
(1916) 06 AHC CK 0008
In the Allahabad High Court

Qazi Abdur Razzaq

APPELLANT

Vs

Seth Partab Singh

RESPONDENT

Date of Decision : 14-06-1916

Acts Referred:

Citation : AIR 1916 All 125(2) : 35 Ind. Cas. 638

Hon'ble Judges : Rafique, J

Bench : Single Bench

Judgement

Rafique, J.—The facts of this appeal are as follows:--One Imdad Husain mortgaged with possession V bighas and 6 biswas by a registered-deed on the 5th June 1869 to Johri Mal and Basiram. Imdad Husain died, leaving him surviving a son Nur Muhammad and a daughter Mnsammat Rahmat-un-nissa. Nur Muhammad died in 1885 without issue, leaving him surviving a widow Musammat Shamsi. Musammat Rahmat-un-nissa died subsequently, leaving her surviving two sons, viz., Abdur Raz/.aq and Abdul Ilaq. Musammat Shamsi is also dead. Her two brothers who were her heirs sold her share in the mortgaged property to Partap Singh, son of Johri Mai. On the 25th September 1913 Abdur R.azzaq, one of the sons of Musammat Rahmat-un-nissa, instituted the suit out of which this appeal has arisen, for the redemption of the mortgage of the 5th of June 1869 on the payment of Its. 40, or any other sum that the Court may laid due. The claim was brought against Partab Singh and the legal representatives of Basiram, the other mortgagee. The chief contesting defendant in the case was Partab Singh. He resisted the suit on the ground, among others, that he had purchased the rights of Nur Muhammad, and all that Abdur .Razzaq was entitled to was redemption of 1/3rd of the property. The Court of first instance found that the purchase by Partab Singh from the two brothers of Musammat Shamsi could only convey legally to him the interest of Musammat Shamsi, which would be one siham out of six sihams. The claim for the redemption of 5 sihams out of six sihams was accordingly decreed. On appeal the District Judge modified the decree of the first Court by holding that the share of Imdad Husain at the time of the mortgage of 5th June 1869 was not 7 bighas and 6 biswas but ten-

nineteenths in the khala, according to which calculation the area of the land would be considerably less. Abdur Razzaq has come up in second appeal to this " Court and contends that there was no dispute between him and the defendants as to the area of the mortgaged property on the share of Imdad Husain. No objection with regard to the share of Imdad Husain or the area of the land mentioned in the mortgage-deed of 1869 was taken in the written statement and no issue was framed upon it, nor any objection seems to have been taken in the grounds of appeal to the lower Appellate Court. I think that the contention of the appellant is correct. The dispute between the parties seems to have been, whether the purchase by Partab Singh from the brothers of Musammat Shamsi conveyed to him the whole of the share of Nur Muhammad or only the share of Musammat Shamsi. In my opinion, the finding of the first Court was correct on the point. The learned Judge of the lower Appellate Court was not justified in disposing of the appeal on a ground which was not urged for the defence and in respect of which Abdur Razzaq had no opportunity to give evidence. I allow the appeal and set aside the decree of the lower Appellate Court and restore that of the first Court. Costs are allowed to the appellant.