

Madho Ram Vs. Jagat Singh

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Court : Allahabad

Decided On : Feb-14-1919

Reported in : AIR1919All322; 52Ind.Cas.18

Judge : Henry Richards, C.J. and ;Rafique, J.

Appellant : Madho Ram

Respondent : Jagat Singh

Judgement :

1. This appeal arises out of a suit for pre-emption. The property was sold on 21st of February 1916. The vendee, although not actually a co sharer, was a mortgagee in possession from the vendor and his brothers. On the following July (long before the institution of the present suit) the vendee endowed the property. The present suit was instituted on the very last day of limitation by the vendor's own brother without making the Thakurji a party. The first Court dismissed it on the ground that the Thakurji was a necessary party to the suit. It held that the evidence as to the consent to the sale was not sufficient. We may say in passing that there is a strong probability when one brother in a Hindu family sells his property, and there is no evidence of any quarrel, that the other brother knows of the sale. We need hardly say that it stands to reason that where two Hindu brothers have not quarrelled, a brother desiring to sell his property would be only too pleased to sell his property to his own brother rather than to a stranger, if his brother was in a position and wished to buy. The lower Appellate Court held that the Thakurji was a

necessary party and reversed the decree of the Court of first instance upon the ground that the suit against the Thakurji would not be barred. The Court thought that Article 120 of the Limitation Act would apply. We must bear in mind that the Thakarji was a necessary party to the present suit. If the effect of the deed of endowment was to vest the property in the Thakurji, then possession could only be got by virtue of a decree against the Thakurji. In the course of the argument the learned Counsel on behalf of the respondent was forced to admit that if the vendee had re sold the property to an outsider, a decree for possession by pre-emption could not possibly be made in the absence of that third party. So far as the original vendee is concerned, he would have a complete answer to a suit for possession when he proved that he had re-sold the property and that it was no longer in his possession. An attempt has been made to distinguish between the Thakurji and a third party who had purchased property, because it is said that the possession is still in the hands of the defendant in his capacity as trustee. But it seems to us that he is in possession in an entirely different capacity. He was not sued as trustee, he was sued in his personal capacity. No doubt the Court has power to add a defendant. The Court, of course, would not add a defendant where it was clear that at the time he would be added as a defendant the claim was barred as against him. The Court below considered, as we have already stated, that Article 120 is the appropriate Article, and that the suit would not be barred as against the Thakarji if he was made a party. We think it unnecessary in the present case to decide what is the appropriate Article, but the fact remains that the Thakurji even upto the present time has not been made a party to the suit. We are asked that even now this Court should amend the pleadings by adding the Thakurji as a defendant. Bearing in mind the circumstances of the present case, namely, the relationship between the vendor and the pre-emptor and the date upon which the suit was instituted, we do not think that this is a case in which we are called upon to add parties at this stage. It is said that under the provisions of Order I, Rule 9, the suit ought not to be dismissed by reason of the nonjoinder of the Thakurji. A careful perusal of that rule shows that it only deals with cases where the Court can deal with the matter in controversy in the suit with regard to the rights and interests of the parties actually before it. The matter involved in the present case is the possession of the property sold. On the finding of the Court

below, and, in our opinion also, this property is now in the possession of the Thakurji and it is impossible that we can give a decree against the Thakurji who is not before us. We must allow the appeal, set aside the decree of the lower Appellate Court and restore the decree of the Court of first instance with costs in all Courts, including in this Court fees on the higher scale.

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