

A                    MOHAN CHANDRA TAMTA (DEAD)

THR. LRS.

v.

ALI AHMAD (D) THR LRS & ORS.

B                    (Civil Appeal No. 4610 of 2014)

SEPTEMBER 12, 2019

**[DEEPAK GUPTA AND ANIRUDDHA BOSE, JJ.]**

- C     *Suit – Finding as to ownership – Who cannot challenge – Suit property, three storeyed structure was owned by three brothers, each having 1/3<sup>rd</sup> share in the property – One of the brother mortgaged his 1/3<sup>rd</sup> share – Eventually, the predecessor-in-interest of the appellant became the full owner of the property – As per the plaintiff, defendant nos. 1 & 2 were permitted to stay in some portion of the house by appellant's predecessor-in-interest – He issued notice to them to vacate the house but they refused – Suit for eviction filed – Dismissed – Appeal also dismissed – Appellant's predecessor-in-interest sold the property to the appellant – Appellant filed suit for recovery of possession of the top floor of the property, in the alternative also prayed for redemption of any un-redeemed portion of the mortgaged property – Defendant nos. 1 & 2 denied the ownership and claimed that the property was owned by defendant no. 3 (the mortgagee) – Suit decreed – Defendant no. 2 filed appeal but, no appeal was filed by defendant no. 3 – First appellate court dismissed the plaintiff's suit – Appellant filed second appeal in the High Court – Allowed – Appeal filed by one 'MJ' in the Supreme Court on the ground that she was also one of the legal heirs and no notice was served upon her – Allowed – Case remanded to the High Court – High Court held that even in the absence of defendant no. 3, the appeal was maintainable – Held: High Court erred in holding that defendant nos. 1 & 2 could maintain an appeal challenging the finding of the trial court that defendant no. 3 was not the owner of the property when defendant no. 3 himself had not challenged this – Tenants remain tenants whoever be the landlord/owner – Trial court held that the plaintiff had become the full owner*

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*of the whole property which stood redeemed and defendant no.3 had no share in the property –This finding should have been challenged by defendant no.3 and cannot be challenged by the defendant nos.1 & 2 who only claimed to be the tenants in the property – Therefore, the appeal filed by them before the District Judge on the issue as to whether the plaintiffs had become the full owner of the property or not, was not maintainable – Judgment of the High Court set aside while that of the trial court decreeing the suit in favour of the appellants is restored.*

**Disposing of the appeal, the Court**

**HELD:** 1.1 The High Court gravely erred in holding that defendant nos. 1 and 2 could maintain an appeal challenging the finding of the trial court that defendant no. 3 was not the owner of the property when defendant no. 3 himself had not challenged this. Defendant nos. 1 and 2 only claimed to be the tenants in the property. They did not claim any ownership rights. It is true that according to them, it was defendant no. 3 who was the mortgagee of the property but the trial court in the presence of the owner after contest decreed the suit in favour of the plaintiff and against the defendants. It specifically held that the plaintiff had become the full owner of the whole property which stood redeemed and defendant no. 3 had no share in the property. This finding should have been challenged by defendant no. 3. This finding cannot be challenged by the tenants. The tenants remain tenants whoever be the landlord/owner. Once defendant no. 3 had not challenged the decree of the trial court with regard to his title, defendant nos. 1 and 2 cannot be allowed to challenge the finding of ownership with which they are not directly concerned. Therefore, the appeal filed by them before the District Judge on the issue as to whether the plaintiffs had become the full owner of the property or not, was not maintainable. They could have challenged the decree on other grounds but not on this ground. The judgment of the High Court is set aside. The judgment and decree of the trial court decreeing the suit in favour of the appellants is restored.  
[Paras 11-14][170-G-H; 171-A-D]

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- A CIVIL APPELLATE JURISDICTION: Civil Appeal No. 4610  
of 2014

From the Judgment and Order dated 31.03.2009 of the High Court of Uttarakhand at Nainital in Second Appeal No. 670 of 2001 (Old No. 2341 of 1979).

