

Budh Sen and ors. Vs. Ram Piari and Dropadi and ors.

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Court : Allahabad

Decided On : Jul-17-1920

Reported in : (1921)ILR43All164

Judge : Grimwood Mears, Knight, C.J. and ;Kanhaiya Lal, J.

Appellant : Budh Sen and ors.

Respondent : Ram Piari and Dropadi and ors.

Judgement :

Grimwood Mears, Knight, C.J. and Kanhaiya Lal, J.

1. These are two Letters Patent appeals arising out of a suit for redemption. It appears that Hansa was the owner of some land situated in Shahganj in the Agra City, whereon stood a kachcha house and chaupal. In 1861 he mortgaged with possession the said land with the kachcha house and chaupal standing thereon to Hargobind in lieu of Rs. 20. On the 30th of June, 1863, Hansa sold his equity of redemption in that property to Jug d Kishore, the predecessor in interest of the present plaintiff. Jugal Kishore filed a suit for redemption and obtained a decree on the 6th of October, 1863, conditional on his paying Rs. 20 to the mortgagee. No time was fixed by the decree for the payment of that money and no money was in fact paid to Hargobind in pursuance of it. Whether this was due to some private arrangement with Hargobind or some other cause is not clear. Hargobind subsequently pulled down the kachcha kotha and chaupal standing thereon and

built a shop and a balakhana at a cost of Rs. 5,500. He remained in possession of that property till 1889, when he mortgaged the shop and balakhana, with the land upon which they stood, to one Khubi Ram, describing himself as the absolute owner of that property. This mortgage was simple. Later on he executed two deeds of further charge in favour of Khubi Ram. On the 25th of May, 1901, the heirs of Khubi Ram got a decree for sale on foot of those deeds and in execution of that decree the property in question was sold by auction on the 1st of August, 1902, and purchased by the decree-holders themselves. The auction purchasers subsequently sold their rights in the said property to the present defendants by two sale deeds, one of which was executed, on the 29th of January, 1904, and the other on the 22nd of May, 1905.

2. The present suit was filed by the plaintiffs on the 26th of March, 1915, for the redemption of the mortgage made by Hansa in 1861. The court of first instance came to the conclusion that the claim was not barred by limitation, that a second suit for redemption was maintainable, and that the plaintiffs were entitled to a decree for redemption on payment of Rs. 20 on account of the principal sum secured by the mortgage. One of the pleas urged by the defendants was that their predecessor, Hargobind, had built shops and other apartments on the land in dispute at a considerable cost and that the plaintiffs were not entitled to get back the property without paying the cost of the constructions made by him. The court of first instance found that one of the houses originally existing on the disputed land had fallen down and that the mortgagee was justified in rebuilding it. It, therefore, allowed Rs. 100 on account of the cost of its reconstruction.

3. With regard to the remaining buildings standing on the land its finding was that those buildings had been constructed in order to improve the house and that the plaintiffs were not liable for the costs of those improvements. The decree passed by that court consequently was that the plaintiffs should get possession of the property, including the improvements made by the mortgagee, on payment of Rs. 120 to the defendants. That decree was upheld by the court of first appeal.

4. On second appeal to this Court, which came up before a single Judge, it was held that, although the predecessors in title of the defendants, namely, the heirs of

Khubi Ram, had been in adverse possession of the disputed property since the 1st of August, 1902, and had been succeeded by the defendants who had been in adverse possession from the date of their purchase, the defendants were not entitled to tack on the period of their adverse possession to the period of the adverse possession held by that heirs of Khubi Ram. On that ground alone the learned Judge dismissed the appeal, except in so far that he allowed the defendants to remove the materials of the constructions made by their predecessor in title, subject to their undertaking to restore, the land in the condition in which it was, with the buildings as they stood on the date of the mortgage.

5. A considerable argument has been addressed to us in regard to the applicability of Article 131 of the Indian Limitation Act (No. IX of 1908). That point appears to have been pressed also in the courts below, and seems to have very much obscured the main issue involved in the case, namely, whether, irrespective of Article 134, the defendants had perfected their adverse title by possession for more than twelve years prior to the suit. Article 148 is intended to protect the interest of the mortgagor against the mortgagee in possession or the person who holds the interest of the mortgagee, including his heirs or assigns as such. Article 134 is designed to protect the interest of the person in possession who might have obtained, by transfer from the mortgagee, larger rights than those which the mortgagee was competent to transfer for valuable consideration, and has remained in unqualified enjoyment of the same for more than twelve years from the date of the transfer. As pointed out in *Husaini Khanam v. Husain Khan* (1907) I.L.R. 29 All. 471 (480) and *Seeti Kutti v. Kunhi Pathumma* (1917) I.L.R. 40 Mad. 1040, the transfer referred to in Article 134 is a transfer with possession or followed by possession as a necessary incident or ingredient of it. If a transfer is not accompanied by the delivery of possession, Article 144 may come into operation when possession is obtained afterwards and held adversely for more than twelve years. We have, therefore, to consider whether that article is applicable in view of the findings here arrived at.

