

(1911) 01 AHC CK 0020

Allahabad High Court

Case No: None

Chandra Deo Missera and
Others

APPELLANT

Vs

Harpal Singh and Others

RESPONDENT

Date of Decision: Jan. 19, 1911

Citation: 9 Ind. Cas. 293

Hon'ble Judges: Tudball, J; Richards, J

Bench: Division Bench

Final Decision: Dismissed

Judgement

1. This appeal arises out of a suit in which the plaintiffs sought possession of zemindari share in some eight villages. The property was purchased on the 20th of June 1881 in the name of one Baldeo Sahai. At that time shares in eighteen villages were purchased. The plaintiffs are the brothers and a nephew of Baldeo Sahai. The property which is sought to be recovered in the present suit is part but not all which was comprised in the sale-deed. Part of the property, the subject matter of this suit, was mortgaged by Baldeo Sahai first of all on the 31st of August 1885. This mortgage was really a renewal of the mortgage dated the 3rd of December 1880. We are perfectly satisfied that the mortgage of the 3rd of December 1880, which was renewed as already mentioned by the mortgage of the 31st August 1885, was executed for the purpose of raising in part the purchase-money required for the purchase of the property, the subject-matter of the sale-deed of the 20th of June 1881. On the 28th of February 1894, a decree was obtained against Baldeo Sahai on foot of the mortgage of the 31st August 1885. The property, the subject-matter of the mortgage, was put up for sale, sold and purchased by the decree-holders in September 1897. The proceeds of the sale of the mortgage property proved insufficient and the decree-holders applied for a decree u/s 90 of the Transfer of Property Act. A decree u/s 90 was obtained and a certain share in the village of Odhra Salempur, (which has nothing to do with the present suit), was sold. At the

same time a share in the village of Hajipore was also sold. This share in the village of Hajipore is part of the property which the plaintiffs in the present suit seek to recover. It is to be mentioned that the present plaintiffs were not parties to the suit on foot of the mortgage and the decree, nor were they parties to the application for the decree u/s 90 of the Transfer of Property Act. The plaintiffs' case according to their plaint was that the purchase by Baldeo Sahai was in truth and in fact not a purchase for his own benefit entirely. They contended that the purchase was made partly for Baldeo Sahai himself, partly for one Sheo Harak Singh and partly for them. They accordingly contended that they were not bound in any way by the decrees of sales which had taken place. Their case was that, at the time of the purchase, each of the persons above-mentioned contributed his quota to the purchase money and was entitled accordingly. The present suit was instituted in the year 1908. In the year 1903, a previous suit had been brought by the present plaintiffs against the defendants and it is material to mention the circumstances that gave rise to this suit. After the decree-holders had executed their mortgage decree and got the decree u/s 90 of the Transfer of Property Act which had been partially executed, they made a further application for the sale of further property in execution of the decree u/s 90. That property was a 7 anna odd shares in Mouza Odhra Salempur which was also a part of the property, which was the subject-matter of the sale of 1881 and a part of which had already been sold by the decree-holders in execution of their decree u/s 90. The plaintiffs set forth in their plaint in that suit the obtaining of the decree of foot of the mortgage bond, the sale of the mortgage property the obtaining of the decree u/s 90 of the Transfer of Property Act and the partial execution of that last mentioned decree. They stated boldly in the plaint that the property which up to that time had been sold was the property of Baldeo Singh, the judgment-debtor, but that now the decree-holders were seeking to sell a further share which they had previously expressly omitted in their application for execution and they claimed a declaration that the property which was then sought to be sold was not the property of the judgment-debtor but was their property. The plaintiffs' case then was apparently very much what it is now, namely, that it was a purchase by Baldeo Sahai in his own name for the benefit of himself and other persons in certain shares. The plaint, so far as it purports to set forth the title of the plaintiffs, is vague in the extreme. The evidence that was given in support of it would appear from the judgment of the Subordinate Judge and afterwards of the District Judge in appeal to have been scanty and meagre. The Subordinate Judge held that the plaintiffs had failed to prove their case. In appeal, however, the learned District Judge allowed the plaintiffs to put forward or put forward for them quite a different case and remanded an issue to obtain a finding upon such new case. The case thus put forward is not consistent with the case put forward by the plaintiffs in the present litigation. It was a case that the purchase "in 1881 was a joint purchase made by Baldeo Sahai as manager of a joint Hindu family, the purchase being made out of joint family funds and, of course, intended to retain the character of a family property. The Subordinate Judge found the issue against the plaintiffs and indeed

