

Jaddu Koeri vs Deep Chand Koeri And Anr. on 21 October, 1954

Equivalent citations: AIR1955ALL172, AIR 1955 ALLAHABAD 172

JUDGMENT

Asthana, J.

1. One Khedu was the tenant of plots nos. 141 and 152. He mortgaged these plots with passession to one Bhuttoo by means of the mortgage deed dated 14-6-1908. Some time after the mortgage Khedu died. His son Deep Chand made an application under Section 12, U. P. Agriculturists' Relief Act for the redemption of the mortgage on the allegation that the mortgage debt was paid up from the usufruct of the mortgaged property. He also claimed possession over the above plots. Besides the mortgagee Bhuttoo one other person, viz., Jaddu Koeri whose name was entered in the revenue papers over the aforesaid plots was also impleaded as a defendant in the case on the allegation that he had been set up by the mortgagee and his name in the revenue papers was merely fictitious and that in fact the mortgagee Bhuttoo was in possession of the mortgaged property.

2. The mortgagee Bhuttoo did not contest the suit. Jaddu Koeri alone contested the suit and his defence was that the plaintiff Deep Chand was not entitled to redemption as Khedu had sold his equity of redemption in respect of the aforesaid plots to Azim and Brijraj Tewari and they had relinquished their rights in favour of the zamindar who admitted him as the tenant of the disputed plots.

3. The trial court framed seven issues in the case which are as follows :

1. Whether the plaintiff is a tenant and entitled to sue?
2. Whether Bhuttoo is the mortgagee?
3. Whether the mortgage as alleged exists?
4. Whether defendant No. 2 is tenant?
5. Whether the mortgage money has been paid up. If not how much is due?
6. To what relief is the plaintiff entitled?
7. Whether the suit is barred by Section 10, Civil P. C.?

4. The finding of the trial court was that the plaintiff Deep Chand was the tenant of the aforesaid plots and was entitled to redemption, that Bhuttoo was really the mortgagee of these plots and in

possession of them as such, that Jaddu Koeri was not the tenant of these plots and his name in the papers was fictitious and he was really a man of the mortgagee and that the mortgage money was paid up and the plaintiff was entitled to redemption and possession over the mortgaged property. Jaddu Koeri filed an appeal against this decision before the District Judge of Ghazipur and the finding of the trial court was upheld and the appeal was dismissed with costs. Against this decision Jaddu Koeri filed a revision to this Court which was heard by a learned Single Judge.

It appears from his judgment that the only point which was raised before him on behalf of the applicant was that the question of the status of the applicant should not have been gone into by the courts below in a case under Section 12, U. P. Agriculturists' Relief Act. In support of this contention reliance was placed on two single Judge cases of --'Jagarnath Sahu v. Srikant Dube', AIR 1949 All 589 (A) and 'Ram Datt Singh v. Ajodhia Singh', 1950 All L. J. 878 (B). It was held in both these cases that the scope of Section 12, of the Act did not permit an investigation into the question of tenancy of a person claiming as a tenant of the property mortgaged. Sri Bhargava for the plaintiff relied on the case of --'Ram Kripal v. Bhagwati Saran', AIR 1949 All 318 (C), in support of his contention that the rule did not apply to the facts of the present case. In view of the conflicting decisions on the question of law the learned Single Judge has referred the question to a Bench for decision.

5. The question for consideration is whether it was open to the plaintiff to implead the applicant as defendant on the allegation that he was really not in possession of the mortgaged property but his name was entered in the revenue papers over it as benamidar at the instance of the real mortgagee who was in possession of it and whether the court could decide the question of tenancy raised by him.

6. The first case relied on on behalf of the applicant is that of AIR 1949 All 589 (A). It was held in this case by Seth, J. that the jurisdiction of a court deciding an application under Section 12, U. P. Agriculturists' Relief Act, whether as a court of original jurisdiction or as a court of appeal, was a special jurisdiction conferred upon it by a special provision of the statute and was limited within the four corners of that section, that it had jurisdiction to adjudicate upon the question of redemption and no more and the determination of an adverse claim to tenancy rights by one of the defendants whom the mortgagor alleged to have been fictitiously put up by the mortgagee was outside the scope of the proceedings under Section 12, of the Act.

