
(1988) 01 P&H CK 0028

In the Punjab And Haryana At Chandigarh

Case No : Regular Second Appeal No. 1217 of 1978

Shiba Mal (deceased) now rep. by his L.Rs. & Ors.

APPELLANT

Vs

Siri Ram and ors.

RESPONDENT

Date of Decision : 25-01-1988

Acts Referred:

Citation : (1988) 1 CurLJ 671 : (1988) 2 ILR (P&H) 135 : (1988) PLJ 258 : (1988) 2 RRR 199

Hon'ble Judges : M.S.Liberhan, J

Advocate : B.S. Gill, Advocate, K.T.S. Tulsi, Advocates for appearing Parties

Judgement

M.S. Liberhan, J.

1. The question raised in this appeal is "whether a stranger becomes an owner by adverse possession after getting it redeemed from the mortgagee". Brief facts giving rise to the question are these:

Shri Ram plaintiff filed a suit for possession by way of redemption of land measuring 79 Bighas 15 Biswas Kham on payment of Rs. 1,500/-. The land in dispute was owned by Smt. Paremo widow of Ram Chand, and Parmesharia son of Badna. They had mortgaged the same with possession to Kala Mal and Chanan Mal for Rs. 1,500/-. Defendants Nos. 19 to 23 are their successors. On the death of the mortgagors, Smt. Chando succeeded and further gifted it to the plaintiff. Thus, the plaintiff stepped into the shoes of the mortgagors. On the request of the plaintiff to redeem land the defendants contended that the same had been redeemed by their predecessors in interest (defendants Nos. 1 to 18) that is, Telu Ram and others. In the meantime Telu Ram and the predecessor in interest of the defendants died. The defendants refused to redeem the land and claimed title in themselves.

2. That defendants controverted the allegations and contended that the suit was barred by time Smt. Chando had no right to gift the property, the defendants had become owners and mortgagees of the property in dispute, the gift in favour of

the plaintiff was cancelled in a compromise decree and the plaintiff alleged to have relinquished his right in the property in dispute, the suit in the present form was not maintainable, the estate of Smt. Chando was inherited by the defendants and their predecessors in interest, the land in dispute was redeemed in the year 1943 by the defendants and their predecessors in interest, the plaintiff is estopped from filing the present suit. The defendants further claimed improvements on the land in dispute.

3. On the pleadings of the parties, the following issues were framed:

- (1) Whether the suit is within limitation? O.P.P.
- (2) Whether Mst. Chando had a right to make the gift of the land in suit in favour of the plaintiff on 23.7.1928? If so, its effect? O.P. P.
- (3) Whether the defendants 1 to 18 or their predecessors in interest instituted Suit No. 374 on 9 Bhadon 1985 Bk. which was decided on 6 Aug., 1985 Bk. ? O.P.D.
- (4) Whether that suit ended in compromise between the present plaintiff and the defendants or their predecessor in interest If so, what that compromise was? O.P.D.
- (5) Whether the plaintiff was minor in the year 1985 Bk ? If so, its effect? O.P.P.
- (6) If issues No. 3 & 4 are proved, whether the plaintiff is estopped from filing the present suit? O.P.D.
- (7) Whether the present suit is barred by principles of res judicata? O.P.D.
- (8) Whether the defendants have made any improvements on the land in suit? If so, to what extent and with what effect? O.P.D.
- (9) Relief

The trial Court found the suit was within limitation. Smt. Chando had a right to make the gift and did make a valid gift. The defendants and their predecessors in interest had filed Suit No. 374, the said suit did not end in compromise between the parties, the plaintiff was not found, to be minor when Suit No. 374 was pending. It was further found the plaintiff was not estopped from filling the suit, the suit was not barred by the principle of res judicata, no improvements had been made in the land in suit and the defendants were not entitled to any payment on account of improvements. Thus, a preliminary decree for redemption on payment of Rs. 1500/ in favour of the plaintiff was passed.

4. The defendants challenged the said judgment and decree before the lower appellate Court before whom the main question raised was that the suit was barred by limitation as the suit had been filed after twelve years of the sanction of the mutation in 1943, and the suit was governed by Article 61(b) of the Limitation Act. The lower appellate Court came to the conclusion that the suit was governed by Article 61 (a) and not Article 61(b) of the Limitation Act.

5. The learned counsel for the appellants halfheartedly contended that the suit will be governed by Article 61(b) of the Limitation Act, though he was not able to show either in the pleadings or in the evidence or otherwise that it is a suit for recovery of possession of immoveable property mortgaged after the same had been transferred by the mortgagee for a valuable consideration. It was not even so stated either in the pleadings or otherwise. It is nobody's case that the mortgagees had transferred or alienated the property in despite mortgaged with them for a valuable consideration, much less to show that the said transfer was to the knowledge of the mortgages or it had become known to mortgagor. No transfer can be effected of an interest in immoveable property of the value of rupees one hundred or more without the same being registered. Here, admittedly, no such transfer had been effected. No error has been pointed out in the said finding of the lower appellate Court that the suit is within limitation.

