

NAGPUR HIGH COURT

Balkrishna Gopal

Vs

Rangnath Hanmant

Second Appeal No. 343 of 1945

(Bose, C.J.)

24.11.1949

JUDGMENT

Bose, C.J.

1. This is a plaintiff's appeal in a suit for possession of a field S. No. 31. The plaintiff's case is that the field belonged to ore Sambha, son of Vithu He sold it to the plaintiff on 1-3-1944, but some time before the sale, namely, in the year 1937-38, the defendants dispossessed his vendor.

2. The defendants' case is that Sambha mortgaged this field along with some other property, namely, a house and some cattle, to defendant 1, who was the manager of the defendants' family, on 11-2-1930. The mortgage was for Rs. 1200.

3. On 9-5-1930 Sambha sold the house to a third party with the consent of the mortgagees and also made a payment of Rs. 445 towards part satisfaction of his debt. That left Rs. 800 still outstanding on the mortgage.

4. In March, 1933, Sambha asked the mortgagees to take the field in full satisfaction of the remainder of the mortgage debt and to release the mortgaged cattle. The defendants agreed, so Sambha placed them in possession but they omitted to draw up any document which transferred title to the mortgagees: instead, according to the defendants, there was an oral sale.

5. The first Court held that there was an oral sale but it passed no title because the sale was for more than Rs. 100 But the lower appellate Court held that though the parties called the transaction a sale it was not one in fact. It was a compromise of the mortgage claim and so could be effected orally.

6. I am clear that the learned Judge of the lower appellate Court is wrong. The sort of compromise of which the lower appellate Court is thinking is where both sides claim an equal title to the property and each agrees to recognize a part of the title claimed by the other. A transaction of that kind is not a sale gift or exchange because on the facts agreed to by such a compromise, there is no transfer of title from one to the other. I will illustrate what I mean.

7. If two persons A and B both claim exclusive title to properties x and y, it is clear that the title must reside either wholly in A or wholly in B. In that event the person without title cannot get it in the absence of a valid transfer, but if, instead of fighting out this question, they compromise and agree that A is to have property X and B property Y, then that would not require a written instrument because their agreement imports an admission by A that the title to Y is in B and has always been there and a similar admission by B that the title to X is in A and has also always been there. Now if the title to X has always been with A and both sides are agreed on that fact, there is no need for A to execute a document transferring title to himself - in fact he cannot do so. Equally B cannot transfer title because on the hypothesis of the compromise it has never resided in B but has always been with A. The same position arises with regard to B's right and title to property Y.

8. The position in this case is very different. No one has ever pretended that the right to redeem lay with the mortgagees. Everyone has always agreed that it was with Sambha and the compromise was nothing but a method of satisfying the mortgage. As the right to redeem was always with Sambha and as both parties were agreed about this, they could not validly transfer that right from one to the other except by a written and registered instrument. Of course, they had a right to compromise and of course they could extinguish the mortgage as between themselves by a transfer of a part of the mortgaged property from one to the other just as much as by a transfer of any other property. But they could only do that by a sale, gift or exchange, and the fact that they were agreed about the mode of satisfaction would not alter the substance of the transaction. We, therefore, have to accept the position that the defendants got no title as owner to the property and remained mortgagees.

9. In that event it has also to be accepted that the title continued to reside in Sambha and so he had a legal, as opposed to an equitable, right to transfer it to the plaintiff on 1-3-1944.

10. The next question is whether a mortgagee who gets possession in satisfaction of his mortgage can either resist the claim of a person with title altogether or, in the alternative, demand that his mortgage be first redeemed.

11. Now the right to redeem can only be extinguished by act of parties or by a decree of a Court. (See the proviso to Section 60, T. P. Act). But when it is by act of parties the act must take the shape and observe the formalities which the law prescribes. One method is by payment in cash. In that event nothing is necessary beyond the payment. Another is payment in kind. Thus, a mortgagor can give the mortgagee a horse or a motor car, and if the mortgagee is willing to accept this as a full and proper discharge no formality beyond delivery of possession is necessary because the law prescribes no other formality for the transfer of ownership when the subject-matter is a horse or a motor car. But if the agreement is to transfer immoveable property exceeding Rs. 100 in value then writing and registration are necessary because without that title cannot pass from one to the other and mere delivery of possession is not enough.

12. That brings us to Section 53-a, T. P. Act. Unless that can be applied the mortgagee would not be able to resist an action for possession by a person with title even if the plaintiff were the original mortgagor who had delivered possession under the oral agreement. Neither equity nor estoppel will help because neither can prevail against the law.

13. The legal position before Section 53-a was enacted is explained by the Privy Council in *Ariff v. Jadunath Majumdar*¹ Their Lordships explain the matter thus. At p. 1241 they commence by saying:

"It appears advisable to call attention to the fact that the appellant is the legal owner of the land; and as such he is entitled to possession thereof, subject only to such right (if any) to enjoy it as may have been conferred upon the respondent by virtue of the verbal agreement, either alone or in conjunction with the other facts of the case."

