

Shamsher Bahadur Singh And Ors. vs Lal Batuk Bahadur Singh And Ors. on 16 July, 1952

Equivalent citations: AIR1953ALL147, AIR 1953 ALLAHABAD 147

JUDGMENT

Malik, C.J.

1. This appeal has been filed on behalf of the defendants against a decree for redemption passed by the learned Civil Judge of Pratapgarh. The predecessor-in-interest of one Raja Bhairon Bux Singh had executed a mortgage of the zamindari rights in village Tina in favour of the Allahabad Bank Ltd. The Allahabad Bank filed a suit on the mortgage, obtained a decree and put the village to sale. It was purchased in auction in the year 1905 by the Rani of Pratapgarh. She obtained possession on 4th of February 1906. On 12th June 1891, Raja Bhairon Bux Singh had mortgaged to one Harpal Singh five plots Nos. 139, 190, 196, 197 and 198 measuring 22 bighas 19 biswas and 9 biswansis. This mortgage was subsequent to the mortgage in favour of the Allahabad Bank Limited and the Allahabad Bank Limited in the suit filed by it for sale had impleaded Harpal Singh as a subsequent mortgagee. Harpal Singh, however, made no attempt to redeem the mortgage and the village property was sold as mentioned above.

2. It now transpires that these five plots were probably the 'sir' or 'khudkasht' land of Raja Bhairon Bux Singh and Raja Bhairon Bux Singh and Harpai Singh claimed under Section 108, Clause 10 of the Oudh Rent Act that the plots had become their exproprietary tenancy. This matter was ultimately decided in their favour and it was held that the plots were their ex-proprietary tenancy. The judgment in that case is not before the court but the mortgagee Harpal Singh could not have claimed to be an exproprietary tenant and, if he joined with Raja Bhairon Bux Singh in the claim, it must have been as a mortgagee from him. From the village papers it appears that after that decision the mortgagee remained in possession and in the village papers a record was made that the mortgagor was Raja Bhairon Bux Singh and the mortgagee in possession was Harpal Singh. The village papers for those years that are on the record uniformly contain the said entries. In the year 1947 the legal representatives of the mortgagor filed a suit for redemption of the mortgage of 12th June 1891, and the suit was decreed by both the Courts and against the decree of the lower appellate Court this second appeal has been filed.

3. The contention of the learned counsel is that no mortgage subsisted after the auction sale in 1905 and the rights, if any, of Harpal Singh, mortgagee, in the mortgage of 12th June 1891, must be deemed to have come to an end. Reliance is placed on the well established rule that, if a subsequent mortgagee is impleaded in a suit on the basis of a prior mortgage and he fails to redeem that mortgage and allows the property included in the first mortgage to be sold, his security in that

property ceases and he can no longer claim to redeem the first mortgage. The proposition that after the auction sale of the year 1905 Harpal Singh or his legal representatives had no right to redeem the mortgage in favour of the Allahabad Bank Limited and get back possession of the property that had been sold in execution of the decree cannot be challenged. The question however is what were the rights of the mortgagor and the mortgagee qua the exproprietary tenancy which came into existence as a result of the auction sale of 1905.

4. The lower Courts relied on a decision of this Court in -- 'Sham Das v. Batul Bibi', 24 All 538. The facts in that case upto a certain stage were exactly similar. A zamindar had mortgaged by way of usufructuary mortgage his zamindari together with his 'sir' lands. He lost his zamindari rights and became an exproprietary tenant of the 'sir'. It was held in that case that the usufructuary mortgage did not become ineffectual but took effect as a mortgage of the exproprietary rights. This was on the ground that if a mortgagor's title is altered, the land held under the new title is still subject to the mortgage. The point urged in that case was that the exproprietary rights were not in existence at the time when the mortgage was made in the year 1890, and it could not, therefore, be said that the mortgage attached itself to the property which came into existence long after. Dealing with this argument the learned Judges said:

"The District Judge says, what Rajab Ali himself did not possess at the time of the mortgage to defendants, he could not transfer. He overlooks the fact that a mortgagee is entitled for the purpose of his security to all such interests as may be acquired either as accretions to or in place of the original interest which was conveyed to him: for example, in the case of a mortgage or charge upon lease-holds, if a new lease be obtained by a mortgagor, either on a forfeiture of the original lease or by other means, the owner of the mortgage or charge will have the benefit of the new lease for the purpose of his security, and yet the mortgagor could not at the time of the mortgage have transferred the new lease to the mortgagee as it was not in existence."

This case, therefore, would fully cover the case before us but for the fact that at the time when this decision was given exproprietary tenancy was not non-transferable as it was made in the year 1901.

5. In a single Judge decision of this Court in the case of -- 'Ram Racha v. Gokul Rai', 25 Ind Cas 201 (All), it was doubted whether the principle laid down in the case of -- 'Sham Das v. Batul Bibi', (24 All 538), would still be applicable when the rights of an exproprietary tenant had become non-transferable. The observations of Piggott J. are as follows:

"The contention on their behalf, however, is that the result of the foreclosure suit was merely to extinguish any interests they might have previously possessed in the proprietary rights over the plots of land mortgaged to them; but that their mortgagee rights enured in respect of the exproprietary tenancy created by Statute in favour of the defendants of the first party from the date of the foreclosure decree. For this proposition of law the authority quoted is the case of -- 'Sham Das v. Batul Bibi', (24 All 538). A consideration of this ruling shows that one important factor in the decisions arrived at by the learned Judges who decided that case was the view taken

by this Court that there was nothing in the provisions of the old Rent Act of 1881 to prevent an occupancy tenant from transferring possession over his holding by way of usufructuary mortgage. It may be doubted, therefore, whether this case is any longer to be relied on since the alteration in the law affected by the passing of the Agra Tenancy Act of 1901."

Though, no doubt, if the property actually mortgaged is destroyed any other property obtained by the mortgagor in lieu thereof would be treated as substituted security; it is doubtful whether it would operate as a valid mortgage when such property has been made inalienable under the law. We are inclined to the view that, as the mortgagor could not have made a valid mortgage of the exproprietary tenancy by application of the doctrine of substituted security, no valid mortgage could be created of the exproprietary tenancy. But the matter does not rest here. In the case before us the mortgagor allowed the mortgagee to remain in possession instead of claiming back possession of the property after the auction sale of 1905, as he was entitled to do. If the mortgagor had claimed back possession of the property in accordance with the view taken by this Court in --'Mahabal Singh v. Ram Raj', 1950 All LJ 713 (FB), he would have had to pay to the mortgagee the amount that he had borrowed before he could be restored possession of the five plots that had been mortgaged. The only ground on which, therefore, the mortgagee could resist the delivery for possession of these plots on payment of the money due to the mortgagee was a plea of limitation if the plea was open to him. As we have already said, the mortgagee had continued to occupy the land as a mortgagee and the entries in the village papers have been consistent throughout that Raja Bhairon Bux Singh or his legal representatives were the mortgagors and Harpal Singh or his legal representatives were the mortgagees.

6. The question of limitation was considered in the Full Bench case of -- 'Mahabal Singh v. Ram Raj', (1950 All LJ 713 FB), cited above and their Lordships held in that case that it was not open to the mortgagee who had entered possession under the mortgage to set up any adverse title against the mortgagor and claim that by lapse of time he had perfected his title to those plots. The result, therefore, is that though the mortgage might not have validly subsisted yet the mortgagor was entitled to get back possession of the five plots on payment of the money which had remained due to the mortgagee. This, in substance, is the decree passed by the lower Courts.

7. The appeal, therefore, fails and is dismissed with costs.

8. As the appeal has been dismissed, the stay application is also dismissed and the ad interim stay is discharged.