

Jagannath Prasad Vs. Chhatur Kunwar

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Court : Allahabad

Decided On : Oct-24-1922

Reported in : 79Ind.Cas.308

Judge : Muhammad Rafiq and; Stuart, JJ.

Appellant : Jagannath Prasad

Respondent : Chhatur Kunwar

Judgement :

1. The facts which have given rise to this appeal are as follows: One Musammat Jainti Kunwar, a Hindu widow, executed a deed of simple mortgage in favour of one Nand Ram on the 27th of April 1906, hypothecating by way of security the village of Karara. Two years afterwards, on the 12th of May 1908, she executed a deed of usufructuary mortgage in favour of Jagannath Prasad for Rs. 3,000, hypothecating by way of security the village of Karara, some other villages, and the mortgagee rights in four other villages. Under the terms of the said deed Jagannath Prasad was to pay of the mortgage of the 27th of April 1906, and the money for that purpose was left in his hands. Jagannath Prasad did not pay off the prior mortgagee. The latter sued on foot of his mortgage and obtained a preliminary decree under Section 88 on the 14th of December 1907, and a final decree on the 29th of August 1908. In order to satisfy the said decree and save the property from sale, Musammat Jainti Kunwar executed a third deed of mortgage in favour of one Earn Narain on the 19th of February 1910, in lieu of Rs. 1,700 the whole amount of which was left in the hands of Earn Narain for the payment of the decree of the 29th of August 1908. Earn Narain has paid off the decree of the 29th August 1908. He is dead. On the 27th of March 1919, his widow Musammat Chhatur Kunwar instituted the suit, out of which this appeal has arisen, for the recovery of Rs. 1,700 plus interest due upon the mortgage of the 19th of February 1910, in favour of her husband, by sale of the mortgaged property. Jagannath Prasad was also impleaded as a defendant in the case. He was the principal contesting defendant. The claim was resisted on various pleas, with one of which alone we are at present concerned here. He contended that he had priority over the mortgage of the 19th of February 1910. On the other hand, the plaintiff Musammat Chhatur Kunwar argued that her husband, having advanced money for the satisfaction of the decree of the 29th of August 1906, and having satisfied the said decree, stood in the shoes of the prior mortgagee Nand Earn, whose mortgage of the 27th of April 1906, was prior to that of Jagannath Prasad. The contention of Jagannath Prasad was disallowed by both the Courts below. He has come up in second appeal before us and argues that he has priority over Chhatur Kunwar. He bases his argument on the statement that the mortgage of 27th of April 1906, having merged into the decree of the 29th of August 1908, both the mortgage-security and the right of redemption were extinguished. The mere fact that the husband of

Chhatur Kunwar advanced money for the payment of that decree and paid off that decree would not revive the mortgage of the 27th of April 1906, and thus give Chhatur Kunwar priority over Jagannath Prasad. In support of his contention Jagannath Prasad relies on the cases of Ghagan Lai v. Muhammad Hussain Khan 51. Ind. Cas. 133 : 41 A. 456 : 1 U.P.L.R. (A.) 1 : 17 A.L.J. 741 and Het Ram v. Shadi Ram 45 Ind. Cas. 798 : 40 A. 407 : 5 P.L.W. 88 : 16 A.L.J. 607 : 35 M.L.J. 1 : 24 M.L.T. 92 : 28 C.L.J. 188 : (1918) M.W.N. 518 : 20 Bom. L.R. 798 : 22 C.W.N. 1038 : 9 L.W. 550 : 12 Bur. L.T. 72 : 45 I.A. 130 (P.C.). For Musammat Chhatur Kunwar the contention is that the case of Het Ram v. Shadi Ram 45 Ind. Cas. 798 : 40 A. 407 : 5 P.L.W. 88 : 16 A.L.J. 607 : 35 M.L.J. 1 : 24 M.L.T. 92 : 28 C.L.J. 188 : (1918) M.W.N. 518 : 20 Bom. L.R. 798 : 22 C.W.N. 1038 : 9 L.W. 550 : 12 Bur. L.T. 72 : 45 I.A. 130 (P.C.) has been re-considered by their Lordships of the Privy Council in a subsequent case, namely, Sukhi v. Ghulam Safdar Khan 65 Ind. Cas. 151 : 43 A. 469 : (1921) M.W.N. 445 : 14 L.W. 162 : 26 C.W.N. 279 : 42 M.L.J. 15 : 30 M.L.T. 175 : 24 Bom. L.R. 590 : (1922) A.I.R. (P.C.) 11 : 48 I.A. 465 (P.C.). 'We find that in the last mentioned case the decision of their Lordships has turned upon the consideration of the omission of the following words of Section 89 of Act IV of 1882, namely, 'and thereupon the defendant's right to redeem and the security shall both be extinguished.' In the new Civil Procedure Code of 1908, in Order XXXIV, Rule 5, these words find no place. In Sukhi's case the final decree was passed under the new Act and not under Act IV of, 1882. In the appeal before us the decree of the 29th of August 1908, was passed and framed under Section 89 of Act IV of 1882. In the case of Ghagan Lal v. Muhammad Hussain Khan 51. Ind. Cas. 133 : 41 A. 456 : 1 U.P.L.R. (A.) 1 : 17 A.L.J. 741, which was a Full Bench case of this Court, it was decided that a final decree passed under Section 89 of Act IV of 1882 had the effect of extinguishing both the security and the right of redemption. In other words, the mortgage in respect of which the decree was passed was extinguished. Musammat Chhatur Kunwar in the present case cannot claim priority over Jagannath Prasad, in view of the decision in the case of Ghagan Lai v. Muhammad Hussain Khan 51. Ind. Cas. 133 : 41 A. 456 : 1 U.P.L.R. (A.) 1 : 17 A.L.J. 741. We, therefore, allow the appeal, set aside the decrees of the Courts below, and remand the case to the first Court through the lower Appellate Court for trial on the merits. It will be open to the parties to put in fresh pleas with regard to the statement made by the learned Counsel for Chhatur Kunwar before us that the amount claimed by Jagannath Prasad is not due to him, and any other pleas that might be urged by either Chhatur Kunwar or Jagannath Prasad. The remand is under Order XLI, Rule 23. Costs here and hitherto will abide the result.

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