

(1952) 01 J&K CK 0001
In the Jammu And Kashmir High Court
Case No : Civil Second Appeal No. 45 of 2006

Garibu and others

APPELLANT

Vs

Bhagat Lakhshami Narain

RESPONDENT

Date of Decision : 14-01-1952

Acts Referred:

Citation : AIR 1952 J&K 24

Hon'ble Judges : J.N.Wazir, C.J and Shahmiri, J

Bench : Division Bench

Advocate : D.N.Mahajan, L.N.Sharma, Advocates appearing for the Parties

Judgement

Wazir, C. J.

(1) This is defendant's second appeal and arises out of a suit instituted by plaintiff Lakhshami Narain for possession of a house and the adjoining

vacant land situate in Mohalla Gandoo Ki Chhawani, Jammu. The case for the plaintiff, as disclosed by the plaint, was that he was the brother of

one Bishen Dass and is his legal heir. L. Bishen Dass had acquired mortgagee rights by virtue of adverse possession over the land in dispute and

the defendants without any right or title are in possession of the property in dispute. Hence the suit for possession.

(2) The defendant resisted the suit on the ground that they had inherited the land from one Lassue and are the owners of the property mentioned in

the plaint. The plaintiff has thus no right to possession.

The trial Court of City Judge, Jammu, struck two important issues; (1) Had the possession of Bishen Dass over the property in dispute become

adverse? (2) Is the plaintiff a legal heir of Bishen Dass? The trial Court found both the issues in favour of the plaintiff and decreed his suit. On

appeal the learned District Judge affirmed the findings arrived at by the trial Court and dismissed the defendant's appeal. The defendants have come up in further appeal to this Court.

It is necessary to give the facts in detail which have given rise to this controversy between the parties. Nihal Chand and Hardial secured a mortgage

with possession of the property in dispute on 4th of Besakh, 1974, from one Lassu Doom for Rs. 70/. The mortgage deed was executed on that

date and was registered on 19th Besakh 1974. A rent note was simultaneously executed by the mortgagor in favour of the mortgagees. On 29th of

Jeth, 1975, Nihal Chand and Hardial mortgagees received Rs. 90/ from Bishen Dass and made an endorsement on the rent note stating therein that

they have received the mortgage money from Bishen Dasg and the mortgage deed be returned to the mortgagor. By virtue of this rent note L.

Bishen Dass is alleged to have stepped into the shoes of the mortgagees and completed his title as a mortgagee by prescription. On 2nd Jeth,

2002, a suit was brought by L. Bishen Dass against Mst. Mani, her husband Thoru and their son Sangara for ejectment from the property in

dispute. The suit was dismissed. He filed appeals before the District Judge and the High Court but was unsuccessful. Bishen Dass died leaving no

issue and Lakhshami Narain, the present plaintiff claiming to be his legal heir, brought the present suit out of which this appeal has arisen.

(3) The sole question for consideration in this 2nd appeal is whether adverse possession of L. Bishen Dass over the property in dispute has been

established. The Courts below have held that the plaintiff has proved the adverse possession of his predecessor in interest who acquired mortgagee

rights by virtue of prescription.

(4) A' preliminary objection has been raised on behalf of the respondent that both the Courts below have concurrently held that Bishen Dass has

been in adverse possession of the property in dispute and had acquired mortgagee rights by prescription. This being a finding of fact is conclusive

in second appeal, It is true that concurrent findings of facts are binding on this Court and cannot be challenged in second appeal but when the

findings of fact are based wholly upon surmises or conjectures without any positive evidence to support them, they can be set aside in second

appeal. In this case it is contended on behalf of the appellants that there is no

evidence to support the finding arrived at by the Courts below in regard to the adverse possession of Bishen Dass over the property in dispute. We have been taken through the evidence and we find that the contention of the appellant's counsel is correct. The plaintiff had to show that from S. 1975 to 1987 the plaintiff's predecessor in interest remained in adverse possession over the property in dispute and thus perfected his inchoate title of a mortgagee. There is no satisfactory evidence produced to show that L. Bishen Dass ever was in possession of the property after the rent note was endorsed in his favour by the original mortgagees. The Courts below have been impressed by the evidence of one Tek Chand who resides in the neighborhood of the property in dispute. He has stated that the property belonged to L. Bishen Dass and the defendants were his tenants. A suit was filed by Bishen Dass against the present tenants for ejectment and in that suit it was held that the relationship of landlord and tenant was not established and the suit was dismissed. In face of that finding in the suit which was between the same parties the evidence of Tek Chand has no weight.

