

(1932) 03 AHC CK 0011
In the Allahabad High Court

Durga Shanker and Others

APPELLANT

Vs

Lala Ganga Sahai and Others

RESPONDENT

Date of Decision : 02-03-1932

Acts Referred:

Citation : AIR 1932 All 500

Hon'ble Judges : Bennet, J

Bench : Division Bench

Judgement

Bennet, J.—This is an appeal by the defendants 1st party against a decree of redemption passed by the lower appellate Court. A large number of points, have been argued. The mortgage in question was dated 31st July 1869 and was a mortgage of a shop executed by one Magni Ram to Bohj Ram and Chhote Lal for Rs. 1,200 for a period of five years with the condition that the profits-were to be taken in lieu of interest. The suit for redemption was brought by one of the heirs of Magni Ram, and other heirs were joined as defendants 2nd party. The suit was brought in 1929. The defendants-appellants resisted the suit on the ground that various further sums were due to them in place of the mortgage money, Rs. 1,200, and the appeal is mostly concerned with such claims. One of these claims is in regard to three documents two of which are simple bonds for Rs. 99 executed on 20th July 1870 by the predecessors of the plaintiff and the other is a promissory note for Rs. 25 of 1870. These three sums have been disallowed by the lower appellate Court. We note in the first place that the appellants have neglected to get these documents translated and therefore they are not strictly speaking entitled to argue in regard to the details contained in the documents. One of the simple bonds for Rs. 99 was in regard to the amount expended by the mortgagees on a kharanja and the predecessor of the plaintiff agreed to pay this amount. This kharanja does not come under the heading of repairs, and it constitutes an improvement. There was no provision in the deed that the amount should be added to the mortgage money. In our opinion this document cannot be tacked on to the mortgage deed in suit and there was a mere personal covenant. The second document was a deed for Rs. 99 and the document states that the

mortgagor borrowed this sum as a loan from the mortgagees for making certain repairs. This does not prove in our opinion that the money was spent on repairs. This document also does not create any charge on the mortgaged property and it cannot be tacked on to the mortgage in suit. The third document was a mere promissory note and although there are word in it stating that payment will be made when the shop is released from the mortgage or previously if possible there is no charge expressed on the property in suit. We consider that none of the three documents constitute any claim which can be enforced as a charge on the mortgaged property in this redemption suit. Another point argued by learned Counsel was about a sum of Rs. 25 which has been allowed to the plaintiff against the defendants on account of the defendants closing up a grain pit or khatti. The lower appellate Court held that the grain pit had been filled up by the defendants and that no permission for filling it up was shown. Under these circumstances we consider that the charge was correctly made against the defendants.

2. Further claims were made in regard to a sum of Rs. 165-9-3 on which the defendants claimed a very large sum as interest. This amount was stated to have been expended in repairs. In proof of the expenditure of this amount in repairs the defendants tendered only certain very old account books. No doubt Section 90, Evidence Act, states that in the case of documents over 30 years old there is a presumption that they are written by persons by whom they purported to have been written. Learned Counsel desired to rely on Section 32 (2), Evidence Act, but that can only be applied in case it is proved that the person who wrote the document in question is dead or otherwise not available as a witness and there is no evidence to that effect. Therefore Section 32 will not apply. Section 34 states that account books alone will not be sufficient to charge anybody with liability and in the present case account books alone are tendered for this purpose. We consider therefore that the lower appellate Court was correct in refusing to allow this claim for Rs. 165-9-3 for repairs. These were the points argued on appeal. We dismiss this appeal with costs including fees of the counsel on the higher scale allowed in this Court.

3. The cross-objection related partly to a takina, that is, a payment of two annas per mensem as rent to the zamindar who was the owner of the site on which the shop stood. The mortgage deed was silent as to the payment of this amount and the mortgage deed stated that interest on the mortgage money and the profits from the property mortgaged would be equal. Accordingly this was a case where Section 77, T.P. Act, applied and that section states that nothing in Section 76(h), would apply to such a case. Learned Counsel for appellants wished to apply Section 76(h), for the present case and claimed the arrears of rent alleged to have been paid by the defendants. No other section of the Transfer of Property Act was shown under which the defendants could claim takina in the present case. Learned Counsel argued that he could get his claim u/s 72, Clauses (a) and (b). But in our opinion this section has no bearing on the points in question. We consider therefore that the claim for takina should have been disallowed in toto

and accordingly we allow the claim in the cross-objection as regards the amount of takina and interest in toto.

4. The cross-objection further dealt with a claim of the plaintiff in regard to a nim tree alleged to have been appropriated by the defendants. The defendants in their written statement had alleged that they had not appropriated this nim tree at all and the lower appellate Court has disposed of the point by stating:

The mortgagee has purchased the land and I think he was entitled to taka the wood of the tree which it appears had fallen on account of wind.

5. u/s 76(e) a mortgagee in possession must not commit any act which is destructive or permanently injurious to the property. That means that he must not commit waste, such as (felling unripe timber). But there is no prohibition in this clause against taking the wood of a fallen tree which fell from natural causes. Such wood is part of the profits of the property and a mortgagee in possession is entitled to take the profits. When the mortgage provides that profits shall be taken in lieu of interest, as in the present case, Section 77 provides that Section 76(h) shall not apply and therefore that there shall be no accounting of the profits. Section 63 does not apply to the case, as the fall of a tree does not make the tree an accession to the mortgaged property, as there is no addition to the property. The fall of the tree is like the maturing of a crop. as the tree has become ripe for harvest. Its fall makes it come into the position of the profit, and the person in possession of the property is the person who takes that profit. In other words the mortgagee in [possession is entitled to take the produce of the property, and a tree which falls by natural causes becomes part of the produce. We may note that in English law the rights are more extensive. Halsbury's Laws of England 1912, Edn., Vol. 21, p. 203, says:

A mortgagee in possession has statutory power to cut and sell timber and other trees ripe for cutting, and not planted or left standing for shelter or ornament.

6. We hold therefore that the defendants considered as mortgagees cannot be held liable for the valua of the nim tree. We also note that at the time of appropriation the defendants had acquired the zamindari rights in the site of the shops, and the plaintiffs merely claim to redeem the shops, and this is a further reason why the defendants cannot be held liable for the value of the nim tree. On the cross-objection a further argument was made in regard to a stable. The order of the Court of first instance was that the possession of the stable should be delivered to the plaintiff on payment of Rs. 185 in case defendants do not remove-its materials. Defendants did remove the materials and the lower appellate-Court found:

The stable has already been removed and I am not satisfied that the breaking of the stable has injuriously affected the other property.

7. The case therefore comes u/s 63 where separate possession or enjoyment is possible. It is only in case separate enjoyment or possession is not possible, that

the accession should be delivered with the property. Accordingly there is no merit in the cross-objection that the stable could not be legally removed. We therefore allow the cross-objection with proportionate costs to the extent indicated in regard to the total takina amount decreed and the interest on that amount.