

Asharfi Devi and ors. Vs. Prem Chand and ors.

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Court : Allahabad

Decided On : Mar-04-1971

Reported in : AIR1971All457

Judge : Jagmohan Lal, J.

Acts : Limitation Act, 1908 - Schedule - Article 144; [Transfer of Property Act, 1882](#)
- Sections 3 and 5

Appeal No. : Second Appeal No. 508 of 1963

Appellant : Asharfi Devi and ors.

Respondent : Prem Chand and ors.

Advocate for Def. : M.P. Srivastava, ;M.M. Krishna and ;Umesh Chandra Srivastava, Advs.

Advocate for Pet/Ap. : S.C. Dass, ;H.N. Tilhari and ;J.C. Srivastava, Advs.

Disposition : Appeal allowed

Judgement :

Jagmohan Lal, J.

1. This second appeal arises out of a suit filed by the plaintiff respondents Nos. 1 and 2 for recovery of possession of a house situate in the town of Bahraich and for

damages. The house admittedly belonged to one Barati Lal who was the great grand-father of the plaintiff-appellants. According to the plaintiffs, it was a self-acquired property of Barati Lal and he had full disposing power over it, Barati Lal had dedicated this house along with some other property to Sri Thakurji Maharaj, the presiding deity of a temple built by him, under his wills dated 23-5-1908 and 12-10-1927, Barati Lal remained the Sarverakar till his death and after him his son Jot Prasad became the Serverkar. Jot Prasad died on 17-3-1936 and after him the plaintiffs became Sarverakars. This house had however been usufructually mortgaged by Jot Prasad to Hanoman Prasad defendant-respondent No. 3 by means of a mortgage deed dated 6-8-1935. Subsequently Jot Prasad's widow Smt. Bittan Devi defendant-respondent No. 7 sold the equity of redemption to Lakhpai Rai defendant appellant (who died during the pendency of appeal and is now represented by Smt. Asharfi Devi and others) under a sale deed dated 7-10-1948. This sale deed was executed in favour of Lakhpai Rai as well as Ghasi Ram defendant-respondent No. 4 but the latter subsequently transferred his interest in the house to Lakhpai Rai. Lakhpai Rai filed a suit for redemption of the mortgage against Hanoman Prasad. That suit was decreed and a final decree for redemption was passed on 17-9-1951 and in execution of that decree possession was delivered to Lakhpai Rai on 26-4-1952.

The plaintiffs alleged that they came to know about these transactions only after this delivery of possession had been made to Lakhpai Rai, Lakhpai Rai subsequently made a mortgage of this property in favour of Rajmal defendant-respondent No. 5 who is now in possession of this property. According to the plaintiffs neither Jot Prasad had any right to mortgage this property to Hanoman Prasad nor Jot Prasad's widow Smt. Bittan Devi could make a transfer of the equity of redemption to Lakhpai Rai. However, since Lakhpai Rai had redeemed the mortgage to Hanoman Prasad after making payment of Rupees 500/- to him, the plaintiffs were prepared to pay this amount to Lakhpai Rai which they wanted to get adjusted against the mesne profits payable by Lakhpai Rai in respect of this property from 26-4-1952 when he entered in wrongful possession of it. The plaintiffs as Sarverakars filed the suit for recovery of possession of the property against all these persons in the court of Munsif on 17-4-1961.

The plaint was however returned by that Court on ground of jurisdiction and then it was presented before the Civil Judge on 15-1-1962. The plaintiffs had also set up an alternative case that if the property is not held to be a wakf property, they were entitled to its possession as heir of Barati Lal and Jot Prasad.

