FIRST APPEAL No.380 OF 1973

Against the judgment and decree dated 31.7.1973 passed by Sri R.N.Singh, 2nd Addl. Sub Judge, Champaran, Motihari in T.Suit No. 129/2 of 1968/1971.

PANNA LAL----------(Appellant)

Versus

BIBI TASLIMA KHATOON & ORS----------(Respondents)

For the Appellant : M/s Devendra Pd. Sharma & Kamla Pd.Roy

For the respondents: Mr.Abbas Haidar & Mr.S.K.Thakur.

P R E S E N T

THE HON'BLE JUSTICE SMT. REKHA KUMARI

Rekha Kumari,J This appeal by defendant no.1 (defendant 1st set) is directed against the judgment and decree dated 31st of July, 1973 passed by the Second Additional Sub-Judge, Motihari in Title Suit No. 139 of 1968, whereby the learned Sub-Judge has decreed the suit on contest without cost against defendant no.1 and on contest with cost against defendant nos. 18, 19, 20 and ex-parte without cost against the remaining defendants. The plaintiffs (who were originally six in number) had filed the suit for a decree of recovery of possession of the lands mentioned in the schedule B series in their favour and for mesne profits.

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2. The case of the plaintiffs/respondent 1st party is that the lands described in schedule A which includes properties described in schedule B series belonged to the family of defendant 2nd set (respondent 2nd party). The ancestors of the defendant 2nd party had executed 'Zarpesgi' makfoola by a registered deed dated 25.8.1944 for a sum of Rs. 24551/- in favour of defendant 1st party (appellant) in respect of schedule A property. The mortgage was for 5 years and the mortgage security comprises of certain mokarari tenures, some Bakast and Gairmajarua lands and some buildings. When the mokarari tenures vested in the State of Bihar on 26.1.1955 (by virtue of Bihar Land Reforms Act – for short 'the Act'). Defendant no.1 notified his mortgage to the Claims Officer which was adjudged and the

principle money under the mortgage bond was declared payable out of the compensation money payable to the family of defendant 2nd party on account of the vesting of the tenures. The defendant 2nd party got occupancy rights in the Bakasht lands, Gairmajarua lands and the buildings comprised in the mortgage and the rent was duly fixed and is being paid.

3. The further case of the plaintiffs is that even after the claim decree, the defendant 1st party (appellants) held over the occupancy lands and the buildings comprised in the mortgage under the bona fide impression that the mortgage was subsisting. The different plaintiffs in the meantime, purchased the lands described in schedule B to (IV) under different registered sale deeds on 24.5.1967 from defendant 2nd party and as the lands purchased were contained in the above mortgage deed, they filed this common suit. It is also their case that defendant 3rd party (respondent 3rd party) are settlees from defendant 1st party of the land shown in schedule B (III), although the defendant 1st party was expressly prohibited from making any settlement creating any raiyati impress in the lands under mortgage. Therefore, the said sublet is illegal and not binding on the mortgagees.

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4. The further case of the plaintiffs is that after their purchase and prior to that, defendant 2nd party made demands upon the defendant 1st party (appellant) to give up possession of the lands but he paid no heed to it and hence, is the necessity for the suit. It is also their case that defendant 1st party is entitled to recover his principle money under the mortgage from Jamindari compensation and that the encumbrance under the mortgage over the Bakast, Gairmajarua lands and the buildings became extinct on the vesting of the estate.

5. The defendant 2nd party in the written statement supported the case of the plaintiffs. Defendant 1st party contested the suit by filing written statement and additional written statement. He took all possible legal objections including mis-joinder of causes of action and non-joinder of the State of Bihar as a necessary party. He, however, admitted his status as a Zarpesgi mortgagee under the defendant 2nd party respecting schedule A properties including the suit lands and

also admitted that on vesting of their tenure, the defendant 2nd party became statutory tenants in respect of the Bakast lands under the mortgage and as regards the Gairmajarua lands and the buildings comprised in schedule B (III) he contended that those lands were orally settled by defendant 2nd party in favour of defendant 3rd party, who became tenants under the State of Bihar in consequence of the vesting. The defendant 1st party further pleaded that the mortgage created under the above deed still subsisted in spite of settlement to his claim by the Claim Officer. Therefore, he is entitled to retain possession of the Bakast lands until the mortgage was redeemed by making payment of the entire mortgaged money. In the additional written statement he took the further plea of title by adverse possession.

