

Mohd. Suleman And Ors. vs Maqsood Hussain And Anr. on 30 November, 1953

Equivalent citations: AIR1954ALL420, AIR 1954 ALLAHABAD 420

JUDGMENT

Randhir Singh, J.

1. This is a plaintiff's second appeal against a decree of the Additional Civil Judge of Lucknow.

2. Defendants I and 2 executed a mortgage in favour of Hafiz Afzal Husain, since dead, for Rs. 1000/- on 3rd of July, 1937. No interest was contracted and it was mentioned in the mortgage deed that the mortgagee had been put into possession. The mortgagee, however, gave back the mortgaged property to the mortgagors on theka. On the 11th of April, 1946, a suit for the recovery of the mortgage money and certain sums due from the mortgagors on account of the unpaid theka money as also for Rs. 103/12/3 said to have been paid by the mortgagee in satisfaction of a decree was instituted.

It was alleged on behalf of the plaintiff that he had to pay Rs. 103/12/3 in order to save the property from being sold in execution of a decree and he was, therefore, entitled to recover this amount along with the mortgage money from the mortgagors under Section 72 of the Transfer of Property Act. The un-realized theka money was claimed on the ground that it represented interest on the principal sum.

3. The suit was contested on several grounds. The material grounds, however, on which the suit was contested are that the plaintiff was not entitled to any interest as the mortgage was a possessory mortgage and that he was not entitled to recover Rs. 103/12/3, as this sum had not been paid for protecting the property from sale and further that no notice had been served upon the mortgagors to pay up the money before the sum was paid by the mortgagee in the execution court. A plea was also raised that a sum of Rs. 74/- out of Rs. 1000/- had not been received by the mortgagors.

4. The trial court came to the conclusion that the plaintiff was entitled to a decree for Rs. 926/- on account of the principal sum and was not entitled to recover any money on account of interest. The trial court also held the plaintiff entitled to recover Rs. 103/12/3. Both the parties, then went up in appeal to the Additional Civil Judge. The Additional Civil Judge dismissed the appeal instituted by the present appellant, but allowed the appeal of the defendants to this extent that the decree in respect of Rs. 103/12/3 was set aside on the ground that the mortgagee was not entitled to this sum. The mortgagee plaintiff has now come up in second appeal. Hafiz Afzal Husain appellant died during the pendency of the appeal and his heirs have been brought on the record,

5. Two points have been pressed on behalf of the appellants. The first is that the lower appellate court should not have rejected the claim in respect of Rs. 103/12/3, as this sum had been paid by the predecessor of the appellants in satisfaction of a decree in execution of which the property was being put up for sale. It is contended on behalf of the respondents that this decree in execution of which the property was being put up for sale was a simple money decree and the appellant was not bound to pay up this sum nor did the sale in execution of that decree affect the rights of the mortgagee.

After a mortgage is made the property is comprised of two parcels the equity of redemption and the mortgagee rights. If a person puts to sale the equity of redemption In execution of a simple money decree, the rights of the mortgagee] under the mortgage & the mortgage security remain unaffected. Section 72 of the Transfer of Property Act would not, therefore, cover the case of such a payment. This view has also been held in 'Sheo Dul-are v. Mt. Batasha', 16 Oudh Gas 48 (A), as also in some other cases. The learned counsel for the appellants has not been able to cite any law in support of his contention that payment under such circumstances would entitle the mortgagee to recover the amount paid by him to save the equity of redemption from being sold.

6. The other question, whether a notice was or was not given to the mortgagors before the payment was made, does not therefore, arise and the view taken by the lower appellate court that the appellants were not entitled to recover the sum of Rs. 103/12/3 appears, therefore, to be the correct view.

7. The next point which has been argued on behalf of the appellants is that a decree in respect of the unpaid theka money, which represented interest, should have been passed in favour of the appellants. I am unable to agree with this contention. The theka money represented the profits of the land let out on theka and it was open to the mortgagee to sue for recovery of the theka money in the revenue courts. If he did not do so, it would not be open to him to claim that amount along with the mortgage money in a suit brought by him. There is, therefore, no merit in this contention also and the view taken by the two courts below cannot be assailed. No other point has been pressed in arguments.

8. In this case although both the points argued arose out of the same judgment and decree, two separate appeals had been filed. As both the appeals have been heard, it is not necessary to decide whether two separate appeals could be maintained.

9. Both the appeals are dismissed with costs.