Rameshwar Bux Singh And Ors. vs Ganga Bux Singh And Ors. on 28 April, 1950

Equivalent citations: AIR1950ALL598, AIR 1950 ALLAHABAD 598

Author: Ghulam Hasan

Bench: Ghulam Hasan

JUDGMENT

Ghulam Hasan, J.

1. This second appeal filed by the plaintiffs has been referred by a Bench to a Full Bench of three Judges for decision.

2. On 14th September 1909 a possessory mortgage was made by one Lao Singh to Kallu Singh and Kamal Singh (sons of Rudan Singh) and Sheo Prasad Singh (son of Sheo Singh). Sheo Singh and Rudan Singh were brothers. The mortgage was for Rs. 925/- with interest at one per cent. per mensem, The period fixed for redemption was 20 years. Although the mortgage was possessory; it is common ground that possession was not delivered. The suit out of which the present appeal arises was filed on 15th September 1941--the last date of limitation -- by the sons of Kallu Singh against the sons of the mortgagor for recovery of Rs. 1850/- which was the double of the original consideration of the mortgage deed by sale of the entire mortgaged properts'. The representatives of the other two mortgagees were not impleaded but it was stated that the plaintiffs are the representatives of the original mortgagees.

3. The defence was that Kamal Singh died leaving two daughters and Sheo Prasad Singh died leaving a sister, who also died leaving a son, who is alive. The plaintiffs, it was alleged, are not the heirs and representatives of Sheo Prasad Singh or Kamal Singh. It was pleaded that the non-joinder of the heirs of Kamal Singh and Sheo Prasad Singh was fatal to the maintainability of the suit.

4. Issue No. 2 was to the effect: "Are the plaintiffs the only legal representatives of Sheo Prasad Singh Kallu Singh and Kamal Singh mortgagees ? If not, its effect ?"

5. The trial Court held that the suit was liable to fail not because of the non-joinder of the parties as required by Order 34, Rule 1, Civil P. C., but because of the rule of substantive law Under Section 45, Contract Act, that in the casa of joint promisees the right to claim performance rests with the representatives of the promisees jointly. The suit was accordingly dismissed.

6. The plaintiffs filed the appeal but reduced the claim from Rs. 1850/- to Rs. 450/-, which represented their l/3rd share. They prayed that the decree of the trial Court be set aside and the plaintiff's suit decreed for Rs. 450/- only. The lower appellate Court upheld the view of the trial Court.

7. The question which falls to be considered in the present reference is whether the view of the Courts below is right. An instructive case on the subject is the Pull Bench decision of the Allahabad High Court in Pursotam Saran v. Mulu, 9 ALL. 68 (F.B.). That was a case in which upon the death of the sole mortgagee his estate was divided among his heirs, one of whom, a son, was entitled to 14 out of 32 shares. The son executed a sale deed conveying the mortgagee rights under the mortgage to a third person. The representative of the purchaser sued the mortgagor for sale of the mortgaged property. Actually the mortgagor had acquired only the rights of the son of the mortgagee, though the deed purported to be the assignment of the whole mortgage. It was held by the Full Bench of five Judges that the plaintiff was not entitled, in respect of his own share, to maintain the suit for sale against the whole property, the other parties interested not having been Joined. It was further held that he was not entitled to succeed, even in an amended action, in claiming the sale of a portion of the property in respect of his own share. Sir John Edge C. J., who delivered the judgment of the Pull Bench quoting with approval the following observation of the learned Judges in Bishan Dial v. Manni Ram, 1 ALL. 297, in respect of a foreclosure suit, "The whole of the mortgage-debt is due to the persons claiming under the original mortgagees jointly and not severally, and the mortgagors are entitled to a joint receipt for all sums they may pay in satisfaction of the debt; nor does the foreclosure law contemplate the issue of a notice of foreclosure in respect of a portion of the unpaid mortgage-debt, except under circumstances which do not exist in this ease." observed:

> "I agree in the broad principle that the mortgagors would be entitled to a joint receipt that is, in cases where this law applies, and it is not apparent that a different state of things was intended here."

