

Ram Dhari Misir vs Mangal Misir And Ors. on 4 December, 1950

Equivalent citations: AIR1951ALL555, AIR 1951 ALLAHABAD 555

JUDGMENT

Bind Basni Prasad, J.

1. This is a defendant's appeal arising out of a pre-emption suit. The material facts are these :

2. On 2-7-1945, a deed which was ostensibly one of gift was executed by defendant 5 in favour of Ram Nihora, father of defendants 1 to 4. The plaintiff came with the allegation that the transaction was really one of sale and the deed was executed as one of gift to defeat the right of pre-emption. Both the lower Courts have concurrently held that the transaction was really one of sale. The trial Court, however, dismissed the suit on the ground that the land was a protected land and as no permission of the Assistant Collector in charge of the sub-division had been obtained under Section 24, U. P. Regulation of Agricultural Credit Act, 1940, the transaction could be treated only as a mortgage under Section 25 of the said Act. In appeal the learned District Judge took an opposite view. He remarked :

"The right of pre-emption is nothing more and nothing less than a right of substitution of the pre-emptor for the vendee in the transaction and in the deed embodying that transaction and I do not think this right is at all affected by the provisions of the Act invoked by the learned Munsif. If the sale is legally invalid the pre-emptor would be subject to the consequences of absence of Collector's sanction for sale entitled to just as much as the original vendee and the vendee is not entitled to take shelter behind the Act which is intended for the benefit of owners of protected land and not transferees of such land from protected owners. Consideration of the question of sanction for alienation is beyond the scope of a pre-emption suit and all that is to be considered in such a suit is whether the transaction is a sale by a private treaty and the pre-emptor has a right of pre-emption and there is no obstacle to the enforcement of such right. Clause 1 of Section 25 does not say that a sale will cease to be a sale and be a mortgage if the sale has no sanction of the Collector behind it and its purport is that such sale will take effect as a mortgage."

3. I am unable to agree with the above view of the learned District Judge. The following facts are now undisputed in this Court. The land in dispute is protected land as defined in Sub-section (12) of Section 2. The transaction was really one of sale. No permission of the Assistant Collector in charge of the sub-division was obtained under Section 24 of the Act. Learned District Judge has incorrectly construed Section 25 of the Act. He has referred to Sub-section (1) only, but not to Sub-section (2) of that section. The section provides as follows :

"25 (1) Where a permanent alienation of protected land has been made otherwise than in accordance with the provisions of this Act, it shall take effect as a mortgage in the form prescribed by Clause (a) of Sub-section (1) of Section 13.

(2) In any suit or proceeding before a civil Court of competent jurisdiction relating to a permanent alienation of protected land made otherwise than in accordance with the provisions of this Act, in which the parties to such alienation or their successors-in-interest have been impleaded, the Court shall revise and alter the terms of such alienation so as to Substitute for it a mortgage in the form prescribed by Clause (a) of Sub-section (1) of Section 18 on such terms as the Court considers to be equitable and thereupon such mortgage shall take effect in supersession of such alienation."

4. Now Section 24 provides that the permission of the Assistant Collector is necessary for a permanent alienation. According to Sub-section (9) of Section 2 of the Act a sale is one of the kinds of permanent alienations. Inasmuch as the present sale was made without the Assistant Collector's permission it was "a permanent alienation of protected land made otherwise than in accordance with the provisions of this Act." It cannot take effect as a sale under Sub-section (1) of Section 25. It can take effect only as a mortgage. According to Sub-section (2) it is the duty of a civil Court in "any" suit or proceeding relating to a permanent alienation of protected land made otherwise than in accordance with the provisions of the Act to revise and alter the terms of such alienation so as to substitute for it a mortgage in the form prescribed under Section 13. A pre-emption suit is one of the kinds of suits contemplated by Sub-section (2) of Section 25. To decree a suit for pre-emption based on the sale of a protected land without the permission of the Assistant Collector is to give a recognition to it and to defeat the object of the D. P. Regulation of Agricultural Credit Act, 1940. As the preamble of this Act will show one of its objects was to restrict voluntary alienation of certain classes of land. The aim was to save the proprietors of protected land from their own imprudent acts and to retain with them their means of livelihood. The transaction may have been intended by the parties to be one of sale, but it cannot have the effect of sale in the eyes of law having regard to the provisions of Section 25 of the Act. It is only when there has been a sale which is effective and operative as such that a right of pre-emption can accrue under the Agra Pre-emption Act. If a transaction which is ostensibly a sale but is really a mortgage according to Section 25, D. P. Regulation of Agricultural Credit Act, the transaction is essentially a mortgage and so there can be no pre-emption.

5. The suit for pre-emption was rightly dismissed by the trial Court. The trial Court should, however, not have stopped short at the dismissal of the suit but should have revised and altered the terms of the sale and substituted for it a mortgage in the form prescribed by Clause (a) of Sub-section (1) of Section 13 of the Act. That, clause provides :

"A usufructuary mortgage for which the mortgagor delivers proprietary possession of the land to the mortgagee and authorizes him to retain such possession and to receive the rents and profits of the land in lieu of interest and towards payment of the principal, on the condition that after the expiry of such term not exceeding twenty

years, as may be agreed upon, the land shall be re-delivered to the mortgagor."

6. The only point for consideration is as to for what period the self-liquidating mortgage should be. Of course, the period should in no case exceed twenty years. For the determination of this period the annual profits of the property sold, the sale consideration and reasonable interest thereupon have to be taken into consideration. The case must, therefore, go back to the trial Court for the determination of the above points.

7. Learned counsel for the respondents has contended that in view of the proviso to Sub-section (2) of Section 26 of the Act the permission can be obtained even subsequently. There are several flaws in this argument. The Court has to see the state of affairs as it exists on the date of the decision. Up till this day admittedly permission has not been obtained. The permanent alienation is, therefore, contrary to the Act. Secondly, Section 26 relates to proceedings under Sections 34 and 35, U. P. Land Revenue Act, and not to proceedings in the civil Court. Thirdly, according to the proviso it is on the application of the alienor that the Assistant Collector can grant him an ex post facto permission. Shri Krishna Shankar who raised this point does not represent the alienor but the pre-emptor. I see no force in this point.

8. The appeal is allowed with costs throughout. The decree of the lower appellate Court is set aside and the suit for pre-emption is dismissed. The case is remanded to the trial Court through the lower appellate Court. The trial Court will re-admit the case to its original number and proceed in accordance with Sub-section (2) of Section 25, U. P. Regulation of Agricultural Credit Act, 1940, to substitute a mortgage for the sale in dispute.