(5) Another fact which appears to have influenced the Courts below is that in an execution application, Sant Singh versus Pheru, the judgmentdebtor Pheru filed written objection that he had no property and from this fact inference is being drawn that Pheru had no property and he was holding possession of the property in dispute on behalf of Bishen Dass, It may be pointed out that Pheru's admission that he had no property would not in any way lead to the inference that the property in dispute was in the possession of Bishen Dass.

(6) It has been further remarked by the learned District Judge' in his judgment that:

Jaswant Singh, plaintiff's witness has been produced who is a Recordkeeper of the Municipality and he states that a notice to Bishen Dass was issued by the municipality for a site situated in Gandu Ki Chhawani. From the record produced in the Court and from the oral evidence it is fully proved that Bishen Dass acquired the rights of mortgagee of the property in dispute. Although the mortgage deed was not registered yet he remained in possession of the mortgaged property for more than twelve years and was letting it off during this period and as such he had full rights

of mortgagee by lapse of time.

It is clear how the learned District Judge has drawn the inference from the notice issued to Bishen Dass in regard to a certain property in Gandu Ki

Chhawani that the property in dispute was in the possession of Bishen Dass. There is not an iota of evidence to show that Bishen Dass has ever

given the property on rent or realized any rent from any tenant during the period of 1975 to 1987. The finding of the learned District Judge that

Bishen Dass had acquired full rights of mortgagee by lapse of time is, therefore, based on no evidence at all.

(6a) It is a fundamental principle of law that when the question of acquisition of title by adverse possession has to be determined, clear and definite

evidence relating to different points of time should be adduced by the person who asserts that his possession has been adverse for a statutory

period and he has thus acquired title by prescription. In this case no evidence has been adduced to show that Bishen Dass ever realized rent from

the tenants after the rent note was endorsed in his favour by the mortgagees.

(7) Moreover, there is another circumstance which goes to show that Bishen Dass never asserted his rights as a mortgagee. From the endorsement

on the rent note it appears that the mortgage deed had to be returned to the mortgagor. If Bishen Dass wanted to step into the shoes of the

mortgagees he would have retained the mortgage deed in his own possession and would not have allowed the mortgagee to mention in the

endorsement that it would be returned to the mortgagor. The learned counsel for the respondent has not been able to explain as to why it was

stated in the endorsement that the mortgage deed should be returned to the mortgagor when the person in whose favour the endorsement was

made wanted to exercise the rights of mortgagees himself.

(8) It has been contended on behalf of the appellants that the plaintiff has not been able to establish that the property in dispute is the same as is

alleged to have been mortgaged in the year 1974. We have examined the boundaries given in the plaint and the boundaries which are mentioned in

the mortgage deed. We find that the boundaries in the plaint are quite different from the boundaries given in the mortgage deed. No satisfactory

explanation is forthcoming as to why the boundaries of the properties are different. It has been suggested by the counsel for the respondent that on

account of lapse of time the boundaries have changed. It was for the plaintiff respondent to prove that the boundaries given in the mortgage deed

have changed into the boundaries as given in the plaint. No effort seems to have been made to establish the identity of the property. There is the

statement of a person residing in the neighborhood but we find that that statement is so vague and indefinite that it does not establish satisfactorily

the identity of the property in dispute.

(9) Lastly it is contended by the respondent's counsel that the defendant appellants have not been able to show that they are the heirs of Lassu and

are thus the owners of the property. It is not necessary for the defendants to prove their title to the property. They are already in possession of the

property and it is the plaintiff who is to prove the title to the property before he can get possession of it. The defendants are already in possession

and, therefore, prima facie, they have a good title against all but the true owner.

(10) Having given our best consideration to the facts and circumstances of the present case, we are satisfied that the plaintiff has failed to establish

the plea of adverse possession set up by him over the property in dispute. We, therefore, allow the appeal, set aside the decree passed by the

Courts below and dismiss the plaintiff's suit with costs throughout.