

RAJASTHAN HIGH COURT

Banshi Lal

Vs.

Raj Bai

C.S.A. No. 323 of 1999

(Prakash Tatia, J.)

29.10.2003

JUDGEMENT

Prakash Tatia, J.

1. Heard learned counsel for the appellant.
2. This second appeal is against the judgments and decrees of the two Courts below by which the trial Court dismissed the suit filed by the plaintiffs for possession of the property in dispute against the defendant-respondents by judgment and decree dated 11-9-1990 and against which, the first appeal, was dismissed by the first appellate Court by judgment and decree dated 22-7-1999.
3. Brief facts of the case are that the plaintiffs Kalicharan, Shrinivas and Bhagwati Lal submitted that they are owners and are in possession of the property mentioned in para No. 1 and described in para No. 2 of the plaint. The defendant's ancestor Kalyan Mal was brother in near relation of the plaintiffs, as they are also coming from the family of one common ancestor Sukhdeoji. It is stated that after the purchase of the big property (Nohara), the plaintiffs proceeded to take possession of the Nohara from the deceased Kalyan Mal. The plaintiffs offered Kalyan Mal Rs. 750/- (how Kalyan Mal came in possession and why plaintiffs offered above amount to Kalyan Mal is not mentioned in the plaint). At this time Kalyan Mal requested plaintiffs that he may be permitted to live in two rooms situated near the 'pole' of Nohara as he is not having other place and house to live. The plaintiffs accepted the request of Kalyan Mal and gave these two rooms to deceased Kalyan Mal for his residence. In the year 1970, the plaintiffs told Kalyan Mal to vacate the rooms upon which deceased Kalyan Mal sought further time of three years by which he will take another house and will hand over the possession of the rooms to the plaintiffs. In these circumstances, the plaintiffs

permitted Kalyan Mal to live in the rooms for three years more. Kalyan Mal expired in the year 1971 and since the children of deceased Kalyan Mal were of tender age, therefore, the plaintiffs did not insist for possession of the rooms. In the year 1976, the plaintiffs requested defendant Nos. 1, 2 and 3 to handover the possession of the rooms upon which they denied. Not only this but defendants, to humiliate the plaintiffs, got a suit instituted through one Bal Kishan for injunction against the plaintiffs about one plat-form (Chabutri) situated outside the house. That suit was pending in the Court of Munsiff at the time of filing of present suit by the plaintiffs. The defendants on 9-6-1978, prepared for raising construction in the property, therefore, the plaintiffs filed the suit before the trial Court on 24-7-1978 seeking relief of possession of the rooms as well as for injunction against the defendants. During pendency of the suit in trial Court, the plaintiff No. 1 Kalicharan died and his legal representative were taken on record.

4. The defendants-respondents submitted written statement before the trial Court and stated that complete Nohara is the property of the defendants. The said Nohara was mortgaged by the ancestor of Banshi Ram Inani in the Samvat Year 1927 with defendant's ancestor Shri Kalyan Mal for Rupees 1501/-. The defendants further stated that defendants came to know that Kalyan Mal had half share (as mortgagee) in the Nohara and Kalicharan, Kanmal had half share (as mortgagee). On 22-12-1936, Banshi Ram transferred his rights in Nohara in favour of Kalicharan and Kanmal. It is mentioned in the transfer deed that your (Kalicharan and Kanmal) mortgagee's right are joint with Kalyan Mal, and Kalyan Mal is in possession of half of Nohara, therefore, you may take possession of the half Nohara from Kalyan Mal after paying him half of mortgage amount i.e., Rs. 750.50. It is stated by the defendants that the said amount was never paid and Kalyan Mal started living as owner of the Nohara. Kalicharan and Kanmal both were living separately since long ago. In case the plaintiffs had any right to take possession of the property by redeeming the mortgage then that right has come to an end in the year 1941 as per the law of Limitation which was prevailing in the Mewar State and the suit has been filed after 116 years of the possession of the defendants, therefore, the defendants have become the owner of the property in dispute.

5. The trial Court framed issues. After trial, the trial Court dismissed the suit of the plaintiffs after holding that the defendants are in possession since last 116 years and the plaintiffs are not entitled for decree for possession of the property nor are they entitled to redeem the property.

6. The first appellate Court dismissed the appeal of the plaintiffs by judgment and decree dated 22-7-1999. The appellants preferred this second appeal raising two substantial questions of law which are as under:-

(i) "Whether the plaintiffs, joint mortgagees of the property in dispute lost their right to recover possession of the property from the defendants and if not, whether the plaintiffs are entitled to obtain the possession of the property from the defendants subject to payment of Rs. 750.50?"

(ii) Whether the defendants can acquire adverse possession against the plaintiffs who are joint mortgagees in joint possession of the property in dispute?"

