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**(1968) 07 PAT CK 0014**  
**In the Patna High Court**  
**Case No : A.F.A.D. No. 470 of 1965**

Sirinivas Fogla and Others

APPELLANT

Vs

Satyanand Gupta and Others

RESPONDENT

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**Date of Decision :** 26-07-1968

**Acts Referred:**

Transfer of Property Act, 1882 — Section 58, 60

**Citation :** AIR 1969 Patna 64 : (1969) 17 BLJR 107

**Hon'ble Judges :** S.N.P. Singh, J;Kanhaiyaji, J

**Bench :** Division Bench

**Advocate :** Prem Lall, Parmeshwar Prasad Sinha and Sadhu Saran Sahai, for the Appellant; Lal Narain Sinha, J.C. Sinha, Keshri Kishore Saran and Rajendra Prasad Sinha, for the Respondent

**Final Decision :** Dismissed

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## Judgement

Kanhaiyaji, J.—This second appeal is By the defendants against the concurrent judgments and decrees of the two courts below decreeing the suit of the plaintiff for redemption of the Sudbha-rana bond dated the 28th March, 1932, executed by Raghunandan Prasad Sahu alias Ragho, Sahu, son of Ramadhin Sahu (hereinafter called Raghunandan Sahu) in favour of Mohari Bai wife of Kushal Marwari.

2. The facts leading to this appeal, in short, are that Raghunandan Sahu borrowed a sum of Rs. 1,800/- from Mohari Bai and executed a Sudbharna bond in ber favour in lieu of interest and gave his two houses mentioned in Schedule 1 of the plaint as security and put her in possession over the houses as Sudbharnadar. Subsequently, Raghunandan died leaving behind him his two sister"s sons Satyanand Gupta and Pandit Bidyanand Vedalankar who were full brothers. On 3rd December, 1950 there was partition between the two brothers by which the two houses along with other properties were allotted to the share of Satyanand Gupta. In 1958 Satya-Band Gupta filed a petition before the Anchal Adhikari, Khagaria for getting his name mutated with regard to the said two

houses, but on contest by the defendants the petition was dismissed. Thereafter Satyanand Gupta offered the mortgage money to the defendants and on their refusal filed the present suit, for the reliefs mentioned in the plaint. Mohari Bai is dead and her heirs are the defendants of the suit. Defendants nos. 1 to 4 who are majors filed a joint written statement and contested the suit. Their main defence was that the document executed by Raghunandan Sahu on the 28th March, 1932 in favour of Mohari Bai was deed of sale and not a Sudbharna bond.

The houses fell down during the earthquake of 1934 and were reconstructed by Mohari Bai who incurred an expenditure of about Rs. 1,00,000 over their construction to the knowledge of Raghunandan Sahu. Their further case was that in ease it be held that the document dated the 28th March, 1932 was a Sudbharna bond, then it has been extinguished by the conduct of the parties. They also pleaded adverse possession, estoppel and acquiescence. According to defendants nos. 1 to 4, the plaintiff was neither the Bhagina of Raghunandan Sahu nor was he his heir and legal representative. The Guardian-ad-litem filed a formal written statement on behalf of the minor defendants supporting the case of the major defendants.

3. The plaint of the present suit as originally filed, contained the following reliefs:--

"21 (Ka) -- It may be adjudicated and decided by the court that the deed dated 28-3-1932 executed by Sri Raghunandan Prasad Sahu alias Ragho Sahu in favour of Srimati Mohari Bai was in fact a Sudbharna mortgage bond and not a deed of sale or conditional sale, and it may be further declared that the plaintiff is the legal heir in his capacity as the Bhagina (sister's son) of Sri Raghunandan Prasad Sahu alias Ragho Sahu, deceased, and the plaintiff has got the right of redemption of the Sudbharna property,

(Kha) -- After adjudication of the above facts, a decree for redemption may be passed in favour of the plaintiff and he may be permitted to deposit the Sudbharna money, and the defendants may be directed to withdraw the Sudbharna money and to give up their possession of the Sudbharna property and to deliver it to the plaintiff.

(Ga) -- If the defendants fail to deliver possession to the plaintiff within the period fixed by the court, possession thereof may be delivered through court, and in that case a decree for future mesne profits from the date fixed in the decree till the date of delivery of possession may be passed in favour of the plaintiff: against the person and property of the defendants after ascertainment thereof by the (Pleader) Commissioner.

(Gha) -- The costs of the suit may be awarded to the plaintiff against the defendants.

(Angha) -- Other reliefs deemed fit in the circumstances of the case may be granted to the plaintiff."

