

A

GURUCHARAN KOERI AND ORS.

v.

BIBI SHAMSUNISSA

JULY 27, 1993

B

[K. JAYACHANDRA REDDY AND N.P. SINGH, JJ.]

Code of Civil Procedure, 1908 : S.100—Suit for redemption—Whether is for entire property mortgaged or for a part thereof—Held, is a mixed question of fact and law.

C

The plaintiff-appellants filed a suit for redemption which was dismissed by the trial court, but was decreed by the first appellate court. The defendant filed a second appeal before the High Court and successfully contended that the suit was not maintainable as it had been filed only in respect of a part of the land mortgage.

D

On appeal by special leave to this Court, the plaintiff-appellants contended that the plea of non-maintainability of the suit raised by the defendant pertained to a question of fact which could not have been raised for the first time in the second appeal before the High Court.

E

Allowing the appeal, this Court

HELD : The question - whether the suit for redemption was in respect of all the plots which had been mortgaged or only in respect of a part thereof - raised by the defendant is a mixed question of fact and law. The objection had not been taken at any earlier stage and the courts below did not go into this question. The case is remitted back to the Court for disposal in accordance with law. [417-F-H; 418-A]

F

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 3403 of 1993.

G

From the Judgment and order dated 8.5.1992 of the Patna High Court in Appellate Decree No. 149 of 1983.

S.B. Sanyal and Vishnu Mathur (N.P.) for the Appellants.

H

Uday Sinha and A. Sharan (N.P.) for the Respondent.

The Judgment of the Court was delivered by

N.P SINGH, J. Leave granted.

The plaintiffs are the appellants before this Court. They filed a suit for redemption, of mortgage bond dated 28th July, 1916 executed by Gopal Mahto, the ancestor of the appellants in favour of one Akram Hussain. The suit had to be instituted when the defendant refused to accept the mortgage money, which was tendered to her. The Trial Court dismissed the said suit. On Appeal being filed by the appellants, the suit was decreed by the learned Subordinate judge and the respondent was directed to withdraw the money deposited in her favour had to deliver vacant possession of the land to the appellants within the time fixed by the court, failing which the appellants were to take possession of the disputed land through the process of the Court. On second appeal being filed on behalf of the defendant/respondent, the High Court dismissed the suit on the ground that as the suit for redemption had been filed only in respect of one of the five plots, which had been mortgaged in favour of the predecessor in interest of the defendant, the said suit was not maintainable.

Before the High Court, a stand was taken on behalf of the respondent that by the aforesaid mortgage deed, plot Nos. 557, 558, 559, 564 and 565, having a total area of 74 decimals, were mortgaged, but the appellants had sought redemption in respect of two plots i.e. plot Nos. 565 and 551; out the two plots, plot No. 551 was never the subject matter of mortgage and as such the suit for redemption was not maintainable. The appellants have produced a copy of the plaint along with the schedule thereof and it was urged on their behalf that the suit has been dismissed by the High Court under misconception about the factual position in respect of the subject matter of dispute. A grievance was also made that the question whether the suit for redemption is in respect of all the plots which had been mortgaged or only in respect of part thereof, was a question of fact and as such any such plea regarding non-maintainability of the suit, should not have been taken on behalf of the respondent for the first time before the High Court.

The learned counsel appearing for the respondent, could not point out from the records of the appeal that this objection had been taken on behalf of the respondent at any earlier stage and the courts below have gone into this question. It cannot be disputed that it is a mixed question

¹ A of fact and law. In such a situation, we are left with no option but to set aside the judgment of the High Court and to remit the case back to the High Court for disposal in accordance with law. The appeal is accordingly allowed. In the facts and circumstances of the case, there shall be no order as to costs. As the suit had been filed as early as in the year 1970, the High Court is requested to dispose of the said appeal as early as possible.

R.P.

Appeal allowed.