6. The defendant 3rd party in their written statement claimed to have acquired title to the property mentioned in schedule B (III) on the basis of settlement by state and also adverse possession.

7. The learned Sub-judge on the pleadings of the parties framed the following issues for determination.

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(1) Is the suit, as framed, maintainable?

(2) Have the plaintiffs right to sue and valid cause of action for the suit?

(3) Is the suit barred by the law of limitation?

(4) Is the suit bad for defect of parties or misjoinder of causes of action?

(5) Has the defendant no.1 (mortgagee decree holder) to proceed under Section 14 of the Bihar Land Reforms Act, 1950, only or he can proceed against the Bakast lands or other suit properties of the defendants 2nd party (mortgagor-judgment debtor) in his (deft. no.1's) possession, by virtue of the deemed settlement of the same with defendants 2nd party under Section 6 of the Act, for realization of the principal of the Zerpesgi

money, the alleged purchase of the same by the plaintiffs after vesting notwithstanding?

(6) Are the plaintiffs entitled to a decree for recovery of possession regarding the suit lands?

(7) Are the plaintiffs entitled to a decree for mesne profits, past or future or both?

(8) Are the alleged purchases by the plaintiffs valid and operative?

(9) To what relief or reliefs, if any, are the plaintiffs entitled?

(10) Is the plea of adverse possession available to defendants? It so, is there proof, on the merits of the evidence led, of his continued adverse possession of the suit lands for over 12 years?

(11) Is there proof of it that defendant no. 18 had perfected his title to khesra no. 863 of village Madhuri, P.S. Main-Tand by virtue of adverse possession?

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8. The learned Sub-Judge after considering the evidence held that the plea of adverse possession is not available to defendant no.1. The plaintiffs are valid purchasers of the suit land except schedule B (III) lands for which no sale deed was filed. The defendant no.1 can persue only the remedy under Section 14 of the Act and cannot proceed against the lands covered by Ext.1 series (sale deeds). The suit is not bad for any misjoinder of causes of action. The suit was not barred by limitation. The suit is maintainable and the plaintiffs have good cause of action for recovery of possession and mesne profits except with regard to the lands in schedule B (iii) alleged to have been purchased by plaintiff no.5.

9. He, accordingly, decreed the suit except with regard to the lands of schedule B (iii) said to have been purchased by plaintiff no.5 and directed the

defendant 1st party to put the plaintiffs in possession within one month with further direction that failing which the possession would be delivered through the process of the court. He further ordered for preliminary decree for mesne profits for 3 years period next prior to the institution of the suit, in favour of the plaintiffs.

10. The points which have been urged and for consideration in this appeal are:-

i. Whether any consequence of the vesting of the tenure of the vendees of the plaintiffs i.e. defendant 2nd party, the later could acquire any right, title and interest respecting the Bakast lands in suit so as to convey from valid title to the plaintiffs ?

ii. Whether the appellant mortgagee (defendant 1st party) was entitled to retain possession of the Bakast lands in suit on the ground that the mortgaged was not redeemed ?

iii. Whether the suit for possessions having not been presented within 12 years from the date of vesting, the right, title and interest of the plaintiffs and/or vendors had extinguished by adverse possession of the appellant/defendant 1st party.

