

(1929) 02 AHC CK 0045

Allahabad High Court

Case No: None

Kallu

APPELLANT

Vs

Ganesh and Others

RESPONDENT

Date of Decision: Feb. 19, 1929

Acts Referred:

- Transfer of Property Act, 1882 - Section 76(d)

Citation: AIR 1929 All 348

Hon'ble Judges: Ashworth, J

Bench: Division Bench

Final Decision: Dismissed

Judgement

Ashworth, J.

This appeal arises out of a suit brought by the plaintiff-respondent for redemption of certain mortgaged property. The Courts below have held that the property was first mortgaged by one Bhawanidin to Kallu on 7th November 1890 for Rs. 90 a provision of the mortgage being that the mortgagor should repair the house. A second mortgage was made by Jokhu, Bhawani's son, in favour of Mt. Batul, wife of Kallu. This was dated 1st July 1901. Part of the mortgage money was assigned for the redemption of the mortgage and Rs. 58 for cost of repairs during the previous eleven years. The Courts have found that Kallu was in effect the mortgagee under the second deed, and consequently that second deed must be deemed to cancel the first deed and amount to a fresh mortgage in favour of Kallu. This finding has been objected to in grounds 3 and 4 of the memorandum of appeal, but these grounds are not pressed by the appellant's counsel. Consequently we are only concerned with the deed of 1901. The present plaintiff is the purchaser of the equity of redemption from Jokhu by a deed dated 5th November 1927.

2. The only question that arises in this appeal is whether the lower appellate Court was justified in refusing to add to the mortgage money as money to be paid before

redemption was allowed (a) sums alleged to be spent by Kallu for rebuilding the house six or seven years ago and (b) sums spent from time to time by Kallu for keeping the house in repairs. As regards (c) the lower Court has held that as the mortgage deed of 1890 placed the duty of doing the repairs on the mortgagor, the mortgagee was not entitled to spend money on repairs except so far as he could pay for such repairs out of the rents and profits. It applies Section 76(d), T.P. Act. It is sufficient to say that Section 76, T.P. Act, is not applicable to a usufructuary mortgage. That section applies, and is expressed as applying to a case when during the continuance of the mortgage the mortgagee takes possession of the mortgaged property. It cannot apply to a case where the mortgage is in its inception usufructuary. In the case of a usufructuary mortgage the mortgagee is bound to pay all normal expenses of upkeep, it being a condition of such a mortgage that the rents and profits are to be received in lieu of interest, and that the property is to be redeemed on payment of the mortgage money. The same remarks apply to the sums spent for rebuilding. A usufructuary mortgagee has no right to claim from his mortgagor the costs of rebuilding the property. Section 63 only allows the mortgagee to recover the price of an accession where he can prove that the accession was necessary to preserve the property from destruction. When a house has fallen down it is impossible to preserve it from destruction. The only remedy of the mortgagee would be u/s 68, assuming that the section can be made applicable to a usufructuary mortgage. I hold, therefore, that the decision of the lower Court was right although on different grounds to that advanced. The appeal, therefore, fails and is dismissed.