

Mir Singh Vs. Raghubir Singh

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Court : Allahabad

Decided On : Apr-13-1939

Reported in : AIR1939All615

Appellant : Mir Singh

Respondent : Raghubir Singh

Judgement :

Verma, J.

1. This is a second appeal by the defendant against a decree of the Additional Civil Judge, Muzaffarnagar, affirming a decree of an Assistant Collector of the first class in that district. The suit was for the recovery of a sum of Rs. 344 principal, and Rs. 56 interest, total Rs. 400, as theka money under Section 132, Agra Tenancy Act, 3 of 1926. The Courts below have granted a decree for the recovery of Rs. 323 on account of principal with past interest at 12 per cent, par annum and pendente lite and future interest at 3J per cent, per annum. The appellant is the owner of the zamindari share in question. On 20th March 1930 he borrowed Rs. 2000 from the plaintiff respondent and executed a deed of mortgage in his favour. In this deed the transaction is stated to be a usufructuary mortgage and the mortgagor states that he had put the mortgagee in possession. The deed however authorizes the mortgagee to demand his mortgage money at any time and confers on him the power to realize the mortgage money by sale of the property. It is

further provided in the deed that the property would remain hypothecated until the mortgagor paid up the mortgage money and redeemed the property. On the same day, the appellant executed another deed, stated to be a kabuliyat in favour of the mortgagee and purported to take the mortgaged property on lease from the mortgagee as a thekadar and agreed to pay a certain sum of money to the mortgagee every year. The suit is based on this kabuliyat. No deed of lease, as required by Section 200, Tenancy Act, was executed by the mortgagee.

2. The pleas in defence were that the transaction between the parties really amounted to a simple mortgage, that no lease having been executed the suit was not maintainable, that the suit did not lie either as one for the recovery of theka money or as one for compensation on account of use and occupation, and that the Revenue Court had no jurisdiction to entertain the suit. There were certain other pleas which need not be mentioned. The Assistant Collector framed a number of issues, the first of which was : 'Is the mortgage in suit a usufructuary mortgage?' This issue was referred to the Civil Court for a finding. The Civil Court found that the mortgage in question was neither a usufructuary mortgage nor a simple one, but that it was an anomalous mortgage. It was found that the mortgagee was given possession over the mortgaged property, but the mortgagor having hypothecated the property and having conferred on the mortgagee the powers mentioned above, the transaction was not a usufructuary mortgage, pure and simple. On receipt of this finding the Revenue Court tried the other issues. One of these issues was issue 4 in these words : 'whether a zamindar can sue his thekadar on the basis of a kabuliyat?' The decision on this issue was in favour of the plaintiff and a decree was passed in his favour, as mentioned above. The defendant appealed to the District Judge. The appeal¹ was heard by the Additional Civil Judge who, as already stated, affirmed the decree of the Assistant Collector.

3. The first point raised by the learned Counsel appearing for the defendant, appellant is that the transaction in question was a simple mortgage. I have gone through the deed. The principal terms are given above. In my judgment, the decision that it is not a simple mortgage and that it is an anomalous mortgage is correct. On the one hand, possession was delivered to the mortgagee; on the other, the property was hypothecated and the power to demand the mortgage

money and to sell the property for its realization was conferred. I agree with the finding of the Courts below on this point.

4. The next point urged is that no written instrument of lease having been executed by the mortgagee, the defendant mortgagor never became a thekadar and that therefore no suit for the recovery of theka money could be filed in the Revenue Court. The case before me is almost on all fours with the case in *Bakhtawar v. Lilapat* : AIR1935 All785 , decided by a learned Single Judge. The points mentioned in the last paragraph of the judgment in that case as having been raised by the advocate for the appellant have not been raised before me; in other respects the two cases are similar. I am in complete agreement with all that has been said by the learned Judge in that case. I would only add that there is ample authority for the proposition that a suit like the present may be treated as one for compensation for use and occupation. Reference may be made to the Pull Bench case in *Sheo Karan Singh v. Parbhu Narain Singh* (1909) 31 All. 276 It also seems to me clear that Section 26&, Tenancy Act, is a complete answer to the contention that the suit was not instituted in the right Court. For the reasons given above, I dismiss the appeal with costs. Leave to appeal under the Letters Patent is granted.