- B Arvind Kumar Shukla, Ms. Reetu Sharma, Nihal Ahmad, Kunal Yadav, Ms. Neena Shukla, Advs. for the Appellants.

The Judgment of the Court was delivered by

**DEEPAK GUPTA, J.**

- C 1. This case has a long and chequered history. The litigation initially started almost 59 years back. The suit property was a three storeyed structure in the town of Almora in Uttarakhand. The first records of this house are from the year 1872 when this property is recorded in the ownership of three brothers namely Pir Bux, Kalia and Subrati. Each brother had 1/3<sup>rd</sup> share in the property. Pir Bux mortgaged his 1/3<sup>rd</sup> share in favour of one Ahmadulla Khan for Rs.50/- in the year 1872. One of the brothers, Subrati died issue-less and his share of the property devolved upon his two brothers Pir Bux and Kalia, who got an additional 1/6<sup>th</sup> share each making them owners of half share each in the property. On the death of Kalia, his share was succeeded by his son Ilahi Bux, and on the death of Ilahi Bux his widow Smt. Hafizan succeeded to his share of the property. She sold her entire share of the property i.e., 50% to one Lalta Prasad Tamta, predecessor in interest of the present appellant.
- F 2. Half of Subrati's property i.e. 1/6<sup>th</sup> of the total which had fallen to the share of Pir Bux from Subrati was inherited by his son Gulam Farid who in turn sold this property to Lalta Prasad Tamta by way of a sale deed on 28.07.1944. Thus, Lalta Prasad Tamta became the owner of 2/3<sup>rd</sup> of the structure. The remaining 1/3<sup>rd</sup> continued to be under mortgage. According to the plaintiff, Gulam Farid redeemed the property from Ahmadulla Khan and sold the 1/3<sup>rd</sup> share to Lalta Prasad Tamta on 17.03.1954. Therefore, Lalta Prasad became the full owner of the property.
- G 3. It is the case of the plaintiff that defendant no.1 Khalil Ahmed and defendant no.2 Ali Ahmad were permitted to stay in some portion of this house by Lalta Prasad Tamta. Over a period of time the building started subsiding and the ground floor got embedded in the earth and only two storeys were left. In 1960, Lalta Prasad Tamta issued notice to the said two defendants to vacate the house but they refused to do so.
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He then filed Suit No.115 of 1960 for their eviction. The defendant nos. 1 and 2 denied the title of Lalta Prasad Tamta over the property and claimed that they were the tenants of defendant no. 3 Mustaffa Shah Khan, who was not a party in this suit. The said suit instituted by Lalta Prasad Tamta was dismissed. Civil Appeal No. 58 of 1961 filed before the District Judge, Nainital, was also dismissed.

4. Accordingto the plaintiff, encouraged by the dismissal of this suit, the defendants got further emboldened and trespassed over other rooms in the house. It was urged that defendant no. 3 Mustaffa Shah Khan had no right in the property suit.

5. Another relevant fact is that according to the plaintiff after the death of Ahmadulla Khan he was succeeded by three sons. One of his sons Mahmood Shah Khan had 1/3<sup>rd</sup> share of 1/3<sup>rd</sup>, i.e. 1/9<sup>th</sup> share in the property. Mahmood Shah Khan transferred his rights of mortgagee to one Sadiq Hussain and Vilayat Hussain.In 1958, Lalta Prasad Tamta instituted a Civil Suit No.216 of 1958 against Sadiq Hussain and Vilayat Hussain. A compromise was arrived at between the parties and Sadiq Hussain and Vilayat Hussain abandoned their rights in the property. Thus, Lalta Prasad Tamta became the owner of this 1/9<sup>th</sup> share too. There is obviously some confusion because according to Lalta Prasad Tamta he had already redeemed the entire 1/3<sup>rd</sup> share of Ahmadulla Khan w.e.f. 17.03.1954. His explanation is that to avoid any cloud to his title he settled the matter.

