
(1923) 03 AHC CK 0069
In the Allahabad High Court

Fateh Din and Others

APPELLANT

Vs

Kishen Lal

RESPONDENT

Date of Decision : 28-03-1923

Acts Referred:

Transfer of Property Act, 1882 — Section 68(c)

Citation : AIR 1923 All 584 : 73 Ind. Cas. 902

Hon'ble Judges : Lindsay, J; Daniels, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

1. This appeal arises out of a suit in which a usufructuary mortgagee sued for his mortgage-money on the ground of not having obtained possession of the full property mortgaged to him. Two points were in issue and have been found by the Court below. In the first place, at the time of the mortgage it was stipulated that the mortgagors should pay Rs. 76 a year as interest on the mortgage-money. The mortgagors executed a simultaneous kabuliyat which was really part of the same transaction, agreeing to rent the plots from the mortgagee at a rent of Rs. 76. At the time of fixing rent by the Revenue Court they objected that Rs. 76 was in excess of the rent which they were liable to pay as ex-proprietary tenants--the plot mortgaged was sir plot--and rent was fixed at Rs. 27-4-7. The learned District Judge has held in favour of the defendants-appellants on this point on the ground that the value of the security was not diminished within the meaning of Section 68 by this transaction. We are unable to agree with the learned District Judge on this point. The value of a property depends to a large extent upon the income which is obtainable from it and property yielding an income of Rs. 27 a year is obviously of much lesser value than property yielding an income of Rs. 76 a year.

2. The second point urged by the plaintiff was that certain plots had been inserted in the mortgage-deed which did not belong to the mortgagors and of which the plaintiff was, therefore, unable to obtain possession. The lower

Appellate Court finds this to have been the fact, and u/s 68(c) of the Transfer of Property Act has given the plaintiff a decree for the mortgage-money. It is contended in this Court that Section 68(c) is not applicable on the ground that it is not proved that the mortgagors deliberately inserted these plots in the deed knowing that they had no title to them. This circumstance, however, immaterial. u/s 65 of the Transfer of Property Act the mortgagor is deemed to contract that he has the interest which he professes to have in the mortgaged property, and, further, u/s 68(c) of the Act, whenever the mortgagor fails to deliver possession of the property to the usufructuary mortgagee the latter is entitled to sue for his mortgage money. On both issues, therefore, we find in favour of the plaintiff. We accordingly uphold the decree of the Court below and dismiss the appeal with costs including in this Court fees on the higher scale.