

(1949) 10 PAT CK 0004

In the Patna High Court

Case No : A.F.O.D. No's. 56 and 93 of 1946

Batuk Prasad Bhagat and Another

APPELLANT

Vs

Rudra Das Chakravarty and Others

RESPONDENT

Date of Decision : 26-10-1949

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 22 Rule 4, Order 6 Rule 2, Order 7 Rule 1
Limitation Act, 1908 — Article 142, 148, 12, 6, 6
Transfer of Property Act, 1882 — Section 60

Citation : AIR 1950 Patna 206

Hon'ble Judges : Sinha, J; Reuben, J

Bench : Division Bench

Advocate : Girijanand Prasad, in No. 56, L.M. Ghosh and S.C. Mazumdar, in No. 93, for the Appellant; L.M. Ghosh, S.C. Mazumdar, Gauri Shankar Prasad, Ramanugrah Narayan Singh, (in No. 56) and Rajani Kant Sinha, (in No. 93), for the Respondent

Judgement

Reuben, J.—These two appeals are directed against a decision of the Subordinate Judge at Hazaribagh dated 22nd December 1945, decreeing in part a suit impugning the validity of three mortgage decrees and the sales held in execution thereof.

2. Three simple mortgage bonds were executed on 10th July 1910, each hypothecating a one-third milkiat share in villages Dania, Lalpania and Khakhanda in the jurisdiction of Police Station Gomia to secure a sum of Rs. 2,200. The mortgagors sold their entire interest in these villages to the late Kalachand Chakravarty, father of the plaintiff, by a sale-deed dated 23rd March 1914. The mortgagors (mortgagees) sued on their bonds and obtained decrees for sale in Mortgage Suits No. 123 of 1917, 48 of 1918 and 49 of 1919. The property hypothecated was sold in execution of these decrees on 3rd February 1920, 4th February 1921 and 4th July 1921, respectively. In each case, the purchasers were the mortgagees decred-holders who subsequently transferred their rights under the purchase to Ram Ratan Bhagat, who was himself a joint

decree-holder. Defendant 3 is the heir of Ram Ratan Bhagat and big possession over the property is admitted. The plaintiff sued for a declaration of the nullity of the mortgage decrees and the sales thereunder and for recovery of the property. The validity of the decree and sale in Mortgage Suit no. 123 is challenged on the ground that the final decree was passed and the execution was levied against Kalachand after his death, in Mortgage Suit No. 48 on the ground that the plaintiff was not impleaded either in the suit or the execution and in Mortgage Suit no. 49 on the ground that the plaintiff, then a minor, was not properly represented and, in the alternative, that there was gross negligence on the part of his guardian ad litem. In addition, there was a prayer for a decree for redemption of the simple mortgages.

3. The Subordinate Judge decreed the suit in respect of mortgage Suit No. 123 of 1917 accepting as established the allegations of the plaintiff. He has held that the plaintiff was properly represented in the other two suits, and has refused relief in respect thereof. Hence, the pre-sent appeals. Defendant 2 is the appellant in Appeal No. 56 and the plaintiff in Appeal No. 93.

4. The first hurdle in the way of the plaintiff is that of limitation. He was a minor when the sales in question took place, and it is admitted that by the time he attained his majority on 4th May 1940, the period of limitation for the filing of a suit for recovery of possession had expired. u/s 6 read with Section 8, Limitation Act, the period of limitation for the filing of a suit was extended by three years. This suit was filed on 5th May 1943. In holding that limitation is saved, the learned Subordinate Judge reckoned this period of three years from the date of attainment of majority, and excluded this date itself under the provisions of Section 12 of the Act. It appears to me that there are two mistakes in his reckoning. u/s 6, Sub-section (1), a person labouring under a disability is entitled to institute a suit within the same period "after the disability has ceased" as would otherwise have been allowed under Schedule I to the Act. u/s 8 the extension of time given by Section 6 shall not extend for more than three years "from the cessation of the disability." The three year period, therefore, must be counted, not from the date of attainment of majority, but from the date of the cessation of minority. In this case the cessation of minority occurred on 3rd May 1940, and the three-year period began to run on 4th May. Section 12 provides that, in computing limitation, "the day from which such period is to be reckoned shall be excluded." This would exclude 3rd May. According to the Subordinate Judge, 4th May was to be excluded. Even so, the period of three years would commence on 5th May 1940, and would expire at the last moment of 4th May 1913. Under the provisions of Section 8, therefore, 5th May would be too late for the filing of the suit. Mr. Ghosh has appealed to Section 9, General Clauses Act of 1897, which provides that where time is to be reckoned ""from" a particular date that date shall be excluded. This is a provision equivalent to Section 12, Limitation Act, and, as I have shown, does not help the plaintiff.