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11. Learned counsel for the appellant submitted that as the entire tenure interest of the mortgagors defendant 2nd party vested in the State free from all encumbrances, they could not convey any title to the plaintiffs on the basis of the sale deeds executed on 24.5.1967. He also contended that as the suit lands vested in the State in view of Section 4(a) of the Act, the plaintiff cannot obtain decree for possession. In support of the submission, he relied on the decision of the Supreme Court in the case of Nathuni Prasad Singh and others Vs Vishwanath Singh Sharma and others 1977 PLJR, 591 (SC), wherein, it has been held that a decree for possession cannot be obtained by a landlord or owner after

the land has vested in State. He further submitted that as provided under Section 3 & 4 of the Act, on notification under Section 3 of the Act, the lands vests absolutely in the State free from all encumbrances and as provided under Section 6 of the Act in respect of the agricultural or horticultural lands under has possession of an intermediary would be retained by him as raiyat having occupancy right subject to payment of rent. Therefore, as in this appeal, the lands are used for agricultural purposes, defendants second set became raiyat from the date of vesting of estate on 26.1.1955, but as they did not take possession of the lands and the appellant continued in possession for more than 12 years, and after 12 years of such possession, the sale deeds in question, were executed, the sale deeds conferred no right to the appellants, as the title of the defendant 2nd set had ceased being divested by the adverse possession of appellant. He also submitted that the learned Sub-Judge has committed an error in holding that the appellant could not prove adverse possession of 12 years.

12. Learned counsel for the respondent, on the other hand, submitted that as the case of the appellant in his written statement is that he was entitled to retain possession unless and until the mortgage money is paid, the possession of the appellant cannot said to be adverse possession, because for the purpose of proving adverse possession, the defendant must also prove animus possidendi which is lacking in this case. Hence, the appeal cannot be allowed on the basis of the adverse possession of the appellant, which the sole basis of this appeal. His submission also is that as in consequence of vesting, the defendant 2nd party became raiyati tenant in respect of the suit lands under appeal (Bakast lands), they could validly execute sale deeds in respect of those lands to the plaintiffs.

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13. In order to decide to the first two points mentioned above, it is pertinent to refer to relevant provisions of Section 3, 4, 6 and 14 of the Act. According to Section 3 (1), the State Govt. may from time to time, by notification declare that the estates or tenures of a proprietor or tenure holder specified in the notification have passed to and vested in the state. According to

Section 4(a) such estate or tenure shall with effect from the date of vesting, absolutely vest in the state free from all encumbrances, and such proprietor or tenure holder shall cease to have any interest is such estate or tenure other than those expressly saved by or under the provisions of the Act. Section 4(d) provides that no suit shall lie in any Civil Court for the recovery of any money due from such proprietor or tenure holder, the payment of which is secured by a mortgage of or in charge on such estate or tenure and all suits and proceedings for the recovery of any such money which may be pending on the date of vesting, shall be dropped. Section 6 (1) (e) provides that on or from the date of vesting, all lands used for agricultural or horticultural purposes, which were in has possession of an intermediary on the date of vesting including lands used for agricultural or horticultural purposes forming the subject matter of a subsisting mortgage, on the redemption of which the intermediary is entitled to recover has possession shall be deemed to be settled by the State with the intermediary and he shall be entitled to retain possession thereof and hold them as raiyat under the State having occupancy rights in respect of such lands subject to payment of fair and equitable land. According to Section 14, every creditor whose debt is secured by mortgage, by within for the period prescribed therein notify in the prescribed manner his claim in writing a Claim Officer to be appointed by the State for the purpose of determining the amount of debt legally and justly payable to each creditor in respect of his claim. Besides these, Chapter V of the Act provides the manner of determining the compensation and Chapter VI provides the manner of compensation to be paid.

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14. Therefore, the combined effect of Section 3, 4, 6 of the Act is that from the date of vesting of estate or tenure under the Act, all estates under notification vest in the state free from all encumbrances and the proprietors or tenure holders lose all interest in these estates. But in respect of Bakast land in possession of the intermediary, they are simultaneously deemed to be settled with the outgoing proprietor or tenure holder and they would hold such lands as

occupancy raiyat subject to the payment of rent determined by the State. The provisions also show that where the Bakast lands are subject matter of a subsisting mortgage on the date of vesting, on the redemption of a which, the intermediary was entitled to recover has possession, the lands would be deemed to be settled with the intermediary by the State and the only remedy for the mortgagee is to notify his claim to the Claim Officer under Section 14 of the Act for the purposes of determining the amount of debt legally and justly payable to him and he was entitled to recover payment only from the amount of compensation to be paid to intermediary. He has no other remedy.

