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Court : Mumbai

Decided On : Dec-19-1902

Reported in : (1904)ILR27Bom176

Judge : Chandavarkar and; Aston, JJ.

Appellant : Bala

Respondent : Shiva and ors.

Judgement :

Chandavarkar, J.

1. The plaintiff, Bala bin Pandu Devkar, brought this suit to redeem the lands in dispute, alleging that their owner, Rama Mahadu Surve, had mortgaged them to Govind Lakshman BhoBle, father of defendant No. 1 and grandfather of defendants 2 and 3, about forty-five years ago, for Rs. 100; that the period fixed for redemption was ten years; and that the mortgagor Rama's heirs had sold the equity of redemption to the plaintiff.

2. There were twelve defendants brought on the record. Of them defendants 4, 7, 8 and 9 contended that the property had come into the possession of their ancestor Dhonda Balkoji for Rs. 500 in A.D. 1788 and that since then their family had been in possession. They denied the mortgage sued upon and pleaded limitation. Defendant No. 12 claimed two of the lands in suit under a mortgage

from defendant No. 1 and his father. The other defendants raised no defence.

3. Defendants Nos. 1 to 10 and defendant No. 13 are descended from one ancestor. The Subordinate Judge following the principle laid down in *Balaji v. Babu* (1868) 5 Bom. 159 *Ramchandra v. Balaji* (1884) 9 Bom. 137 and *Parmanand v. Sahib Ali* (1889) 11 All. 438 held the mortgage alleged by the plaintiff proved. He based his finding, firstly, on an admission made by Govind, father of defendant No. 1. contained in Exhibit 56, that the dhara of Rama bin Mahadu Surve was in the possession of his family under a mortgage: secondly, on an admission of defendant No. 1 in Exhibit 30 that one of the lands in suit was in his possession under a mortgage; thirdly, on oral testimony; and, fourthly, on the fact that the lands still stood in the revenue records in the name of Rama Mahadu Surva's heir. Accordingly, the Subordinate Judge passed the usual decree for redemption. In appeal, the First Class Subordinate Judge, A.P., has reversed that decree, holding that the mortgage sued on is not proved.

4. It is quite clear from the appellate judgment that the Subordinate Judge, A.P., was of opinion that the plaintiff must fail unless he proves that the mortgage transaction was entered into in 1853, because in the plaint it was stated that the lands had been mortgaged forty-five years ago. Criticising the judgment of the Subordinate Judge in the Court of first instance, the Subordinate Judge, A. P., says, referring to the admission of a mortgage made in exhibit 56 by Govind, father of defendant No. 1, and that made by defendant No. 1 in Exhibit 30, that these admissions 'undoubtedly do not refer to the mortgage on the basis of which the plaintiff's suit is founded and are no evidence of any particular mortgage.' Then the Subordinate Judge, A.P., says at the end of his judgment: 'The Subordinate Judge has held that the lands were mortgaged in 1846. The plaintiff in 1898 alleged that they were mortgaged forty five years ago, i.e., in 1853. The plaintiff's witness No. 34, whose evidence is the only evidence on the point, said in 1900 that the lands were mortgaged about fifty years ago, i.e., in 1850.' In the plaint the mortgage set up was stated to have been made about forty-five years ago; and it is taking too literal and technical a view of the plaint to take it to mean that the mortgage transaction was entered into in 1853 and that unless that was proved the plaintiff must fail. The plaintiff has been careful to state the date of the

mortgage approximately, and it was open to him on the pleadings to show that the lands were mortgaged, if not in 1853, at any rate at some time about that period. On this point we would draw the attention of the Court below to the observation of this Court in *Lakshman v. Hari Dinkar* (1880) 4 Bom. 584.

5. It is true that when a plaintiff sues to redeem, and the defendant denies the mortgage, the plaintiff must in the first instance 'prove' his title. 'A plaintiff, who alleges that his ancestor forty-four years ago made a mortgage to the ancestor of the present possessor of a property and by virtue thereof seeks to dispossess the present possessor must prove his case clearly and indefeasibly' *Sevvaji Vijaya Raghunadha Valoji Kistnan Gopalar v. Chinna Nayana Chetti* (1864) 10 M I.A. 105. In the present case the Subordinate Judge, A. P., was right in throwing the onus on the plaintiff of proving his case, and of requiring him to 'make out a prima facie case by sufficient and satisfactory evidence.' But in dealing with the evidence the Subordinate Judge, A. P., as pointed out above, acted under the erroneous impression that what the plaintiff had to prove was, some specific mortgage alleged to have been made in 1853. No doubt the plaintiff has stated in the plaint that the lands were mortgaged about forty-five years ago, but the real question between the parties is sufficiently apparent on the record, and that is whether the defendants are mortgagees. The plaintiff did not tie himself down to any specific mortgage made in that year and no other, and would be entitled to succeed if he proves that the lands were still held by the defendants as mortgagees.

