

ORISSA HIGH COURT

Jayagopal Mundra

Vs

Gulab Chand Agarwalla

Second Appeal No. 325 of 1969

(G.K. Misra, C.J., B.K. Patra and K.B. Panda, JJ.)

12.12.1973

JUDGMENT

G.K. Misra, C.J.

1. The disputed property is a house with vacant site in village Bagdihi in the Dist. of Sambalpur. Deceased Punumchand, father of deft. No. 3 and deceased Bhagirathi (original defendant No. 4) were owners of the disputed property. They executed a usufructuary mortgage bond {Ext. 3} on 19-7-1911 in favor of the ancestors of the plaintiffs. In 1939 deceased Kashiram Marwari trespassed upon the disputed property. The predecessors-in-interest of the plaintiffs brought Title Suit No. 40 of 1940 in the court of the Munsif, Sambalpur, for declaration of their title as mortgagees and for recovery of possession from Kashiram Marwari. The suit was decreed on 29-4-1941. The trial Court decree was confirmed in S. A. No. 13 of 1942 on 18-9-46. Defendants 3 and 4 were parties to that litigation. It was held in that suit that defendants 3 and 4 were the owners of the disputed property. Kashiram was a trespasser and the predecessors-in-interest of the plaintiffs were the usufructuary mortgagees and they were given delivery of possession by eviction of Kashiram. In execution of the decree, delivery of possession of the property was given on 10-3-50. Ext. 1 is the writ of delivery of possession and Exhibit 1/a is the peon's report. Ext. 2 dated 26-4-50 is the order of the Munsif recording the fact of delivery of possession. Case of the plaintiffs is that after delivery of possession, an arrangement was made between the plaintiffs and defendants 3 and 4 that the plaintiffs would become the owners of the disputed property and would continue in possession as before. In 58, defendants 1 and 2 trespassed on the disputed property. The suit was accordingly filed on 19-3-63.

Defendants 3 and 4 fully supported the case of the plaintiffs. Defendants 1 and 2 did not dispute the fact of the previous litigation in which the predecessors-in-interest of the plaintiffs got a decree for recovery of possession as usufructuary mortgagees against Kashiram. They however, denied the factum of delivery of possession on 10-3-1950 and the possession of the plaintiffs subsequent thereto. Their case was that Kashiram Marwari was the owner of the property by being in continuous possession for the last 40 years till it was sold to them by Mithuram and Sama Bai, the nephew and widow of Kashiram respectively, by an unregistered sale deed (Ext. A) on 13-1-1960 for Rs. 1,500/- whereafter they are in possession of the disputed property by reconstructing the rooms.

2. The trial Court recorded the following findings :

- (i) Defendants 3 and 4 were the real owners of the disputed property and not Kashiram.
- (ii) Plaintiffs have title to the disputed property as mortgagees.
- (iii) Delivery of possession of the disputed property to the plaintiffs was given on 10-3-1950 through court in Execution Case No. 90/1949 by evicting Kashiram.
- (iv) Evidence of possession on both the sides was equally unsatisfactory. The principle that possession follows title, and the presumption of continuity of possession are applicable to this case and plaintiffs were found to be in possession within Twelve years of the suit. It accordingly decreed the suit for recovery of possession against defendants 1 and 2. So far as defendants 3 and 4 were concerned, their right in the disputed property was left undecided.

