

Kesho Singh and ors. Vs. Roopan Singh and ors.

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Court : Allahabad

Decided On : Nov-24-1926

Reported in : AIR1927All355

Appellant : Kesho Singh and ors.

Respondent : Roopan Singh and ors.

Judgement :

Iqbal Ahmad, J.

1. The controversy in this appeal relates to old plot No. 1166 corresponding to new plot No. 1501. The said plot admittedly belonged to Roopan Singh defendant-respondent. The plaintiff's case was that Roopan Singh, by a sale-deed, dated the 23rd of November, 1907, sold the said plot along with certain other plots to Mahadeo Singh, the predecessor-in-title of the plaintiffs, but by mistake in lieu of Plot No. 1166, Plot 1167 was entered in the sale-deed. The plaintiffs alleged that notwithstanding this mistake their names were recorded as against Plot No. 1166 by the Revenue Court, and the entry in their favour continued up to 1329 F, when on an application of Roopant Singh, defendant-respondent that entry was corrected and Roopan Singh's name was entered against the said plot. That plot from before the execution of the sale-deed has all along been in possession of a mortgagee and as such the relief claimed by the plaintiff's was for a declaration of their title to that plot.

2. The defence to the suit was two-fold. Firstly, it was denied by the defendants that there was any mistake in the sale deed and it was asserted that, as a matter of fact, Plot No. 1166 was never intended to be sold to Mahadeo Singh, and the latter in collusion with the scribe of the sale-deed got the said plot entered in the sale-deed. It was further pleaded that the proper remedy of the plaintiffs was to have sued for rectification of the sale-deed and this not having been done within three years from the date of the accrual of the cause of action, the suit was time-barred.

3. Both the pleas urged in defence found favour with the trial Court and it accordingly dismissed the plaintiffs' suit.

4. On appeal by the plaintiffs the lower appellate Court has found as a fact that the defendants intended to sell Plot No. 1166, but by mistake instead of that Plot No. 1167 was entered in the sale-deed. But that Court has held, that the proper remedy of the plaintiffs was to have brought a suit for the rectification of the instrument within three years from the date that the plaintiffs discovered the mistake, and this not having been done, the plaintiff's were no longer entitled to ask the relief that they prayed for in the plaint. In support of this conclusion two reasons have been assigned by the learned District Judge. In the first place he observed that as an immovable property can only be transferred by a registered instrument, and as in the sale-deed in favour of Mahadeo Singh the plot in dispute is not entered the plaintiffs cannot claim a title to the said plot. He further observed that oral evidence to vary the terms of the sale-deed in favour of Mahadeo Singh was inadmissible and hence it must be taken that Plot No.1166 was never transferred to Mahadeo Singh.

5. I am unable to agree with the lower appellate Court. True it is that a remedy by way of rectification of an instrument by a suit is open to a party, when through fraud or mutual mistake of the parties an instrument in writing does not truly express their intention. But this does not mean that if, notwithstanding the mutual mistake the property actually intended to be transferred has passed to the possession of the vendee the vendee's title to the property can be challenged simply because the instrument has not been rectified within three years from the

date of the discovery of the mistake by the vendee. It will always be open to the vendee, if his title is challenged by the vendor, to show that there was a mistake in the instrument and that, as a matter of fact, the property in his possession was intended to be transferred to him. In fact the vendee is entitled, in view of the provisions of proviso 1 to Section 92 of the Indian Evidence Act, to, lead oral evidence to show the mistake in the instrument. The mere failure of the vendee, to have the instrument rectified within three years from the date of the discovery of the mistake, cannot have the effect of extinguishing his title to the property intended to be conveyed to him, though not properly described in the sale-deed. This was the view taken in the case of *Astulla v. Sadatullah* [1917] 28 C.L.J. 197.

6. Reliance has been placed on behalf of the respondents on the case of *Bijoy Chand v. Secretary of State* [1918] 48 I.C. 972. That case, in my opinion, is distinguishable from the present case. In that case the suit was for the rectification of an instrument and for certain consequential reliefs, and it was held that the suit for rectification of the instrument having been brought more than three years from the date when the plaintiff became aware of the mistake was barred by Article 96 of the first Schedule to the Limitation Act. The suit giving rise to the present appeal was not a suit for rectification of an instrument but was for a declaration of the plaintiffs' title to a plot against which their names had been entered in the Revenue Court and were expunged on the application of the defendants. The cause of action for the present suit accrued to the plaintiffs when their names were expunged and the names of the defendants were entered in the revenue papers and the suit being within six years from that date was well within time.

7. True it is that a sale of immovable property of the value of one hundred rupees or upwards can be made only by a registered instrument, but the mere fact, that there is no such sale-deed with respect to Plot No. 1166 in favour of the plaintiffs does not disentitle them to the relief prayed for in the plaint. Plot No. 1166 being in possession of a mortgagee, the vendee obviously without the redemption of the mortgage, could not get actual possession of the same. In order to give effect to the transaction of sale, all that could be done was to get the name of the vendee substituted in place of the vendor in the revenue papers, and this was done after the execution of the sale deed. The entry of the plaintiffs' names in the revenue

papers as against Plot No. 1166 continued for a period of ten years. In short, notwithstanding the mistake in the description of the plot intended to be sold to the vendee, the vendee's name was entered in respect of the plot actually intended to be sold and in view of the finding of the lower appellate Court on the question of fact, it cannot be denied that the vendor got the consideration for Plot No. 1166 and as such it is clear that the transaction was acted upon by the parties. This being so, the case is governed by the rule of law laid down in the case of Mahomad Musa v. Aghore Kumar Ganguli [1915] 42 Cal. 801. It was observed in that case that

When the acting and conduct of the parties are founded upon, as in the performance or part performance of an agreement, the locus paenitentiae which exists in a situation where the parties stand upon nothing but an engagement which is not final or complete, is excluded. For equity will support a transaction clothed imperfectly in those legal forms to which finality attaches after the bargain has been acted upon.

8. In my Judgment, notwithstanding the fact that the plaintiffs did not sue for rectification of the instrument they were under circumstances of the present case, entitled to the reliefs sought.

9. Accordingly, I allow the appeal, set aside the decrees of the Court below and decree the plaintiff's suit in terms of relief (a) prayed for in the plaint with costs in all Courts including in this Court fees on the higher scale.

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