2. The suit was contested mainly by Lakhpat Rai and Rajmal. They pleaded inter alia that the property in suit was an ancestral property in the hands of Barati Lal and he could not make any valid wakf of this property, that the wakf, if any, made by him was not acted upon and that after the death of Barati Lal his heirs had been dealing with the property included in the alleged wakf as their personal property. By means of a partition between the two sons of Barati Lal the house in suit was allotted exclusively to Jot Prasad who validly mortgaged it to Hanoman Prasad. After the death of Jot Prasad his widow Smt. Bittan Devi succeeded to the property as the sole heir of Jot Prasad. She validly sold her equity of redemption in this house to Lakhpat Rai by means of a sale deed dated 7-10-1948 and the vendees entered in possession of the property after this sale-deed. The property was then redeemed by them from the previous mortgagee Hanoman Prasad through a redemption suit and thereafter they got actual possession over the property. In any case, the vendees were bona fide transferees for valuable consideration without any notice of the alleged wakf and as such they are protected by Section 41 of the Transfer of Property Act. It was further pleaded that the plaintiffs had no possession over the property within twelve years of the suit and their claim was barred by limitation.

3. Both the Courts below found that the property in suit was self-acquired property of Barati Lal who had full disposing power over it, that Barati Lal had made a valid wakf of this property along with some other properties through his wills dated 28-5-1908 and 12-10-1927, that the wakf was real and genuine wakf which had been acted upon, that Jot Prasad became the Sarverakar of this wakf after the death of his father Barati Lal, that Jot Prasad had no authority to mortgage this property to Hanoman Prasad nor his widow Smt. Bittan Devi had such authority to transfer the equity of redemption to Lakhpat Rai and that these transfers made by them were invalid and void. It was further held that the transferee was not protected by Section 41 of the Transfer of Property Act as the documents under which the

property was dedicated were registered documents of which the transferee shall be presumed to have notice. Lastly, it was held that the suit was not barred by limitation.

4. In this appeal the learned counsel for the appellants seriously challenged the last two findings of the lower Courts regarding the protection not being available to the appellants under Section 41 of the Transfer of Property Act and the suit being within time.

5. So far as the question of limitation is concerned, it appears that the matter was not properly argued before the Lower Courts with the result that those courts have not made correct approach to that question. The finding recorded by them is hardly of any assistance. It has first to be discovered which is the governing article that will apply to this case. The learned counsel for the appellants contended that the suit would be covered either by! Article 134-B or Article 144 of the Limitation Act. 1908 which would govern this case. It would be better to mention a few facts before we consider which article would be applicable to the suit. The following pedigree would show the relationship of the plaintiffs with Barati Lal.

BARATI LAL

(died on 28-2-1932)

_____ | _____

||

Jot Prasad = Smt. Bittan Devi Brahma Prasad

(died issueless on Defendant Respondant (died on 13-4-1935)

17-3-1936) No. 7 |

Bhagwati Prasad

(died on 27-5-1932)

_____ | _____

Prem Chand Gyan Chand

Plaintiff Respondent Plaintiff-Respondent

No. 1 No. 2

Barati Lal was possessed of considerable property and he had built a temple. In his will dated 28-5-1908 (Ext. 2) he had declared that certain properties including the house in suit shall not go to his heirs after his death but they shall be dedicated to this temple and he was already spending the income of those properties towards the expenses of this temple. He had further provided under this will that after his death his sons and sons' sons whoever may be found competent and devotees to God shall Act as Sarverakars and if no such person was found among his descendants, he had also made alternative provision for the selection of Sarverakars. In his subsequent will dated 12-10-1927 (Ext. 1) Barati Lal included some more properties in the wakf by providing that those properties would not be claimed by his heirs to whom some other properties had been willed. In this document it was clearly specified that after his death his son Jot Prasad would act as Sarverakar.

It appears that after the death of Barati Lal which took place in February 1932 the other son Brahma Prasad was not happy over this wakf. He therefore filed a suit against Jot Prasad for partition of the entire property left by Barati Lal including the wakf property. This was suit No. 36 of 1934. Jot Prasad contested that suit and In his written statement he alleged that some of the properties included in the suit were wakf properties which he was holding as Sarverakar and In which no share could be claimed by Bhahma Prasad. These properties included the house in suit also. With regard to the remaining properties Jot Prasad's defence was that a private partition had already taken place between him and his brother Brahma Prasad and each of them was in possession of the properties allotted to him in that partition. That suit abated after the death of Jot Prasad because his legal representatives were not brought on record. Jot Prasad died on 17-3-1936 but

before his death Jot Prasad himself had started squandering the wakf property by making transfer thereof treating it as his personal property. One of these properties, namely, the house in suit was mortgaged by him with Hanoman Prasad by means of a usufructuary mortgage deed dated 6-8-1935 for Rs. 500/-.