6. Lalta Prasad Tamta in turn sold the property to Mohan Chandra Tamta, appellant herein, on 27.08.1966. Mohan Chandra Tamta filed a suit for recovery of possession of the top floor of the house (3<sup>rd</sup> floor) and in the alternative also prayed for redemption of any un-redeemed portion of the mortgaged property and expressed his willingness to pay the balance mortgaged amount. The defendant nos. 1 and 2 contested the suit and denied the ownership of the plaintiff on the suit property. They again claimed that the property was owned by defendant no.3 Mustaffa Shah Khan who had been impleaded as party in this suit. Defendant no.3 supported the stand of defendant nos. 1 and 2. It was pleaded that the suit for redemption is barred by time.

7. The Trial courtheld that Lalta Prasad Tamta had acquired full ownership of the property and he had transferred the same to Mohan Chandra Tamta. A finding was given that the entire property transferred

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- A to Ahmadulla Khan was redeemed by Lalta Prasad Tamta. The suit was accordingly decreed on 23.03.1975.

8. Defendant no.2, i.e. the tenant, filed an appeal being Civil Appeal No.10 of 1975 but no appeal was filed by defendant no.3 Mustaffa Shah Khan against the decree passed by the trial court. The first appellate

- B court allowed the appeal and dismissed the plaintiff's suit holding that plaintiff is the owner of the property only to the extent of 3/4<sup>th</sup> share and since defendant nos. 1 and 2 are the tenants of defendant no.3 they are not liable to be evicted.

9. The present appellant filed a second appeal in the Allahabad

- C High Court. The High Court in the first round set aside the judgment of the first appellate court, allowed the appeal and decreed the suit for possession. An appeal was filed by one Smt. Murtaza Jahan in this Court on the ground that she was also one of the legal heirs and no notice had been served upon her. This Court allowed the appeal only on that short ground and remanded the case to the High Court.

- D 10. After remand, the High Court framed three questions of law but we are only concerned with the substantial question at serial no.3 which reads as under:-

“	xxx	xxx	xxx
E	xxx	xxx	xxx

3. Whether, appeal of tenant was maintainable, while the mortgagee (defendant no.3) had accepted the decree of the trial court by which the trial court recorded the finding that redemption of mortgage has also taken place?"

- F The High Court held that even in the absence of defendant no.3 the appeal was maintainable.

- G 11. We have heard learned counsel for the appellants. In our view, the High Court gravely erred in holding that defendant nos. 1 and 2 could maintain an appeal challenging the finding of the trial court that defendant no.3 was not the owner of the property when defendant no.3 himself had not challenged this.

- H 12. An important aspect of the matter is that defendant nos. 1 and 2 only claimed to be the tenants in the property. They did not claim any ownership rights. It is true that according to them, it was defendant no.

3 Mustaffa Shah Khan who was the mortgagee of the property but the trial court in the presence of the owner after contest decreed the suit in favour of the plaintiff and against the defendants. It specifically held that the plaintiff had become the full owner of the whole property which stood redeemed and defendant no.3 Mustaffa Shah Khan had no share in the property. This finding should have been challenged by defendant no.3. This finding cannot be challenged by the tenants.

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13. The tenants remain tenants whoever be the landlord/owner. Once defendant no.3 Mustaffa Shah Khan had not challenged the decree of the trial court with regard to his title, defendant nos. 1 and 2 cannot be allowed to challenge the finding of ownership with which they are not directly concerned. Therefore, the appeal filed by them before the District Judge on the issue as to whether the plaintiffs had become the full owner of the property or not, was not maintainable. They could have challenged the decree on other grounds but not on this ground.

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14. In view of the above discussion, we set aside the judgment dated 31.03.2009 of the High Court of Uttarakhand, at Nainital in Second Appeal No.670 of 2001 and restore the judgment and decree dated 23.03.1975 of the trial court decreeing the suit in favour of the appellants. The appeal stands disposed of accordingly. Pending applications, if any, shall also stand disposed of. No order as to costs.

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Divya Pandey

Appeal disposed of.