

Raj Bahadur Lal And Ors. vs Sitla Prasad And Ors. on 12 December, 1950

Equivalent citations: AIR1951ALL596, AIR 1951 ALLAHABAD 596

Author: V. Bhargava

Bench: V. Bhargava

JUDGMENT

Malik, C.J.

1. This is a defts' appeal arising out of a suit for possession of six sir plots situate in village Mahewa Kalan, Mahal Ramkumar Uparwar, Patti Sitla Prasad, area 6 bighas 15 biswas, & for mesne profits.
2. The suit was dismissed by the trial Ct. but the lower appellate Court set aside that decree and gave the plts. a decree for possession over the plots in suit & also for recovery of Rs. 180/- as mesne profits.
3. A learned single Judge of this Ct. dismissed the appeal but gave leave to the defts. to file an appeal under the Letters Patent.
4. This case had to be put up for hearing on several dates as the facts were not clearly stated in the judgments of the lower Cts. & we had great difficulty in finding out what the correct facts were. Learned counsel have, however, given us agreed facts now & we can, on the basis of those agreed facts, proceed to decide the case.
5. A short pedigree of the family may be helpful: One Ganga Bishun had two sons, Hira Lal & Raghubar Dayal. Raghubar Dayal had two sons, Naunidh Lal & Sausidh Lal. Naunidh Lal's daughter was Sm. Ram Dulari & Ram Dulari's son was Mahesh Prasad. Sausidh Lal's widow was Sm. Punita Devi No. 1.
6. On 6-6-1892, Hira Lal & Naunidh Lal made a mtge. of their three-fourths share in the property to Sm. Sitabi for Rs. 600/-. On 20-5 1904, Sm. Punita Devi No. 1, widow of Sausidh Lal, made a mite, of the remaining one-fourth share to the same mtgee, Sm. Sitabi, for Rs. 99/-. Thus Sm. Sitabi became the mtgee. of the entire property. Sm. Sitabi died & was succeeded by her son, Baijnath Sahai. Baijnath Sahai executed six sub-mtges. of six sir plots to one Mabaraj Kishore on various dates: two mtges. were executed on 9-6-1918, three on 10-6-1918 & one on 15-4-1920 On 16-7-1918, Baijnath Sahai executed three other sub-mtges. in favour of one Baldeo Sahai. Maharaj Kishore sub-mtgee., was succeeded by his widow, Sm. Punita Devi No. II. Baldeo Sahai sub-mtgee.

transferred his rights to Sm. Punita Devi No. II & thus Sm. Punita Devi No. II became the sole sub-mtgee. After her death, her daughter, Sm. Sital Devi, succeeded her. Thus, Sital Devi became the sole sub-mtgee. of the rights of all the co-sharers in these plots On 2-11-1925, Sm. Punita Devi No. 1 made a gift of her one fourth share to Sitla Prasad, pltf. 1. On 13-6-1926, Sitla Prasad redeemed Baijnath Sahai with the result that Sitla Prasad became the owner of the one-fourth share that had been gifted to him & Sital Devi remained the sub-mtgee. of the entire interest of all the co-sharers in the sir plots. On Hira Lal's death, his entire share came to Naunidh Lal & thus Naunidh Lal became the owner of three-fourths share in the property which after his death was inherited by his daughter, Sm. Ram Dulari. On 2-6-1928, Sm. Ram Dulari & her son, Mahesh Prasad, sold the three-fourth share in the property to Sitla Prasad pltf. 1 & Ram Prasad, predecessor in-interest of the other pltf. for Rs. 600/- Thus the pltf. became the owners of the entire property. On 17-4-1930, Sitla Prasad, pltf. 1, & Ram Prasad transferred to Baijnath Sahai the two-thirds share in Mahal Uperwar, to which the six sir plots now in dispute relate, & two-third of two third of Mahal Kachar which they had acquired under the sale deed of 2-6-1928, in full satisfaction of the mtge, dated 6-6-1892. The position thus was that the pltf. remained owners of one third in Mahal Uperwar & five-ninths in Mahal Kaehar & Baijnath Sahai became the owner of four ninths share in Mahal Kaehar & of two-third share in Mahal Uperwar. On 29-4-1930 Baijnath Sahai transferred to the defts., his two thirds share in Mahal Uperwar & four ninths share in Mahal Kaehar for a sum of Rs. 2,150/- & left Rs. 1,316-10-6 in the hands of the vendees for payment of debts including two items of Rs. 550/- & Rs. 250/- payable to Sm. Sital Devi aforesaid for redemption of her sub-mtges. On 2-6-1933, the defts. converted the possessory mtge. into a simple mtge. for Rs. 781-10 agreeing to pay interest at the rate of twelve annas per cent per mensem & got back possession over the six plots. They thus redeemed the sub-mtges.

7. The defts. raised several pleas but we are not now concerned with all of them & the only plea that remains for consideration is the question whether the pltf. are entitled to get possession of the property without paying to the defts. their rateable share of the liability under the sub mtges. mentioned above.

