

Ajodhia Singh vs Data Din And Anr. on 31 August, 1951

Equivalent citations: AIR1952ALL544, AIR 1952 ALLAHABAD 544

JUDGMENT

Agarwala, J.

1. This is a defendant's appeal arising out of a suit for possession. The suit was instituted in the revenue Court under Section 180, D. P. Tenancy Act. The plaintiff alleged that on 4-7-1928, he mortgaged his tenancy plots with Ajodhia Singh, defendant 1, and placed him in possession, that Srimati Ram Pati, defendant 2, was wife of Ajodhia Singh and her name recorded in the revenue papers without any right, that the mortgage money had been paid up from the usufruct of the land in suit, that the plaintiff approached the mortgagee in July, 1949, with the mortgage consideration for redemption of the land in suit, but that the defendant refused either to accept the money or to redeem the land in suit. The plaintiff, therefore, prayed that a decree for possession may be passed against the defendants and damages as allowed by law may also be awarded to him. Defendant 2 did not put up any defence. The suit was contested by defendant 1 alone. He pleaded that he was not a mortgagee of the plots in suit because no mortgage was ever executed, that he was himself the tenant of the land and that in any case he had perfected his right to possession as a hereditary tenant by virtue of having been in possession of the plots in suit for more than three years and that the suit was barred by limitation. One further plea was raised by him. It was worded in these terms: That the suit in the present form was defective and the Court had no jurisdiction to try it. He explained this plea, however, by saying that the plaintiff should have filed a suit for redemption under Rule 12, Agriculturists' Relief Act or under Section 83 for account.

2. The trial Court framed four issues:

1. Is defendant-mortgages of the land in suit?
2. Is defendant trespasser?
3. Is the suit maintainable?
4. To what relief and damages, if any, is plaintiff entitled?

It came to the conclusion that the defendant was the mortgagee of the land in suit but became a trespasser because he refused to hand over possession of the land in suit to the plaintiff when he was offered the mortgage consideration in July, 1949. On the third issue he stated: "This has not been pressed by the parties and is answered in the affirmative." On issue 4 it stated that it was the admitted case of the parties that the mortgage consideration of the property in suit had been paid up from the usufruct of the property in suit. About defendant 2's possession it held that she was also a

trespasser. In the result it decreed the suit for possession without payment of any amount.

3. From this decree there was an appeal to the Civil Judge. One of the grounds of appeal to the lower appellate Court was that the trial Court has no jurisdiction to try the case. The decision of the trial Court on the other points arising in the case were also disputed. The lower appellate Court settled two points for determination:

"(1) Whether Ajodhya Singh is a mortgagee of the land in suit or whether he is a trespasser? (2) Whether the original Court has jurisdiction to try the present suit and is the suit maintainable in the present form?

On the question of jurisdiction and maintainability of the suit in its present form the lower appellate Court held that these points were not pressed before the trial Court; but since the question had been argued, it held that there was no force in the plea. The mortgage deed was for Rs. 250, and as such, according to that Court, a suit under Section 12, Agriculturists' Relief Act, could be filed only in the revenue Court, which would be the very same Court in which the present suit was filed. The lower appellate Court, therefore, observed that it did not make any difference so far as the jurisdiction of the trial Court was concerned. It was further of the opinion that the suit was maintainable in its present form, because it was not possible for the plaintiff to bring a suit under Section 12, U. P. Agriculturists' Relief Act, he not having been shown to be an agriculturist. It further observed that at any rate the plaintiff had an alternative remedy, either to file a suit under Section 12, U. P. Agriculturists' Relief Act or, treating the defendant as a trespasser, to file a suit under Section 180, U. P. Tenancy Act against him. On point No. 1 it held that although the defendant was originally a mortgagee of the plots in suit, he became a trespasser when he refused to redeem the mortgage upon the request of the plaintiff. He also discussed the plea of limitation and held that limitation would count from the date of refusal and, therefore, the suit was not barred by limitation. In the result the appeal was dismissed. Against this decree the defendant has come up in second appeal to this Court.

