

RAJASTHAN HIGH COURT

Hansia

Vs.

Bakhtawarmal

Second Appeal No. 3 of 1953
(K.N. Wanchoo, C.J. and D.S. Dave, J.)

08.10.1957

JUDGMENT

Wanchoo, C.J.

1. This is a second appeal by two out of four defendants against the judgment and decree of the Civil Judge, Sojat, in a suit for redemption of mortgage. It has been referred to a Division Bench by a learned single Judge as an important question of law is involved in it.

2. Respondents Nos. 1 and 2 are plaintiffs. Their case was that their father and uncle had mortgaged a house situate in village Sawrad with Sobha, Tiloka and Bhoma, predecessors-in-title of the defendants for Rs. 209/- in Samwat 1967. The said mortgage was to be redeemed after a period of 31 years. When the plaintiffs sought to redeem the property after the expiry of this period, the defendants refused to accept the money and hand over possession.

Consequently, the plaintiffs brought this suit for redemption against the defendants. Two of the defendants, namely Bhanja and Benia, sons of Tiloka admitted the plaintiffs' claim. The other two, Hansia and Achalia, contested this suit. They denied the mortgage and asserted that the property belonged to themselves. They also pleaded with respect to the document produced in support of the mortgage by the plaintiffs that as the document was not registered, it was of no avail to the plaintiffs.

3. The suit of the plaintiffs was for redemption. The plaint, as it was drafted, was a pure and simple plaint in a suit for redemption based on the mortgage of Samwat 1967. The prayer was for redemption and possession of the house in dispute.

4. Three issues were framed by the trial court, of which two are relevant for our

purposes. They are these:

- (1) Did the predecessors of the plaintiffs mortgage with possession the house in suit for Rs. 209/- in Samwat 1967 to the predecessors of the defendants?
- (2) Whether the mortgage-deed in suit was compulsorily registrable.

5. The trial court held that the mortgage in suit was founded on an unregistered mortgage-deed which was inadmissible in evidence and, therefore, the suit was dismissed. There was an appeal by the plaintiffs which was allowed and a preliminary decree for redemption was passed. The appellate court held that the unregistered mortgage-deed could be referred to for looking into the character of possession and also for determining the quantum of interest for which the defendants had prescribed under the invalid mortgage. Hence this second appeal.

6. The main question, therefore, which falls for decision is whether a suit for redemption can be maintained on an unregistered mortgage-deed of this kind. The document in question was executed in Samwat 1967 i.e. in 1910 A. D. and we have to look to the law in force in the former State of Marwar in this matter at that time. There was no Transfer of Property Act in force at that time. There was, however, a Registration Act in force of 1899. Under Section 7 of that Act, as amended on 1-10-1907, any usufructuary mortgage of the value of Rs. 200/-and upwards was compulsorily registrable. Further, under Section 18 of that Act, it was provided that if any unregistered document, which was compulsorily registrable, was produced in court, it would not be admitted in evidence. Thus the mortgage-deed in suit, being compulsorily registrable under the law then in force, was inadmissible in evidence to prove its terms. The present suit was filed in January 1949. By that time, the Marwar Registration Act, 1934 had come into force and contained Section 49 of the Indian Registration Act. Section 18 of the Marwar Law of 1899 may be taken to be more or less equivalent to Section 49 of the Indian Registration Act. In addition to that, the Transfer of Property Act also came into force in Marwar from 5-3-1949 and Section 59 provides that where the principal money secured is one hundred rupees or upwards, a mortgage other than a mortgage by deposit of title-deeds can be effected only by a registered instrument signed by the mortgagor and attested by at least two witnesses.

7. The lower appellate court has held, relying on *Purusottam Das v. S. M. Desouza*,¹ that as the mortgage was in existence for more than 12 years, the mortgagee has

prescribed for the mortgagee's interest and, therefore, a suit for redemption will lie and that in effect twelve years' possession on the basis of a mortgage-deed, which was invalid and inadmissible in evidence when it was executed, would give rise to a valid mortgage which the mortgagor could redeem. It is this view which is being challenged before us by the appellants.

8. We have, therefore, to examine the view taken in Purusottamdas's case. In that case, the learned Judges held that the possession of the mortgagee under a void mortgage could not be adverse in respect of the absolute title of the owner. They further held that the suit for redemption in such circumstances was really in the nature of a suit to recover back possession given away under the limited interest by way of a mortgage and was thus a suit to recover back possession of the limited interest in immovable property under Article 144 of the Limitation Act, and therefore, if the person has been in possession for over twelve years, the right of the mortgagor under the invalid mortgage to recover back possession of the limited interest without payment is extinguished and the mortgagee under the invalid mortgage becomes a full-fledged mortgagee as if the mortgage was valid and must be redeemed. This case was decided in a State where Section 59 of the Transfer of Property Act and Section 49 of the Registration Act were in force. With all respect, we find it very difficult to understand how a mortgage, which is void under Section 59 of the Transfer of Property Act, can become a valid mortgage after twelve years' possession of the mortgagee under the invalid mortgage. This would be holding something directly against the statutory provision in Section 59 of the Transfer of Property Act which lays down that the only way in which a mortgage of immovable property of the value of one hundred rupees and upwards can be created is by means of a registered instrument. It would also amount to setting at naught Section 49 of the Registration Act, which makes unregistered mortgages inadmissible in evidence (this corresponds to Section 18 of the Marwar Registration Act of 1899) except for collateral purposes.

