

Pandurang Mahadeo Kavade And Others

Vs

Annaji Balwant Bokil And Others.

Civil Appeal No. 300 of 1966

(Vaidialingam, J.)

05.02.1971.

JUDGMENT

VAIDIALINGAM, J. -

1. This appeal by defendants Nos. 1 to 7 by special leave is directed against the judgment and decree, dated February 14, 1963, of the Bombay High Court in First Appeal No. 718 of 1957, reversing the decree of the Trial Court and decreeing the suit of the plaintiff - first respondent.
2. At the outset it is to be stated that some of the original parties are dead and their legal representatives have been brought on record. But for the sake of convenience we have given the description of the parties as at the time of the institution of the suit.
3. The plaintiff instituted, in the Court of the Civil Judge, Senior Division, Poona, Special Civil Suit No. 38 of 1955, for recovery of possession of the suit property. In the alternative the plaintiff claimed that if it is held that the sale deed Ex. 78 was not binding on the defendants, he should be given his share in the property equitably.
4. The circumstances under which, according to the plaintiff, the suit was instituted may be stated : The suit property belonged to one Savitribai, who sold it in 1864, to one Appaji Ramji. On November 7, 1867, the widow of Appaji Ramji, Kasabai, mortgaged the property with possession Rs. 1,600/- to Ramaji krishnaji. On June 6, 1869, Kasabai sold the property to Thakuji Hariba Bhandavalkar. Ramji Krishnji sub-mortgaged the property with possession on May 7, 1885, to one Bhaguji Kavade for Rs. 900/-. Ramji Krishnaji died leaving his only son Mahadev, the father of defendants 1 to 7. Mahadev, as heir of Ramji Krishnaji, became the owner of the mortgagee's rights in the property. Thakuji Hariba Bhandavalkar died leaving his brother Naguji. Naguji died leaving his son Ganpati. Ganpati died leaving no issues. Mahadev, the father of defendants Nos. 1 to 7 was the sister's son of Ganpati and he inherited, as such, the estate of Ganpati. Ganpati had inherited the rights in the equity of redemption in the suit property owned by Thakuji Hariba Bhandavalkar and that right was inherited by Mahadev. Thus Mahadev became the owner of both the right in the suit property, namely, the right as owner of the equity of redemption obtained through his maternal-uncle Ganpati and the rights of the mortgagee obtained by inheritance from his father Ramji Krishnaji. But these rights were subject to the sub-mortgage which had been executed by his father on May 7, 1885.
5. Mahadev under Ex. 78, dated January 9, 1926, sold his rights in the suit property to Balwant Ganesh Bokil, father of the plaintiff for Rs. 1,800/- subject to the sub-mortgage, dated May 7, 1885. The defendants Nos. 1 to 7 on the basis of the decree stated to have been obtained in Civil Suit No.

80 of 1941, on the file of the Subordinate Judge, Junior Division, Poona, claimed to have obtained possession of the suit property. The said defendants had also sold about 3 acres from and out of the said suit property on January 25, 1947, to the 8th defendant and they had also on October 8, 1948, entered into an agreement with defendants Nos. 9 and 10 to sell certain other items forming part of the suit property. On the above allegations the plaintiff claimed to have become the full owner of the suit property and sought recovery of possession or in the alternative for being given a share in the suit property.

6. The appellants contested the claim of the plaintiff on various grounds. They denied the title of the plaintiff and contended that Mahadev did not succeed to his maternal-uncle Ganpati and in consequence he did not inherit the rights in the equity of redemption, in the suit property. As such they further contended that under Ex. 78 Mahadev could not have sold the rights of the equity of redemption to the plaintiff's father. They further pleaded that even the mortgagee's rights were not transferred under Ex. 78 as it has been held in Civil Suit No. 80 of 1941, that the transaction of sale under Ex. 78 is invalid and not binding against the appellants as it was executed by their father without any legal necessity. They pleaded that the said finding in Civil Suit No. 80 of 1941, operates as res judicata and debars the plaintiff from claiming any relief as against them. They also raised objections to the frame of the suit and also pleaded that it was barred by limitation and that in any event the plaintiff not having redeemed the sub-mortgage, dated May 7, 1885, had no right to ask for recovery of possession of the suit property.