Subsequently by an amendment allowed by the learned Munsif, Clause "Kha" of the reliefs mentioned in paragraph 21 of the plaint was amended as follows:--

(Kha) -- A decree for redemption of rehan may be passed by the court in favour of the plaintiff and the plaintiff may be put in exclusive possession of the Sudbharna property on dispossession of the defendants after taking the Sudbharna money."

4. The trial Court framed nine issues and decided all the issues in favour of the plaintiff and decreed the suit. It held that the suit was properly valued, document was a mortgage and not a sale-deed, and the suit was not barred by estoppel or acquiescence. The plaintiff has got a cause of action and right to redeem and his right has not been extinguished by adverse possession. It further held that the plaintiff was the sister's son of Raghunandan Sahu and the suit as framed was maintainable. In appeal before the Subordinate Judge filed by the defendants, at the time of argument, the lawyer for the defendants did not challenge the finding of the trial Court that the document dated the 28th March, 1932 was a Sudbharna bond and not a sale deed. However, from the argument advanced, the learned Subordinate Judge formulated the following points for determination:--

"1. Whether the plaintiff and his brother Pandit Bidyanand Vedalankar are the Bhagina of Shri Raghunandan Prasad Sahu alias Ragho Sahu and whether after the death of Sri Raghunandan Pd. Sahu they came in possession over his entire properties including the house in suit?

2. Whether the plaintiff is only entitled to redeem the Sudbharna bond dated 28-3-32?

3. Whether the plaintiff's title has been extinguished by adverse possession?

4. Whether the suit is barred by estoppel?"

The learned Subordinate Judge decided all the points in favour of the plaintiff-respondent and dismissed the appeal. He held that, the plaintiff was the sister's son of Raghunandan Sahu, the plaintiff and his brother were the only nearest reversioners of Raghunandan Sahu at the time of the filing of the present suit, the defendants did not acquire title to the suit houses by adverse possession and the suit was not barred by estoppel.

5. The main questions which have been argued before us by Mr. Prem Lall appearing for the appellants are that the Sudbharna bond has become a sale deed by the acts of the parties. The plaintiff is estopped and it is not open to him to challenge that the document is not a sale deed but a Sudbharna bond. The plaintiff has lost the right of redemption by adverse possession and lastly the Munsif had no power to amend the plaint to assume jurisdiction to try the suit. Mr. Prem Lall did not challenge the finding of the lower appellate court that Satyanand Gupta (Plaintiff) and Pandit Bidyanand Vedalankar were the Bhagi-nas of Raghunandan Sahu and they were the only reversioners of Raghunandan Sahu

at the time of the filing of the present suit, and on partition between the plaintiff and his brothers the suit properties had been allotted to the share of the plaintiff.

6. In support of the first point Mr. Prem Lall referred to the default clause of the Sudbharna bond (Ext. 2/Ka) which is as follows:

"If I, the executant, fail to repay th" aforesaid debt on the due date of repayment, save the (the money covered by this mortgage bond) (sic) shall be treated as consideration money on the expi ry of the term and this Sudbharna bond shall be treated as a deed of sale and on the expiry of the term the said creditor shall enter into possession of the Sudbharna property as a vendee and shall get her name entered in the office of the zamindar by getting the name of me, the executant, removed, therefrom."

He contended that as the money borrowed on the Sudbharna bond has not been repaid by the 30th Baisakh 1340 Fasli, the consequences have taken place, as stated above. There is no dispute that the mortgagor did not repay the amount on the due date. Thereafter the defendants got their names mutated in th\* Sharista of the Anchal Adhikari in place of Raghunandan Sahu. Therefore, it was argued tor the appellants that the equity of redemption had been extinguished as laid down u/s 60 of the Transfer of Property Act. It will also amount to this that by such consensual act of the parties, the defendants remained in possession for more than twelve years and, therefore, they acquired title by adverse possession. The argument is that even though the act itself may not transfer the title of the properties in law and may be invalid in law, but still it will give the starting point for adverse possession. In support of this argument, Mr. Prem Lall relied on two cases of this Court.

