh, borrowed a further sum of Rs.50 from Harmangal Singh, repayable on the 16th of June, 1886, with interest at Rs.2 per cent. per mensem.

The documents under which the first and the third of the above sums were borrowed contained the following recital: "If perchance we do not pay the debt on the stipulated date, the rate of interest will continue to be the same. As our share of zamindari of taluqa Bibipur is mortgaged to the abovenamed creditor, together with other co-sharers, for Rs.600, when we redeem this property we will pay this sum of Rs.99 with interest and then we will pay the mortgage money of the zamindari, and then the property will be redeemed."

The documents under which the second and the fourth sums were borrowed contained the recital: "In consideration thereof our own share of zamindari property of villages Bibipur and Maharajpur and Deobra Chak Manohra, Bansipatti, Chak Jiwan, pargana Kiwai, district Allahabad, amounting to 4 pies which is mortgaged for Rs.600, together with shares of other co-sharers; when we redeem that property we will at first pay this money, principal with interest at Rs.2 per cent. per mensem and then redcem that property . . . The date fixed for the payment of this money is . . . The interest before and after the date of stipulation will continue to run at Rs.2 per cent. per mensem."

Between the dates of the third and fourth of these deeds the integrity of the mortgage of 1883 had been broken by reason of the purchase by the mortgagee himself of the equity of redemption in respect of a 2 pie share of the mortgaged property at a court sale which was confirmed in June, 1885.

Harmangal Singh died 30 years before the institution of the suit and defendants Nos. 1 to 5 are his representatives in interest.

The plaintiff had purchased the equity of redemption of the shares of Ajit Singh, Dindayal Singh, Ramghulam Singh and Harnam Singh at a court sale on the 21st of November, 1927, and he brought the suit out of which this appeal arises to redeem the whole of the mortgage, excluding the 2 pie share purchased by the mortgagee.

The representatives in interest of the mortgagee contended that the plaintiff was not entitled to redeem the mortgage of 1883 without paying the principal and interest due under the four deeds mentioned above as well as the amount of the mortgage of 1883.

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In the trial court it was conceded by the learned counsel for the plaintiff that in view of the fact that the integrity of the mortgage had been broken the plaintiff was not entitled to redeem more than the shares that he had purchased. The correctness of this proposition was not questioned in the lower appellate court, nor has this point been agitated before us.

The trial court gave the plaintiff a decree for redemption of the shares purchased by him on payment of a proportionate share of the mortgage of 1883 and the amounts due under the second and the fourth deeds mentioned above. The learned Munsif held that while the second and the fourth deeds created a charge on the mortgaged property, the first and the third deeds did not create a charge on the property mortgaged in 1883.

On appeal by the plaintiff and cross-objection by the contesting defendants the learned Additional Subordinate Judge of Allahabad affirmed the decision of the trial court that the first and third deeds did not create a charge over the property mortgaged in 1883. He held that no doubt the intention of the persons executing these documents was to secure the money advanced by the hypothecation of the property and by tacking on these two mortgages to the mortgage of 1883, but that the language of the documents fell short of giving effect to this intention. He further held that the plaintiff could not be called upon to pay the amount due on the second of the above deeds, because at the date on which this deed was executed the integrity of the mortgage had not been broken. He, however, held that the plaintiff was bound to pay a rateable share of the money due under the fourth deed, as this deed had been executed after the integrity of the mortgage had been broken. He modified the decree of the trial court accordingly.

The contesting defendants have come to this Court in second appeal on the ground that all four documents constituted a valid charge on the mortgaged property, and the plaintiff was not entitled to redeem his share of the mortgage of 1883 without paying the amounts due under the first three deeds mentioned above, besides the amount due on the fourth deed.