7. The Trial Court over-ruled almost all the objections raised by the appellants. The learned Civil Judge held that the suit was not barred by limitation nor was it barred by res judicata by virtue of the decision in Civil Suit No. 80 of 1941. The learned Judge held that as the defendants had not raised any plea that Ex. 78 was not executed for legal necessity and as such not binding on them, the plaintiff was justified in not adducing any evidence to prove that the said document was executed for legal necessity. The learned Judge held that Ex. 78 was binding on the appellants. As the mortgagee's rights had been obtained by Mahadev along with his sons, the said right belonged to the entire family and therefore the plaintiff's father under Ex. 78 could have become only the owner of 8/10th share of the mortgagee's rights in the family. But the learned Judge held that the plaintiff has not established that Mahadev inherited the rights in the equity of redemption as heir to his maternal-uncle, Ganpati. According to the learned Judge there was only evidence on record to show that Naguji succeeded to these rights as the brother of the deceased Thakuji Hariba Bhandavalkar. In this view the Trial Court held that the plaintiff has not established that he has become the full owner of the suit property. It is seen that during the course of the hearing of the suit the plaintiff applied for amendment to the plaint so far as the cause of action was concerned by attempting to treat the suit as one for redemption and possession of 1/7th share in the suit property. The Trial Court, however, took the view that permitting this amendment would change the entire nature of the suit and the application for amendment was rejected. On the basis of the finding that the plaintiff has not established that he has become the full owner of the suit property, the Trial Court dismissed the suit.

8. On appeal by the plaintiff, the High Court disagreed with the Trial Court's view that the plaintiff has not proved that Mahadev obtained the rights in the equity of redemption as heir to his maternal-uncle, Ganpati. The High Court held that the material on record as well as the admissions of the appellants themselves clearly show that Naguji died leaving his son Ganpati and that Mahadev, the vendor, under Ex. 78 inherited the estate of Ganpati as his sister's son. On a construction of Ex. 78 the High Court held that Mahadev conveyed his entire interest in the suit property both as owner of the equity of redemption and the mortgagee's rights to the plaintiff's father subject only to the sub-mortgage of May 7, 1885. The High Court agreed with all the other findings of the Trial Court.

Inasmuch as the plaintiff was held to have proved his full title of the property, the High Court reversed the decree of the Trial Court, and decreed the plaintiff's suit.

9. Mr. C. K. Daphtary and Mr. Sarjoo Prasad, who followed him, raised three contentions : (1) the finding of the High Court that under Ex. 78 both the rights in the equity or redemption as well as the mortgagee's rights were transferred to the plaintiff's father, is erroneous. On the other hand, Ex. 78 clearly shows that only the rights in the equity of redemption owned by Mahadev were conveyed to the plaintiff's father and the mortgagee's rights were retained by the family consisting of Mahadev and his sons; (2) assuming that Mahadev purported to convey the mortgagee's rights also under Ex. 78, the transfer of such rights does not bind the appellants as the plaintiff has not proved that the transaction was for legal necessity; and (3) in any event the finding in Civil Suit No. 80 of 1941, that Ex. 78 was not executed for legal necessity and as such not binding on the appellants, operates as res judicata and hence the plaintiff is not entitled to any relief.

10. On the other hand, Mr. R. S. Kotwal, learned counsel for the plaintiff, first respondent supported the judgment of the High Court on all aspects.

11. From the above contentions it is to be noted that the appellants do not challenge the finding of the High Court that Mahadev inherited the rights in the equity of redemption as heir to his maternal-uncle, Ganpati. In fact the first contention is raised on the basis that Mahadev had become the owner of the equity of redemption.

