

Bindeshri Upadhyia and ors. Vs. Sital Upadhyia and ors.

Bindeshri Upadhyia and ors. Vs. Sital Upadhyia and ors.

SooperKanoon Citation : sooperkanoon.com/467056

Court : Allahabad

Decided On : May-25-1927

Reported in : AIR1927All702

Appellant : Bindeshri Upadhyia and ors.

Respondent : Sital Upadhyia and ors.

Judgement :

1. This second appeal arises out of a suit brought by the plaintiffs for a declaration that a certain mortgage-deed executed on 22nd May 1915 by their father, defendant 1, in favour of defendants 2 and 3 is invalid on the ground that their father executed the deed without legal necessity and that the property being an occupancy holding could not be transferred under the provisions of the Tenancy Act. Amongst other pleas the defendants took up the plea that the suit was barred by limitation. The trial Court applied Article 126, Limitation Act, and found that the suit was maintainable as it was brought within 12 years of the date of the alienation impugned. In first appeal the District Judge hold that Article 126, Limitation Act, was not applicable inasmuch as the plaintiffs were not asking for possession but only for a declaration. It has been explained to us that the plaintiffs could not ask for possession inasmuch as, even if the deed in suit be set aside, the defendants are in possession under previous mortgages.

2. The sole point argued before us in this appeal is that the lower appellate Court was wrong in refusing to apply Article 126. It is argued that Article 126 will apply

even though the father's alienee does not get possession of the mortgaged property in cases where the interest actually mortgaged was not capable of physical possession. We are unable to accept this proposition. It is sufficient in our opinion, to refer to the decision of *Munia Goundan v. Ramasami Chetty* [1918] 41 Mad. 650. Article 126 is doubtless based upon the principle that a son's knowledge of alienation by his father ordinarily arises when he sees the alienee in possession. In cases where the alienee never gets possession, no limitation can arise under Section 126. In such cases the right of the son will amount merely to obtaining a declaration that the deed is invalid. The limitation prescribed for such a suit is Section 120, namely six years. In this case six years having elapsed from the date of the alienation impugned, the suit was rightly held by the lower appellate Court to be time barred. For these reasons we dismiss this appeal with costs.

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com