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RAJ CHANDRA DHAR v. K. D. O. C. RAY.

YOUNG, OFFG. C.J.

with which the Appellate Court is ordinarily concerned is whether the evidence on the record is sufficient to support that decree, and that the question of due service of summons is the subject matter not of an appeal from the decree but of the special proceeding under Order IX.

In this case, it was not contended that the evidence, as it stood, was insufficient to support the decree, and, in the view I take, we are not concerned with the question whether, but for the refusal of the learned trial Judge to grant time, that evidence would have been subject to cross-examination and been supplemented by evidence on the other side.

I would accordingly dismiss the appeal with costs.

CARR, J.—I concur.

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Jan. 23.

APPELLATE CIVIL.

Before Mr. Justice Lentaigne and Mr. Justice Carr.

MAUNG PE GYI AND FOUR

v.

HAKIM ALLY.*

Sale with an option to repurchase within a certain period—Amount of repurchase money left blank in the document—Oral evidence to fill in the blank—Evidence Act (I of 1872) Section 93 and proviso 1 to section 92—Specific Relief Act (I of 1887), section 31—The document, a deed of mortgage by conditional sale—Transfer of Property Act (IV of 1882), section 58 (c)—Presumption as to the amount of repurchase money, when not specified.

Where a deed of sale of land contained a clause by which the purchaser undertook "to re-sell the land to the vendor at his request within three years for Rs. . . . ," *held* that the omission to insert the amount of the price for repurchase was attributable to either an oversight of both parties and was tantamount to a common or mutual mistake or to an intentional omission by the purchaser on whose instructions the deed was prepared for subsequently taking advantage of the omission as against his vendor and would amount to fraud on

* Civil First Appeal No. 60 of 1923 against the decree of the District Court of Myaungmya in Civil Regular No. 9 of 1922.

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his part and oral evidence under the circumstances to fill in the blank was admissible.

Held further, that such a document was clearly a mortgage by conditional sale as defined in section 58 (c) of the Transfer of Property Act and that, in the absence of any specific agreement as to the payment of a different sum for redemption, the mortgagor was entitled to redeem on payment of the "mortgage-money" which in such circumstance can only mean the amount actually due under the deed.

Surty—for the Appellants.

M. C. Naidu—for the Respondent.

CARR, J.—On the 30th April 1920, by the registered deed, Exhibit 1, the plaintiff-respondent conveyed his land, measuring 33·98 acres, to the defendants for a sum of Rs. 600. The deed contained also an ageement for repurchase by the plaintiff within three years. The amount to be paid for the repurchase was, however, left blank.

The plaintiff sued for specific performance of this agreement and for rectification of the deed or in the alternative for its cancellation. (He also alleged that the defendants had dispossessed him of an adjoining holding which is referred to as an "extension" but which in fact is larger in area than the original holding. This land he alleged that he had himself cleared and brought under cultivation. He prayed for possession of this land.) His contention as regards the repurchase was that the price was to be the original sum paid by him, he paying interest in the meantime and remaining in possession of the land.

The defendants alleged that the land was to be repurchased at the market price obtaining at the time of repurchase, and alleged that plaintiff remained in possession as their tenant, paying rent, not interest. (As regards the adjoining holding they alleged that they themselves cleared and brought it under cultivation.)

The District Judge gave the plaintiff a decree as prayed and the defendants now appeal.

The sixth ground of appeal alleges that plaintiff did not exercise his right of repurchase within three years. This is obviously wrong, since the suit was filed within two years of the date of the deed.

The fifth ground is that the Court (wrongly described as the Appellate Court) erred in finding that the "extension" was made by the respondent.