He accordingly held that a plaintiff cannot sue for foreclosure either in respect of the whole of the mortgage or charge or in respect of his particular share. There was no reference in this case to the provisions of Section 45, Contract Act, and it seems that the decision proceeded upon the principle of indivisibility of the mortgage.

8. By Section 45, Contract Act, it is provided that "when a person has made a promise to two or more persona jointly, then, unless a contrary intention appears from the contract, the tight to claim performance rests, as between him and them, with them during their joint lives, and after the death of any of them, with the representative of such deceased parson jointly with the survivor or survivors, and, after the death of the last survivor, with the representatives of all jointly."

9. The illustration appended to the section is as follows:

> "A in consideration of 5,000 rupees lent to him by B and C, promises B and C jointly to repay them that sum with interest on a day specified. B died. The right to claim performance rests with B's representative jointly with C during C's life, and after the

> death of C with the representatives of B and C jointly."

It is obvious from a plain reading of this section that in a mortgage contract where several mortgagors borrow money from several mortgagees to whom they hypothecate their property as security for the debt borrowed, it is the manifest intention of the parties to the mortgage that the mortgagors, or any one of them, shall pay the entire mortgage debt to the mortgagees and in default that the entire mortgage debt will be realised by sale of the property and further that the mortgagees shall jointly be entitled to recover the mortgage debt from the mortgagors, and not any one of them acting singly. I can see no escape from the position that the provisions of Section 45 apply to a mortgage contract. They were applied in the Pull Bench case of the Bombay High Court in Adiveppa v. Rachapva, A. I. R. (35) 1948 Bom. 211 : (50 Bom. L. R. 30 F. B.), to which I shall make a detailed reference hereafter and other cases.

10. An earlier decision of a Full Bench of four out of five Judges of the Allahabad High Court in Kandhiya Lal v. Chandar, 7 ALL. 313 : (1885 A. W. N. 34 F. B.) held in the case of a money-bond, not a mortgage, that when upon the death of the obligee of the moneybond, the right to realise the money devolved in specific shares upon his heirs, each of such heirs cannot maintain a separate suit for recovery of his share of the money due on the bond.

11. In Mushtaq Ali Khan v. Behari Lal, A. I. R. (l) 1914 ALL. 225: (25 I. C. 508), a Bench of the Allahabad High Court held that where the integrity of a mortgage is not split up, all the owners of the mortgagee rights are necessary parties to the mortgage suit, and no part of the mortgage debt can be recovered, nor the property be sold to realise any part thereof except by all the mortgagees bringing a suit within the time prescribed by law. There was no reference to any judicial decision.

12. In Lal Ram Sarup v. Kunji Lal, A. I. R. (22) 1935 ALL. 268 : (159 I. C. 48) one mortgagee out of six abandoned the security and sued for his share of the mortgage debt without impleading his co-mortgagees but later on impleaded the other mortgagees on objection being taken without amending his relief. Sulaiman C. J., sitting with Ganga Nath J., held that one mortgagee could not sue for a decree of his share of the mortgage debt. The learned Chief Justice observed :

> "They (mortgagors) entered into one single transaction with a group of people to whom moneys were due previously and with whom they contracted that the amount would be payable in one lump sum to them jointly and they jointly would have the right to recover the amount and would get the mortgaged property gold. If each one of them be allowed to bring a suit separately for his share of the mortgage debt the result would be that the mortgagor would be compelled to resist six separate suits and would be put to considerable inconvenience and harassment and such a view would encourage multiplicity of suits involving waste of time of the Courts as well,"

Following a decision of the Privy Council in Sunitabala, Devi v. Dhara Sundari Debi, 46 I. A. 272: (A. I. R. (6) 1919 P. C. 24) he observed that the proper course for the co-mortgagee is to implead the other mortgagees as defendants and sue for a decree of the entire amount or for the sale of the entire mortgaged property. The abandonment of the security by one of the mortgagees would not bind the

other co-mortgagees who are jointly interested in the whole amount. He applied Section 45, Contract Act. He also referred to the decision in Kandhiya Lal v. Chandar, 7 ALL. 313 : (1885 A. W. N. 34 F. B.). This decision was given on 1st Hovember 1934.