In this case the sons of the mortgagors had made an application under Section 12 of the Act for the redemption of the mortgage and among the defendants they impleaded not only the two mortgagees but also their father, Rachha Sahu, on the allegation that his name stood fictitiously recorded as a tenant over two of the mortgaged plots Nos. 554 and 240 though the mortgagees themselves were in actual possession of these two plots. With due deference to his Lordship I am unable to agree with his view. There is no doubt that in a case of redemption the questions which have to be determined are whether the applicant is entitled to redeem the mortgage and if so whether without payment of any sum or on payment of some money. If in order to determine this question it is necessary to determine incidentally some other questions which arise in the case I do not think that the Court is debarred from entering into those questions in order to grant the appropriate relief to the plaintiff. It cannot be said that the revenue Court before which the application under Section 12 was made

was not competent or had no jurisdiction to decide the question of tenancy raised by one of the defendants.

In order to grant the relief to the plaintiff it was necessary to decide whether the mortgaged property was really in possession of the mortgagees and the name of the other defendant or defendants in the revenue papers was fictitious or otherwise. There can be no doubt that if the finding of the Court were that the contending defendant who was setting up a paramount title had no connection with the mortgage and was in possession of the property on his own behalf as a tenant he could not be dispossessed in a suit for redemption nor could a decree be passed against him in that suit. If, however, the finding was that the mortgagees were really in possession of the property and the defendant who was setting up his claim as a tenant over it was really not in possession of it except that his name was entered in the revenue papers at the instance of the real mortgagees in order to defeat the claim for redemption then certainly the suit can be decreed against him.

If it were open to a mortgagee to set up a third person who has really no connection with the mortgaged property in order to defeat the claim for redemption then a mortgagor would be put to unnecessary trouble and harassment to obtain possession over the mortgaged property and he will have to file several suits against different persons for the recovery of the mortgaged property. I do not think that this is equitable. I have not" been able to find anything in Section 12 which debars a court in a case under this section from entering into the question whether the person who was claiming an interest in the mortgaged property had really any such interest or was really a creature of the mortgagee and had been set up by him in order to defeat the plaintiff's claim for redemption.

It may be that under Order 34, Rule 1, Civil P. C. a person claiming a paramount title to the mortgaged property is not a necessary party, but if he appears to be a proper party for the correct decision of the case and to grant the relief to the plaintiff and his presence is necessary to decide the question he may be impleaded as a defendant in that suit and where such a person has been impleaded and has raised his pleas and has invited a decision from the court it is not open to him subsequently in appeal or in revision when the decision has gone against him to say that the court had no jurisdiction to decide the question raised by him. Even if it is assumed that a person setting up a paramount title is not a proper party in a suit for redemption but if he is so impleaded and a decision is given against him it can at the most be a case of misjoinder of parties and the decision of the court cannot be vitiated simply on this ground unless it has in any way prejudiced such defendant.

7. The next case relied on by the applicant is of '1950 All LJ 878 (B)'. This was a case under Section 12, U. P. Agriculturists' Relief Act and in this case besides the mortgagees some other persons were impleaded as defendants on the allegation that they were members of a joint Hindu family with the mortgagees, that the mortgagee rights had been acquired but of the joint family funds and that these defendants were in possession of the mortgaged property as mortgagees. The defence taken up by these defendants was that they had no concern with the mortgage but they were in possession as tenants. The trial Court found that the contending defendants were not in possession of the mortgaged property as tenants but as mortgagees and it, therefore, decreed the suit for redemption.