3. The learned Lower Appellate Court recorded the following findings :

- (i) Kashiram was a rank trespasser.
- (ii) The nephew and widow of Kashiram had no title to the disputed property. The unregistered sale deed (Ext. A) executed by them in favor of defendants 1 and 2 is void ab initio. Defendants 1 and 2 are rank trespassers.
- (iii) Right of the plaintiffs as mortgagees was extinguished after the expiry of fifteen-years from the date of the mortgage (1911) under Section 17 of the Orissa Money-lenders Act.
- (iv) The admission of defendants 3 and 4 that there was an arrangement whereby they relinquished their proprietary interest and right to possession in the disputed property in favor of the plaintiffs does not create any title in favor of the plaintiffs.
- (v) There was delivery of possession in favor of the plaintiffs on 10-3-50 but such delivery of possession was symbolical and not actual inasmuch as Kashiram Marwari was not physically evicted from the disputed house. Plaintiffs did not get physical possession of the property though delivery of possession was effected by the peon.
- (vi) Plaintiffs have failed to prove possession within twelve years of the suit. Article 64 of the new Limitation Act applies. Defendants 1 and 2 and their predecessors-in-interest were in possession of the disputed house for more than twelve years continuously. The principle that possession follows title does not apply to this case.

On the conclusion that plaintiffs were not in possession within twelve years of the suit and defendants 1 and 2 and their predecessors-in-interest were in continuous possession for more than twelve years, the learned Subordinate Judge dismissed the plaintiffs' suit.

4. Jayagopal, legal representative of deceased plaintiff No. 1 filed the second appeal. This appeal came up for hearing before me. In course of argument it was contended on the authority of (*Banamali Mahapatra v. Chirivuri Venkayamma*¹) that after the discharge of a possessory mortgage under Section 17 of the Orissa Money-lenders Act, the possession of the erstwhile mortgagee is that of a trespasser. Their Lordships in paragraph 13 observed thus :

"xx xx The mortgagee's possession after the expiry of fifteen years' limit becomes by

operation of law that of a trespasser and he is liable to eviction." This decision has been subsequently distinguished in some of the single Judge decisions of this Court. To examine the correctness of the Division Bench decision, the case was referred to a larger Bench. This is how the matter has come before us.

5. The findings of the learned Subordinate Judge that Kashiram and defendants 1 and 2 were rank trespassers, that proprietary title had not been conveyed to the plaintiffs either by an arrangement with defendants 3 and 4 or by their admission, that plaintiffs were not in factual possession within twelve years of the suit, that the vendors of Ext. A were in possession of the disputed property till 13-1-60, and that defendants 1 and 2 were in possession till 19-3-63 (the date of the suit) are pure findings of fact not assailable in Second Appeal. The correctness of the appellate Court judgment would be examined without disturbing these findings.

6. The suit was filed on 19-3-63. The new Limitation Act (Act 36 of 63) came into force on 1-1-64. The learned Subordinate Judge was clearly wrong in saying that Article 64 of the new Limitation Act would be, applicable to this case.

7. In support of the appeal Mr. Sinha advanced the following contentions :

(i) The conclusion of the Lower Appellate Court that delivery of possession in favor of the plaintiffs on 10-3-1950 was symbolical is contrary to law.

(ii) The learned Subordinate Judge acted contrary to law in not noticing the legal position that symbolical delivery of possession against the judgment-debtor amounts to actual delivery of possession.

(iii) The Appellate Court acted contrary to law in not giving effect to the proposition that plaintiffs who got delivery of possession on 10-3-1950 are entitled to resist their possession against the entire world except the true owners.

(iv) The Appellate Court acted contrary to law in not keeping in view the proposition that though the usufructuary mortgage was discharged after the expiry of fifteen years by operation of law under Section 17 of the Orissa Money Lenders Act, the mortgagee continued in possession on behalf of the mortgagors until the mortgage security was delivered to defendants 3 and 4 or until any hostile animus was exercised. In this case defendants 3 and 4 accepted the case of the plaintiffs that the latter were continuing in possession on behalf of the former even after the discharge of the mortgage.

(v) Possession of Kashiram and the vendors of Ext. A from 10-3-1950 till the execution of Ext. A on 13-1-60 for a period of little less than ten years and the possession of defendants 1 and 2 for a period of little more than three years from 13-1-60 till 19-3-63 when the suit was instituted cannot- be-tacked. The two groups of trespassers were quite independent. Conclusion of the learned Subordinate Judge that defendants 1 and 2 had acquired title by adverse possession is contrary to law.

