

Patna High Court

Ramdhani Sahu And Ors. vs Jagdeo Lal Marwari And Ors. on 8 April, 1959

Equivalent citations: AIR 1960 Pat 316

Author: S C Prasad

Bench: S C Prasad

JUDGMENT Shib Chandra Prasad, J.

1. The plaintiffs have appealed from the Judgment of the Additional Judicial Commissioner of Chotanagpure at Ranchi reversing a decision of the Additional Subordinate Judge of the same place in a suit filed by the plaintiffs for redemption of a usufructuary mortgage bond dated 1-10-1910 executed by one Sadhu mortgaging plots 1884 and 790 for Rs. 200/-. The mortgage was in favour of one Biseshwnr Lal Marwari predecessor-in-interest of defendants 2 to 5 and one Jagdeo Lal Marwari, defendant No. 1.

2. There were four brothers, Sadhu, Sita, Badri and Prayag. Sadhu was the, eldest member of the family and, as such it was alleged that he had mortgaged the property for legal necessity. In 1925 a suit was filed by Badri and Prayag attacking several others alienations including the mortgage in suit executed by Sadhu on the ground of want of legal necessity and family benefit. They also contended that the mortgage was void as it was in contravention of the provisions of Section 46 of the Chotanagpur Tenancy Act.

The present defendants contested the suit and pleaded that Sadhu was the karta of the family that he had executed the mortgage as such for legal necessity and family benefit, and that the mortgage was not hit by the provisions of Section 46 of the Chotanagpur Tenancy Act. It was held by the court that the mortgage was without legal necessity and family benefit, and that mortgage having been also hit by the provisions of Section 48 of the Chotanagpur Tenancy Act was void. It was further held that the claim of Badri for recovery of possession was barred by limitation. So far as Prayag was concerned, the suit was decreed and he was given joint possession of the land along with the defendants.

3. In 1911, it appears plot 290 had been purchased by defendant No. 11 and also Mahadeo Lal Marwari the predecessor-in-interest of defendants 12 and 13 in execution of a decree for money against Sadhu. Sita and Sadhu subsequently died. The remaining two brothers Badri and Prayag sold their interest in plot 884 to the plaintiffs by a registered sale deed dated 24-5-1946 for Rs. 1,500/-. The plaintiffs alleged that after this purchase they tendered the money to the defendants which was refused and, therefore, they filed this suit for redemption of the mortgage.

4. In the present suit the plaintiffs' case was that Sadhu was the Karta of the joint family and he had, executed the mortgage for legal necessity and family benefit, and as the plaintiffs had purchased the right of redemption from Badri and Prayag they were entitled to redeem it.

5. The defence was that the plaintiffs had no title and, therefore, the mortgage executed by Sadhu was not for legal necessity and was, therefore, void ab initio. It was also void because it contravened the provisions of Section 46 of the Chotanagpur Tenancy Act, and that the defendants having

remained in possession of the land for more than 12 years had perfected their right as full owners by adverse possession. In the alternative, it was contended that as they had improved the land by investing Rs. 1,000/- the decree for redemption should be made conditional upon their paying this amount to the defendants.

6. The learned trial court found that the mortgage was void as it offended against the provisions of Section 46 of the Chotanagpur Tenancy Act. and also because there was no legal necessity justifying this mortgage, and that the defendants 1 to 5, the respondents mortgagees having remained in continuous possession of the land for more than 12 years of the mortgage had acquired rights of mortgagee, in those lands. He further found that in the suit of 1925 it had been directed by the Court, deciding that suit, that Badri had right of redemption and that the plaintiffs having purchased the right of Badri over and above the right of Prayag they were entitled to redeem the entire bond, the other co-mortgagors being entitled to contribute their shares and take possession of the lands accordingly.

The plea of improvement was negatived. I may also mention that the defendants had also prayed that the cost incurred by them in defending the previous suit of 1925 should be paid to them before the mortgage could be redeemed. The trial court negatived this defence also saying that the defendants had failed to prove the amount which they had actually incurred in defending the previous suit.

7. The learned Additional Judicial Commissioner has reversed the decree passed by the trial court holding that the plaintiffs had no right to redeem the bond because their predecessors-in-interest Badri and Prayag had paramount title in the disputed land, and in view of the decision of the court in the title suit of 1925 the mortgagees must be held to have prescribed and to have become mortgagees after the expiry of 12 years from the date of the mortgage bond against Sadhu and his heirs only who alone were entitled to redeem the mortgage. Having come to this conclusion the learned Additional Judicial Commissioner allowed the appeal and set aside the judgment and decree passed by the learned Additional Subordinate Judge and dismissed the suit with costs.

