

# **Mst. Satwati And Anr. vs Kali Shanker And Ors. on 13 September, 1954**

**Equivalent citations: AIR1955ALL4**

**Author: V. Bhargava**

**Bench: V. Bhargava**

## **JUDGMENT**

Malik, C.J.

1. These two appeals are connected and arise out of the same suit. Raj Kumar on 8-5-1935 had executed a mortgage deed in favour of Uma Shankar. Both the mortgagor and the mortgagee are dead. The mortgagee's legal representatives (sic) the suit out of which these appeals have arisen for sale of the mortgaged property by enforcement of the mortgage transaction. Besides the mortgagor's widows, Satyavati and Ram Dulari, the plaintiffs impleaded two other defendants, Kailash Nath Misra defendant 3 and Kalka Prasad defendant 4. Kailash Nath Misra was a half brother of the mortgagor and after the death of the mortgagor Raj Kumar he had sold a half share in the mortgaged property to Kaika Prasad, defendant 4, The plaintiffs alleged in the plaint that the property in suit was the self-acquired property of Raj Kumar of which he was the sole owner and after his death it was inherited by his two widows and defendant 3 had no right, title or interest in the said property which he could transfer and therefore neither he nor defendant 4, the transferee from him, had any interest in the property included in the Mortgage.

2. The defendants contested the suit on various grounds. The only plea taken by defendants 1 and 2 with which we are now concerned is that they had a right of residence in the residential house which had been mortgaged and the property could only to sold subject to their right of residence. Defendants 3 and 4 filed separate written statements and while defendant 4 took up the plea that Raj Kumar and Kailash Nath were brothers and members of a joint Hindu family and the mortgage executed by Raj Kumar was not binding on Kailash Nath, Kailash Nath took up the plea that the property belonged half and half to him and Raj Kumar and that Raj Kumar had no right to mortgage anything more than his half share. In the written statement filed by Kailash Nath, the second paragraph of the additional pleas was as follows: "No cause of action to file this suit against the contesting defendant accrued to the plaintiffs." No clear plea was taken in the written statement of Kailash Nath that he was claiming a paramount title to the property, that he had been unnecessarily impleaded and should be discharged. On the date the written statements were filed the learned Munsif framed the issues in the presence of counsel and no issue was framed on the point whether defendants 3 and 4 had been unnecessarily impleaded and should be discharged. The issues framed by the learned Munsif read as follows:

1. Whether the mortgage deed in suit was duly executed and was it for consideration?
2. Is the mortgage deed binding on all or any of the defendants? If so, to what extent is it binding on the property mortgaged? Whether defendant 3 had a half share in this property?
3. Are the plaintiffs not entitled to interest and costs under Sections 32, 34 and 39, U. P. Agriculturists' Relief Act?
4. To what relief, if any, are the plaintiffs entitled?"

3. The learned Munsif held that Raj Kumar was the sole owner of the property mortgaged and decreed the plaintiffs' suit. The defendants filed appeals before the learned District Judge and in the appeal filed on behalf of defendants 3 and 4, the ground No. 2 was to the following effect :

"2, That when the plaintiffs-respondents' case was that the entire mortgaged property belonged to Raj Kumar, it was improper to make the appellant, who asserted his paramount title, a party to the suit relating to the mortgage-deed and according to law the appellants' right of ownership cannot be finally decided in this suit. The Court below has erred in law in adjudicating the appellants' rights."

4. The learned District Judge carefully went into this ground of appeal and held that, though in a suit based on a mortgage a person setting up a paramount title was not a necessary party and it might be more convenient if the disputes between him and the claimants under the mortgage are left for decision to another case, yet where the defendant had not asked for his discharge and the case was fought out on the merits and the defendant had suffered a decree to be passed against him, it could not be said that that decree was invalid and must be set aside. The learned Judge relied on a decision of the Calcutta High Court in -- 'Bhaja Chaudhri v. Chunni Lal', 5 Cal LJ 95 (A) and as regards the claim of the widows that they had a right of residence the learned Judge relied on a decision of this Court in -- 'Bisheshwar Dayal v. Mst. Jafri Begam', AIR 1937 All 251 (B) where the widow's claim that she had a right of residence as against the mortgagee was overruled.