6. Mr. Ghosh meets this difficulty by arguing that the suit was not merely a suit

for recovery of possession, but also a suit for redemption, limitation for which is sixty years under Article 148 of the Schedule to the Limitation Act and has not yet expired. He says that, when his client was dispossessed, there were two remedies open to him: either, firstly, he could bring a suit for recovery of possession, or, secondly, he could sue to redeem the mortgagee. It appears to me that the moment it is conceded that a suit for recovery of possession lay the plaintiff comes within the mischief of Section 28, Limitation Act. Under that section, at the determination of the period limited to any person for instituting a suit for possession of any property, his right to such property shall be extinguished. The period in this case expired on 3rd May 1943; after that date, the plaintiff has no interest in the property and is not entitled to redeem.

7. Following another course of reasoning Mr. Ghosh has contended that the possession of the auction-purchaser in the mortgage sales was not illegal, that a purchaser in execution of a mortgage decree obtained in the absence of a necessary party acquires thereby the position of a mortgagee, and takes subject to the right of redemption of the party who was not impleaded in the suit. He cites in particular *Jugdeo Singh Vs. Habibulla and others* and *Hemanta Kumar Bose Vs. Jitendra Nath Pal and Others*, , as authorities that, where such a purchaser does not get possession, it is open to him to sue for possession subject to this right of redemption. The line of decisions of which these cases are instances is explained in *Bidhu Ranjan v. Soleman Pramanik* I. L. R. (1941) cal. 209 :A. I. R. 1941 cal. 613, by Mukherjea J., who delivered the leading-judgment in *Hemanta Kumar Bose Vs. Jitendra Nath Pal and Others*, :

"..... If the mortgagor himself or the person, in whom the mortgagor's rights were vested, was impleaded as a party defendant, but some person interested in the equity of redemption, as for "example, a puisne mortgagee, was left out, then the purchaser acquires not only the rights of the mortgagee plaintiff but the interest of the mortgagor as well, and he can sue for possession as purchaser of the mortgagor's rights subject to his first mortgagee's rights being redeemed by the puisne mortgagee, and he, in turn, being allowed to redeem the latter in his capacity as a mortgagor. But when the equity of redemption is entirely unrepresented in the mortgage Bait and the holder of the equity of redemption is not at all made a party to such suit, the possession of the purchaser cannot be higher than that of the assignee of the mortgagee's rights. As a purchaser of the mortgagee's rights he cannot sue for possession, and his only remedy would be to institute a suit for enforcement of the mortgage bond."

In the present case, the equity of redemption was entirely vested in the plaintiff, and, in his absence, the auction-purchaser would acquire no interest, so that his entry on the property would be the entry of a trespasser.

7. Great stress has been laid by Mr. Ghosh on the provisions of Article 148 of the Schedule to the Limitation Act read with Section 60, T. P. Act. Article 148 relates to a suit against a mortgagee to "redeem or to recover possession" of immovable property mortgaged. A suit for redemption is defined in Section 60, T. P. Act,