4. A preliminary objection has been raised to the hearing of this appeal. It has been urged that since no question of jurisdiction was decided by the trial Court no appeal lay to the Civil Judge and that, therefore, his decree was a nullity and no second appeal can lie against a decree which is null and void. This contention has no force. In the first place, it appears to me that the plea of jurisdiction was decided by the trial Court. That it was raised in the written statement can admit of no doubt. The issue framed by the trial Court, however, did not distinctly refer to the jurisdiction of the Court. The issue merely was, whether the suit was maintainable. There is a great deal of difference between the plea of maintainability of a suit and the plea of jurisdiction in the Court to try a suit. In the present case, however, since the pleas of maintainability and jurisdiction were mixed up by the defendant, the Court seems to have framed the issue of maintainability not in its strict sense but as covering the question of jurisdiction also. It may be that the plea was not pressed at the time of arguments, but the Court did give a decision in the affirmative and this, in my opinion, was sufficient to entitle the plaintiff to take his appeal to the lower appellate Court.

5. In the second place, even if no question of jurisdiction was decided and no appeal lay to the lower appellate Court, the learned Judge of the lower appellate Court having entertained the appeal and

decided it, a second appeal to this Court would lie under the provisions of Section 269, U. P. Tenancy Act. The preliminary objection, therefore, fails.

6. On the merits, however, I am of opinion that this appeal cannot succeed. The mortgage of a tenancy holding, like the holding in the present case which was a hereditary tenancy, is not transferable under the provisions of the U. P. Tenancy Act and was also not transferable under the Oudh Rent Act. The mortgage was, therefore, void. But the mortgagee, having come into possession of the plots with the permission of the mortgagor, could not be said to be a trespasser unless the permission were withdrawn. In the case of a void mortgage the mortgagor is entitled to recover back possession over the mortgaged property in his capacity as the owner of the mortgaged property. The mortgagee is, no doubt, in defence, entitled to claim that the mortgagor should not be given unconditional possession over the mortgaged property but should be given possession subject to the condition that he pays to the mortgagee what is due to him upon the mortgage. This has been now finally decided by a Full Bench of this Court in Mahabal Singh v. Ram Raj, (1950 ALL. L. J. 713). Thus, though the mortgagor has to pay the amount due to the mortgagee, he is not thereby prevented from recovering possession over the mortgaged property treating the mortgage as a void mortgage and the defendant mortgagee as a trespasser. The institution of a suit for possession against the mortgagee is enough to terminate the licence under which the mortgagee must be deemed to have held the property when his mortgage was void. When the licence was thus terminated and the position of the mortgagee became that of a trespasser, a suit under Section 180, U. P. Tenancy Act could be brought against the mortgagee when the mortgaged property consisted of tenancy plots. The terms of S. 180 are fulfilled because the mortgagee will be retaining possession over the property "without the consent of the person entitled to admit him as tenant". Since a question may arise whether the suit could be filed in the civil Court or was entertainable by the revenue Court under Section 180, as decided by another Full Bench of this Court in D. N. Rege v.

Muhammad Haider, 1946 ALL L. J. 369, a suit against a trespasser lies in the civil Court when the trespasser claims the property as proprietor but it lies in the revenue Court under S. 180, U. P. Tenancy Act when the trespasser claims the property as tenant. In the present case the defendant claimed the property as a tenant. He could not have claimed it in any other capacity because a mortgagee of tenancy plots can become only a tenant of the mortgaged property when the period for redemption has elapsed. The defendant, therefore, was liable to be sued in the revenue Court under the provisions of S. 180, D. P. Tenancy Act. The suit was not barred by limitation, because the licence having been terminated by the institution of the suit itself there will be no question of limitation. The plaintiff, however, was liable to pay the amount, if any, due to the defendant. It was admitted before the trial Court that the mortgage money must be deemed to have been paid off by the usufruct of the property and that nothing was payable to the mortgagee on that account. The decree passed by the Courts below must, therefore, stand.

7. This appeal is, therefore dismissed with costs. The stay order dated 25-4-1951, is discharged.