

Munshi And Ors. vs Chiranji Singh And Anr. on 2 September, 1955

Equivalent citations: AIR1956ALL237, AIR 1956 ALLAHABAD 237

Author: Raghubar Dayal

Bench: Raghubar Dayal

JUDGMENT

Raghubar Dayal, J.

1. Two plots Nos. 62/1 and 64/3 in village Sahawali, Pargana Rajpura, Tahsil Gunnaur, District Budaun, were mortgaged in 1891 with possession. The representatives of the mortgagor applied under Section 12, U. P. Agriculturists' Relief Act (No. 27 of 1934) for an order directing that the mortgage be redeemed and that they be put in possession of the mortgaged property. They deposited Rs. 65/- alleging it to be the amount which was due on the mortgage.

The representatives of the mortgagee objected to the redemption of the mortgage and the Assistant Collector enquired into the matter and held that plot No. 62/1, which corresponded to the theft plot No. 111, had not been mortgaged and that Rs. 65 was the amount due under the mortgage. He ordered redemption of the mortgage with respect to plot No. 64/3, corresponding to the then plot No. 77, payment of the money deposited to the mortgagee and delivery of possession to the mortgagor.

On appeal to the District Judge under Section 23, Agriculturists' Relief Act, the order of the Assistant Collector was maintained. The appellate order was passed on 14-4-1945.

2. In May 1949 more than three years after the passing of the appellate order the representatives of the mortgagor-decree-holders applied in execution for the recovery of possession. This application was dismissed as time-barred.

3. The representatives of the mortgagor then filed another application under Section 12, Agriculturists' Relief Act in the court of the Assistant Collector. The representatives of the mortgagee again objected to the redemption on the ground that the decision in the previous proceedings under Section 12, Agriculturists' Relief Act operated as res judicata and barred the second suit.

The Assistant Collector did not agree with this contention and ordered the redemption of the mortgage with respect to both the plots. On appeal by the representatives of the original mortgagee the appellate court reversed the order of the Assistant Collector and dismissed the application under

Section 12, Agriculturists' Relief Act. It is against this order that the applicants, representatives of the mortgagor, have filed the present application in revision contending that the decision of the court below is wrong.

4. It has been contended for the opposite party that the order of the court below, right or wrong, is not revisable under Section 115, Civil P. C, Reliance is placed on the case reported in --'Keshardeo v. Radha Kissen', AIR 1953 SC 23 (A). It is contended that the court could decide a question wrongly and by deciding, a question wrongly the court did not act Illegally or with material irregularity in the exercise of its juris diction which the court below undoubtedly possessed over the subject-matter of dispute.

It is true that the court does not commit any illegality or irregularity in the exercise of its jurisdiction on account of its deciding any question of fact or law wrongly, but it has been held by the Privy Council in -- "Joy Chand Lal v. Kamalaksha Chaudhury", AIR 1949 PC 239 CB), that "if the erroneous decision results in the subordinate court exercising a jurisdiction not vested in it by law or failing to exercise a jurisdiction so vested a case for revision arises under Sub-section (a) or Sub-section (b), and Sub-section (c) can be ignored."

This principle of law has been endorsed in the Supreme Court case relied on by the learned counsel for the opposite party. The Privy Council, however, in continuation of the quotation made in the Supreme Court case further observed :

"The cases of -- 'Babu Ram v. Munna Lal', AIR 1927 All 358 (C) and -- 'Hari Bhikaji v. Naro Vishvanath', 9 Bom 432 (D), may be mentioned as cases in which a subordinate court by its own erroneous decision (erroneous that is in the view of the High Court), in the one case on a point of limitation and in the other on a question of res judicata, invested itself with a Jurisdiction which in law it did not possess, and the High Court held, wrongly their Lordships think, that it had no power to interfere in revision to prevent such a result."

This was by way of illustrating the effect of what their Lordships held by saying that if, the erroneous decision resulted in the court's exercising a jurisdiction or not exercising a jurisdiction, a case for revision would arise under Sub-section (a) or Sub-section (b) of Section 115, Civil P. C., though not under, Sub-section (c) of that section.

The non-repetition of this illustrative observation in the judgment of the Supreme Court does not mean that this observation has not been approved by the Supreme Court. I am, of opinion that decisions on question of res judicata would, as these observations of the Privy Council indicate, very well come under the principle of law laid down by the Privy Council and approved by the Supreme Court that some! types of erroneous decisions by a court of competent jurisdiction can lead to further assumption or non-assumption of jurisdiction and thus can give rise to cases for revision under Sub-section (a) or Sub-section (b) of Section 115, Civil P. C. Applying this principle to the facts of the present case I am of opinion that the order of the court below will be open to revision in case it is found by this Court that that order is wrong in law or in fact.

5. The case for the applicants in revision can be split up in two portions, one relating to original plot No. 62/1, corresponding to present plot No. 111, and the other relating to original, plot No. 64/3, corresponding to present plot No. 77. It was held in the previous proceeding that the mortgage in suit, did not include plot No. 62/1 land that therefore the applicants under Section 12, Agriculturists' Relief Act had no right to redeem that plot.