Each of these contentions requires careful examination.

8. The finding of the Lower Appellate Court that Kashiram, the judgment-debtor, was not physically removed from the disputed house by the plaintiff when delivery of possession was effected on 10-3-50 is one of fact and cannot be disturbed in second appeal. The further question for consideration, however, is whether such delivery of possession against the judgment-debtor amounted to actual delivery of possession.

9. To clarify the legal position it would be appropriate to notice the distinction between actual and symbolical delivery of possession in execution of a decree against the judgment-debtor or some one on his behalf. The subject is dealt with in Order 21. Rules 35 and 36, Civil Procedure Code which run thus :

"35. (1) Where a decree is for the delivery of any immovable property, possession thereof shall be delivered to the party to whom it has been adjudged, or to such person as he may appoint to receive delivery on his behalf, and, if necessary, by removing any person bound by the decree who refuses to vacate the property.

(2) Where a decree is for the joint possession of immovable property, such possession shall be delivered by affixing a copy of the warrant in some conspicuous place on the property and proclaiming by beat of drum, or other customary mode, at some convenient place, the substance of the decree.

(3) Where possession of any building or enclosure is to be delivered and the person in possession, being bound by the decree, does not afford free access, the court, through its officers, may after giving reasonable warning and facility to any woman not appearing in public according to the customs of the country to withdraw, remove or open any lock or bolt or break open any door or do any other act necessary for putting the decree-holder in possession.

36. Where a decree is for the delivery of any immovable property in the occupancy of a tenant or other person entitled to occupy the same and not bound by the decree to relinquish such occupancy, the court shall order delivery to be made by affixing a copy of the warrant in some conspicuous place on the property, and proclaiming to the occupant by beat of drum or other customary mode, at some convenient place, the substance of the decree in regard to the property." The distinction was pointed out very clearly in (*Ram Prasad Ojha v. Bakshi Bindeshwari Prasad*²). These two Rules lay down that if the property is in occupation of the Judgment-debtor or of some one on his behalf, possession shall be delivered, if necessary, by removing the judgment-debtor and placing the decree-holder in occupation of the property. On the other hand, if the property is of such a nature that the judgment-debtor is not in actual occupation of it, as for instance, when the property is in occupation of a tenant, the only mode of giving possession is by proclaiming on the spot that possession has been given to the decree-holder. When a decree-holder is put in actual occupation of the property, everybody else has been ousted from it, and consequently dispossessed. On the other hand, if the court simply proclaims that the decree-holder has been put in possession, such a delivery of possession can be binding only upon those who are parties to the proceedings or on those who claim through them. This difference in the mode of delivery of possession is due to the nature of the property and not on account of difference in the nature of possession. The question will

always be not what was the mode of delivery of possession but who was in fact ousted by it. The term 'symbolical possession' is applied where delivery of possession is made under Order 21, Rule 35(2) and Rule 36. Actual possession is delivered under Order 21, Rule 35(1).

10. So far as delivery of possession against the judgement-debtor or any person in occupation on, his behalf is concerned, there is no distinction between the two modes of delivery of possession. Law is well settled that as against the judgement-debtor symbolical delivery of possession amounts to actual delivery of possession. In a Full Bench decision of five Judges rendered by the Calcutta High Court in (*Juggobundhu Mukherjee v. Ram Chunder Bysack*³) their Lordships observed thus :

"In the one case, the delivery of the land is to be made by placing the plaintiff, in direct possession. In the other, the delivery is effected by the officer of the Court by going through a certain process prescribed by Section 224 (corresponding to Order 21, Rule 36 CPC), and proclaiming to the occupants of the property that the plaintiff has recovered it from the defendant. This is the only way in which the decree of the court, awarding possession to the plaintiff, can be enforced; and as, in contemplation of law, both parties must be considered as being present at the time when delivery is made, we consider that, as against the defendant, the delivery thus given must be deemed equivalent to actual possession.