The arguments addressed to us at the hearing of the appeal raised two important questions of law. The first point to be decided is whether the first and third deeds referred to above constituted a charge on the property mortgaged in 1883. According to the decision of a Full Bench of this Court in

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Lallu Singh v. Ram Nandan (1) they would not create a charge on the property mortgaged. The position, however, has been altered by a subsequent decision of their Lordships of the Privy Council in *Aditya Prasad v. Ram Ratan Lal* (2). In the light of this decision it appears to us that it may be necessary to modify the view hitherto held by this Court as to what constitutes a tacking deed creating a charge on property previously mortgaged. It will be necessary in the present case to decide whether the first and third deeds created a charge upon the property or not.

In the event of it being held that these two deeds created a charge on the mortgaged property, and, in any case, in respect of the second of the deeds, a further point arises for consideration. What is the effect of these deeds which, while executed by one or two of the original mortgagors before the integrity of the mortgage had been broken, purported to create a further charge on the mortgaged property? If the decisions in *Muhammad Husain v. Sheodarshan Das* (3), and *Tarkeshwar v. Kalka Pathak* (4) are to be followed, it would seem that the execution of such a tacking bond by one or two of the mortgagors only will not preclude the mortgagors as a body from exercising their right to redeem the earlier mortgage. In those cases, however, it does not appear that the integrity of the earlier mortgage had been broken at the time the suit was brought. It seems to us difficult to say that one mortgagor cannot further burden his own share in the equity of redemption and if the purchaser of that share, after the integrity of the mortgage had been broken, can redeem it without paying such further charge, the mortgagee loses his security for such further charge.

We think that the points of law raised by this appeal are of considerable importance and that it is desirable that they should be determined by a Full Bench of this Court. We accordingly direct that the case be laid before the Hon'ble Acting Chief Justice for the constitution of a Full Bench.

The case was then laid before and heard by a Full Bench.

Mr. *Shiva Prasad Sinha*, for the appellants.

Mr. *Balshwari Prasad*, for the respondents.

MUKERJI, A. C. J., KING and NIAMAT-ULLAH, JJ. :—

This appeal has been referred to a Full Bench because of

(1) (1929) I.L.R., 52 All., 281.

(2) (1930) I.L.R., 5 Luck., 365.

(3) (1907) 4 A. L. J., 176.

(4) A. I. R., 1927 All., 144.

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some difficult points of law involved in it. The facts of the case briefly are these. One Gobind Singh owned a 2 annas 8 pies share in several villages. He had eight sons, namely Rajpal, Ajit, Ramghulam, Dindayal, Ramroshan, Harnam, Ahbaran and Kalu. All the sons except Rajpal made a usufructuary mortgage of a 2 annas 4 pies share for 15 years with one Harmangal Singh. Harmangal Singh is now represented by the defendants in the suit out of which this appeal has arisen. The plaintiff, who is the respondent No. 1 in this appeal, has sued to recover the entire property mortgaged, except a 2 pies share which was purchased by the mortgagee, on payment of a proportionate amount of the mortgage money, which was Rs.600.

The plaintiff is the purchaser of 18 $\frac{2}{7}$ pies and the share is made up in this way: He purchased the shares belonging to the branches of Dindayal, Ramroshan, Harnam and Ajit. It appears that Kalu's branch became extinct and the 4 pies share belonging to Kalu was inherited by the remaining seven branches. Thus the share of each branch was augmented by $\frac{4}{7}$ pies. The four branches who sold their shares to the plaintiff thus became entitled to $4 \times \frac{4}{7}$ pies in addition to their original shares. Thus the plaintiff has become entitled to 18 $\frac{2}{7}$ pies.

The plaintiff's suit was met with the plea that at different dates, to be presently mentioned, different branches of the mortgagor's family executed certain deeds by way of a further charge and that the plaintiff could not recover the property claimed without payment of the money borrowed by, and due on foot of, these deeds of further charge. These documents are as follows:—

(1) Mata Prasad Singh, grandson of Ajit, borrowed Rs.99 from Harmangal on the 16th of July, 1884, and agreed to pay interest at 2 per cent. per mensem. The money was repayable, initially, on the 27th of June, 1885, and in any case it was to be paid before the mortgage of 1883 was redeemed.

