

Gulba Vs. Basanta and ors.

Gulba Vs. Basanta and ors.

SooperKanoon Citation : sooperkanoon.com/461105

Court : Allahabad

Decided On : Jan-28-1910

Reported in : 5Ind.Cas.547

Judge : John Stanley, C.J. and ;Banerji, J.

Appellant : Gulba

Respondent : Basanta and ors.

Judgement :

1. The facts which gave rise to the suit in this case are these. Kishan Lal defendant mortgaged a chaupal to Grulba appellant. A decree was obtained upon the mortgage on the 20th of August 1907. Thereupon the plaintiffs, who are two of the members of the Lodh caste, brought the suit which has given rise to this appeal for a declaration that the chaupal with its appurtenant shops is owned and possessed by the plaintiffs the first defendant, Kishan Lal and other members of the brotherhood and that it is not liable to sale in execution of the decree obtained by the appellant against Kishan Lal. The plaintiffs state that the chaupal belongs to them and other members of the Lodh community, that the first defendant Kishan Lal who is the Mokaddam (i.e. headman) amongst the Lodhs had no power to mortgage it, that the decree passed upon the mortgage is calculated to deprive the plaintiffs of their rights and is prejudicial to them, that the plaintiffs are owners and sharers in the chaupal and that they are competent to sue in order to protect their rights.

2. The defence was that the chaupal did not belong to the Lodh community but was the exclusive property of Kishan Lal the mortgagor of the appellants. It was also asserted that the amount of the mortgage was taken for the purpose of reconstructing the chaupal and that, therefore, the plaintiffs were liable for the said amount. There was a farther plea to the effect that the plaintiffs alone were not competent to maintain the suit.

3. The Court of first instance found that the chaupal belonged solely to the defendant Kishan Lal. It was also of opinion that the plaintiff alone could not maintain the suit and accordingly dismissed the claim.

4. Upon appeal by the plaintiffs the only issue framed by the lower appellate Court was whether the chaupal belonged to all the Lodh community. The finding on that issue was in the appellant's favour, the learned Subordinate Judge being of opinion that the chaupal was not the exclusive property of Kishan Lal and that it was the common property of the Lodh community. In respect of the plea that Section 30 of the old Code of Civil Procedure was a bar to the suit, the Court below held that the section did not apply.

5. It is contended before us in this appeal that the plaintiffs cannot maintain the suit as they did not obtain the permission of the Court under Section 30 of the Code of Civil Procedure, 1882, to sue on behalf of the Lodh community. In our judgment this contention is not well founded. Section 30 of the old Code, which corresponds to Order 1, Rule 8, of the present Code is an enabling section and does not debar some of the members of a community from maintaining a suit in their own right. In the present case the plaintiffs alleged that the mortgage made by Kishan Lal, the first defendant, was calculated to interfere with their rights as some of the members of the Lodh community. Section 42 of the Specific Relief Act empowers a person, entitled to any right in any property, to institute a suit against any one denying his title to such right and the Court may make a declaration that he is so entitled. As the plaintiffs alleged that their title to the property as part owners of the chaupal had been interfered with by the mortgage, they, in our opinion, are entitled to bring a suit for the protection of their rights. The principle of the ruling in *Zafaryab Ali v. Bakhtawar Singh* 5 A. 497, seems to us to apply to this

case. That was a suit by certain Muhammadans to set aside a mortgage of endowed property belonging to a mosque and a decree enforcing the mortgage. It was held that the plaintiffs were entitled to maintain the suit. Another case which has an important bearing on the question before us is that of Baiju Lal Parbatia v. Bulak Lal Pathuk 24 C. 385. In that case the plaintiffs, who alleged themselves to be members of a priestly community called Gayawals of the town of Graya, and were the punch or representative committee of their community, sued for the removal of masonry structures raised by one member of the community. It was held that Section 30 of the Code was an enabling section and did not debar the plaintiffs from suing in their own right for the relief claimed. 'We are, therefore, of opinion that the Court below was right in holding that the plaintiffs were entitled to maintain the suit and that Section 30 of the old Code of Civil Procedure did not bar it.

6. There was one question, however, raised by the defendants in their defence, namely, that the amount of the mortgage was received for the construction of the chaupal which has not been determined. If the appellant's mortgagor represented the Lodh community in the management, of the chaupal and if he borrowed money for the repairs of the chaupal, the mortgage might be enforceable against the mortgagor and the mortgaged property. This question the Court below did not try. We accordingly refer the following issues to that Court under the provisions of Order 41, Rule 25, of the Code of Civil Procedure.

1. Was the mortgage in favour of the appellant made by Kishan Lal to raise money for the reconstruction, of the chaupal?

2. If so, what powers had Kishan Lal in respect of the chaupal, and was he competent to mortgage it for the above purpose?

7. The Court will take such additional evidence as may be necessary. On receipt of the finding, the usual 10 days will be allowed for filing objections.