(1940) 01 AHC CK 0013

Allahabad High Court

Case No: None

Mt. Daulta Kuer and Others	APPELLANT
Vs	
Ram Das Rai	RESPONDENT

Date of Decision: Jan. 24, 1940

Citation: AIR 1940 All 349 : (1940) 10 AWR 276

Hon'ble Judges: Bennet, J

Bench: Division Bench

Final Decision: Dismissed

Judgement

Bennet, J.

This is a second appeal by the defendants against concurring decrees of the Courts below in favour of the plaintiff, a minor. The plaintiff sued for a declaration that a mortgage deed executed by his father Ram Subhag on 28th May 1920 for Rs. 800 to the defendants was void against him and that a mortgage decree in Suit No. 450 of 1932 which was a preliminary decree for sale of ancestral property obtained against his father alone was also void against him. This decree was on the mortgage of 28th May 1920. The facts as found by the Courts below are that there was a mortgage of 5th August 1913 executed by Bachcha Rai who was a cousin of Ram Subhag and formed a joint family with him and Bachcha Rai was the head and manager of that joint family. This mortgage deed was in favour of Ram Baran Rai and others for Rs. 499. After this there was a partition between Ram Subhag and Bachcha Rai who were the only two members in the joint Hindu family. The mortgage deed of 1913 was allotted to the share of Ram Subhag. By this expression it is probable that what was meant was that the property on which this mortgage existed was given to the share of Ram Subhag and that he was required to pay that mortgage debt and that Bachcha Rai ceased to have any liability to pay that mortgage debt. The Courts below have come to the conclusion that this was not an antecedent debt of Ram Subhag because Ram Subhag did not incur the debt by executing the mortgage deed of 1913. But we consider that by the partition between Bachcha Rai and Ram

Subhag, Ram Subhag undertook the sole liability for this debt and therefore it became his debt. In Mayne''s Hindu Law and Usage, Edn. 10, p, 426, it is stated:

Antecedent debt means an indebtedness of the father prior in time to and independent in origin of the particular dealing with the family property, whether by way of sale, mortgage or other disposition which it is sought to enforce against the son.

2. We consider therefore that by this partition this debt became the debt of Ram Subhag and Ram Subhag became the sole person who was liable to pay this debt. It was therefore undoubtedly the debt of Ram Subhag from the date of partition and that debt was antecedent to the mortgage of 1920. In our opinion therefore the debt of 1913 was undoubtedly an antecedent debt of Ram Subhag in 1920. Now by the mortgage in question of 1920 the entire mortgage money was devoted to the payment by the Ram Subhag''s mortgagees of the prior mortgage of 1913. Therefore, in our opinion, the entire consideration of the mortgage of 1920 was antecedent debt and is binding on the plaintiff. There is however another point which has been raised by the appellants and that is that the plaintiff was born in 1922 and therefore he has no legal right to challenge the mortgage of 28th May 1920. In reply to this learned Counsel for the plaintiff-respondent argued that the plaintiff did not desire to do more than to challenge the decree of 1932. But the relief granted by the Courts below is in regard to the mortgage of 1920 as well as the decree of 1932. Moreover, if the plaintiff is not entitled to challenge the mortgage of 1920, he cannot be entitled to challenge the decree of 1932. The next ground which was argued was that although the Munsif has come to a finding that the plaintiff was born in 1922, the lower Appellate Court did not come to a finding on the point. The trial Court granted a decree in favour of the plaintiff and the defendants appealed. The first ground of appeal was:
It is fully proved from the evidence on the record that the hypothecation bond in question was executed before the birth of the plaintiff-respondent and that according to law the plaintiff-respondent and the property in suit are liable for it.