13. Another decision reported in Lachhmi Narain v. Babu Ram, A. I. R. (22) 1935 ALL 391 : (154 I. C. 437) which was given on 2nd November 1934, may also be referred to. Two suits were brought by two sets of mortgagees claiming their own shares. The mortgage deeds showed that the shares of the mortgagees were specifiad in the deeds obviously with the consent and knowledge of the mortgagor. The learned Judges recognised that ordinarily a mortgage is indivisible both as regards the mortgagees and the mortgage security, the mortgagees being joint tenants of the entire mortgaged property which is charged with every portion of the mortgage money. The learned Judges went on to say:

> "where however there is severance of interests as between the mortgagees with the consent of the mortgagor the position is different so far as the frame of the suit is concerned."

They also observed :

> "Where severance of interests of several mortgagees arises from their own action to which the mortgagor is not privy, it Is obvious that the indivisibility of the mortgage is not affected. Any private arrangement between the mortgagees over the head of the mortgagor cannot destroy their joint character as against the mortgagor. Where however the mortgagor and all the mortgagees agree in the mortgage dead itself that the former should be deemed to have borrowed particular sums forming the consideration of the deed from individual mortgagees each of the mortgagees should be considered to be a creditor to the extent of the sum advanced by him."

14. In two Calcutta cases the suit of some of the mortgagees, without impleading the heirs of the other mortgagees as required by Order 34, Rule 1, was held to be unmaintainable. See Abdul Rahman v. Salimannessa Bibi, A.I.R. (13) 1926 Cal. 416 : (89 I. C. 121) and Govindchandra v. Jamaluddin Mandal, 60 Cal. 777: (A. I. R. (20) 1933 Cal. 621). In the latter case it was held that Order 34, Rule 1 must be held as being not controlled by Order 1, Rule 9, but that Order l, Rule 9 is sub-ordinate to Rule 1 of Order 34. It was further held in this case that if a necessary party had not been impleaded at the time of the institution of the suit but it was brought on the record after the period of limitation had expired, the suit was bound to fail.

16. In Ramchandra Ayyar v. Sivaram Ayyar, A. I. R. (23) 1936 Mad. 895 : (169 I. C. 352) the suit was by one of several co-mortgagees for his share of the mortgage money. The other co-mortgagees were impleaded as defendants and the prayer in the suit was for the sale of the entire mortgaged property and yet the suit was held as being not maintainable. It was laid down as a general principle that unless there is a covenant to pay the amount due to any particular co-mortgagee separately there can be no suit for a share of the mortgage money. The reasoning employed in the following passage may be reproduced in the words of the learned Judge with advantage :

> "It was never contemplated that any particular co-mortgagee should be in a position to insist upon payment of his share before any others were paid or that he should be entitled to bring a suit to recover his own share. If for instance the price fetched at the sale of the mortgaged property proved to be less than the amount due under the mortgage, it is obvious that as the intention was that none of the co-mortgagees should have priority, the loss should be borne equally by all the co-mortgagees, so that the share of the plaintiff or any other co-mortgagee cannot be determined beforehand, i.e. till it is known how much the mortgaged property fetches at the sale; it is thus clear that what was intended by the parties was that not only whole of the mortgaged property was to be sold but that the sale proceeds should be shared between the various co-mortgagees in accordance with their shares, and if the amount fetched at the sale was insufficient, proportionately according to their shares."

16. The decision of the Fall Bench of the Bombay High Court in Adiveppa v. Bachappa, A. I. R. (35) 1948 Bom. 211 : (50 Bom. L. R. 30 F. B.) in my opinion clinches the matter. In that case a mortgage was made in favour of the karta of a joint Hindu family. Upon his death, the mortgage debt devolved on the surviving members but they separated into three branches, each of whom had a karta of its own. One of the kartas of the new separated family sued to recover the entire mortgage debt by sale of the entire mortgaged property. The Pull Bench held that the mortgage being indivisible, the whole suit failed and the mortgagee plaintiff could not recover even his share of the mortgage money. The learned Chief Justice (Stone C. J.) applied Section 45, Contract Act, and took the view that a mortgage is a contract whereby the mortgagors agree to repay a single total sum to the mortgagees and in default to have a single total sum raised by the sale of the mortgaged property and there is no contract between them that if the mortgagee's title should devolve upon several co-owners, then each co-owner should have the right to demand piecemeal a proportionate sum and have such proportionate sums raised by the sale of the whole or some part of security. Such an arrangement, according to him, could only arise from an express agreement with the mortgagors. Dealing with the argument based on Order 1, Rule 9, Civil P. C., the learned Chief Justice held that this rule is a rule of procedure and not of substantive law. That rule does not permit a decree either for a whole or one-third of the indivisible mortgage-debt to one of three co-owners of that debt. He defined the object of Order 1, Rule 9 in the following words :