(2) Deonarain Singh, a grandson of Harnam Singh, and Mata Prasad, a grandson of Ramghulam, mortgaged between them a 4 pies share to Harmangal for Rs.85 on the 6th of September, 1884, and agreed as to payment in almost similar terms to those agreed to by Mata Prasad in document No. (1).

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(3) Bishnath and Jageshar Singh, sons of Ramroshan, borrowed Rs.85 from Harmangal on the 11th of April, 1885, on terms similar to the documents Nos. (1) and (2).

(4) Sheokumar Singh, son of Kalu Singh, borrowed Rs.50 from Harmangal on the 4th of September, 1885, on terms similar to the terms of bonds Nos. (1), (2) and (3).

The point that was seriously considered in the courts below was whether these four deeds created any charge on the properties mortgaged in 1883 and, therefore, the moneys due on these bonds were repayable at the time of redemption of the mortgage deed of 1883. The courts below have differed on this point. The learned Munsif was of opinion that documents Nos. (2) and (4) created a charge and documents Nos. (1) and (3) did not. The learned Subordinate Judge held that the documents Nos. (1) and (3) did not create a charge, that document No. (4) did create a charge and document No. (2), although it did create a charge, was not operative inasmuch as when the document was executed the integrity of the mortgage had not been broken.

The documents have been translated for our benefit and we have perused them. They are more or less in the same language and the important portions of the language used are these: "When I redeem my zamindari share in taluqa Bibipur . . . , which is mortgaged for Rs.600 to the aforesaid creditor . . . , I shall first pay this sum of Rs.99, together with interest, and then I shall pay the mortgage money of the zamindari share. Until

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I pay up this amount I shall not sell or mortgage this mortgaged zamindari." This is an extract from the document No. (1). In document No. (2) the following occurs: "When we redeem this mortgage (of 1883) we shall first pay up this amount, principal and interest, at the rate of 2 per cent. per mensem. Until we pay this amount we shall not mortgage or sell the aforesaid zamindari." The following occurs in document No. (3): "When we or our heirs redeem the above-mentioned property (mortgaged in 1883) we shall first pay this sum, together with interest, then the mortgaged zamindari aforesaid will be redeemed. Until the principal and interest of this deed are paid we shall not mortgage or sell the aforesaid property." The following is an extract from document No. (4): "When I redeem the mortgage (of 1883) I shall first pay up this sum, principal and interest, at the rate of 2 per cent. per month. Until I pay up this amount I shall not mortgage or sell the aforesaid zamindari."

The agreement that the mortgagor shall pay the amount due on the subsequently executed bond before he redeems the prior mortgage is an agreement to create a charge on the property previously mortgaged. This was the view taken by their Lordships of the Privy Council in *Aditya Prasad v. Ram Ratan Lal* (1). In addition to the language which was found sufficient to their Lordships of the Privy Council to create a further charge, we have got the stipulation on the part of the mortgagors that they would not mortgage or sell the property previously mortgaged till the money due on the subsequently executed document had been paid. The stipulation meant that the previously mortgaged property was made security for the payment of the money subsequently borrowed. We are accordingly of opinion that all the four documents create further charges on the property mortgaged in 1883.

(1) (1930) I.L.R., 5 Luck., 365.

