

(1921) 05 PAT CK 0030
In the Patna High Court

Babu Edal Singh and Others

APPELLANT

Vs

Babu Ram Bahori Lal and Others

RESPONDENT

Date of Decision : 16-05-1921

Acts Referred:

Bengal Tenancy Act, 1885 — Section 60
Land Registration Act, 1876 — Section 78

Citation : AIR 1921 Patna 344 : 62 Ind. Cas. 843

Hon'ble Judges : Ross, J;Jwala Prasad, J

Bench : Division Bench

Judgement

Jawal Prasad, J.—The plaintiffs are the appellants. They have obtained a mortgage-decree based upon three bonds of 1907 executed by Ram Richha Prasad Singh and Shiva Nandan Singh. The mortgagors had 9 annas, 4 pies milkiat interest and 6 annas, 8 pies of mokarrari interest in a village named Shekhopur Indaut, otherwise called Mayi Chhoti Jagir, in the District of Patna, bearing Touzi No. 231/10129. The milkiat and the mokarrari interest amounted to 16 annas of the Mouza and this entire 16 annas was mortgaged to the plaintiffs in the mortgage-bonds on the basis of which the preliminary decree of the 23rd of February 1911 was obtained. The decree was made final on the 8th of April 1911. In execution of the said decree the mortgaged property detailed as above was sold on the 27th of November 1915. The plaintiffs were the purchasers at the auction sale. The sale was confirmed on the 25th of January 1916 and was followed by the grant of a sale-certificate and delivery of possession on the 17th of March 1916. The defendant No. 1, Ram Bahori Lal, had a mortgage of 12 annas interest of the mortgagors in the village. His mortgage was dated the 15th of April 1909.

2. On the 6th of June 1910, Ram Bahori Lal along with the other defendants Nos. 2 to 4 brought a suit to enforce the mortgage and obtained a preliminary decree on the 16th August 1910, which was made final on the 7th of January 1911. They obtained delivery of possession on the 22nd February 1915. In the writ of the delivery of possession the property was detailed as follows:--9 annas, 4 pies

milkiat interest and 2 annas, 8 pies mokarrari interest.

3. In the meantime the equity of redemption of the mortgagors in the property was purchased by the Gorakhpur Bank, Limited, and its name was substituted in place of the mortgagors in Register D of the Collectorate on the strength of the sale certificate, dated the 1st July 1913. The defendants, after obtaining delivery of possession on the 2nd February 1915, got their names mutated in place of the Gorakhpur Bank, Limited, in Register D, on the 25th August (sic). (Exhibit X). The mortgage-bond of the defendants was in the name of defendant No. 1, but the decree and the execution proceedings ending with the delivery of possession were all in the names of all the defendants, inasmuch as they were members of a joint family and the defendant No. 1 was the karta of the family and the interest in the mortgage belonged to all the members of the family. In the mortgage bond of the defendants, dated the 16th June 1909, the defendant No. 1, Ram Bahori Lal, is not described as a karta of the family, or as taking the mortgage on behalf of the family. But the fact is not denied by any of the parties in the suit that the bond in question belonged to the entire family and Ram Bahori Lal was, as a matter of fact, acting as karta of the family. Defendant No. 1, Ram Bahori Lal, was alone made party in the mortgage suit of the plaintiffs. He was also not described as having been sued in the representative capacity and as karta of the family of the defendants. Defendant No. 2 is the brother of Ram Bahori Lal, defendant No. 1. Defendant No. 3 is his cousin. Defendant No. 4 is the minor son of Ram Kishun, defendant No. 2. Defendant No. 5 is the minor son of Ram Bahori Lal, defendant No. 1, and was not born at the time of the execution of the mortgage-bond.

4. After obtaining delivery of possession of the property on the 17th March 1916, the plaintiffs applied for the mutation of their names in place of the defendants Nos. 1 to 5 in the Land Registration Department of the Patna Collectorate. This application naturally was in respect of the milkiat interest of 9 annas, 4 pies, inasmuch as the register maintained by the Collectorate under the Land Registration Act relates only to such an interest, and not to mokarrari interest. The application of the plaintiffs in the Land Registration Department was opposed by the defendants as well as by one Ram Autar Lal, whose name will be mentioned more prominently hereafter in connection with the principal pleas taken by the defendants. Ram Autar Lal claimed to be registered on the basis of a sale certificate (Exhibit 1), dated the 10th February 1916, and dakhaldahani, dated the 28th February 1916, but he had purchased only the Jagirdari interest, in the village and, therefore, his objection was summarily rejected, and we are not at all concerned with his Jagirdari interest in the present case.

