

LETTERS PATENT APPEAL

Before A. N. Bhandari, C. J. and D. Falshaw, J.

MST. KASTURI DEVI,—Appellant.

versus

CHUNI LAL AND OTHERS,—Respondents.

Letters Patent Appeal No. 61 of 1956.

Limitation Act (IX of 1908)—Articles 134 and 148—Applicability of—Mortgagee transferring mortgagee rights—Suit by mortgagor for redemption—Whether governed by Article 134 or 148—Lawful possession—What constitutes—Mortgagee remaining in possession after extinguishment of the mortgage—Possession—Nature of— Whether lawful or adverse to the mortgagor—Adverse possession—Essentials of—Mortgagee in possession—Whether and how can set up adverse title.

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Held, that the object of article 134 of the Indian Limitation Act, 1908, is to cut down the period available to the mortgagor under article 148 and to compel him to watch the conduct of the mortgagee and to intervene on transfer. The help of this article can be invoked only if the defendant establishes to the satisfaction of the Court that the mortgagee or his successor-in-interest has transferred something other than the original mortgage; something more than the mortgage, something larger than the mortgage; an interest unencumbered by the mortgage. He must show that the mortgagee has transferred some right belonging to the mortgagor over and above the mortgagee rights acquired by him. If, for example, a mortgagee proceeds to transfer not only the mortgagee rights acquired by him from the mortgagor but also the rights of ownership vesting the mortgagor, a suit by the mortgagor to recover property from the transferee of absolute title from the mortgagee would be governed by article 134 and not by article 148.

Held, that a person is said to be in lawful possession of immovable property when he holds it as an owner or with the consent of the owner. He is said to be in adverse

possession thereof when he holds it not under the legal proprietor or by his consent, express or implied, but under a claim of right or colour of title. If the possession can be said to be the constructive possession of the true owner or if it can be said to be in subservience to the rights of the true owner, it cannot ripen into title by adverse possession, no matter how long maintained, since hostility is of the very essence of adverse possession. When the original entry is made with the permission of the true owner the law presumes that such an occupation is in subordination to the legal title. The possession continues to be permissive as long as it is apparently permissive, for one must proceed on the assumption that the possession is with amity and in subservience to the title of the rightful owner.

Held, that a mortgagee remaining in possession of the mortgage, without any open or express repudiation of the relation created by the mortgage, is not in contemplation of law holding adversely to the mortgagor, whatever may be his secret intention. His possession in such a case is presumed to be in subordination to the legal title. Where the mortgagee is in possession of land under colour of an invalid mortgage deed, his possession is with the permission of the mortgagor and is not adverse. Again, where a person who obtains possession under an invalid mortgage and there is nothing to show that at any time he has asserted possession under any claim of absolute right, he acquires by the lapse of twelve years a prescriptive right to limited interest by way of mortgage. Again, a person in possession of a property as usufructuary mortgagee under a void mortgage for more than twelve years acquires by prescription the rights of a mortgagee.

Held, that the possession necessary to support a claim of title by prescription must be adverse, that is it must be actual and uninterrupted, open and notorious, hostile and exclusive and under a claim of right for the statutory period. If any of these elements is lacking, title by adverse possession cannot ripen. Adverse possession is when the one in actual possession asserts ownership in himself and claims title to the land in hostility to the claims of all other persons. It is an aggressive act and it is necessary, therefore, that before permissive possession can be converted into adverse possession there should be a disclaimer of the owner's title of such a character and so open that

the real owner must be presumed to know that possession adverse to his title has been taken. Nothing but a clear, unequivocal and notorious disavowal of the title of the owner will render the possession, however, long continued, adverse to him. It is open to a mortgagee in possession, before or after the extinguishment of the mortgage, to set up an adverse claim by denying the mortgage, by asserting a title in himself, and by disavowing the idea of holding for and in subservience to the mortgagor. He may manifest his intention of setting up an exclusive title in himself either by an actual notice or by acts which are so clear, positive and unequivocal that the true owner must reasonably and necessarily be considered to have notice that the land in question is being held by the mortgagee as his own. Adverse possession must be made out by clear and positive proof and not by inference as every presumption is in favour of a possession in subordination to the title of the true owner.

