Mt. Ramkali And Ors. vs Murlidhar And Ors. on 25 September, 1950

Equivalent citations: AIR1951ALL655, AIR 1951 ALLAHABAD 655

JUDGMENT

Wali Ullah, J.

1. This is an appln. in revn. Under Section 115, Civil P. C. directed against an appellate order confirming the order of the Asst. Colr. of the first class passed in proceedings started by an appln. Under Section 12, U. P. Agriculturists' Relief Act. The appln. has been allowed by both the Cts. below. To avoid confusion, the appcts. Under Section 12 of the Act would hereafter be refd. to as "the pltfs." & the opposite parties to that appln. would be refd. to as "the defts."

2. It appears that the pltfs. filed an appln. Under Section 12, Agriculturists' Relief Act, for redemption of an old mtge. executed in Jeth of 1285 F. (corresponding to June 1878). The property mortgaged consisted of four plots of land, viz. plots Nos. 1061, 809, 426 & 1334, with a total area of five bighas & thirteen biswas, in village Tindwari. The pltfs. claimed to be the representatives of the original mtgors. of the property in suit. The original mtgors. were two persons, viz. Binda Chhangua, sons of Dayal Kachhi. The mtgors, held the plots in question on "Bhej Barari" tenure. The original mtgee. was one Tika, son of Anaisu. The defts. are the representatives of the original mtgee. The consideration for the mtge. was Rs. 10 only. It was provided in the mtge. deed that when the principal money with interest thereon was paid up by the usufruct of the property mortgaged the property would be redeemed in the month of Jeth of that year & possession thereof would be delivered to the mtgors.

3. The case of the pltfs. was to this effect: Binda & Chhangua, the original mtgors, were the last Bhej Barars of the plots in suit. They disappeared from the village & were untraceable for about thirty years prior to the date of the appln. They must, therefore, be presumed to be dead. They had left no heirs behind them. The plts. claimed a right to redeem the property on the ground that they as zamindars had acquired the rights of Binda & Chhangua who must be deemed to have abandoned the plots in suit. Lastly, it was alleged that the mtge. money had been paid up by the usufruct of the property mortgaged long before the date of the appln.

4. The claim was contested by the defts. the representatives of Tika the original mtgee. It was alleged that Binda & Chhangua were not the original mtgors. & that there were in fact two mtge. deeds of two different dates for two different sums of money in favour of one Anaisu, the father of Tika. Another plea taken in defence was that the Bhej Barars being full owners of the land held by them, there was no question of a reversion of the right in such tenure to the zamindar, in the absence of the heirs of Binda & Chhangua. Lastly, it was pleaded that the claim for redemption was time-barred

inasmuch as it was made more than sixty years after the date of the mtge.

5. Three main issues were raised in this case :

1. Whether the pltfs. were entitled to redeem the property in suit ?

2. If so, what was the amount of consideration ? &

3. Whether the suit was time barred ?

The learned Asst. Colr. held that the holders of Bhej Barari tenure really had the status of tenants. The tenants having abandoned the holdings, their rights reverted to the zamindars concerned. Therefore the pltfs. being the zamindars of the plots in question were entitled to redeem the property. He further held that the principal amount as well as interest had been fully satisfied out of the usufruct of the property. Lastly, he held that the claim for redemption was not barred by limitation. In view of these findings, he allowed the appln. & ordered that the mtge. stood redeemed & the appcts. be put in possession of the plots in suit. Against the decision of the learned Asst Colr., the defts. filed an appeal & the pltfs. filed their cross-objections. The learned Civil Judge who heard the appeal affd. the findings of the trial Ct. He held that the specific mtge. set up by the pltfs. was proved. He also held that the claim for redemption was not barred by limitation. On the main question relating to the nature of "Bhej Barari" tenure, he held that it was a kind of proprietary interest or quasi-proprietary interest, carved out of the full ownership of the land. As such, in the event of the holders of such tenure dying, or disappearing, without leaving any heirs, it merged in the parent estate, i. e., it reverted to the zamindars. In view of these findings, he dismissed both the appeal as well as the cross-objections. The defts. -- the appcts. before me--have now come up in revn. to this Ct.