9. Article 144 of the Limitation Act certainly provides for a suit for possession of immovable property or of an interest therein. But can it be said that a mortgage, which is invalid from its very inception, creates any interest in the mortgagee? We feel that it is not possible to say that there is any interest in the property in the mortgagee on the basis of an invalid mortgage in view of Section 59 of the Transfer of Property Act or Section 49 of the Registration Act.

In these circumstances, there can, in our opinion, be no question of a suit for

possession of a limited interest based on an invalid mortgage, for the interest contemplated under Article 144 is an interest which can arise in law. But if no interest can arise in law at all of the character envisaged in Purusottam Das's case, there can, in our opinion, be no question of prescribing for that kind of limited interest.

10. We may also point out that Article 144 is a residuary article for it provides for suits for possession of immovable property or any interest therein not hereby otherwise specially provided for. Now suits against a mortgagee to redeem or to recover possession are specifically provided for in Article 148 where the period of limitation is 60 years. Therefore Article 144 does not apply to usufructuary mortgages at all and the time needed for prescribing for the interest of a mortgagee (assuming that this is at all possible) would be 60 years and not 12 years.

11. The authority in Purusottam Das's case has been followed in *Sukra Oraon v. Jagat Mohan Singh*² In this case, the learned Judges of the Patna High Court held another Division Bench ruling of their own court, namely *Bhukhan Mian v. Ra-dhika Kumari Debi*³ as incorrect. In Bhukan Mian's case, the Acting Chief Justice remarked (at page 480) as follows:

"I am aware of a number of cases in India which appear to have the effect of holding that a person can prescribe for a limited interest but I must say that I always fail to understand them, as both a tenancy and a mortgage are creatures of contract, and on fundamental principles I find it difficult to hold the view that a contract can be brought into existence by prescription."

12. Manohar Lall J. observed as follows at page 483:

"I cannot understand how by a mere oral assertion a person can acquire rights as against a true owner as a mortgagee : it is necessary to have a contract to that effect either oral or unregistered, where the amount advanced is below Rs. 100/- , and necessarily a registered document where the money advanced is above Rs. 100/-. If the mere oral declaration of the parties would be held sufficient in law to establish the relationship of mortgagor and mortgagee, in the latter case, in my opinion, it would be stultifying and openly violating the Statute."

13. We may say so with respect, we agree with these observations.

14. In *Ma Kyi v. Maung Thon*,⁴ the Rangoon High Court held that where a usufructuary mortgage for over Rs. 100/- is not registered, a suit by the owner for the possession of the property on redemption is not competent. The proper course for the plaintiff would be to sue for possession relying on his title.

15. The same view was taken in *Maung Daw Na v. Maung Wa Maung*⁵ In that case it was held that although a person cannot sue for redemption on the strength of an abortive or invalid usufructuary mortgage, yet if he sues for possession and proves his title and then the defendant sets up adverse possession the plaintiff may prove that the character of the possession was not adverse to him by giving evidence of the factum of the unregistered mortgage though not of its terms.

16. We are therefore of opinion that where a mortgage is invalid in view of the provisions of the Transfer of Property Act or any other law like a Tenancy Act or is inadmissible in evidence in view of Section 49 of the Registration Act or analogous law, there can be no question of a mortgage coming into existence on the mere basis of twelve years' possession by the mortgagee under the invalid mortgage. If this were to be allowed, we would be clearly going against the provisions of the statute. Nor can the proviso to Section 49 be used to show the nature of possession where the suit is based on the mortgage-deed and the prayer is for redemption of the mortgaged property. The proviso to Section 49 allows an unregistered document affecting immovable property, which is compulsorily registerable, to be received as evidence of any collateral transaction not required to be effected by registered instrument. It has been held by the Privy Council in *Varada Pillai v. Jeevarathnammal*⁶ that an unregistered document like this can be given in evidence to explain the nature and character of the possession held in that case by the defendant. But it is one thing to use the document as evidence of a collateral transaction under Section 49 and another to use it for the very purpose of proving the mortgage. In a suit for redemption based on such an invalid mortgage, the use of the document is not for any collateral purpose, but for the very purpose of proving the mortgage which the Registration law forbids. The proviso to Section 49 therefore, cannot be availed of by a plaintiff in support of a suit for redemption. It would be a different thing if the plaintiff brought a suit for possession and he was met by a plea of adverse possession; he can then use the unregistered document to show the nature of the defendant's possession and prove that it was never adverse. That would be using the document for a collateral transaction to