8. Shri Shambhu Prasad, learned counsel for the defts.-appls., has argued that his clients by paying off the sub-mtges, though with the money left in their hands by their vendors, could claim that so long as the pltf. did not pay their share of the money due under the sub mtges. they were not entitled to claim possession of the property. This claim could be put forward only if the defts. could claim that they had been subrogated to the position of the sub-mtgee., Sm. Sital Devi, by reason of the payment made on 2-6-1933. This argument, however, is no longer open to learned counsel as it has been well settled by an F. B. of this Ct. in *Sita Ram v. Sharda Narain*, A. I. R. (37) 1950 ALL. 682: (1950 A. L. J. 970), affirming the decision of this Ct. in *Hira Singh v. Jai Singh*, I. L. R. (1937) ALL. 880: (A.I.R. (24) 1937 ALL. 588), that a vendee from a mtgr who pays off the prior mtge. out of the money left with him by his vendor, which money he is bound to pay under the terms of the contract of sale, cannot claim to be subrogated to the rights of the mtgee unless a registered instrument expressly creating such rights of subrogation was executed in accordance with the terms of Section 92, T. P. Act.

9. Learned counsel has, however, relied on Section 82, T. P. Act, & has contended that by reason of his clients having paid off the entire amount due under the sub-mtges. they can claim the benefit of that section & can claim contribution from the pltfs. It has further been urged that this right of contribution is a charge on the property & the pltfs. cannot get back possession of the property without paying off the charge. In support of this argument learned counsel has relied on a decision of their Lordships of the Judicial Committee in *Ganeshi Lal v. Charan Singh*, 1930 A. L. J. 753: (A. I. R. (17) 1980 P. C. 183).

10. Coming to the question whether the applts. can claim contribution from the pltfs. we may mention that in the Full Bench decision, above referred to, it was held, agreeing with the view expressed in *Hira Singh's case*, (I. L. R. (1937) ALL. 880 : A. I. R. (24) 1937 ALL. 688), that when money is left in the hands of a vendee by his vendor, & the vendee is liable under the contract of sale to pay the amount to the prior mtgee. & satisfy the mtge., the vendee making the payment is acting merely as agent of the vendor & cannot claim that the payment was made by him in his own right. The learned Judges made it clear that the money left in the hands of a vendee is the money belonging to the vendor. There are several decisions of this Ct. to the effect that, if in such circumstances where it was the mortgaged property that was being sold for a fixed price & not merely the equity of redemption, the vendee had to pay more than the amount left in his hands, he can claim the balance from his vendor, in the absence of any contract to the contrary; & if, on the other hand, he had to pay less, or for some reason or other he had not to pay the money to the mtgee. the vendee holds the money on trust for the vendor & the vendor can claim a refund of the amount from the vendee. This being the correct legal position there can be no doubt that the payment made in the circumstances by the vendees was merely as agents of the vendors. In this view we fail to see how the vendees can claim any contribution in their own right. Learned counsel has urged that the claim was being put forward by them not in their own right but as agents of their vendors, but an agent cannot sue in his own name unless the name of the principal is undisclosed & the same rule should apply to a counter claim also. We are, therefore, of the opinion that the applts. are not entitled to claim any contribution under Section 82, T. P. Act.

11. As regards the decision of their Lord-ships of the Judicial Committee relied on by learned counsel we have carefully examined the facts of that case & in our view that case does not support the contention of learned counsel. The facts of that case were that on 8-11-1906, the owner of the property, who may be called A, had made a mtge. of two items of property K & M to one Mangal. On 19-5-1914, A sold the property K to Sher Singh. Substantial part of the sale consideration was left in the hands of Sher Singh to pay off the mtge. of Mangal & also to satisfy a simple money decree in execution of which the property K had been advertised for sale by auction. Sher Singh did not make any payment with the result that property K was sold in execution of the simple money decree & it was purchased by a stranger, who may be called C. C thus became the owner of the property K subject to the mtge in favour of Mangal. In July 1914 the other item of property M was sold in execution of another simple money decree against A & the property was purchased by one Ganeshi Lal. Thus Ganeshi Lal became the owner of the property M subject to the mtge. The result, therefore, was that Mangal was the mtgee. & C was the owner of property K subject to the mtge. & Ganeshi Lal was owner of property M subject to the mtge. On 16-4-1915, C sold the property to Sher Singh. Thus, Sher Singh again became the owner of the property having lost it in the auction sale of 1914. Mangal

filed a suit for sale on the basis of his mtge. & on 20-8-1921, both the items of property K & M were sold in auction. Sher Singh paid up the whole of the decretal amount & thus saved the property being sold. He, thereupon, filed a suit for contribution & the suit was resisted by Ganeshi Lal who pleaded that if Sher Singh had fulfilled his contract with A & had paid up the money due in accordance with the agreement contained in the sale deed dated 19-5-1914, the question of the mtge. having to file a suit for recovery of his money & of putting the property to sale would never have arisen. Their Lordships repelled this contention, & decreed the suit. They emphasised the fact that the two items of properties each belonged to two persons subject to the same mtge. & therefore, the provisions of Section 82 were clearly applicable. In that case Sher Singh was not claiming the right of contribution under the sale deed in his favour by the original owner A, or by reason of the fact that he had carried out the contract embodied in that sale deed, but on the ground that he had acquired a new title by reason of his purchase from O the auction purchaser, & the payment that he had made was not as the agent of the mtgor. but in his own right as the owner of the property having purchased it from C The decision, therefore, in Ganeshi Lal's case (1930 A. L. J. 753 : A. I. R. (17) 1930 P. C. 183) cannot help the appellants.

12. The result, therefore, is that in our view there is no force in this appeal & we dismiss it with costs.