

(1975) 01 MP CK 0004
In the Madhya Pradesh High Court
Case No : S.A. No. 622 of 1968

Sunderlal Malloo Singh Rajput and another APPELLANT
Vs
Dhannoo Ram Singh and others RESPONDENT

Date of Decision : 15-01-1975

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 151
Transfer of Property Act, 1882 — Section 43, 6(a)

Citation : (1977) J LJ 536

Hon'ble Judges : Raj Krishna Tankha, J

Bench : Single Bench

Advocate : Y.S. Dharmadhikari with D.M. Dharmadhikari, for the Appellant; R.P. Verma for respondents Nos. 1 to 4, for the Respondent

Final Decision : Dismissed

Judgement

R.K. Tankha, J.—This is an appeal by Sunderlal (defendant No. 12) and Smt. Keshar Bai (defendant No. 13) against the judgment and decree dated 16-4-1966 passed by the Additional District Judge, Betul, in Civil Appeal No. 1-A of 1965.

2. The present suit was filed for redemption of a mortgage by Dhannoo son of Ramsingh (respondent No. 1-plaintiff No. 1), his mother Smt. Bhagwanti (respondent No. 2-plaintiff No. 2) and the transferees of half share of the suit property by them, namely, Khushalsingh (respondent No. 3) and Fakirchand (respondent No. 4-plaintiff No. 4).

3. The admitted facts are that the suit property, viz., Khasra numbers 88/1, 90, 91, 89, 95 and 96, area 20.27 acres, located in village Khaparakhedi, tahsil Multai, District Betul, including a house belonged to one Gurdhi, who is alleged to have died in the year 1916 (wrongly mentioned by the lower Court as 1905). Gurdhi effected a usufructuary mortgage of the suit property by a registered mortgage-deed (Ex. P-6) dated 13-8-1902 with possession in favour of Hirachand and Manakchand. Ramsingh son of Gurdhi during the life-time of his

father effected sale of the suit lands excluding the house by a registered sale-deed (Ex. D-5) dated 25-7-1903 in favour of one Malloosingh. Ramsingh died near about the year 1944 and as regards the date of death, of Malloosingh it is not known but he died earlier to his son, it was also not disputed that the Khasra numbers of the suit lands were consolidated and instead one khasra number was given as 131 and the area was also modified as 20.45 acres.

3. The case of the respondents 1 to 4-plaintiffs, in brief, is that Gurdhi executed a usufructuary mortgage in favour of Hirachand and Manakchand vide mortgage deed dated 13-8-1902 (Ex. P-6). In that deed the period of repayment or redemption was fixed as 10 years and as such in view of Article 148 of the Limitation Act, 1908, the period of redemption being 60 years, the present suit filed on 23-12-1962 for redemption of the alleged mortgage was within limitation. It was also pleaded that Ramsingh son of Gurdhi had no right or title to effect sale of the suit lands vide sale-deed dated 25-7-1903 (Ex. D-5) in favour of Malloosingh and as such Sunderlal son of Malloosingh (defendant No. 12) and Mst. Keshar Bai (defendant No. 13), who are the appellants in the present appeal, prescribed no right or title to the suit property. It was further pleaded that the original mortgagees, namely, Hirachand and Manakchand, had filed two Civil Suits, one for possession and the other for mesne profits against Ramsingh and his vendee Malloosingh. Civil Suit No. 195 of 1905 was for possession and the same was decreed in favour of the mortgagees, copy of the judgment (Ex. P-4) is dated 9-4-1906 and the mortgagees got, possession in pursuance of the decree passed in that Civil Suit. The Second Civil Suit No. 176 of 1909 was for mesne profits for the year 1905-1906, which was also decreed, copy of that judgment (Ex. P-5) is dated 20-9-1909. The respondents 1 to 4-plaintiffs pleaded that by virtue of the decree passed in Civil Suit No. 195 of 1905, the original mortgagees had obtained possession of the suit lands on 29-11-1906. But, thereafter, Malloosingh secured possession of the suit lands as assignee of those original mortgagees. That being so, according to them, the possession of Malloosingh and his successor-in-title, would be only on behalf of the original mortgagees and not on the basis of their own rights, since on 6-6-1962 Dhannoo (respondent No. 1) and his mother Smt. Bhagwanti Bai (respondent No. 2) sold their half share vide sale-deed (Ex. P-7) in favour of Khushalsingh (respondent No. 3) and Fakirchand (respondent. No. 4), and therefore, these respondents 1 to 4 jointly filed the present suit for redemption of the mortgage against other respondent-appellants, that is to say, heirs of original mortgagees, i.e., Hirachand, and, Manakchand, who were defendants 1 to 11 and 14 to 19. appellants Sunderlal and Mst. Kesharbai, heirs of Malloosingh are in possession of the suit lands and are defendants 12 and 13 respectively. Smt. Rasi (respondent No. 22) and Smt. Parbatibai (respondent No. 23), who are in possession of the suit house are defendants 20 and 21 respectively.

