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MAHADEO PRASAD SINGH v. JAGARNATH PRASAD.

KULWANT SAHAY, J.

view is supported by the decision of Mullick and Sultan Ahmed, JJ. in *Baburia Janakdulari Kuer* v. *Bindeswari Gir*(1).

I, would, therefore, set aside the decree of District Judge and decree the suit for possession of the land claimed. The plaintiffs are also entitled to mesne profits as claimed the amount of which will be determined by the first court on a proper application being made therefor. The appellants are entitled to their costs throughout.

COURTNEY TERRELL, C.J.—I agree.

Appeal allowed.

PRIVY COUNCIL.

J. C.* 1934.

Feb. 2.

KAMTA SINGH

v.

CHATURBHUJ SINGH.

On Appeal from the High Court at Patna.

Mortgage—Discharge of Mortgage—Suit for Contribution —Plaint—Claim based on registered Mortgage verbally varied —Transfer of Property Act (IV of 1882), sections 59, 82.

The appellants having paid off a mortgage on land which they had purchased sued the respondents for contribution in accordance with section 82 of the Transfer of Property Act, 1882, alleging that land purchased by the respondents from the mortgagors was also subject to the mortgage. By their plaint the appellants set out a registered mortgage deed covering the respondents' land, but stated that its terms had been verbally varied. The respondents by their written

* PRESENT: Lord Tomlin, Lord Russell of Killowen, and Sir Lancelot Sanderson.

(1) (1920) 5 Pat. L. J. 456.

statement contended that the effect of the verbal agreement was to exclude their land from the charge:

Held, that the suit failed having regard to section 59 of the Transfer of Property Act, 1882, as there was no registered instrument embodying the mortgage on which the claim was based.

Decree of the High Court, *Kamta Singh* v. *Chaturbhuj Singh*(1), affirmed on a different ground, without expressing any opinion as to the grounds of the decision.

Appeal (no. 133 of 1931) by special leave from a decree of the High Court (January 14, 1929) affirming a decree of the Subordinate Judge of Monghyr (November 30, 1924).

The appellants having paid Rs. 14,000 to discharge a mortgage on land bought by them in 1916 at a sale for revenue instituted a suit claiming from respondents nos. 1 to 43 (defendants first party) contribution on the principle enacted by section 82 of the Transfer of Property Act, 1882.

The facts appear from the judgment of the Judicial Committee.

The High Court, affirming the Subordinate Judge, dismissed the suit.

The learned Judges (Ross and Chatterji, JJ.) by separate judgments agreed with the finding of the trial Judge, that the appellants had purchased as benamidars for the *pro forma* respondents nos. 53 to 61 (referred to in the judgment of the Board as "Harbans"), who on December 2, 1915, had bought from the mortgagors 61 acres included in the revenue sale to the appellants. The learned Judges by separate judgments held in effect that as on that sale Rs. 14,000 out of the purchase price had been left with "Harbans" to discharge the mortgage, and as the defendants first party (respondents nos. 1 to 43)

(1) (1929) I. L. R. 8 Pat. 585.

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had purchased free from incumbrances, the plaintiff-appellants were not entitled to contribution against them.

1934 January 15, 16, 18. *Upjohn K. C.* and *Wallach* for the appellants.

De Gruyther K. C. and *Pringle* for respondents nos. 1 to 10 and 33 to 38.

Reference was made to *Ganeshi Lal* v. *Charan Singh*(1); *Muhammad Abbas* v. *Muhammad Hamid*(2); Transfer of Property Act, 1882, sections 56, 59, 82;

Indian Evidence Act, 1872, sections 58, 92.

February 2. The judgment of their Lordships was delivered by

LORD TOMLIN.—This is an appeal in a suit in which the purchasers of part of the lands comprised in a mortgage having bought subject to the mortgage and having paid off the mortgage debt, claim contribution from persons owning other parts of the lands subject to such mortgage.

The appellants before their Lordships are the plaintiffs in the suit seeking contribution, while such of the respondents as are represented before their Lordships (hereafter referred to as the respondents) are the persons from whom contribution is claimed.

The suit was begun in the Court of the Subordinate Judge of Monghyr and was taken on appeal to the High Court of Judicature at Patna. In both Courts below the appellants failed.

The history of the case begins with a mortgage dated the 6th December, 1905, made by or on behalf of a joint Hindu family of part of the *raiyati* holding of such family containing about 454 acres, and also of shares in certain proprietary lands.

(1) (1930) I. L. R. 52. All. 358; L. R. 57 I. A. 189.
(2) (1912) 9 All. L. J. 499.

The mortgage deed was expressed to be for an advance of Rs. 35,000, and was framed so as to consist of (1) an usufructuary mortgage in lieu of interest for a term of nine years of 175 acres described in the first schedule to the mortgage, being part of the *raiyati* holding of the family, and (2) a mortgage of the 175 acres described in the first schedule, and also of shares in certain proprietary lands described in the second schedule as security for all the monies, principal and otherwise, owing under the mortgage.

The mortgage deed was duly registered within a day or two of its execution, but full effect was never given to it. It is admitted by both parties that as the result of a verbal agreement entered into between the mortgagors and mortgagees about the time at which the deed was registered, the mortgagees advanced Rs. 14,000 only of the Rs. 35,000 mentioned in the deed, and were put into usufructuary possession of 70 acres only out of the 175 acres mentioned in the deed. There is a conflict between them as to whether as the result of the verbal agreement the remainder of the 175 acres of which usufructuary possession in lieu of interest was not given were excluded wholly from the mortgage so as to cease to be any part of the security.