As against the third parties, of course, this symbolical possession (as it is called) would be of no avail; because they are no parties to the proceeding. But if the defendant should, after this, again dispossess the plaintiff by receiving the rents and profits, we think that plaintiff would have twelve years from such dispossession to bring another suit. This decision was accented as laying down good law in (*Sri Radha Krishan Chanderjee v. Ram Bahadur*⁴). Their Lordships observed :

"xx xx This decision is one of longstanding, and has been followed for many years. Their Lordships see no reason to question it or to hold that this rule of procedure should now be altered."

In (*Maharaja Pratap Udai Nath Sahi v. Sunderbans Koer*⁵) the legal position was succinctly out in the following words :

"xx xx Where symbolic possession is delivered in a case where actual possession ought to have been delivered the symbolical possession will operate as actual possession. The delivery of symbolical possession even erroneously operates as actual possession against the judgment-debtor and his legal representatives."

It is unnecessary to multiply authorities. Mr. Mohanty concedes that there is no contrary view. This view has been consistently followed in the Patna High Court (See *Mahabir Sinha v. Emperor*⁶; *Rajendra Narayana Bhanja Deo v. Chaudhuri Chintamani Mahapatra*⁷, *Ramanand Pathak v. Bindhachal Tewari*⁸; *Ram Narain v. P.B. Corporation*⁹; and *E.H. Christian v. Hari*

*Prasad*¹⁰). In (*Manikayala Rao v. Narasimhaswami*¹¹) the same view has been taken and reference was made to AIR 1917 PC 197. Thus, the legal position is well settled that symbolical delivery of possession against the judgment-debtor where even actual possession could have been delivered amounts to actual delivery of possession.

11. The significance of the aforesaid dictum is that by obtaining delivery of such symbolical possession the prior adverse possession of the judgment-debtor comes to an end. The decree-holder who obtains such symbolical delivery of possession against the judgment-debtor in execution of a decree can file a suit for recovery of possession within twelve years of the date of delivery of symbolical possession (see (1880) ILR 5 Cal 584 (FB) AIR 1948 Patna 416; AIR 1955 Patna 158 and *Harasit Golder v. Jaladhar Biswas*¹²): This principle has nothing to do with the doctrine of possessory title under which a person in prior possession can hold and resist his possession against the entire world excepting against the true owner. By the decree plaintiffs obtained a declaration of title as mortgagees and recovery of possession. In execution of the decree they got symbolical possession against the judgement-debtor though actual possession could have been delivered. Kashiram was in possession of the disputed house and the bailiff could have given actual possession to the plaintiffs by removing Kashiram. Despite the absence of such actual delivery of possession the symbolical delivery of possession as against Kashiram amounts to actual delivery of possession. It is to be noted that both to the decree and the execution case against Kashiram, the real owners, defendants 3 and 4, were parties. Plaintiffs obtained a decree for recovery of possession as mortgagees without any objection from the real owners though by that date the mortgage had stood discharged by operation of law under Section 17 of the Orissa Money-lenders Act.

12. The same result would ensue by the application of the doctrine of possessory title. Law is well settled that possession of a person is good against the entire world except against the true owner (see *Gadadhar Sahu v. Karsanbasta Patel*¹³; *Banshidhar Mohapatra v. Souri Samal*¹⁴ and *Nair Service Society Ltd. v. K.C. Alexander*¹⁵). In this case plaintiffs obtained a decree for declaration of their title as mortgagees and in execution of that decree they came into possession on 10-3-50. What is the character of such possession would be discussed later; but the fact remains that plaintiffs obtained such possession in the presence of the true owners who were parties to the litigation. Possession of the plaintiffs on 10-3-50 can be resisted by them against Kashiram and his heirs against any subsequent trespass. Such delivery of symbolical possession interrupts adverse possession by the judgment-debtor. The delivery of symbolical possession is the line of demarcation between possession precedent and possession subsequent (see AIR 1943 Patna 416 and AIR 1966 SC 470).