12. The first question that arises for consideration is regarding the nature of the rights conveyed by Mahadev under Ex. 78. Great emphasis has been laid by the learned counsel for the appellants on the recital in the said document made by Mahadev that he was conveying the property "which I have inherited from my maternal-uncle as the heir". Based upon this recital it is argued that under this document Mahadev sold to the plaintiff's father only those rights which he had inherited from his maternal-uncle as the heir. No doubt, if this recital stood by itself, the argument on the side of the appellants, appears to be attractive. We have already mentioned that Mahadev was the sister's son of Ganpati who owned the rights in the equity of redemption. On inheritance to his maternal-uncle, Mahadev became the owner of the equity of redemption. But we have also referred to the fact that Mahadev, on the date of Ex. 78, has also obtained, through his father Ramji Krishnaji, the rights of the mortgagee in the suit property. Therefore, on January 9, 1926, when Mahadev executed Ex. 78, he was the owner of both the equity of redemption and the mortgagee's rights in the property. No doubt by inheritance to his maternal-uncle he had obtained the equity of redemption in his individual right; but so far as the mortgagee's rights are concerned, there is no controversy that those rights belonged to the family of Mahadev and his sons.

13. We have gone through the various recitals in Ex. 78 and they clearly, in our opinion, establish that Mahadev conveyed to the plaintiffs; father whatever rights he had in the suit property. He did not reserve to himself or his family any rights in respect of the suit property under this document. The total consideration of the sale deed is Rs. 1,800/-. Out of this amount a sum of Rs. 900/- was allowed to be retained by the plaintiff's father to pay off the sub-mortgage of May 7, 1885. There was the usual indemnity clause by which Mahadev undertook to indemnify the plaintiff's father, if any obstruction was caused to his rights. There is the further recital "now neither we, nor our Bhaubands nor heirs, etc, retain any kind of right, title and interest in it". This recital clearly shows that Mahadev was conveying all his rights in the suit property. All these recitals clearly show that the entire rights owned by Mahadev in the suit property were conveyed to the plaintiff's father. Therefore, we are not inclined to accept the contention of the learned counsel for the appellants that

only the equity of redemption was conveyed to the plaintiff's father under this document.

14. The second contention of the learned counsel for the appellants does not require any serious consideration. It is no doubt true that an alienee from a Karta of the joint family will have to establish that the transaction in his favour is for legal necessity and as such binding on the minor members of the family. But in this case, both the Trial Court as well as the High Court have concurrently held that the appellants did not plead that Ex. 78 is not binding on them on the ground that it has not been executed by their father Mahadev for legal necessity. It has been found both by the Trial Court as well as the High Court that in the absence of such a plea it was unnecessary for the plaintiff to have adduced evidence on this aspect.

15. Mr. Sarjoo Prasad pointed out that the plaintiff himself has specifically referred in the plaint to the finding given in Civil Suit No. 80 of 1941, that Ex. 78 has not been executed for legal necessity and as such was not binding on the appellants. In view of this specific statement, the counsel urged, it was the duty of the plaintiff to have adduced evidence to prove that Ex. 78 had been executed by Mahadev for purposes of binding on his sons, the appellants. We are not inclined to accept this contention of the learned counsel. The recitals relied on by the appellants in the plaint have been made with reference to the plaintiff's plea that the decision in Civil Suit No. 80 of 1941, is not binding on him and that the appellants cannot rely on the same. In answer to this plea it is significant to note that the appellants did not raise any contention that Ex. 78 is not valid and binding on them as it has not been executed for legal necessity. In the other hand, their plea was that the decision in Civil Suit No. 80 of 1941 and the finding recorded therein operate as res judicata. Apart from these circumstances we also find that no specific issue has been framed on this point. On the other hand, Issue No. 3 to the effect :

"Do defendants prove that the sale-deed, dated January 9, 1926, is not binding upon them ?"

clearly case the burden on the appellants. They never asked for recasting the issues and they went to trial on the above issue. Here again, both the Trial Court and the High Court have recorded a finding that the sale-deed is binding on the appellants. In view of these circumstances the finding of the Trial Court as well as of the High Court, that it was unnecessary for the plaintiff to lead any evidence on this aspect is correct. In fact we find from the judgment of the High Court that a request was made by the appellants to frame an issue on the question of legal necessity and remit the case to the Trial Court. But this request was in our view rightly disallowed. Therefore, the second contention has to be rejected.