under which the mortgagor has a right at any time after the principal money has become due, on payment or tender of mortgage money, to require the mortgagee, among other things, "where the mortgagee is in possession of the mortgaged property to deliver possession thereof to the mortgagor. Mr. Ghosh argues that, even if the plaintiff's right to sue for recovery of possession as from a trespasser is barred, he is still entitled u/s 60 read with Article 148 to ask for delivery of possession. The remedy in question depends on the existence of the relationship of mortgagor and mortgagee between the parties. As I have pointed out, this relationship was dissolved as soon as the period limited for a suit to recover possession as from a trespasser expired. Apart from this, it seems clear to me that Section 60 and the lengthy period of limitation provided by Article 148 relate to a suit for recovery of possession from a mortgagee as such. Here, we are concerned with a simple mortgage. It is difficult to see how a simple mortgagee, who enters into possession by way of purchase of the equity of redemption, can be said to be in possession as a mortgagee. I am supported in this opinion by *Jiwa Khan v. Lakhmi Chand* 11 I. C. 429 : 232 P. L. R. 1911 and *Munna Lal v. Hamid Ali* 79 I. C. 39 : A. I. R. 1925 Lah. 53 (vide also *Humayun Qadar v. Suraiya Begam* AIR 1931 oudh 69 : 127 I. C. 252 and *Luchi Rai and Another Vs. Jagarnath Sahu and Others*, . In *Nizam Din Khan v. Rashid Ali Khan* 16 Lah. 12 ; A.I.R.1934 Lah. 902 , their Lordships went even further and applied the same principle to a case in which a usufructuary mortgagee who was not in possession under the mortgage obtained possession under an invalid sale. In reply, Mr. Ghosh has drawn our" attention to several decisions as authorities that a purchaser in execution of a mortgage decree, which by reason of some defect does not operate to extinguish the mortgage, becomes himself a mortgagee. *Khiarajmal v. Diam* 32 I. A. 23 : 32 Cal. 296 , which was followed in *Mir Wajid Ali and Another Vs. Alidad Khan and Others*, , is distinguishable in as much as it deals with a usufructuary mortgage. It is based on the principle that a person who has entered into possession of a property as a usufructuary mortgagee cannot, during the subsistence of the mortgage, make his possession adverse by asserting an independent title in himself, *Baijnath Prasad Singh Vs. Muneshwar Singh and Others*, is also a case of usufructuary mortgage. On facts further it was held by Wort J. that the usufructuary mortgagee did not set up an adverse title. It is easy to see why in the case of such a mortgage the possession of the mortgagee cannot become adverse for, so long as the mortgage subsists, the mortgagee is entitled to possession, and, whatever interest in himself the mortgagee may assert, it cannot be said that the owner of the equity of redemption is being wrongly excluded from possession. In *Ramjhari Koer Vs. Kashi Nath Sahai and Others*, , there were three incumbrances on the property, the first a usufructuary and other two simple mortgages. The second mortgagee obtained and executed a decree for sale on the foot of his mortgage without impleading the third mortgagee. He was himself the auction-purchaser and took delivery of possession. The third mortgagee then sought to redeem him and the possession of the second mortgagee for twenty years was set up as adverse. Their Lordships rejected this defence. This decision is only apparently in support

of the contention of Mr. Ghose. It was not a case of adverse possession at all, for the possession of the property seems to have been with the usufructuary mortgagee all along, in *Nannu Mal Vs. Ram Chander and Others*, the point at issue was the application of Sections 63 and 70, T. P. Act, and the question of adverse possession was not considered. *Gulabchandsao v. Batshiruddin Nasiruddin A. I. R. 1941 Nag. 141 : I. L. R. 1941 Nag. 244*, the decision of a single Judge is distinguishable on the faces, being a case for foreclosure. His Lordships did not lay down any principle inconsistent with what I have said above. He observes at p. 143 :

"Whether mortgagee's possession becomes adverse or not depends upon the nature of the right which the mortgagee asserts while entering into possession of the mortgaged property. If he enters into possession pursuant to the rights acquired by him under the mortgage his possession will in my opinion not be adverse. It is only when he takes possession in assertion of a right independently of the mortgage that his possession will become adverse."

In the case before him, he held that the mortgagee entered into possession as such and, therefore, his possession did not operate to bar the remedy of the non-impleaded party by way of redemption. *Sulleman Sashim v. Esso A.I. R. 1926 Sind 145 : 20 S. L. R. 277* was a case of simple mortgage, but is distinguishable on the facts as the mortgagor, being unable to discharge the mortgage debt, handed over possession to the mortgagees qua. mortgagees to enable them to realise, if not the principal, at least the interest out of the income of the mortgaged property. *Vallabhdas Mulji v. Pranshankar Nar-bheshankar A. I. R. 1929 Bom. 24: 113 I. C. 313* is similarly distinguishable. There, the mortgagee, exercising under the mortgage deed, his power of sale transferred the property to himself. *Fawcett J.* held in the circumstances that he entered into possession as a mortgagee. *Kali Mahmud Talukdar v. Dina Bandhu Dutt A. I. R. 1920 Cal. 937 : 62 I. C. 502* was decided on its own peculiar facts. The simple mortgagee got into possession of the mortgaged property under a sale which was subsequently set aside. He was allowed to continue in possession, however, and was treated as a mortgagee in possession being made to account for the actual realisations made by him. The only case comparable on the facts is *Awadh Singh v. Nanhai 46 I. C. 872 : A. I. R. 1917 Nag. 33*, a decision of the Additional Judicial Commissioner, Nagpur. The learned Judge applied to a case of simple mortgage an observation of their Lordships of the Privy Council in *Khierajmal v. Daim 32 I. A. 23 : 32 Cal. 396* which, in his opinion, was independent of the form of the mortgage. With respect, I would disagree.