Between the date of the mortgage deed and December, 1915, the mortgagors sold to the respondents some 316 acres out of the total *raiyati* holding of 454 acres. It is not disputed that some part of those 316 acres was included in the 175 acres mentioned in the mortgage deed, but no part of them appears to have been included in the 70 acres of which usufructuary possession was given to the mortgagees.

The sale to the respondents was not expressed to be subject to any mortgage, but the conveyance to them contained a declaration to the effect that the title of the vendors was free from any flaw or defect, and also a covenant by the vendors to make good any loss should the title prove defective.

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On the 2nd December, 1915, the mortgagors sold and conveyed a further 61 acres of the *raiyati* holding of 454 acres to certain persons (hereafter referred to as Harbans).

These 61 acres or some parts of them were included in the 70 acres of which usufructuary possession had been given to the mortgagees.

In the conveyance to Harbans the consideration was expressed to be Rs. 18,932. Of this sum Rs. 1,932 were expressed to have been paid to the mortgagors, but the mortgagors were stated to have "kept in deposit" with Harbans Rs. 17,000, the balance of the consideration, for payment as to Rs. 3,000 of a certain mortgage debt of that amount, with which this case is not concerned, and as to Rs. 14,000 with payment of the amount advanced on the mortgage created in December, 1905.

In 1916 the Revenue authorities, not having been paid the rent payable in respect of the *raiyati* holding or some part of it, issued a certificate for the recovery thereof under the provisions of the Public Demands Recovery Act (Bengal Act II of 1895).

In the result 137 acres of the *raiyati* holding, including the 61 acres purchased by Harbans, but not including any of the 316 acres purchased by the respondents, were put up for sale by the Revenue authorities, and the right, title and interest of the mortgagors and Harbans therein were sold to and purchased by the appellants.

In the Courts below there are concurrent findings (for the support of which there was in their Lordships' opinion evidence) that the purchase was made by the appellants as benamidars of Harbans. These findings should not in their Lordships' judgment be disturbed, though in the view which their Lordships take of the case they become immaterial.

Subsequently the appellants paid off the mortgage debt of Rs. 14,000 and commenced this suit to recover contribution from the respondents.

In their plaint the appellants set out the mortgage deed of 6th December, 1905, and then in paragraph 5 alleged in effect that according to an amicable settlement effected between the mortgagor and mortgagees the sum of Rs. 14,000 only was paid by the mortgagees out of Rs. 35,000 mentioned in the deed and that instead of 175 acres only 70 acres came into the possession of the mortgagees, but that the other stipulations of the mortgage deed remained intact.

The respondents in their written statement in effect alleged that the fresh agreement between the parties took out of the mortgage for all purposes all the *raiyati* land except the 70 acres of which usufructuary possession was given to the mortgagees.

A number of matters have been considered and adjudicated upon by the Courts below which in the view their Lordships take of this case do not demand consideration, and upon these matters therefore their Lordships must not be taken to indicate any opinion.

In their Lordships' judgment the answer to this appeal is to be found in section 59 of the Transfer of Property Act, which is in the following terms:—

> Where the principal money secured is one hundred rupees or upwards, a mortgage can be effected only by a registered instrument signed by the mortgagor and attested by at least two witnesses.
>
> Where the principal money secured is less than one hundred rupees, a mortgage may be effected either by an instrument signed and attested as aforesaid, or (except in the case of a simple mortgage) by delivery of the property.
>
> Nothing in this section shall be deemed to render invalid mortgages made in the towns of Calcutta, Madras, Bombay, Karachi and Rangoon, by delivery to a creditor or his agent of documents of title to immoveable property, with intent to create a security thereon.

The appellants are suing as persons who, owning one property subject, with property of other persons, to a common mortgage, have paid off the mortgage and are entitled to call on the owners of the other

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property to bear their proper proportion of the burden. It is therefore essential for them to allege and prove a mortgage affecting both their lands and also the lands of the respondents.

As the mortgage relied on is alleged to have been to secure Rs. 14,000, the section which has been cited applies, and the mortgage cannot be proved unless it be in writing and duly registered.

In fact, the appellants allege that the terms of the security are to be found not in the deed of the 6th December, 1905, but in that deed as modified by a verbal arrangement subsequently made. The respondents admit a modification by verbal agreement, but attribute to the verbal agreement an effect different from that alleged by the appellants. Here is the mischief which apparently the statute seeks to prevent. Having regard to the statute the appellants cannot, in their Lordships' opinion, prove their allegations as to the security at all.

Moreover, as the appellants admit that the transaction was not governed by the registered mortgage deed alone, it would be inadmissible to allow them, when they have failed to prove the transaction alleged, to set up the registered mortgage deed unmodified as being the instrument which alone governs the relations between the parties.

For the reasons which have been indicated and without expressing any opinion upon the other matters dealt with in the Courts below, their Lordships are of opinion that this appeal fails and ought to be dismissed, and they will humbly advise His Majesty accordingly. The costs of the respondents who appeared in the appeal must be paid by the appellants.

Solicitors for appellants: *W. W. Box & Co.*

Solicitors for respondents nos. 1 to 10 and 33 to 38: *Watkins & Hunter.*