6. I have heard the learned counsel for the appcts. as well as the learned counsel for the opposite parties. On the one hand, it has been contended for the appcts. that holders of plots on Bhej Barari tenure are in reality full proprietors of the land held; that on the extinction of their line there is nothing which can revert to the zamindars concerned. Accordingly the zamindars have no right to apply for redemption Under Section 12, Agriculturists' Relief Act. It has also been contended that Section 12, U. P. Agriculturists' Relief Act, has no application to a case where redemption is sought without any payment. On the other hand, it has been contended for the opposite parties that the nature of Bhej Barari tenure is such that on the extinction of the line of the holder of such tenure the holding necessarily reverts to the zamindar concerned. Therefore, the zamindars-opposite parties are entitled to claim redemption of the mtge. in suit.

7. The decision of the case, therefore, rests mainly on the determination of the true character of Bhej Barari tenure & its incidents. Before dealing with this question, however, I may dispose of the contention that Section 12, Agriculturists' Relief Act, has no application to a case like the present where redemption is sought without any payment. The argument is based upon the closing words of Section 12 where it is provided that the appct. shall deposit the sum which the appct. declares to the best of his belief to be due under the mtge. The question is whether deposit of a sum is an absolutely

essential condition for the application to be competent. Obviously if, according to the appct., no money is due, he can make no deposit. In this connection reference may be made to the case of Iqan Husain v. Babu Ram, (1938) A. L. J. 1115, decided by a Bench of two learned Judges of this Ct. In that case an appln. Under Section 12, Agriculturists' Relief Act, for redemption of a usufructuary mtge. was filed but no deposit was made as, according; to the appct. the usufruct of the property had discharged the principal as well as the interest on the mtge. money. The appln. was dismissed by the Civil Judge on the ground that Section 12 of the Act did not apply when nothing was due from the mtgor. on account of the mtge. & when no deposit was made. After an analysis of the provisions of chap. III of the Act, the learned Judges held that the reference in Section 12 to the sum of money to be deposited by the appct. did not rule out the case of the appct. who made no deposit as no sum was due. I must, therefore, hold that there is no force in this contention.

8. The main question of law raised by this revn. though short, is a novel one & there appears, to be little positive authority on it. That question, is, what is the true nature of Bhej Barari tenure & what are its incidents ? From the record of the settlement of 1286 F. relating to this village it appears that Bhej Barars were described as "Asamiyan Jamai" & they were entered in the Jamabandi. Again, from the wajib-ul-arz as well as the tasfia darbandi of the same year it is clear that Bhej Barars are Asamiyan Jamai & they pay proportionate rent as entered in the Khewat. Then we find that in the records of the current settlement of the year 1311 F. as well as in the dastoor-dehi of the same year Bhej Barars are entered in the titimma khewat, i. e. the appendix to the khewat. They pay proportionate revenue as entered in the khewat together with the ordinary cess. It is recorded that they have a right to mtge. their holdings but not to sell them without the consent of the zamindar. It appears that the village was partitioned in 1335 F. & then the status of the Bhej Barars as given in the earlier documents was reiterated. Thus it is clear that holders of Bhej Barari tenure of this village pay an amount which actually amounts to land revenue together with cess, in proportion to the land in their possession. Further, it appears that the settlement of proportionate land revenue was directly made with them at the time of the settlement & their names were entered in the appendix to the khewat of the village. They possess a right to mtge. their holdings without the consent of the zamindar but they have no right to sell the land in their possession. Obviously, holders of such tenure do not fit in with any of the classes of tenants recognised by the Tenancy Law, They cannot, therefore, be described as "tenants". The question arises whether they are to be deemed as "proprietors" of the land in their possession. They are not full proprietors for the sample that they have no right of sale; nonetheless, are they proprietors of a kind?