5. The objection of the defendants prevailed in the Land Registration Department to this extent, that the names of the plaintiffs were substituted in the place of defendant No. 1, Ram Bahori Lal, but were refused to be so registered in place of the other defendants Nos. 2 to 5. This was obviously upon the ground that the name of Ram Bahori Lal alone appeared in the decree and the sale-certificate of

the plaintiffs, and not of all the ether defendants. The matter in the Land Registration Department was fought up to the Commissioner, and the order of the Deputy Collector remained unaltered: Vide Exhibits 15, 16 and 17. The final order of the Commissioner is dated the 10th January 1917. This is the cause of the plaintiffs coming to Court in the present litigation. They filed their plaint on the 30th of January 1917, stating the dates of the several orders of the Registration Department, culminating in that of the Commissioner of the 10th January 1917, as the dates on which the cause of action accrued to them. The plaint is a pretty long one, giving in detail and in chronological order the events that led to the institution of the present suit. We are not at all concerned in this case with all the details. It will be sufficient to refer only to the main features and allegations in the plaint. The plaintiffs assert that they acquired the proprietary and the mokarrari interest belonging to the mortgagors, Ram Richhya Singh and Shiva Nandan Prasad Singh, by virtue of the auction-purchase on the 27th April 1915, which was perfected by its confirmation and grant of sale certificate and was materialised by the delivery of possession on the 17th March 1916. They allege that they were in possession of the property as aforesaid and that the order of the Revenue Department refusing to register their names did not affect their possession, but might create difficulty or danger in future in their realising arrears of rent from the tenants by reason of the provisions in the Bengal Tenancy Act (Section 60) and the Land Registration Act (Section 78). The principal relief sought by the plaintiffs is a declaration of their title to the property in dispute so as, on the strength of the declaration, to obtain the mutation of their names in the Collectorate to enable them to remove any bar to their realising rents from the tenants through Court. It is well hereto quote from the plaint the reliefs sought by the plaintiffs, for there has been a good deal of argument on both sides upon the actual nature and scope of the suit. They are as follows:

1. That it may be determined by the Court that the plaintiffs are the purchasers of the proprietary interest in 9-annas, 4-pies share in Mouza Shekhopur Indaut, otherwise called Mayi Chhoti Jagir, Parganna Beshwak, District Patna, bearing Touzi No. 231/10129, the jama sadar of the entire 16 annas being Rs. 354-0-4.
2. It may be determined by the Court that the defendants have no right to the 9-annas, 4-pies share.
3. If on account of the order passed in the Land Registration Department the plaintiffs be considered to be dispossessed from 7-annas, 5-pias, 12-karants share, then the defendants may be ousted therefrom, and the plaintiffs may be put in possession thereof; that mesne profits from the date of dispossession till the date of recovery of possession may be ascertained in the execution proceedings and on taking Court-fees, the amount may be awarded against the defendants liable for the same.
4. That costs in Court with interest till the date of realisation may be awarded against the defendants.

5. That besides the reliefs sought for above, the plaintiffs may be awarded any other relief to which they may be deemed entitled.

6. The defendant No. 1, the mortgagor Ram Bahori Lal, did not enter appearance. Defendant No. 2 and defendants Nos. 3 to 5 put in two separate written statements, but their defence was substantially the same, They pleaded that they had themselves purchased the property in dispute in execution of their own mortgage decree. That decree was passed on the 16th of August 1910 on foot of a mortgage, dated the 15th April 1909, in which 15 annas, 6 pies of the village was secured for the payment of the mortgage-money. The decree was made final in January 1911 and in execution of the decree the defendants purchased 9 annas, 4 pies milkiat and 2 annas, 8 pies mokarrari share in the village on the 2nd of February 1915 and July 1915 respectively. They also pleaded that they were not bound by the decree, the sale and the dakhaldahani of the plaintiff", inasmuch as they were not made parties to them, the defendant No. 1 only having been made party. In conclusion they set up the title of the purchaser of the property in dispute in a mortgage prior to that of the plaintiffs. That mortgage was dated the 1st of June 1907 with respect to 14-annas, 3-pies share of the Mouza and stood in the name of one Prem Narain. Prem Narain obtained a decree on foot of his mortgage on the 16th September 1914, making the plaintiffs and defendants as parties to the suit, and in execution of that decree Ram Autar Lal and Babu Lal Ram, whose name has already been mentioned while stating the case of the plaintiffs, purchased the property on the 19th of January 1916. That sale was confirmed on the 4th of March 1916. The defendants stated that the plaintiffs not having redeemed the prior mortgage-decree of Prem Narain, the right of redemption was extinguished and so also their purchase of the 27th of November in satisfaction of their own mortgage and subsequent confirmation of the sale and dakhaldahani of March 1916 are of no avail to them. In view of the pleadings of the parties, the following issues were framed for determination in the suit:

1. Have the plaintiffs any cause of action?
2. Have the plaintiffs any subsisting title to the Mouzah in suit?
3. What was the interest of Sheo Nandan and Ram Rachhya Prasad Singh in the Mouza in suit?
4. Were the plaintiffs ever in possession of the Mouzah in suit?
5. Did defendant No. 1 represent defendant No. 2 and other members of his family in suit No. 235 of 1909" (the plaintiffs" suit based upon their mortgages of 1907 in which they obtained a decree and ultimately purchased the property on the 27th November 1915).
6. Are the bonds in favour of the plaintiffs valid and for consideration?
7. Are the plaintiffs entitled to recover possession?

8. To what relief, if any, are the plaintiffs entitled?

7. The learned Subordinate Judge held that the bonds in favour of the plaintiffs were valid and for consideration and thus disposed of Issue No. 6 in favour of the plaintiffs. In fact the point in that suit was not seriously pressed before him, nor has it been pressed before us. He also held that defendant No. 1, Ram Bahori Lal, who was made party in the mortgage suit of the plaintiffs, sufficiently represented the other defendants Nos. 2 to 5. Accordingly, he decided Issue No. 5 also in favour of the plaintiffs. The finding in this issue and the legal effect of it has been questioned by the respondents in this appeal as a ground for the final order passed by the Subordinate Judge dismissing the plaintiffs' suit. We shall, therefore, have to consider this issue in the present appeal. As to Issue No. 3, the Subordinate Judge held, and he was supported by the khewat Exhibit B-1, that the milkiat interest in the village of Sheo Nandan and Ram Rachhya was 9 annas, 4 pies and the mokarrari 6 annas, 2 pies. This reduces the interest of the mortgagors in the village from 16 annas to 15 annas, 6 pies. But that does not affect their milkiat interest of 9 annas, 4 pies with which only we are concerned in the present litigation. The Subordinate Judge decided the remaining issues against the plaintiffs. He has held that the plaintiffs have no valid and subsisting interest in the village by virtue of their auction-purchase of the 27th November 1915 and that they did not obtain possession and were never in possession of the property in dispute by virtue of their purchase. Accordingly, the learned Subordinate Judge dismissed the plaintiffs' suit.

8. The principal contention of the learned Vakil on behalf of the plaintiffs-appellants has been that the Court below was wrong in holding that the plaintiffs' purchase was in any way affected by the purchase of the property in question by Ram Autar and Babu Lai in execution of the prior mortgage decree of Prem Narain (Exhibit R). The plaintiffs purchased the property as stated above on the 27th of November 1915. Their purchase was confirmed on the 25th of January 1916 and dakhaldahani on the 17th of March 1916. The dakhaldahani (Exhibits 7, 7-a and 8) mentions the aforesaid dates. It also mentions taking from the sale proclamation the prior mortgage of Prem Narain and the decree obtained thereon. That decree, as already observed, was obtained on the 16th of September 1914 and the sale had taken place on the 19th of January 1916 subsequent to the purchase of the plaintiffs. Therefore, before the sale in execution of the decree of Prem Narain took place, the plaintiffs had already purchased property in the execution of their mortgage decree. The sale of Prem Narain was also confirmed subsequent to that of the plaintiffs. After the confirmation of the plaintiffs' sale the property in dispute vested in the plaintiffs-purchasers by reason of Section 65 read with Order XXI, Rule 85 of the Code of Civil Procedure. Under those provisions the property vested in the plaintiffs on the 27th of November 1915. The plaintiffs, no doubt, did not redeem the prior mortgage decree of Prem Narain in which they were made parties, and consequently the sale of Prem Narain would prevail as against the plaintiffs. The purchaser in execution of the decree of Prem Narain was, therefore, entitled to