13. The next question for consideration is whether the suit is barred by adverse possession. Plaintiffs came into possession on 10-3-50 and the suit was filed on 19-3-63. Apparently the period is more than twelve years. It, however, constitutes two separate periods as found by the appellate court. Kashiram and his heirs were in possession from 10-3-50 till 13-1-60 when Ext. A was executed. Defendants 1 and 2 are in possession from 13-1-60 to 19-3-63. If both the periods can be tacked, then alone defendants 1 and 2 would acquire a title by adverse possession; otherwise not.

14. Section 2(4) of the Indian Limitation Act, 1908 runs thus :

"2. In this Act, unless there is anything repugnant in the subject or context-

(4) 'defendant' includes any person from or through whom a defendant derives his liability to be sued."

If defendants 1 and 2 have derived their liability to be sued from the vendors of Ext. A, then alone they would come within the meaning of 'defendant' so as to prescribe against the plaintiffs by tacking the period of their possession with that of the vendors. As was observed in ILR (1963) Cut 482 position of law is well settled that a person in possession of land without title has an interest in the property which is heritable and good against the entire excepting against the true owner this interest, unless the true owner interferes, is transferable. The aforesaid test is to be applied to see if defendants 1 and 2 have derived any valid title to the interest of the vendors under Ext. A. The interest of the vendors was assessed at a value at Rs. 1,600 which is the consideration under Ext. A. Under Section 34 of the T. P. Act any transfer for more than Rs. 100 must be by a registered document. Ext. A is unregistered and consequently it transfers no title in favor of defendants 1 and 2. Whatever interest the vendors under Ext. A had acquired by continuing in possession as trespassers from 10-3-50 till 13-1-60 was not validly conveyed by Ext. A. Though the interest of the vendors was transferable, in fact it was not transferred by a valid document as required under law. The result is that the vendors of Ext. A and the vendors thereunder (defendants 1 and 2) are independent trespassers. Independent trespassers cannot tack their possession so as to acquire a title by adverse possession. That is based on the juristic theory that the moment a trespass comes to an end before the expiry of the prescriptive period, possession of the person entitled to possession as against the trespasser revives in the eye of law though he might not have got actual possession. Law is well settled that possession of independent trespassers cannot be tacked. In (*Secy. of State v. Debendra Lal Khan*¹⁶) their Lordships observed thus :

"xx xx It is true that the periods of possession of a series of independent trespassers cannot be added together and utilized by the last possessor to make up the statutory total period of adverse possession."

The same view has been taken in (*Gurbinder Singh v. Lal Singh*¹⁷). On 13-1-60 when the possession of vendors of Ext. A ceased, possession of the plaintiffs in the eye of law revived. The subsequent possession of defendants 1 and 2 from 13-1-60 till 19-3-

63 is an independent trespass of defendants 1 and 2.

15. We would now examine as to the character of the possession of the mortgagee after the discharge of a possessory mortgage under Section 17 of the Orissa Money-lenders Act. Section 17(1) runs thus.

"17. Discharge of possessory mortgages : (i) Notwithstanding anything to the contrary contained in any other law or anything having the force of law or in any contract, any possessory mortgage, which is executed either before or after the commencement of this Act, shall, unless discharged previously, be deemed to stand discharged after the expiration of fifteen years from the date of the mortgage and the mortgagee shall deliver up to the mortgagor all documents in his possession or power relating to the mortgaged

property and shall, if an required, re-transfer the property to the mortgagor at his cost free from the mortgage and from all encumbrances created by him or those claimed under him and shall also put the mortgagor in possession the mortgaged property."

