
(1950) 05 GAU CK 0005
In the Gauhati High Court
Case No : Second Appeal No. 2137 of 1946

Mt. Rupeswari Chutiani and others

APPELLANT

Vs

Giridhari Chutia and others

RESPONDENT

Date of Decision : 24-05-1950

Acts Referred:

Transfer of Property Act, 1882 — Section 41

Citation : AIR 1952 Guw 19

Hon'ble Judges : T.V. Thadani, C.J; Ram Labhaya, J

Bench : Division Bench

Advocate : N.M. Dam, for the Appellant; S.K. Ghose, B.C. Barua, Gunjanan Barua and B.N. Chaudhury (for Respondents Nos. 4-8), for the Respondent

Final Decision : Allowed

Judgement

Ram Labhaya, J.—This is a second appeal from the order of the Addl. Sub-Judge, A.V.D., dated 22-5-46 by which the decree of the trial Court dismissing plff.-respts". suit with costs was reversed and plffs". suit decreed.

2. Plffs". suit was for a declaration of title to and khas possession of the property in suit. The property was mortgaged to the 1st deft. by a registered mortgage-deed, dated the 30th March 1926. Soneswar Chutia mortgaged the property on his own behalf and on behalf of his nephew Holiram Chutia. The mortgage consideration was for Rs. 500/-. The relevant portions of the mortgage-deed are as follows:

(1) We having borrowed Rs. 500/- from the abovenamed Mt. Rupeswar Chutiani, do hereby mortgage our interest in the lands described above for 5 years from today. You will pay the revenue for the lands and enjoy the land in lieu of interest.

(2) I shall redeem the mortgage at the end of 5 years from today by paying the mortgage debt. If we cannot redeem the lands within the time fixed, the mortgaged lands shall be deemed to be sold for the said mortgage debt and you will enjoy the land in your own right by getting patta issued in your name and I

and my heirs shall have no objection to it. Such objection will be disallowed even if made on the strength of this deed.

3. The first three plffs. are the sons of Soneswar Chutia who mortgaged the land. Holiram, his nephew, who was a minor at the time of mortgage and was represented by Soneswar is the fourth plff. Their case is that since the date of mortgage deft. 1 has been in possession of the land and as more than 12 years have elapsed since the date of the mortgage, which, according to them, is usufructuary they are entitled to redeem the property without payment of any money under the provisions of the Assam Money Lenders (Amendment) Act, 1943. They also averred that they discovered after obtaining a certified copy of the Jamabandi that defts 2 & 3, sons of deft. 1, had got their names mutated as purchasers of the land in suit on 8-11-33 and about 3 years after the mutation on 15th July 1936 had transferred a part of the suit land described in Schedule 2 attached to the plaint to defdts. 4-8. The mutation in favour of defdts. 2 and 3 was challenged on the ground of fraud and it was pleaded that there was no sale or relinquishment of the land by the plffs. in favour of defts. 1 & 2. The transfer to defts. 4-8 was also challenged as something not legal and binding on the plffs.

4. The first three defts. repudiated the claim. They pleaded that the mortgage was for 5 years and, according to the terms contained in it, if it was not redeemed at the expiry of 5 years, the property was to be deemed to have been sold for the mortgage consideration and the mortgagees could get a patta issued in their names as purchasers. In pursuance of the terms of the mortgage, the plffs. and the late Soneswar got the names of defts. 2 & 3 mutated in 1933 by reason of their purchase. It was further alleged that later on there was a separate patta issued to the defts. as the result of a partition.

5. Defts. 4-8 claimed that they were the "bona fide" purchasers for consideration without notice of plffs". title and were protected u/s 41 of the Transfer of Property Act.

6. The learned Munsiff found on issues 2 and 3 in favour of defts. His finding was that defts. had been in possession of the suit land for more than 12 years as absolute owners to the knowledge of the plffs. and their ancestors and as such plffs. had lost their right to redeem the property. On issue No. 5 he found in favour of the transferees, defts. 4 & 3. As a result of his finding he dismissed the suit.

7. Plffs. appealed. The learned Addl. Sub-Judge allowed the appeal and decreed plffs." claim. He held that defts. 1, 2 and 3 cannot claim ownership of the land on the basis of default in payment of mortgage money on the due date. The term of the mortgage-deed by which the property was to be deemed as sold on default in the payment of the mortgage money within the stipulated period was a clog on the equity of redemption. The mutation of 1933 also could not convey title to the defts. in the absence of any registered document particularly when defts. were already in actual possession. His conclusion was that there was no

valid sale or relinquishment of the property in favour of the defts. and plffs. were thus entitled to redeem. In his view, defts. 4-8 also could not resist the claim as defts. 2 and 3 could not pass any valid title to them. He, further, found that the mortgage was usufructuary in nature and it stood discharged under the provisions of Assam Money Lenders (Amendment) Act. Plffs". claim was, therefore, decreed.