delivery of possession of the property as against the plaintiffs. That was the position of the purchaser of the property in execution of the decree of Prem Narain as against the defendants as well. The position of the defendants was even worse than that of the plaintiffs, inasmuch as their mortgage was of a subsequent date and they have only the right to redeem the plaintiffs' mortgage. Their decree or purchase or the delivery of possession (2nd February 1915) would not in the least affect the right of the plaintiffs in the property in question. This is upon the assumption that all the defendants Nos. 1 to 5 are bound by the plaintiffs' decree. No doubt, defendant No. 1 was admittedly a party and unquestionably he is bound by the plaintiffs' decree and the sale. The question for consideration is whether the defendants can set up a title of the purchaser of the property in the execution of Prem Narain's decree as a defense against the plaintiffs' claim arising under their purchase in execution of their own mortgage-decree. In other words, whether the defendants can be permitted to defeat the plaintiffs' claim not upon the strength of their own title, but that of a prior mortgagee whose title was paramount to both the plaintiffs and the defendants. It has not been attempted, nor was it permissible, even to contend that the defendants can on the basis of their own title resist the plaintiffs' claim. It was pointed out that the claimant to the seizure of the goods must show a better title of some sort in himself than that of the execution creditor and cannot give himself a title or defeat that of the execution creditor by merely showing that some one else has a title superior to that: vide *Richards v. Jenkins* (1887) 18 Q.B.D. 451 : 56 L.J.Q.B. 293 : 56 L.T. 591 : 35 W.R. 365 and *Carne v. Brice* (1840) 7 M. & W. 183 : Dowl. P.C. 884 : 10 L.J. Ex. 28 : 4 Jur. 1115 : 151 E.R. 731 : 53 R.R. 684. That question, so far as the claimant is concerned, must be left to the execution-creditor and the third person to determine: *Jennings v. Mather* (1902) 1 K.B.1 : 70 L.J.K.B. 1032 : 85 L.T. 396 : 50 W.R. 52 : 8 Manson 329 : 18 T.L.R. 6 and *Usher v. Martin* (1890) 24 Q.B.D. 272 : 59 L.J.Q.B. 11 : 61 L.T. 778. The defendants in the present case could only be permitted to raise the title of a third person, or what is technically called *jus tertii*, when they were able to show some right in themselves as against the plaintiffs or in some third person through whom they derived such a right; but having no right or title in themselves as against the plaintiffs, they cannot possibly be permitted to defeat the claim of the latter simply by showing a superior title in a third person who does not concern himself with the present litigation. This appears to me to be the true situation of the legal question raised in this issue, as is evident from the aforesaid authorities that I have consulted. This appears to be in consonance also with the principle. I, therefore, hold that the defendants have no right in the present case of pleading a title in the purchaser in execution of the prior decree of Prem Narain. We have not got the sale-certificate obtained by the said purchaser in Prem Narain's decree on record in the present case, nor do we know whether the purchaser has taken out delivery of possession of the property. We were, however, told by the learned Vakil on behalf of the respondents that the said purchaser has obtained a sale-certificate and he wanted to show us the same. We do not, however, think that that fact in any way

affects the decision of the present point. The plaintiffs have, under the provisions of the CPC quoted above, a perfect title to the property in dispute as against the defendants and they were entitled to the declaration of their title they seek in the present case so far as the defendants are concerned, and as already observed, unless and until the purchaser in the prior mortgage decree wants to enforce his right against the plaintiffs, the plaintiffs must be deemed to be the rightful owners of the property.

9. Now, as to whether the defendants Nos. 2 to 5, who are the respondents before us, are bound by the plaintiffs' decree. The answer to this depends upon whether they would be considered to be parties to the suit in which the plaintiffs obtained a decree. Defendant No. 1, as the holder of the mortgage, dated the 15th April 1909, subsequent to that of the plaintiff of 1907, was made a defendant in the suit (Suit No. 235 of 1909). The mortgage is in the name of defendant No. 1 only, without showing as to whether he took the mortgage in his personal capacity or as representing the joint Mitakshara family of which the defendants Nos. 2 to 5 in the present case are the members. The plaintiffs, therefore, made defendant No. 1 only as party to the suit. It, however, appears that the mortgage in question did really belong to the entire family and defendant No. 1 acted simply in the representative capacity on behalf of the family, though he did not disclose his capacity in the mortgage-bond. That this is so is evident from the suit brought by the defendants themselves to enforce their own mortgage of the 15th April 1909. In that suit it was clearly stated that defendant No. 1 was the karta of the family and took the mortgage-bond in that capacity. As a matter of fact, the claim of defendants Nos. 2 to 5 is based upon the fact that defendant No. 1 acted as karta in the said mortgage transaction of 1909. Therefore, defendant No. 1 described in the bond acted in the representative capacity and similarly when he was described in the mortgage suit of the plaintiffs he represented the entire family. It is conceded by the learned Vakil on behalf of the respondents that a decree can be obtained against the karta of the family as binding upon all the members thereof and that in execution of such a decree the entire family property would pass to the purchaser at the auction-sale. The learned Vakil, however, sought to make a distinction between the decrees obtained upon contracts entered into by the karta and the decrees obtained on foot of a mortgage-bond, which is consummated by the delivery of possession of the property. I do not appreciate this distinction. I, therefore, agree with the Court below that the defendant No. 1 represented the entire family when he was made a party in the case brought by the plaintiffs to enforce their mortgage. Therefore, all the defendants are bound by the plaintiffs' purchase and the delivery of possession.