14. The facts there were that the plaintiff placed the defendant in possession of a piece of land in pursuance of a verbal agreement to grant the defendant a permanent lease on a rent of Rs. 80 a month. In pursuance of their agreement the defendant erected structures on the land with the knowledge and approval of the plaintiff. But no formal deed of lease was ever executed. Their Lordships held that title never passed despite the delivery of possession. It continued to reside in the plaintiff.

15. Next they examined whether the defendant could resist the plaintiff's suit for possession and held, first that part performance could not apply because equity follows the law (p. 1249) and second, that there was no trace of estoppel because no act was done by either the plaintiff or the defendant which was not referable to the verbal and invalid contract. In the result the plaintiff's claim for possession was decreed and the defendant was given time to remove his structures.

16. A similar decision was reached by the Privy Council in *Pir Bakhsh v. Mahomed Tahar*², a case of sale, or rather an agreement to sell, The proposed vendee was placed in possession and then the vendor went back on his contract after the right of the vendee to enforce specific performance had become barred by limitation Their Lordships decreed the plaintiff's claim for possession and all that the defendant was allowed was compensation for the improvement effected by him.

17. It is clear from this that as that part of the title which resides in the mortgagor, called the right to redeem, has not been extinguished, the mortgagor is entitled to possession unless the mortgagee can show how and why he has the right to keep the owner of the property out of possession.

18. An estoppel can be ruled out at once and for the same reason as in *Ariff v. Jadunath Majumdar*³, In the first place, it was not pleaded and, in the second, the mortgagor has made no statement of fact which he is precluded from denying. All that the mortgagor, or rather his representatives, did was to attempt an oral sale to the mortgagee of the right to redeem. No one disputes that fact and no one was misled. But what then? The law operating on that fact says that that was ineffective to pass title; and there can be no estoppel against the law. Therefore, estoppel can be ruled out.

19. Next comes Section 53-A and the question there is whether the plaintiff or his predecessor contracted with the defendant in writing to transfer immovable property for consideration.

20. Now, in so far as the transfer is based on the oral sale, it can be ruled out of consideration at

once because it is not in writing. The question then arises whether the transfer was in pursuance of the mortgage. That depends on the terms of the deed. The document, Ex. D-1, has not been translated but the relevant portion runs thus:

"As security for the loan we mortgage with you the following immovable property retaining possession with us.....We stipulate that in default of repayment of the loan. . . we undertake that you will have the right to foreclose (lahan-gahan) the aforesaid property."

21. Now, when there is a mortgage, the full rights of ownership are split up into two. The mortgagee obtains under the mortgage a transfer of an interest, namely, the mortgagee's rights. The mortgagor retains the right to redeem. On foreclosure the balance of the right is transferred to the mortgagee and the right to redeem is extinguished, (Section 58, Transfer of Property Act.) In my opinion, the mortgagor here does not undertake to transfer the mortgagor's interest, called the right; to redeem, to the mortgagee if there is default in payment. What he undertakes is to suffer lahan gahan, that is foreclosure. But foreclosure can only be effected by the Courts and when possession is eventually taken, it is in pursuance of a decree of a Court and not in pursuance of the contract. An intermediate stage has first to occur. The contract has to be superseded and be merged in the decree. Therefore, the possession which the mortgagee took was not in part performance of this contract for the simple reason that the contract, namely the mortgage, did not give him the right to possession until the happening of two events, (1) default and (2) foreclosure, by which was meant foreclosure through a Court, there being no other mode of foreclosure. Accordingly, Section 53 A is not attracted.

22. The last question is whether the defendant can use his mortgage as a shield and claim to be redeemed before he is compelled to part with possession. I do not think he can. This right only arises when the mortgagee not only obtains possession of the property but gets a valid title to the whole or part of it, or is entitled to possession under or because of his mortgage or, when a third party pays off a mortgage debt, to protect his own interests. It cannot arise when a mortgagee takes possession without any right to possession. The right is an equitable one and can only arise when it is equitable that the person lawfully in possession should be allowed to defend. This has just been decided by the Division Bench of which I was a member in *Bhagirathibai v. Manohar*⁴, I need not repeat the reasons which have been set out in full there. It is enough to refer to the Privy Council in *Bijai Saran v. Bageshwari Prasad*⁵, and to *Tukaram v. Eknath*⁶ and *Bidhu Ranjan Sarkar v. Soleman Pramanik*⁷, As between the mortgagor and mortgagee, when considerations of the kind which I have just mentioned do not arise, the mortgagee must work out his rights against the mortgagor on the basis of the contract between them, that is, on the basis of the mortgage.

23. The appeal succeeds. The decree of the lower appellate Court is set aside and that of the first Court restored. Costs here and in the lower appellate Court will be paid by the defendants-respondents.

Appeal allowed.

Cases Referred.

- ¹58 Cal. 1235: (AIR 1931 PC 79)
²58 Bom. 650: (AIR 1934 PC 235)
³58 Cal. 1235 at p. 1241: (AIR 1931 PC 79)
⁴ F.A. No. 108 of 1945 : (AIR 1951 Nag164)
⁵ AIR 1929 PC 288: (120 I. C. 650)
⁶ I.L.R. (1943) Nag. 796: (AIR 1944 Nag 57)
⁷ I.L.R. (1941) 2 Cal. 209: (AIR 1941 Cal 613)