16. This leaves us with the consideration of the question whether the decision in Civil Suit No. 80 of 1941, operates as res judicata. The present appellants had instituted Civil Suit No. 80 of 1941, on the file of the Civil Judge, Junior Division, Poona, for redemption of the sub-mortgage of May 7, 1885. As the sub-mortgagee raised an objection to the relief of redemption asked for by the appellants herein, the present plaintiff was impleaded as the third defendant in that suit. He contended that the present appellants have no right to redeem the sub-mortgage after the execution of the sale-deed Ex. 78 by Mahadev in favour of his father. An issue was raised in that suit to whether the sale-deed Ex. 78 was executed by Mahadev for legal necessity. There is no controversy that it was found in that suit that Ex. 78 was not binding on the appellants as it has not been executed by Mahadev for legal necessity. This finding, it is seen, has been confirmed by the District Court as well as by the High Court.

17. The appellants are, no doubt, justified in contending that a finding has been recorded against the

present plaintiff in Civil Suit No. 80 of 1941, that Ex. 78 is not binding on them. If that decision operates as res judicata, the plaintiff will have to fail. The question is whether the said decision is res judicata in the present proceedings. There is no controversy that the Court of the Civil Judge, Junior Division, which tried the Civil Suit No. 80 of 1941, was a Court of limited jurisdiction. The pecuniary jurisdiction of that Court was limited to Rs. 5,000. On the other hand, the present suit, which is for recovery of possession, has been valued for the purpose of jurisdiction at Rs. 11,001. In order to operate as res judicata it must be established that the previous decision was given by a court which had jurisdiction to try the present suit. So far as we could see the defendants have nowhere in the written statement alleged that the value of the property, for the recovery of which the plaintiff has not sued was worth in 1941, only Rs. 5,000/- or less, in which case the Civil Judge, Junior Division, would have jurisdiction to try the present suit. The High Court has quite rightly pointed out, with reference to the sale-deeds executed by the appellants in 1947, in favour of Defendants 8, 9 and 10 that the suit property must have been worth, even in 1941, much more than Rs. 5,000. If that is so, it follows that the Civil Judge, Junior Division, who tried Civil Suit No. 80 of 1941, had no jurisdiction to try the present suit. It follows that the decision in Civil Suit No. 80 of 1941, has been rightly held not to operate as res judicata both by the Trial Court and the High Court.

18. Mr. Sarjoo Prasad contended that the present suit should be really considered to be one for redemption, in which case the Civil Judge, Junior Division, would have jurisdiction to try the same. As we have already pointed out the present suit is for recovery of possession and cannot be considered to be one for redemption. This contention also cannot be accepted.

19. Mr. Sarjoo Prasad finally argued that there could not have been a merger of the rights in the equity of redemption and the mortgagee's rights in Mahadev. His contention was that the equity of redemption was obtained by Mahadev in his individual right by inheriting his maternal-uncle's estate. On the other hand, the mortgagee's rights are obtained by Mahadev from his father Ramji Krishnaji. The mortgagee's rights were owned by Mahadev and his sons as joint family property. As the two rights were owned by Mahadev under two different titles, there can be no merger in law. We do not think it necessary to go into this aspect of this case. We have already accepted the finding to go into this aspect of this case. We have already accepted the finding that the sale effected by Mahadev under Ex. 78 to the plaintiff's father is binding on the appellants. It has also been held that all the rights owned by Mahadev were transferred under the said transaction in favour of plaintiff's father. We have also held that there is no bar of res judicata. From all this it follows that at any rate in the hands of the plaintiff's father, both rights have merged and he was entitled to ask for recovery of possession.

20. Mr. Sarjoo Prasad again made a request that his clients may be given an opportunity to raise the contention that Ex. 78 is not binding on them as it is not supported by legal necessity. For this purpose he made a request that the appellants may be permitted to amend suitably the written statement and that the matter may be remitted to the Trial Court for further consideration. We have already indicated that a similar request was made to the High Court, which was rejected. We have also no hesitation in rejecting this request.

21. In the result the decree and judgment of the High Court are confirmed and appeal dismissed with costs of the first respondent-plaintiff.