9. The expression "Bhej Barar" is thus explained in Baden-Powell's 'Land Systems of British India' at p. 143: bhej-proportionate share & barar-list of revenue-payments. According to Baden-Powell, historically the origin of this system is connected with frequent exchanges of lands & also with the method of equalizing the revenue burden. It was naturally suited for a time of frequent changes & heavy revenue-assessments; but when once land is properly classified & fairly equally assessed such periodical changes become unnecessary & the system tends to lose all its importance. The District Gazetteer relating to Banda at p. 112 refers to this form of tenure as a tenure unknown elsewhere. It is described as a form of tenant right known as the 'bhej barar' or Jamai tenure. According to the Gazetteer in some intances this tenure can be traced "to grants on the part of zamindars, either of land at revenue rates or of fields free of all payments, which have been subsequently assessed to

revenue but not to rent. In some villages the tenure was at one time so common that there was comparatively little land paying ordinary Teats. Customs differ in various villages with regard to it for whereas in some the bhej barari tenants are recorded in a khewat appendix (titimma khewat) as a sort of subproprietors, with all powers of alienation except sale & mtge. with possession, in others they are recorded as a form of privileged tenants in the record of cultivators (khatauni). At the present settlement their lands have been assessed at the revenue incidence of the mahal, with or without cesses added according to village custom; & the sum so payable by them is recorded against their holdings in the Ichatauni to be realised by the zamindar."

10. It would thus appear that essentially the system of "Bhej Barari" tenure is a system in which it is land revenue & not rent, as we understand the terms, which is distributed on different parcels of land held by different individuals in proportion to the area of the land held. It would also appear that customs differ in different villages in regard to it. In some villages, e.g. in the village with which we are concerned in the present case, Bhej Barari tenants are recorded in a khewat appendix, i.e., titamma khewat, while in others they are recorded merely as a class of privileged tenants & entered in the khatauni. Whatever be the form in which the record of their holdings is kept, it appears that essentially holders of Bhej Barar tenure are a kind of sub-proprietors with limited powers of alienation. In the present case, according to the wajib-ul-arz as well as the dastoor-dehi refd. to above, the Bhej Barars are liable to pay proportionate part of their land revenue as entered in the khewat, together with the ordinary cess. They possess the right to mtge. their holdings without securing the consent of the zamindar but they have no right of sale. It follows, therefore, that Bhej Barars of village Tindwari must be held to be a kind of sub-proprietors & not tenants of the lands held by them.

11. The next question is whether on the death of such a holder without leaving any heirs, the land would revert to the zamindar of whose mahal it forms a part. The learned counsel for the appcts. has strongly contended that the Bhej Barari tenure is very similar to the istimararee mokurrari tenure of Bengal. Further, it has been contended that the Judicial Committee of the P. C. has held in the case of Sonet Kooer v. Mirzah Himmut Bahadoor, 1 Cal. 391 : 3 I. A. 92 that the nature of istimarari mokurrari tenure is such that it does not, on the death of the grantee of such a tenure without heirs, revert to the zamindar; nor does the Zemindar, in such a case take such a holding by escheat. It has been contended that the Crown (i.e., the ruling power) by the general prerogative as the lord paramount takes the land by escheat. On the other hand, the learned counsel for the opposite parties has contended that the Bhej Barari tenure, in its incidents, is akin to a fixed rate tenancy as it prevails in this State; & that in the case of fixed rate tenancy it has been held by a F. B. of this Ct. in the case of Tulshi Ram v. Gur Dayal Singh, 33 ALL. 111 that "on the death of a fixed-rate tenant without heirs his tenancy does not escheat to the Grown but reverts to the zemindar."

12. It must be observed at the outset that in the case of Sonet Kooer v. Mirza Himmut Bahadoor (ubi supra) their Lordships of the P. C. were dealing with a case where a Mokurrari grant of a village had been made by a zamindar, which was to be held by the grantee absolutely from generation to generation subject to the payment of a reserved rent. In that case no right was resvd. to the grantor to resume the grant either in the case of failure of issue of the grantee, or on default of payment of the rent resvd. Their Lordships consd. the doctrine of escheat as applicable to the Crown in the case

of a vacant inheritance and also the question whether the zemindar could in similar circumstances resume the grant. It was held that the mokurrari was clearly an absolute interest; it was also an alienable interest & it might have been seized & sold in certain circumstances. It could not, however, be forfeited for the non-payment of rent. In these circumstances their Lordships held that:

> "Lands belonging to a zemindari granted by the zemindar under an absolute hereditary mokurrari tenure, do not, on the death of the grantee without heirs revert to the zemindar; not does the zemindar, under such circumstances, take by escheat a tenure subordinate to & carved out of his zemindari."
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> "Where there is a failure of heirs, the Crown, by the general prerogative, will take the property by escheat, subject to any trusts or charges affecting it; & there is nothing in the nature of a mokurrari tenure which should prevent the Crown from so taking it subject to the payment of the rent reserved under is."

(The italics are mine.)

13. On the other hand, in the case of Tulshi Bam v. Gur Dayal Singh (ubi supra) the F. B. of this Ct. had to deal with the case of a fixed rate tenant. In that case the zemindar of a village in the district of Ballia instituted a suit for redemption of usufructuary mtge. created by a fixed rate tenant of a holding. It was alleged that the tenant had not been heard of for more than seven years & must, therefore, be presumed to have died. It was alleged that he had died without leaving heirs. The question arose whether the pltf.-zemindar had any interest in the equity of redemption of the property & could maintain the suit for redemption. The F. B. had to consider the question with reference to a fixed rate tenancy. They distd. the case of Sonet Kooer (ubi supra) by observing that that case was concerned with a mokurraree istimraree tenure; that the mokurragee, though carved out of zemindari, being an absolute alienable interest, could not have reverted to the grantor. It could not have been forfeited for the non-payment of rent, for in such a case the zemindar could only have caused it to be seized, put up for sale & sold to the highest bidder. In these circumstances, it was pointed out by the F. B., their Lordships of the P. C. thought that the estate having so passed to the purchaser would not determine upon the death of the grantee without heirs. The nature of a tenancy at fixed rates was very different. As pointed out by Banerji J.

> "Such a tenancy is carved out of the land-holder's interest in the land to which it relates & a fixed rate tenant has no absolute interest in it. If the tenancy comes to an end it necessarily goes back to the estate which it was carved out of & lapses to the land-holder. It is true that a fixed rate tenant has a heritable & transferable interest in his holding ..... but if he does not transfer the holding & dies leaving no heirs entitled to inherit it, the tenancy becomes extinct & reverts to the landlord who created it. The landlord has in certain cases a right to determine the tenancy, eject the tenant & re-enter into possession ..... his (the fixed rate tenants) interest in his holding is thus of a limited character & differs in material respects from an absolute hereditary mokurrari tenure which formed the subject of consideration by their Lordships of the P. C. in Sonet Kooer v. Mirza Himmut Bahadur, 3 I. A. 92."

14. Next, reference may be made to the case of Kally Dass v. Monmohini Dassee, 24 Cal. 440, decided by a learned single Judge of that Ct. Jenkins J. (afterwards Sir Lawrence Jenkins). It was a case relating to a permanent lease. It was held:

> "A lease notwithstanding that it is permanent is liable to forfeiture under the provisions of the T. P. Act if the tenant denies the title of the landlord.
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> Leases which are permanent & which came into existence before the passing of the T. P. Act are governed by the general rule that a tenant who impugns his landlord's title renders his lease liable to forfeiture, which rule is only a particular application of the general principle of law that a man cannot approbate & reprobate."

At p. 447 the learned Judge observed:

> "The impossibility on which the deft relies is based upon the assumption that a lessor has no reversion. There seems to me to lurk in- this assumption a fallacy based on the theories of English real property law.
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> A man who being owner of land grants a lease in perpetuity carves a subordinate interest out of his own & does not annihilate his own interest. This result is to be inferred by the use of the word "lease,"

which implies an interest still remaining in the lessor. Before the lease the owner had the right to enjoy the possession of the land, & by the lease he excludes himself during its currency from the right, but the determination of the lease is a removal of that barrier, & there is nothing to prevent the enjoyment from which he had been excluded by the lease."

