

(2001) 07 PAT CK 0106

Patna High Court

Case No: Appeal From Appellate Decree No. 232 of 1986

Saraswati Devi and
Others

APPELLANT

Vs

Baidya Nath Pd. and
OthersRESPONDENT

Date of Decision: July 4, 2001**Acts Referred:**

- Civil Procedure Code, 1908 (CPC) - Order 34 Rule 7

Citation: (2001) 2 BLJR 1516 : (2001) 3 PLJR 447**Hon'ble Judges:** Someshwar Nath Pathak, J**Bench:** Single Bench

Judgement

Someshwar Nath Pathak, J.

This Second Appeal is directed against the judgment passed by Sri P. Xaxa, Ist. Additional District Judge. Siwan, in title appeal No. 78 of 1984. The defendants of the title Suit No. 152/10 of 1970/84 are the appellants before this Court. The aforesaid suit was decreed by the trial Court by its judgment dated 30-6-1984. The first appellate Court also confirmed the aforesaid decree and then the defendants of the suit have preferred this second appeal.

2. The facts of this case are that one Bala Kamakar the grand-father of Ramlal Kamakar (plaintiff) had mortgaged the suit land in favour of one Prabhu Sah on 20-11-1925. Prabhu Sah died and he was succeeded by his descendants, defendant Nos 4 to 6 of the suit. When the plaintiff went to tender the mortgage money to the defendant second set (4 to 6) on 30-5-69, the latter told the plaintiff-respondent that the deed was assigned to the ancestor of defendants 1 to 3, Brij Bhushan. Then the plaintiff went to tender the mortgage money to defendants 1 to 3. These defendants claimed that they were owners of the suit land and no assignment was made to them or their ancestors. So, they failed to accept the mortgage money and to return the mortgage deed to enable the plaintiff to get

his suit land redeemed. Thereafter the suit was filed for redemption of the suit land and recovery of possession. The case of the defendant No. 1, the only contesting defendant, (appellant here) was that, of course, Bala Kamakar had mortgaged the suit land to Prabhu Sah, but the latter came in possession of only half of the mortgaged land. However, there was no assignment of this mortgage to Brij Bhushan. The fact was that the suit land was auction-sold in execution of the decree passed in rent suit and the employee of Brij Bhushan Achraj Ojha, purchased the land."Besides the above, the descendants of Bala Kamakar including some females had sold the suit land to the defendants family and Achraj Ojha had executed a deed of surrender and one of the females of the descendants of Bala Kamakar had executed deed of surrender. The trial Court and the appellate Court both came to hold, on the basis of evidence that it was not proved by the defendants that the suit land was auction sold by the ex-landlord and that if at all he had purchased the suit land, that purchase was only regarding the shares of female descendants of Bala Kamakar. So, their status on the suit land was that of mortgagee on assignment. Hence the suit was decreed.

3. The law framed in this second appeal was whether the suit was barred by limitation. However, the law raised before me during the course of argument was that the suit was barred under Order XXXIV, Rule 7 C.P.C. because assignment of the mortgage was not proved. So, there was no relationship of mortgagor and mortgagee between the plaintiffs and the defendants 1 to 3 and the suit was not maintainable. Of course, so far the issue raised before me. I think that the appellants' lawyer was correct in his approach. In a simple suit for redemption of a mortgage, there must be a relationship of mortgagor and the mortgagee between the parties. Admittedly Bala Kamakar had mortgaged the suit land to the ancestor of defendants 4 to 6 in the year 1925. So unless it was proved that the mortgage was assigned to defendants 1 to 3 to the suit, the relationship of mortgagor and the mortgagee between the plaintiffs on the one hand and the defendants on the other could not exist. Defendants 4 to 6 did not contest the suit nor any evidence was adduced on behalf of the plaintiffs to establish that these defendants (1 to 3) were assignees from the original mortgagee. In this connection neither any documentary evidence nor oral evidence was adduced. Besides that the contesting defendants claimed title over the suit land by virtue of purchase etc. Admittedly, they were in possession over the suit land. It was also not mentioned in the plaint or in the evidence of the plaintiff-respondent as to when mortgage was assigned to the contesting defendant No. 1 or his family and, so there was no pleading or evidence on behalf of the plaintiff-respondents as to for how long the contesting defendants remained in possession. In such a circumstance, right course for the plaintiff-respondents was to amend the suit for declaration of title after paying proper Court-fee and to seek recovery of possession. This having not been done, the suit remained a simple suit for redemption of mortgage. So, I am of the considered opinion that the simple suit for redemption of mortgage was not maintainable in the facts and circumstances of this case. The two lower Courts had held that since the defendants had failed to establish, by their evidence, that they had, of course, purchased the suit land either in auction sale or by simple sale

or on the basis of deeds of surrender, their status on the suit land was that of mortgagee on assignment. This finding of the lower Courts is based on just a facile presumption and not on the basis of cogent and positive evidence. This finding, therefore, in my opinion, is legally erroneous. .

4. In the result, there is no alternative but to allow the appeal and set aside the judgment of the trial Court and the judgment of the appellate Court. The plaintiff-respondents shall be free to file a proper suit for declaration of title and recovery of possession on payment of proper Court-fee. No order as to cost of this appeal.