(1923) 07 AHC CK 0057

In the Allahabad High Court

Chhiddu APPELLANT

Vs

Desraj and Others RESPONDENT

Date of Decision : 17-07-1923

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 34 Rule 7
Encumbered Estates Act, 1934 — Section 13

Citation : AIR 1924 All 394 : 77 Ind. Cas. 753

Hon'ble Judges : Lindsay, J;Kanhaiya Lal, J

Bench : Division Bench

Final Decision : Allowed

Judgement

1. This was a suit for redemption, the appellant being the plaintiff. The principal defendant in the suit was one Desraj who was alleged to be the mortgagee.

2. According to the particulars set out in paragraph 2 of the plaint a mortgage was executed on the 3rd of June 1890 by one Atbal Singh, father of the plaintiff. The mortgage was in favour of the first defendant, Desraj, the mortgage money was Rs. 2,100, and the mortgage was with possession.

3. The principal defence which was set up in the suit and which was accepted by the learned Judge in the Court below was that the deed upon which the plaintiff claimed a right of redemption, although it had been duly executed and registered, yet did not operate as a mortgage at all, inasmuch as the transaction was entirely fictitious. It was pleaded that this mortgage had been executed by Atbal Singh in favour of Desraj merely in order to defeat the claim for pre-emption which had been brought in respect of the property by one Gopal. It seems that on the very day on which Gopal filed his suit for preemption against one Kamta who was the first purchaser, Kamta sold the property to Atbal Singh, and three or four days alter Atbal Singh executed the mortgage upon which the present suit is based.

4. In the Court below there seems to have been a good deal of discussion

regarding the burden of proof with respect to the plea that the document of the 3rd of June 1890 was a fictitious document.

5. The opinion of the Subordinate Judge was that the burden lay upon the plaintiff. In this matter we have no doubt that the Subordinate Judge was wrong. The execution and registration of the document having been admitted if the defendant made the allegation that the document had been executed merely for show and was purely fictitious, the burden of proof rested upon him.

6. The Pleaders of both parties declined to produce oral evidence in the case.

7. Certain facts were brought to notice and certain documents were before the Court which led the Subordinate Judge to the conclusion that on whichever of the parties lay the burden, it was established to his satisfaction that the mortgage was in fact a fictitious transaction. He referred in particular to a pre-emption suit. Suit No. 544 of 1890 in which the question of the genuineness of this deed of mortgage had been gone into by the Court. That was a suit in. which Gopal, the pre-emptor, was a plaintiff and in which both Atbal Singh, the mortgagor, and Desraj, the mortgagee, were implead as defendants. It was, certainly held in that case that the mortgage was a sham and. had been entered into for the purpose of defeating Copal''s claim for preemption.

8. The Judge, however, was not right in saying that the judgment in this suit could be accepted as evidence of the facts stated therein. We do not mean to lay down that the judgment was altogether inadmissible, but we think it was not such a strong piece of evidence in favour of the defendant''s case as the Subordinate Judge thought it to be.

9. And after all whatever importance we may attach to the finding in that suit regard in: the fictitious character of this mortgage, we have the outstanding fact that subsequently Desraj himself professed to purchase the equity of redemption of this mortgage from one Khalaq Singh for a sum of Rs. 400. As a fact, however, Khaltq Singh was not the owner of the equity of redemption, nevertheless it is clear that Desraj had treated the mortgage as a genuine transaction.

10. It has been pointed out that Desraj did not go into the witness-box to sustain the plea which he raised by way of answer to the plaintiff''s claim. The reason for this is apparent. There can be no doubt that in the pre-emption suit brought by Gopal Desraj had sworn to the genuine character of this mortgage. He was not, therefore, going to take the risk of prosecution for perjury by going into the witness-box in this case and showing that the transaction was fictitious.

11. On the evidence as it stands we are satisfied that the plea raised by Desraj that this mortgage was a fictitious mortgage was not established.

12. We must, therefore hold that the document is to be treated for the purposes of the suit as a genuine document of mortgage.

13. This brings us to another part of the case. In his plaint the plaintiff claimed

that he was entitled to redemption without paying any sum. This plea was based upon the fact that certain, proceedings had been taken on the plaintiff''s behalf under the Bundelkhand Encumbered Estate''s Act (I of 1903).

14. We have upon record the judgment and award of the Special Judge of Mohaba dealing apparently with the estate of the present plaintiff. This order is dated the 18th of December 1905 (See Exhibit 7, page 23 of the printed record).

15. It is pleaded, therefore, that because proceedings were taken under this present Act, and because the judgment and the award were made as already indicated, all the debts on estate of the plaintiff must be deemed to have been discharged, regard being had to the provisions of Section 13 of the Encumbered Estates Act.

16. The difficulty which we feel about this argument is that we have not before us the full record of the proceedings in the Court of the Special Judge. We observe from the order of the Special Judge that the application which was made under the Act on behalf of the plaintiff Chhiddu (who was at that time a minor) was made by one Jujhar Singh who, strangely enough, was acting in those very proceedings on behalf of his own father, Gopal Singh, who was one of the persons who was pressing his claims against Chhiddu''s estate. This fact attracted the notice of the learned Judge, but he appears to have thought it no harm to act upon the application, although it was made by a person apparently unauthorized.

17. We might, in the first instance, assume, that proceedings were regularly taken under the Special Act, but, the presumption must be overturned when we find it clearly stated that the person who was acting for the minor Chhiddu as his next friend was also acting in the same proceedings as the agent of one of the opposite patties.

18. In the circumstances we hold that these proceedings were not regularly taken, and that consequently, we are not in a position to conclude that this particular mortgage debt with which we are now concerned became any discharged under the provisions of Section 12 of the Special Act.

19. The result, therefore, is that the mortgage deed is held to be a genuine document and the mortgage debt is still outstanding.

20. We think the plaintiff is entitled to a decree for redemption, and we order accordingly. The appeal is allowed. The decree of the Court below is set aside, and it is ordered that a decree for redemption be drawn up in favour of the plaintiff. The plaintiff must pay Rs. 2,100. We give six months from the date of this decree for payment:

Having regard to all the circumstances, and in particular to the fact that the plaintiff has strongly pressed his case for redemption without payment of any sum, we think it proper to direct that the parties do bear their own costs both here and in the Court below.

21. The office will prepare a decree in terms of Order XXXIV, Rule 7, Civil Procedure Code.

