

Devidas Dwarkadas Vs. Shamal Gopal

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Court : Mumbai

Decided On : Oct-21-1919

Reported in : (1920)22BOMLR149; 58Ind.Cas.595

Judge : Norman Macleod, Kt., C.J. and ;Heaton, J.

Appeal No. : Second Appeal No. 679 of 1918

Appellant : Devidas Dwarkadas

Respondent : Shamal Gopal

Disposition : Appeal allowed

Judgement :

Norman Macleod, Kt., C.J.

1. The plaintiff sued to recover possession of the plaintiff land on the ground that it had been leased to the defendant, and for Rs. 39 for rent.
2. He alleged the land belonged to one Marghabhai Babar who leased it to defendant for one year for Rs. 39 by a lease dated 20th June 1914. The plaintiff was an assignee of the lease under a deed dated the 14th June 1915.
3. The defendant was the owner of the suit land which formed an unrecognized division of a Narva. In 1895 he mortgaged it to Babar Solaidas, but continued in possession, first under a lease for ten years then under yearly leases of a moiety,

and finally under yearly leases of the whole. Mar ghabhai Babar and his nephew assigned their mortgage rights, a decree and the lease of the 20th June 1914 to the plaintiff in 1915.

4. At the trial defendant's pleader contended that the mortgage and lease were void under Section 3 of the Bhagdari and Narwadari Act, 1862. The learned trial Judge held that the mortgage, the lease and the assignment were all void and dismissed the suit.

5. In first appeal the learned appellate Judge considered that the question whether the plaintiff could recover turned on the question whether he ever got possession and remanded the case for trial of issues as to when Margha got physical possession of the land.

6. The lower Court found that Margha did not obtain physical possession until after March 1905.

7. It was proved that the defendant mortgagor remained in possession after the mortgage under a lease for ten years. On the 11th August 1905 he passed a lease for a moiety of the land, (Exhibit 27) although he said he remained in possession of the whole. Then for the monsoon of Sainvat 1965 he passed a lease for the whole of the land, Exhibit 28. On the other hand the mortgagee said he personally cultivated the land in 1961 but took the defendant into partnership and got him to execute Exhibit 27, and pursued the same course for three or four years until Exhibit 28 was passed in 1965. After that the defendant parsed a lease for the whole of the land.

8. On these findings the learned District Judge came to the conclusion that the vice of the original alienation had not been cured and the suit was not maintainable.

9. But from the decision in Javerbhai v. Gordhan (1914) 17 Bom. L. R. 259 it may be gathered that physical possession is not necessary. In that case the defendant mortgaged a house which formed an unrecognized division of a Bhag to the plaintiff in 1901 for Rs. 729. The deed of mortgage contained a covenant to pay

compensation to the mortgagee in the event of there being any hindrance or obstruction, concerning the house. The defendant continued in possession under yearly rent-notes. At the determination of the rent-note for the year ending July 1909 the defendant refused to surrender possession. On the 9th November 1910 the plaintiff sued to recover possession of the house or in the alternative for Rs. 729 as compensation. It was held that the mortgage and the rent-notes were void under the provisions of the Bhagdari Act. That the consideration for the mortgage failed ab initio and a suit to recover the money as received for the plaintiff's use was barred under s. 62 of the Indian Limitation Act, but it was open to the plaintiff to claim under the covenant, although the mortgage was void. But it was also held that the mortgagee was in adverse possession of the limited interest as mortgagee in possession and in assertion of that right held adversely to the defendant who continuously attorned to him. It would follow that if such adverse possession had continued for twelve years the plaintiff would have been able to recover possession as mortgagee. If that decision is correct the plaintiff in this case would be entitled to recover as having been in possession for more than twelve years.

10. The real question is whether the mortgage was void. If it was, the lease for ten years and the rent notes would also be void.

11. The defendants can plead their illegality in answer to the plaintiffs suit. In *Adam Umar v. Bapu Bavaji* : (1908)10BOMLR1128 it was held that possession acquired under an alienation made in contravention, of Section 3 of the Bhagdari and Narwadari Act, 1862 can become adverse and bar a suit for recovery by the individual alienor or his representatives in interest. In *Jethabhai v. Nathabhai* I.L.R(1901) 28 Bom. 399: 6 Bom. L. R. 428 the plaintiff obtained: under a deed of compromise a portion of a Bhag or share in a Narva other than a recognized division of such Bhag or Narva. The Commissioner held that the alienation was void and put the defendant in possession. The plaintiff then filed the suit claiming to be entitled to succeed by adverse possession. Chandavarkar J. said:

But it is of the essence of a title by adverse possession that it must relate to some property, which is recognized by law. But here there is no such property, since the Legislature has prescribed this kind of property on which (the plaintiffs seek to

found their title by adverse possession.

12. In *Javerbhai v. Gordhan* (1914) 17 Bom. L. R. 259 Batchelor J. distinguished this case on the ground that the plaintiffs there contended that they held the land as forming part of the holding and as subject to all the incidents of the tenure. But it is difficult to see how a mortgagee can obtain a title to the mortgage by adverse possession. He is not in possession adversely to the mortgagor and the very essence of adverse possession is that it must be hostile to the interest of the real owner. What is meant, I suppose, is that the possession is hostile to any defence that may be raised by the mortgagor that the mortgage is void. *Ratuchandra Venkaji Naik v. Kallo Devji Deshpande* I.L.R.(1915) 39 Bom. 587 : 17 Bom. L. R. 630 was a converse case. In 1909 the plaintiff sued to redeem property consisting of Watan Inam land which had been mortgaged by his grand-father in 1867. The defendants-mortgagees contended that the mortgage became void under the Watan Act on the death of the mortgagor in 1873 and that they had been in adverse possession since then. It was held the mortgagee remained a mortgagee for the purpose of a redemption suit. Unless there was some definite indication on the part of the person in possession that he would from a certain date claim as owner and not as mortgagee he could only acquire by adverse possession the limited interest to which he was entitled at the mortgagor's death, namely, that of mortgagee. That would be an authority in this case for holding that the defence that the mortgage was void ab initio was not available to the defendant. But the defendant and his assignor having attorned to the plaintiff, I do not think it is open to the defendant in this suit to contend that the plaintiff had no right to let out the property on rent, so that I think the plaintiff is entitled to the relief he claims. We have nothing to do with the question whether the defendant will be able hereafter to set aside the mortgage, nor with the powers which the Collector has under the Act to avoid the alienation. The appeal is allowed. The plaintiff must be put in possession of the plaintiff land, and there will be a decree for Rs. 39 with costs throughout.

Heaton, J.

13. I agree that the plaintiff must be awarded possession of the property and one year's rent. We need not, I think, in this case, express any definite opinion on the question of acquiring the rights of a mortgagee by adverse possession. It is a difficult question, and my mind is far from clear on the point. But for other reasons altogether, I think the plaintiff must succeed here. The defendant was in the position of a tenant, and it appears from the facts found by the appellate Court that he was placed in possession of this land by the person, the plaintiff, who purports to be the landlord, and his possession since then has been continuously possession of a tenant under a landlord. Where these are the facts, I think that the principle of Section 116 of the Indian Evidence Act must prevail, and it must be held that the (defendant must surrender possession before he can place himself in |a position successfully to plead that the tenancy is void.

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