On appeal the learned District Judge reversed the finding and held that they were not in, possession as mortgagees but were in possession as tenants. He, therefore, dismissed the suit for possession against them. The plaintiffs filed a revision against this order and it was held by Ghulam Hasan, J. that the plaintiffs could not get a decree for possession against the contending defendants in view of the finding of the lower appellate court. In my opinion this decision is not of much help to the applicant. There is no doubt that in view of the finding of the lower appellate court that the contending defendants were not in possession of the mortgaged property as mortgagees but were in possession of it as tenants there can be no doubt that the plaintiffs could not eject them in a suit for redemption and their appropriate remedy was to file a separate suit for their ejectment.

8. The next case is of 'AIR 1949 All 318 (C)'. This case was relied on by the opposite party. In this case one of the defendants whose name was entered in the revenue papers as tenants of the mortgaged property was impleaded as defendant, in the suit for redemption on the allegation that he was really not in possession of the mortgaged property, that the mortgagee Rameshwar was actually in possession of it and that he had wrongly set up the other defendant and got his name entered in the revenue papers in order to defeat the claim for redemption. It was held by Bhargava, J. that the Court could determine the question whether the mortgagee had put up a fictitious person as a tenant to prevent the mort-gagor from obtaining possession over the mortgaged property, that if the finding was that the allegations were untrue and the persons concerned was a bona fide tenant the court would have no jurisdiction to oust him, but initially it had jurisdiction to enter into the question raised. I am inclined to agree with this view for the reasons already given above.

9. The next case is of -- 'Bhuban Mohan Ghose v. Co-operative Hindustan Bank', AIR 1925 Cal 973 (D). This was a suit brought by the mortgagee for the enforcement of a mortgage. Besides the mortgagors one Susila Bala was impleaded as a defendant in the case on the allegation that she was merely a benamidar of the mortgagors, i.e., the defendants 1 and 2. The defence of Susila Bala was that she was really the owner of the mortgaged property and not a benamidar of the mortgagors as alleged by the plaintiff. The question whether Susila Bala was in possession of the property or was merely the benamidar of the mortgagors was decided by the court and was found against her. It was contended in appeal that as she was claiming a paramount title to the mortgaged property this question could not have been gone into in the mortgage suit and the trial court had committed a mistake in deciding it .as it had no jurisdiction.

By a Division Bench of the Calcutta High Court it was held that a suit to enforce a mortgage in which the adverse claims of persons not privy to the mortgage and setting up a title paramount to that of the mortgagor and the mortgagee are sought to be investigated, it is open to objection on account of misjoinder and inconvenience, that the question, however, was not one of jurisdiction and at most the misjoinder was an irregularity or inconvenience, and where there had been no prejudice by reasons of the misjoinder the irregularity, if any, was not such as would justify an appellate court in setting aside the decree.

10. In -- 'Bisheshar Dayal v. Kit. Jafri Begam', AIR 1937 All 251 (E), a Bench of this Court consisting of Thorn and Allsop, JJ. held that there was nothing in Order 34, Rule 1 which prohibited a mortgagee from impleading in the mortgage suit any person who according to his allegation was

disputing his title as mortgagee, that to hold otherwise would in many instances lead to more highly undesirable and inequitable results and would lead to unnecessary multiplication of suits, that either before or after filing the mortgage suit he would have to bring another suit against the person claiming the as a prior transferee to the mortgaged pro'perty for a declaration that that person's title was invalid. They observed that it would be unfortunate if he had to follow such a devious course.

11. In -- 'Khub Lal Upadhya v. Jhapsi Kundu', AIR 1924 Pat 613 (F), a Division Bench of the Patna High Court consisting of Dawson Miller and Mullick, JJ. made the following observations :

"Although it is, as a general rule, desirable in mortgage suits to exclude all issues between the parties except those immediately concerned with the mortgage suit itself, the Court may in certain cases allow other issues to be determined in such a suit even if they should depend upon separate causes of action and the Court may in proper cases grant leave for that to be done. Where the defendants raising a paramount title are in possession and likely hereafter, if their differences are not settled by the mortgage suit, to resist the possession of a successful plaintiff in a mortgage suit, it would in many cases be very convenient to allow the issues of their title to be determined in the mortgage suit so that after determination of those issues the plaintiff will know whether he may or may not get an undisturbed possession of the property instead of having to bring a separate suit later on."