Vs

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(J. M. Shelat, P. Jagmohan Reddy JJ)

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JUDGMENT

VAIDIALINGAM, J. -

1. This appeal by defendants Nos. 1 to 7 by special leave is directed against the judgment and decree, dated February 14, 1963, of the Bombay High Court in First Appeal No. 718 of 1957, reversing the decree of the Trial Court and decreeing the suit of the plaintiff - first respondent.
2. At the outset it is to be stated that some of the original parties are dead and their legal representatives have been brought on record. But for the sake of convenience we have given the description of the parties as at the time of the institution of the suit.
3. The plaintiff instituted, in the Court of the Civil Judge, Senior Division, Poona, Special Civil Suit No. 38 of 1955, for recovery of possession of the suit property. In the alternative the plaintiff claimed that if it is held that the sale deed Ex. 78 was not binding on the defendants, he should be given his share in the property equitably.
4. The circumstances under which, according to the plaintiff, the suit was instituted may be stated : The suit property belonged to one Savitribai, who sold it in 1864, to one Appaji Ramji. On November 7, 1867, the widow of Appaji Ramji, Kasabai, mortgaged the property with possession Rs. 1,600/- to Ramaji Krishnaji. On June 6, 1869, Kasabai sold the property to Thakuji Hariba Bhandavalkar. Ramji Krishnaji sub-mortgaged the property with possession on May 7, 1885, to one Bhaguji Kavade for Rs. 900/-. Ramji Krishnaji died leaving his only son Mahadev, the father of defendants 1 to 7. Mahadev, as heir of Ramji Krishnaji, became the owner of the mortgagee's rights in the property. Thakuji Hariba Bhandavalkar died leaving his brother Naguji. Naguji died leaving his son Ganpati. Ganpati died leaving no issues. Mahadev, the father of defendants Nos. 1 to 7 was the sister's son of Ganpati and he inherited, as such, the estate of Ganpati. Ganpati had inherited the rights in the equity of redemption in the suit property owned by Thakuji Hariba Bhandavalkar and that right was inherited by Mahadev. Thus Mahadev became the owner of both the right in the suit property, namely, the right as owner of the equity of redemption obtained through his maternal-uncle Ganpati and the rights of the mortgagee obtained by inheritance from his father Ramji Krishnaji. But these rights were subject to the sub-mortgage which had been executed by his father on May 7, 1885.
5. Mahadev under Ex. 78, dated January 9, 1926, sold his rights in the suit property to Balwant Ganesh Bokil, father of the plaintiff for Rs. 1,800/- subject to the sub-mortgage, dated May 7, 1885. The defendants Nos. 1 to 7 on the basis of the decree stated to have been obtained in Civil Suit No. 80 of 1941, on the file of the Subordinate Judge, Junior Division, Poona, claimed to have obtained possession of the suit property. The said defendants had also sold about 3 acres from and out of the said suit property on January 25, 1947, to the 8th defendant and they had also on October 8, 1948,

entered into an agreement with defendants Nos. 9 and 10 to sell certain other items forming part of the suit property. On the above allegations the plaintiff claimed to have become the full owner of the suit property and sought recovery of possession or in the alternative for being given a share in the suit property.

6. The appellants contested the claim of the plaintiff on various grounds. They denied the title of the plaintiff and contended that Mahadev did not succeed to his maternal-uncle Ganpati and in consequence he did not inherit the rights in the equity of redemption, in the suit property. As such they further contended that under Ex. 78 Mahadev could not have sold the rights of the equity of redemption to the plaintiff's father. They further pleaded that even the mortgagee's rights were not transferred under Ex. 78 as it has been held in Civil Suit No. 80 of 1941, that the transaction of sale under Ex. 78 is invalid and not binding against the appellants as it was executed by their father without any legal necessity. They pleaded that the said finding in Civil Suit No. 80 of 1941, operates as *res judicata* and debars the plaintiff from claiming any relief as against them. They also raised objections to the frame of the suit and also pleaded that it was barred by limitation and that in any event the plaintiff not having redeemed the sub-mortgage, dated May 7, 1885, had no right to ask for recovery of possession of the suit property.