5. In the present case the widows have filed in this Court Second Appeal No. 600 of 1945 and defendant 8 has filed Second Appeal No. 256 of 1945. Both these appeals came up before a Bench of this Court on 11-10-1950 and the learned Judges thought that the decision in AIR 1937 All 251 (B) was in conflict with an earlier decision of this Court in -- 'Gobardhan v. Manna Lal', AIR 1918 All 81 (C), and referred the case to a larger Bench.

6. On behalf of the widows the only point taken is that the widows had a right to claim a right of residence and maintenance against their husband and after his death they are entitled to have their rights declared as against the mortgagee. It is true that on marriage a husband becomes both legally and morally bound to maintain his wife and to provide her with a suitable place of residence according to his status and circumstances, but the widow has got no charge on any property belonging to the husband if a charge has not been created either by a Court of law or under a proper

deed executed by the husband. If the husband in his life-time had transferred the property, the widow could not have claimed that she had a right to reside in the house and proceed to enforce her right, which is a personal right against the husband, as against the transferee. Learned counsel has cited two cases, -- 'Lakshman Ramchandra Joshi v. Satyabhama Bai', 2 Bom 494 (D), and -- 'Ram-zan v. Mt. Ram Daiya', AIR 1918 All 408 (E). Neither of these cases helps the appellants. As a matter of fact the observations in both of them are against his contention.

The main point for decision in 2 Bom 494 (D) was whether a widow of a member of a joint Hindu family could claim a right of maintenance and residence against the other members of the family after her husband's death or her right was merely a personal right against her husband which ceased on his death. It is now well-settled that wife of a member of a joint Hindu family has a right to be maintained from the joint family property if her husband was a member thereof and after his death her right to be maintained out of the income of the joint family property continues and the right of maintenance includes the right of residence. After the Hindu Women's Rights to Property Act, 1937, she is now entitled to her husband's share but we need not go into it for the purposes of this case. But even in 'Lakshman Ramchandra Joshi's case (D)' it was recognised that such a right would not be available to her against a transferee to whom the property had been validly transferred by the joint family. In AIR 1918 All 408 (E) it was also pointed out that a wife has. no right to claim a right of residence as against the person to whom the property might have been transferred. Second Appeal No. 600 of 1S45 has, there is fore, no force.

7. In the appeal filed on behalf of Kailash Nath Misra, learned counsel has urged (sic) Kailash Nath Misra was not a necessary (sic) and that his name should have been remove the from the array of defendants and we should (sic) set aside the decree against him and discharge him and leave the dispute between him and the plaintiffs for decision in another suit.

8. Proceedings for the enforcement of a mortgage and a decree based thereon are specifically provided for in Order 34 of the Code of Civil Procedure. The forms of the decrees to be passed by the Court in suits on mortgages are given and they are different from decrees that are passed in suits for the determination of title. In a suit on a mortgage Order 34, B. 1 provides that all persons having an interest either in the mortgage-security or in the right of redemption shall be joined as parties to any suit relating to the mortgage. This provision is mandatory and in a suit by a mortgagee for the enforcement of a mortgage all persons interested in the right of redemption or in the mortgage-security must be impleaded as defendants to the suit. If a person has a paramount title, he is not interested and his rights cannot be affected by the enforcement of the mortgage as against the mortgagor. Order 34 deals with suits on mortgages in which only the mortgagees or the persons interested in the right of redemption or the mortgaged security are interested. Any person having any claim paramount to the claim of the mortgagor can stand out and claim a right to have his rights determined in separate proceedings.

A mortgage decree has to be drawn up in accordance with the rules in Order 34 and probably in most cases it would result in confusion if a person who is not interested either in the mortgage-security or in the right to redeem, is impleaded. It is therefore now well-settled that a person having a paramount title is not a necessary party in a mortgage suit and need not be

impleaded. A mortgagor may be content in a suit to redeem his mortgage to implead only his mortgagee or the mortgagee's representatives and other persons interested in the equity of redemption. Similarly a mortgagee may be content in obtaining a decree for the enforcement of his mortgage for whatever it is worth against the mortgagor and his representatives. But if (sic) mortgagee in a suit brought on a mortgage impleads certain other persons who were setting up an adverse title to the mortgagor, the Court may on an objection made by such defendants discharge them from the array of parties and leaver the dispute for decision in another litigation.

