

Abdul Bari and ors. Vs. Amirjan and ors.

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Court : Kolkata

Decided On : Nov-26-1926

Reported in : AIR1927Cal940

Appellant : Abdul Bari and ors.

Respondent : Amirjan and ors.

Judgement :

Mukerji, J.

1. The plaintiffs instituted the suit out of which this appeal arises for setting aside a decree passed in a mortgage suit on the ground that it was fraudulently obtained, and for other reliefs.

2. In 1886, two persons Uzir Ali and Khadim Ali executed a mortgage in respect of lands of Schedule 1 to the plaint. In 1892, Uzir Ali alone executed a document, in respect of the lands of Schedules 1 and 2 to the plaint, the exact character of which is disputed in the present suit. The interest of the mortgagee under the document of 1886 ultimately passed on to one Asgar Ali who in 1890 instituted a suit, being suit No. 25 of that year, on the basis of the said mortgage, obtained a decree and in execution thereof purchased the lands of Schedule 1 and then sold them to the predecessors of the present defendants.

3. The plaintiffs who are the heirs of Uzir Ali at first instituted suit No. 636 of 1920, practically ignoring the mortgage of 1886 and praying to redeem the lands of Schs. 1 and 2, treating the document of that year as a mortgage. The claim was opposed on the ground that the defendants were in possession under purchase from Asgar Ali who had obtained the decree under the mortgage of 1886 as aforesaid. The plaintiffs then withdrew that suit with liberty to bring a fresh one. Then the present suit was filed.

4. Shortly stated, the plaintiffs' case is that the mortgage of 1886 had been paid off, suit No. 25 of 1898 was a fraudulent one and all proceedings taken therein were tainted with fraud and the plaintiffs had no knowledge of them and consequently the decree and proceedings subsequently held were void and inoperative.

5. The main defence of the defendants on the merits was that Uzir Ali himself had appeared in suit No. 25 of 1898 and had filed a written statement pleading that he had tendered the money due on the mortgage of 1886 but it had not been received and that Uzir Ali had thereafter withdrawn from the contest, and that there was no fraud. The other defences of the defendants were that the suit was barred by limitation and the document of 1892 was a kobala and not a mortgage and consequently the plaintiffs had no rights left in them under which they could get any relief in the suit. The Courts below have concurrently decreed the suit. Some of the defendants have then preferred this appeal.

6. The appellants' first ground is that the suit is not maintainable and that at any rate the findings of the lower appellate Court are not sufficient to sustain the decree. The suit, it must be remembered, is not founded upon a mere allegation that the decree was wrong or incorrect or obtained by perjured evidence but upon allegations which, if true, would amount to a gross fraud practiced in relation to the proceedings in Court. It is well settled that upon such allegations a decree may always be challenged. As regards the question of sufficiency of the findings the one that is enough to vitiate the decree is that Uzir Ali never appeared in the suit, but a written statement purporting to have been his, had been fraudulently filed in the suit. This finding has been recorded in so many words in the judgment of the

learned Munsif. That the Judge has affirmed this finding is clear from his observation that

it is difficult to believe that Uzir Ali having fabricated a false receipt would allow the suit to be decreed in this fashion and it is more clearly apparent from his finding on the question of plaintiffs' knowledge of the proceedings which he says dates from 1920, namely, from the time when the written statement in suit No 636 of 1920 came to the plaintiffs' knowledge.

7. This ground, therefore, has no substance. The question of limitation, which has been next argued on behalf of the appellants, cannot arise if the finding on the question of plaintiffs' knowledge which is a finding of fact is right.

8. Lastly, the appellants contended that the document of 1892 was a kabala and not a mortgage. The learned Judge in view of the paucity of the materials on the record has left the question open and the learned vakil for the appellants was eventually convinced about the propriety of 'this course adopted by the learned Judge. The appeal fails and is accordingly dismissed with costs.

Graham, J.

9. I agree. If it were the case that the former decree which it is sought to set aside, had been obtained by fraud in the ordinary sense of the word, e.g., by means of perjured evidence, false documents, or the like, so as to mislead the Court and obtain an erroneous decision, I should not in that case be prepared to hold that the matter could be reopened, and the decree set aside. There is, however, something more than that. There are, as my learned brother has, pointed out, concurrent findings in both the Courts below that the decree in the former suit No. 25 of 1898- was obtained by practicing a gross fraud upon the Court, and, that being so, it is well established by authority that the decree is liable to be set aside.

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