

Muhammad Abdul Karim Vs Hashmat-Un-Nissa Begam and Others

None

Court: Allahabad High Court

Date of Decision: Dec. 5, 1906

Citation: (1907) ILR (All) 155

Hon'ble Judges: John Stanley, C.J; William Burkitt, J

Bench: Division Bench

Final Decision: Allowed

Judgement

John Stanley, C.J. and William Burkitt, J.

This appeal has occupied a considerable time. The learned Counsel for the respective parties

have opened up before us and discussed carefully all the points which could be urged on behalf of their clients. The suit was one for specific

performance of an agreement alleged to have been entered into between the defendant Musammat Hashmat-unnissa Begam and Musammat

Zainab-un-nissa Begam and the plaintiff on the 27th of July 1902. In the alternative, the plaintiff prays for a declaration that he is entitled to pre-

empt a mortgage executed after the alleged agreement for purchase, on the 17th of September 1902. The plaintiff's case is as follows: He alleges

that on the 27th of July 1902 Musammat Hashmatun-nissa Begam along with Musammat Zainab-un-nissa Begam her sister, entered into an

agreement with him for the sale of 2 biswas of the village of Sheikhpur. The share which belonged to Hashmat-un-nissa was attached in execution

of a decree and in consequence of this, as the plaintiff alleges, it was agreed that the sale of the share of Zainab-un-nissa should be carried out

forthwith, and that the sale of the share of Hashmat-un-nissa should be completed when permission was obtained from the Court of the

Subordinate Judge for the sale of that share under the provisions of Section 305 of the Code of Civil Procedure. In spite of this agreement, the

plaintiff says, Hashmat-un-nissa entered into an agreement with the defendants Musammat Ruqia, Musammat Kubra and Alim-ud-din for a

mortgage of her share in the village to secure a sum of Rs. 8,000, As a matter of fact a mortgage was executed in favour of these parties on the

17th of September 1902, and the mortgagees are in possession, the mortgage being a usufructuary mortgage.

2. The learned Subordinate Judge held that the defendant Hashmat-un-nissa had entered into a binding agreement for the sale of her share, and

gave the plaintiff a decree for specific performance. In regard to the claim for pre-emption the learned Judge came to no decision, holding that it

was unnecessary to do so in view of his decision on the first question.

3. The defendant Hashmat-un-nissa, as also her mortgagees, have preferred the present appeal against this decision. Throughout Hashmat-un-nissa

denied that she had any knowledge of the agreement of sale, and indeed after careful consideration of the evidence it seemed to us impossible to

hold that there was any binding agreement for sale. The learned Counsel for the respondent recognized the difficulties in his way in supporting the

decision of the Court below, and ultimately withdrew his prayer for specific performance and consented to the suit being dismissed so far as

regards this relief. We think that no other course was open to him, the evidence failing to show that there was any binding agreement for the sale of

the property. In addition to this there were other defects in the way of the respondent, the difficulty of surmounting which was apparent to his

learned Counsel.

4. Having withdrawn his prayer for specific performance the respondent falls back upon the alternative claim and asks the Court to consider the

case made by him upon this branch of the suit. He is met, however, by the objection that the stamp paid on the plaint was insufficient in view of the

provisions of Section 17 of the Court Fees Act. That section provides that ""where a suit embraces two or more distinct subjects, the plaint or

memorandum of appeal shall be chargeable with the aggregate amount of the fees to which the plaint or memorandum of appeal in suits embracing

separately each of such subjects would be liable under this Act."" A court fee was paid only in respect of the claim for specific performance. No fee

was paid on the claim for pre-emption. Mr. Wallach ingeniously argued that the suit did not embrace two or more distinct subjects; that the claim

was in reality a claim to recover possession of property either on the ground that the plaintiff was entitled to possession by reason of the agreement

for sale or by reason of his right of pre-emption. When we look into the position of matters we find that this is not so. The claim for specific

performance is a claim in respect of the proprietary interest in the land. Whereas under the claim for pre-emption the plaintiff respondent could only

obtain such interest as the mortgagees of the defendant Hashmat-un-nissa possessed. Their claim in fact is to stand in the shoes of the mortgagees,

taking over their bond and obtaining possession as usufructuary mortgagees. These two claims appear to us to be separate and distinct claims,

and, as such, to fall within the purview of the section to which we have referred. This being so, the plaint having been insufficiently stamped, there is

no alternative for us but to allow the appeal. We allow the appeal, set aside the decree of the Court below, and dismiss the plaintiff's suit with

costs in all Courts.