Letters Patent Appeal under clause 10 of the Letters Patent, against the judgment and decree of Hon'ble Mr. Justice Dulat, dated the 9th May, 1956, in R.S.A. No. 931 of 1955, whereby the decree of Shri Rameshwar Dial, Additional District Judge, Rohtak at Gurgaon, dated the 1st November, 1955, (reversing that of Shri Banwari Lal, Sub-Judge, 1st Class, Palwal, dated the 26th June, 1954, and granting a decree for possession by redemption of the property in suit on payment of Rs. 2,000 to Mst. Kasturi in respect of Khasra Nos. 109, 110 and 111 and directing that the decree as regards Khasra Nos. 681, and 684 against other defendants respondents shall be treated as ex parte and that they shall be entitled to possession of those khasra numbers without any payment to them) was affirmed.

P. C. PANDIT, for Appellant.

D. N. AGGARWAL, for Respondent.

JUDGMENT

BHANDARI, C. J.—Two questions arises for ^{Bhandari, C. J.} decision in the present case, namely (1) whether the mortgagors have brought the suit within the period prescribed by law, and (2) whether the

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mortgagees' rights of possession have ripened into rights of ownership by efflux of time.

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The proprietary rights in a certain plot of land vested in the State while the occupancy rights vested in Rang Lal, Ram Lal and Lal Singh. In the year 1906 the occupancy tenants mortgaged their occupancy rights with one Sufaid for a sum of Rs. 270 and four years later the State sold its rights of ownership to the same person. On the 4th June, 1931, Ghassi, son of Sufaid transferred his right by way of sale to Charanji Lal, on the 17th June, 1943, Charanji Lal transferred these rights to Nathi and on the 1st February, 1950, Nathi transferred them by way of gift to his sister Kasturi Devi.

On the 9th February, 1953, Chuni Lal who is a successor-in-interest of the original mortgagors and certain other persons who are transferees from him brought a suit against Kasturi Devi for the redemption of the property. The trial Court dismissed the suit, but the learned District Judge decreed the claim and the order of the learned District Judge was upheld by a learned Judge of this Court. The defendant has appealed.

Mr. P. C. Pandit who appears before us for the defendant urges that the Courts below should have dismissed the plaintiffs' suit because the suit is barred by time and because the defendant's rights in the property have ripened into rights of ownership by the passage of time.

The question of limitation appears to me to present no difficulty whatsoever. It will be recalled that the original mortgagors created the mortgage in the year 1906, that Ghassi transferred

his rights in the property to Charanji Lal in the year 1931, and that Chuni Lal and others brought the suit for redemption on the 9th February, 1953. *Prima facie*, the suit is well within time, for article 148 of the Limitation Act empowers a mortgagor to bring a suit against a mortgagee to redeem or recover possession of immovable property mortgaged within a period of sixty years from the date on which the right to redeem or to recover possession accrues. But it is contended on behalf of the defendant that the suit is governed not by the provisions of article 148 reproduced above but by the provisions of article 134 which declares that a suit to recover possession of immovable property mortgaged and afterwards transferred by the mortgagee for valuable consideration must be brought within a period of twelve years. The present suit, it is contended, was brought long after the expiry of this period and must therefore be held to be barred by time.

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The object of article 134 is to cut down the period available to the mortgagor under article 148 and to compel him to watch the conduct of the mortgagee and to intervene on transfer. The help of this article can be invoked only if the defendant establishes to the satisfaction of the Court that the mortgagee or his successor-in-interest has transferred something other than the original mortgage; something more than the mortgage; something larger than the mortgage; an interest unencumbered by the mortgage [*James Richard, Rennel Skinner v. Kunwar Naunihal Singh* (1); *Sri Ram v. Najibullah and others*, (2) and *Nani Bai v. Gita Bai kom Gunge* (3)]. He must show that the mortgagee has transferred some right belonging to the mortgagor over and above the mort-

(1) A.I.R. 1929 P.C. 158
(2) A.I.R. 1926 Oudh. 547
(3) A.I.R. 1958 S.C. 706

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gatee rights acquired by him. If, for example, a mortgagee proceeds to transfer not only the mortgagee rights acquired by him from the mortgagor but also the rights of ownership vesting in the mortgagor, a suit by the mortgagor to recover property from the transferee of absolute title from the mortgagee would be governed by article 134 and not by article 148 [*Sri Ram v. Najibullah and others* (1)].

