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MANU/BH/0004/1951

Equivalent Citation: AIR1951Pat137

IN THE HIGH COURT OF PATNA
FULL BENCH

A.F.A.D. No. 2088 of 1947

Decided On: 16.04.1951

Appellants: **Kameshwar Prasad Singh**
Vs.
Respondent: **Meghan Garain and Ors.**

Hon'ble Judges/Coram:
David Ezra Reuben, Syed Jafar Imam and Vaidynathier Ramaswami, JJ.

Counsels:
For Appellant/Petitioner/Plaintiff: Lalnarain Sinha, Ishwarinandan Pd. Singh and L.M. Sharma, Advs.

For Respondents/Defendant: Mahabir Pd. and Sidheshwar Pd. Singh, Advs.

JUDGMENT

Vaidynathier Ramaswami, J.

1. The question to be determined in this appeal is whether the pltf. ought to be granted a decree for redemption with respect to an area of 19 bighas & odd located in Mohiudinpore Khasiawan of which the defts. are said to have taken usufructuary mtge.

2. The pltf. brought the suit on the allegation that in Jeth 1320 Fasli Banke Bihari Singh had given the land by an oral ijara for a sum of Rs. 216 to four sets of defts., viz., defts. 1 to 5, defts. 6 to 10, defts. 11 to 14 & defts. 15 to 21. The pltf. alleged that as successor-in-interest of Banke Bihari Singh he repaid the ijara money to the defts. & after redeeming the mtge. obtained possession of the land. There was a subsequent dispute Under Section 144, Cr. P. C. between the parties & the Sub divisional Mag. issued a warning notice against; the pltf. The pltf. asserted that on 20-8-1941 the defts. dispossessed him from the land illegally. The pltf. therefore asked (1) for

> "a declaration that the defts. came in possession by virtue of the ijara of Jeth 1320 fasli & the said ijara was redeemed on 12th Jeth 1348 fasli by the pltf. & the possession of defts. thereafter was illegal, (2) that a decree for possession may be passed in favour of the pltf. against the defts. (3) that a decree for mesne profits be granted from date of dispossession till the date of the suit & thereafter till the recovery of possession by the pltf."

The main ground of, defence was that the defts. had not taken any oral ijara but they had purchased the land by an unregistered sale deed from Banke Bihari Singh. There was an alternative plea that even if the case of oral ijara was true such oral ijara was void & inoperative & the defts. were in adverse possession for the statutory period & had acquired absolute title to the land.

3. The Subordinate Judge held that the oral ijara was invalid, that the defts. had been in adverse possession of the land for over 12 years & had acquired absolute title. He disbelieved the defts.' case that Rambabu, the maternal uncle of Bankey Bihari Singh, had executed any unregistered sale deed in their favour. The Subordinate Judge disbelieved the story of the pltf. that he had repaid the ijara money on 12th Jeth 1348, that he had obtained possession of the land or that the defts. had dispossessed him on 20-8-1941. On these findings, the Subordinate Judge dismissed the suit. The decree of the learned Subordinate Judge has been affirmed by the Dist. J. in appeal.

4. When the second appeal first came for hearing it was argued by Mr. Lalnarain Sinha on behalf of the pltf. that possession of the defts. as mtgees since 1320 fasli could in no way extinguish the title of the mtgor. when he sued for possession after repayment of the mtge. money. Impressed by this argument, the H.C. remanded the case to the Dist. J. for a finding whether the defts. were in possession of the properties as mtgees or as purchasers. The H. C. ordered that the unregistered sale deed relied upon by the defts. should be taken into evidence for the collateral purpose of showing the nature of the possession asserted.

5. The Dist. J. thereafter examined the evidence & recorded the finding that the defendants were in possession as mtgees. of the land, that they continued to be in possession as mtgee. from 1320 Fasli till the year 1941 when they asserted for the first time their rights as purchasers of the land.

6. When the appeal was heard after remand, Sinha & Rai JJ. refd. the whole appeal for decision by a larger bench since they doubted the authority of the ruling in Bhukhan Mian v. Radhika Kumari Debi 19 PLT 489.

7. Before the F. B. two questions were mainly argued (1) whether it is open to the pltf. to claim a decree for redemption despite the fact that the plea of adverse possession was not distinctly raised in the plaint & it has not formed the subject-matter of an issue before the Subordinate Judge, & (2) whether the pltf. could be granted such a decree on the ground that the defts. had acquired only the right of mtgee. by adverse possession for more than 12 years.