It would thus be seen that all possessory shall be deemed in stand discharged after the expiration of fifteen years from the date of the mortgage unless the same had been discharged earlier. The liability of the mortgagee does not cease immediately on the discharge of the mortgage. The section prescribes that on discharge the mortgagee shall deliver to the mortgagor all documents in his possession or power relating to the mortgaged property. Further, if the mortgagor so wants, the mortgagee shall re-transfer the property to the mortgagor at his cost free from all encumbrances created by him. Lastly, he will put the mortgagor in possession of the property.

16. The question for consideration is whether on the discharge of the mortgage by operation of law under Section 17 of the mortgagee continues in possession as a trespasser. In (1954) 20 Cut LT 467 a Bench of this Court consisting of Narasimham and Mahapatra, JJ. held that such possession after the expiry of fifteen years becomes by operation of law that of a trespasser. In our view, this conclusion is not sound both on authority as well as the provisions in the section itself. The section itself clearly says that the mortgagee shall put the mortgagor, in possession of the property on discharge of the mortgage. Until the mortgagee puts the mortgagor in possession he continues in possession of the property on behalf of the mortgagor and not in derogation of his right, title and interest. Though no express permission has been granted by the mortgagor to the mortgagee to continue the possession, on discharge of the mortgage, the nature of the possession is permissive and not hostile until by any express act the mortgagee exercises his hostile animus. On the discharge of the mortgage the mortgagor will only sue for possession and not file a suit for redemption as the mortgage has been discharged but the mortgagee continues in possession on behalf of the mortgagor as before.

17. In (*Mr. Beti Bai v. Tanya Singh*¹⁸) Sulaiman, J. (as he then was) held that even if the debt stands discharged it does not necessarily follow that from that moment the possession of the mortgagee is adverse.

In AIR 1930 Calcutta 15 a Division Bench of that Court consisting of Jack and Mitter, JJ. held that mere payment of mortgage money without more does not amount to adverse possession by the mortgagee after the date of payment. In (*Mulchand Nahakram v. Mt. Ganga*¹⁹) Mudholkar, J. (as he then was) observed that by the mere fact of the satisfaction of the mortgage debt, the possession of the usufructuary mortgagee did not become adverse to the mortgagor and as such the mortgagee could not be said to have excluded the mortgagor from possession from the date of satisfaction of the mortgage. The same view has been taken in (*Kanakaraj v. B.V. Sundaraya Iyer*²⁰) though we do not agree with their Lordships that the possession of the mortgagee is wrongful from the date of discharge of the debt. The possession of the mortgagee is on behalf of the mortgagor and is permissive. In (*Padma Vithoba Chakkayya v. Mohd. Multhani*²¹) their Lordships clearly said that when a person gets into possession of properties as mortgagee, he cannot by any unilateral act or declaration of his prescribe for a title by adverse possession against the mortgagor, as in law his possession is that of the mortgagor. The principle that the possession of the mortgagee does not become adverse to that of the mortgagor on mere discharge of the mortgage on payment of mortgage dues applies with equal force to the discharge of the mortgage by operation of law. Any contrary view will lead to startling consequences which

militate against the very object enshrined in Section 17(1) of the Orissa Money-lenders Act. An illustration would make the position clear. In this case the mortgage is of the year 1911. If the possession of the mortgagee becomes adverse from the date of discharge by operation of law, the predecessors-in-interest of the plaintiffs would acquire a title by adverse possession against the mortgagors. The result is that by virtue of Section 17(1) the mortgagors would lose their title to the property even though without the application of Section 17 the mortgage would have been in operation. In fact, the predecessors of the plaintiffs brought the earlier suit for declaration of title as mortgagees and the suit was decreed in second appeal in 1946. Thus, the view that after the discharge the mortgagee continues in possession as a trespasser would have startling results. We are unable to accept this view as correct. Our learned brother R.N. Misra, J. took the correct view in (*Basudeb Patnaik v. Indumati Devi*²²) The observations of the Division Bench in 20 Cut LT 467, as extracted in paragraph 4 of this judgment, are contrary to law and are hereby overruled.