In the case of Markanda mahapatra Vs. Varada Kameswar Rao Naidu and Others, the facts were that a village which was a service tenure was granted to the ancestor of the plaintiff and of the defendants second party about 200 years ago by the Ra.ja of Parlakhemedi. Sometime back the village had been mortgaged to the predecessor-in-title of defendant No. 1, The claim of the plaintiff was that the usufruct of the village had satisfied the usufructuary mortgages, and he was entitled to get back the village. While it was claimed on behalf of defendant No. 1 that he had acquired rights by adverse possession against the true owners as he had been possessing the whole village since after 1922 when the usufructuary mortgages had been fully satisfied. It has been decided in the above case that where the mortgagor and the mortgagee both agree by a consensual act that the possession hitherto held as mortgagee should now be held as vendee, such a transaction tantamounts to delivery of the property by the vendor to the vendee. In support of this, reliance was placed on several decisions of the Madras High Court and other High Courts. Mr. Justice B. P. Sinha. as he then was, in paragraph 31 of the said judgment has observed as follows:--

"It is well recognised principle that a mortgagee cannot, by a mere assertion of his own or by a unilateral act on his own part, convert his possession as

mortgagee into that of an absolute owner. But where, as in the present case, the bilateral acts of the parties referred to above, though invalid and, therefore, inoperative to convey title on the dates of those transactions, would operate to give ad-verSe possession which, if continued for the statutory period, would ripen into a food title."

Another case relied upon by Mr. Prem Lall is Sukhdeo Singh v. Lekha Singh AIR 1957 Pat 502. It only reiterates the principle that where both the mortgagor and the mortgagee agree by a transaction to which they are parties, that the character of possession as mortgagee should change into that of possession as an absolute owner in spite of the invalidity of the transaction to convey title at once, the possession so given can operate on the expiry of the statutory period to create title by adverse possession. In the above case the Courts below had found that the compromise was genuine and the mortgagees had been in adverse possession of the disputed land since the date of the compromise for more than twelve years and, therefore, they had acquired indefeasible title by adverse possession. If by some act the parties agree to transfer the equity of redemption to the transferee, but for some reason or other the instrument is invalid to pass a good title in law, it may amount to explain the nature and character of the possession thenceforth held by the parties. In such a case although the sale or the compromise may be invalid for want of registration, the character of the possession of the mortgagee changes and thereafter he begins to possess the property not as a mortgagee but as a purchaser and if he remains in possession for the statutory period, he would acquire title by adverse possession.

7. These cases stand by themselves and are distinguishable. In my opinion, these cases are not authorities for the proposition that a mortgagee may acquire title by adverse possession in all cases. The principle laid down there cannot be extended beyond the facts of those cases.

8. Learned Advocate General appearing on behalf of the plaintiff contended that the penalty clause inserted in the mortgage bond amounted to a clog and it cannot be a foundation for changing the nature of the possession of the mortgagee. In support of his argument he relied on a case of the Supreme Court. Murarilal Vs. Dev Karan, . This was a suit for redemption of a mortgage executed on the 19th March, 1919. The bond executed in favour of the mortgagee provided that a mortgagor would get the property redeemed on payment of the mortgage amount as well as the cost of patta which may have been incurred by the mortgagee and the repairing expenses within a period of 15 years After the expiry of the stipulated period of 15 years, this shop would be deemed as an absolute transfer for this very amount. Till the mortgage money is not paid, the mortgagor shall have no concern with the shop. The Supreme Court held that the relevant clause meant that in the event of the amount due under the mortgage remaining unpaid within the stipulated period, the mortgagor's title would be extinguished and the mortgagee would become the absolute owner of the

property. Hence, the stipulation in the mortgage deed amounted to a clog and could not be enforced so as to bar the suit for redemption subject, of course, to the general law of limitation prescribed in that behalf.

Similarly in AIR 1930 142 (Privy Council) while the Privy Council was dealing with the provisions of the mortgage deed conferring on the mortgagee upon redemption interest in the mortgage property, it was held that the said provisions amounted to a clog or fetter on the equity of redemption and as such were void since they were inconsistent with the very nature and essence of the mortgage. These decisions show that such stipulations are void, and they cannot be a foundation for changing the rights and title of the parties to the deed. In my opinion, the relationship of mortgagor and mortgagee continued as of a creditor and a debtor even after the failure of the mortgagor to pay the mortgage amount on the due date. The transaction being a mortgage, question of interpretation of the document does not arise.

9. The next question in this case is as to whether there was any subsequent act by which the character of the mortgage changed into a sale-deed. Mr. Prem Lall relied on three facts in support of his contention: that after the failure of the mortgagor to repay the amount on the due date, the mortgage became a sale. Firstly he relied on the mutation of the names of the defendants in the office of the Anchal Adhikari in place of Raghunandan Sao, secondly, admission made by Raghunandan Sao in a Criminal case and thirdly reconstruction of the house by spending a huge amount of money by the defendants sometime after the year 1934. There is no dispute that the names of the defendants had been mutated, but there is a great dispute regarding the admission of Raghunandan Sao. It appears that there was a criminal case started against one Banshi Marwari with regard to the construction of a latrine in one of the houses in suit. Raghunandan Sao was a defence witness on behalf of Banshi Marwari and he stated.