Some of the properties were transferred by Jot Prasad in favour of his wife Smt. Bittan Devi by means of a gift deed. One of those properties was another house included in the wakf which was subsequently sold by Smt. Bittan Devi to one Satyadeo. The plaintiffs filed another suit of the present nature against Satyadeo and Smt. Bittan Devi for recovery of possession over that house which belonged to the wakf. That was suit No. 1 of 1951. That suit was dismissed on the ground of limitation and some other grounds and the decree was affirmed in second appeal by this Court also on the ground of limitation. In this way, the plaintiffs finally lost one of the houses included in the wakf property in favour of Satya Deo.

6. As regards the house in suit it is an admitted fact that Hanoman Prasad as a mortgagee remained in possession of this house from 6-8-1935 when it was mortgaged in his favour by Jot Prasad till 26-4-1952 when its possession was delivered through Court to Lakhpatri Rai in execution of the decree for redemption obtained by him. The equity of redemption had been sold by Smt. Bittan Devi to Lakhpatri Rai and Ghansi Ram on 7-10-1948 and shortly after that these vendees filed a suit for redemption against Hanoman Prasad in that very year. In that suit a preliminary decree was passed on 31-8-1949 and a final decree on 17-9-1951 after these vendees had deposited the mortgage money. After redeeming the mortgage the mortgagor's and mortgagee's rights were merged in the hands of Lakhpatri Rai who continued to be in possession thereof as full owner.

7. On these facts it has been contended on behalf of the appellants that the suit would be barred by limitation both under Article 134-B and Article 144 whichever article is applied to the case. Under Article 134-B the starting point of limitation relevant for this case is the date of death of Jot Prasad which was 17-3-1936. The suit was filed at the earliest on 17-4-1961, even if the benefit of Section 41 is allowed to the plaintiffs for having filed this suit in wrong Court, the suit was beyond 12 years from the date of death of Jot Prasad and as such it would be

barred under Article 134-B. The learned counsel for the plaintiff-respondents however contended that this article may be applicable only with regard to the mortgagee rights which had been transferred by Jot Prasad himself under the mortgage deed dated 6-8-1935. But it would not be applicable to equity of redemption which had been transferred by his widow on 7-10-1948. In my opinion, this contention is correct.

The learned counsel for the plaintiff-respondents further contended that even though the plaintiff's suit for recovery of possession of mortgagee rights had not been instituted within time against Hanoman Prasad, he could at best prescribe to mortgagees rights in the property though otherwise the mortgage deed in his favour was void. He could not, in any case, prescribe to full owner's rights in the property. Lakhpat Rai as a succes-sor-in-interest of Hanoman Prasad by virtue of his having redeemed his mortgage could also not claim more than mortgagee rights on account of the failure of the plaintiffs to sue the mortgagee within twelve years. For this reason the plaintiffs had already offered to pay Rupees 500/- for redeeming this mortgage. The lower Courts did not even allow this sum to Lakhpat Rai before ordering his dispossession from the property.

8. The learned counsel for the appellants however argued that it is true that Hanoman Prasad had originally entered in possession of this property as a mortgagee on the basis of the mortgage deed dated 6-8-1935 executed in his favour by Jot Prasad and as such he could not deny the right of redemption held by Jot Prasad and his personal heirs. But he was a mortgagee qua Jot Prasad and his personal heirs and not any third persons like the plaintiffs against whom he could perfect his title by adverse possession to the entire rights in the property. This contention, however, does not appear sound. Once a person has entered in possession of the property as a mortgagee even though the mortgage deed may be void, he continues as a mortgagee by remaining in possession for more than the period prescribed for filing a suit for his ejectment, so long as the right of the mortgagor and his successor-in-interest to redeem the mortgage subsists. Whoever is for the tune being found to be the rightful owner of the equity of redemption would be entitled to redeem this mortgagee and he can-not claim an adverse title against him during the subsistence of the mortgage.