The very first sentence of the passage relied on --"Their Lordships are satisfied that the possession has been that of the mortgagees throughout" distinguishes that case from a case of simple mortgage. In the one case the mortgagee enters as such and cannot alter the nature of his possession by subsequent assertion of title. In the other case, the mortgagee is not in possession and enters into possession in assertion of an absolute title in himself.

8. Mr. Ghosh has suggested somewhat half, heartedly that this is not really a case of dispossession, and has drawn our attention to the assertion in the plaint that, at the time the mortgage suits were filed and when the property was sold, the thika was still existing and the property was in the possession of the thikadars. Except for a statement by one of the witnesses that the thika was given for a period of six years, there is no evidence on record regarding the terms or the duration of the thika. On the contrary, it is expressly stated that the defendants (according to the plaintiff, the other defendants along with defendant 2 are the successors, in-interest of Kalachand Chakravarty) have been in possession of the mortgaged property since the date of their purchase, have sold wood from the jungle and have appropriated the usufruct of the villages.

9. Firstly, it was contended that the defendant has not pleaded adverse possession, and the point cannot be taken in appeal. It does not appear to me that the question of adverse possession really arise. The plaintiff has come to the Court with a clear case of dispossession. According to his story, the defendant 2's predecessors-in-interest entered into possession as trespassers and have dispossessed him. He seeks to recover possession from them. He cannot get relief unless he establishes that within the period limited by Article 142 of the Schedule to the Limitation Act read with Sections 6 and 8 of the Act he was in possession of the property. There is no evidence whatever to prove his possession within this period.

10. In view of my conclusions on the point of limitation, it is not necessary to go into the merits of these appeals on the facts. Since the issues have been raised before us, however, I shall briefly deal with them.

11. As regards Mortgage Suit No. 123 of 1917, the evidence is one-sided as to the date of the death of Kalachand Chakravarty, and the correctness of the finding of the Subordinate Judge is not challenged. Kalachand Chakravarty died before the passing of the final decree, which was, therefore, a nullity so far as the present plaintiff is concerned (*Jungli Lall v. Laddu Ram* 4 P. L. J. 240 : A. I. R. 1919 pat. 430). In the execution case proceedings were taken against Kalachand Chakravarty. There can, therefore, be no doubt that the sale was a nullity.

12. It appears from the order-sheets of Mortgage suits 48 and 49 that the plaintiff under the denomination "minor son (name not known) of Kalachand Chakravarty", was impleaded as a defendant under the guardianship of his mother Hemangiri Devi. Notices were issued both to him and to his proposed guardian. After service of the notices, and the failure of his mother to appear and consent to act as his guardian, a pleader Mr. Bimal Krishna Ghosh was appointed as the guardian ad litem. The pleader was given about one and a half months' time within which to file a written statement. During this period, he tried to get into touch with the minor but got no response. He was, therefore, unable to file any written statement. All this happened a long time ago, and there is no oral evidence available of what happened. Proceeding on the presumption that all official acts have been regularly performed, there can be no doubt that

Hemangini Devi, who was herself a defendant in one of these suits, was aware of the proceedings and her failure to appear herself and to instruct the guardian ad litem of the minor indicates the consciousness that there was no defence to these suits. On the evidence, therefore, the Subordinate Judge has rightly held that the minor was properly represented, and the plea of gross negligence against the pleader guardian is not justified.

13. The only evidence available regarding the proceedings in execution is contained in the register of civil suits, an extract copy of which has been placed upon the record. This contains entries relating to execution, and, in column 23 of the register, are entered the names of the persons against whom execution is taken out. In the entry relating to Mortgage Suit No. 48, there is no mention of the minor. We find from the decree (Ex. 8A) that he has also been omitted from the decree. In these circumstances, there is no certainty that execution was levied after notice to the minor. The sale would, therefore, be ineffective against him and, if this suit had not been barred, the plaintiff would have been entitled to a decree in respect of the property covered by this sale. In the register of civil suits relating to Mortgage suit no. 49, we find fifteen named persona against whom execution was taken out and a further entry "name not known." From the copy of the final decree (EX. 8B), it is clear that this entry relates to the plaintiff. In the circumstances, there is no reason to suppose that notice was not issued to him before execution was levied. The sale in this case, therefore, must be held to have been a valid sale. For the reasons given by me above, I consider that the appeal of defendant 2 should succeed and that of the plaintiff should fail. I would, therefore, modify the decree of the Subordinate Judge and direct that the suit be dismissed. In the peculiar circumstances of the case, as the plaintiff has failed on what is a technical point, I consider it fair that the parties should bear their own costs. There will be no order as to costs.

Sinha, J.

I agree.