On this question I have no hesitation in agreeing with the District Judge that the extension was made by the plaintiff-respondent. His story is strongly supported by his witnesses, who are all persons likely to have a knowledge of the facts. On the other hand the appellant's story as to his clearing is extremely vague and unsatisfactory, as is the evidence of his witnesses. The appellant did not in fact work the purchased land himself and it is unlikely that he would employ coolies to clear the adjacent land. He himself has very inadequate knowledge of how much land he got cleared and what it cost him. His witnesses, too, appear to know very little about the matter. The impression created by their evidence is that had they been asked to point out the land to which they refer the majority of them would have been unable to do so. And they all live (except Po Tun) at a very considerable distance from the land. The first ground is to the effect that the lower Court should not have admitted oral evidence to fill up the blank. Section 93 of the Evidence Act is relied upon and that section read with Illustration (*b*) certainly seems to bear directly on this case. On the other hand proviso 1 to section 92 allows proof of any fact which will entitle any person to any decree or order relating to the document "such as fraud—or mistake in fact or law." And section 31 of the

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Specific Relief Act entitles a party on the ground of fraud or mistake to have a document rectified so as to bring it into accord with the real intention of the parties. Reading these provisions together I am of opinion that if either fraud or mistake be established evidence to fill the blank can be admitted.

Rendered freely the relevant part of the deed reads as follows—" (1) will resell to the vendor at his request within three years for Rs. ." The amount is all that is omitted. The only possible inference from this is that it was intended to insert the amount of the price for repurchase. And the omission to insert it can be attributed to only one of two reasons. Either it was omitted owing to an oversight of both parties, which would amount to a common or "mutual" mistake, or it was intentionally omitted by the defendant, on whose instructions the deed was prepared, in order that he might subsequently take advantage of the omission as against the plaintiff. That would amount to fraud on his part.

I am of opinion therefore that evidence on this point may be admitted. And on the evidence on the record I have no hesitation in agreeing with the finding of the District Judge that the plaintiff's version is correct and that the amount agreed upon was Rs. 600, the same as the consideration for the original sale.

In my view therefore the appeal fails.

The deed may be looked upon in another light. On the face of it the deed is clearly a mortgage by conditional sale as defined in section 58 (*c*) of the Transfer of Property Act. That being so in the absence of a specific agreement as to the payment of a different sum for redemption the mortgagor is entitled to redeem on payment of "the mortgage money," under section 60 of the Act. The mortgage

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money can in such circumstances mean only the amount actually due under the deed, in this instance the amount of the original loan. From this point of view also the plaintiff is entitled to the relief sought.

I would therefore dismiss this appeal with costs.

LENTAIGNE, J.—I concur.

APPELLATE CIVIL.

1924

Jan. 30.

Before Mr. Justice Pratt and Mr. Justice MacColl.

HAJI PU AND THREE
v.
TIN TIN.*

Practice—Order granting permission to administratrix to sell immoveable property, whether appeal lies from—Probate and Administration Act (V of 1881), section 86—Civil Procedure Code (V of 1908), section 105—Considerations which should guide the Court in granting permission to sell immoveable property.

Held, that an appeal lies from an order of the District Judge granting permission to an administrator to sell immoveable property and that section 105, Civil Procedure Code, did not appear to affect the provision of section 86, Probate and Administration Act.

Per PRATT, J.—"It was not desirable that permission should be given to sell immoveable properties not in the possession of the administratrix, to some of which third parties claimed an absolute title and others of which were subject to ostensible encumbrances, unless it was proved that other properties, not the subject of contention, were unavailable for sale.

The Court ought also to have satisfied itself that the sales were necessary and in the interest of the estate as a whole."

Abiram Dass v. *Gopal Dass*, 17 Cal., 48; *Brojo Nath Pal* v. *Dasmony Dassee*, 2, C.L.R., 589—*referred to.*

Uma Charan Dass v. *Muktakeshi Dasi*, 28 Cal., 149—*followed.*

Kalimuddin v. *Maharni*, 39 Cal., 566—*dissented from.*

Lutter—for the Appellants.

Sanyal—for the Respondents.

PRATT, J.—This is an appeal against an order of the District Court granting permission to the Adminis-

* Civil Miscellaneous Appeal Nos. 66 and 67 of 1923 from the order of the District Court, Mandalay, in Civil Miscellaneous case No. 172 of 1920.