In this view of the matter, even if the suit is governed by Article 134-B, Hanoman Prasad and after his being redeemed by Lakhpat Rai, the latter could not claim more than mortgagee rights in the property and in that capacity he can at best insist that the possession shall not be delivered to the plaintiffs before they pay the mortgage money:

9. The position with regard to the recovery of equity of redemption which had been transferred by Jot Prasad's widow Smt. Bittan Devi to Lakhpat Rai and Ghasi Ram on 7-10-1948, has to be dealt with separately. The plaintiffs' claim for a recovery of this interest in the property would not be governed by Article 134-B and it would evidently fall under Article 144 unless some other article applies to the case. No other article was suggested to have application by the learned counsel for the parties. We have now to see on what date the possession of the defendant became adverse to the plaintiff as regards this equity of redemption which is the starting point of limitation under Article 144.

10. On behalf of the appellant It was contended that since Smt. Bittan Devi was not a sarverakar of this property at any time, her possession over the property included in the wakf would be adverse from the very inception when she entered in such possession either during the lifetime of Jot Prasad on the basis of a gift or after his death as his legal heir. In the present case, Smt, Bittan Devi is supposed to have entered in possession of the equity of redemption of house in suit after the death of Jot Prasad. From a perusal of the mortgage deed dated 6-8-1935 executed by Jot Prasad it is evident that one of the conditions of the mortgage was that the repairs to the mortgaged property shall be carried out by the mortgagor at his own expense and if he fails to do so, the mortgagee may get the repairs done and add expenses incurred over these repairs to the mortgage money. Lakhpat Rai D. W. 1 deposed that before he purchased this equity of redemption the repairs to the mortgaged house used to be carried out by Smt. Bittan Devi and after the purchase, he was getting those repairs done. This was a real and visible link between the mortgagor and the mortgaged property which is mostly absent in any other usufructuary mortgage. That is how the plaintiffs were also aware that this property was in possession of Smt. Bittan Devi as had been admitted by them in their written statement Ext. A-11 dated 19-4-1937 filed in Suit No. 46 of 1937 of

which the plaint is Ext. A-10.

It appears that after the death of Barati Lal the plaintiffs' grand-father Brahma Prasad made a usufructuary mortgage in respect of three houses included in the wakf in favour of one Barati Lal Baqqal on 30-8-1934 but the mortgagee was delivered possession at that time over only one of those houses and not over the other two. Out of the other two houses one is the house in suit itself and the other was the house which the plaintiffs lost in favour of Satyadeo in the former suit. Barati Lal mortgagee therefore filed a suit against the plaintiffs and Smt. Bittan Devi for recovery of possession over these other two houses as well, and in the alternative for recovery of his mortgage money. It was in this suit that a written statement Ext. A-11 was filed on behalf of the present plaintiff-respondents who were minors at that time through their mother as their guardian for the suit. In this written statement it was admitted that both these houses were included in the wakf and as such Brahma Prasad was not competent to mortgage them and that in any case those houses were now in possession of Smt. Bittan Devi and if any decree is passed in favour of the mortgagee, It should be passed against Smt. Bittan Devi and these contesting defendants should not be made to pay any costs of the suit.

This clearly shows that as early as April 1937 it was known to the plaintiffs through their mother that the house in suit as well as the other house lost in favour of Satyadeo were in possession of Smt. Bittan Devi though they constituted wakf property. It is therefore contended on behalf of the appellants that Smt. Bittan Devi had already perfected her title to the equity of redemption by her adverse possession for more than twelve years before she sold that equity of redemption to Lakhpat Rai and Ghasi Ram on 7-10-1948.

