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Court : Allahabad

Decided On : Oct-25-1929

Reported in : AIR1930All175

Appellant : Nannhun

Respondent : Halka

Judgement :

Young, J.

1. This is a defendant's appeal from the judgment dated 25th June 1927 of Mr. Sarup Narain, Subordinate Judge of Jhansi. The plaintiff brought a suit for the redemption of two houses, five trees, 24 plots of occupancy land and mesne profits, but the only matter for consideration now is the redemption of the 24 plots.

2. The facts as alleged by the plaintiff were that the plaintiff's father, one Har Gobind, in the month of December 1899 executed a mortgage for Rs. 199 in favour of the ancestors of defendants 1 to 4. It was a term of the mortgage that if the mortgage was not paid off in the course of one year then the mortgagees were to take possession as if it were usufructuary mortgage. The plaintiff's case was that the mortgagees did take possession on the failure of the mortgagor to pay off the mortgage and enjoyed the usufruct for many years, and that the amount of money thus recovered by the mortgagees greatly exceeded the principal and interest of the mortgage. He, therefore, prayed for redemption, possession and

mesne profits.

3. Three of the defendants, who were relatives and descendants of the original mortgagees, admitted that they were in possession as mortgagees. One defendant alone, the present appellant, also related to the mortgagees, did not so admit. All the defendants, however, challenged the deed on the ground that it was inadmissible in evidence on various grounds:

1. That the mortgage deed was improperly stamped:

2. That it was a document which ought to have been registered under Section 59, T.P. Act, and that it had not been registered, and, therefore, under Sections 17 and 49, Registration Act, was inadmissible in evidence;

3. That under Section 91, Evidence Act, the deed itself being inadmissible no other evidence was admissible, and

4. That even if the document was admissible in evidence, it was not properly proved.

4. As regards ground 1, the document was originally a simple mortgage and not usufructuary. The provision as to the usufruct only became operative on the happening of a certain condition which might never have occurred. I, therefore, in agreement with the ruling reported in Anonymous case [1884] 10 Cal. 274, hold that the document was properly stamped.

5. The chief point raised by the appellant is No. 2. There can be no doubt that by Section 59, T.P. Act, the deed must be registered, and that under Sections 17 and 49 Registration Act, being unregistered, it is inadmissible in evidence. The matter standing thus, a very serious obstacle of course is put in the plaintiff's way if the mortgage deed itself cannot be proved. Unless the plaintiff could bring in aid some other evidence, his action for redemption must fail. Under Section 91, Evidence Act, the deed itself being inadmissible no other evidence is available to the plaintiff, but the plaintiff relied upon, and strenuously argued the doctrine of part performance as laid down in the leading case of Maddison v. Alderson [1883] 8 A.C. 467, and relied upon the decision of the Privy Council in the case reported in

Mahomed Musa V. Aghore Kumar Ganguli A.I.R. 1914 P.C. 27. The plaintiff urged that by this Privy Council decision the equitable doctrine of part performance was applicable to India, and that the contract having been performed by both the parties the deed was admissible to show the nature of the defendant's possession. I am of opinion that the case of Mahomed Musa A.I.R. 1914 P.C. 27 cannot be relied upon by the respondent in support of this point. That case, in my view, is distinguishable. It referred to a compromise entered into in 1873 at which date the Transfer of Property Act had not been passed, and, indeed, at that date the compromise need not have been in writing. Under such circumstances it was possible to bring in aid the doctrine of part performance. In the matter before me, however, there is direct statutory enactment and no equitable doctrine can override the provisions of statute law. I think that the observations of the Court made in the case of Ramgopal v. Tulsi Ram A.I.R. 1928 All. 941 (F.B.). which are those of a Full Bench of this Court, are applicable to this case. Point 2 must, therefore, be decided in favour of the appellant, and that being so, it is unnecessary to consider the other points raised by him.

6. I regret having to decide in favour of the appellant in this case because it is clear on the facts that he has no merits, and by this decision he will be enabled to keep possession of property which clearly is not his, unless the plaintiff can claim the property in some other action which will not be barred by statutory limitation.

7. The appeal is allowed with costs.