10. Now, as to whether the plaintiffs obtained possession of the property under the writ of the Court executed on the 17th of March 1916, it is impossible to appreciate and understand the argument of the learned Subordinate Judge in his judgment, whereby he came to the conclusion that the plaintiffs were not in possession of the property and that the defendants were in possession at least in

respect of the milkiat interest in dispute. In fact he has not addressed himself to the legal aspect of the question created by the execution of the writ of delivery of possession. The fact that the writ was duly executed is not seriously challenged by the respondents. In fact, it was given effect to in the Land Registration Department, inasmuch as the names of the plaintiffs were registered in respect of the property in dispute on the strength of their purchase and the writ of delivery of possession. The Land Registration Authorities, however, registered the plaintiffs' names only in respect of defendant No. 1 whose name stood in the sale-certificate as judgment-debtor, and refused to do so with regard to the names of defendants Nos. 2 to 5 whose names did not appear in the said certificate. It is admitted that the land in the village in question is held by tenants and the possession delivered by the Court was not an actual and direct possession over the lands of the village, but only a constructive possession, namely, the right to receive rents from the actual occupants of the land. Such a possession is technically for convenience" sake called symbolical possession as distinguished from the possession by actual delivery of land. The distinction has been made and recognised in the Code of Civil Procedure, Order XXI, Rules 35, 36, 95 and 96. The possession in this case was delivered under Order XXI, Rule 95. Such a delivery is as effectual against the judgment debtors as the actual delivery of possession. This view has been upheld by authorities: *Joggobundhu Mitter v. Purnanund Gossawami* 16 C. 530: 8 Ind. Dec. (N.S.) 350 and *Juggobunahu Mukerjee v. Ram Chunder Bysack* 5 C. 584: 5 C.L.R. 548 : 3 Shome L.R. 68 : 2 Ind. Dec. (N.S.) 979. Therefore, the possession delivered in this case was binding against the defendants, who were judgment debtors in the present suit. The plaintiffs would, therefore, be deemed to be in possession of the property on the 17th of March 1916. The learned Subordinate Judge was thus wrong in treating them as having never obtained possession or being out of possession. The plaintiffs' suit was principally a suit for a declaration of their title to the property in question as against the defendants. This relief was sought with a view to do away with the effect of the order of the Land Registration Authorities refusing the registration of their names as against defendants Nos. 2 to 5. No doubt they stated in relief No. 3 that in case they are dispossessed by defendants Nos. 2 to 5 on account of the order of the Land Registration Authorities, then they may be put in possession of the same; but nothing appears to have been done after the passing of the order of the Land Registration Department in the way of disturbing the possession of the property. It has already been shown that on that date which happened soon after the delivery of possession, the plaintiffs were in possession of the property in question. Therefore, the plaintiffs were never dispossessed. The relief No. 3 was only a contingent one, depending upon the events that might have happened after and in consequence of the order of the Land Registration Department, namely, their dispossession by the defendants. The real object of the suit was stated in paragraph 14 of the plaint, in which the plaintiffs clearly stated that they were in possession of the proprietary interest of the share on the basis of their purchase, but that on account of the order of the Deputy Collector in the

Land Registration Department a difficulty might arise in future in the way of their bringing a suit for the realisation of rent by reason of Section 60 of the Bengal Tenancy Act and Section 78 of the Land Registration Act.

11. We, therefore, pet aside the findings of the Court below on Issues Nos. 1, 2, 4 and 8 and hold that the plaintiffs are entitled to a declaration as set forth in relief No. 1 of the plaint, namely, that they had title to the property in dispute as against the defendants in the case. The appeal is, therefore, allowed with costs.

Ross, J.

12. I agree.