6. Then we come to the evidence adduced by the plaintiff. The Sub-ordinate Judge, A.P., has declined to accept the oral evidence, and, under ordinary circumstances, his appreciation of it would be binding upon this Court in second appeal. But where such appreciation is influenced by an erroneous view of the plaintiff's cause of action as stated in the plaint, it is open to this Court in second appeal to interfere. Assuming that the oral testimony of the witnesses of the plaintiff is fairly open to the unfavourable comments to which the Subordinate Judge, A.P., has subjected it, we have in this case certain admissions by defendant No. 1's father and by defendant No. 1 himself contained in Exhibit 56 and in Exhibit 30 respectively. Exhibit 56 is a mortgage of one of the lands in dispute in 1880 by defendant No. 1's father to defendant No. 11. There defendant

No. 1's father speaks of that land as one of the dhara lands of Kama bin Mahadu Sarve held by his (defendant 1's father's) family in mortgage. Similarly, defendant No. 1 made an admission in Exhibit 30 as to Survey No. 139, Pot No. 6. The factum of these admissions is admitted, nor is it disputed that all the lands in dispute are known as the dhara of Rama bin Mahadu Surve. They have stood as such in the revenue records in the name of Rama and his heir. The Subordinate Judge, A.P., does not hold that the admissions were not made; nor does he reject them on the ground that as they were made by defendant No. 1's father and defendant No. 1 respectively they cannot have any probative force against the other defendants. The ground on which he declines to draw a presumption from them in favour of the plaintiff's case is that 'these statements were made by defendant No. 1 and his father with the object of describing the lands rather than as specification of title.' So far as this remark of the Subordinate Judge, A.P., applied to Exhibit 56, it is not borne out by the wording of the document itself. The word used there is that the dhara of Rama bin Mahadu Surve 'continued with us in mortgage'-expressions which can bear no other construction than that the dhara was held at the date of Exhibit 56 in mortgage by the family of defendant No. 1's father. In other words, the father of defendant No. 1 speaks of the title of his family to the dhara as one not only originally founded upon but still continuing on a mortgage to the family. There is no warrant, therefore, for the remark of the Subordinate Judge, A.P., that the admission was more a description of the property than a specification of title. It is true that in Exhibit 56 defendant No. 1's father also speaks of the land mortgaged thereby to defendant No. 11 as his property. But that recital is not necessarily inconsistent with the recital as to the property continuing with him as a mortgagee. The second ground assigned by the Subordinate Judge, A.P., for rejecting the admissions in Exhibits 56 and 30 is that they 'do not refer to the mortgage on the basis of which the plaintiff's suit is founded and are no evidence of any particular mortgage.' They may be no evidence of any particular mortgage, but they are certainly evidence to show that the defendants came into possession as mortgagees, and as such they have a bearing on the main question at issue in the case-whether the defendants are mortgagees or owners of the property? The Subordinate Judge, A.P., seems to have been under the impression that nothing short of proof that the lands were

mortgaged in 1353 could be treated as evidence in law in favour of the plaintiff's case. As already pointed out above, that way of treating the plaintiff's claim is opposed to the ruling of this Court in *Lakshman v. Hari Dinkar* (1880) 4 Bom. 584 which is followed in *Raghunath Annaji v. Babaji bin Rama* (1890) P.J. p. 297.

7. The proper and legal mode of dealing with a case of this kind has been pointed out in a number of decisions of this Court beginning with *Balaji Narji v. Babu Devli* (1868) 5 Bom 159. There it was said by this Court: 'It being the ordinary custom in this part of India that deeds creating mortgages should remain in the custody of the mortgagee alone, no counterpart being taken by the mortgagor, very slight prima facie proof that a mortgage had been originally made would serve to shift the entire burden of proof on the defendant in cases of this character; but this prima facie proof must be forthcoming, and in its absence a plaintiff seeking redemption cannot be relieved of the burden which is imposed on all plaintiffs of establishing the fact or facts out of which their claim to relief arises.' This does not mean that the moment the plaintiff adduces any slight evidence, the burden is shifted. As with all evidence, the Court must appreciate it, and the burden is shifted only when the Court regards the evidence as trustworthy where it is a question of its trustworthiness. Where, as in the present case, there are admissions of a mortgage, the Court ought to deal with them as evidence, for admissions are only evidence and not conclusive proof, and if it finds that the admissions are trustworthy and may be legally used against all the defendants, then the burden would be shifted. That is the principle on which the decision in *Balaji v. Babu* (1868) 5 Bom 159 was followed in *Vishram v. Devkoran* (1886) P.J. 248 and *Rama v. Baburao* (1874) P.J. 19. If the lower Appellate Court find that the defendants' ancestors came into possession as mortgagees and that the plaintiff's allegation as to a mortgage is proved, it will be for the defendants to meet that case. On this point we would draw the attention of the lower Court to *Rajah Kishen v. Narendar* (1875) 8 I.A. 86 and *Parmnand v. Sahib Ali* .

8. We must, for the reasons, *re* (1889) 11 All. 488 *verse* the decree and remand the appeal for a fresh hearing. At such fresh hearing the lower Appellate Court should dispose of the case on all the issues, including the issue as to the alleged mortgage which the plaintiff seeks to redeem. In this judgment we have dealt only

with the mode in which the Subordinate Judge, A.P. should consider the case, and in reversing his decree and remanding we do not by any means express any opinion on the evidence which it is for the lower Appellate, and not for this, Court to appreciate. Costs to abide the result.

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