

(1911) 01 AHC CK 0003**Allahabad High Court****Case No:** None

Babu Sarju Parshad and Others

APPELLANT

Vs

Babu Bindeshari Bakhsh Pal and
Others

RESPONDENT

Date of Decision: Jan. 18, 1911**Citation:** 9 Ind. Cas. 298**Hon'ble Judges:** John Stanley, C.J; Banerji, J**Bench:** Division Bench**Final Decision:** Dismissed**Judgement**

1. The suit out of which this appeal arises was brought by the plaintiffs-appellants to enforce a mortgage of the 20th of August 1895 made by the defendant Bindeshri Baksh Pal Singh for himself and as general attorney of his brother's widow Musammat Lakhpai Kunwari in favour of Hari Singh, the predecessor-in-title of the plaintiffs. The property comprised in the mortgage consisted of a 6 annas 8 pie share in the village Rusia, a 2 annas 8 pie share in the village Tejpur and a 2 annas 8 pie share in a third village Nakahi Nagani. There is no controversy in this appeal as regards the share in Tejpur. The Court below has made a decree for the sale of that share and also of a 2 annas 8 pie share in Nakahi Nagahi. As regards the share in Mouza Rusia, it has dismissed the claim. That share was purchased at auction in execution of a decree obtained on an earlier mortgage by Musammat Jairaj Kunwar, the wife of the first defendant. The share in Nakahi Nagahi was sold by the mortgagors to the respondent Ram Kumar Naik on the 5th of August 1905. What we have to consider in this appeal is whether the plaintiffs-appellants are entitled to a decree for sale of the share in Mouza Rusia and of the whole of 2 annas 8 pie share in Mouza Nakahi Nagahi mortgaged under the mortgage deed executed in favour of Hari Singh. As regards the share in Mouza Rusia which was purchased at auction by Musammat Jairaj Kunwar, the allegation of the plaintiffs is that this purchase was in reality by Bindeshari Baksh Pal Singh and that Musammat Jairaj Kunwar was only his

benamidar. They say that as the real purchaser was Bindeshri Baksh Pal Singh and he mortgaged it to them, they are entitled to a decree for sale of the share in the aforesaid village. On behalf of the respondent Musammat Jairaj Kunwar, it is urged that the claim against her is barred by the provisions of Section 317 of Act No. XIV of 1882 which was the Act applicable at the date of the institution of the present suit.

2. We think that, in view of the ruling of the Full Bench in *Ram Narain v. Mohonia* 26 A. 82 : A.W.N. (1903) 199 this contention must prevail. In that case it was held that a mortgagee who derived his title from his mortgagor is precluded by the provisions of the aforesaid section from bringing a suit for a declaration that the auction purchaser of the mortgaged property was the benamidar of the mortgagor and was not the beneficial owner. This is what the plaintiffs seek to do in the present suit. They seek to have it declared that Musammat Jairaj Kunwar is the benamidar of their mortgagor Bindeshri Baksh Pal Singh from whom they derive title as mortgagees. In view of that ruling the claim as against Musammat Jairaj. Kunwar is not maintainable and this part of the decree of the Court below must be upheld though not on the ground on which that Court has made it.

3. As regards the share in Nakahi Nagahi, it was mortgaged jointly by Bindeshri Baksh Pal and Musammat Lakhpant Kunwari. If the mortgage was made by both of them, Ram Kunwar Naik purchased the share mortgaged subject to the mortgage but assuming that the mortgage was not a valid mortgage on behalf of Lakhpant Kunwari, the plaintiffs are in our judgment still entitled to a decree for sale of the 2 annas 8 pie share mortgaged to them. The ground on which we think the plaintiffs are entitled to such a decree is that Bindeshri Baksh Pal purported to mortgage the 2 annas 8 pie share on the representation that he was authorized to mortgage that share. If Musammat Lakhpant Kunwari owned part of that share her interests were admittedly those of a Hindu widow who succeeded to her husband and, therefore, amounted only to a life interest. She is dead and, therefore, the life-interest has determined. Ram Kumar Naik as purchaser from her has no longer any right to the property acquired by him under his purchase from her. That property has passed to Bindeshri Baksh Pal as the next reversioner. As Bindeshri Baksh purported to mortgage the whole of the 2 annas 8 pie on a representation that he was authorized to make the mortgage and as he is at present the sole owner of the 2 annas 8 pie share, the mortgage will operate on the 2 annas 8 pie share under the provisions of Section 43 of the Transfer of Property Act. In this view the plaintiffs are entitled to a decree for sale of a 2 annas 8 pie share in Nakahi Nagahi and the decree of the Court below must be varied as regards the share in that village comprised in the mortgage.

4. We accordingly vary the decree of the Court below so far that we make a decree for sale of 2 annas 8 pie share of the village Nakahi Nagahi instead of 10 1/3 pie as decreed by the Court below. The appellants will get their costs of this appeal and also in the Court below from Ram Kumar Naik defendant including in this Court fees

on the higher scale. Musammat Jairaj Kunwar will get her costs of this appeal from the plaintiffs-appellants including fees on the higher scale. We extend the time for payment of the mortgage money for a period of 6 months from this date. In other respects, we affirm the decree of the Court below. The objections preferred by Ram Kumar Naik necessarily fail and are dismissed with costs.