

Harish Chandra and ors. Vs. Chandra Shekhar and ors.

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Court : Allahabad

Decided On : Jan-27-1976

Reported in : AIR1977All44

Judge : Chandra Prakash, J.

Acts : [Transfer of Property Act, 1882](#) - Sections 5

Appeal No. : Second Appeal No. 2718 of 1971

Appellant : Harish Chandra and ors.

Respondent : Chandra Shekhar and ors.

Advocate for Def. : Rajendra Kumar, ;G.P. Bhargava and ;A.N. Bhargava, Advs.

Advocate for Pet/Ap. : N.L. Ganguly and ;Rajeshwar Prasad, Advs.

Disposition : Appeal dismissed

Judgement :

Chandra Prakash, J.

1. This is a defendants mortgagees' second appeal against the judgment and decree dated 7-8-1971, dismissing the appellant's appeal after confirming the judgment and decree of the trial Court.

2. The following pedigree is undisputed:--

Smt. LAXMI BAHU

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Smt. Kalawati Chandra Shekhar Chandrabhal Chandra Shish

(Defdt. No. 4) Plfl. (Defdt. No. 5) (Defdt. No. 6)

Smt. Laxmi Bahu was undisputed owner of the house in dispute. On 10-1-1930 she executed a deed of mortgage in favour of Ram Sumer in respect of the house for Rs. 2,500. Defendants Nos. 1 and 2 are admittedly the successors in respect of all the property of Ram Sumer.

3. The suit giving rise to this appeal was filed by respondent No. 1 for the redemption of aforesaid mortgage on the allegations that Smt. Laxmi Bahu was the owner of the disputed property. She died on 30th January, 1930 leaving behind her three sons including the plaintiff and a daughter Smt. Kalawati, Defendant No. 4. By a deed of sale dated 10th December, 1947 Smt. Kalawati defendant No. 4 executed a deed of relin-quishment in favour of the plaintiff and his brothers defendants Nos. 5 and 6. On 16th January, 1950, defendants Nos. 5 and 6 relinquished their shares in favour of the plaintiff by a deed of relinquishment of that date. Plaintiff alone therefore, filed the suit aforesaid for redemption against the defendants Nos. 1 and 2. The defendant No. 3 was the husband of Smt. Laxmi Bahu deceased.

4. Defendants Nos. 3 to 6 did not contest the suit and the case proceeded ex parte against them. Defendants Nos. 1 and 2 died during the pendency of the suit. Defendants Nos. 1 and 2 filed a joint written statement. They resisted the case on the ground that after the death of Laxmi Bahu, the property in dispute devolved on Smt. Kalawati, defendant No. 4 alone and the deed of relinquishment by her executed in favour of the plaintiff and her two brothers defendants Nos. 5 and 6 would not confer any title. It was denied that any deed of relinquishment was

executed by Smt. Kalawati, defendant No. 4 in favour of the plaintiff or her brothers defendants Nos. 5 and 6.

It was further alleged that the transaction evidenced by the deed of mortgage was in fact a sale and it was given the shape of a usufructuary mortgage in order to defeat a claim of pre-emption or custom of Zari Chaharam. According to the plaintiff, this evidence was barred by Indian Evidence Act. It was further pleaded that the suit was undervalued and the court fee paid was insufficient. It was further alleged that after the death of Devi Charan, all his heirs should have been impleaded. It was further pleaded that the suit had abated against defendant No. 3, it was also alleged that the plaintiff and his co-sharer had relinquished their rights in the mortgaged property in favour of defendants Nos. 1 and 2. Defendants Nos. 1 and 2 further claimed that they had effected improvements.

5. The trial court framed the following twelve issues in the case:---

1. Whether the plaintiff and his co-sharers, if any, have relinquished their rights in the mortgaged property in favour of the defendants Nos. 1 and 2 in the month of April 1932? If so, its effect?
2. Whether the defendants 1 and 2 have invested any amount over repairs, improvement and tax? If so how much and whether they are entitled to recover the same?
3. To what relief, if any, is the plaintiff entitled?
4. Whether the document dated 10-1-1930 executed by Laxmi Bahu in favour of Ram Sumer Mishra was got written in the form of usufructuary mortgage instead of sale for the reasons given in para 10-K of the written statement?
5. Whether the plea taken by the defendants 1 and 2 in para 10-K of the written statement is barred by Section 91 of the Indian Evidence Act?
6. Whether Smt. Kalawati executed any deed of relinquishment on 10-12-1947 in favour of the plaintiff? If so, its effect?

