

APPELLATE CIVIL.

Before Sir Henry Richards, Knight, Chief Justice, and Mr. Justice Tudball.

HASAN ALI KHAN (PLAINTIFF) v. AZHAR-UL-HASAN AND OTHERS

(DEFENDANTS).*

1918
July, 26.

Mortgage—Construction of document—Mortgage of entire sixteen annas of village without reservation—Grove lands.

Where a zamindar mortgages his entire zamindari rights in a village without any reservation whatever, there is no reason why the mortgage should not be held to include the mortgagor's rights in grove land purchased some time before the execution of the mortgage.

THE facts of this case were as follows :—

One Ali Mazhar was the sole proprietor of the entire 16 annas of a certain zamindari mahal. He obtained decrees against certain persons who held certain shares in three groves, and in execution thereof he purchased those shares, namely, $\frac{7}{12}$ in groves numbered 231 and 344, and $\frac{3}{4}$ in grove No. 778. Subsequent to the purchase he executed two mortgages, by which he hypothecated "the entire 16 annas zamindari together with all appurtenances, without any exception or reservation." The mortgagee brought a suit for sale on the mortgages, and in execution of the decree for sale purchased the entire property herself. She then sold all her rights to the present plaintiff. The defendants, sons of Ali Mazhar, were entered in the revenue papers as tenants of the groves in question, and were in possession thereof. The plaintiff sued for possession of the groves. The plea raised in defence was that Ali Mazhar's rights as a grove-holder were separate from his zamindari and were not comprised in the mortgages and, consequently, had not passed by purchase to the plaintiff. The court of first instance decreed the suit, but the lower appellate court sustained the defendants' plea and dismissed the suit. The plaintiff appealed to the High Court. The appeal coming on for hearing before a single Judge was referred by him to a Bench of two Judges.

Babu Piari Lal Banerji (with Mr. B. E. O'Connor and Mr. S. A. Haidar), for the appellant :—

At the date of the mortgages by Ali Mazhar he was the sole zamindar, and consequently he could not at the same time also

* Second Appeal No. 1255 of 1916, from a decree of Kunwar Sen, Subordinate Judge of Allahabad, dated the 22nd of May, 1916, reversing a decree of Triloki Nath, Second Additional Munsif of Allahabad, dated the 12th of April, 1915.

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hold inferior rights in the same land. By his purchase he acquired the rights of the grove-holders, but those rights merged completely in his zamindari rights. If there had been other co-sharers in the zamindari, then it would be possible that he could have possessed distinct grove-holder's rights as against the proprietary body. The case of *Har Lal v. Himmat Rai* (1) was discussed and distinguished. The mortgages were very comprehensive and expressly left no reservations of any rights whatsoever.

Mr. *Nihal Chand* (for Mr. *W. Wallach*, with him *Munshi Haribans Sahai*), for the respondents :—

The mortgages were only of the zamindari rights, and *Ali Mazhar* intended to keep apart the rights of a grove-holder which he had acquired. Merger was a question of intention, and the lower appellate court had found that the intention of *Ali Mazhar* was to keep those rights separate. The case of *Amatoo v. Muksud Ali* (2) was relied on. As was pointed out in the case mentioned by the appellant, a grove-holder's rights would not necessarily or ordinarily be included in the term zamindari property.

Babu Piari Lal Banerji, was not heard in reply.

RICHARDS, C. J., and TUDBALL, J.:—The facts connected with this appeal may be shortly stated as follows :—One *Ali Mazhar* having become the owner of the sixteen anna mahal mortgaged the same to the plaintiff's predecessor. The mortgage is most comprehensive in its terms, the mortgagor purporting to mortgage his entire interest without any sort of reservation. A decree was obtained on foot of this mortgage. The property was sold and purchased by the plaintiff or his predecessor. The present suit is brought to recover certain fractional shares in three groves. It appears that prior to the mortgage which we have mentioned above *Ali Mazhar* obtained decrees against certain persons who had certain rights as grove-holders. In execution of these decrees he put up to sale the interest (whatever it was) of the grove-holders and purchased it himself. The argument put forward on behalf of the defendants is that this interest was an interest separate altogether from the zamindari, and it did not

(1) *Weekly Notes*, 1885, p. 305. (2) (1914) 28 *Indian Cases*, 314.

form portion of the mortgaged property, and consequently did not pass to the plaintiff when he purchased under the mortgage decree. It seems to us that this contention is not sound. We have already mentioned that the acquisition of the grove-holder's interest was prior to the mortgage and we have referred to the terms of the mortgage deed. There was no reason of any kind why the interest of the grove-holders should not merge in the inheritance. Ali Mazhar was the sole owner of the sixteen anna mahal. At that time there was no reason why it would in any way be for the benefit of Ali Mazhar to keep outstanding the interest of the grove-holders. It is absolutely clear under the circumstances of the present case that the interest of the grove-holders, purchased and acquired by Ali Mazhar, merged in his estate as zamindar. Furthermore the very terms of the mortgage deed are quite wide enough to include and comprehend every interest that he possessed at the date of the mortgage in the sixteen anna mahal which he sold. We allow the appeal, set aside the decree of the lower appellate court and restore the decree of the court of first instance with costs in all courts.

Appeal allowed.

Before Sir Henry Richards, Knight, Chief Justice, and Mr. Justice Tudball.

HIRDE NARAIN (JUDGMENT-DEBTOR) v. ALAM SINGH (DECREE-HOLDER)*.

Act No. IX of 1908 (Indian Limitation Act), section 4—Act No. X of 1897 (General Clauses Act), section 10—Pre-emption—Time for payment of pre-emptive price not to be extended beyond period fixed by decree.

Held that neither section 4 of the Indian Limitation Act, 1908, nor section 10 of the General Clauses Act, 1897, applies to the payment of money payable by the successful plaintiff under a decree for pre-emption.

THE facts of this case were as follows :—

In a suit for pre-emption a decree was passed, on the 11th of October, 1915, in favour of the plaintiff, directing him to deposit in court the sum of Rs. 2,000 within six months. The decree further provided that in the event of the plaintiff failing to do so the suit would stand dismissed with costs. The 11th of April, 1916, was a holiday. On the 12th of April, the plaintiff brought the

* Second Appeal No. 1644 of 1917, from a decree of J. H. Cuming, District Judge of Saharanpur, dated the 16th of July, 1917, reversing a decree of E. R. Neave, Subordinate Judge of Dehra Dun, dated the 15th of July, 1916.

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