"I know the accused. I sold a house of mine at Khagaria to the accused about a year ago."

It is difficult to accept that this statement of Raghunandan Sao is admissible to establish any change in the nature of the possession of the mortgagee. When this statement was made Mohari Bai, the mortgagee of the Sudbharna bond, was alive and continued even after the above statement was made. Therefore, the statement made by Raghunandan Sao was obviously wrong, because he had not sold the house to the accused of the criminal case. Even if it be accepted that the statement of Raghunandan Sao indicated that he made an admission that Mohari Bai had become the owner of the disputed house, even then in the eye of law it would not extinguish the right of redemption in respect of the Sudbharna bond in question.

In this connection it would be profitable to see the case reported in Ram Singh and Others Vs. Baij Nath and Others, , which has been relied upon by the lower appellate court A Division Bench of the Allahabad High Court in the above case

has rightly held:

"A mere admission by a mortgagor or an understanding between him and the mortgagee that the mortgagee has become the owner of the mortgaged property cannot extinguish the mortgage or destroy the right of redemption of the mortgagor.

It is open to a mortgagor and mortgagee to enter into a contract subsequently to the mortgage for the sale of the mortgaged property to the mortgagee. But the contract must not be part and parcel of the original loan or mortgage bargain. In other words, the act of the parties that is referred to in Section 60 of the Transfer of Property Act as extinguishing a mortgage must be one which is independent of the mortgage transaction and is not a part and parcel of it."

As stated by me above, the mutation and the admission both cannot be relied upon by the defendants in support of their case of adverse possession. So far the case of the defendants that they have reconstructed the houses after investment of about a lakh of rupees, the findings of the courts below are against this contention of the defendants. The defendants made out a case in their written statement that the suit houses were reconstructed after the earthquake of 1934 to the knowledge of Raghunandan Sao and the plaintiff and they stood by and acquiesced in the same, Mr. Prem Lall contended that the plaintiff is bound by estoppel, which sometime is called building estoppel, because having acquiesced to the reconstruction of the houses, at such a heavy cost he cannot turn round and claim title to the houses. But as the court below has found none of the witnesses who were examined on behalf of the defendants stated in his examination-in-chief to reveal that he ever saw either Raghunandan Sao or the plaintiff near the disputed houses when they were being constructed after the earthquake of 1934, as alleged by the defendants, nor there is anything on the record to indicate that Raghunandan Sao gave his consent to the reconstruction of the house at the costs of the defendants. It is alleged by the plaintiff that Raghunandan Sao was living at somewhere else at that material point of time and he had no knowledge of the reconstruction of the house. There is no evidence on the record that the house of the plaintiff was at a distance of about 100 steps from the suit houses. The court below has not even accepted this allegation of the defendants that the houses were completely demolished by the earthquake of 1934, and the defendants rebuilt the same by spending a lakh of rupees. In this situation, the contention of Mr. Prem Lall that act of the mortgagor accepted by the mortgagee will change the nature of the transaction cannot be accepted.

The cases relied upon by him, namely, Sk. Khadimul Haque and Others Vs. Marai Dubey and Another, and Bharat Singh and Another Vs. Bhagirathi, are distinguishable and do not support the contention made on behalf of the appellant Mr. Prem Lall also relied upon the cases Mahanth Ramrupgir and others Vs. Lal Chand Marwari and others and Dr. Abdul Khair Vs. Miss Sheilla Myrtla James and Another, in support of his contention that if a party having an interest

to prevent an act being done acquiesces in it so as to induce a reasonable belief that he consents to it, and the position of others is altered by their giving credit to his sincerity he has no more right to challenge the act, But there can be no acquiescence or waiver in a case where both parties are unaware of their rights in the disputed property. Unless both are fully cognizant of their right to dispute them, the parties cannot be said to acquiesce in the claims of the other. In the instant case there is nothing to show that Raghunandan Sao or the plaintiff was aware that the unilateral acts of the defendants would change the nature of the rights. Therefore, no building estoppel or equity has arisen in favour of the defendants which can prevent the plaintiff in the circumstances of the case to claim redemption of the suit houses.