7. The Trial Court over-ruled almost all the objections raised by the appellants. The learned Civil Judge held that the suit was not barred by limitation nor was it barred by *res judicata* by virtue of the decision in Civil Suit No. 80 of 1941. The learned Judge held that as the defendants had not raised any plea that Ex. 78 was not executed for legal necessity and as such not binding on them, the plaintiff was justified in not adducing any evidence to prove that the said document was executed for legal necessity. The learned Judge held that Ex. 78 was binding on the appellants. As the mortgagee's rights had been obtained by Mahadev along with his sons, the said right belonged to the entire family and therefore the plaintiff's father under Ex. 78 could have become only the owner of 8/10th share of the mortgagee's rights in the family. But the learned Judge held that the plaintiff has not established that Mahadev inherited the rights in the equity of redemption as heir to his maternal-uncle, Ganpati. According to the learned Judge there was only evidence on record to show that Naguji succeeded to these rights as the brother of the deceased Thakuji Hariba Bhandavalkar. In this view the Trial Court held that the plaintiff has not established that he has become the full owner of the suit property. It is seen that during the course of the hearing of the suit the plaintiff applied for amendment to the plaint so far as the cause of action was concerned by attempting to treat the suit as one for redemption and possession of 1/7th share in the suit property. The Trial Court, however, took the view that permitting this amendment would change the entire nature of the suit and the application for amendment was rejected. On the basis of the finding that the plaintiff has not established that he has become the full owner of the suit property, the Trial Court dismissed the suit.

8. On appeal by the plaintiff, the High Court disagreed with the Trial Court's view that the plaintiff has not proved that Mahadev obtained the rights in the equity of redemption as heir to his maternal-uncle, Ganpati. The High Court held that the material on record as well as the admissions of the appellants themselves clearly show that Naguji died leaving his son Ganpati and that Mahadev, the vendor, under Ex. 78 inherited the estate of Ganpati as his sister's son. On a construction of Ex. 78 the High Court held that Mahadev conveyed his entire interest in the suit property both as owner of the equity of redemption and the mortgagee's rights to the plaintiff's father subject only to the sub-mortgage of May 7, 1885. The High Court agreed with all the other findings of the Trial Court. Inasmuch as the plaintiff was held to have proved his full title of the property, the High Court reversed the decree of the Trial Court, and decreed the plaintiff's suit.

9. Mr. C. K. Daphtary and Mr. Sarjoo Prasad, who followed him, raised three contentions : (1) the finding of the High Court that under Ex. 78 both the rights in the equity or redemption as well as the mortgagee's rights were transferred to the plaintiff's father, is erroneous. On the other hand, Ex. 78 clearly shows that only the rights in the equity of redemption owned by Mahadev were conveyed to the plaintiff's father and the mortgagee's rights were retained by the family consisting of Mahadev and his sons; (2) assuming that Mahadev purported to convey the mortgagee's rights also under Ex. 78, the transfer of such rights does not bind the appellants as the plaintiff has not proved that the transaction was for legal necessity; and (3) in any event the finding in Civil Suit No. 80 of 1941, that Ex. 78 was not executed for legal necessity and as such not binding on the appellants, operates as res judicata and hence the plaintiff is not entitled to any relief.

10. On the other hand, Mr. R. S. Kotwal, learned counsel for the plaintiff, first respondent supported the judgment of the High Court on all aspects.

11. From the above contentions it is to be noted that the appellants do not challenge the finding of the High Court that Mahadev inherited the rights in the equity of redemption as heir to his maternal-uncle, Ganpati. In fact the first contention is raised on the basis that Mahadev had become the owner of the equity of redemption.