But if, as in this case, the defendants take up contradictory pleas and it may be that it was on that account that they did not claim to be discharged and an issue is framed as regards their rights for decision on the merits and the issue is decided, it cannot be said that the Court either went beyond its jurisdiction or did anything which was so improper or illegal that the Court of appeal must even in the absence of any (sic)judice interfere. The rule is more a rule of (sic)venience and prudence than a rule affecting (sic) jurisdiction of the Court. (sic) a suit brought on a mortgage the question is generally raised is a question relating to validity of the mortgage. The validity of the mortgage was challenged in this suit on three (sic)ounds, by the widows on the ground that the mortgage deed was a fictitious transaction and did not been properly attested, on behalf of the transferee defendant 4 on the ground that the mortgaged property was joint family property and Raj Kumar had no right to transfer the same and on behalf of his transferor defendant 3 Kailash Nath on the ground that Raj Kumar had only a half share in the property and therefore he could not mortgage the whole property. Order 34, Rule 1 no doubt provides for the impleading of persons interested in the right of redemption or the mortgage-security but it no-where lays down that, if the plaintiff has impleaded a person who is claiming a paramount title the Court has no jurisdiction to decide the same and its decision must be set aside by the appellate Court. Where the Court is of the opinion that it would lead to complications and prejudice it can always direct that persons who were claiming paramount title in the mortgaged property should be excluded from the array of parties.

9. In the case before us, on the pleas taken by the defendants themselves, they could not claim that they be discharged. The cases set up by the transferor defendant 3 and the transferee defendant 4 were conflicting and it may be that it was on that account that the learned counsel did not ask that an issue be framed on the point. Section 99, Civil P. C., provides that no decree shall be reversed or substantially varied, nor shall any case be remanded, in appeal on account of any misjoinder of parties or causes of action or any error, defect or irregularity in any proceedings in the suit, not affecting the merits of the case or the jurisdiction of the Court."

Parties produced such evidence as they considered necessary, the case was decided on the issues framed by the Court and it is not even suggested to us that the decision has in any way affected the merits of the case. We are clearly of the opinion that there is no question of Jurisdiction and that the Court was competent to deed the question of title raised by the appellant.

10. Learned counsel has referred us to a number of cases. The first case relied on was --Radha Kunwar v. Reoti Singh', AIR 1916 PC 8 (F). In that case in a suit brought on a mortgage a paramount title was set up by one of the defendants as regards a part of the mortgaged property. An issue was framed on the point and it was decided that the person setting up the paramount title had an

interest in the property to the extent of half of what he had claimed there was an appeal in this Court and it varied the decision of the trial Court and held that the person claiming the paramount title had no interest at all in the property. The decree was thus not a decree of affirmance and an application was made for leave to appeal to the Privy Council which was granted. Before the Board an objection was taken that leave should not have been granted as the valuation of the subject-matter in dispute did not exceed Rs. 10,000/-and the subject-matter in dispute, it was urged, was only the portion of the property with respect to which the paramount title had been set up.

Their Lordships agreed with this contention and held that leave should not have been granted and dismissed the appeal. The decision, therefore, is not in favour of the appellant, butt on behalf of the appellant. Learned counsel has relied on a sentence in the judgment that the joinder of the parties who were setting up a paramount title was irregular and that it could only tend to create confusion. These observations, however, do not help the learned counsel. We have already said that in a mortgage suit a person setting up a paramount title is not a necessary party and he need not be impleaded at all. But if he has been impleaded and the question of paramount title has been gone into and decided on the merits, then it cannot be said that the decision was not binding on the parties.

As a matter of fact in -- 'Radha Kishun v. Khurshed Husain', AIR 1920 PC 81 (2) (G) where the question was whether in a previous decision in which a person claiming a paramount title had been impleaded was barred from claiming in a subsequent suit a declaration as to his title to the property, their Lordships pointed out that in the previous suit the paramount title had not been challenged and therefore the previous decision could not operate as 'res judicata'. Their Lordships pointed out that if in the previous suit the paramount title of the plaintiff had been challenged and had been decided against him, he could not subsequently have that matter reagitated. The relevant portion of the judgment reads as follows:

"Bakhtaur Mull's position therefore was that he was a prior mortgagee with a paramount claim outside the controversy of the suit unless his mortgage was impugned. Consequently to sustain the plea of 'res judicata' it is incumbent on the Sahus in the circumstances of this case to show that they sought in the former suit to displace Bakhtaur Mull's prior title and postpone it to their own. For this it would have been necessary for the Sahus as plaintiffs in the former suit to allege a distinct case in their plaint in derogation of Bakhtaur Mull's priority."

