

(1923) 02 AHC CK 0078
In the Allahabad High Court

Ram Sewak Rai and Others

APPELLANT

Vs

Sheo Naik Rai and Others

RESPONDENT

Date of Decision : 15-02-1923

Acts Referred:

Transfer of Property Act, 1882 — Section 68

Citation : 73 Ind. Cas. 945

Hon'ble Judges : Ryves, J;Gokul Prasad, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

1. In the year 1869 the predecessors of the plaintiffs put in execution a simple money-decree which they had obtained against one of the defendants and the predecessor-in-title of the others. In those proceedings the parties came to an agreement which was embodied in an application made to Court. According to that agreement it was acknowledged that the sum due to the plaintiffs was Rs. 301, and certain plots of land measuring 3 bighas 12 biswas belonging to the defendants were put into possession of the plaintiffs and it was agreed that they should take the usufruct in lieu of the interest due on the debt and that the defendant could redeem on payment of Rs. 301. It was further agreed that if the plaintiffs were dispossessed they should then proceed with the execution of the decree. The Court passed orders in terms of this compromise and the plaintiffs obtained possession. They remained in possession of the whole land until the year 1884, when, during the settlement, the area in their possession was reduced to 2 bighas 2 biswas and 13 biswansis. In the year 1916 that area was further reduced owing to diluvion and in 1920 the whole of it was submerged by the river. This suit was brought u/s 68 of the Transfer of Property Act requiring the defendants to give an equivalent security to the plaintiffs for the land which had disappeared or to pay up the Rs. 301 plus Rs. 78 for damages and Rs. 185 for Government Revenue and interest said to have been paid by the plaintiffs for the defendants since the year 1877. The defendants resisted the suit on many grounds. They denied the document created a mortgage at all, it not being

stamped or registered or attested. They further said that Section 68 of the Transfer of Property Act had no application because the mortgage, if any, was executed long before the Act came into force. But the two main grounds on which the suit was resisted were that according to the terms or the compromise the plaintiffs' only remedy was to execute the decree and if they attempted to execute the decree the application would be barred by limitation because their cause of action arose in 1916 and this suit was filed in 1920. Furthermore, if the proceedings in execution were taken out then the items for Government Revenue and interest could not be added. The second main ground is, that there was no contract between the parties by which the plaintiffs could recover the Government Revenue. The Trial Court in an excellent judgment decreed the suit and that decree has been upheld by the lower Appellate Court. The defendants come here in second appeal, and reiterate the pleas taken in the Court below. In our opinion they have no force. All the arguments as to want of stamp, registration and so forth in the document of 1869 are set at rest by the principles laid down in the case of *Abid Husain v. Asghar Husain* 19 Ind. Cas. 445 : 11 A.L.J. 306 which was confirmed by their Lordships of the Privy Council on appeal, and in *Salamat-uz-zamani Begam v. Masha Allah Khan* 43 Ind. Cas. 445 : 40 A. 187 : 16 A.L.J. 98. Assuming that all due formalities had not been complied with, it is far too late in the year 1920 to challenge a mortgage which has in fact been given effect to for over 50 years. As to the argument that Section 68 of the Transfer of Property Act does not apply to mortgages executed before the Transfer of Property Act, it is enough to say that even if it does not the Hindu Law is exactly to the same effect and that admittedly governs the parties. With regard to the Government Revenue it has been found by both Courts and the finding is conclusive in second appeal that in the year 1877 the mortgagors themselves, that is, the defendants, applied to the Tahsildar stating that they were no longer able to pay the revenue of this land and in consequence revenue was collected from the plaintiffs. As to the argument that there was no contract originally for the payment of the Government revenue we think this is not correct. In every contract of usufructuary mortgage there is at least an implied contract for quiet possession and this implies a contract to pay the Government revenue. If the plaintiffs had not paid the Government revenue they would have been dispossessed from the land. The only other argument which it is necessary to consider is that the only remedy of the plaintiffs was in the execution department. The simple answer to this would be that the parties never contemplated the total destruction of the land by diluvion. If the land had remained the same and if dispossession had been caused by the defendants, there might have been some force in this argument, but as the facts are found, we think that the proper remedy of the plaintiffs was by a suit and that the suit has been rightly decided. We, therefore, dismiss this appeal with costs including in this Court fees on the higher scale.