Such a finding must operate as res judicata and it cannot be open to the applicants to raise the same point over again, whatever might have been the reason for arriving at that conclusion in the previous proceedings. The reasons might be right or might be wrong. The decision arrived at after contest must be held to be final on the general principle of res judicata.

6. It has been urged for the applicants that the principles of res judicata are not applicable to proceedings under the Agriculturists' Relief Act in view of what has been said by Dar J. in -- 'Shri Nath v. Puran Mal', AIR 1942 All 19 at pp. 34-35 (FB) (E), & by Sinha J., in -- 'Mohd. Mohsin v. Mohd. Mohtashin', AIR 1945 All 281 (F). Dar J. observed at page 35 :

".....I feel also some difficulty in applying the rule of res judicata and the rule about the amendment of judgment and decree on general principles to their full extent in matters arising between a creditor and an agriculturist under the Agriculturists' Relief Act."

This dictum was quoted by Sinha J. in AIR 1945 All 281 (F). He observed:

"It has been held in -- 'Shri Nath v. Puran Mal (E)', that the Agriculturists' Relief Act is meant for the benefit of a restricted class of people and there can, strictly speaking, be no/ res judicata. Dar, J. at page 34 observed :....."

(Then follows the aforesaid observation of Dar, J.) It does not appear that the Full Bench deciding the case of 'Shri Nath v. Puran Mal (E)', held that there could be no res judicata in connection with proceedings under the Agriculturists' Relief Act. I have not been pointed out any such finding or observation in the judgments of the other learned Judges in deciding that case;

Dar J. himself, as the aforesaid quotation would show, did not hold anything to that effect. He simply gave expression to some doubts he . entertained. He himself observed just after the aforesaid observation :

"At the same time it was not contended at the Bar and it is not possible to hold that the principle of res judicata can in no case apply between a creditor and an agriculturist with regard to the question of reduction of interest."

and proceeded to give certain cases in which the principle of res judicata could apply. It follows, therefore, that these two cases cannot be taken to be authorities for laying down that the principle of res judicata is not applicable to the proceedings under the Agriculturists' Relief Act.

7. It has been further contended for the applicants that res judicata or its principle would apply only to decrees and not to the cases where mere orders are passed. Sections 16 and 23, Agriculturists' Relief Act, refer to the decisions of the Assistant Collector as orders. For the applicability of the principles of res judicata, it is not necessary that the decisions which are alleged to operate as res judicata should be contained in decrees.

Section 11, Civil P. C., itself lays down the conditions for the applicability of the bar of res judicata to be that the certain matter should have been heard and finally decided by a court competent to try the subsequent suit and that the suit or the issue should have related directly and substantially to the matter in issue in the subsequent suit. The conditions laid down in Section 11, Civil P. C., can be satisfied even in the cases where orders and not decrees are passed by courts.

Orders are also passed after hearing the parties and can be final in those proceedings in which they are passed. The principle of res Judicata, however, has been held to be of wider application on the basis of the wider principle of the finality of decisions by courts of law. It would be a mockery of a decision if a decision of a court of competent jurisdiction be treated as nothing by another court having the same jurisdiction over the matter and having identically the same point for its consideration.

I am, therefore, of opinion that the mere fact that the decisions of the Assistant Collector are referred to as orders does not bar the applicability of the principle of res judicata to those decisions.

8. It, therefore, follows from the above that the decision in the previous proceedings under Section 12, Agriculturists' Relief Act, that plot No. 62/1, corresponding to present plot No. 111, did not form part of the mortgage transaction operates as res judicata in the present suit and that the view . of the court below on this point is perfectly correct.

9. The previous proceedings under Section 12, Agriculturists' Relief Act, with respect to the redemption of the mortgage relating to original plot No. 64/3 corresponding to present plot No. 77, ended successfully for the applicants in so far as the Assistant Collector ordered under Section 16 that the mortgage be redeemed. The order of the Assistant Collector is not on the record; the appellate court's order is, and it makes it clear that the court had declared the applicants entitled to redeem the mortgage with respect to plot No. 64/3, corresponding to plot No. 77.

The provisions of Section 16 provide for an order for the redemption of the mortgage in case the applicants had paid the mortgage money found due. The absence of the order of the Assistant Collector, therefore, does not appear to me to be any insurmountable difficulty in holding what that order was.

It is not contended for the opposite party and it is not presumed either that that order contained any direction that in case the applicants did not pay the mortgage money the application for redemption would stand dismissed or that the application would stand dismissed in case the applicants did not obtain possession. In fact, no such order is contemplated by the U. P. Agriculturists' Relief Act, The amount alleged to be due is required to be deposited in the first instance and if there be any balance

due as a result of the finding of the court that a larger amount was due the applicant is ordered to pay that extra amount, and it is after the deposit of the excess amount that the Assistant Collector is required to pass the order of redemption under Section 16, Agriculturists' Relief Act.

Section 18 of the Act provides that in all cases in which 'the court orders redemption it shall, if necessary, also put the applicant in possession of the mortgaged property. It follows from these provisions that the applicant-mortgagor has simply to deposit in court the amount found due on the mortgage and also to establish that he is entitled to redeem the mortgage and the result follows that the court orders redemption and is enjoined to put the mortgagor in possession in case it be necessary.