meet the case of the defendant based on adverse possession. The conclusion, therefore, at which we arrive is that where there is an invalid mortgage which is required by law to be registered, it cannot be used in evidence and the fact that the mortgagee under the invalid mortgage has been in possession for over twelve years cannot convert him into a mortgagee who is to be redeemed and cannot make the document which was inadmissible into a document conferring the interest of a mortgagee on the person in possession. The only remedy for the plaintiff in such a situation is to sue for possession based on title which must be proved by evidence other than the invalid mortgage deed. If in such a suit for possession, he is challenged by the defendant on the ground of adverse possession under Article 144 (for there can be no question of the application of Article 142 in a case of this kind, as there has been no dispossession or discontinuance of possession) he can then use the invalid mortgage-deed to show the nature of the defendant's possession, namely that it was not adverse to him. But the mere fact that the defendant in such a suit has been in possession on the basis of an invalid mortgage for more than twelve years would not make the transaction a valid mortgage and the defendant a mortgagee.

17. Learned counsel for the respondents relied on a single Judge decision of this Court in *Ramchandra v. Ramhans* 7 In that case Bapna J. differed from the view of Manoharlal J. in Bhukhan Mian's case where he laid down that the possession of the so-called mortgagee became adverse to the plaintiff from the very date of the invalid mortgage. With respect, we agree with the view taken by Bapna J. on this point and cannot accept the view of Manohar Lall J. that in such a case, the so called mortgagee's possession is adverse from the very day of the invalid mortgage. A further question was raised before Banna J. namely that the suit should have been for possession and not for redemption. He did not hold in that case that a suit for redemption would lie. What he held was that there was no difference between a suit for possession containing a prayer for allowing the defendant such sums of money as may be due to him and a suit for possession on payment of the mortgage amount. He, therefore, held that the lower court was quite right in granting a decree for possession to the respondent on his paying Rs. 400/-. This seems to show that there was no decree for redemption as such in that case and Bapna J. did not hold that an invalid mortgage becomes a full-fledged valid mortgage after the so called mortgagee has been in possession for twelve years.

18. This brings us to the second question which arises in this case. That question is

whether in this suit for redemption we should grant a decree for possession to the plaintiffs on payment of the amount which they admitted as due. It is in this connection also that reliance was placed on Bapna J.'s view in Ramchandra's case.

19. Reliance is also placed on *Appamma v. Chinnaveadu*,⁸ on which Bapna J. also relied. In Appamma's case, there was a difference of opinion between two judges and the matter was referred to Ramesam J. and his observations at page 296 are pertinent to the case before us.

"Even if the defendants acquired no mortgage or other limited interest by adverse possession, the plaintiffs can succeed if they are able to prove their title. It cannot be said that the character of the suit is changed. In the first place, even as the suit is framed, it is a suit for possession based on title as against defendants Nos. 5 to 8 and the suit is not a suit for mere redemption. But apart from this, I agree with the decision in *Annada Hait v. Khudiram Hait*⁹ where it was held that a suit to redeem a usufructuary mortgage is substantially a suit for possession".

20. It is true that in some respects, a suit for possession and a suit for redemption are similar. But there are vital differences also. These differences arise on account of court-fee and limitation. In a suit for redemption, the limitation is sixty years; in a suit for possession, it is only twelve years.

In these circumstances, it may not always be convenient to treat a suit for redemption as a suit for possession, though there may be cases in which this may be done. As Ramesam J. pointed out in Appamma's case, that suit was already partly for possession and there was, therefore, little difficulty in converting it wholly into a suit for possession. This will depend upon the facts of each case. But speaking generally, where the suit is wholly one for redemption and no more, it should be dismissed and the plaintiff left to a remedy by a separate suit for possession. We do not think in such a suit it would be right after so many years to permit the plaintiff to amend the plaint and convert it into a suit for possession. In the present case, the plaint was a pure and simple plaint in a suit for redemption. The issues framed also were issues in a suit for redemption. The defendants never raised the question of twelve years adverse possession as they might very well have done if it was a suit for possession. In these circumstances, we are of opinion that the present suit which is a pure and simple suit for redemption must be dismissed and the plaintiffs left to their remedy by a suit for

possession, to which the defendants may be able to raise such defenses as are open to them. In the present case, the character of the suit would be completely changed if it is turned into a suit for possession, and, therefore, the plaintiffs must file a separate suit for possession. The matter might have been different if the facts were as in the Madras case namely that the suit was partly for possession against some of the defendants and in such a case, there might not be any difficulty in allowing amendment and turning it into a suit for possession against all of them.

We are, therefore, of opinion that in this case, we cannot treat this as a suit for possession, nor can we permit amendment after such a long time. The plaintiffs must file a proper suit for possession based on title separately.

21. We, therefore, allow the appeal and dismiss the suit with costs to the defendants-appellants throughout.

Appeal allowed.

Cases Referred.

1. AIR 1950 Ori 213
2. AIR 1957 Pat 245
3. AIR 1938 Pat 479
4. AIR 1935 Ran 230 (FB)
5. AIR 1941 Ran 261 (FB)
6. AIR 1919 PC 44
7. 1955 Raj LW 190
8. AIR 1924 Mad 292
9. 19 Cal LJ 532