

PRIVY COUNCIL

Radha Kunwar,

Vs.

Reoti Singh

P.C.A. No. 46 of 1915.

(Lord Buckmaster, CJ, Lord Atkinson and Sir John Edge. JJ)

26.6.1916

JUDGMENT

Lord Buckmaster CJ.

1. It is always to be regretted when an appeal is disposed of on a preliminary point, and the parties are compelled, after having incurred considerable expense to leave this Board without a determination of the real merits of their dispute. But in this case their Lordships feel that they have no choice in the matter, and that they are bound to advise His Majesty that the preliminary point raised must prevail.

2. The facts of this case are these: In 1884 a mortgage was executed of certain property for a sum of Rs. 2,000, with interest at 12 per cent. On the 30th of November, 1909, the persons who were entitled to the benefit of that mortgage took proceedings in order to have it enforced. They claimed that the amount due upon the mortgage was Rs. 38,494, and they asked for an order for payment of that sum against the defendant and a sale of the property. They made, as parties to that suit, not merely the people who claimed under the mortgagors but also certain people who had set up adverse claims to the mortgaged property, among whom the appellant was one. Their Lordships think that this joinder of these parties was irregular, and that it could only tend to confusion.

3. What followed was this: The present appellant, who claimed through a person named Hukum Singh, said that she was entitled to 4 *biswas* of the property. That dispute was entirely independent of the mortgage transaction of 1884. Whatever the amount of that mortgage might be, in no circumstances could the appellant have been made responsible for it. If it had been held that her claim was good, the mortgagor would have completely failed, so far as her share of the estate was concerned; if it had

been held that her claim was bad, she could have had no right whatever to redeem the mortgage. The cause, however, proceeded without any objection being taken, and, in the end, on the 8th of June, 1909, a decree was made by the Subordinate Judge in which he declared that the appellant was entitled to one-half of the 4 *biswas* which had been set up as her original claim. From that decision an appeal was taken to the High Court, and on the 14th of November, 1910, the High Court decided that the appellant had no title at all. The result was that as to one-half there were concurrent findings both of the Subordinate Judge and of the High Court that the appellant had no claim and as to one-half there were differing judgments. The appellant accordingly sought to obtain leave to appeal to His Majesty in Council from the judgment of the High Court, and for that purpose it was essential that she should satisfy the condition of section 110 of the Civil Procedure Code of 1908. That section provides that an appeal can only be allowed in certain cases where the amount or value of the subject-matter of the suit in the Court of First Instance was Rs. 10,000, or upwards "and the amount or value of the subject-matter in dispute on appeal to His Majesty in Council must be the same sum or upwards."

4. Upon the appellant's application for a certificate that the value of the subject-matter exceeded the Rs. 10,000 there appears to have been argument before the High Court and a certificate has been given in her favor. But it is objected that that certificate, on the face of it, proceeds upon a wrong principle, and that this Board ought not to regard it as conclusive of the appellant's right to appeal.

5. Their Lordships think that the respondent's contention in this respect is correct. The certificate is prefaced by an order in which the High Court state what the reasons were that led them to the conclusion that the subject-matter was above the prescribed limit, and it is quite plain, on an examination of that order, that they were deciding as between two rival contentions. The one that was put forward on behalf of the respondent was that in point of fact the appeal related only to the value of the 2 *biswas*, while the appellant asserted that it related to the whole subject-matter of the suit which was Rs. 38,000. This latter argument was enforced by suggesting that if the appellant's case failed the mortgage would operate over the whole of the property and there would be a right left in the mortgagee to sell and dispose of this piece of the estate for the total value of the mortgage debt; that as the mortgage debt affected equally every part of the property subject to the original mortgage, it affected the whole of those 2 *biswas*, and the subject-matter of the disputes therefore was Rs. 38,000. This contention prevailed before the High Court, and they state in terms that

the decree which was the subject of appeal had imposed on the property a liability for Rs. 38,000 and that in consequence the value of the subject-matter of the appeal exceeded, the necessary prescribed sum.

6. Their Lordships think that this was an entire mistake. As between the respondent, who was seeking to enforce his mortgage, and the appellant the subject-matter of the suit was not Rs. 38,000. The subject-matter of the dispute was simply the value of the property which the appellant claimed, and it was quite immaterial for that purpose what the value of the mortgage might be. As has already been pointed out, the appellant could under no circumstances have been made responsible for the amount of the mortgage nor could its extent in any way whatever have in the least degree varied her rights. In truth the confusion has arisen because the cause of action against the appellant, that is to say, the right to obtain a declaration of title against her adverse claims, has been joined with another which was quite distinct, the enforcement of rights under a mortgage.

7. Their Lordships think that the subject-matter of this appeal is nothing but the 2 *biswas* to which the Subordinate Judge found that the appellant was entitled.

8. Then Sir William Garth urges that in these circumstances, as this question of the value has never been determined by the High Court, the matter ought to go down for the purpose of seeing whether those 2 *biswas* would support the value of Rs. 10,000 and thus enable an appeal to be maintained. After considering all the arguments upon this point, their Lordships think that, out of consideration for the parties themselves, no such direction ought to be given. Had it been possible, when the original certificate was applied for, to have established that the value of those 2 *biswas* exceeded the Rs. 10,000 - a perfectly simple and straightforward thing to do - all this difficulty as between the value of the estate and the value of the mortgage would at once have vanished, but it seems impossible to read the judgment of the High Court without seeing that there were two contentions, and only two, before them. Upon the one contention the appellant would have failed, and that was that the subject-matter of the suit related to the 2 *biswas*, and on the other contention she would have succeeded, and that was that the subject-matter of the suit was affected by the value of the mortgage debts. It was the latter contention which the High Court wrongly adopted.

9. Their Lordships will therefore humbly advise His Majesty that this objection must succeed, and that this appeal should be dismissed with costs.

Appeal dismissed.

