(1925) 12 CAL CK 0059

Calcutta High Court

Case No: None

Keshab Lal Goswami		APPELLANT
	Vs	
Bholanath Gangopadhya and Others		RESPONDENT

Date of Decision: Dec. 3, 1925

Citation: AIR 1926 Cal 910 : 94 Ind. Cas. 342

Hon'ble Judges: Suhrawardy, J; Mukerji, J

Bench: Division Bench

Judgement

Mukerji, J.

The plaintiff who was unsuccessful in the Courts below has preferred this appeal with respect to 5 bighas of land. The Courts below have dismissed the plaintiff''s suit holding that it was barred by limitation. The first ground urged on behalf of the appellant is to the effect that Article 148 of the First Schedule to the Limitation Act applies to the case and, therefore, it should have been held that the suit was well within time. In order to deal with this ground it is necessary to consider the allegations upon which the plaintiff came to Court. Shortly stated the plaintiff''s case was that about 13 bighas of land belonged to one Jafer Sheik and after his death it passed by inheritance to his son Kinu and daughter Umeda, that in l887 Kinu mortgaged the land by way of usufructuary mortgage to two persons, Sheik Jamait, Sheik Chhakuri, that in 1888 the said mortgagees or one of them it is not very clear whether both or one of them were parties to the transaction--sub-mortgaged the property to Anantaram and Dayal Mandal who were put in possession thereof. The plaintiff''s case was that after the death of Kinu, Umeda Kinu''s sister became entitled to the property and that on the 7th July 1920 the plaintiff purchased the same from Umeda, paid off the debt due on the mortgage and got back the mortgage-deed. He wanted to take possession of the property after his purchase but that the defendants acting in collusion with each other forcibly resisted and prevented him from taking possession. The defence shortly stated was that of these 13 bighas of land, Kinu in 1893 sold 8 bighas to Ananta and Dayal and thus paid off

the mortgage in their favour that thereafter there was an oral sale by Kinu in favour of Ananta and Dayal in respect of the remainder of the land and that the defendants had purchased the land in execution of a decree against Ananta and Dayal. The suit, therefore, in essence was a suit for declaration of title and recovery of possession. There was no relief claimed in the plaint as against the defendants on the footing of their being mortgagees or persons who represented the mortgagees. To such a suit Article 148 of the First Schedule to the Limitation Act cannot possibly apply and the Courts below were, in my opinion, right in applying Article 144 to the case.

2. The second ground taken on behalf of the appellant relates to the sufficiency of findings of the lower Appellate Court upon which the suit has been disposed of. The learned Subordinate Judge first of all set out the pleadings of the parties. He then stated in his judgment that the defence had adduced evidence to prove the oral sale in respect of the rest of the land in favour of Ananta and Dayal. He observed that that evidence was accepted by the learned Munsif but it was urged before him that the story of the verbal sale was not to be found in the written statement. He then gave an explanation as to why this story may not have found a place in the written statement. Then he observed thus: "When a part of the mortgaged property was sold and according to the recital in the kobala the mortgage debt was satisfied and only the balance of the consideration money was taken by Kinu, the mortgagee could not retain the remaining land. In the ordinary course the rest of the land would be returned to the, mortgagor so that if the remaining land returned to the possession of Ananta and Dayal there must be a legal origin for the possession or if the possession was unlawful, then it was apparently adverse to the mortgagor. In the latter case the plaintiff''s claim would be obviously time-barred." The learned Subordinate Judge, in my opinion, was not right in disposing of the question of limitation, in this way. He did not arrive at any finding on the question as to whether there was a transfer of possession in respect of the 5 bighas of land on the mortgage being satisfied from Ananta and Dayal to Kinu or whether the land came back to the possession of Ananta and Dayal afterwards. He says that in ordinary course after the mortgage was satisfied the land would come back to the mortgagor and if Ananta and Dayal came to be in possession afterwards the possession of Ananta and Dayal must be taken to have been based either on legal origin or it amounted to unlawful possession. The learned Vakil on behalf of the respondents has urged that this judgment be read as embodying the findings with regard to all these points. I am unable to accede to his contention in this respect. It seems to me that in order to dispose of the question as to whether the suit is barred by Article 144 the learned Subordinate Judge will have to come to the following necessary findings. In the first place he will have to find whether in point of fact after the satisfaction of the mortgage debt the 5 bighas of land which was not included in the kobala of 1893 came back to the possession of Kinu and thereafter Ananta and Dayal could not claim to be in possession of it. If this question is found in the affirmative then it will not be necessary to go into other matters; and on a finding in

the affirmative with regard to this point the learned Judge will be right in holding that in that case the possession of Ananta and Dayal must have been either under the verbal sale or it was possessive which was adverse to the mortgagor. If, however, the point is not decided in the affirmative then the learned Judge will have to find as a fact whether there was an oral sale in respect of the 5 bighas. If the question cannot be determined in the affirmative then the question will arise as to whether the possession of Ananta and Dayal became adverse to that of Kinu and if so, at what point of time. It is not the law that simply because a mortgage debt has been satisfied and the mortgagee continues in possession became adverse from the point of time of satisfaction of the mortgage debt. If any authority is needed for this proposition reference may be made to the case of Habeebullah v. Abdul Hamid 13 Ind. Cas. 963 : 34 A. 261 : 9 A.L.J. 131. At page 265 the learned Judges observe as follows: "The possession of a mortgagee does not become adverse to the mortgagor merely because the mortgagee; remains in possession after the mortgage money has been satisfied out of the usufruct or has been otherwise paid off. Much more is required to set time running against the mortgagor." The question whether the possession of the mortgagee after the mortgage debt has been satisfied is adverse to the mortgagor or not is always a question of animus or intention of the parties concerned. The whole of the circumstances will have to be considered in order to find out whether the mortgagees in the present case continued in possession as mortgagees or as owners in respect of the property. I am therefore of opinion that the findings of the Subordinate Judge are not sufficient to dispose of the question of limitation which arises in the present case.

3. In this view of the matter I would set aside the decree passed by the learned Subordinate Judge and remand the appeal to his Court so that the questions to which I have referred may be considered afresh and the appeal disposed of in the light of the observation I have made. Costs will abide the result.

Suhrawardy, J.

4. I agree.