A question at once arises whether Ghassi, the original mortgagee, purported to transfer to Charanji Lal an interest larger than was given him by the mortgage of the year 1906. The original deed, dated the 4th June, 1931, executed by Ghassi in favour of Charanji Lal has not been produced and its contents have not been brought out by independent evidence. The Court is thus left to judge what was transferred from a perusal of the judgment in a suit for possession which was brought by Charanji Lal against Ghassi in the year 1932 and in which a decree for possession was passed in favour of Charanji Lal on the 14th June, 1933. One of the pleas raised by Ghassi in defence to Charanji Lal's suit was that he had transferred only the rights of ownership acquired by him from the State and that he had not transferred the mortgagee rights acquired by him from the original occupancy tenants. The Court came to the conclusion that Ghassi had transferred all the rights in the property vesting in him, namely the rights of ownership acquired by him from the State and the rights of a mortgage acquired by him from the occupancy tenants. There is not an iota of evidence on the record in support of the contention that he transferred some right belonging to the mortgagors over and above the mortgagee rights

(1) AIR 1926 Oudh. 547

acquired by him. He did not transfer something more than the mortgage. I have accordingly no hesitation in endorsing the view of the learned Single Judge that there can be no question of the applicability of article 134 of the Limitation Act. This brings me to the consideration of the second question which has been raised by Mr. Pandit, namely, whether the defendant has acquired the rights of ownership in the property by efflux of time.

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It is common ground that the mortgagors were members of an agricultural tribe, that the mortgagee was not a member of the same tribe or a tribe in the same group, and that in view of the provisions of the Alienation of Land Act the mortgage took the form of a usufructuary mortgage for a period of twenty years. Mr. Pandit contends that as soon as this period of twenty years expired in the year 1926 the debt was extinguished by the operation of law (section 7) and the mortgagors became entitled to the redelivery of the land [section 6(a)]. The mortgagors did not claim repossession of the property in the year 1926 and the status of the mortgagees was altered into that of trespassers. By the year 1953 when the plaintiffs brought the suit for redemption, out of which this appeal arises, the defendant had maintained possession for the statutory period and had thus acquired title by adverse possession. *Deputy Commissioner, Gujrat v. Allah Dad and others* (1), has been cited in support of this contention. In this case Addison, J. held that under section 14 for want of sanction of the Deputy Commissioner the sale took effect automatically as a usufructuary mortgage for the term of twenty years but it ceased to be a mortgage at the end of that period and the vendee

(1) A.J.R. 1937 Lah. 408

Mst. Kasturi Devi became trespasser after expiry of that period. The
 Chuni ^{v.} Lal vendee being then in possession only for three
 and others years after such period, his claim to property by
 adverse possession could not succeed.
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I must confess with great regret that I am unable to concur in this view. A person is said to be in lawful possession of immovable property when he holds it as in owner or with the consent of the owner. He is said to be in adverse possession thereof when he holds it not under the legal proprietor or by his consent, express or implied, but under a claim of right or colour of title. If the possession can be said to be the constructive possession of the true owner or if it can be said to be in subservience to the rights of the true owner, it cannot ripen into title by adverse possession, no matter how long maintained, since hostility is of the very essence of adverse possession. When the original entry is made with the permission of the true owner the law presumes that such an occupation is in subordination to the legal title. The possession continues to be permissive as long as it is apparently permissive, for one must proceed on the assumption that the possession is with amity and in subservience to the title of the rightful owner.

A mortgagee remaining in possession of the mortgaged premises after the extinguishment of the mortgage, without any open or express repudiation of the relation created by the mortgage, is not in contemplation of law holding adversely to the mortgagor, whatever may be his secret intention. His possession in such a case is presumed to be in subordination to the legal title. Where the mortgagee is in possession of land under colour of an invalid mortgage deed, his possession is with the permission of the mortgagor and is

not adverse [*Mst. Raj Rani v. Gulab and another* (1)]. Again, where a person who obtains possession under an invalid mortgage and there is nothing to show that at any time he has asserted possession under any claim of absolute right, he acquires by the lapse of twelve years a prescriptive right to limited interest by way of mortgage [*Purusottam Dass and another v. S. M. Desouza and another* (2)]. Again, a person in possession of a property as usufructuary mortgagee under a void mortgage for more than twelve years acquires by prescription the rights of a mortgagee. [*Contayana Gopala Dasu and others v. Inapatulupula Rami and others* (3)].