The learned counsel for the respondents has urged that according to certain facts, which will be presently stated, a sale deed of the 28th of July, 1920, by reason of the fact that it is registered and the four documents Nos. (1) to (4) are unregistered, has a priority over those documents under the provisions of section 50 of the Registration Act. It appears that certain descendants of Gobind Singh belonging to the branches of Dindayal, Ramroshan and Ajit sold their shares by the sale deed of the 28th of July, 1920, for a sum of Rs.700 in favour of Harnam Singh's branch and the plaintiff. The sale deed makes no mention of the four deeds of further charge enumerated above, although it mentions the mortgage of 1883. Jaipal, the plaintiff and one of the purchasers under the deed of 1920, relinquished his rights acquired under the sale deed in favour of his co-vendees (descendants of Harnam's branch). Subsequently the members of Harnam's branch made a mortgage of the property acquired in 1920, and also their original shares, in favour of Jaipal. Jaipal brought a suit for sale on that mortgage and in execution of the decree that followed purchased the property himself. The argument, therefore, was advanced that the sale deed of 1920 for all practical purposes annulled the four unregistered documents. This plea, however, was not raised before the arguments were addressed in the court of the Munsif. The learned Munsif noticed the fact that the plea had been raised very late. The belatedness of the plea precluded the defendants from raising the possible plea that the plaintiff made the purchase of 1920 with notice of the pre-existing unregistered documents. We find that the plaintiff purchased with members of Harnam Singh's branch, and Harnam Singh's branch belongs to the same family to which the vendors belong. It is quite possible, therefore, that Harnam Singh's branch, and through them the plaintiff, were all aware of the existence of the four unregistered documents. The plaintiff, in our opinion, should have raised his plea,

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which he now wants to substantiate, as soon as the defendants pleaded the four unregistered documents. In our opinion we should not allow the plaintiff now to raise the plea.

The next point to be considered is, what is the liability of the property under the four unregistered documents? Mr. *Baleshwari Prasad* has very correctly argued that for the purposes of determining the liability we should separate the several shares which belonged to the several branches. The fact that the defendants, the mortgagees under the deed of 1883, purchased a 2 pies share out of the property mortgaged to them broke up the integrity of the mortgage and, therefore, it is not open to the plaintiff to redeem more than the share purchased by him. That share, as we have already pointed out, is 18 2/7 pies.

The document No. (1), the deed of further charge dated the 16th of July, 1884, was executed by Ajit Singh's branch and, therefore, the original 4 pies share of Ajit Singh can be redeemed only on payment of one-seventh of Rs.600, the mortgage money under the deed of 1883, and the amount due under the document dated the 16th of July, 1884, document No. (1).

Dindayal's original share of 4 pies is free from any further charge, because nobody belonging to his branch ever created any. Therefore the 4 pies share originally belonging to Dindayal may be redeemed on payment of only one-seventh portion of Rs.600.

Ramroshan Singh's original 4 pies share is charged under document No. (3). This will, therefore, be redeemable on payment of one-seventh of Rs.600 plus the amount payable under the document of the 11th of April, 1885.

As to the further charge created by the document No. (2), dated the 6th of September, 1884, that document was executed by two persons, namely *Deonarain*, grandson of *Harnam*, and *Mata Prasad*, grandson of *Ramghulam*. *Ramghulam*'s 2 pies share is now in the possession

of the defendants mortgagees. Harnam's 2 pies share is liable to be redeemed and it would be redeemable on payment of one-fourteenth portion of Rs.600 plus one-half of the money due under the document No. (2) dated the 6th of September, 1884. The other half of Harnam's original share, namely 2 pies, is redeemable on payment of only one-fourteenth portion of Rs.600.

Kalu's 4 pies share was inherited to the extent of $2 \frac{2}{7}$ pies by the four branches of the plaintiff's vendors. Kalu's successors created the further charge under the document No. (4) dated the 4th of September, 1885. The plaintiff would be entitled to redeem this $2 \frac{2}{7}$ pies share on payment of four-sevenths share of one-seventh of Rs.600 plus four-sevenths of the amount due under document No. (4) dated the 4th of September, 1885.

We accordingly modify the decree of the courts below and make a decree under order XXXIV, rule 7 of the Code of Civil Procedure and grant six months' time for payment. A fresh decree will be prepared in this Court specifying the several amounts payable under the several documents in accordance with our judgment. The several portions redeemable under our decree will be specified separately, so that the different amounts chargeable to different properties may be clearly specified. Interest at the stipulated rate will be calculated up to the period of six months; thereafter interest will be payable, in case of delay in redemption, at 6 per cent. per annum on the several bonds of further charge.

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