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Court : Allahabad

Decided On : Oct-30-1907

Reported in : (1908)ILR30All49

Judge : John Stanley, C.J., ;William and ;Burkitt, JJ.

Appellant : Durga

Respondent : Balak Puri and ors.

Judgement :

John Stanley, C.J. and Burkitt, J.

1. This is an appeal against the decree of the Subordinate Judge of Allahabad in a suit brought by Musammat Parbhawati, one of the four daughters of one Nar Singh Bhan, for redemption of two mortgages of the 7th of July 1871 and 26th of September 1871, executed in favour of the Akhata Panchaiti to secure two sums amounting together to Rs. 6,000. Nar Singh Bhan died on the 1st of July 1886, and upon his death some litigation ensued between the parties who were interested in his property. It is unnecessary to deal with this litigation; suffice it to say that on the 19th of February 1895 possession of the substantial part of the mortgaged property was surrendered by the Akhara to the three surviving daughters of the mortgagor; only a small tiled house of little or no value remained with the mortgagees. The plaintiff Musammat Parbhawati was at this time a minor. It is alleged by the Akhara Panchaiti that on the 5th of February 1895 a sum of Rs.

5,700 was paid to the daughters of Narsingh Bhan as representing surplus collections of the profits recovered by the Akhara as mortgagees. Whether or not this sum was paid it is unnecessary for us to determine. We did not think it necessary, in the view which we take of the case, to ask Mr. Banerji, the learned advocate for the appellant, to lay before us the evidence in support of this alleged payment. The learned Subordinate Judge appears to have had considerable doubt as to whether this payment was made or not; but as we have said, however this may be, we do not consider it necessary to determine it in the present appeal.

2. On the 12th of May 1904 the present suit was instituted by Musammat Parbhawati abovementioned, but on the 5th of December 1904, after the pleadings had been filed by the respective parties, Musammat Parbhawati died. Now on a perusal of the plaint it is clear beyond doubt that the right which she claimed was a personal right. Her case was that as the unmarried daughter of her father, Nar Singh Bhan, she was at the time of his death entitled to the entire of his property to the exclusion of her sisters. Her claim is set forth in the second paragraph of the plaint. Her surviving sister Musammat Durga, and also the heirs of a deceased sister, were sued as defendants in the suit. If Musammat Parbhawati had lived and the suit had come to a hearing during her life and been determined in her favour, she would have been entitled to the exclusion of Musammat Durga and the other defendants to the property in dispute, for the estate of a Hindu daughter, and that estate would have determined with her death, and, therefore, it appears to be clear that her suit was one to establish a personal right, and it did not survive, but abated upon her death. Upon her death, however, an application was made by Musammat Durga who was, as we have said, a defendant in the suit, to have her name removed from the list of defendants and substituted as the solo plaintiff. The Court below acceded to this application, we think improperly. The claim of the plaintiff Parbhawati being a personal claim did not survive; on the contrary the suit abated upon her death, and it was not competent for the Court below to substitute Musammat Durga as plaintiff in her place.

3. We now make the order which the Subordinate Judge should have, in our opinion, passed, and I declare that the suit abated on the death of the original

plaintiff, Musammat Parbhawati, and that the order substituting Musammat Durga as plaintiff in her stead should not have been made. We give the costs of the appeal to the appellant.

4. We think it right to say that our judgment in this appeal is not to be taken as in any way prejudicing the right of Musammat Durga to institute any suit she may be advised against the appellant in respect of the mortgaged property.

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