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The possession necessary to support a claim of title by prescription must be adverse, that is it must be actual and uninterrupted, open and notorious, hostile and exclusive and under a claim of right for the statutory period. If any of these elements is lacking, title by adverse possession cannot ripen. Adverse possession is when the one in actual possession asserts ownership in himself and claims title to the land in hostility to the claims of all other persons. It is an aggressive act and it is necessary, therefore, that before permissive possession can be converted into adverse possession there should be a disclaimer of the owner's title of such a character and so open that the real owner must be presumed to know that possession adverse to his title has been taken. Nothing but a clear, unequivocal and notorious disavowal of the title of the owner will render the possession, however, long continued, adverse to him. It is open to a mortgagee in possession, before or after the extinguishment of the mortgage, to set up an adverse

(1) A.I.R. 1928 All. 552
(2) A.I.R. 1950 Orissa 213
(3) I.L.R. 44 Mad. 946

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claim by denying the mortgage, by asserting a title in himself, and by disavowing the idea of holding for and in subservience to the mortgagor. He may manifest his intention of setting up an exclusive title in himself either by an actual notice or by acts which are so clear, positive and unequivocal that the true owner must reasonably and necessarily be considered to have notice that the land in question is being held by the mortgagee as his own. Adverse possession must be made out by clear and positive proof and not by inference as every presumption is in favour of a possession in subordination to the title of the true owner.

Now, what were the facts and circumstances of the present case ? The mortgagors in the present case mortgaged their property in the year 1906 and as the mortgagee was a non-agriculturist, the mortgagee could retain possession of the property for a period of twenty years under the provisions of section 6 (a) of the Alienation of Land Act. The property was not redeemed in the year 1926 or thereafter and the mortgagees continued to remain in possession thereof. Their possession after the year 1926 must be deemed to be permissive and in the same capacity as the capacity in which they held the land originally. Neither the mortgagee nor his successors-in-interest put the property to a use which was inconsistent with the rights of mortgagors as occupancy tenants. They did not deny the mortgagors' rights under the mortgage and did not set up an adverse or exclusive claim in themselves. The mere fact that they continued to retain possession of the property after the mortgagee rights had been extinguished by the operation of law, does not indicate any hostility on their part to the claims of mortgagors as occupancy tenants. It seems to me, therefore, that even though the possession of the land remained

with the mortgagees after the mortgage had been extinguished and even though the possession was not surrendered to the mortgagors the possession cannot, in the absence of a hostile act, be deemed to be adverse to the mortgagors.

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For these reasons I would uphold the order of the learned Single Judge and dismiss the appeal with costs. Ordered accordingly.

FALSHAW, J.—I agree.

Falshaw, J.

B.R.T.

APPELLATE CIVIL

Before S. S. Dulat and D. K. Mahajan, JJ.

HARNAM KAUR AND ANOTHER,—*Defendants-Appellants.*

versus

SAWAN SINGH AND OTHERS,—*Plaintiffs-Respondents.*

Regular Second Appeal No. 307(P) of 1953.

Punjab Tenancy Act (XVI of 1887)—Sections 4 and 59—Tenancy-at-will and occupancy tenancy—Difference between—Occupancy tenancy—Nature of—Patiala and East Punjab States Union Occupancy Tenants (Vesting of Proprietary Rights) Act (III of 1953)—Occupancy tenant a widow holding life estate under custom acquiring ownership rights under the Act—Whether becomes absolute owner or remains a life holder.

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Held, that unlike a tenancy-at-will an occupancy tenancy cannot be resumed at will of the landlord. So long the occupancy tenant pays the fixed rent to the landlord, he is entitled to retain the land and its succession is regulated by section 59 of the Punjab Tenancy Act. In case an occupancy tenant transfers the tenancy without the consent of the landlord, the transfer is voidable at the instance of the landlord. In case of a transfer the transferee stands in the same position *qua* the landlord as his transferor stood. It is also settled law that on the death of an occupancy tenant leaving no heirs who can succeed to him under section 59 of the Tenancy Act, the