

Kalla and Others Vs Hargian and Another

Court: Allahabad High Court

Date of Decision: March 11, 1912

Citation: (1912) ILR (All) 416

Hon'ble Judges: Tudball, J; Karamat Husain, J

Bench: Division Bench

Final Decision: Allowed

Judgement

Karamat Husain and Tudball, JJ.

On the 29th of January, 1909, Hargian, Bhogi Ram, Paran Sukh and Kachera executed a mortgage with

possession in favour of Manik to secure a sum of Rs. 1,500. The entire property mortgaged was 26 bighas, 5 biswas. The share of Hargian in that

was 4 bighas, 18 biswas, that of Bhogi Ram, 1 bigha, 12 biswas, and the remaining 19 bighas, 15 biswas belonged to Paran Sukh and Kachera.

The mortgagors undertook a liability joint as well as several to pay the mortgage debt. On the same day Hargian executed a deed by way of

mashrut-ul-rehan (a further charge) in favour of Manik, in which he mortgaged his own share amounting to 4 bighas 18 biswas, for a sum of Rs.

99. In this separate deed by way of mashrut-ul-rehan, the stipulated that at the time of redeeming the mortgage executed jointly by him and three

other persons, he would pay the money due under this separate deed. There is a recital in the mortgage deed that a sum of Rs. 150 was due by

Hargian to Kalla and others. The plaintiffs then brought a suit for the pre-mortgage of the share of Hargian under the mortgage deed, dated the

29th of January, 1909, executed by the four persons already mentioned. The plaintiffs in their plaint alleged that the share of Hargian in the

mortgage debt was only a sum of Rs. 153, out of which the plaintiffs were, according to the recital in the deed, entitled to a sum of Rs. 150, and

that, therefore, they were entitled to pre-mortgage on payment of Rs. 3. The court of first instance decreed the claim, and the decree of that court

was affirmed by the lower appellate court except as to costs. That court directed that the plaintiffs, in order to succeed in their suit, were bound to

pay a sum of Rs. 356-8-0, over and above the sum of Rs. 150, which was due upon their own mortgage. The plaintiffs have preferred a second

appeal to this Court, and it is contended by their learned vakil that the transaction by way of mashrut-ul-rehan being a separate and independent

transaction, the plaintiffs are entitled to pre-mortgage the prior transaction alone, and that the mode adopted by the courts below of determining the

amount which the plaintiffs are bound to pay under the mortgage is wrong. Both these pleas in our opinion are well founded. We have no doubt

that the mortgage of 29th January, 1909, is a transaction quite separate from the transaction evidenced by the deed of mashrut-ul-rehan of the

same date. The mortgagors under the mortgage are four persons, and every one of them has undertaken a liability joint and several. The mortgaged

property is 26 bighas, 5 biswas. The mortgage is a mortgage with possession. In the deed of mashrut-ul-rehan Hargian only is the mortgagor. The

mortgaged property is his share only, amounting to 4 bighas, 18 biswas. The consideration for the mashrut id-rehan is quite distinct from the

consideration for the joint mortgage. The mortgage under the mashrut-ul-rehan is strictly speaking, a simple mortgage, while the mortgage under

the deed executed by Hargian and the three others is a usufructuary mortgage. That being so, the plaintiffs in their suit for premortgage are not

liable to pay the sum of Rs. 99, secured by the mashrut-ul-rehan deed. The share of Hargian in the property mortgaged by him along with three

other persons is 4 bighas, 18 biswas, and the entire sum of Rs. 1,500 is a charge upon the entire property amounting to 26 bighas, 5 biswas. The

charge on the share of Hargian is, therefore, in the proportion of the value of 4 bighas, 18 biswas to the value of 26 bighas, 5 biswas. We are

supported in this view by the ruling of this Court in Sita Ram v. Nand Ram Weekly Notes 1881 p. 80. As the lower appellate court has not come

to any finding regarding the value of the share of Hargian and the value of the entire property mortgaged on the 29th January, 1909, we refer the

following issue to that court for a finding:--What are the proportionate values of the share of Hargian and of the entire mortgaged property? The

court will be at liberty to take such additional evidence as the parties may adduce, Ten days will be allowed for objections on return of the finding.