APPELLATE CIVIL

Before Mr. Justice C. M. King, Chief Judge and Mr. Justice Ziaul Hasan

1935 *May* 10

RANDHIR SINGH (PLAINTIFF-APPELLANT) *v.* RAMESHAR AND OTHERS (DEFENDANTS-RESPONDENTS)*

Transfer of Property Act (IV of 1882), section 101—Hindu Law—Joint Hindu family—Mortgage in favour of Hindu father—Sale of equity of redemption in favour of sons—Father and sons forming joint Hindu family—Merger of mortgage in favour of Hindu father in the sale—Presumption that mortgage or sale was in favour of joint family, whether arises.

Where a property is mortgaged to a Hindu father and the equity of redemption is sold to his sons, the mortgage does not merge in the sale even if the father and sons form a joint Hindu family and a pre-emptor cannot obtain the property free of the mortgage. There is no presumption that either the mortgage or the sale is in favour of all the members of the joint family and there is nothing in Hindu Law to prevent a member of a joint family acquiring separate property, *Darshan Singh* v. *Arjun Singh* (1), *Kanhaiya Lal* v. *Ikram Fatima* (2), *Bindeshri Singh* v. *Balraj Sahai* (3), and *Bhawani Kunwar* v. *Mathura Prasad Singh* (4), distinguished.

Mr. *D. K. Seth,* for the appellant.

Dr. *Jai Karan Nath Misra* and Messrs. *R. B. Lal, K. P. Misra* and *Bani Bilas Misra,* for the respondents.

KING, C.J. and ZIAUL HASAN, J.:—This is a plaintiff's first appeal in a suit for pre-emption against a judgment and decree of the learned Subordinate Judge of Unao, dated the 11th of August, 1933.

The suit related to a share in the village of Kiratpur, pargana Bihar, district Unao, which was sold by respondent No. 4 to respondents 1 and 2 for a sum of Rs.800 by a sale deed dated the 21st of December, 1931. The property in suit was subject to two usufructuary mortgages in favour of respondent No. 3, who is the father of respondents 1 and 2. One of the mortgages

*First Civil Appeal No. 101 of 1933, against the decree of Saiyed Shaukat Husain, Subordinate Judge of Unao, dated the 11th of August, 1933.

(1) (1926) I.L.R., 1 Luck., 560.
(2) (1932) I.L.R., 8 Luck., 103.
(3) (1906) 10 O.C., 49.
(4) (1912) I.L.R., 40 Cal., 89.

was dated the 2nd of June, 1927 and was executed for Rs.1,500. The second was for Rs.3,500 and was executed on the 13th of May, 1928. In addition to these mortgages there were two deeds of further charge, dated the 2nd of June, 1927 and 8th May, 1928, for sums of Rs.500 and Rs.700 respectively. The sale was of the equity of redemption and the property was sold subject to these mortgages in favour of respondent No. 3.

The plaintiff's case was that respondents 1 to 3 being members of a joint Hindu family, the mortgages in favour of respondent No. 3 merged in the purchase of the 21st of December, 1931. It was also contended that a sum of Rs.400 out of the recited sale consideration was fictitious. It was said that the real sale consideration was Rs.4,400 but as it was alleged that the defendants-vendees had cut away some trees of the value of Rs.2,000 from the property in suit, the plaintiff prayed for a decree for possession of the property on payment of Rs.2,400. In defence it was admitted that respondents 1 to 3 were members of a joint Hindu family but it was contended that the mortgages in favour of respondent No. 3 did not merge in the purchase made by respondents 1 and 2 and that the equity of redemption was purchased for Rs.800 so that the plaintiff pre-emptor should redeem the mortgages in favour of respondent No. 3 before he could obtain possession of the mortgaged property.

The learned Subordinate Judge upheld this plea and gave the plaintiff-appellant a decree subject to the mortgages in favour of respondent No. 3 on payment of a sum of Rs.800.

The plaintiff brings this appeal and has strenuously contended that the mortgages in favour of respondent No. 3 have merged in the sale made in favour of respondents 1 and 2 and that he should obtain the property free of those mortgages.

In our opinion the contention of the appellant is quite untenable. It is clear from the deed of sale, exhibit 1, that the property was sold subject to the mortgages in

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favour of respondent No. 3. It is argued that respondents 1 to 3 being members of a joint Hindu family, the mortgages and the sale must be deemed to have been in favour of all of them and that the mortgagees having purchased the property the mortgages should be deemed to have been extinguished. No doubt respondents 1 to 3 are members of a joint Hindu family but in the absence of any proof in support of the plaintiff-appellant's contention, it cannot be presumed that either the mortgages or the sale was in favour of all the members of the joint family. There is nothing in Hindu law to prevent a member of a joint family acquiring separate property but if it be assumed for the sake of argument that the mortgages and sale in question were in favour of the entire joint family, even then there can in our opinion be no merger of the mortgages in favour of respondent No. 3, in the sale in favour of respondent Nos. 1 and 2. The plaintiff-appellant relies on the following cases: *Darshan Singh* v. *Arjun Singh* (1), *Kanhaiya Lal* v. *Ikram Fatima* (2), *Bindeshuri Singh* v. *Pandit Balraj Sahai* (3), and *Bhawani Kunwar* v. *Mathura Prasad Singh* (4).

All these cases were however decided while old section 101 of the Transfer of Property Act was in force and proceeded on the principle of that section, which ran as follows:

"Where the owner of a charge or other encumbrance on immoveable property is or becomes absolutely entitled to that property the charge or encumbrance shall be extinguished unless he declares by express words or necessary implication, that it shall continue to subsist or such continuance would be for his benefit."

Even under this section it would have been incumbent on the plaintiff-appellant to show not only that there was no intention that the mortgages in favour of respondent No. 3 should continue to subsist after the sale in

(1) (1926) I.L.R., 1 Luck., 560.
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question but also that such continuance was not for the benefit of the vendees. The sale deed however clearly shows that the intention was that the said mortgages should continue. As a matter of fact section 101 of the Transfer of Property Act of 1882 was repealed by the amending Act (XX of 1929), that is to say, before the sale in question was made in favour of respondents 1 and 2. That section cannot therefore be applicable to the sale in question and there is nothing in the Act as amended by Act XX of 1929 which supports the appellant's contention.

It seems to us clear that as the vendor-respondent possessed no more than the equity of redemption in the property in suit and as no more was purchased by the vendees-respondents than the equity of redemption, the plaintiff pre-emptor cannot claim possession of the property free of the mortgages in favour of respondent No. 3.

In our opinion the Court below came to a right conclusion and we dismiss this appeal with costs.

Appeal dismissed.