7. The learned counsel for the appellants vehemently submitted that though it was not pleaded by the plaintiffs but it is proved that the suit property was mortgaged with Kalyan Mal and with plaintiffs ancestors, therefore, the plaintiffs and the defendants are in possession of the property as co- mortgagee. The defendants, who are in possession as co-mortgagee's successors, cannot claim any adverse possession against the plaintiffs. The plaintiffs ancestor purchased the rights of the mortgagor, therefore, the plaintiffs have right to recover the possession of the mortgaged property after paying Rupees 750.50/- to the defendants. Learned counsel for the appellants submitted that though the appellants have not pleaded that the suit property was mortgaged with the plaintiffs ancestors and the defendants ancestors, nor the plaintiffs pleaded that they have right to redeem the property in question and further, though the suit had not been framed as it was required to be framed for redemption of mortgaged property and further the plaintiffs have not pleaded that the defendants are in joint possession of property in dispute with the plaintiffs or with plaintiffs ancestors at any time before, still, the plaintiffs can now seek decree against the defendants on the basis of the facts which though not pleaded but have come on record. Substantially, contention of learned counsel for the appellants is that the plaintiffs can get the decree on the basis of facts which plaintiffs had not pleaded and on the basis of the grounds which are not the foundation of plaintiffs claim directly or indirectly in the pleading as the facts came on record either in reply to plaintiff's plaint allegations and the defendants have admitted some facts, which could have been case of the plaintiff in alternative (though not pleaded). The learned counsel for the appellants, in support of his this contention relied upon the judgments of the Hon'ble Supreme Court delivered in the cases of *Srinivas Ram Kumar v. Mahabir Prasad*, ¹ *Soni Lalji Jetha (deceased) through his L.Rs. v. Soni Kalidas Devchand*, ² and the judgment of this Court delivered in the case of *Ram Chandra v. Ram Hans*, ³

8. First of all it is to be seen, whether the plaintiffs can claim decree in their favor against the defendants on the basis of the case which they never pleaded? If yes, then whether in the facts of this case whether the plaintiffs are entitled for decree for possession of the property in dispute which is in possession of the defendants since last 116 years from the date of filing of the suit (the suit was filed in the year 1978).

9. It is not in dispute that the plaintiffs filed the suit for possession of the two rooms situated in one Nohara described in paras 1 and 2 of the plaint. Plaintiffs claimed their ownership over the entire Nohara within which these rooms are situated. Plaintiffs specifically pleaded that at the time of purchase, the plaintiffs offered Rs. 750.50 to late Kalyan Mal but at his request the plaintiffs permitted Kalyan Mal to live in two rooms. Meaning thereby, the plaintiff's claim is founded upon their title to the property and cause of action is that the defendants and their ancestor are in occupation of the room as licensee with a condition that at the time of delivery of possession of the above two rooms the plaintiffs will pay Rs. 750.50 to the defendants. The plaintiffs are ready to pay Rs. 750.50 to the defendants but the defendants refused to deliver possession of the above two rooms to the plaintiffs. Admittedly, it was never the case of the plaintiffs that the plaintiffs and defendants ancestors are mortgagees in possession of the property in dispute having half share of each i.e., plaintiff's and defendant's half share each. Not only this but in fact, the plaintiffs specifically pleaded that they are owner of the entire Nohara and are in possession of the entire Nohara (Para one of the plaint). What can be gathered from the pleading of the plaintiffs is that plaintiffs deliberately tried to suppress the facts, which is clear from the pleadings in subsequent para of the plaint, where the clear from the pleadings in subsequent para of the plaint, where the plaintiffs stated that at the time of taking possession of the Nohara, Rs. 750.50 was offered to Kalyan Mal without disclosing how Kalyan Mal came into possession of the two rooms of the Nohara and why the plaintiff's ancestors offered Rs. 750.50 for vacating the rooms. It appears that the plaintiffs, deliberately did not want to admit this fact that deceased Kalyan Mal was in occupation of half of the Nohara as mortgagee in possession as it may go against the interest of the plaintiffs and instead of getting possession of two rooms the plaintiff will have to admit possession of Kalyan Mal over the half of the Nohara and not only on two rooms. If the plaintiffs would have pleaded that Nohara was redeemed in earlier time, it would have been difficult for the plaintiffs to now recover possession of these two rooms from the defendants who are in possession of the rooms in dispute since last more than hundred years. In this confusion, the plaintiffs sought decree, cleverly, for possession of the rooms after paying Rs. 750.50 to the defendants and did not frame

the suit for redemption of the mortgaged property as limitation for filing suit for redemption already expired long ago.