11. On behalf of the plaintiff-respondents it is argued that Smt. Bittan Devi being a personal heir of Jot Prasad who was the Sarverakar of this wakf property, limitation would not run against her for bringing a suit for recovery of possession in view of the provisions contained in Section 10 of the Limitation Act. As such, Smt. Bittan Devi could not acquire any title to this property under Section 28 of the Act on account of the failure of the plaintiffs to bring a suit for possession against her within twelve years from the date of her possession. If Smt. Bittan Devi's

possession was not of any avail to her to prescribe a title under Section 28, that possession cannot be taken advantage of by her vendee also by tacking it to his own possession. In this connection reference was made to a previous decision of this Court relating to another item of wakf property which has been lost by the plaintiffs in favour of Satyadeo. That decision is Ext. A-9 which was also reported in Prem Chand v. Satyadeo : AIR1961 All434 . The facts of that case were that Jot Prasad had made a gift deed of the other house included in the wakf in favour of his wife Smt. Bittan Devi in 1934 and on the basis of this gift Smt. Bittan Devi entered in possession of this property and she remained in possession thereof till she sold it to Satyadeo on 24-1-1939. The suit for possession was brought against Satyadeo by the plaintiffs as Sarverkars of the wakf a few days before the expiry of twelve years from the date of this sale deed. The Article that was held applicable to the suit was 144 and if only Satyadeo's adverse possession which could not start before 24-1-1939 was taken to be the starting point of limitation under Article 144, the suit would have been within time.

But Tandon. J. was of the view that even though the suit for recovery of possession of the property so long as it was in the hands of Smt. Bittan Devi would not be barred by any limitation In view of Section 10, that Section would not be applicable when the suit is filed against her transferee, and further that the transferee would also be entitled to tack the adverse possession of Smt. Bittan Devi to his own possession starting with effect from 24-1-1939. I feel some difficulty in accepting this view and I would have referred the case to a large Bench if the success of the appellants' plea of limitation in this case had depended on his tacking the adverse possession of Smt. Bittan Devi to his own adverse possession. But in this case it is contended on behalf of the appellants that Lakhpatt Rai had himself remained in adverse possession for more than twelve years before the suit was filed so as to bar the suit under Article 144. It is evident that if the vendee Lakhpatt Rai had entered in possession of the property on 7-10-1948 when the sale deed in respect of the equity of redemption was made in his favour by Smt. Bittan Devi, the period of twelve years had already expired before this suit was filed.

The learned Counsel for the plaintiff-respondents however contends that an equity of redemption cannot be subject to adverse possession during the continuance of the mortgage when the property is in the actual possession of the mortgagee and for that reason adverse possession of Lakhpat Rai shall be deemed to commence only on 28-4-1952 when he was put in effective possession of the property in execution of the decree for redemption obtained by him against Hanoman Prasad. This abstract proposition that the equity of redemption cannot be subject to adverse possession during the continuance of the mortgage is disputed on behalf of the appellants. The learned counsel for the parties referred to a large number of rulings on this point some of which will be noted in the following paragraphs.

12. In *Kunwar Sen v. Darbari Lal* AIR 1916 All 79 a suit for redemption of a usufructuary mortgage was brought not by the heirs of the original mortgagor who was dead but by some third persons who alleged that the real owner of the property was their own predecessor who had entered in some arrangement with the mortgagor named Dulha Rai and in pursuance of that arrangement Dulha Rai made a usufructuary mortgage of the property in favour of the predecessor of the defendants which the plaintiffs wanted to redeem. The suit being contested, It was found that the plaintiffs' predecessor was not the owner of the property and that the plaintiffs did not claim through Dulha Rai. As such their suit was dismissed. In appeal a new plea was set up on behalf of these plaintiffs that even if it is not proved that their own predecessor was the owner of this property, the plaintiffs had acquired title to the equity of redemption against the heirs of Dulha Rai by remaining in adverse possession for more than twelve years. Though this new plea was allowed to be set up, it was found on a scrutiny of the evidence that they had failed to prove adverse possession over the property as against the heirs of Dulha Rai mortgagor. In that connection it was also observed that a person cannot be said to be in adverse possession of the right to redeem immovable property, where the right to possession and actual possession is all the time in the hands of the mortgagee and that the mere fact that he succeeds in getting his name recorded in the revenue papers does not confer title on him.