8. It is contended before me by learned counsel for the appellants that the court of appeal below has completely misdirected itself in taking the view that the plaintiffs' predecessor-in-interest had no right to redeem having ignored the provisions of Sections 60 and 91 of the Transfer of Property Act. It is contended, that when it was found by the court in the title suit of 1925 that the mortgage, being not for legal necessity and being hit by the provisions of Section 46 of the Chotanagpur. Tenancy Act was void, but in spite of this the defendants had continued to remain in possession of the land on the basis of that void mortgage it could not be as a matter of law, that they were prescribing as mortgagees against all persons who were interested in the land and not simply against Sadhu and his heirs.

It is the capacity and intention of the person prescribing which are to be considered, in finding out the status which he acquires, after completing the period prescribed for acquiring that status. The fact that the previous decision in the title suit of 1925 was to the effect that the mortgage was not for legal necessity and, therefore not binding on Badri and Prayag as well as Sita. who was not a party to

that suit, did not affect this position. On the other hand, learned counsel for the respondents has urged that the decision in file title suit of 1925 is the crucial fact to be considered in this case.

If there had been no such decision, then of course the plaintiffs could have claimed redemption because in that contingency the defendants would have been held to have prescribed as mortgagees against all the members of the family which owned the land in suit. But having regard to the decision of that suit of 1925, which was that Prayag was granted a decree for joint possession on the ground that the mortgage being void, was not binding on him, the effect of this was that so far as Prayag was concerned the defendants must be held to have prescribed as against him not as mortgagees but as full owners.

Learned counsel went further and said that there would be the effect as against Badri also in spite of the fact that it had been held by the court in the title suit of 1925 that his claim for possession was barred by time.

9. I think the contention of learned counsel for the appellants is correct and is well founded. The decision of the title suit of 1925 must be taken to have been sought by Prayag and Badri on the ground that the property was not bound by the mortgage executed by Sadhu, because it was without legal necessity and also because it was hit by the provisions of Section 46 of the Chotanagpur Tenancy Act. It is conceded before me, and it was also conceded in the court below that alienation made by any member of a joint Hindu Mitakshara family, if it is not for legal necessity does not pass the rights of the executant also.

Consequently the decision of the previous suit of 1925 giving Prayag joint possession and dismissing the claim of Badri on the ground of limitation must be held to be limited to their distinct rights which they claimed as members of the family of being not bound by the transaction of the mortgage on the ground of its being invalid as such, Prayag did not choose to take joint possession and allowed the person, who was holding possession of the land on basis of a void mortgage to continue in possession and the mortgagees also continued to remain in possession of the land as such.

It cannot therefore be said that the decision of the court in the title suit of 1925 in any way enlarged the rights of the defendants, so as to make them those of a full owner after the expiry of the period of 12 years even against Prayag. It must be held that the defendants had been prescribing throughout as mortgagees against all. So far as Badri was concerned it is admitted before me that in the previous suit there was a direction by the court that although his right of possession on the ground of the mortgage being void was barred by limitation, he had a right to redeem.

Thus his right of redemption was recognised in the presence of the defendants in that very suit. The plaintiffs as I have stated above, have got their title to the land by purchasing the right of Badri also. Apart, therefore, from any other consideration even on these facts alone the claim of redemption should have been allowed by the court below. I think that the court of appeal below fell into error by taking a wrong view of the law and therefore, its finding must be set aside,

10. Learned counsel for the respondents has also argued before me that the defendants, who were appellants before the learned Additional Judicial Commissioner, did not challenge the findings of the trial court on the point of improvements and the claim of costs for defending the suit of 1925, and the court of appeal below did not apply its mind to that aspect of the case because that was not raised before the learned Judge. From the judgment of the learned Additional Judicial Commissioner I do not find that alternatively this point was raised before him by the defendants which they ought to have done if they really wanted to challenge the findings of the trial court on this point and should have invited the court of appeal to record its findings.

It must, therefore be taken that the findings of the trial court on this point were accepted by the defendants. Consequently, there is no substance in the contention of learned counsel for the respondents raised before me that the matter should go back to the court of appeal below for recording its findings on this point.

11. The appeal is allowed. The judgment and decree passed by the learned Additional Judicial Commissioner are set aside and those of the learned Additional Subordinate Judge are restored. The appellants shall get costs throughout.