8. The first three defts. alone appealed. When the appeal came up for hearing before us, it was discovered that the learned Addl. Sub-Judge had omitted to give a finding on the question as to whether by reason of any sale or relinquishment by the plffs. after the expiry of the term of the mortgage in favour of defts. more than 12 years before suit the character of defts". possession had altered. The case was, therefore, sent back to him for giving his finding on the question of adverse possession which had formed the basis of the trial Court's decree in the light of observations made in the order of remand, dated the 19th December 1949. Mr. M.K. Barkataki, successor in office of the learned Addl. Subordinate Judge who had disposed of the appeal originally, agreed with the trial Court in the view that there was a relinquishment of title by the plffs. in 1931. He observed that there was no "specific evidence showing that Holiram also relinquished his title in 1931. He, however, inferred from his acquiescence in the transfer, indicated by his endorsement on the mutation chitha that he was also a party to it. In his view, he was bound by the transfer whether he was a minor in 1931, or an adult. If he was a minor, he argued, Soneswar, his uncle, must have acted for him. If he had attained majority his acquiescence is indicated by the mutation and his failure to deny the truth of the statement made by debt. 1 at the trial justified the inference that he was also a party to the oral sale or relinquishment.

9. Mr. Dam, the Learned Counsel for the appellants, urges that the Courts below are now agreed in the view that debt.-appellants had been in adverse possession for more than 12 years before suit by reason of the relinquishment of the security by the plffs. in 1931. The finding is on a question of fact and is binding. He is, in these circumstances, entitled to ask for dismissal of the suit.

10. The finding of the lower appellate Court after remand has been assailed on behalf of the plffs. on three grounds, namely (1) that the defence that there was an oral relinquishment of all rights in the property or a sale of it by the plffs. in 1931 was never raised and the matter could not therefore be regarded as properly in issue, and (2) that in any case plff. 4, Holiram, was no party to the oral sale and was therefore not bound by it, (3) and that adverse possession as a distinct basis for acquisition of title was not at all relied on or proved and that there was no definite allegation in the W.S., as to its commencement.

11. The suit was for possession of the property without payment of the money, on the ground that the mortgage had become extinct by operation of law. The mutation by which defts. 2 & 3 were shown as purchasers and the subsequent partition of the land and its transfer to defts. 4-8 were all challenged as

fraudulent transactions. The case of fraud set up was met by the plea that in pursuance of the conditions of the mortgage-deed Soneswar, deceased, and Holiram, plff. both got the name of defts. 2 and 3 mutated as owners in 1933. It cannot be said that sale or relinquishment was nor at all alleged. The mutation of 1933 by itself would be an act of relinquishment even if no oral transaction had taken place before. The plea of voluntary relinquishment was an answer to the allegations of fraud. The defence was that both Soneswar and Holiram were parties to the mutation. The trial Judge was therefore, justified in including in issue 2 the question whether there was a sale after the mortgage. It may be noted at this stage the the words "sale" and "relinquishment" have both been used interchangeably to describe the transaction by which the mortgage security was alleged to have been relinquished. The issue whether there was a sale after the mortgage was tried between the parties without any objection from the plffs. Evidence on this issue was led only by defts. Plffs. did not produce any evidence and neither Holiram nor any other plff. came into the witness box to refute the statements made by deft. 1 and her witness. When appealing, plffs. did not urge that the issue whether there was a sale after the mortgage did not arise as that there was no such plea. On the other hand they contended that the learned Munsiff should have held that the equity of redemption was not sold. The finding of the learned Munsiff was challenged no doubt, but not on the ground that there was no basis for the issue. It is too late now to suggest that the issue whether there was a sale or relinquishment after the expiry of the period of the mortgage did not arise or that there was no plea to that effect.

12. The question whether there was relinquishment as alleged by the defts. is no doubt a question of fact. The evidence on this point is one sided. Deft. 1 appeared in the witness box. She examined 6 other witnesses in support of her contention. The evidence has been believed by the two Courts below.