In this case reference was made to an English decision *Casborne v. Scarfe*, 1737-1 Atk 603 (LC) in which Lord Hard-wicke had pointed out that an equitable estate

might be barred by time just as much as a legal estate. After that it was observed:--

'..... There can be nodoubt that an equitable estate, as distinguished from a legal estate, can be barred by time, but it seems to us impossible that any person can be in possession of the right to redeem a mortgage where, under the terms of the mortgage, the mortgagee is entitled to the actual possession, and is in fact in possession thereunder.'

13. In *Shiam Lal v. Mohamad Ali* : AIR1935 All174 it was held on the peculiar facts of that case that a person could not acquire title by adverse possession to land which was the subject of a usufructuary mortgage and therefore in thepossession of the mortgagees, merely because he had managed to get his name recorded in the village papers for a series of years in respect of the mortgaged property. The following observation made at page 178 of the report is significant:--

'..... It may be conceded that an equitable estate as well as a legal estate can become barred by tune and an equity of redemption can become by adverse possession the property of a person but I am satisfied that in the present case it cannot be said that the defendants Jagan Nath or Shiam Lal or their immediate predecessor Muhammad Jan or even the widows of Hashmat have, become the owners of the equity of redemption by adverse possession,'

14. The facts of *Salig Ram v. Gauri Shankar* : AIR1935 All542 were also entirely different. In that case while the property was in possession of the mortgagee, a trespasser entered in possession thereof by dispossessing the mortgagee and the mortgagee failed to bring a suit against him. Subsequently the mortgagor brought a suit for possession against the trespasser. It was observed at page 543 of the report:--

'..... Under Article 144limitation begins to run when possession becomes adverse to the plaintiff. If the mortgagor is not entitled to any kind of possession or enjoyment of the mortgaged property during the continuance of the usufructuary mortgage, the mortgagor is not entitled to use a trespasser for possession. It is the mortgagee alone who can do so, and if the mortgagee does not care to bring such

suit for more than 12 years,, Section 28, Limitation Act. operates to extinguish the mortgagee's title to the property in possession of a trespasser. The mortgagor's right to sue for possession accrues for the first time when after redemption he is unable to take possession of part of the mortgaged property which he finds to be in possession, of a trespasser, who denies his title to it. He becomes entitled to sue the trespasser when he redeems the property and is opposed by the trespasser. It is clear that the period of limitation for his suit is 12 years to be reckoned from the date of redemption, and the trespasser's possession would not become adverse to him till after redemption. Cases in which the mortgagor is entitled to some sort of enjoyment of the mortgaged property in spite of the usufructuary mortgage stand on a different footing.'

15. In *Hanamgowda v. Irgowda*, AIR 1925 Bom 9 it was held that possession by a man of the equity of redemption while the property is in the actual possession of the mortgagee should be deemed to become adverse when he signifies his assertion of his rights by an overtact. What that overt act is would depend upon the facts of each case.

16. *Sudarsan Das v. Ram Kirpal Das*, AIR 1950 PC 44 only decides whether Articles 134 or 144 would be applicable to a suit for recovery of possession of a wakf property that had been sold in execution of a decree. The following material observations were however made in this case at pages 47-48 of the report:--

'.....Article 144 certainly extends the conception of adverse possession to include an interest in immoveable property as well as the property itself nor was it disputed in argument by the respondents that there could be adverse possession of an undivided share, given the appropriate circumstances.'

Those observations support the view that an equity of redemption which is nothing but an interest in immoveable property can be subject to adverse possession.