> "The paramount object of Order 1, Rule 9, as indeed of all the rules contained in Schedule 1, Civil P. C., is to regulate the business and procedure of the Courts, so that justice may be done between the parties, according to their rights and interests at law and by their contracts, Such rules are framed for expediency in order that judicial business may be conveniently and expeditiously despatched, and that there may be an end to litigation. Rules which regulate the business and procedure of the Courts are 'matters of mere machinery', they can never create new legal rights, where none existed before the parties crossed threshold of the court house."

Regarding the attempt to implead a co-owner after the period of limitation I feel tempted toad opt the reasoning employed in the following passage :

> "It is no doubt true that the Limitation Act bars the remedy and not the right, the right remains; but it cannot be enforced by judicial process. Thus, in the Courts a time-barred mortgagee has no legal status, and no rights; he cannot sue and his presence as a defendant cannot enlarge or in any way affect proceedings which without him are defective and must fail. There is no, place for him in the structure of the proceedings before the Court for his capacity to activate them Is dead. But apart from this, the vital section, Section 3 upon which the whole Limitation Act depends for its efficacy, in terms says that he shall not be there, for the section not only requires that every suit instituted after the period of limitation shall be dismissed, but also, that every application made after such period shall meet a similar fate. In my judgment the application to add as defendant the two kartas, against whom the limitation period had run, was such an application, for its only object was to enable the plaintiff more effectively to enforce payment of the mortgage money, and as such it ought to have been dismissed. It was an attempt, by the device of procedural rules, to perfect an indivisible legal right, which a statute already held in part eclipse."

With this statement of the law as contained in the above decision I respectfully agree.

17. The case in Nathi Lal v. Lala, 9 A.L.J. 410 : (14 I. C. 35) was a case of a joint Hindu family. The suit was by some of the representatives of the mortgagee junior members of the family, whose fathers were on record, were impleaded on the defendants' objection after limitation. Under these circumstances it was held that the suit was not liable to be defeated for non-joinder of parties.

18. In Prashaii Lal v. Laiq Singh, 21 A. L. J. 701 : (A. I. R. (11) 1924 ALL. 107) the subsequent mortgagee was not impleaded and it was held that Order 34, Rule 1, Civil P. C. could not be made the ground for dismissing the entire sail.

19. It will be necessary to refer to the cases relied upon for the appellants. Sunitabala Debi v. Dhara Sundari Debi, 46 I. A. 272 : (A. I. R. (6) 1919 P. C. 24) was a case which had been initiated by the Administrator-General of Bengal for obtaining probate of the will of a certain Hindu gentleman, who left a daughter and two widows. By a compromise arrived at in these proceedings it was agreed between the daughter and the two widows that as a release of their claim against the estate the daughter should pay each of the widows Rs. 80,000/- with interest at 6 per cent. and to secure these sums by executing in their favour a mortgage of the testator's estate. In pursuance of this compromise, the daughter executed the mortgage of the real and personal estate in payment of the two sums of Rs. 80,000/-. One of the widows sued to recover Rs. 80,000/- by sale of half of the mortgaged property. The defence of the daughter was that Section 67, T. P. Act, forbade the relief for sale of half the property. The Subordinate Judge decreed the suit but the High Court reversed the decree holding that it was not possible to obtain partial relief on mortgage and allowed the plaintiff to make necessary amendments in the plaint and sent the case back to the trial Court Their Lordships of the Privy Council held that the mortgage effected the conveyance of the real estate to the mortgagees as tenants in common, and no redemption could be effected of part of the property by paying to one of the mortgagees her separate debt "It is not a mortgage", they went on to observe, "to each of a divided half, tout a conveyance to them of the whole property". The following

observations may be reproduced with advantage :

> "Where a mortgage is made by one mortgagor to two tenants in common, the right of either mortgagee who desires to realise the mortgaged property and obtain payment of the debt, if the consent of the co-mortgagee cannot be obtained, is to add the co-mortgagee as a defendant to the suit and to ask for the proper mortgage decree, which would provide for all the necessary accounts and payments, excepting that there could be no judgment for a sum of money entered as between the mortgagee defendant and the mortgagor."