3. This point however was not pressed before the lower Appellate Court and apparently the lower Appellate Court did not consider whether the finding of the Munsif in regard to the birth of the plaintiff in 1922 was correct or not. Now that the matter has become the subject of an argument in this Court, we have heard learned Counsel on the subject of the evidence on which the Munsif arrived at his finding that the plaintiff was born in 1922. The Munsif sets out that there was before him the school certificate stating that the plaintiff was born in 1922. The plaintiff is stated to have relied on a horoscope and on a medical certificate to prove to the contrary. No evidence was produced to prove the certificate and therefore the certificate is merely hearsay. In regard to the horoscope, evidence was called to show that it was in the handwriting of a Pandit who was dead. The document was tendered in evidence on the last date of hearing and the defendants did not have an

opportunity to contest the authenticity of the assertion. The Munsif therefore rejected the horoscope as unreliable. The Munsif stated in regard to the plaintiff: "He appears to be hardly more than 10 or 12 years old." This statement appears in the judgment dated 14th January 1935 and the Court was therefore well within the mark in putting down the birth of the plaintiff as in 1922. We consider that the finding of the Munsif is correct and this Court in second appeal is entitled to come to a finding of fact where the lower Appellate Court has omitted to arrive at such a finding.

4. For the appellants learned Counsel relied on three rulings to show that in the case of a mortgage executed by the father who was the sole owner of the estate at the time of the execution, the mortgage could not be challenged by a son or sons born subsequently. It is of course a well-known fact that in regard to a sale by a father who is the sole owner of the property at the time of sale, sons born subsequent to the sale cannot challenge it. The principle is that a son at birth takes an interest in the property which is held by his father. Where some of that property has been sold by his father before his birth, that property does not belong to his father at the time of the son''s birth and therefore he does not take an interest in it. Now the argument in regard to a mortgage by the respondent was that the property of the father was still intact and remained intact until a sale in consequence of a decree on the mortgage. This argument however is not accurate. The Transfer of Property Act, Section 58(a) states:

A mortgage is the transfer of an interest in specific immovable property for the purpose of securing the payment of money advanced, etc.

5. Now when the son is born subsequent to the mortgage, the property of the father is not the same property as it was before the mortgage, but it is that property less the interest which has been transferred by the mortgage. Therefore, it is not correct to say that the father''s property is intact at the birth of the son. The first ruling on which learned Counsel for the appellants relied is Partab Singh v. Bohra Nathu Ram (1923) 10 AIR All 197. In that case there was a mortgage in 1897 by all the members of the family who were sui juris. Certain sons were born subsequent to 1897. There was then on 19th January 1909 a mortgage by the three surviving adult members of the family to pay off the mortgage of 1897. It was held that the sons who were born after 1897 could not contest the validity of the deed of 1909. On p. 51 it is stated:

Now, if it be a sound principle of law that those of the appellants who were born between the month of January 1897, and the month of January 1909, acquired from the date of their birth an interest in property already saddled with a mortgage charge which it was not open to them to dispute, it seems to follow as a reasonable and even necessary extension of this doctrine that these appellants cannot dispute the consideration for the mortgage deed now in suit which was, when all is said and done, a mere renewal of the previous mortgage of 28th January 1897.

6. The second ruling was Suraj Prasad v. Hakhan Lal (1922) 9 AIR All 51. In that case there was firstly a simple mortgage on 12th June 1901 by the father as the sole owner of the property. The defendant Suraj Prasad was not born then. There was afterwards a mortgage in 1906, part of which was to pay off the mortgage of 1901, It was held that it was not open to the son born after 1901 to plead that there was no legal necessity for the amount of mortgage money in the bond of 1906 which was to pay off the mortgage of 1901. The third ruling on which the appellants relied was Chattarpal Singh v. Natha (1906) AWN 26. In that case there was firstly a mortgage on 15th January 1880 by Udai Ram who was the sole owner of the property. Subsequently sons were born to him between 1887 and 1897. There was a suit for sale on the mortgage and on 14th May 1891 the decree-holder purchased the property in execution sale. In 1896 the sons brought a suit to recover the property. It was held that as the sons were not in existence at the date of the mortgage in 1880, they could not challenge the validity of that mortgage. Against the three rulings no ruling has been shown to us by learned Counsel for the respondent in which any Court has held that a son born after the execution of a mortgage by his father as the sole owner is entitled to challenge the validity of that mortgage. We therefore consider that the Courts below were wrong on this point and that the decrees should be set aside. For the reasons given above, we allow this second appeal with costs throughout and we dismiss the suit of the plaintiff.