

Ganga Pandey And Ors. vs Raja Ram Dubey And Ors. on 5 March, 1951

Equivalent citations: AIR1952ALL604, AIR 1952 ALLAHABAD 604

JUDGMENT

1. In these two cases a point of law arises on which two views are possible. Mortgages were made of occupancy tenancies, & it is now well settled that such mortgages are void. The mortgagors filed suits under Section 33, U.P. Agriculturists' Relief Act, for accounts on the ground that out of the usufruct of the property the whole of the mortgage debt was satisfied. A Full Bench of this Court in Ghassu v. Babu Ram, 1944 A. L. J. 1 had held that though a mortgage of occupancy holdings was void, being contrary to the provisions of the D.P. Tenancy Act, an application for redemption of such a mortgage could be made under Section 12, U. P. Agriculturists' Relief Act. The point was referred to a Bench of five Judges in Mahabal Singh v. Ram Raj, & the decision of the R.B. is reported in 1950 A. L. J. 713. It was held in that case that a usufructuary mortgage of an occupancy holding by a tenant was void but a mortgagor was entitled to bring a suit in a civil Court, for possession of the property & in such a suit he would be entitled to get possession if he paid the amount due under his mortgage, but that the provisions of Section 12, U. P. Agriculturists' Relief Act, would not apply to such a void mortgage & the mortgagor cannot, therefore, apply for redemption under the provisions of that section. At first sight that case appears to be distinguishable. Section 12, U.P. Agriculturists' Relief Act, clearly provides for the redemption of a "mortgage". There has, therefore, to be a mortgage before Section 12 can apply. Section 33, on the other hand, does not mention any mortgage. All that it requires is that there should be a debt. The relevant portion of Section 33 (1) is :

"An agriculturist debtor may sue for an account of money lent or advanced to, or paid for, him by any person or due by him to any person"

In a sense an agriculturist who has borrowed money on the security of occupancy tenancy can be said to be a debtor as whenever he wants to get back possession of the property he has to refund the amount which he had borrowed. The difficulty, however, arises when we look at Sub-section (2) of Section 33. There can be no difficulty in determining the amount still payable by the plff. to the deft. even on a void mortgage; but the second part of that sub-section provides for a decree to be passed in favour of the deft, for the amount due on an application by him. Under a void mortgage neither the mortgagor can sue for redemption nor the mortgagee can sue for his money. Even if the mortgage be void, the mortgagor remains the owner of the property & it is, therefore, that this Ct. has held that the mortgagor can claim back possession of the occupancy holdings which he had purported to mortgage, but in such a suit for possession the mortgagor can be put on terms. To give the mortgagee a decree for his money under Section 33, Sub-section (2) would amount to a recognition of the validity of the mortgage & this, to our minds, will be against the terms of the decision in Mahabal Singh's case. It, therefore, appears to be more in keeping with that decision as also the equitable principles applicable to these cases that when a mortgagor brings a suit for possession the Courts when putting him on terms would be entitled to determine the amount

payable applying the rates of interest provided for in the Debt Acts. We are, therefore, of the opinion that a suit under Section 33, U.P. Agriculturists' Relief Act, for accounts of money due under a void mortgage, being a mortgage of occupancy holdings, does not lie.

2. The result, therefore, is that both the appeals are allowed. The plffs'. suits will be dismissed. We make no order as to costs.