

Basharat Husaln and anr. Vs. Abdullah Khan

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Court : Allahabad

Decided On : Nov-29-1912

Reported in : (1913)ILR35All48

Judge : Macnaghten, ;Moulton, ;John Edge and ;Ameer Ali, JJ.

Appellant : Basharat Husaln and anr.

Respondent : Abdullah Khan

Judgement :

Macnaghten, J.

1. The respondents in these consolidated appeals are the representatives of the late plaintiff Saiyid Basharat Husain, now deceased, who was the owner of valuable zamindari property, subject to a mortgage, dated the 25th of August 1880, and three further charges tacked to it. The mortgage of 1880 and these further charges are now vested in the appellant,
2. The controversy in this case arose out of these mortgage transactions. The original mortgagee was Husain Ali Khan, who made the advances to Basharat Husain, and took the securities in the name of his wife.
3. Basharat Husain brought a suit for redemption. His right to redeem was not disputed. The only question was as to the terms and conditions on which the

decree for redemption should be made.

4. On the part of the appellant it was maintained that the rights of the parties must be governed by the provisions of the mortgage deed of 1880, which was duly executed and duly registered. On the other hand, the mortgagor contended, (1) that the real intention of the parties was to be gathered, not from the mortgage deed, but from negotiations and conversations alleged to have taken place before the mortgage was executed; and (2) that on the mortgagor relinquishing the mortgaged property, which had been leased to him immediately after the date of the original mortgage, an agreement was come to between the mortgagee and the mortgagor as to the mode in which the rents and profits of the property were to be dealt with. The only evidence produced in support of this alleged agreement was a letter or rukka, neither registered nor witnessed, purporting to be dated the 11th of June 1881, and to be signed by the mortgagee (who died in 1886, ten years before the institution of the suit). The Subordinate Judge of Meerut, who was the Trial Judge, came to the conclusion that the document in question was a forgery. The learned Judges of the High Court considered it genuine and gave effect to it. It is not necessary for their Lordships to determine whether the document is genuine or not. By the provisions of the Registration Act (Act III of 1877) such a document being unregistered is inadmissible in evidence.

5. As regards the first contention on the part of the mortgagor, which appears to have been argued at great length in the Courts below, it seems impossible to support the decision of the High Court. It is no more permissible in India than it is in this country to contradict or vary the express and unambiguous terms of a written instrument by reference to preliminary negotiations or previous conversations. The Indian Evidence Act is clear on the point.

6. The consideration for the mortgage of 1880, was the sum of Rs. 70,000. The mortgage was expressed to be for the term of eight years. The mortgage deed contains the following statement:

It is agreed by mutual consent of the parties to this document that the profits of the property mortgaged shall belong to the aforesaid mortgagee in lieu of the interest on the mortgage money, and I the mortgagor, shall have no claim for mesne

profits. The mortgagee also shall have no right to claim interest on the mortgage money advanced by him.

7. The mortgagee relied on this provision. The learned Judges of the High Court refused to give it any effect, holding that the mortgage was usufructuary only in form, and that the security was intended to be a simple mortgage carrying interest at the rate of 6 per cent. per annum. In coming to this conclusion the learned Judges seem to have been influenced both by the preliminary negotiations to which the mortgagor and his witnesses deposed, and by the circumstance that by a deed practically contemporaneous with the mortgage, the property was leased to the mortgagor for the period of the mortgage on very favourable terms at a rent which worked out at 6 per cent. per annum on the sum secured. The net profits of the property in mortgage were apparently not less than Rs. 6,000. The rent reserved was only Rs. 4,200. Favourable as the terms were, the mortgagor very soon fell into arrear. The mortgagee brought a suit against him, and he then gave up possession to the mortgagee. It may be that if the mortgage deed means what it says, it would have been better for him to have fought the case out. Such is evidently the view of the High Court. But after all, that is no concern of the Court. It was for the mortgagor to judge what was the wisest course for him to pursue.

8. Having regard to the eagerness of wealthy money-lenders to obtain security on zamindari property, and the competition among them for a position thought so advantageous, there does not seem to be anything strange in the apparently easy terms of the first mortgage transaction between the lender and the borrower.

9. Their Lordships agree with the High Court in thinking that the mortgage and the lease were parts of one and the same transaction. But there is no inconsistency between the two instruments. Nor would there have been any inconsistency if the mortgage itself had contained a provision for granting a lease on the terms upon which the lease was actually granted.

10. One point was raised by the mortgagee before the Subordinate Judge on which he failed. It was not dealt with by the learned Judges of the High Court because they were against the mortgagee on the main question. The point was raised again before this Board. It was this: Part of the property expressed to be

mortgaged was withdrawn from the security in consequence of a successful claim to it by the mortgagor's sister. The mortgagee claimed damages or compensation for the diminution of his security. The Subordinate Judge rejected that claim, being of opinion that the mortgagee when he took his security was aware of the circumstances of the property and the position of the mortgagor's family. Their Lordships think that the Subordinate Judge was right. They consider that the Transfer of Property Act, Act IV of 1882, Section 65(a), on which reliance was placed (whatever the construction of that section may be) can have no application to the present case where the mortgage was executed before the date of the Act, though one of the further charges was subsequent to it.

11. Their Lordships will humbly advise His Majesty that the appeals should be allowed, the orders of the High Court discharged with costs (any costs paid thereunder being repaid), and the order of the Subordinate Judge restored.

12. The respondents will pay the costs of the appeals.