4. In the present case only Sunderlal son of Malloosingh (appellant No. 1) and Mst. Kesharbai (appellant No. 2) contested the suit with regard to their, rights over, the suit lands, namely, khasra No. 131, area 20.45 acres. As regards Mst.

Rasi (respondent No. 22) and Mst. Parbati Bai (respondent No. 23), they contested the suit on the basis of their possession of the house. The rest of the respondents, who are legal representatives of the original mortgagees (except the minors) supported the case of the respondents 1 to 4-plaintiffs in their written statement. As regards the minors, who were represented by their guardian-ad-litem, they formally denied the claim but did not adduce any evidence in support of their plea. Thus, the only contesting defendants were the present appellants, Sunderlal and, Smt Keshar Bai, for the agricultural lands and Mst. Rasi (respondent No. 22) and Mst. Parbati Bai (respondent No. 23) for the house.

5. In the present appeal, I am only concerned with the case of the appellants, namely, Sunderlal (defendant No. 12) and Smt. Keshar Bai (defendant No. 13) who alone have filed the present appeal and as such I shall only mention here their plea in brief. According to them, Ramsingh effected a registered sale-deed (Ex. D-5) dated 25-7-1903 in favour of their predecessor Malloosingh, though at that time Ramsingh's father Gurdhi was alive. But subsequently he became the sole owner after the death of Gurdhi in the year 1915. Although the sale-deed executed in the year 1903 was void, it became effective by virtue of section 43 of the Transfer of Property Act. It was also pleaded that the appellants and their predecessor Malloosingh had been in possession of the suit property since 1915 and as such they prescribed an adverse title against the plaintiffs. Since they are the heirs of purchaser from Ramsingh, who was the son of Gurdhi, whatever rights Ramsingh had including the right of redemption they stood transferred to them. These defendants denied the fact of assignment as alleged in the plaint.

6. The trial Court dismissed the suit but the lower appellate Court decreed the same. Now the appellants, who are defendants Nos. 12 and 13, have alone come up in the present second appeal.

7. Before proceeding to decide the appeal, I would like to mention that I.A. No. 810 of 1969 was submitted by the appellants seeking transposition of the names of respondents 22 and 23 as appellants on the ground that they were shown in the array of respondents due to inadvertance. That, application, as it appears from the order-sheet of the Court dated 23-7-1969, was then opposed by the learned counsel for the Plaintiffs. This Court did not pass any orders and left the application to be considered at the time of the final hearing of the appeal. But that application was not pressed before me. Accordingly it is rejected.

8. On 6-10-1969 it was brought to the notice of this Court that respondents Nos. 20 and 21 had died sometime back and their legal representatives were not brought on record. In consequence of that the appeal so far as they were concerned stood abated as ordered on that day. It was further ordered that the effect of the abatement on the rest of the appeal shall be considered at the time of final hearing of the appeal. Thereafter, I.A. No. III-4022 of 1969 dated 26-11-1969 was moved u/s 151 of the CPC for deletion of the names of the deceased respondents 13, 20 and 21 from the memo, of appeal, they having

died. It was contended that the legal representatives of respondents 20 and 21 were already on record as respondents Nos. 10, 11 and 12. As regards the respondent No. 13 he was only impleaded as a pro forma defendant in the capacity of one of the legal representatives of the original mortgagee, Manakchand and all other legal representatives of said Manakchand are already on record and hence deletion of the names of these respondents would not render the appeal incompetent and it was prayed that the appeal be allowed to be proceeded with. At the hearing, this application was not opposed by the learned counsel for the respondents 1 to 4-plaintiffs as according to him the present appeal does not abate on account of the legal representatives being on record nor the question of its abatement on that score arises. Besides that, with regard to respondent No. 13, he was only a pro forma defendant. Therefore, the deletion of the names of three respondents from the array of parties vide order-sheet of this Court dated 17-12-1969 has not resulted in the abatement of this appeal.

