

(1964) 04 PAT CK 0005
In the Patna High Court
Case No : A.F.A.O. No. 226 of 1961

Jainarayan Sah and Another

APPELLANT

Vs

Mt. Surat Kuer and thereafter Mt. Radhika Devi and Others

RESPONDENT

Date of Decision : 07-04-1964

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 11

Citation : AIR 1964 Patna 482

Hon'ble Judges : U.N. Sinha, J; R.J. Bahadur, J

Bench : Division Bench

Advocate : S.S. Verma, for the Appellant; Rama Kant Verma and Lala Rajendra Prasad, for the Respondent

Final Decision : Dismissed

Judgement

1. This appeal has been filed by some of the judgment-debtors, who were defendants fourth party in a redemption suit numbered as Title Suit No. 34 of 1953. It arises out of a miscellaneous case numbered as 56 of 1960, which arose upon an objection filed by the appellants u/s 47 of the Code of Civil Procedure, in Execution Case No. 14 of 1960, levied by the decree-holders of the title suit.

2. Shortly stated, the facts are as follows: In 1953 a plaintiff had filed the redemption suit in question for the redemption of a mortgage, impleading the defendants fourth party, who were in possession. It appears that the plaintiff had alleged that the defendants fourth party were in possession as nominal tenants or were in possession because they had somehow been brought on the scene and had been allowed to take possession of the house, which was the subject-matter of the mortgage. Defendants fourth party, however, raised a plea of paramount title, alleging that they had obtained title to the property in dispute by adverse possession. As a matter of history, it may be stated that the names of defendants fourth party were expunged from the record at one stage. By an order passed by this Court on the 21st of March, 1957, in Civil Revision No. 756 of 1955, they were permitted to be impleaded in the suit, as the plaintiff had

originally done. The suit for redemption was ultimately decreed on the nth of December, 1959.

Thereafter, execution was levied by the decree-holders in Execution Case No. 14 of 1960. An objection was taken by the appellants to the effect that they could not be evicted from the disputed house without a proper proceeding being taken under Bihar Act III of 1947. It was contended that the decree-holders were at liberty to take symbolical possession under Order XXI Rule 35 of the Code of Civil Procedure, but that they were not entitled to take Khas possession by evicting the appellants. The miscellaneous case registered at the instance of the appellants was dismissed by the learned Subordinate Judge, and on appeal, that order has been affirmed.

3. Learned counsel for the appellants has reiterated the contentions to the effect that in the execution case, the appellants are not liable to be evicted, and if the decree-holders desired to evict the appellants, they were bound to take proceedings under Bihar Act III of 1947 for the purpose. It is also argued that the decree-holders could take possession in this execution case only under Order XXI Rule 35 of the Code and they are not entitled to take Khas possession. Reliance is placed mainly on the decision of *Hira Lal Gupta v. Brijkishore Prasad Verma*, 1959 Pat L R 234. Learned counsel for the contesting respondents has, on the other hand, argued that in the redemption suit it was not admitted by the parties, that the appellants were tenants, having been inducted by the mortgagees. According to the learned counsel, the plaintiff's case was that the defendants fourth party had somehow been brought in the house, either as nominal tenants or as persons to be merely put in possession of the house. According to the learned counsel, the stand taken by the appellants in that suit was that they had a paramount title to the property, and ultimately, one of the appellants admitted during the course of the suit that the defendants fourth party were inducted in the house by the permission of one Basudeo Dubey. It is thus contended that the decision of this Court reported in 1959 Pat L R 234 is distinguishable.

It is further urged that on the assumption, that the allegations of the parties were that the appellants were tenants, an order was passed in the redemption suit to the effect that the mortgagor must be put in direct possession, and, therefore, the question decided between the parties is *res judicata*, and the appellants would not be permitted to raise a question in the execution case that they were tenants and, therefore, they cannot be evicted except in a proceeding under Bihar Act III of 1947. Having heard learned counsel for the parties, we are of the opinion that the contentions raised by the learned counsel for the respondents are valid and must be accepted. It appears from the judgment of Title Suit No. 34 of 1953 that the plaintiff's case was that the defendants fourth party, who happen to be relations of one Gaya Prasad Sah, one of the mortgagees, came to live in the house by permission of Gaya Prasad, Even assuming that the plaintiff had alleged in the plaint that the defendants fourth

party had somehow been inducted as nominal tenants in the house, it is clear that the case of defendants fourth party was that they had obtained paramount title by adverse possession.

The defence case has been considered in paragraphs 37 and 38 of that judgment and the several cases set up by these defendants have been mentioned there in detail. The learned trial Judge has mentioned in this context that in evidence, Jainarayan Shah, who is one of the appellants in this Court, deposed that he had been inducted in the house by Basudeo Dubey and lived there by permission. After a review of the facts set up by the defendants fourth party, the suit for redemption was decreed and it was ordered that the mortgagor be put in possession, after the mortgage money is deposited in favour of defendant No. 1. In our opinion, the case of Hira Lal Gupta, 1959 Pat L. R. 234, relied upon by learned counsel for the appellants, is quite distinguishable. In that case, it was not disputed that during the continuance of the mortgage in that case, Hira Lal had been inducted as a monthly tenant of some of the rooms of the house involved in that litigation.

Secondly, on the assumption that the status of defendants fourth party as tenants under the mortgagees was involved in the redemption suit, a decree was passed in favour of the mortgagor for possession in 1959, when Bihar Act III of 1947 was in force. It was open to the defendants fourth party to contend in that redemption suit that on the assumption that they were tenants under the mortgagees, they were not liable to be evicted from the house in suit. Clearly, the decree in Title Suit No. 34 of 1953 will be *res judicata*, so far as the question of tenancy, which has been raised by the appellants in the execution case, is concerned. It is clear that the defendants fourth party might and ought to have raised this objection in the redemption suit, and they having not done so, the executing court cannot give any relief, by holding that they are not liable to be evicted in pursuance of the redemption decree, in view of Bihar Act III of 1947.

Learned counsel for the appellants has further urged that the general rule that if the mortgagees are evicted, then the tenants inducted by the mortgagees may also be evicted, is subject to exceptions, as enumerated by their Lordships of the Supreme Court in the case of Mahabir Gope and Others Vs. Harbans Narain Singh and Others, . It is urged, in this context, that if defendants fourth party became tenants under the Special Act, it is open to them to contend that even if the mortgagees are ousted, their tenants can take recourse to a defence under the Special Act in favour of the tenants. Here also, the point is of no substance, if it is held that this objection should have been raised by the defendants fourth party at the appropriate stage. It was open to them to urge in the suit for redemption that they were not liable to be evicted in a mere suit for redemption, in view of the Special Act in favour of the tenants. But this defence was not urged in the suit for redemption, and a decree was passed in favour of the mortgagor for possession. In our opinion, it is not open to the defendants fourth party, the appellants, now to contend that in spite of the decree passed in the

suit for redemption, they are not liable to be evicted in execution.

4. The appeal must fail, and it is dismissed with costs.