15. The above views find support from the decisions of Supreme Court in the cases of Shiv Shankar Prasad Sah & Anr. Vs Baikunth Nath Sah & others AIR 1969 Supreme Court 971, Raja Shailendra Narayan Bhanjdeo Vs Kumar Jagat Kishore Narayan Singh & Others AIR 1962 Supreme Court 941 and the Division Bench decisions of this Court in the cases of Jagarnath Sahu & Others Vs Suba Singh & Others 1962 BLJR NOC XXVI, Balpan Mahto Vs Yadav Nath Deogharia & Others 1980 BLJR 281 and Raj Prasad Narayan Singh & Others Vs Ram Pratap Pandey & Others 1971 PLJR 575.

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16. In this case admittedly, the lands under appeal were Bakast lands of defendant 2nd party and that by notification dated 26.01.1955 under Section 3 of the Act, the lands vested in the State. It is also submitted that the lands were subject matter of prior mortgage dated 25.8.1944 (Vide Ext. 10) in favour of defendant Ist party. It is, therefore, apparent that on 26.01.1955 the lands in question vested in the State of Bihar and from that date, defendant 2nd party started holding the lands as occupancy raiyat under the State free from all encumbrances subject to the payment of fair rent determined by the State. Exts. 14, 18, 21 (1), 22 and 26 would show that in the Rent Fixation Case No. 80 of 1960-61 by order dated 4.2.1964, rent was fixed in favour of defendant 2nd party in respect of the Bakast lands of plot nos. 878, 881, of khata no. 2 of village Madhuri which were subject matter of the mortgage. The written statement of

defendant no.1 shows that he has also admitted the legal position that after vesting, the defendant 2nd party became statutory tenants of the Bakast lands and their names were mutated and rent was fixed in their favour in respect of Bakast lands.

17. It is also manifest that from the date of vesting i.e. on 26.01.1955 the mortgage dated 25.8.44 ceased to exist and the relationship of mortgagor and mortgagee between defendant 2nd party and defendant 1st party extinguished and defendant Ist party was entitled to mortgaged money only out of the compensation amount of defendant 2nd party after preferring his claim to the Claim Officer within a period fixed by Section 14 of the Act. The evidence of DW 6 Kanhaiya Lal, the attorney of the mortgagee (defendant 1st set has not examined himself in the case) also is that he had filed Claim Case No. 61/55 on behalf of defendant 1st set, but the amount of claim has not been received. Ext.22 (a) shows that by order dated 22.3.56, the Claim Officer had ordered that the entire principal money is legally and justly payable to the applicant (defendant 1st set) out of the compensation money payable to the intermediary. Ext. 21 shows that the defendant 1st set had filed application on 28.5.56 before the Collector for the mortgaged money. Order 29 dated 7.4.74 discloses till that date no payment was made to him.

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18. Therefore, it is evident that though on vesting of estate/tenure in the State of Bihar absolutely on 26.1.55 in respect of the Bakast lands i.e. the lands under appeal, the defendant 2nd party becomes raiyat with right to possession and so they continued to have the right to transfer these lands.

19. It is, therefore, obvious that transferees would have right to obtain possession, if the title of the defendant 2nd party had not been extinguished on the date of transfer by adverse possession of the appellant. The decision of Nathuni Prasad Singh (supra) is not applicable to the facts of this case.

20. It is also clear from the above provisions of the Act that the relationship of mortgagor and mortgagee between defendant 2nd party and

defendant 1st party ceased from 26.1.55 and by operation of law the defendant 2nd party would hold possession of the suit lands and there was no need for redemption of the mortgage and the mortgagee (appellant) would be entitled to realize the mortgage money out of the compensation of the defendant 2nd party.

21. The first and second points, therefore, are answered accordingly and in favour of the plaintiff/respondent.

22. The most important point in this appeal however is whether the appellant had acquired title over the suit lands by adverse possession before the execution of the sale deeds (Ext. 1 series) in favour of the plaintiffs.

