ALLAHABAD HIGH COURT

Sidhari Ram

Vs.

Dr. Gargi Din

(P.C. Banerji, Acting C.J. and Ryves, J.)

13.07.1923

JUDGMENT

P.C. Banerji, Acting C.J. and Ryves, J.

1. This appeal arises out of a suit for the redemption of a mortgage. The mortgage is said to have been made by one Sahai in favor of Gaya Prasad and in the plaint it was, stated that the mortgage had been made some time in 1870. Sabai's son was Kunji and the plaintiff claims to be the heir of Kunji. On the 28th of March 1908, Gaya Prasad, his brother and his son executed a sale-deed in favor of the defendant, Dr. Gargidin, of mortgagee rights in the grove now in dispute. In that sale-deed they stated that they were mortgagees of the grove of Kunji who was, as we have said above, the son of Sahai and they purported to sell their rights as mortgagees to the defendant Gargidin for Es. 125. They stated in the eale-deed that they were in possession as mortgagees for a long time and that it was the mortgage under which they were in possession which they were transferring to Gargidin. The plaintiff in his plaint no doubt gave some particular of the mortgage, but in the fourth paragraph of his plaint he stated that the mortgage which he was seeking to redeem was the mortgage which the defendant Gargidin had purchased from Gaya Prasad in 1908, so that there can be no doubt that the mortgage which the plaintiff sought to redeem was the particular mortgage the rights in which were sold to the defendant Gargidin by Gaya Prasad, his brother and his son. Gargidin denied the mortgage set up by the plaintiff and denied every one of the allegations of the plaintiff. He even denied that the plaintiff was the representative. of Sahai, but it appears that he helped the plaintiff in getting his name entered in the revenve papers as the legal representative of Kunji, the son of Sahai. The Court of first instance decreed the claim but that decree was set aside by the lower Appellate Court by a judgment which we cannot but regard as perverse. The learned Subordinate Judge who decides the case in the Appellate Court did not give due effect to the allegations in the plaint. He was under the impression that the plaintiff sought to redeem a particular mortgage and that it was not the very mortgage which the defendant had purchased and he pro ceeded to find whether the particular mort gage which the plaintiff set up was established. He, in our opinion, misconceived the nature of the plaint. The plaintiff by this suit sought to redeem the mortgage which the,

defendant Gargidin had acquired by virtue of the sale-deed executed in his favor on the 28th March 1908, and for which he paid L 125. That mortgage was set forth in the sale deed and that mortgage was accepted by the defendant. Therefore, if the claim was not time-barred it was a claim which the defendant Gargidin had no ground for resisting. The very fact of Gaya Prasad selling his mortgagee rights was an express acknowledgment of the existence of a subsisting mortgage and of subsisting rights which he was competent to sell and the very fact of Gargidin purchasing those rights was an acceptance on his behalf of an existing mortgage, a mortgage which was in force, as a subsisting mortgage on the date of the sale to him. He was not purchasing such property which was on the date of sale not in existence. Therefore, the very fact of the execution of the sale-deed by Gaya Prasad and the acceptance of a sale from him by Gargidin was an admission of a subsisting mortgage of the property now in dispute. This being the mortgage which the plaintiff sought to redeem the suit which was instituted by the plaintiff was clearly within time corn-puting limitation from the date on which the subsisting mortgage was acknowledged by the original mortgagee and by the purchaser from that mortgagee and was in substance accepted by the purchaser from that mortgagee. In this view the decision of the lower Appellate Court cannot be regarded as a decision that the mortgage sought to be redeemed had not been proved or did not exist. We think that we cannot regard the decision of the lower Appellate Court as a decision upon a question of fact and in view of the circumstances to which we have referred the judgment of the learned Judge was clearly erroneous. We are unable to agree with the view of the learned Judge of this Court that the finding of the lower Appellate Court was finding of fact which was binding on him. In our opinion the suit was rightly decreed by the Court of first instance.

2. We allow the appeal set aside the decree of this Court and of the lower Appellate Court and restore that of the Court of first instance with costs in all Courts.

.