

APPELLATE CIVIL.

*Before Sir Grimwood Mears, Knight, Chief Justice, and
Mr. Justice Lindsay.*

1925
October, 22.

RAM KUNWAR (DEFENDANT) *v.* GOVIND RAM AND
OTHERS (PLAINTIFFS).*

*Mortgage—Property remaining after redemption in the hands
of the mortgagee and afterwards of his widow to the
exclusion of his sons—Adverse possession—Original
mortgage no longer subsisting.*

Where money due on a mortgage had been paid, but the mortgagee, notwithstanding this, remained in possession of the mortgaged property, and on his death his widow, in spite of the fact that there were sons of the mortgagee in existence, took possession and remained in possession for a series of years, it was held that the widow's possession was adverse to persons claiming as purchasers of the equity of redemption and they could not be allowed to set up their rights under the original mortgage, which had long since ceased to exist.

THE facts of this case are fully stated in the judgement.

Munshi *Haribans Sahai* and Babu *Lalit Mohan Banerji*, for the appellant.

Babu *Saila Nath Mukerji*, for the respondents.

MEARS, C. J., and LINDSAY, J. :—After hearing the arguments in this case we have come to the conclusion that the appeal must be allowed, the decision of the Judge of this Court reversed and the decree of the first appellate court restored.

The suit as framed was a suit for redemption in which the defendant was one Musammam Ram Kunwar, who is now before us as the appellant.

It appears that on the 22nd of November, 1884, one Pahar Singh executed a mortgage in favour of four persons, one of whom was Ram Prasad. The

* Appeal No. 131 of 1924, under section 10 of the Letters Patent.

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amount of the mortgage money was Rs. 1,000 and admittedly Ram Prasad was interested in this money to the extent of one-fifth only.

On the 17th of October, 1890, Pahar Singh the mortgagor sold some other property of his to three of these mortgagees and he left with them a sum of Rs. 938 in order to discharge the mortgage of 1884. It has been found, and has not been questioned, that Rs. 938 represented the full amount of the mortgage debt at the time this transaction took place.

It is further proved that Ram Prasad, who, as we have said, was interested to the extent of 1/5th in this mortgage, received his proportionate share of this money. A further fact which is established by the evidence on the record is that when this money was paid in pursuance of the contract made on the 17th of October, 1890, the mortgage deed which was executed on the 22nd of November, 1884, was returned to the mortgagor Pahar Singh.

After this transaction had taken place, it seems that Pahar Singh, in the year 1891, made a mortgage of this property which had been so released to certain other persons by way of conditional sale. In the year 1894 these mortgagees got a decree for foreclosure, the property was brought to sale in the year 1896 and after the sale had taken place there was a suit for pre-emption which ended in the property being transferred to the plaintiffs in the present suit. They got a pre-emption decree on the 26th of April, 1898.

It appears that, notwithstanding the payment of the mortgage debt in the year 1890, the portion of the mortgaged property in which Ram Prasad was interested remained in possession of Ram Prasad and after Ram Prasad's death, which it seems took place in or

about the year 1892, this property came into the possession of his widow Musammat Ram Kunwar, who is the appellatant before us.

The plaintiffs, whose title, as we have said, dates back to 1898, brought this suit in the year 1920 against Musammat Ram Kunwar. The position which they took up in the case was that the mortgage of the year 1884 was still subsisting, that the defendant Musammat Ram Kunwar was in the position of a mortgagee and that they were entitled to redeem the property as purchasers of the equity of redemption. A number of defences were raised. The only one with which we are concerned was whether the plaintiffs were entitled to succeed on the case so brought. The case put forward by Musammat Ram Kunwar was that there was no mortgage in existence and that she had been in adverse possession of this property for more than 12 years.

The court of first instance dismissed the suit and gave effect to the plea of adverse possession raised by the lady and this decree was affirmed in appeal by the Subordinate Judge of Mainpuri. There was a second appeal to this Court and the learned Judge has taken the view that the mortgage was still in existence, that Musammat Ram Kunwar could not be heard to set up any adverse title to the property and that consequently the plaintiffs were entitled to have a decree for redemption.

Before us it has been argued that this view taken by the learned Judge of this Court is erroneous. We are of opinion that the learned Judge fell into error in dealing with this question of adverse possession.

To go back to the beginning of things, it is clear that the original mortgagor of the property in the year 1884 was Pahar Singh. It is further quite clear that when Pahar Singh in the year 1890 sold

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some other property to some of the mortgagees and arranged for the discharge of the mortgage debt that after the payment of this money the person who was entitled to immediate possession of the property mortgaged in 1884 was Pahar Singh and no one else. It is quite clear that the other three mortgagees who had entered into the transaction of sale with Pahar Singh in 1890 had no right whatever to this mortgaged property. Undoubtedly the mortgaged property was to return to Pahar Singh.

Ram Prasad, as we have said, died some time after the year 1890. It is an admitted fact that Ram Prasad left sons who are still in existence and who, according to the Hindu law, were his heirs and entitled to possession of all his property. On the other hand, it is equally clear that Musammam Ram Kunwar, the widow of Ram Prasad, had in the presence of her sons no right whatever to any property belonging to her husband. It is admitted, however, that ever since the death of Ram Prasad this lady has been in possession to the exclusion of her sons and all other persons, and that being so, it is difficult to see how her plea of adverse possession of this property can be repelled.

We do not agree with the view which was taken by the learned Judge of this Court. He seems to have been of opinion that the widow of Ram Prasad could not hold adversely to the mortgagor Pahar Singh or his representatives. He thought that the widow's possession might be adverse to her own sons but he held that any right she had would not be a right adverse to Pahar Singh. In our opinion this is not so, for at the time she entered into possession the person who was entitled to immediate possession of this property was, as we have said, Pahar Singh himself.

While it may be that possession which can be referred to a lawful origin is not to be deemed to be adverse, it is quite clear in the present case that the possession of the widow Musammat Ram Kunwar never had any rightful origin. On all hands it must be admitted that she took possession as a trespasser. It cannot, therefore, be said that her possession can be referred back to the possession which her husband originally acquired in his capacity as mortgagee. Her possession at once became adverse as against the person who was then entitled to immediate possession, namely, Pahar Singh. The plaintiffs in the present suit derived their title from Pahar Singh and are in the same position as he would have been had he been alive now. In other words, having been entitled to immediate possession of the property and having failed to bring their suit within twelve years from the date on which they became so entitled, their title to the property has been lost.

We hold, therefore, that the rights of this litigation are with Musammat Ram Kunwar, the defendant appellant, and for the reasons just given we set aside the decree of the learned Judge of this Court and restore the decree of the first appellate court. The appellant is entitled to all her costs in this Court.

Appeal allowed.

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