

Bajinath Vs. Bhadaian

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SooperKanoon Citation : sooperkanoon.com/460762

Court : Allahabad

Decided On : Mar-03-1911

Reported in : 9Ind.Cas.990

Judge : Richards, J.

Appellant : Bajinath

Respondent : Bhadaian

Judgement :

Richards, J.

1. This appeal arises out of a suit to foreclose a mortgage by conditional sale. On the 16th of December 1880, it is alleged, that Musammats Sabji and Chaubi executed a deed in favour of the plaintiff's father.

2. The deed provided that the ostensible vendors should repay the money lent at the time of the execution of the deed with interest within a period of two years, and that in default of payment the ostensible vendee should be entitled to institute a suit and get proprietary possession of the property. This transaction constituted what is known as a mortgage by conditional sale. The plaintiff alleged that the defendant was the heir of Musammats Sabji and Chaubi. The defendant pleaded that the Musammats never executed the document at all, that if they did they had no power to mortgage the property, that the property originally belonged to one

Chatri, who was the grand-father of the defendant, and that the defendant was in possession as heir of Chatri. The Court of first instance decreed the plaintiff's claim. The lower Appellate Court has found that the defendant was in adverse possession for more than twelve years. It also found that the Musammats had no power to mortgage the property and dismissed the suit. The two points that were pressed before me in appeal were, first, that the findings of the lower Appellate Court were not sufficient to dismiss the suit on the ground of adverse possession, inasmuch as adverse possession against the mortgagee was not shown; and, secondly, because adverse possession was not one of the pleas taken by the defendant. I shall deal with the latter point first. It seems to me that the plea of adverse possession was under, the circumstances, open to the defendant. His defence was that he did not claim, under or through the mortgagors of the plaintiff's father. This certainly included the plea that he was in adverse possession at least as against the mortgagors and those claiming under them. It has been argued that the plaintiff's suit is a suit for foreclosure and that under Article 147 of Schedule I of Act IX of 1908, which corresponds with Article 147 of Schedule II of Act XV of 1877, the plaintiff had sixty years from the expiration of two years of the date of the mortgage within which to institute the suit, and that unless it is clearly shown that some claim was made adverse to the mortgagee as such, the plaintiff's right cannot be barred. It seems to me that there is a fallacy in this contention. If the plaintiff had succeeded in showing that the defendant was the heir of and claimed through the mortgagors of the plaintiff's father, the plaintiff would, no doubt, be entitled to the period of sixty years prescribed by the Limitation Act. The plaintiff, however, failed to show that the defendant was in any way claiming under the original mortgagors. It seems to me that as against the defendant the plaintiff was bound to bring a suit within twelve years and that the time began to run when the possession of the defendant became adverse to the mortgagors of the plaintiff's father. This view was taken in the case of Sheoumbur Sahoo v. Bhawaneedeen Kulwar 2 N.W.P.H.C.R. 223. See also the case of Ammu v. Rama Kishna, Sastri 2 M. 226. In the case of Ram Lal v. Masum Ali Khan 25 A. 35 the learned Judges referred to the case of Sheoumber Sahoo v. Bhawaneedeen Kulwar 2 N.W.P.H.C.R. 223 with approval. In my opinion the decision of the Court below was correct and I dismiss the appeal with costs.