6. The other contention raised by the counsel for the appellants is that the appellants who are strangers have redeemed the property in dispute and after redemption became owners by adverse possession against the mortgagors. The said contention has neither been raised before the Courts below nor there is any issue for the same. The question of adverse possession is a mixed question of fact and law. The defendant could succeed only if it could be proved as a matter of fact, the terminus a quo when the possession became adverse to the knowledge of the owners. The adverse possession has to be open and hostile. The person claiming title has to proclaim title openly in himself. Nothing had been brought on the record to prove adverse possession. No such plea was taken. Counsel for the appellants cited *Peria Aiya Ambalam and others v. Shunmugasundaram and others*, A.I.R. 1914 Madras 3134(2) and *Sribhagwan Singh and others v. Rambasi Kaur and others*, A.I.R. 1957 Patna 157. The learned counsel has failed to show how these judgments are *pari materia* on facts or law with the case in hand. The observations made in the said judgments have not been shown to be even remotely relevant to the facts and controversies raised by the appellants. Be that as it is, counsel for the respondent has relied upon, *Nani Bai v. Gita Bai Kom Rama Gunge*, A.I.R. 1958 S.C. 706; *Karam Chand Moola Ram and others v. Telu Ram and others*, A.I.R. 1986 Ph. 473 and *Koshappi Kunji and others v. Velayudhan Damodaran and, others*, A.I.R. 1971 Kerala 38 (F.B.), in order to support the contention that possession by a trespasser cannot be adverse to the mortgagor even if it is accompanied by an assertion of an hostile title to it, to the knowledge of the mortgagor. It is contended, these acts do not cast any cloud on mortgagor's rights. It has been observed in *Kochappi Kunji v. Velayudhan Damodaran*'s case (*supra*), under :

"Property subject to a possessory mortgage comprises two distinct subjects capable of independent possession, the intangible or incorporeal equity of redemption capable only of incorporeal possession and the tangible or corporeal property itself, capable of corporeal possession. Possession of the corporeal property is with the mortgagees, while possession of the incorporeal equity of redemption remains with the mortgagor. If the mortgagor release the equity of

redemption in favour of the mortgagee he thereby makes over his incorporeal possession of the equity of redemption to the mortgagee by what might be called a symbolic or notional delivery, that being the only kind of delivery which the incorporeal equity of redemption is susceptible of. Thereafter the mortgagee is in actual possession of both the corporeal property and the incorporeal equity of redemption, and where the release is invalid in law, the mortgagee is in adverse possession of the equity of redemption. But short of such a release possession of the corporeal property, whether by the mortgagee or by a trespasser therein, is not possession of the equity of redemption even if it is accompanied by assertion of full title to the property to the knowledge of the mortgagor. But where the incorporeal possession of the equity of redemption is accompanied by tangible incidents such as the receipts of rents and profits perception of such rents and profits by a third party asserting possession of the equity of redemption would be cogent evidence of such possession."

I, am of the view that there cannot be an adverse possession against the rights of the mortgagor when in particular the mortgagee is in possession and the mortgagor has no right of possession before redemption.

7. The limitation for right to redemption has been provided as thirty years. The same cannot be curtailed by the trespassers. In order to be in adverse possession one of the essential ingredients is that the trespasser has to be in possession and claiming title to it in himself against the rights of the owner, or title holder. Here, the owner mortgagor had no right to be in possession during the pendency of the mortgage. There can be no adverse possession and it cannot commence against the mortgagor during the period of the mortgage because the mortgagor could not have been dispossessed of his possession as the same vested in the mortgagee. My above observations are fully supported by the law laid down in the Full Bench cited above, and I am in full agreement with it.

8. Learned counsel for the appellants further cited *Kshitish Chandra Bose v. Commissioner of Ranchi*, A.I.R. 1981 S.C. 707; *Digamoer Shridhar Dhekne and others v. Ramratan Raghunath*, A.I.R. 1947 Bombay 471, and *Shukar Hanan Mutawali and others v. Malkappa and others*, A.I.R. 1980 Bombay 213. In my view, these judgments have no relevancy with the present case. Learned counsel read them out. According to him, these lay down the incidents of adverse possession. There is no dispute with the incidents of adverse possession nor they are being challenged by either party. There is no dispute with respect to the principles of adverse possession.

9. There is not an iota of evidence on the record to show the existence of any of the incidents required by the judgments cited by the counsel for the appellants to prove the adverse possession qua the mortgagor

10. No other point has been raised before me by the counsel for the parties.

11. For the reasons recorded above, I find no force in the appeal and the same is dismissed with costs. Counsel's fee Rs. 500/