reading the evidence in that suit given by one of the plaintiffs himself, it is difficult to see how he could have done otherwise. It is quite clear that Hardat Singh could hardly manage to bring himself to say that the property was purchased by the joint family. However, on appeal the learned District Judge held that the purchase was a purchase by Baldeo Sahai as the managing member of the joint family. No second appeal lay from that finding of fact and there the matter rested. The defendants now among other defences strongly rely on the statements made by the plaintiffs themselves in their plaint in the previous litigation, where undoubtedly it is clearly and expressly stated in several paragraphs that the property, which had been sold in execution of the original mortgage decree and also under the decree u/s 90, was the property of Baldeo Sahai; and it is to be remembered that the property which the plaintiffs now seek to recover as theirs is four-fifths of the very property, which, in their plaint in 1903, they so stated to be the property of Baldeo Sahai. The plaintiffs, who have been represented by Mr. Surendra Nath Sen, also rely on the decree which was obtained in this suit. Mr. Surendra Nath Sen contends that, the District Judge having decreed that the plaintiffs were entitled to the 7 annas odd share in Odhra Salempur, which was the subject-matter, that the purchase of 1881 was a joint purchase, the same decree must necessarily be now made in respect of the rest of the property which was the subject-matter of that purchase. On the general merits of the case, we have very little sympathy with the plaintiffs. From the evidence it clearly appears that the sale was a sale made to Baldeo Sahai alone.... The mortgage was made by Baldeo Sahai alone. Mutation of names was effected in his name alone, and we are satisfied that so far as the mortgage property was concerned, possession was given in 1893 to the purchasers. Whether or not the purchase was really a joint family purchase or a purchase by Baldeo Sahai in trust for himself and others, he was the ostensible owner at least of so much of the property as was mortgaged by the mortgage bond of 31st August 1885 and of so much of the property as was actually sold by the decree-holders after they had obtained a decree u/s 90 of the Transfer of Property Act. There is a great deal of evidence to support this view and there is overwhelming evidence of the plaintiffs' own plaint of the 17th July 1903. Paragraph 1 of the plaint is as follows: "On the 28th of February 1894, defendant No. 1 obtained a hypothecation against defendant No. 2 (Baldeo Sahai) from the Court of the Subordinate Judge of Azamgarh and having brought the property of the judgment-debtor to sale, purchased it himself". Paragraph 2 the plaint of is as follows: "After the sale of the hypothecated shares, defendant No. 1 obtained, u/s 90 of the Transfer of Property Act, a simple decree in respect of the balance of the amount decreed against defendant No. 2 and having brought the remaining property of the judgment-debtor to sale, purchased it himself". The plaint then goes on to draw a sharp contrast between the property which had actually been sold and the 7 annas odd share which the decree-holders were then seeking to sell. If the plaint has any meaning at all, it means that in 1903 the very plaintiffs in the present suit admitted and were satisfied that all the property, which was sold up to that time and which includes the property now in

suit, was the property of Baldeo Sahai the judgment-debtor and has been properly sold and realized. Possibly the suit of 1903 was a genuine suit and that, in the events that had happened between the purchase in 1881 and the year 1903, the property which the decree-holders were then seeking to sell had become the property of the plaintiffs. This may have been brought about by partition or otherwise. Assuming that the plaintiffs and Baldeo Sahai were joint at the time of the purchase and perhaps we are bound to assume that they were, having regard to the decree in the previous litigation, the family were undoubtedly separate and had been separate for some time prior to 1903 and, therefore, the property which may at one time have been joint could very well have ceased to be so at the time that the decree-holders were seeking to sell the 7 annas odd share in Odhra Salempur. In our opinion, as to so much of the property, which the plaintiffs seek to recover in the present suit as was comprised in the mortgage, the plaintiffs have no case whatever. As already pointed out on the assumption that the purchase was a joint purchase, we are satisfied that the mortgage of 1885, being a renewal of that of the 3rd of December 1880, was a mortgage for the purpose of raising funds to carry out the family purchase. The family purchase being in the name of Baldeo Sahai and the mortgage being also in his name, the necessary inference is that the mortgage was also made by him in the capacity of the manager of the family. This being so, the family was bound by the mortgage. The property could be sold in execution even though other members of the joint family were not parties to the decree. With regard to so much of the property sought to be recovered in the present suit as was not comprised in the mortgage, but was sold in execution of the decree u/s 90 of the Transfer of Property Act, we hold that the plaintiffs can not go behind the clear and unequivocal statement that that property was the property of Baldeo Sahai the judgment-debtor and not theirs at the date of the sale. We cannot decree possession to the plaintiffs of property which they expressly admitted belonged to the representatives of the defendant. It is quite clear that the suit is devoid of all kind of merit. It has been brought at a very late period and was probably suggested after unexpected success in the suit of 1903. We may mention that if there was any possible ambiguity in the plaint of 1903, it is set at rest by the evidence of the plaintiff Hardat Singh to be found at page 4 of the appellant's book. This was the evidence given after the District Judge had remanded the case for a finding on the issue as to whether or not the purchase was a joint family purchase. The witness says referring to the mortgage decree: A decree was passed in respect of the said amount due to Badri Nath and the property was sold by auction. The property which was sold belonged to Baldeo Singh. The property which Baldeo Singh hypothecated to Badri Nath was his (Baldeo Singh's) exclusive property". It is true that he subsequently made a supplemental statement to which we attach no importance whatsoever. We allow the appeal, set aside the decree of the Court below and dismiss the plaintiffs' suit with costs in both Courts, which in this Court will include fees on the higher scale. The objections under the circumstances cannot be pressed and are dismissed.