

ALLAHABAD HIGH COURT

Budhi Mal

Vs

Bhati

(Tudball, J.)

09.06.1915

JUDGMENT

Tudball, J.

1. This appeal arises out of a suit for sale on the basis of a simple mortgage-deed dated the 8th of January 1902, The mortgagor was one Ismail and the mortgaged property is a house which belonged to him. Ismail was admittedly once a zemindar of the village when he built this house and lived in it. He subsequently lost his proprietary rights and became ex-proprietary tenant of his sir lands, and his successors also admittedly acquired occupancy rights in certain other land. The Court of first instance decreed the suit. The lower Appellate Court has dismissed the suit on two grounds, the first was that the mortgage was illegal and contrary to law and, therefore, not binding on the mortgagor and, secondly, on the ground that under Section (50), Clauses (o) and (c) of the Code of Civil Procedure, the house cannot be sold. The second ground is clearly met by the decision of this Court in *Bhola Nath v. Kishori* 'This is not a case of attachment and sale. It is a question of a decree for sale under a mortgage. In regard to the other ground, the learned District Judge has held that because Ismail lived in this house, this house was an appurtenance to his ex-proprietary holding and to his occupancy holding and that as under the Tenancy Act an ex-proprietary or an occupancy holding cannot be mortgaged, therefore, the mortgage of this house was contrary to law and illegal. In the first place the facts of this case seem to me to show clearly that this house cannot in any way be deemed to be an appurtenance to either of the two holdings in question. It came into existence long before either of these two occupancy holdings were acquired. The house was never allotted to Ismail by any landlord or any other person at the time at which his cultivatory holding was allotted to him, nor with the intention that he should reside therein so as to enable him to carry on his occupation as a cultivator. An appurtenance" in common parlance and legal acceptance is something belonging to another thing as principal and passing as an incident to it. It is an appendage an adjunct an accessory or something annexed to another thing more worthy. I quote this from Webster's International Dictionary. In my opinion in the circumstances of the present case it is impossible to say that Ismail's house was an appurtenance to either of his holdings and that, therefore, the mortgage of this house is contrary

to law. If a mortgagor, such as the present defendants, seek to go behind his solemn word and promise and to prove that the act done was illegal or contrary to law and, therefore, not binding upon him, it is for him to prove the facts dearly and beyond doubt. To merely prove that Ismail lived in this house and that he was a cultivator is insufficient to prove that the house was an appurtenance to the holding and, therefore, could not be mortgaged by him. In my opinion the decision of the Court below is contrary to law and certainly leads to injustice. I allow the appeal, set aside the decree of the lower Appellate Court and restore that of the Court of first instance with costs in all Courts.



Cases Referred.

111 Ind. Cas. 646 : 8 A.L.J. 1045 (F.B.) : 34 A. 25.