9. Having heard learned counsel of the parties, I am of opinion that the present appeal has no force and it must be dismissed. Before I proceed to decide the two points raised before me by the learned counsel for the appellants, I would like to mention that the present appeal relates to the lands, i. e., khasra No. 131, area 20.45 acres only. The matter relating to the house stands concluded in favour of the respondents 1 to 4 Plaintiffs by a judgment and decree of the lower appellate Court as the contesting defendants in that regard, i. e., Mst. Rasi (respondent No. 22) and Mst. Parbati Bai (respondent No. 23) have not come up in appeal before this Court.

10. The first contention of the learned Counsel for the appellants was that by virtue of sale-deed (Ex. D-5) dated 25-7-1903, the transferee Malloosingh from Ramsingh and after the death of Malloosingh, his heirs would get a right of equity of redemption in view of the provisions of section 43 of the Transfer of Property Act as the transferor Ramsingh after the death of his father had acquired interest as the owner of the suit land. It would be better to reproduce the section for the proper appreciation of the contention. Section 43 reads as under:

Where a person fraudulently or erroneously represents that he is authorised to transfer certain immovable property and professes to transfer such property for consideration, such transfer shall, at the option of the transferee, operate on any interest which the transferor may acquire in such property at any time during which the contract of transfer subsists.

Nothing in this section shall impair the right of transferees in good faith for consideration without notice of the existence of the said option.

The principle enunciated by the aforementioned section is that no party, who has made a transfer to another, is entitled to say that the transferee has no right to the property; so that where a person without owning a property purports to

transfer it, he would be bound to make good the transfer if later he acquires that property. The principle of this section is, in fact, an extension of the doctrine of estoppel. To say in other words, this section is based on the doctrine that subsequently acquired interest feeds the estoppel. The rule embodied in section 43 has been explained by their Lordships of the Supreme Court in *The Jumma Masjid, Mercara Vs. Kodimaniandra Deviah*, as under:

That section embodies, as already stated, a rule of estoppel and enacts that a person who makes a representation shall not be heard to allege the contrary as against a person who acts on that representation. It is immaterial whether the transferor acts bona fide or fraudulently in making the representation. It is only material to find out whether in fact the transferee has been misled. It is to be noted that when the decision under consideration was given, the relevant words of section 43 were where a person erroneously represents and now, as amended by Act 20 of 1929, they are where a person fraudulently or erroneously represents, and that emphasises that for the purpose of the section it matters not whether the transferor acted fraudulently or innocently in making the representation, and that what is material is that he did make a representation and the transferee has acted on it. Where the transferee knew as a fact that the transferor did not possess the title which he represents he has, then he cannot be said to have acted on it when taking a transfer, section 43 would then have no application and the transfer will fall u/s 6(a). But where the transferee does act on the representation, there is no reason why he should not have the benefit of the equitable doctrine embodied in section 43, however fraudulent the act of the transferor might have been.

Therefore, in the present case, what is material is that whether Ramsingh did make a representation and the transferee Malloosingh acting on that purchased the suit land. In case there was no representation on the part of Ramsingh, the present appellants cannot invoke the provisions of section 43 of the Transfer of Property Act in their favour. Learned counsel for the appellants relied on the execution of the registered sale-deed (Ex. D-5) dated 25-7-1903 in favour of their predecessor as an act on the part of Ramsingh amounting to representation of his title as vendor within the meaning of that section. It was not disputed before me that besides that act of execution of a registered sale-deed (Ex. D-5) there is no other evidence to show that Malloosingh, the predecessor of the appellants, in whose favour the sale was effected by Ramsingh, was misguided by any representations made by him and in that connection reliance was placed on a decision of this Court in *Ganeshdas and others v. Kamlabai* 1951 N L J 287 : A I R 1952 Nag. 29. In that case, it has been held by Hidayatullah, J., as he then was, that a representation need not be made in any particular form. It can be by word of mouth or by a document. A statement in a sale-deed that the vendor has not transferred the property to anybody in any manner whatsoever, nor has anybody any rights, interest or share therein is quite enough to show that there was a fraudulent representation when in fact the vendor had already sold it to a third party. Now one has to look to the contents of the sale-deed (Ex. D-5). In