8. As regards the first question it is of importance to notice that the pltf. had alleged that there was an oral ijara in 1320 Fasli by Banke Bihari Singh in favour of the defts. that on 12th Jeth 1348 the pltf. repaid the ijara money & came in possession of the land, that on 20-8-1941 the defts. illegally dispossessed the pltf. The pltf. therefore asked for a declaration that the ijara was redeemed, that a decree for possession & mesne profits should be passed in his favour. The lower Cts. have found that the story of payment was not true, that the oral ijara was not re-deemed & that the pltfs. did not obtain possession of the land, that he was not dispossessed by the defts. in the manner alleged in the plaint. For the applt. Mr. Lalnarain Sinha pointed out that in Para. 16 of the written statement defts. stated that the oral ijara was inoperative, that the defts. had been in adverse possession of the land & had acquired absolute title. But it is nowhere stated in the pleadings either in the plaint or the written statement that the defts. had asserted only the limited interest of the mtgee. & that they had acquired such limited interest by adverse possession for mote than 12 years. In the lower appellate Gt. an argument was addressed on behalf of the pltf. that possession of the defts. was permissive & that they had acquired title of mtgee. The argument was rejected by the lower appellate Ct. on the ground that no case of permissive possession was disclosed in the plaint or in the evidence of the witnesses examined on pltfs. behalf & that pltf. could not be permitted to make out a new case

in appeal. The lower appellate Ct. added that the point was not even mentioned in the grounds of appeal. The question was again raised when the appeal was argued in the H. C. before the order of remand was passed. Upon the pleadings of the parties & the issues framed in the present case, it, is, in my opinion, impossible to grant a decree for redemption to the pltf. on the ground that the defts. had prescribed for the limited title of a mortgagee by remaining in possession for over 12 years. If the pltf. had intended to rely upon the plea that the defts. had prescribed only for the limited interest of a mtgee. he should have distinctly stated so in the plaint or raised it in the issue framed by the trial Ct. There is much force in the contention of the learned Advocate-General that the defts. had no proper notice that such a point was going to be raised. In view of the findings of fact, that the pltf. has not repaid the money due on the ijara, that he did not obtain possession after the alleged redemption nor was he dispossessed on the dates alleged, it is manifest that the suit must wholly fail.

9. This opinion is supported by Shiro Kumari Debi v. Govind Shaw Tanti, 2 Cal. 418 in which the plaint stated that the land in dispute had been purchased by the pltf. from one Lochunkali under a kebala & the pltf. had been in possession of the said land through bhag tenants. One of the issues framed was "Is the disputed land held by the pltf. as alleged by him". The Munsif granted a decree but the lower appellate Ct. was not satisfied that the pltf. had established the precise title which he had set up though it was satisfied that he had been in possession for 12 years & upon that ground he gave the pltf. a decree. In second appeal, the H. C. held that the question of adverse possession had not been properly raised either in the plaint or in the issues in this case & the defts. had no proper notice that such a point was going to be raised; & that the suit brought by the pltf. should be dismissed.

10. To the same effect is the decision Joytara Dassee v. Mohamed Mobaruck 8 Cal. 975 in which Field J. States :

> "Then, as to the second point, we think there can be no doubt, & indeed the learned counsel, Mr. Bell, in his argument, very properly admitted, that the plfs. did not make in their plaint any alternative title based upon a twelve years possession. They do, indeed, say that they were in possession of the land, but they do not say that they were in possession for twelve years, or 'from before', or for a long time;' nor do they use any of those other general expressions which are to be found in plaints in this country, & which are at times argued to convey to the party, on the other side, the meaning that the pltf. relies upon an undisturbed possession for more than 12 years. This being so, it appears to us that it is impossible to uphold a decree which is based upon a title not stated by the pltfs. in their plaint, & as to which no issue was framed for trial in the Ct. below. Gases must be tried & determined secundum allegate et probata, & it is contrary to this principle, & may be fraught with injustice, to decide a cause upon a point not raised in the pleadings, nor embodied in an issue, & to which, in consequence, the attention of the parties was not directed at the trial so as to enable them to produce all the evidence relevant thereto which was available to them."

11. In this context reference should be made to Eshenchunder Singh v. Shamachurn Bhutto, 11 M. I. A. 7 in which Lord Westbury pointed out the absolute necessity that determination of a cause should be founded upon a case either to be found in the pleadings involved or consistent with the case thereby made :

> "It is obvious that every one of these propositions of fact is a statement

which it was incumbent on the pltf. to have distinctly alleged, in order that it might be the subject of direct testimony. It is impossible to conclude parties by inferences of fact which are not only not consistent with the allegations that are to be found in the plaint, which constitute the case the deft, has to meet, but which are in reality contradictory of the case made by the pltf, It will introduce the greatest amount of uncertainty into judicial proceedings if the final determination of causes is to be founded upon inferences at variance with the case that the pltf. has pleaded, &, by joining issue in the cause, has undertaken to prove."