17. *Gurbinder Singh v. Lal Singh* : [1965]3SCR63 only lays down that the adverse possession of two independent trespassers cannot be tacked together for counting the limitation under Article 144. This is not relevant for the point before us. The other decision of the Supreme Court *Guranditta v. Amar Dass*, AIR 1965 SC 1966

only lays down that in the case of an execution sale of debutter property it is not the date of death of the incumbent of the Mutt but the date of effective possession as a result of the sale from which the commencement of the adverse possession of the purchaser is to be computed for the purposes of Article 144 of the Limitation Act. It does not lay down that the purchaser of an equity of redemption in an execution sale cannot claim adverse possession for the purposes of Article 144 even though he enters in effective possession of such equity of redemption.

18. In *Ganda Singh v. Ram Narain* a Full Bench had of course, held on the facts of that case that the title to equity of redemption cannot be acquired by adverse possession when the land is in actual possession of the mortgagee. But this decision was based on the assumption that the trespasser claiming adverse possession does not do any overt act so as to excite the notice of the real owner of the equity of redemption who thinks himself to remain in undisturbed possession of his right. This would be evident from the following observations made by Khosla, J. at page 151 of the report:--

'The question now arises how is the rightful owner's possession disturbed. Where the possession is corporeal the matter is quite simple. Possession is disturbed when a stranger or a trespasser takes corporeal possession by entering upon it and asserting that he has a right to it. In the case of incorporeal right, however, the matter is not so simple. The mortgagor cannot enter upon actual possession of the land whenever he wants to because he has parted with his possession to the mortgagee. He can redeem the land in accordance with the terms of the mortgage. If somebody else to his knowledge exercises this right, then it may be said that his rights have been interfered with by someone else, but if he continues undisturbed in the possession of this right, it cannot be said that a trespasser has come and taken adverse possession of his rights.'

19. *Subah Lal v. Fateh Mohamad* : AIR1932 All393 relates to a case of adverse possession between co-owners and deals with the circumstances in which a co-owner shall be deemed to have been ousted from his share in the property when another co-owner makes a mortgage of more than his own share in the property.

20. *Udhaibhan Singh v. Sheoamber Sahai*. AIR 1936 Oudh 168 directly decides the point that is before us. It was held In that case;

'Although the equity of redemption in the case of a possessory mortgage is an intangible thing, yet it is an estate in land and is fully capable of possession, A claim for possession of equity of redemption is a claim for possession of an interest in immoveable property within the meaning of Article 144.'

21. A similar view was held in *Ralli v. Gurnam Kaur* .

22. A review of these decisions shows that it cannot be laid down as a proposition of law that an equity of redemption, where the property is subject to a usufructuary mortgage cannot be subject to adverse possession. The right of redemption in respect of an immoveable property which is subject to a usufructuary mortgage is a right in immoveable property. It is no doubt an intangible property. All the same it is fully capable of transfer by the mortgagor and the transferee can also enter in possession of that right. In appropriate cases this right of redemption can also be subject to adverse possession by a trespasser. What those appropriate circumstances are would depend on the facts of individual case. Ordinarily when the mortgagor has no visible link with the mortgaged property during the subsistence of a usufructuary mortgage, he is not disturbed from his notional or constructive possession over his equity of redemption simply because a transaction with regard to that equity of redemption has been made between third persons who have no legal right in the property. If however such transfer is made to the knowledge of the mortgagor or by doing some overt act or otherwise the transferee asserts his claim to the equity of redemption to the knowledge of the real owner of the equity of redemption, it may amount to the transferee's possession being adverse to the real owner of the equity of redemption.

23. So far as the facts of the present case are concerned we have already seen above that the appellants' prede-cessor-in-interest Smt. Bittan Devi herself had entered in adverse possession of this property after the death of Jot Prasad. She had a visible link with the property by making casual repairs to the mortgaged property from time to time and the fact that she was in possession of this property was known to the plaintiff-respondents as early as 1937. On 7-10-1948 Smt Bittan

Devi transferred this equity of redemption by means of a registered sale deed to Lakhpatt Rai and Ghasi Ram mentioning therein that she had put the vendee in possession of the property- In that very year these vendees filed a suit for redemption of the usufructuary mortgage to which this property was subject, against Hanoman Prasad. Lakhpatt Rai further deposed that after this purchase from Smt. Bittan Devi he used to carry out the casual repairs to this property. He also stated that during the pendency of the mortgage suit a commission was issued to a lawyer who inspected the property and that the plaintiffs were present at that time.