12. The first question that arises for consideration is regarding the nature of the rights conveyed by Mahadev under Ex. 78. Great emphasis has been laid by the learned counsel for the appellants on the recital in the said document made by Mahadev that he was conveying the property "which I have inherited from my maternal-uncle as the heir". Based upon this recital it is argued that under this document Mahadev sold to the plaintiff's father only those rights which he had inherited from his maternal-uncle as the heir. No doubt, if this recital stood by itself, the argument on the side of the appellants, appears to be attractive. We have already mentioned that Mahadev was the sister's son of Ganpati who owned the rights in the equity of redemption. On inheritance to his maternal-uncle, Mahadev became the owner of the equity of redemption. But we have also referred to the fact that Mahadev, on the date of Ex. 78, has also obtained, through his father Ramji Krishnaji, the rights of the mortgagee in the suit property. Therefore, on January 9, 1926, when Mahadev executed Ex. 78, he was the owner of both the equity of redemption and the mortgagee's rights in the property. No doubt by inheritance to his maternal-uncle he had obtained the equity of redemption in his individual right; but so far as the mortgagee's rights are concerned, there is no controversy that those rights belonged to the family of Mahadev and his sons.

13. We have gone through the various recitals in Ex. 78 and they clearly, in our opinion, establish that Mahadev conveyed to the plaintiffs; father whatever rights he had in the suit property. He did not reserve to himself or his family any rights in respect of the suit property under this document. The total consideration of the sale deed is Rs. 1,800/-. Out of this amount a sum of Rs. 900/- was allowed to be retained by the plaintiff's father to pay off the sub-mortgage of May 7, 1885. There was the usual indemnity clause by which Mahadev undertook to indemnify the plaintiff's father, if any obstruction was caused to his rights. There is the further recital "now neither we, nor our Bhaubands nor heirs, etc, retain any kind of right, title and interest in it". This recital clearly shows that Mahadev was conveying all his rights in the suit property. All these recitals clearly show that the entire rights owned by Mahadev in the suit property were conveyed to the plaintiff's father. Therefore, we are not inclined to accept the contention of the learned counsel for the appellants that only the equity of redemption was conveyed to the plaintiff's father under this document.

14. The second contention of the learned counsel for the appellants does not require any serious

consideration. It is no doubt true that an alienee from a Karta of the joint family will have to establish that the transaction in his favour is for legal necessity and as such binding on the minor members of the family. But in this case, both the Trial Court as well as the High Court have concurrently held that the appellants did not plead that Ex. 78 is not binding on them on the ground that it has not been executed by their father Mahadev for legal necessity. It has been found both by the Trial Court as well as the High Court that in the absence of such a plea it was unnecessary for the plaintiff to have adduced evidence on this aspect.

15. Mr. Sarjoo Prasad pointed out that the plaintiff himself has specifically referred in the plaint to the finding given in Civil Suit No. 80 of 1941, that Ex. 78 has not been executed for legal necessity and as such was not binding on the appellants. In view of this specific statement, the counsel urged, it was the duty of the plaintiff to have adduced evidence to prove that Ex. 78 had been executed by Mahadev for purposes of binding on his sons, the appellants. We are not inclined to accept this contention of the learned counsel. The recitals relied on by the appellants in the plaint have been made with reference to the plaintiff's plea that the decision in Civil Suit No. 80 of 1941, is not binding on him and that the appellants cannot rely on the same. In answer to this plea it is significant to note that the appellants did not raise any contention that Ex. 78 is not valid and binding on them as it has not been executed for legal necessity. In the other hand, their plea was that the decision in Civil Suit No. 80 of 1941 and the finding recorded therein operate as res judicata. Apart from these circumstances we also find that no specific issue has been framed on this point. On the other hand, Issue No. 3 to the effect :

"Do defendants prove that the sale-deed, dated January 9, 1926, is not binding upon them ?"

clearly case the burden on the appellants. They never asked for recasting the issues and they went to trial on the above issue. Here again, both the Trial Court and the High Court have recorded a finding that the sale-deed is binding on the appellants. In view of these circumstances the finding of the Trial Court as well as of the High Court, that it was unnecessary for the plaintiff to lead any evidence on this aspect is correct. In fact we find from the judgment of the High Court that a request was made by the appellants to frame an issue on the question of legal necessity and remit the case to the Trial Court. But this request was in our view rightly disallowed. Therefore, the second contention has to be rejected.