18. Reliance was placed on (*Suraj Ahir v. Prithinath Singh*²³) for the contrary view. In that case on the date of vesting in is 1955 the appellants were not in possession as mortgagees. The mortgages had been redeemed in '43. Their Lordships clearly stated that after the redemption and by the date of the vesting the possession of the appellants was not as mortgagees. In that connection they made an observation to the effect "It may be as trespassers or in any other capacity". This observation does not support the contention that their Lordships came to the conclusion that after the mortgage came to an end the mortgagee becomes a trespasser. It was a casual observation not in relation to the issue involved in the case but in answer to an argument that the mortgagee was not in possession as mortgagee and may be in possession in any other capacity including that of a trespasser. This decision is not an authority for the proposition that on the mere discharge of the mortgage the mortgagee's possession is adverse to that of a mortgagor.

19. We would sum up our conclusions thus :

- (i) The symbolical possession obtained by the plaintiffs against Kashiram on 10-3-50 is equivalent to actual possession.
- (ii) The symbolical delivery of possession against the judgment-debtor interrupted the adverse possession which Kashiram had prior to the date.
- (iii) Plaintiffs were in actual physical possession on 10-3-50.
- (iv) Possession of Kashiram and to heirs subsequent to 10-3-50 till the date of execution of Ext. A on 13-1-69 was adverse to the plaintiffs.
- (v) By the unregistered salt deed (Ext. A) the interest of the vendors in the disputed property was not transferred to defendants 1 and 2.
- (vi) 13-1-60 plaintiffs were in physical possession of the property in the eye of law by the doctrine of reverter.
- (vii) From 13-1-60 till 19-3-63 defendants 1 and 2 were in adverse possession.
- (viii) The vendors and vendees of Ext. A are independent trespassers and their possession cannot be tacked.
- (ix) Though the plaintiffs were apparently out of possession for more than twelve years, they were in possession within twelve years as their possession on 13-1-60 is equivalent to their being in physical possession of the property in the eye of law.

(x) Possession of the plaintiffs on 10-3-50 was on behalf of defendants 3 and 4, the successor-in-interest of the mortgagors, who have no objection to the plaintiffs continuing in possession as such.

(xi) Possession of the plaintiffs is not adverse to that of defendants 3 and 4.

On the aforesaid analysis, the plaintiffs are entitled to a decree for recovery of possession against defendants 1 and 2. They are to continue in possession despite the fact that defendants 3 and 4 are parties to the suit.

20. In the result, the judgement of the lower appellate court is set aside and that of the trial court is restored though for different reasons. The second appeal is allowed with costs throughout.

Patra, J.

21. I agree.

Panda, J.

22. I agree.

Appeal allowed.

Cases Referred.

¹(1954) 20 Cut LT 467

² AIR 1932 Pat 145

³(1880) ILR 5 Cal 584 (FB)

⁴ AIR 1917 PC 197

⁵ AIR 1923 Pat 76

⁶ AIR 1934 Pat 565

⁷ AIR 1939 Pat 151

⁸ AIR 1948 Pat 416

⁹ AIR 1953 Pat 110

¹⁰ AIR 1955 Pat 158

¹¹ AIR 1966 SC 470

¹² AIR 1930 Cal15

¹³ ILR (1963) Cut 482

¹⁴1967 Cut LT 601

¹⁵ AIR 1968 SC 1165

¹⁶ AIR 1934 PC 23

¹⁷ AIR 1965 SC 1553

¹⁸ AIR 1926 All 136

¹⁹ AIR 1951 Nag 366

²⁰ AIR 1968 Mad 394

²¹ AIR 1963 SC 70

²²(1970) 1 Cut WR 53

²³ AIR 1963 SC 454