

Dattambhat Rambhat Vs. Krishnabhat Govindbhat

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Court : Mumbai

Decided On : Feb-14-1910

Reported in : (1910)12BOMLR491

Judge : Basil Scott, Kt., C.J. and ;Batchelor, J.

Appeal No. : Second Appeal No. 425 of 1909

Appellant : Dattambhat Rambhat

Respondent : Krishnabhat Govindbhat

Disposition : Appeal allowed

Judgement :

Basil Scott, Kt., C.J.

1. The question in this case is whether the appellant has a right to an order for sale of the mortgaged property the subject of the mortgage deed of the 29th October 1893.

2. The learned Judge of the lower Court has considered that there are two contrary decisions of this Court upon the point and that he was bound to follow the later ruling, and he has accordingly followed what he believed to be the effect of the judgment in Krishna v. Hari : (1908)10BOMLR615 , in preference to one in Mahadaji v. Joti ILR (1892) 17 Bom 425. In giving this preference to the judgment

in Krishna v. Hari : (1908)10BOMLR615 , he has lost sight of the provisions of Section 3 of the Indian Law Reports Act XVIII of 1875.

3. We think, however, that he has misread the judgment in Krishna v. Han : (1908)10BOMLR615 , which was shown by the judgment of the Court in Parashram v. Putlajirao (1909) 11 Bom L.R. 1315 : 34 Bom. 128, to fall within a different class of cases to that in Mahadaji v. Joti ILR (1892) 17 Bom 425. In the last mentioned case there was a distinct covenant to pay after five years from the date of the bond. In Krishna v. Hari : (1908)10BOMLR615 , there was no covenant to pay the principal amount at any particular date. In the mortgage which we now have under consideration the mortgagor covenants : ' As regards the period of repayment of this I shall repay your money in two years from to-day. For this amount the security is the land described below.' It is, therefore, not a case of a purely usufructuary mortgage, but a case in which the mortgage money has become payable by the mortgagor and therefore in the absence of a contract to the contrary the mortgagee has the right under Section 67 of the Transfer of Property Act to an order that the property be sold.

4. We, therefore, reverse the decree of the lower Court and pass a decree for the plaintiff ordering that, in default of the defendant paying the amount of principal and interest not exceeding dam dupat within six months from this date, the property be sold and the proceeds of the sale paid into Court and applied in payment of what is found due to the plaintiff and that the balance if any be paid to the defendants or other persons entitled to receive the same.

5. The plaintiff will be entitled to add his costs of this suit to the mortgage debt.

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