

Mohammad Kamil and ors. Vs. Muhammad Salim and ors.

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Court : Allahabad

Decided On : Jul-11-1929

Reported in : AIR1929All875

Appellant : Mohammad Kamil and ors.

Respondent : Muhammad Salim and ors.

Judgement :

Iqbal Ahmad, J.

1. This is a plaintiffs' appeal and arises out of a suit for a declaration that the plaintiffs are the owners of certain zamindari share in mahal 5 of mauza Hatwa, and in the alternative for recovery of possession of that share by redemption of a mortgage.

2. The suit was decreed by the trial Court, but it was dismissed by the lower appellate Court on the ground that the defendants had prescribed a title to the share in dispute by adverse possession for more than 12 years. There is no controversy about the facts. Jagram Singh and others owned a 4 pie and 14 chhataks share in mahal 2 and 3 pies 13 chhataks and 476 tiles in mahal 5, Hatwa. On 18th December 1909 they usufructuarily mortgaged their entire share in mahal 2 to defendant 1 and the predecessors-in-title of the other defendants for a sum of Rs. 107. Thereafter the mortgagees applied for mutation of names and, by mistake, their names were entered as mortgagees, not only as against the

share of the mortgagors in mahal 2, but also as regards their share in mahal 5.

3. On 14th May 1914, the mortgagees purchased 2 pies 15 chhataks-share of mahal 2 from the mortgagors, and a portion of the sale consideration was set off in liquidation of the mortgage debt to the extent of Rs. 60.

4. On 20th April 1922, the mortgagors sold the balance of their share in mahal 2 and the whole of their share in mahal 5 to the plaintiff-appellants. The mortgagees pre-empted that sale and, on 16th November 1923, their claim with respect to the share in mahal 2 was decreed, and as regards the share in mahal 5 was dismissed. By the decree the balance of the mortgage debt was also set off and, thus, the mortgage was discharged.

5. After the decision of the pre-emption suit, the plaintiffs filed an application in the revenue Court for mutation of names as regards the share in mahal 5. That application, on objection by the defendants, was dismissed.

6. The plaintiff's case was that they acquired title to the share in mahal 5 by virtue of the sale-deed of 1914, and that the defendants had no title to the same.

7. The defence to the suit was that the defendants were in adverse possession of the share in mahal 5 for a period of more than 12 years and, that the plaintiff's suit was time barred. The trial Court overruled the contention of the defendants and decreed the suit. On appeal by the defendants the lower appellate Court has reversed the decree of the trial Court and dismissed the plaintiff's suit.

8. In appeal before me it is argued by the learned Counsel for the appellants that the lower appellate Court was wrong in assuming that it was nobody's case that the defendants' possession over the share in mahal 5 was as mortgagees and not as absolute owners, and that Court was wrong in holding that the defendants, by remaining in possession for more than 12 years, had acquired a complete title to the property in dispute.

9. On the other hand it is argued by the learned Counsel for the respondents that the finding of the lower appellate Court, on the question of the nature and effect of the possession of the defendants, is a finding on a question of fact, and is binding

on me in second appeal.

10. I confess that the case is not free from difficulty, but, after giving the matter my best consideration, I have come to the conclusion that the decree of the trial Court was correct and ought to be restored.

11. So far as findings on questions of fact recorded by the lower appellate Court are concerned, they are undoubtedly binding on me in second appeal. But inference from proved facts is always a question of law, and, therefore, any inference that the lower appellate Court may have drawn from proved facts is not binding on me in second appeal if, in arriving at that inference, the lower appellate Court has misdirected itself on any matter of law.

12. In this case the lower appellate Court has found that the defendants were in possession of the share in dispute for a period of more than 12 years. This finding, I must accept in second appeal. But the question of law that arises for consideration is, as to whether by their long possession defendants prescribed absolute title to the property in dispute, or only a title as mortgagees. In my opinion, on the proved and admitted facts of the case, it must be held that the title prescribed by the defendants was in the capacity of mortgagees and not as absolute owners.

13. As stated above, the defendants' names were entered as mortgagees against the share in mahal 5. This entry of their names was in consequence of the execution of the mortgage deed of 1909 by the mortgagors. Therefore, there is no escape from the conclusion that the defendants secured entry of their names as regards the share in mahal 5 under colour of their title as mortgagees. They all along continued to be recorded as mortgagees. When the defendants brought the pre-emption suit they alleged in the plaint of that suit that the mortgagors were owners of the share in mahal 5. It is to be noted that suit was brought more than 12 years after the date of the mortgage, and, therefore, if the defendants had professed to remain in possession as absolute owners of the share in mahal 5, one would have expected them to say so in the plaint of the pre-emption suit. From these facts the conclusion is irresistible that the defendants professed, and did intend, to remain in possession of that share in the capacity of mortgagees,

and as such, they could not prescribe title as absolute owners with respect to that share. In short the conclusion at which I have arrived is that the defendants, by their long possession, prescribed only a limited title to the share in dispute. The mortgage money has been paid in full, and, therefore, the mortgage has come to an end and, accordingly, the defendants have no title to retain possession of the share in mahal 5.

14. For the reasons given above I allow this appeal, set aside the decree of the lower appellate Court and restore the decree of the trial Court with costs in all Courts.

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