16. This leaves us with the consideration of the question whether the decision in Civil Suit No. 80 of 1941, operates as res judicata. The present appellants had instituted Civil Suit No. 80 of 1941, on the file of the Civil Judge, Junior Division, Poona, for redemption of the sub-mortgage of May 7, 1885. As the sub-mortgage raised an objection to the relief of redemption asked for by the appellants herein, the present plaintiff was impleaded as the third defendant in that suit. He contended that the present appellants have no right to redeem the sub-mortgage after the execution of the sale-deed Ex. 78 by Mahadev in favour of his father. An issue was raised in that suit to whether the sale-deed Ex. 78 was executed by Mahadev for legal necessity. There is no controversy that it was found in that suit that Ex. 78 was not binding on the appellants as it has not been executed by Mahadev for legal necessity. This finding, it is seen, has been confirmed by the District Court as well as by the High Court.

17. The appellants are, no doubt, justified in contending that a finding has been recorded against the present plaintiff in Civil Suit No. 80 of 1941, that Ex. 78 is not binding on them. If that decision operates as res judicata, the plaintiff will have to fail. The question is whether the said decision is

res judicata in the present proceedings. There is no controversy that the Court of the Civil Judge, Junior Division, which tried the Civil Suit No. 80 of 1941, was a Court of limited jurisdiction. The pecuniary jurisdiction of that Court was limited to Rs. 5,000. On the other hand, the present suit, which is for recovery of possession, has been valued for the purpose of jurisdiction at Rs. 11,001. In order to operate as res judicata it must be established that the previous decision was given by a court which had jurisdiction to try the present suit. So far as we could see the defendants have nowhere in the written statement alleged that the value of the property, for the recovery of which the plaintiff has not sued was worth in 1941, only Rs. 5,000/- or less, in which case the Civil Judge, Junior Division, would have jurisdiction to try the present suit. The High Court has quite rightly pointed out, with reference to the sale-deeds executed by the appellants in 1947, in favour of Defendants 8, 9 and 10 that the suit property must have been worth, even in 1941, much more than Rs. 5,000. If that is so, it follows that the Civil Judge, Junior Division, who tried Civil Suit No. 80 of 1941, had no jurisdiction to try the present suit. It follows that the decision in Civil Suit No. 80 of 1941, has been rightly held not to operate as res judicata both by the Trial Court and the High Court.

18. Mr. Sarjoo Prasad contended that the present suit should be really considered to be one for redemption, in which case the Civil Judge, Junior Division, would have jurisdiction to try the same. As we have already pointed out the present suit is for recovery of possession and cannot be considered to be one for redemption. This contention also cannot be accepted.

19. Mr. Sarjoo Prasad finally argued that there could not have been a merger of the rights in the equity of redemption and the mortgagee's rights in Mahadev. His contention was that the equity of redemption was obtained by Mahadev in his individual right by inheriting his maternal-uncle's estate. On the other hand, the mortgagee's rights are obtained by Mahadev from his father Ramji Krishnaji. The mortgagee's rights were owned by Mahadev and his sons as joint family property. As the two rights were owned by Mahadev under two different titles, there can be no merger in law. We do not think it necessary to go into this aspect of this case. We have already accepted the finding to go into this aspect of this case. We have already accepted the finding that the sale effected by Mahadev under Ex. 78 to the plaintiff's father is binding on the appellants. It has also been held that all the rights owned by Mahadev were transferred under the said transaction in favour of plaintiff's father. We have also held that there is no bar of res judicata. From all this it follows that at any rate in the hands of the plaintiff's father, both rights have merged and he was entitled to ask for recovery of possession.

20. Mr. Sarjoo Prasad again made a request that his clients may be given an opportunity to raise the contention that Ex. 78 is not binding on them as it is not supported by legal necessity. For this purpose he made a request that the appellants may be permitted to amend suitably the written statement and that the matter may be remitted to the Trial Court for further consideration. We have already indicated that a similar request was made to the High Court, which was rejected. We have also no hesitation in rejecting this request.

21. In the result the decree and judgment of the High Court are confirmed and appeal dismissed with costs of the first respondent-plaintiff.

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