

Haidar Khan and ors. Vs. Chand Khan and ors.

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Court : Allahabad

Decided On : Mar-27-1919

Reported in : AIR1919All302; 50Ind.Cas.691

Judge : P.C. Banerji, J.

Appellant : Haidar Khan and ors.

Respondent : Chand Khan and ors.

Judgement :

P.C. Banerji, J.

1. This is an appeal against a decree of the lower Appellate Court dismissing the suit of the plaintiffs for possession of a half share in a certain property.

2. The aforesaid property belonged originally to one Jamiat Khan, who died many years ago leaving a son, Chand Khan, and three daughters. One of the daughters, Musammat Rani, has died childless. The 1st plaintiff is the son of one of the daughters, Musammat Shitabo, and the plaintiffs Nos. 2 and 3 are the grandsons of another daughter, Musammat Daleha. Chand Khan's name was entered in the revenue papers in regard to the property and he made several mortgages in favour of Mohan Lal, the 2nd defendant, who has got a decree on his mortgages. The plaintiffs assert that the daughters of Jamiat Khan were in possession of their shares. According to Muhammadan Law half of the property of Jamiat Khan went

to Chand Khan, the son, and the other half was inherited by his sisters, the ancestors of the plaintiffs. It is this half share of which plaintiffs claim possession and they assert that Chand Khan had no right to mortgage that share. The plaintiffs allege that the daughters of Jamiat Khan, and after them the plaintiffs, have been in enjoyment of the profits of the property and that Chand Khan had no exclusive right to take the property or to make the mortgages. The suit was defended on the ground of adverse possession and also on the ground that the mortgagee took the mortgages on faith of the entries in the revenue papers and that Section 41 of the Transfer of Property Act and Section 115 of the Evidence Act protected him and barred the plaintiffs' claim. The Court of first instance dismissed the suit and the lower Appellate Court affirmed the decree of that Court. The learned Judge in his judgment says, though Chand Khan's sisters were heirs of the property they never put forward any claim to it and there is no evidence worth the name that they had ever been in possession of the shares.' This view of the learned Judge is not correct. In a Muhammadan family the possession of the brother should be deemed to be the possession of the sisters also, unless he repudiated the claim of the sisters and asserted a right in himself. Even if the family had not been a Muhammadan family, the possession of one co-sharer would be deemed to be the possession of the other co-sharers, unless the co-sharer in possession had done any act which would amount to an ouster of the other so sharers. This view was held by their Lordships of the Privy Council and has been held by this Court in several cases to which I deem it unnecessary to refer. The learned Judge ought, therefore, to have found whether Chand Khan denied the title of his sisters and excluded them altogether from the property. Section 115 of the Evidence Act has no application to the present case. The sisters did nothing which induced the mortgagee to take a mortgage of the property. That section is clearly no bar to the present suit.

3. The mortgagee relied on Section 41 of the Transfer of Property Act, but in order to make that section applicable it was necessary to find not only that the brother Chand Khan was put forward as ostensible owner of the property, but it must also be found whether the mortgagee after taking reasonable care to ascertain that the transferor to him had power to make the transfer had acted in good faith. The learned Judge has not found whether the mortgagee made any enquiry

whatsoever.

4. In order to enable this Court to decide the appeal it is necessary to have findings from the Court below on the following issues which I refer to that Court, under Order XLI, Rule 25, of the Civil Procedure Code:

(1) Were the daughters of Jamiat Khan and after them the plaintiffs in receipt of the profits of the property owned by Jamiat Khan?

(2) Did Chand Khan ever deny the title of his sisters and set up in himself a right-adverse to them? If so, when and in what manner and were the sisters aware of his act?

(3) Did the mortgagee Mohan Lal make any enquiry as to the title of Chand Khan and did he act in good faith?

5. The Court will take such additional evidence as the parties may adduce relevant to the above issues and on receipt of its finding ten days will be allowed for filing objections.

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