These statements of Lakhpatt Rai were not denied by any of the plaintiffs by coming in the witness-box. These facts clearly show that after purchasing the equity of redemption from Smt. Bittan Devi, the transferees were openly asserting their title to this property and doing other overt acts in exercise of their claim for holding the equity of redemption to the knowledge of the plaintiffs. On these facts it is evident that the adverse possession of the defendants Lakhpatt Rai and Ghasi Ram with regard to the equity of redemption started in October 1948 and after redeeming the property and getting possession over the mortgagee rights as well they remained in full proprietary possession of the property. The suit having been filed in 1961 was barred by 12 years limitation under Article 144. On this ground their suit is liable to fail.

24. It may however be stated that the appellants' plea that the transfer in their favour is protected by Section 41 of the Transfer of Property Act is also well-founded on the facts proved in this case. Lakhpatt Rai had stated that he had made enquiries about the title of his vendor Smt. Bittan Devi not only from Smt. Bittan Devi but also from the plaintiffs and he was informed that she was the owner of the property who was competent to transfer the same. The courts below denied the protection of Section 41 to the appellants on the ground that he did not make a search of the registration records though the alleged wakf had been made by registered documents dated 28-5-1908 and 12-10-1927 and as such he will be deemed to have constructive notice of the property in suit being included in the wakf in view of Explanation 1 to the definition of 'notice' contained in Section 3 of the Transfer of Property Act which provides that where any transaction relating to

immoveable property is required by law to be and has been effected by a registered instrument, any person acquiring such property or any part thereof, or share or interest in, such property shall be deemed to have notice of such instrument as from the date of registration.

In my opinion this provision is not applicable to the case. For one thing, both the above documents though registered under the Registration Act were not required by any law to be so registered. Both these documents were in the nature of will and there is no provision in law which requires a will to be registered. A will is also not a transfer within the meaning of Transfer of Property Act. In fact, the wakf created by Barati Lal was to come into effect, strictly speaking, after his death. In these documents Barati Lal had simply declared that he had set apart certain properties of which the income was being spent by him on the expenses of the temple constructed by him and that after his death his heirs would have no interest in that property. But he nowhere placed himself under an obligation that in his lifetime he would not be competent to deal with those properties or to transfer them or that he would be divested of their ownership which would henceforth vest in the presiding deity.

Even if it is assumed for arguments' sake, though it cannot be inferred from any of the documents, that under these registered instruments Barati Lal made dedication of the property in praesenti in favour of the presiding deity of the temple that would not again bring the transaction within the definition of 'transfer of property' contained in Section 5 of the Transfer of Property Act. This definition confines a transfer from a living person to another living person or persons including a company, association or body of individuals whether incorporated or not. A deity is not included in the term 'person'. If a deity is not a person, a transfer of property made in favour of the deity is not governed by the provisions of the Transfer of Property Act including Section 3 thereof. It was held by a Full Bench of Madras High Court in *Narasimhaswami v. Venkatalingam*, AIR 1927 Mad 636 (FB) that Section 123 only applied to transfer by one living person to another and a gift to God is not a gift to a living person. It was further held in this case that dedication of property to God by a Hindu does not require any document and that property can be validly dedicated without any registered instrument.

If there is no requirement of law that a dedication can only be made by means of registered document, the definition of 'notice' contained in Section 3 including its Explanation will not apply to a property that has been dedicated to God. Under the circumstances the transfer made by Smt. Bittan Devi who was in possession of the property since the death of her husband to Lakhpatt Rai and Ghassi Ram who purchased the same for valuable consideration after making reasonable enquiries about her title would be protected by Section 41 of the Transfer of Property Act, On this ground also the suit of - the plaintiffs is liable to fail.

25. The appeal is allowed. The judgments and decrees of the Courts below are set aside and the plaintiffs' suit is dismissed with costs throughout. The stay order dated 4-11-1963 shall stand discharged.

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