

(1949) 08 AHC CK 0031
In the Allahabad High Court
Case No : Civil Revision No. 217 of 1948

Suraj Bali and Others

APPELLANT

Vs

Rang Bahadur Singh and Another

RESPONDENT

Date of Decision : 11-08-1949

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 115
Limitation Act, 1908 — Article 148
Transfer of Property Act, 1882 — Section 60, 92
Uttar Pradesh Agriculturists Relief Act, 1934 — Section 12

Citation : AIR 1950 All 88 : (1950) 20 AWR 189

Hon'ble Judges : Seth, J

Bench : Single Bench

Advocate : G.P. Bhargava, for the Appellant; S.C. Khare, for the Respondent

Final Decision : Disposed Of

Judgement

Seth, J.—The mortgagor did not pay the amount as required by the preliminary decree, nor did the mortgagees apply for a final decree and the matter rested at that.

2. The trial Court dismissed the suit holding that the right of the plaintiffs to redeem had been extinguished by the preliminary decree mentioned above, that the claim for redemption was barred by res judicata that the plaintiffs have failed to prove the mortgage set up by them, and that the claim was barred by limitation. It left other issues undetermined. The lower appellate Court held that the earlier preliminary decree dated 7th September 1907, did not extinguish the right of redemption, that the defendants had failed to prove that the mortgage was more than 60 years" old and that, therefore, the claim was barred by limitation. It, therefore, set aside the decree of the trial Court and having decided the remaining issues in the case passed a decree for redemption without any payment.

3. It is contended on behalf of the defendants that the right to redeem was

extinguished by the decree of the year 1907 and further that there is no definite finding by the lower appellate Court to the effect that the claim was within limitation and as such that Court was not justified in rejecting the defence and ordering redemption without recording a definite finding on the question of limitation.

4. It appears to me that there is no force in the first contention. Interpreting the decree literally, it did not put an end to the right of redemption. It was drawn up in accordance with the language of Section 92, T. P. Act, which provided for a preliminary decree for redemption in a mortgage suit. That section laid down that a Court passing a preliminary decree for redemption shall order:

"That if such payment is not made on or before the day to be fixed by the Court, the plaintiff shall (unless the mortgage be simple or usufructuary) be absolutely debarred of all right to redeem the property"

The preliminary decree, according to Section 92, was thus to provide that the plaintiff shall be debarred of all right to redeem the property on the happening of a certain contingency. Section 93, which provides for a final decree, used a slightly different language. It provided that:

"..... the Court shall pass an order that the plaintiff and all persons claiming through or under him be absolutely debarred"

Thus, it is manifest that while Section 92 provided that the plaintiff shall be debarred, Section 93 provides that the plaintiff be debarred. A comparison of these two sections discloses that the preliminary decree does not itself put an end to the right of redemption, but contains a declaration that if the mortgage-money is not paid, the right of redemption shall be taken away and it is only the final decree that takes away such a right. No final decree having been passed in the suit in which the preliminary decree was passed on 7th September 1907, the right of redemption was not extinguished. So long as the right of redemption has not been extinguished a mortgagor is entitled to bring successive suits for redemption. I, therefore, overrule the first contention put forward on behalf of the defendants-applicants.

5. There appears to be force in the second contention. The finding on the question of limitation is worded as follows:

"Moreover the evidence adduced on behalf of the defendant for establishing that the mortgage was more than 60 years" old, is neither convincing nor reasonable."

The learned Judge of the lower appellate Court therefore, put the onus of proof on the defendants and held that the claim was within limitation because the defendants had failed to discharge the onus that the claim was barred by limitation. The burden of proof in every case lies upon the plaintiff to prove that his claim is within limitation. The Court below was required to record a definite finding that the claim was not barred by limitation before passing a decree for redemption. In making an order for redemption, without recording this definite

finding, the lower appellate Court has acted illegally and with material irregularity in the exercise of its jurisdiction. A definite finding, one way or the other, on the point whether the claim was barred by limitation or not, has to be recorded and should be recorded before the case is finally disposed of.

6. For the reasons given above, I allow this application in revision, set aside the decree of the lower appellate Court and remand the case to that Court with the direction that it should readmit the appeal to the list of pending appeals, decide the question of limitation in accordance with the observations made above and then finally dispose of the appeal before it. Costs here and hitherto shall abide the result.