

(1929) 07 CAL CK 0051
In the Calcutta High Court

Surendra Nath Choudhury and Others	APPELLANT
Vs	
Barisal Loan Co. Ltd.	RESPONDENT

Date of Decision : 31-07-1929

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 90

Citation : AIR 1930 Cal 313

Hon'ble Judges : Suhrawardy, J;C.C. Ghose, J

Bench : Full Bench

Judgement

Suhrawardy, J.—The facts involved in this appeal, shortly stated, are as follows : Defendants 5 and 6 were the holders of a nimhowla right in a certain property described as property No. 1 under the howladar one Bepin Behary Ghose on the basis of a kabuliyat dated 13th Chaitra 1301 B.S. Bepin was defendant 49 in this suit and he died during the pendency of the suit. It appears that Bepin obtained a rent decree against defendants 5 and 6 and in execution of the said decree, he purchased the nimhowla in question on 15th April 1906. On 1st Chaitra 1314 B.S. corresponding with 14th March 1908, Bepin mortgaged property 1 and certain other properties to the plaintiff company. The date of repayment under the mortgage was some time in May 1908. On 12th March 1909, defendants 5 and 6 made an application under Order 21, Rule 90, Civil P.C., for setting aside the sale of the nimhowla. Meanwhile it appears that Bepin had instituted a rent suit against one Felu and others in respect of a Miras karsa under the Nimhowla and that in execution of the decree in the said rent suit, defendants 5 and 6 purchased the Miras karsa in question. On 10th April 1910, the said defendants 5 and 6 sold the Miras Kasra to one Purna Chandra Sen, who, it is said, was the benamidar of defendants 1 to 4. On 12th April 1910 the sale of the nimhowla in execution of the rent decree obtained by Bepin was set aside. It is said that it was set aside as a result of a compromise. In 1914, the plaintiff company brought a suit against Bepin on the mortgage and obtained a decree in execution of which the property in question was purchased by the company. It is stated that symbolical possession was taken by the plaintiff company. The plaintiff

company brought a rent suit in 1921 against defendants 5 and 6 in respect of a Miras karsa held under the said nimhowla. The suit was dismissed.

2. The plaintiff company allege that they came to know for the first time in that suit in 1921 that on 14th April 1910, the sale of the nimhowla in execution of the rent decree referred to above had been set aside. The plaintiff company was not made a party to the proceedings for the setting aside of the sale and as they did not know of these proceedings, defendants 5 and 6 and the other defendants who had purchased their interest were not made parties by the plaintiff company to the suit on the mortgage. The present suit has been brought by the plaintiff company for recovery of possession of the property in question subject to the right of redemption of the parties who had not been joined in the suit on the mortgage.

3. Defendants 1 to 4 as stated above, Are the purchasers of the nimhowla from defendants 5 and 6 in the benami of one Purna Chandra Sen and the main point taken in the written statement on their behalf was that the suit was barred by limitation. The trial Court decreed the suit. There was an appeal to the lower appellate Court but the appeal was dismissed subject to certain modifications regarding the amount of redemption. Thereafter defendants 1 to 3 have preferred the present appeal.

4. Two questions have been argued before us, (1) that the present suit is not maintainable and (2) that it is barred by limitation, it having been instituted on 14th December 1921 i.e., more than 12 years from the due date of payment under the mortgage in favour of the plaintiff. When the matter came before us in the first instance on 12th December 1928, we were of opinion that it was necessary that findings should be arrived at by the lower appellate Court on two questions, i.e., (1) whether the appellants were aware of the mortgage in favour of the plaintiff company at the time when they had the sale of the nimhowla set aside and, (2) whether the proceedings leading up to the setting aside of the rent sale on 12th April 1910 by compromise were fraudulent. The lower appellate Court has now recorded its findings on the two points mentioned above and is of opinion that the appellants were not aware of the mortgage at the time when they had the sale of the nimhowla set aside and that the proceedings leading up to the setting aside of the rent sale on 12th April 1910 were not fraudulent.

5. There can be no doubt on the facts of this case as set out in the judgments of the two Courts below that no notice was served upon the plaintiff company under Order 21, Rule 92, Civil P.C., in the matter of the proceedings for the setting aside of the sale of the nimhowla. Further it has been found that the plaintiffs were not aware before they instituted their suit on the mortgage (which resulted in a decree in their favour and in execution whereof the properties in question were purchased by them on 18th July 1916) that defendants 5 and 6 or defendants 1 to 4 had any interest whatsoever in the, mortgaged property. Further, the evidence is that not until the suit in 1921 referred to above, did the plaintiff company become aware at any time of the interest of the said persons.

In these circumstances I entertain no doubt whatsoever that the present suit for recovery of possession subject to the right of redemption of the defendants concerned is maintainable. The cases on this point are to be found referred to in the judgments of the two Courts below and it will serve no useful purpose if I were to go through them once again.

6. The next question is whether limitation should run from 18th July 1916, the date of the plaintiff's purchase or from 15th April 1906, the date of Bepin's purchase of the nimhowla. Courts below have held that limitation should run from the date of the plaintiff's purchase. The learned Subordinate Judge observes that the plaintiff having come to know of the interest of defendants 1 to 4 in the rent suit of 1921 and that adverse possession against the mortgagor is of no avail against the mortgagee, time against the plaintiff should be computed from the date of the purchase and not from the due date fixed by the mortgage. The proposition of law as stated by the Subordinate Judge is correct but in my judgment it is not applicable to the facts of this case. It has been found that since his purchase in 1906 Bepin never obtained actual possession and it must be considered that the defendants remained in adverse possession of the nimhowla; so that when Bepin mortgaged the Nimhowla to the plaintiff company, Bepin was not in possession of the mortgaged property and the defendants were in adverse possession thereof. (The mortgage by Bepin did not stop running of the time against him or any one claiming through him.) One test may be usefully applied in determining this question. If Bepin had not mortgaged the nimhowla to the plaintiff company, could he have succeeded in a suit for possession brought in December 1921 (the date of the institution of the present suit)? The answer must be in the negative. There is no reason why his mortgagee or any person claiming through him should acquire a higher right or an act by him creating an interest in the property of which he is not in possession should stop the running of limitation in contravention of Section 9, Lim. Act or create a fresh terminus. Adverse possession against mortgagor does not affect the right of the mortgagee when it commences after the mortgage but this rule does not apply if it had begun before the mortgage which was effected when the mortgagor was not in possession.

7. In the above view the plaintiff's suit must be held to be barred by limitation. The appeal accordingly succeeds, decrees of the Courts below are set aside and the plaintiff's suit is dismissed with costs throughout.

C.C. Ghose, J.

8. I agree.