7. Whether the alleged deed of relinquishment entitles the plaintiff to redeem the alleged mortgage?
 8. Whether the suit is undervalued and the court-fee paid is Insufficient?
 9. Whether the suit is barred by limitation?
 10. Whether the suit is bad for nonjoinder of all the heirs of Devi Prasad?
 11. Whether the plaintiff has no claim against the defendants 1/1 to 1/9? If so, its effect?
 12. Whether the suit has abated?
6. After taking evidence of the parties, the court came to the conclusion that the transaction in dispute was usufructuary mortgage and not a sale and the evidence of the appellants on the point was false. The trial court further held that a deed of relinquishment was executed by Smt. Kalawati, defendant No. 4 in favour of her three brothers on 10-12-47 and by that the plaintiff became one of the mortgagors and entitled to sue and after the deed of relinquishment executed by defendants Nos. 5 and 6 in his favour he became the sole mortgagor. The trial court further held that the suit was properly valued and the court-fee was sufficiently paid. It also held that the original mortgagee or the appellants had not made any improvement and they are not entitled to any amount on that account. It rejected the plaintiff's plea that plaintiff has relinquished his rights in favour of defendant. On the above findings, the trial court decreed the plaintiff's suit for redemption on payment of Rs. 2,500.
7. The appellants who were the successors and defendants 1 and 2 filed an appeal in the courts below and lower appellate court after hearing the case dismissed the appeal and confirmed the decree of the trial court.
8. There is a concurrent finding of fact given by the two courts below that the transaction dated 10-1-1930 was a usufructuary mortgage and not a sale, and the case set up by the appellants that the transaction, in fact, was a sale and it was given the shape or colour of a usufructuary mortgage in order to defeat a claim of

pre-emption or custom of Zari Chaharam was false. This is purely a finding of fact which cannot be challenged in second appeal. Learned counsel for the appellants did not challenge the finding of the courts below that the suit was properly valued and the court-fee paid was sufficient. Learned counsel also did not challenge the finding of the court below that the suit did not abate on the death of Devi Prasad. The finding of the Court below that the plaintiff and his co-sharer did not relinquish the right in favour of the defendants is also a concurrent finding of fact which cannot be challenged in second appeal.

9. It was, however, contended on behalf of the appellants that according to the case set up by the plaintiff himself in the plaint, Smt. Kalawati alone was entitled to succeed to the property in dispute which was the Stridhan of Smt. Laxmi Bahu. The plaintiff or his two brothers Chandrabhal and Chandra Shish did not inherit the property at all. It was argued that Smt. Kalawati being the sole owner of the property in dispute could certainly transfer this property to the plaintiff and his other two brothers but she could not execute the deed of release for the deed of release can only feed the title and it cannot transfer the title. Reliance was placed on the ruling reported in Hutchi Gowder v. Bheema Gowder (AIR 1960 Mad 33) which supports the contention of the appellants. But this ruling was referred to by the Supreme Court in the ruling reported in Kuppuswami v. Arumugam (AIR 1967 SC 1395) in which it had been held at page 1397 that 'a deed called a deed of release can, by using words of sufficient amplitude, transfer title to one having no title before the transfer.'

Now in the deed of release executed by Smt. Kalawati Ex. 2 on 10-12-1947 in favour of the plaintiff and her two brothers Chandrabhal and Chandra Shish. she alleged that on the death of Smt. Laxmi Bahu the property in dispute devolved upon the plaintiff and Chandrabhal and Chandra Shish according to the direction given by Smt. Laxmi Bahu herself, and she was, therefore, executing a deed of release in their favour. If the recitals of the deed Ex. 2 were correct, Chandra Shekhar plaintiff and his brothers defendants Nos. 5 and 6 were already the owners of the disputed property, according to the direction given by Smt. Laxmi Bahu, the original owner, and therefore, they had pre-existing title which was advanced in their favour by Smt. Kalawati by executing this deed of release. If they

had no pre-existing title it vested in Smt Kalawati, defendant No. 4 on the death of Smt. Laxmi Bahu and she transferred her rights in favour of the plaintiff and his two brothers by saying that she had no interest in the property in dispute which should go to the plaintiff and his two brothers, and accordingly she was releasing her rights in their favour. She is a party to the suit and she had not challenged the plaintiff's right to sue because she has no interest left in the property in dispute and she regarded the plaintiff to be the owner or the mortgagor of the disputed property, what Smt. Kalawati meant by executing deed of release in favour of the plaintiff and his two brothers was that virtually she was transferring all her rights in the property in dispute in favour of the plaintiff and his brothers. The law laid down in the Madras case quoted on behalf of the appellant cannot be regarded as good law in view of the Supreme Court ruling noted above.

10. Learned counsel for the appellants tried to distinguish the above ruling on the ground that the case in the Supreme Court was a case of the transfer of moveables and not the case of the transfer of equity of redemption. After the execution of the usufructuary mortgage dated 10-1-1930, the mortgagor was left with equity of redemption only. Smt. Kalawati, executor of the deed of release dated 10-12-1947 had also equity of redemption in the disputed property. The terms of the document containing release in the case considered by the Supreme Court are quoted in para 3 of the ruling, and show that release was in respect of the immovable property also and this deed of release was held to be a deed of conveyance. The Supreme Court ruling, therefore, is applicable with all force to the facts of the case. The deed of release relied upon by the plaintiff amounted to deed of conveyance and therefore, the plaintiff was certainly entitled to redeem, and after executing of the deed of release in his favour by his two brothers he was the sole person to redeem the usufructuary mortgage,

11. Both the courts below, therefore, were right in decreeing the plaintiff's suit for redemption. There is no force in this appeal and it is accordingly dismissed with costs.