It is worthy of note that in the case of Abhiram v. Shyam Charan, 33 Cal. 1003, which was also a case relating to a mokurrari patta, or permanent lease, of a village in Bengal, their Lordships of the P. C. quoted with approval at p. 1014 the statement of the law made by Jenkins J. in the case of Kally Dass (ubi supra).

15. Again, in the case of Raghunath Roy v. Durga Prasad Singh, 46 I. A 158 : 47 Cal. 95; A. I. R. (6) 1919 P. C. 17 Sir John Edge delivering the judgment of the P. C. observed:

> "An expln. as to leases in perpetuity in India, given, by Jenkins J. in Kally Das v. Monmohini Dassee, 24 Cal. 440 : 1 C. W. N. 321 is instructive. It was that : Because at the present day a conveyance in fee simple leaves nothing in the grantors, it does not follow that a lease in perpetuity here has any such result . . . . The law of this country does undoubtedly allow of a lease in perpetuity . . . . A man who, being owner of land grants a lease in perpetuity carves a subordinate interest out of his own & does not annihilate his own interest. This result is to be inferred by the use of the word "lease," which implies an interest still remaining in the grantor'."

16. Lastly, I may refer to the case of Venkatesh Krishna v. Bhujaballi Annappa, 57 Bom. 194: A. I. R. (20) 1933 Bom. 97, decided by a Bench of two learned Judges of that Ct. Thai was also a case relating to a permanent lease. In that case the question arose whether a landlord can redeem a mtge. effected by his permanent tenant who dies without leaving any heirs. The learned Judges in the course of their judgment have refd. to the decision of their Lordships of the P. C. in the cases of Abhiram Goswami (ubi supra) & Raghunath Roy Marwari (ubi supra). They have also refd. to the case of Sonet Kooer (ubi supra) as also to the case of Tulshi Ram Sahu (ubi supra). The decision in the case of Sonet Kooer was distd. but following the other decisions refd. to above, it was held that:

> "Where a permanent tenant effects a mtge. the landlord has an interest in the mortgaged property within the meaning of Section 91, T. P. Act and is, therefore, entitled to redeem the mtge. when the mtgor, tenant dies without any heirs."

It was observed by Patkar J. at p. 99 (of the report in the A. I. R. 20) 1933 Bom. 97.

> "The landlord is the owner of the land & has carved out of his ownership a certain portion, viz., his right of enjoyment which he has transferred to the permanent tenant which could be determined in certain circumstances & the property would revert to the landlord. If the landlord carves out an absolute transferable interest in favour of a permanent tenant which under no circumstances would revert to the landlord it would be difficult to hold that the landlord would have right to redeem the mtge. effected by the tenant; but if on the other hand the interest carved out would revert to the landlord under certain circumstances, e. g., non-payment of rent or denial of landlord's title, the landlord would have sufficient interest to redeem such a mtge."

It would be noticed that in this case it was held by the learned Judges of the Bombay H. C. that on the extinction of the line of the permanent lessee the estate reverted to the zemindar & he had, therefore, a right to redeem the mtge. executed previously by the permanent lessee.

17. In view of the authorities discussed above, it is clear that in the case of a fixed rate tenancy or a permanent lease, on the extinction of the line of the fixed rate tenant, or of the permanent lessee, the zemindar gets back the estate & is fully competent to redeem the mtge. previously executed by the fixed rate tenant, or the permanent lessee, as the case may he.

18. In the present case, I have found that the Bhej Barars are liable to pay a proportionate part of their land revenue as entered in the khewat together with the ordinary cess; & that they possess the right to mtge. their holdings without obtaining the consent of the zamindar, but they have no right of sale. In view of these findings, it is clear that Bhej Barars of village Tindwari are in really a class of sub-proprietors and not tenants of the lands held by them. Such being their position, in my judgment, they must be assimilated to the position of a permanent lessee with a limited right of disposal. It must, therefore, be held that the holding reverts to the zamindar on the death of the Bhej Barar tenant without leaving any heirs. It follows that the zemindar opposite-parties in the present case were entitled to claim redemption of the mtge. in suit.

19. No other point was discussed before me in this case. The result, therefore, is that the appln. fails & is dismissed with costs.