(1929) 12 AHC CK 0026

Allahabad High Court

Case No: None

Jokhu Bhunja		APPELLANT
	Vs	
Sitla Baksh Singh and Others		RESPONDENT

Date of Decision: Dec. 20, 1929

Acts Referred:

- Limitation Act, 1908 - Section 28

Citation: AIR 1930 All 416 : (1930) ILR (All) 539 : 122 Ind. Cas. 411

Hon'ble Judges: Niamatullah, J

Bench: Division Bench

Final Decision: Disposed Of

Judgement

Niamatullah, J.

This is a defendant''s appeal arising out of a suit for redemption of a mortgage evidenced by a deed dated 19th June 1901, executed by one Fateh Bahadur Singh in favour of Jokhu, the defendant-appellant, under which a two-anna share of village Hardua was mortgaged with possession for a sum of Rs. 900. The usufruct of the mortgaged property is to be set off against the interest. By a subsequent deed, dated 16th October 1903, the mortgagor borrowed a further sum of Rs. 525 and hypothecated the property already mortgaged agreeing to pay interest at the rate of one rupee per cent per mensem.

2. It is not disputed that the plaintiff respondents have become the owners of half of the equity of redemption and are entitled to redeem to that extent the integrity of the mortgage having been put an end to in consequence of certain interests acquired by the mortgagee. The principal question which calls for a decision in appeal is whether the defendant-appellant is entitled to recover principal and interest due under the subsequent deed of hypothecation, dated 16th October 1903 before the plaintiff-appellants are allowed to redeem the usufructuary mortgage of 19th June 1901. It appears that the charge created by the second deed of 16th

October 1903 relates, not only to the mortgaged property sought to be redeemed, but also to certain other properties, which are not covered by the mortgage-deed of 19th June 1901. The Court of first instance found that the plaintiff-respondents are not entitled to redeem without paying the proportionate amount of the mortgage-money due under the deed, dated 16th October 1903, together with half, of Rs. 900 the principal amount due under the deed of the usufructuary mortgage of 19th June 1901. The amount of such proportionate amount found by that Court is Rs. 157.8-0.

3. The lower appellate Court has disallowed the sum alleged to be due under the subsequent deed of hypothecation, dated 16th October 1903, relying on Kesar Kunwar v. Kashi Ram [1915] 37 All. 634, which appears to have ruled that, if a suit, if brought on the second deed of mortgage, is barred by limitation, the defendant mortgagee setting up such a deed in a suit for-redemption of the usufructuary mortgage, redemption of which is made conditional on payment of moneys due thereunder and under the subsequent deed, the Court cannot direct payment of what is due under the second deed. We are unable to accept the soundness of that proposition. The deed of hypothecation in question before us distinctly provides that the executant would not be entitled to redeem the usufructuary mortgage of 1901 without previous payment of the sum due under the deed of the later date. The defendant-mortgagee is really founding on this stipulation and is untitled to insist on payment of what is due to him under the second deed. No question of limitation can arise as against the defendant seeking to enforce a clause occurring in the deed which he is setting up in his defence. Apart from this, a mortgagee''s remedy under a deed of simple mortgage may be barred if he omits to bring a suit within 12 years from the accrual of the cause of action but his right is not extinguished. It should be remembered that Section 28, Lim. Act, is confined to suits for possession and does not apply to a suit by a mortgagee for recovery of money due to him by sale of the mortgage property. In cases to which that section does not apply, the remedy by a suit may be barred but the right is not extinguished. We are fortified in the view we are disposed to take by a later decision of this Court in Ram Kishore Ahir v. Ram Nandan Ram AIR 1923 All. 99.

4. For the foregoing reasons we set aside the decree passed by the lower appellate Court and restore that of the Court of first instance. The appellant will have his costs of this Court and of the lower appellate Court.