In the case of Baldeo Prasad v. Bhola Nath, 52 ALL. 134: (A.I.R. (16) 1929 ALL. 941), the plaintiff, the descendants of the original mortgagee, sued as owners of 5/9th share of the mortgage debt against the mortgagors but the owners of the remaining 4/9th share were not impleaded at the date of the suit. They applied for adding them as defendants after the limitation had expired but the application was refused. The learned Judges held that the Court should have made them parties under Order 1, Rule. 9 read with Order 34, Rule 1, Civil P. C. They further held that Section 22, Limitation Act did not affect them, as they were pro forma, defendants and no relief was claimed against them. They passed a decree in favour of the plaintiffs for 6/9th share. This case was noticed by the Pull Bench in Adiveppa v. Rachappa, A. I. R. (35) 1948 Bom. 211: (50 Born. L. R. 30 F. B.). The learned Chief Justice (Stone C. J.,) observed that:

> "The reasons for the decision in Baldeo Prasad v. Bhola Nath, 52 All. 134 : (A. I. R. (16) 1929 All. 941) spring from fine considerations of matter of procedure, and not from substantive legal rights, grounded in the contract between the parties."

20. The decision in Umeshchandar Mandal v. Hemanga Chandra, 60 Cal. 87: (A. I. R. (20) 1933 Cal. 325) was given in connection with the abatement proceedings. In that case one of the mortgagor defendants had died during the pendency of the mortgage suit and a stranger was substituted in his place within time without any objection. It was held that the suit did not abate for non-substitution of the person who had inherited the deceased mortgagor's interest; and there would be no abatement to the claim proportionate to the interest of the deceased mortgagor.

21. In Mt. Waleyatunnissa Begam v. Mt. Chalakhi, 10 Pat. 341 : (A. I. R. (18) 1931 Pat. 164) the mortgagor was a Mahomedan and the suit was brought against his heirs, but one of the heirs was not impleaded as defendant. On objection being taken, the plaintiff applied to bring him on the record and the application was allowed after the period of limitation had expired. It was held that the entire suit could not fail; the shares of the heirs of the original mortgagor being denned by law, the mortgagee could give up his mortgagee lien on the share of any one of the heirs by making a proportionate deduction of the mortgage money and enforce his mortgage for the balance as against the shares of the other heirs who were on the record. This was followed in Muhammad Yunus v. Champamani Bibi, 18 Pat. 141 : (A. I. R. (26) 1939 Pat. 49) in which it was held that as a general rule all persons having the equity of redemption ought to be brought on the record. The failure to bring any one of them on the record does not necessitate the dismissal of the suit if the Court in his absence can deal with the matters in controversy so far as regards the rights and interest of the

parties actually before it, In this case the matter arose in appeal upon the death of three defendants during the pendency of the appeal. The learned Judges held that the appeal abated only against the three defendants, who had not been substituted, but did not abate as a whole.

22. Shivubai v. Shiddheshwar Martand, 45 Bom. 1009 : (A. I. R. (8) 1921 Bom. 152) was a redemption suit filed by some of the heirs. The Court refused to add other heirs as defendants after the limitation had expired. It was held that the plaintiffs' right to redeem was not lost by his omission to make the remaining heirs parties.

23. Mahmood Ali Khan v. Ali Mirza Khan, 10 Luck. 70 : (A. I. R. (21) 1934 Oudh 220) was also a suit for redemption by one of the mortgagors. This was followed is Lasa Din v. Mohammad Abdul Shakoor, A. I. R. (27) 1940 Oudh 235 : (15 Luck. 399). Cases of redemption are governed by entirely different consideration.