the present case, to find out whether any such representation was made in pursuance of the contents mentioned therein so as to attract the provisions of section 43 of the Transfer of Property Act, I went through the contents of the sale-deed (Ex. D-5). But I do not find that it contains any recital to the effect that the vendor had not transferred the said immoveable property to anybody in any manner whatsoever, nor has anybody any rights, interest or share therein. My attention was also invited to para. 13A of the pleadings in the written statement submitted by the appellants. No doubt, a plea of section 43 has been raised but there is no averment to the effect that the appellants acted on the misrepresentation of Ramsingh in purchasing the suit lands. Thus, in my opinion, the appellants have completely failed to prove that there was any subsisting equity in their favour. The contention is, therefore, rejected.

11. The second contention of the learned counsel for the appellants was that admittedly the appellants, predecessor-in-title and afterwards they remained in continuous possession of the suit lands since the year 1903, i.e., the year of the sale-deed (Ex. D-5) and, therefore, their possession was clearly adverse to the right and title of the mortgagees and mortgagors or their heirs and the suit for redemption was clearly barred by adverse possession which ripened into their title. It was also submitted that no doubt for a short period from 1903 to 1906 the appellants possession was disturbed in pursuance of execution of a decree in Civil Suit No. 195 of 1905 which was executed against them by the mortgagees of the suit land. But that would not affect their continued possession inasmuch as admittedly again they got into possession of the suit lands in the year 1906. It was also contended that the respondents Nos. 1 to 4-plaintiffs failed to prove that Malloosingh, predecessor of the appellants, had obtained possession of the suit lands as assignee of the original mortgagees. That being so, the possession of Malloosingh was clearly as of owner and not as a mortgagee and in that view the appellants have acquired title by adverse possession. In support of his contention, learned counsel placed reliance on a decision of the Bombay High Court in Digamber Shridhar Dhekne Vs. Ramratan Raghunath, . It was also submitted that Ramsingh having died sometime in the year 1944 and the appellants having perfected their title during his life-time, whatever right of equity of redemption was there in favour of the heirs of Ramsingh had extinguished long back.

12. In my opinion, the above referred case has no relevance in view of the facts and circumstances of the present case. In that case, the principle laid down was that in a case of a possessory mortgage where the mortgagor is not entitled to possession prior to redemption, in order that an adverse possession of a trespasser against the mortgagee may be adverse to the mortgagor it must be shown that the mortgagor had notice or knowledge of the possession or that there were circumstances that should have given him notice or knowledge of such possession. In the present case, the mortgagees have not filed any suit for possession or title against the appellants. Therefore, the only question that remains for determination is whether the appellants have perfected any right or

title adverse to the mortgagors, i.e., heirs of Ramsingh (respondents 1 and 2). In view of the admitted fact that the respondents 1 to 4-plaintiffs failed to prove that Malloosingh obtained possession of the suit lands as assignee of the original mortgagees and admittedly the sale-deed (Ex. D-5) dated 25-7-1903 was void since Ramsingh had no right to effect the sale of the suit lands during the life-time of his father, I am of opinion that the possession of Malloosingh and after his death of the appellants would be that of a trespasser. That being so, the point that, in fact, emerges for consideration is whether the possession of the appellants, which they secured in the year 1915 (subsequent to their dispossession in the year 1906 in pursuance of a decree) can be construed as within the knowledge and hostile to the title of Ramsingh and in that event the respondents 1 to 4 plaintiffs would lose their right of equity of redemption. The fallacy in the argument of the learned counsel for the appellants lies in suggesting that the possession of the appellants should be deemed to be continuous from the year 1903 which they got in pursuance of the sale-deed executed by Ramsingh in their favour and the period from 1906 to 1915 should not be taken into consideration as they again came into possession in the year 1915. It is no doubt true that if the possession would have been continuous right from the year 1903, when admittedly the appellants had got possession in pursuance of the sale-deed (Ex. D-5), they might have perfected their title by adverse possession during the life-time of Ramsingh himself who died in the year 1944. But in the present case, there is no dispute that between the year 1906 and 1915 the appellants had lost their possession over the suit lands and they again came into possession in the year 1915. In that event burden was on them to show that their possession was for more than 12 years since 1915 by asserting a hostile and independent title not only against the mortgagee but also against the mortgagor and to his knowledge. If that was not so, the right of redemption of the mortgagor had not vanished under the law, the period for which prescribed being 60 years. A Division Bench of this Court in Seth Narainbhai Ichharam Kurmi and Another v. Narbada Prasad Sheosahai Pandey and others 1941 N L J 534 : A I R 1941 Nag. 357 : I L R 1942 Nag. 564 laid down that a trespasser would not extinguish the right of the real owner unless he enters upon the immovable property and physically ousts him from occupation as well as from possession and sets up an adverse title in himself. In a later decision in Lalsingh v. Fakir 1949 N L J 26 (S. A. No. 722 of 1944, decided on the 13th October 1948), Vivian Bose, A.C.J. (as he then was) held as under:

There can be no adverse possession by the mortgagee with possession until the mortgagor is entitled to immediate possession. The general rule regarding adverse possession is that time does not begin to run against a person until he becomes entitled to immediate possession. In the case of a usufructuary mortgage unless there are conditions in the mortgage deed to the contrary a mortgagor is not entitled to immediate possession until he redeems. Consequently there can be no adverse possession in the ordinary sense and the usual period of 60 years cannot be curtailed by the mortgagee.

13. In *Sri Kishun Raut and Others Vs. Ram Brich Singh and Others*, , it has been laid down that where a third person who had dispossessed the mortgagee in possession, remained in possession of the mortgaged property for more than 12 years by asserting a hostile and independent title not only against the mortgagee but also against the mortgagor to his knowledge, he acquired full title not only against the mortgagee but also against the mortgagor with the result that the mortgagor could not claim redemption. In that case, the case of *Tarubai v. Venkatrao* I L R 27 Bom. 43 has been followed, where it has been held as under:

No doubt, as long as the mortgagee is in possession he and all claiming under him represent the mortgagor's possession. If the mortgagee in possession is dispossessed on grounds affecting only his right, as for instance, his right, as heir to represent the original mortgagee or his right, as in *Purmanand Das v. Jamnabai* I L R 10 Bom. 49, to possession in spite of a third party's lien on the property then the dispossession of the mortgagee obviously does not imperil or call in question any right of the mortgagor and the mortgagor is not concerned or entitled to insist on being immediately restored to possession and the possession taken is not adverse to him and cannot cause time to run against him. To give the mortgagor a right to insist on immediate possession, there must be an unequivocal ouster preventing the possession of the mortgagor from continuing altogether by leaving no room for doubt that the person taking possession does not profess to represent the mortgagor, but to hold in spite of him. In such a case, the mortgagor is as effectually and unmistakably displaced as if there had been no mortgage at all. When an ouster takes place in that manner the mortgagor knows that no one is in possession who can represent or continue his possession, or who is entitled preferentially to possession and, therefore, he becomes entitled (and it is necessary and his duty, if he does not want his right to be barred) to claim possession immediately

Therefore, applying the rules laid down in the aforesaid cases, I am of opinion that in the present case the evidence is totally lacking on the part of the appellants to prove the rights on the basis of which Malloosingh had re-entered possession of the suit lands in the year 1915. Mere re-occupying the suit lands without asserting a hostile title against the mortgagor could not be said that the right of redemption, which was there with the mortgagor, had extinguished. In the present case, there is nothing to construe that the mortgagor had a right to insist on immediate possession no sooner the suit lands were occupied in the year 1915 again by the appellants. Gurdhi, father of Ramsingh, had effected usufructuary mortgage in the year 1902 and the period of repayment or redemption was fixed as 10 years. Therefore, the period of limitation of 60 years prescribed under Article 148 of the Limitation Act, 1908 would start running after the expiry of those 10 years, which means that the limitation to claim redemption was till the year 1972. The present suit was filed on 23-7-1962 well within the period of limitation. Therefore, the claim of the appellants on the basis of adverse possession fails and the contention is accordingly rejected.

14. In the result, the appeal fails and is dismissed with costs throughout. The judgment and decree of the lower appellate Court is hereby affirmed. counsel's fee as per schedule or a certificate whichever is less.