10. The suit has been framed as a suit for possession against a person in possession as licensee or person in possession who agreed to vacate the property after taking some money from the plaintiffs. Now, after losing in two Courts below the plaintiffs became wise and have raised grounds based upon disputed questions of facts and wants to rely upon some of the facts only from the pleading and evidence of the defendants which suite them. According to plaintiffs, admissions of defendants in pleading and evidence proves a case which could have been the case of the plaintiffs in the alternative. The plaintiffs, who pleaded their ownership and exclusive possession over the property (Nohara) want turn round and want to say that the defendants are in possession of the part of the Nohara (disputed two rooms) as co-mortgagees with plaintiffs. The plaintiffs, who admitted exclusive possession of the defendants in property in dispute want to withdraw their admission and want to claim their possession in the property through defendants that too in a case where the defendants are in exclusive possession of the property in dispute since last more than 116 years. Plaintiffs if were co-mortgagees, they admitted their exclusion from the property from the time when they purchased the property in dispute and admitted exclusive possession of the defendants since last more than 100 years, cannot be permitted to withdraw their admission made in the plaint. After admitting exclusive possession of the defendants, it was for plaintiffs to prove that the suit filed by them is still within limitation but they failed to plead and prove this. It is not the case where the defendants have admitted any case of the plaintiffs which could have been a case of the plaintiffs in the alternative. Arguments of learned counsel for the appellants proceeds on legal plea that one co-owner's possession is possession of all co-owners but by ignoring the legal position that one co-owner can claim exclusion of another co-owner and can claim even adverse possession against co-owner though for that, exclusion must be apparent required to be prove by strong evidence. Here in this case, in fact, the defendants even if admitted fact of mortgage of the property in dispute but at the same time claimed exclusion of the defendants from the property in dispute more than 100 years ago and in fact the plaintiffs admitted their own exclusion and dispossession from the property in dispute. Therefore, the judgments relied by the learned counsel for the appellants do not help the appellant rather in some way helped to the defendants as the plaintiffs admitted the case of the defendants claim of exclusive possession over the suit property.

11. The learned counsel for the appellants relied upon the judgment of this Court delivered in the case of Ram Chandra (supra) in support of his argument that mortgagees' possession cannot be adverse even if it is found that the mortgage is illegal or even void. The said judgment was considered by the Full Bench of this Court in the case of *Lachhmi Narain v. Kalyan*,⁴ The said judgment delivered in the case of Ram Chandra supra has no application to the facts of this case because of the reason that even if the suit filed by the plaintiffs be treated as suit for possession from co- mortgagees then also it was for the plaintiffs to prove that they have right to recover the possession of the property in dispute, despite the fact that they are admittedly not in possession of the property since last more than 116 years from the date of the filing of the suit. The question of adverse possession is different than the question of limitation for filing the suit for possession or suit for redemption. If the appellants-plaintiffs want to rely upon their right as purchasers of the mortgagor's right then they have to prove that their suit is within the period of limitation. The appellants- plaintiffs failed to show their right to recover possession continued or was surviving on 18-7-1978 when they filed the suit for recovery of possession. The Full Bench of this Court considered the judgment of Ram Chandra (supra) also and held that "in a case where mortgage deed is not registered and mortgagee is in possession under a void or inoperative mortgage deed, then after 12 years, the mortgagee in possession acquires only the mortgagee's right. At the same time, Full Bench of this Court held as under :-

"Thus suit for redemption of the mortgage created by the operation of law is governed by Article 148 and the period will run after the expiry of 12 years from the date when possession was taken under such mortgage deed."

12. The new Article in place of Article 148 in the Indian Limitation Act, 1963 is Article 61. The Full Bench of this Court decreed the suit of the plaintiff for redemption by specifically holding that the suit is decreed as the point of limitation has been decided in favor of the plaintiff. But in the present case, there is nothing on record except the document Ex. 2 sale-deed dated 22-12-1936 containing a recital that the property was mortgaged in the Samvat Year 1927. It was for the plaintiffs to produce and prove the mortgage deed of the Samvat Year 1927 to show that on 22-12-1936 subsisting right of redemption was sold to the plaintiff's ancestors and it was for the plaintiffs to plead and prove that after 1936, the right to redeem continued till the year 1978 when the present suit was filed. Neither it has been pleaded by the plaintiff nor has been proved, therefore, the plaintiffs were not entitled for relief of the decree

for possession by redemption of the mortgage even if plaintiffs are permitted to set up alternate case.

13. I do not find force in the submission of the learned counsel for the appellants that plea of adverse possession is not available to the defendants. The plea of adverse possession is available to the even co-owners and co- sharers as well as against the co-mortgagees with a difference that in these cases, the ouster is required to be proved by the person claiming adverse possession, not by implication only. The difference is of standard and nature of proof only. In this case, I do not find any illegality in the judgment of the two Courts below when both the Courts below found that the defendants were in possession of the property since last more than 116 years of filing of the suit.

14. In view of the above, the appeal of the appellants is dismissed.

Appeal dismissed.

Cases Referred.

1. AIR 1951 SC 177
2. AIR 1967 SC 978
3. 1955 RLW 190
4. AIR 1960 Raj 1