
(1964) 04 OHC CK 0002
In the Orissa High Court
Case No : Second Appeal No. 261 of 1963

Mst. Nilabati Padhiani and Others

APPELLANT

Vs

Pirabati Padhiani and Others

RESPONDENT

Date of Decision : 30-04-1964

Acts Referred:

Limitation Act, 1908 — Article 144

Citation : AIR 1964 Ori 258

Hon'ble Judges : S. Barman, J

Bench : Single Bench

Advocate : G. Rath, for the Appellant; R.K. Mohapatra, for the Respondent

Final Decision : Allowed

Judgement

S. Barman, J.—Defendants are the appellants. On November 23, 1960, the plaintiffs filed the suit for redemption and possession of the suit land under an oral mortgage of July 9, 1939. The defence in the suit is that plaintiff No. 1 as Karta of the plaintiffs family and as guardian of the minor plaintiffs settled the suit lands with deft. No. 1 for Rs. 13/- and 4 Khandis of paddy as consideration for the settlement and executed a rayati patta on July 9, 1939 and put defendant No. 1 in possession of the same. The defendant also pleaded that they perfected title by adverse possession and the suit is barred by limitation.

2. The trial Court dismissed the plaintiff's suit on the finding that the suit was barred by limitation and that the defendants acquired title by adverse possession. The trial Court also found that the suit land was settled with defendant No. 1 as aforesaid. In appeal, the learned lower appellate Court reversed the decision of the trial Court and decreed the suit in favour of the plaintiffs on the finding that the suit is not barred by limitation; that possession of the mortgagee was permissive and not adverse. The learned lower appellate Court disbelieved the story of settlement of the suit land with the defendants as alleged. He found that the oral mortgage had been proved. Hence this Second Appeal.

3. The undisputed position in law is that possession of persons having no legal title but nevertheless holding possession of the land under colour of an invalid grant of the land, not being referable to any legal title is prima facie adverse to legal title "of the owners of the land from the very moment such persons took possession of the land under the invalid grant. The possession of such an alienee must be deemed to be adverse from that date and it must continue to be adverse.

4. In the present case, in view of the finding that the oral mortgage was not valid by reason of the provisions of Section 22 (b) of the Sonapur Bhumi Bidhi which requires a written deed of conveyance and other formalities as provided therein, the defendants' possession must be adverse. On this point the learned lower appellate Court's finding was this:

"If the mortgage was created orally in contravention of law (referring to Section 22 (b) of the Sonapur Bhumi Bidhi), it is void mortgage and so the defendants entering into possession on such mortgage would hold it as permissive possession till they prescribe their title. After 12 years of the mortgage he would prescribe the mortgagee's interest and not any superior title. Therefore in any view of the matter the plaintiffs having proved the mortgage are entitled to redeem it".

The question now is : When, on the facts of the present case, was the title of the plaintiffs as original owners extinguished after the defendants obtained possession under an invalid mortgage? Undoubtedly when a mortgagee gets possession under an invalid mortgage he acquires by prescription the limited interest of a mortgagee, on the expiry of the period of 12 years. It is also the settled view that where a person obtains possession under an invalid mortgage and there is nothing to show that at any time he has asserted possession under any claim of absolute right, he acquired on the lapse of 12 years a prescriptive right to the limited interest of a mortgagee.

5. This leads to the further question : Did the defendants ever claim absolute right in respect of the suit land? If so what is the effect of such assertion of absolute right? It appears from the written statement of the defendants that they claimed absolute right and not as mortgagees. The defendants' case is that a rayati patta was executed in favour of defdt. No. 1 on July 9, 1939 and that defendant No. 1 was put in possession of the suit land. The relevant portions of the defendants' written statement are these:

"2.....Plaintiff No. 1 as the manager or the Karta of the family..... settled the suit lands with the defendant No. 1 for Rs. 13/- and 4 Khandis of paddy as consideration for the settlement and executed a rayati Patta on 9-7-39 and put the defdt. No. 1 in possession of the same.

3. That since 9-7-1929 the defdt. No. 1, has been in possession of the suit lands along with his sons in his own right, title and interest. The defdt. No. 1 had been paying rents of the suit lands to the plaintiffs against receipts and now paying

the same to the N. T. against receipts. The defendant also had applied for mutation of the suit lands in his own name in the year 1947."

Thus the defendants claim independent title and not as mortgagees. The learned lower appellate Court has apparently overlooked this aspect of the position. He did not take into consideration the positive stand taken by the defendants claiming absolute right in respect of the suit land. Even if the oral mortgage is found to be true, the defendants having asserted independent title, their possession was adverse. It all boils down to the simple question: What was the animus possedendi of the defendants? The answer is that it was in exercise of this independent title and not as mortgagees that the defendants possessed. In such a case what is decisive is the defendants' assertion of absolute right. In fact this is the ratio decidendi of the decisions cited in this case as discussed hereunder.

6. In Purusottam Das and Another Vs. S.M. Desouza and Another, , the facts were these: The suit lands admittedly belonged to the plaintiffs' family. The plaintiffs' case was that the defendants were allowed to occupy the suit lands by some arrangement. The case of the defendants was that the father of the plaintiff's borrowed various sums of money from the defendants on security of the suit lands; that the defendants had been in possession for over 12 years. The defdts. further alleged that all the mortgages were invalid and inoperative in law and that the plaintiffs' father not having recovered possession of the lands within 12 years have lost their right to them; that the deltds. have acquired perfect title by adverse possession. On these facts, a question arose whether when a person obtains possession under an invalid mortgage and there is nothing to show that at any time he has asserted possession under any claim of absolute right, the title of the original owners is extinguished. Extinction of title by adverse possession is provided for in Section 28 of the Limitation Act. On this question the Court held that when a mortgagee gets possession under a void mortgage, the mortgagor can within 12 years therefrom recover possession of the property freed from the limited interest but beyond the twelve years only subject to the limited interest. On the expiry of twelve years not only is the right of the original owner to the limited interest extinguished, but the said limited interest gets transferred to the person in possession. In that particular case the defendants did not claim absolute right as in the instant case. Here the defendants claim absolute right under a raiyati patta, dated July 9, 1939. It is by reason of this distinguishing feature, on the facts of the present, case that the decisions relied on, on behalf of the plaintiffs-respondents do not support the decision of the learned lower appellate Court.

7. Where the learned lower appellate Court went wrong was that he did not take into consideration the position that it was not the mortgagee's interest that was prescribed by adverse possession, but the absolute interest which the defendants claim under the raiyati patta settlement dated July 9, 1939. By reason of the defendants' assertion of independent absolute right in respect of the suit lands,

the defendants" possession became adverse and by such possession for twelve years the plaintiffs" right to such property was extinguished.

8. Entertaining this view on the facts and circumstances of the case, I am of opinion that the defendants acquired absolute title to the suit lands by adverse possession. In this view of the case the decision of the learned lower appellate Court is set aside.

The plaintiff"s suit stands dismissed. In the result, therefore, this appeal is allowed with costs throughout.