12. In view of these authorities, I am of Opinion that the pltf. in the present case ought not to be granted a decree for redemption on the ground that the defts. continued in possession of the land asserting themselves to be mtgees. for the period required by the statute. It follows that the decree of the lower Cts. is right & the second appeal must fail.

13. If this conclusion is correct, it is not necessary to examine the second question whether the defts. had acquired limited title of a mtgee. upon the evidence recorded by the Dist. J. on remand.

14. In the order of reference the learned Judges abate that Bhukhan Mian v. Radhika Debi19 PLT 489 required reconsideration if that case was an authority for the proposition that the possession of one who came over the property as a mtgee. in possession becomes adverse not only to the extent of the mtgee's rights but completely in respect of absolute title. At P. 494 of the report, Wort A.C.J. says :

> "I am aware of a number of cases in India which appear to have the effect of holding that a person can prescribe for a limited interest but I must say that I always fail to understand them as both a tenancy & mtge. are creatures of contract, & on fundamental principles I find it difficult to hold the view that a contract can be brought into existence by prescription. The view that I hold of the matter is beat expressed by the Allahabad H.C. in Umr-un-nissa v. Muhammad Yar Khan 3 All. 24. Pearson J. in delivering one of the judgments of the F.B. of that Ct. made this observation : 'In my opinion in order to bar the suit under Article 144 of the Act of 1877 the adverse possession of the defts. must be of the same nature as that sought by the pltf." At p. 498, Manohar Lall J. states :
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> > "In this view I do not think it is necessary to consider whether the deft. can ever be held in law to be able to prescribe against a true owner his rights as a mtge. but if it were necessary to decide this matter I would have respectfully, agreed with the observations which have fallen from my Lord the Chief Justice on this point in the judgment just delivered by him."

15. But it is right to point out that the question whether there could be a prescription of a limited right of mtgee. was not really in issue in that case, & the passages from the judgments of Wort A.C.J., & Manohar Lall J. were mere obiter dicta. It is not necessary to examine the correctness of these dicta in the present appeal. In his concurring judgment, Manohar Lall J. concedes that no question of prescription arose in that case for the deft, never asserted that he had prescribed a mtge. nor did the pltf. make out such a case either in the pleading or in the evidence nor was any issue raised as to when the deft. began to prescribe & further the period of twelve years

did not expire from the date of entry in the Record of Eights relied upon by the defence. As no adverse possession was pleaded or established, the remarks of Wort A.C.J. & Manohar Lall J. were not necessary for the decision of the case. As suggested by Vaughan C. J. in Bole v. Horton, vaugh 360, 382:

> "An opinion given in. Court, if not necessary to the judgment given of record, but that it might have been as well given if no such, or a contrary opinion, had been broached is no judicial opinion, no more than a gratis dictum"

16. For the reasons already assigned, I hold that this appeal must be dismissed with costs.

David Ezra Reuben, J.

18. I agree.

19. Regarding the contention that the defts. by prescription had acquired the title of usufructuary mtgees., it has been contended by Mr. Lal Narain Sinha that all the necessary facts have been pleaded. He points out that the plaint states that the defts. entered in 1320 under an oral mtge. & that the pltfs. redeemed the mtge. in 1348, that is to say, the defts. were in possession as mtgees. for the statutory period of prescription. On these pleadings, however, the acquisition of mtgee's rights by prescription was irrelevant. The defts. were being sought to be evicted as trespassers, & were concerned only to prove their case of purchase. Hence, they cannot be treated as having had sufficient notice of a plea of title by adverse possession.

Syed Jafar Imam, J.

20. I agree that the appeal be dismissed.

21. The pltf.'s suit was in ejectment. On the allegations in the plaint, there can be no question that the suit was for recovery of possession from the defts. who had dispossessed the pltf. without any title or right on a particular date. In a suit for ejectment, the pltf. has to prove not only his title but also his possession within twelve years of the suit. The finding is that the story of the pltf. that he was dispossessed on a particular date after he had come into possession on redeeming the ijara was found to be false. On the contrary, it was found that the defts. were in possession since the year 1320 Fasli. On these findings, there could be no other course for a Ct. of law to take than to dismiss the pltf.'s suit.

22. The argument now made that the defts. had acquired a limited interest by prescription cannot be entertained in the present suit. No such plea had been taken in the plaint, nor was there any issue framed in this respect. No such thing was argued before the trial Ct. or before the appellate Ct. what had been argued was that even if there could be no legal mtge. by way of an oral ijara, the defts'. possession would not be that of trespassers, but they must be deemed to have been in possession on pltf.'s behalf & such possession was permissive possession.

23. In my opinion, it becomes quite unnecessary in the present case to discuss the case of Bhukhan Mian v. Radhika Debi 19 PLT 489 or to say one word whether that decision was or was not rightly decided.

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