The learned Advocate General relied on two decisions in support of his submissions that generally the possession of the mortgagee cannot be regarded as adverse to the mortgagor. In the case of *Khiaraimal v. Daim* ILR (1904) Cal 296 the Judicial Committee of the Privy Council has observed as follows:--

"Their Lordships are satisfied that the possession has been that of the mortgagees throughout, and the question at issue is exclusively one between the mortgagor and mortgagee. As between them, neither exclusive possession of the mortgagee for any length of time short of the statutory period of sixty years nor any acquiescence by the mortgagor not amounting to a release of the equity of redemption will be a bar or defence to a suit for redemption if the parties are otherwise entitled to redeem."

In another case referred to by the learned Advocate General, namely, *Ramlochan Singh and Others Vs. Pradip Singh and Others*, a Bench of this Court has rightly laid down the principle of law which is as follows:--

"Adverse possession is possession in denial of the right of another to immediate possession. Consequently, possession cannot be regarded as adverse against a person who is not entitled in law to possession. So long as the mortgagee remains in possession, the mortgagor has no immediate right to claim possession of the mortgaged property. In such circumstances the possession of the mortgagee cannot be regarded as adverse to the mortgagor."

Therefore, I am of opinion that the plaintiff has not lost his right to redeem the mortgage and obtain khas possession of the suit properties.

10. It was further urged on behalf of the defendants that the Munsif cannot resume jurisdiction by allowing amendment of the plaint. It was contended by Mr. Prem Lall that originally, according to the reliefs claimed, the suit was for a declaration of the plaintiff's title followed by another declaration that the plaintiff "has got the right to redeem the mortgage bond and also for possession. Therefore, the valuation of the suit was not only Rs. 1,800, the value of the mortgage bond, but Rs. 72,935, the valuation of the houses estimated by an Engineer appointed in the suit. In other words according to Mr. Prem Lall, the Munsif had no pecuniary jurisdiction initially when the plaint was filed before him

and, therefore, he had no jurisdiction to allow the amendment of the plaint. According to him, the plaint comes u/s 7 Clause V(e) of the Court Fees Act and after the amendment it became a suit u/s 7 Clause X Part I of the Court Fees Act.

The declaration sought by the plaintiff that he was Bhagina of Raghunandan Sao even though it may be taken to be not necessary, still the Court will have no jurisdiction to ignore it and allow the amendment. Mr. Prem Lall in support of his contention relied upon some decisions of other High Courts, but he conceded that in case it is construed that the plaint originally framed was only for a redemption and it was from the very beginning a suit for redemption, then the suit was maintainable and the cases relied upon by him will have no application. In the first place there is no specific plea of want of pecuniary jurisdiction in the written statement. Secondly, the substance of the plaint has to be seen in deciding the nature of the suit. I have already quoted the reliefs mentioned in the plaint originally filed and also the amendment allowed by the learned Munsif. On a perusal of the facts stated in the plaint and the reliefs, I am of definite opinion that the suit from the very beginning was a suit for redemption of the Sudbharna bond and it was rightly valued at Rs. 1,800/-. The valuation of a suit for redemption of a mortgage bond is both for the purposes of jurisdiction and computation of court fees.

In the Full Bench case of Ramkhelawan Sahu Vs. Bir Surendra Sahi and Others, this Court has held that the valuation of a suit for Court fee purposes is to be determined by the question whether the suit is really one for declaration in the true sense of the word, or whether it is a suit for possession. So where the plaintiff claims certain property as a reversionary heir of a deceased male after the death of his widow on the ground that the alleged gift by the widow under which the defendants claim possession is void, that suit is merely for possession, as the deed of gift can be ignored and there need be no suit or claim to have it set aside. In the instant case, the plaintiff really wanted a decree for redemption of the Sudbharna bond and the declaration as sought regarding his Bhaginaship was merely surplusage and, therefore, the nature of the suit remained the same before the amendment and even after the amendment, and the learned Munsif had jurisdiction to allow the amendment. The valuation put on the relief at Rs. 1,800 shall also be the valuation u/s 8 of the Suits Valuation Act for the purposes of jurisdiction. It follows, therefore, that Rs. 1800 was the correct valuation of the suit and the Munsif had full jurisdiction to allow the amendment and not to return the plaint, as contended by Mr. Prem Lall. It also appears that the defendants had come in revision before this Court against the order of the amendment allowed by the learned Munsif. but they withdrew the same, and they had taken no objection with regard to the amendment of the plaint in their memorandum of appeal filed in the court below. Therefore, the defendants cannot be allowed to raise this point in a second appeal before this Court.

11. All the points raised in the appeal on behalf of the appellants fail and the appeal is, accordingly dismissed. But in the circumstances of the case the parties

will bear their own costs of this Court.

S.N.P. Singh, J.

12. I agree.