

(1929) 03 AHC CK 0048
In the Allahabad High Court

Musammat Kamela Bibi

APPELLANT

Vs

Sheikh Baqar Husain and Another and Musammat Khatun
Bibi and Others

RESPONDENT

Date of Decision : 12-03-1929

Acts Referred:

Citation : 118 Ind. Cas. 168

Hon'ble Judges : Boys, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

Boys, J.—This is a defendant's appeal arising out of a suit for redemption. The first question arising for decision is whether the judgment of the lower Appellate Court that the fact of there being an existing mortgage is res judicata and that the defendant cannot challenge now the existence of the mortgage is correct or not? If the answer be in the affirmative no further question arises. In 1863, the plaintiff's predecessor executed a mortgage in favour of the defendant's predecessor, the terms of which were unusual, but it has been held to have been a mortgage by conditional sale, and in regard to this no question now arises. In 1867, the predecessor-in-title of the defendants took certain proceedings under Regulation XVII of 1806. In 1906, the predecessor-in-title of the defendants brought a suit against the predecessor-in-title of the plaintiff for possession of certain trees, and the question for determination is whether the finding in this suit of 1906, that the plaintiff in that suit was a mortgagee and that the mortgage was existing is now binding as res judicata on his successors. The learned Munsif has held that the decision in question did not amount to res judicata, while the lower Appellate Court has answered the question in the contrary sense. In the first place it is to be noted that the parties deliberately joined issue on the question whether the plaintiff in that suit was a proprietor or a mortgagee. As the learned Munsif in the present suit says the plaintiffs in that suit claimed that their predecessors-in-title had "proprietary possession "while

the defendants in that suit definitely contended that the plaintiff "had been in possession as a mortgagee of the groves and not as a proprietor". Now it is at the outset manifest that the rights of a proprietor and the rights of a mortgagee are widely different, and it is equally manifest that the rights which the plaintiff in that suit would have obtained if he had got a decree on the basis of being a proprietor would have been very different to the rights which he would have obtained if he had only got a decree on the basis that he was a mortgagee. He deliberately asked for a finding that he was entitled to relief on the basis that he was a proprietor. As to the issues struck (I quote from the learned Munsif in the present suit) " the learned Munsif struck three issues in the case, the first of them being " Did the trees in suit belong to Qurban Ali at the time of sale to the plaintiffs?" This issue and the other issues were decided in favour of the plaintiff Maula Bux and the Court gave him a decree for possession of the groves and the amount of the damages claimed by him (vide judgment Ex. 8). On appeal the learned Subordinate Judge framed a different issue from that struck by the trial Court, namely, whether the plaintiff respondent, i. e. Maula Bux, was the owner of the trees in suit? The learned Subordinate Judge found this issue against Maula Bux holding that as Qurban Ali had brought no suit to foreclose the mortgage which he ought to have brought in accordance with the provisions of Regulation XVII of 1806, he did not acquire " a right of absolute ownership and the mortgage, therefore, subsisted. He dismissed the appeal."

2. The learned Munsif in the present suit thus expresses his view of this judgment: "I am of opinion that the issue framed by the Court of first instance and the Appellate Court referred to above was not necessary for the decision of that suit.... This being so, I hold that the decision of the Appellate Court not being necessary and essential to the right decision of that suit does not, in view of the ruling reported as *Muthaya Shetti v. Kanthappa Shetti* 45 Ind. Cas. 975 : 34 M.L.J. 431 : 7 L.W. 482 : 23 M.L.T. 291 : (1913) M.W.N. 334 operate as res judicata on this point".

3. It is this view of the Munsif which is repeated before me and upon which stress is laid.

4. The lower Appellate Court after setting out the facts has held: "Now having regard to the pleadings, the issues and the judgment I do not see how it can be said under the above circumstances that the question about the existence of the mortgage was an unnecessary one. The question was whether the tree was included in the mortgage or not. Thus the existence of the mortgage had got to be determined", and he relies upon *Midnapore Zemindari Co. v. Nareshi Narayan Roy* 80 Ind. Cas. 827 : 51 I.A. 293 : AIR 1924 P.C. 144 : 26 Bom.L.R. 651 : 47 M.L.J. 23 : 51 C. 631 : 35 M.L.T. 169 : (1924) M.W.N. 723 : 29 C.W.N. 34 : 20 L.W. 770 : L.R. 5 A. (P.C.) 137 : 23 A.L.J. 76 : 3 P.L.R. 193 : 6 P.L.T. 750 (P.C.).

5. I have no hesitation in agreeing with the view of the lower Appellate Court. In reference to the issue framed by the trial Court in the 1906-suit: "Did the tree in suit belong to Qurban Ali at the time of the sale to the plaintiff?" and the issue

framed by the Appellate Court: "Whether Maula Bux was the owner of the tree in suit? " I am unable to find, and Counsel for the appellant here is unable to suggest to me that there is for the purpose of the present case any material difference in the issues. However, that may be, in both the phrasings the question of the proprietary right in the trees as against merely a mortgagee right was clearly raised.

6. In my view the plaintiff in the 1906-suit deliberately invited the Court to hold a proprietary right in the trees and not merely the right of a mortgagee. It is contended that as the plaintiff got a decree he did not invite the Appellate Court, the effect of whose judgment is now in question, to come to any finding. But that is in my view an untenable proposition. If a plaintiff initiates litigation by deliberately taking up a particular standpoint he cannot complain when his opponent carries the case to a higher Court, and the higher Court arrives at a decision as to the validity of the plaintiff's claim as stated by the plaintiff himself.

7. Personally I would deprecate the use of the word " necessary " issue, I prefer to stand upon the language which the Legislature has elected to use. I have to consider whether the question as to the nature of the plaintiff's right in the 1906-suit was " a matter directly and substantially in issue". Again, was it" directly and substantially in issue ", whether the plaintiff was entitled to the trees as a proprietor, which he declared himself to be, or not? The basis of his right was definitely asserted by him, and by contending that he had acquired proprietary rights by reason of the proceedings under Regulation XVII of 1806, he was definitely and strenuously putting his right in issue. Before the case of Midnapore Zemindari Co. v. Naresh Narain Roy 80 Ind. Cas. 827 : 51 I.A. 293 : AIR 1924 P.C. 144 : 26 Bom.L.R. 651 : 47 M.L.J. 23 : 51 C. 631 : 35 M.L.T. 169 : (1924) M.W.N. 723 : 29 C.W.N. 34 : 20 L.W. 770 : L.R. 5 A. (P.C.) 137 : 23 A.L.J. 76 : 3 P.L.R. 193 : 6 P.L.T. 750 (P.C.) was brought to my attention I asked Counsel for the appellant whether the language of Section 11 was not clearly meant to cover a case where a party had deliberately raised an issue and fought it out, and whether it was not the intention of the section, on the face of it, to hold him bound by the result where he had so raised the issue and fought it out. The principle of the decision of their Lordships in the case in question is essentially to the same effect. And he cannot say that because he only raised the issue in the trial Court he is not bound by the consequences that followed in the Appellate Court.

8. I agree, therefore, with the view of the lower Appellate Court and no other point being argued before me, I dismiss the appeal with costs.

9. I am invited to give leave to appeal. I have no objection and give the leave.