13. The statement of D.W. 1 was that after the expiry of 5 years from the date of the execution of the mortgage she demanded the money from Soneswar. Soneswar asked for some more time. She then went to him again with three persons to demand payment. Soneswar told her that he was unable to pay her the money and he relinquished the land in her favour. Thereafter in Kartick next he got her name mutated in the Chitha. In cross-examination she stated that there was no writing evidencing relinquishment taken but Soneswar promised that he would give the writing before the S. D. C., by allowing a mutation. The two other witnesses who were examined on the point also stated that Soneswar promised to get the mutation of relinquishment attested in favour of deft. 1. Both Holiram and Soneswar made separate endorsements on the chitha mutation by which they acknowledged relinquishment of the mortgage security. There was no reference to the alleged oral relinquishment about two years before. This oral relinquishment of 1931 was not expressly pleaded. The plea of relinquishment was no doubt set up and reliance was placed on the terms of the document and the mutation. The intervening oral transaction was not set up as the basis of valid title or for purpose of proving a starting point for adverse possession. The

plea of adverse possession itself as the basis of title was not raised. There was however an issue on the question whether there was a sale or relinquishment after the mortgage. Advantage was taken of this plea to give evidence of an oral arrangement which now is sought to be utilised not as conferring title but as merely changing the character of debts". possession, or in other words for the plea of adverse possession which was not taken up. It is possible that at the time of the written statement it was not realised that the relinquishment by mutation was not valid in law and thus the need for a plea of adverse possession starting from a date antecedent to the mutation was not felt.

14. The evidence led does not show that the oral transaction was intended or taken by the parties to be a complete act of relinquishment. Deft. 1 got the promise from Soneswar that he will get a mutation attested in her favour. According to the terms of the mortgage deed also she was to get a separate patta if payment was not made within the period allowed by term of the mortgage. When Soneswar promised to get a mutation, Holiram was not present. It has not been claimed that Soneswar could represent Holiram in 1931. There is no suggestion that Holiram was a minor even then. The relinquishment could not have been completed without him. Some writing showing relinquishment was also considered necessary as a promise was obtained from Soneswar that he would give the necessary writing at the time of mutation. Assuming that the transaction between Soneswar and deft. 1 came in Baisakh 1931, it was no more than an agreement to relinquish security later by a mutation. It was at the time of mutation that both Soneswar and Holiram acknowledged the relinquishment but without referring to an oral transaction of 1931. The relinquishment, in these circumstances, in point of fact came in 1933 when the mutation was attested. A promise by Soneswar alone in 1931 to relinquish security by obtaining a mutation in favour of debts. would not change the character of possession of the mortgagees vide, AIR 1925 114 (Oudh) . The change in the character of possession would occur from the date of the mutation as even in spite of the mutation, the relinquishment for a consideration of Rs. 500/- was not valid in law. In these circumstances it is clear that debts. had not acquired title on the basis of adverse possession when the suit was instituted and plffs. would thus be entitled to redeem the mortgage. This conclusion also disposes of the remaining contentions raised by Mr, Ghose in regard to the appellate finding on the question of adverse possession.

15. The next question is whether the mortgage has been extinguished by operation of law and plffs. are entitled to possession without payment of the mortgage money. The condition of the mortgage that if the land was not redeemed within the time fixed, it shall be deemed as sold for the mortgage debt is a clog on the equity of redemption. It effectively bars redemption if enforced and therefore is unenforceable. This clause therefore must be left out of consideration when considering whether the mortgage is such that it will stand extinguished under the provisions of Section 9(2)(1) of the Assam Money Lenders Act as amended by Act VI of 1943 after a period of 12 years from the

date of the mortgage. If, the mortgage can be treated as usufructuary mortgage, plffs. would be entitled to recover the property without payment of any money. The mortgage was with possession for 5 years. Land revenue was to be paid by the mortgagee who was to remain in possession of the land. He was to take the usufruct in lieu of interest. There was the further stipulation that the mortgagors shall redeem the mortgage at the end of 5 years by paying the mortgage debt. This promise to pay amounts to a personal covenant. But for this covenant the transaction would have been a usufructuary mortgage pure and simple. Where a personal covenant is found to exist either in express terms or by necessary implication in a usufructuary mortgage, the mortgage becomes anomalous. The mortgage in question, therefore, cannot be treated as purely usufructuary. The case, in this respect is covered by our decision reported in "Rahimuddin v. Nayam Chand", AIR 1950 GAU 18. The mortgage in these circumstances cannot be regarded as having been discharged and plffs. can redeem the property only on payment of the mortgage debt.

16. The result is that the appeal is allowed. Plffs. shall be entitled to recover possession of the property in suit on payment of Rs. 500/- to the defts. The mortgage consideration shall be divided between defts. 2 and 3 on one side and defts. 4-8 on the other in the proportion in which they hold the land.

17. In the peculiar circumstances of the case, we leave the parties to bear their own costs of the entire litigation.

Thadani, C.J.

18. I agree.