12. In -- 'Kasi Chettiar v. Ramasami Chettiar Firm', AIR 1937 Mad 176 (G), decided in 1936 by a Division Bench of the Madras High Court consisting of Varadhachariar and, Mockett, JJ. it was held that the rule that in a mortgage suit pleas, in the nature of a claim by way of title paramount are not to be introduced was not applicable to a case where a mortgage executed by a member of a joint Hindu family was sought to be enforced against the other members of the family as his heirs and the latter set up that the property mortgaged was family property and not the separate property of the mortgagor and that it was proper that a plea of this nature must be tried before a mortgaged property is brought to sale.

13. From a consideration of the above authorities it will appear that, ordinarily a person claiming a title paramount to the mortgagor or the mortgagee will not be impleaded in a suit on the basis of the mortgage, but this rule is not an inflexible rule and will depend on the contingencies of each case. The rule is based on convenience and to avoid unnecessary complications in a mortgage suit. If, however, it is necessary to decide the question of paramount title set up by the defendant in order to afford appropriate relief to the plaintiff and to avoid multiplicity of suits such a question can be gone into in a mortgage suit.

There is, however, no question of want of jurisdiction in such cases. It can, at the most, be one of misjoinder but when it is alleged that the person claiming adversely or by title paramount is a benamidar of the mortgagee or is in possession and likely to resist the claim of a successful plaintiff in the mortgage suit or has really got no interest in the mortgaged property and has been set up by the defendant mortgagee to defeat the plaintiff's claim for redemption it may be convenient to join him as a party to the mortgage suit. If it is not done then it is possible that the decree for redemption

which is obtained by the plaintiff may become infructuous as he will not be able to obtain possession over the property which stands in the name of another person and who is setting up a paramount title at the instance of the mortgagee. In such cases after obtaining a decree for redemption he will have to file another suit for possession of the mortgaged property against that person.

14. In the present case the applicant contended that the plaintiff was not the tenant of the disputed plots as his father had sold them and the persons to whom they had been sold had relinquished their tenancy rights in them. It was, therefore, necessary for the lower court to determine whether the sale deed alleged to have been executed by the plaintiff's father was a valid sale deed and binding on him and whether in view of that sale deed the plaintiff had lost his equity of redemption and was no longer the tenant of the disputed plots. In order to determine this question the lower court had to enter into the question of the genuineness of the sale deed and when, it found that the sale deed was not genuine and binding on the plaintiff then the plaintiff as the son of the mortgagor Khedu inherited the tenancy rights from him and was entitled to redeem them. After this finding it was not necessary to determine whether the applicant was the tenant of these plots because in view of this finding he could not possibly acquire tenancy rights in those plots nor could the zamindar have conferred them on him. It was also necessary for the lower court to determine whether the mortgagees were in actual possession of the mortgaged property and that finding too is in favour of the plaintiff.

15. In my opinion no question of want of jurisdiction arises in this case. The trial court had the powers of the Assistant Collector, Ist class, and as such had the jurisdiction to decide the question of tenancy raised before it. If it is considered to be a case of misjoinder of parties or causes of action, which in the circumstances of the present case I do not think that it is, the objection about it should have been taken at the earliest possible opportunity before the settlement of issues as provided in Order 1, Rule 13, Civil P. C. and when such objection is not taken it will be deemed to have been waived and will not be entertained in appeal or revision. It is not open to the applicant now to raise this question when he himself invited a decision about his tenancy rights from the lower Court and that question was decided against him. I am of opinion that in order to determine the plaintiff's right of redemption the question of his tenancy right and that of the applicant which incidentally arose had to be decided and the lower Court in deciding it has acted properly and has also avoided multiplicity of suite. It has not committed any mistake.

16. The application has no force and is rejected with costs.

Agarwala, J.

17. I agree.