There was no occasion, therefore, for the Assistant Collector to have passed any order about the dismissal of the application in case of any non-payment of money or of non-taking of possession. The order under Section 12 really is equivalent to both the passing of the preliminary and final decrees in ordinary redemption suits. The position, therefore, is that in the previous proceeding under Section 12, Agriculturists' Relief Act, the Assistant Collector ordered and the appellate court confirmed that the mortgage be redeemed. The mortgagors, however, failed to obtain possession.

They applied in execution for possession but their application was rejected as time-barred. It is not of consequence to the question under de termination whether this order was correct or not. The question for decision really is whether what happened in the previous case bars the present suit for redemption.

10. It is strenuously contended for the applicants that the second suit for redemption lies unless the right of redemption is extinguished by either a decree of the court or by the act of the parties as laid down in Section 60, Transfer of Property Act. There has been no such extinction and therefore the second suit is maintainable. A number of cases have been relied on in this connection.

AH of them except one held a second suit maintainable when the decrees in the previous suit for redemption provided that in case of default of payment of the mortgage money held due within a certain period of time, the suit for redemption will stand dismissed. It was held in these circumstances that the decree does not extinguish the right of redemption. The suit for redemption was merely dismissed. The mortgagor could sue for redemption within sixty years and therefore could bring in a second suit for redemption.

One such case need be referred and it is --'Raghunath Singh v. Mt. Hansraj Kunwar¹, AIR 1934 PC 205 (G). This case is not applicable to the present case where the suit for redemption, had ended successfully in the passing of an order redeeming the mortgage -- an order which can be said to be equivalent to the passing of a final decree for redemption. Similar was the reasoning in -- 'Dondh Bahadur Rai v. Tek Narain Rai', 21 All 251 (H), where the suit for redemption was decreed on payment of a certain amount by the mortgagor without saying anything as to what would have happened if there was no such payment. In this case also it was held that a second suit for redemption would lie. This case, is also distinguishable because the redemption was to be on payment and when no payment was made there could not have been any possible redemption of the

mortgage.

Section 60, Transfer of Property Act, defines the right of mortgagor to redeem as a right on payment or tender, at a proper time and place, of the mortgage money, to require the mortgagee to deliver to the mortgagor the mortgage deed, etc., and to deliver possession to the mortgagor where the mortgagee be in possession of the mortgaged property and to retransfer the mortgaged property to the mortgagor or any third person as the mortgagor may direct.

A suit to enforce such a right is described in the section as a suit for redemption. It is also provided that the mortgagor will have that right to redeem provided it had not been extinguished by the act of the parties or by decree of a court. The decision in the previous suit does not extinguish the mortgagor's right to redeem in the sense that the mortgagor on his committing a default would be deprived to redeem the mortgage. Such was not the position or the order.

The decision, however, converted the right which the mortgagor had to redeem into an effective order of the court redeeming the mortgage and thus freeing the mortgaged property from the burden of the mortgage. In fact subsequent to the decision there existed no mortgage and consequently no further right to redeem. A suit for redemption is a suit to enforce the right to redeem and once such a right has been enforced and enforced successfully the right spends itself and comes to an end.

The applicants, therefore, had no existing right to redeem the alleged mortgage of 1891 Which too in fact does not subsist after the decision in the previous proceedings under Section 12, Agriculturists Relief Act. It is on this ground that this second application under Section 12, Agriculturists' Relief Act, to redeem the mortgage of 1891 with respect to plot No. 64/3, corresponding to plot No. 77, is not maintainable. In support of this view, reference may be made to the case reported in -- 'Prayag Narain v. Mohd. Ebrahim', AIR 1948 Oudh 238 (1). It was observed there:

"In the case of a usufructuary mortgage, on the passing of an order absolute for sale, the ownership of the mortgagor is relieved of the encumbrance, that is to say, the right of the usufructuary mortgagee to remain in possession, which right is only given to secure the repayment of the loan, comes to an end. The mortgagor's title cannot be extinguished merely by the lapse of 3 years without execution of the decree though it can be extinguished by adverse possession for 12 years by a person not entitled to hold the property."

11. It has also been contended for the applicants that their right to redeem included the right to get possession and as they have not yet obtained possession they can put in a second application for redemption. I do not agree with the contention. As a result of the order in the redemption proceedings they get the right to possession of the property. They can obtain possession through the proper process of law. If they do not so obtain possession it is their own fault.

I am not concerned at present with the correctness or otherwise of the order on their application in execution for the recovery of possession in 1949. If that order was correct, their right to possession

also comes to an end by their not taking proper legal steps in time. If that order was wrong, they submitted to it and did not take necessary steps to get that order rectified. Their failure cannot vest in them a second right to redeem.

12. I am, therefore, of opinion that the court below is right in holding that this second application under Section 12, Agriculturists' Relief Act, to redeem the mortgage of 1891 is not maintainable in view of the previous proceeding and decision therein. I, therefore, dismiss this application with costs.