In -- 'Jaggewar Dutt v. Bhuban Mohan Mitra', 33 Cal 425 (H) in the judgments of Rampini and Mookerjee JJ. though Mookerjee J. said in the body of the judgment that "It is not competent for the mortgagee to make as party defendant, one who claims adversely to the title of the mortgagor and mortgagee. He is a stranger to the mortgagee, has no connection with the mortgage, and as his adverse claim of title cannot in any way be affected by the mortgage suit, in which he has no interest, he cannot be made a party for the purpose of litigating such claim of title."

the learned Judge held that the question was not one of jurisdiction and where in a mortgage suit a question of paramount title, raised by the defendant, is tried without objection, neither party can ask for reversal on the ground that the issue was not properly triable in the action.

11. The facts in AIR 1918 All 81 (C) were entirely different. There were two suits; Munna Lal was made a party and impleaded as a subsequent mortgagee of a one-biswa share. Munna Lal did not appear and the suit was decreed ex parte. No dispute was raised in the plaint as against Munna Lal with respect to 3 3/4 biswa share. In the second suit Munna Lal put in a defence and claimed that he was the owner of 3 3/4 share and that the mortgagee had no right to mortgage that share. The entire share mortgaged was 4 3/4 biswas of which Munna Lal claimed to be the owner of 3 3/4 and the subsequent mortgagee of one biswa. The Court held that Munna Lal's paramount title as to 3 3/4 biswa share could not be tried in that suit and refused to go into that question. Munna Lal then filed a suit of his own for a declaration of his title to 3 3/4 biswa share and the plea of 'res judicata' was repelled by the Court on the ground that the plea of Munna Lal as to 3 3/4 biswa share was clearly outside the scope of the mortgage suit.

We can find no conflict between that decision and the decision in the other case mentioned by the learned Judges who referred the case to the Pull Bench, i.e. AIR 1937 All 251 (B) where the defendant had been impleaded as a subsequent transferee on whom the mortgage was claimed to be binding and the defendant did not appear and the suit was decreed. It was held that if Jafri Eegam's contention was that she was the prior mortgagee and not a subsequent mortgagee she should have entered appearance and contested the claim. The point was considered at some length by one of us in a decision of this Court in -- 'Ajai Verma y. Ram Bharosey Lal', AIR 1951 All 794 (I). At page 800 it was said:

"A defendant is not bound to put forward his independent title at the risk of being barred from setting it up in future, if such paramount title has not been challenged by the plaintiff, but, if the plaintiff has impleaded a person claiming a paramount title to the mortgaged property as a defendant in the suit on the ground that the defendant has no such paramount title and the property is liable to be sold free from any such claim, the question of paramount title can be decided in the mortgage suit and if the question is decided there is no reason why the decision should not operate as 'res judicata'."

We need not repeat what was said in that case, but it was recognised that though it may not be necessary in a suit brought on a mortgage to put forward a paramount title and such a plea may be outside the scope of a mortgage suit, yet if a plea had been taken and decided, the decision would be binding on the parties.

12. The only portion of the judgment 'Gobardhan's case (C)' on which reliance placed is the observations at p. 83 which read follows:

"We must take it as settled law that in a (sic) brought by a mortgagee to enforce his mortgage a person claiming a title paramount to the mortgagor and the mortgagee is

not a necessary party, and the question of the paramount title cannot be litigated in such a suit."

13. The learned Judges made those observations with respect to the facts of that particular case where the Court had disallowed the point to be raised and left it for decision in another case. The word "cannot" does not mean that the Court has no jurisdiction to decide the point and that if the Court has entertained the plea and decided the point on the merits the decision of the Court would be without jurisdiction. In fact in a later part of the judgment the learned Judges point out:

"If Munna Lal had allowed the question of his paramount title to be determined in the suit, he might not be permitted in appeal to contend that the decree of the Court below was vitiated by reason of the determination of that question, but that was not the case here."

14. The result, therefore, is that this appeal also has no force.

15. The second appeals are dismissed with costs.