

Allahabad High Court

Baldeo Singh And Anr. vs Hira Lal And Anr. on 22 December, 1911

Equivalent citations: 13 Ind Cas 951

Author: Chamier

Bench: K Husain, Chamier

JUDGMENT Chamier, J.

1. This was a suit by the respondent, Hira Lal, for possession of zemindari property purchased by his father, Ranjit, at an auction-sale.

2. The facts are as follows: In April 1884, two brothers, Baldeo Singh and Nand Kishore mortgaged the property in suit to Ranjit in order to pay off debts incurred by their father, Indarjit. In 1893, the interest of Nand Kishore in the property was purchased by the respondent, Muhammad Raza, at a sale held in execution of a money-decree. In April 1894, Ranjit brought a suit on his mortgage against the two mortgagors and Muhammad Raza, and obtained a decree for sale, in execution of which he purchased the property himself. The sale was confirmed in January 1898, but the certificate of sale was not issued to Ranjit till March 1905. In January 1907, he applied to the Court under Section 318 of the Code of Civil Procedure, 1882, for possession of the property. Nand Kishore had died and his son, Roshan Singh, was not made a party to the proceeding¹. Muhammad Raza was a party but did not put in an appearance. Baldeo Singh resisted the application on the ground that it was barred by limitation. This plea having been overruled, he appealed to the Court of the District Judge. Ranjit there pleaded that no appeal lay. The District Judge held that an appeal did lie, because the order on Ranjit's application was one passed under Section 244 of the Code. He held, also, that Ranjit's application was barred by limitation. The appeal was accordingly allowed and Ranjit's application was dismissed. Ranjit filed a second appeal in this Court. This Court did not touch the question whether the order of the first Court was appealable to the Court of the District Judge, but dismissed the second appeal on the ground that Ranjit's application, under Section 318, was barred by limitation. Seven months later, a Pull Bench of the Court, overruling several previous decisions, held that the question to be decided upon an application under Section 318, was not a question between the parties to the suit or their representatives and could not be determined under Section 244, in other words, that no appeal lies against an order passed upon an application under Section 318. The majority of the Full Bench held that an auction-purchaser could claim possession, not only by means of an application under Section 318, but also by a separate suit. That decision was pronounced on December 14th, 1908. The present suit was instituted on January 10th, 1909. One of the pleas taken by the defendants was that the matter was *res judicata*. It has been rejected by the Courts below. In my opinion, they were right. The final decision in the case, under Section 318, was the decision of this Court. As already stated, this Court decided only that Ranjit's application was barred by limitation. It expressed no opinion what-over on the question whether an appeal lay against an order passed upon an application under Section 318. Strictly speaking, this Court ought not to have taken up the question whether Ranjit's application was barred by limitation, without first deciding whether the question upon an application under section 318 was one arising under Section 2-14, for, unless the question arose under Section 244, no appeal lay to the Judge, and the decision of the first Court should have been restored. However, the fact remains that this Court did not decide that the question was one arising under Section 244, and that no separate suit would lie.

3. I agree, therefore, with the Courts below that the present suit is not barred by the previous proceedings.

4. As the mortgage of April 1884 was made for the purpose of paying the debts of Indarjit, it was binding upon the present appellant, Roshan Singh. It is urged that as he was not made a party to the suit upon the mortgage, he should at least be given an opportunity of redeeming the mortgage. I dealt with this question at length in my judgment in the case of Balwant Singh v. Aman Singh 33 A. 7 : 7 Ind. Cas. 112 : 7 A.L.J. 852 and I see no reason to alter the opinion which I there expressed, and with which my brother Tudball agreed.

5. For the reasons stated in that judgment, I hold that the appellant, Roshan Singh, is not now entitled to redeem the mortgage. Baldeo Singh, who was a party to the suit on the mortgage, is, of course, not now entitled to redeem the mortgage. I would dismiss the appeal with costs.

Kakamat Husain, J.

6. The facts necessary for the disposal of this appeal are fully set out in the judgment of my learned colleague and need not be repeated.

7. I agree with him that the present suit is not barred by the principle of res judicata. This Court in the ruling to be found in Ranjit Singh v. Baldeo Singh A.W.N. (1908) 162 : 5 A.L.J. 516 : 30 A. 360 did not decide that no separate suits would lie.

8. I regret, however, that I am unable to hold that Roshan Singh lost his right to redeem the mortgage, dated the 1st of April, 1884. I adhere to the rule laid down in Ram Prasad v. Man Mohan 30 A. 256 A.W.N. (1908) 106 : 5 A.L.J. 297. The reasons given by my learned colleague in Balwant Singh v. Aman Singly 33 A. 7 : 7 Ind. Cas. 112 : 7 A.L.J. 852 have not altered my opinion.

9. The right to redeem a mortgage is quite distinct from the right to get back a share in a property sold in execution of a decree upon a mortgage.

10. The former involves an admission that the mortgage debt is binding upon the person who seeks redemption, while the latter presupposes that the mortgage does not affect the share claimed. From the fact that a mortgage made by the father in a Hindu joint family is of a binding nature upon his sons who are joint with him, it cannot follow that their right to redeem the mortgage is lost simply because the property has been sold in execution of the decree upon the mortgage. The ruling of the Full Bench in Debt. Singh v. Jia Ram 25 A. 214 does not go that length. It simply lays down that when a sale in execution of a decree upon a mortgage by the father has taken place, his sons, if joint with their father, cannot succeed to recover their shares upon the sole ground that they were not made parties to the suit upon the mortgage. Their suit must be based upon some ground which, under the Hindu law, would free them from liability as sons in a Hindu joint family to pay their father's debts. Similarly, the fact that a private sale by the father in a joint Hindu family is binding upon his sons in certain cases, cannot lead to the conclusion that a mortgage of a joint family property which is binding upon his sons deprives them of their right to redeem after a sale in

execution of the mortgage-decree. If the law laid down by this Court that a person entitled to redeem, who is not impleaded in the suit upon the mortgage, does not we his right to redeem the sale of the property in execution of the mortgage is correct, a necessary corollary is that a Hindu son, in a joint Hindu family, whose father mortgaged the family property for a debt, which the son was bound to pay, is entitled to redeem even after the sale of property in execution of the mortgage-decree, provided that he was a necessary party and was not impleaded.

11. A private sale by the father in a joint Hindu family or an auction-sale by a Court is held to be binding upon his sons, because of their pious duty to pay their father's debt and not because a sale has taken place, and as there is no pious duty to abstain from redeeming the mortgage made by the father, an auction-sale cannot extinguish, the right to redeem. When they claim redemption, they in fact come forward to perform the pious duty cast upon them by the Hindu law, and I fail to see how an auction-sale can stand in their way.

12. For the above reasons, I would allow the appeal so far as to give Roshan Singh an opportunity to redeem the mortgage, dated the 1st of April 1884. I give him his costs.

13. The order of the Court is that the appeal is dismissed with costs.