

Harnek Singh

Vs

Harbax Singh and Others

Civil Appeal No. 3315 of 1983

(K. Jagannatha Shetty, P. B. Sawant, M. M. Punchhi JJ)

25.07.1990

ORDER

1. Two courts below have held that the mortgage was executed and was redeemable. The mortgaged land was held by the first appellate court do defy identity due to consolidation operations having taken place in the meantime. The trial court, however, had no difficulty in identifying the land and had decreed the suit. The first appellate court upset it and the High Court affirmed that view disentitling the plaintiff-appellant to the relief of actual possession. All the same the courts below were one that the possession. All the same the courts below were one that the possession could only be ordered symbolically.

2. The terms of the mortgage authorised the mortgagees to create a tenancy or to cultivate land by themselves. The plea of the plaintiffs that the tenancy created by the mortgagees in favour of their sons was not bona fide was negatived. That finding is unassailable in the instant appeal. The only point thus to be seen is whether the land is identifiable.

3. Significant facts which emerge herein are that the mortgagees were initially the purchasers of the land in dispute. The purchase in their favour was successfully pre-empted by the present appellant. Somehow in the revenue papers the decree of pre-emption did not find way of substituting the pre-emptor as owner and consolidation operations took place in the meantime. The owners of the land as recorded got the post-consolidation holding intermingled with the pre-empted land, which land was in the meantime mortgaged in their favour. The land involved in the instant litigation had to be extricated from that conglomerated holding. The lower appellate court was wrongly of the view that it could not be carved out in the instant suits. It could at best have left it to the excuting court but not deny the relief of actual possession. In this view of the matter, we allow the appeal and order the delivery of the actual possession to the appellant by setting aside the judgment and decree of the first appellate court as confirmed by the High Court while restoring that of the trial court. No costs.

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