24. Madkorao v. Eknathrao, A. I. R. (35) 1918 Nag. 56 : (I. L. R. (1947) Nag. 412) was a case brought by a mortgagee against all the mortgagors for foreclosure in which he obtained a preliminary decree for foreclosure which was subsequently made absolute. One of the mortgagors appealed but did not implead the other mortgagors as parties. It was held that the appeal did not fail in Mo, and that it was possible to work out the right of the appellant mortgagor, even though the others had not been made parties to the appeal.

25. After a careful consideration of the authorities, I am of opinion that the suit by one of the mortgagees, is not maintainable either for the whole or for a part of the share in the mortgaged property. The principle of the indivisibility of the mortgage and the principle that all the joint promisees must combine to enforce the claim against the promisors applies. It is not possible to split up the mortgage and permit one of the mortgagees to enforce his claim either for the whole or for a part, nor is it possible for him as one of the joint promisees to enforce the claim without impleading his co-promisees either as plaintiffs or, in the case of their refusal, as defendants within the period of limitation.

26. An application was made before us on behalf of the appellants asking for the addition of the defendants who had not been impleaded in the suit and the appeal. If the principle enunciated in Adiveppa v. Rachappa, A. I. R. (35) 1948 Bom. 211 : (50 Bom. L. R. 30 F. B.) applies, the question of adding parties will not arise, but even if the application is allowed, the appellants cannot be allowed to sue only for a share. Learned counsel for the appellants clearly stated before us that their claim represented one-third share in the mortgage security. The plaintiffs came to Court on the allegation that they were the sole representatives of the original mortgagees. This was obviously incorrect. They did not choose to implead the representatives of the other mortgagees notwithstanding the fact that the objection of nonjoinder was clearly raised in the written statement. Even if the Court was prepared to exercise its discretion under Order l, Rule 9, it seems clear that the appellants have disentitled themselves to this indulgence in view of their conduct. To allow the appellants to add parties at this stage would be to re-open the whole trial and to send the case back for a fresh investigation. Such a course was clearly discountenanced by their Lordships of the Privy Council in Naba Kumar v. Radhashyam, A. I. R. (18) 1931 P. C. 229 : (134 I. C. 654).

27. In Girdhar Parashram v. Firm Moti Lal Champalal, A.I.R. (28) 1941 Nag. 6 : (I.L.R. (1941) Nag. 615) the prayer to join an appeal was refused on the ground that the party had refused to join the defendants at the proper stage of the trial. Accordingly I see no reason to grant this application.

28. The result is that this appeal f fails and is dismissed with costs.

Misra, J.

29. I agree.

30. The suit was by the heirs of one of the three mortgagees for recovering the entire debt by sale of the whole hypothecated property without impleading the heirs of the other two mortgagees. The amount sought to be recovered was reduced in the lower appellate Court.

31. The claim offended against the cardinal rule applicable to all cases where the mortgage security is held by a number of persons jointly as tenants in common that all persons having an interest in the debt should join in an action of this nature as plaintiffs as far as possible and those refusing to join as such should be impleaded as defendants in order to enable the Court to pass an effective decree. The defect is of substance and not merely one: of procedure which may be curable by recourse to the provisions of Order 1, Rule 9 and Order 1, Rule 10, Civil P. C., for it violates the doctrine of indivisibility of the mortgage. My learned brother Ghulam Hasan J. has thoroughly examined the case law bearing on the point and it is unnecessary for me to refer to it again. The case is governed by the principles laid down in Parsotam Saran v. Mulu, 9 ALL. 68 F.B.,Govindchandra v. Jamaluddin Mandal, 60 Cal. 777 : (A. I. R. (20) 1933 Cal. 621), Adivappa v. Rachappa, A. I. R. (35) 1948 Bom. 211 : (50 Bom. L. R. 30 F. B.) and Sunitabala Debi v. Dhara Sundari Debi, 46 I. A. 272 : (A. I. R. (6) 1919 P.C. 24). There was no separation of the individual interest of the mortgagees in the deed and no circumstances which could warrant waiver of the doctrine. The suit as instituted was wholly incompetent and regard being had to the fact that the rights of the heirs of the deceased mortgagees have become unenforceable because they have become time barred, the defect cannot be cared now by adding them as party defendants.

Kidwai, J.

32. Having had the advantage of reading the judgments of my learned brothers, I agree with them and have nothing to add.