23. In this case admittedly the appellant came in possession of the suit lands under a deed of mortgage as mortgagee and by operation of law on 26.1.55, the mortgage become extinct and the defendant 2nd party were entitled to possession but defendant Ist party (appellant) continued in possession for more than 12 years before the execution of the sale deeds. But it is well settled that a naked possession without any claim of title is not sufficient. To make a possession adverse there must an entry under colors of right claiming title hostile to the true owner.

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24. It is the intention to claim title which makes the possession adverse. The Supreme Court in the case of Karnataka Board of Wakf Vs Govt. of India (2004) 10 SCC 779 has held that " adverse possession is a hostile possession by clearly ascertaining hostile title in denial of the title of the true owner." It has been observed therein that "physical fact of exclusive possession and the animus possidendi to hold as owner in exclusion to the actual owner are the most important factors that are to be accounted in cases of this nature."

25. It is also settled that plea of adverse possession is not a pure question of law, but blended one of fact and law and that since a person pleading adverse possession tries to defeat the rights of true owner, it is for him to clearly plead and establish all facts necessary to establish his adverse possession.

26. In this case, the appellant in his written statement did not take the plea of adverse possession. His contention therein is that in spite of the order of Compensation Officer, the entire encumbrance is there and the defendant Ist party is entitled to hold the Bakast land and till the entire mortgage money amounting to Rs. 24551/- was paid by the plaintiffs. He has reiterated this contention in several paragraphs in the written statement as noted in the impugned judgment.

27. Therefore, it is clear that the appellant mortgagee did not continue in possession after the extinction of the mortgage, under a color of right claiming title hostile to his owner. He was not asserting hostile title in denial of the title of defendant 2nd set. Hence, in this case there was no animus possidendi to hold the suit lands by the appellant as owner. This being so, though the appellant continued to remain in possession for more than 12 years, on account of the nature of the possession, his possession cannot be termed as hostile.

28. The appellant in his additional written statement, however, has stated that he had perfected title by adverse possession by remaining in possession since 26.1.55. According to the learned trial court the appellant was not entitled to raise this plea in the Additional written statement as the defendant could not set up new case in Additional written statement, when the Additional written statement was filed as defence to an amendment in the plaint and the defence was out of context. But without entering into discussion on this point as to whether this defence could be taken in Additional written statement , it may be mentioned that appellant has not led any evidence to prove that he had been exercising possession as owner. In cross-examination DW 6, the attorney holder of the appellant has, of course, stated he has been coming in adverse possession, but I think this is not enough to prove adverse possession especially on the face of repeated averments in the written statement that he has been holding possession as the mortgage money has not been paid. The learned trial court has rightful held that the plea taken by the appellant in the written statement is destructive of the plea of adverse possession in the additional written statement.

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29. In the case of Mohan Lal & Others Vs Mir Abdul Gaffar AIR 1996 Supreme Court 910, the plaintiff had come in possession of the suit property under an agreement for sale. He, however, in the suit for possession pleaded adverse possession and right to retain possession under Section 53A of the T.P. Act. The Supreme Court held that having come into possession under the agreement, he must disclaim his right there under and plead and prove assertion of his independent hostile adverse possession.

30. In this case also the appellant had to disclaim his right under the mortgage and plead and prove his independent adverse possession. But this has not been done by the appellant.

31. I, therefore, agree with the submission of the learned counsel for the respondent/plaintiffs that as the ingredient of animus possidendi is lacking, the possession of the appellant was not an adverse possession.

32. Hence, defendant 2nd party were the owner of Bakast lands and they sold those Bakast lands mentioned in schedule B, B(i), B(ii) and B(iv) to plaintiffs 1, 2, 3, 4 and 6, these plaintiffs acquired title over the same and were entitled to recover possession from the appellant along with mesne profits as decreed.

33. In the result, the appeal is dismissed with costs.

(Rekha Kumri, J.)

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PATNA HIGH COURT
DATED 23rd MAY 2008
N.F.A.R./ DKS