6. In the present case what Hargobind mortgaged with Khubi Ram was the proprietary interest which he believed and professed or pretended to have held in the disputed property. In pursuance of that mortgage and the further mortgages

which had been made thereafter, a decree was obtained by the mortgagee and the property was sold in execution of that decree. The property mortgaged was not the mortgagee interest of Hargobind, but the so-called proprietary interest which he claimed to have held in that property. The auction purchasers, similarly, had not purchased the mortgagee interest of Hargobind, but had purchased what was described as his proprietary interest. They remained in possession of that proprietary interest from the date of their purchase and afterwards they sold their proprietary interest to the present defendants, who have since been in possession of the same. A mortgagee, it is true, is estopped from denying the title of the mortgagor or from setting up adverse possession against him, but where the property mortgaged has passed from the mortgagee to a third party who has obtained rights therein for valuable consideration in good faith and in full belief that he was purchasing the transferor's proprietary interest, and the transferor represented that he held that proprietary interest, it cannot be said that such a transfer is a transfer of the mortgagee interest, so as to render Article 148 of the Indian Limitation Act (No. IX of 1908) applicable. In *Ammu v. Rama Krishna Sasli* (1879) I.L.R. 2 Mad. 226 it was held that Article 148 applied only to suits for redemption and to such suits as might be instituted against mortgages or persons claiming under them, except purchasers for value; but it did not apply to suits against strangers nor to suits which were not suits for redemption. In *Chinto v. Janki* (1892) I.L.R. 18 Bom. 51 it was similarly held that where land was mortgaged with possession to a certain person, and that person was ousted from possession by another who remained in possession of the said land and dealt with it as his own for 40 years, a suit for redemption brought by the mortgagor or his legal heirs would not fall under Article 148, but would be governed by Article 144 of the Limitation Act, and would fail if the person in possession succeeded in proving that his possession was adverse to the mortgagor for more than 12 years prior to the suit. Article 148 cannot, therefore, apply to the present suit; and if that article does not apply the only other possible article that can apply is Article 144, Article 134 is excluded by the fact that the vendors of the defendants had not purchased from the mortgagee. They had acquired their rights by virtue of an involuntary sale, which, according to the decisions in *Ahamed Kutti v. Raman Nambudri* (1910) I.L.R. 9 All. 97, *Bhagwan Sahai v. Bhaywan Din* (1886) I.L.R. 9

All. 97 and Sheo Nath Singh v. Mahipal Singh (1905) 2 A.L.J. 234, is excluded from its operation. But even an auction purchaser may, unless he is a purchaser of the mortgagee interest as such, remain in possession of the property purchased for more than twelve years, and may acquire adverse rights by virtue of his possession. The defendants are, therefore, entitled to claim that if their possession has been adverse for more than 12 years they cannot be ousted from the property. The only ground upon which the learned Judge of this Court found adversely against the present defendants was that the possession of the previous holders, namely, the auction purchasers, could not be tacked on to the possession of those who had derived their title from them. But it is well settled that a person who is in possession of land without title has, while he continues in possession and before the statutory period has elapsed, a transmissible and inheritable interest in the property, but that interest is liable at any moment to be defeated by the entry of the rightful owner; and if such person is succeeded in possession by one claiming through him who holds till the expiration of the statutory period, such a successor has then as good a right to the possession as if he himself had occupied for the whole period.' (Halsbury's Laws of England, Vol. 19, p. 157). In Babu Ram v. Banke Bihari Lal (1906) 3 A.L.J. 424 it was, accordingly, held that if the period of possession of a trespasser and his predecessor in title who was also a trespasser extended over a period of 12 years, he acquired an absolute title to the property of which he had been thus in possession. In fact the learned Counsel for the plaintiffs concedes that such tacking is permissible in the case of a person who has derived his title from a holder who had been in similar possession of the disputed property. That being so the ground on which the learned Judge proceeded cannot be sustained.

7. We allow the appeal of the defendants, set aside the decree of the single Judge and of the courts below, and dismiss the plaintiff's suit with costs throughout. We dismiss the appeal, filed by the plaintiffs, L.P.A. No. 131 of 1919 with costs.