

Sm. Ram Piari And Ors. vs Ram Adhin And Ors. on 16 January, 1953

Equivalent citations: AIR1953ALL472, AIR 1953 ALLAHABAD 472

JUDGMENT

Sapru, J.

1. This application in revision has been referred to this Bench by a learned single Judge of this Court because, as we shall show hereinafter, this case raises a question on which there is a conflict of opinion in this Court.

2. This revision arises in the following circumstances. The plaintiffs presented an application under Section 12, Agriculturists' Relief Act for redemption of certain zamindari property mortgaged by their predecessor-in-interest. They impleaded in this application one, Ram Adhin, who is now dead and is represented in this revision by his heirs and legal representatives, as a person who they alleged had been put up fictitiously by the mortgagee and who pleaded that he was a tenant of the land in his own right and not a person put up fictitiously by the mortgagee. The trial Court framed four issues and decreed the suit holding that a sum of Rs. 1660/- was due from the mortgagors to the mortgagee & that, on payment of that sum, the mortgagors would be entitled to redeem the property. It further found that the patta in favour of Ram Adhin was not a genuine one. According to the learned Munsif, it was a farzi document. He further found that Ram Adhin had not acquired any adverse possession and was, indeed, not in adverse possession of the property at all. From that decree of the trial Court, defendant 4 went in appeal to the learned District Judge.

The learned District Judge allowed the appeal, holding that the decree against defendant 4 should be set aside. In doing so, he stated that he was following the case of -- 'Jagannath Sahu v. Srikant Dube', AIR 1949 All 589 (A). He found that there was a difference of opinion between the former and the later view of this Court and, quite rightly, he followed the later decision of this Court. Having regard to the view that he was taking, he felt it was neither necessary for him to go into the question whether the tenancy of the appellant before him was genuine or fictitious, nor to consider whether a reference to the revenue Court was permissible or not on the ground that a question of tenancy right was involved. From that decree of the learned District Judge the plaintiffs have come up in revision to this Court.

3. When the case came up before a learned single Judge of this Court, he found that the view of the learned District Judge that the decisions of this Court were not unanimous on the point which had been raised before the learned District Judge was correct. As the question, in the opinion of the learned single Judge, was of some importance, he decided to refer it to a Division Bench.

4. The question for our consideration is whether, in a suit for redemption under Section 12, Agriculturists' Relief Act, it is open to the civil Court to determine the question whether the mortgagee has put up a fictitious person as a tenant to prevent the mortgagor from obtaining possession over the mortgaged property. I We shall now proceed to consider this question. The application has been argued with commendable thoroughness by learned counsel for both the parties and the relevant law has been placed before us for our consideration.

The first case to which our attention has been invited is that of, -- 'Ram Kirpal v. Bhagwati Saran', AIR 1949 All 380 (B). In this case it was observed by Bhargava J. that in a suit for redemption under Section 12, Agriculturists Relief Act, the civil Court could determine the question whether the mortgagee had put up a fictitious person as a tenant to prevent the mortgagor from obtaining possession over the mortgaged property. The learned Judge pointed out that proceedings under Section 12, Agriculturists' Relief Act were in the nature of a suit it having been so held in the case of -- 'Jawahir v. Jadu', AIR 1949 All 120 (C). The paramount consideration with Bhargava J. appears to have been, though it is not stated by him explicitly, that it was desirable to avoid multiplicity of proceedings. He was of the opinion that the cause of action against the mortgagee was not different from the cause of action against the person who had been put fictitiously into possession of the mortgaged property. For these reasons, he thought that the question could be gone into by the Court in an application under Section 12, Agriculturists' Relief Act.

5. This decision was dissented from in a later case decided by Seth J. who, indeed, had committed himself to a different view from that of Bhargava J. in an earlier but unreported case. In another case namely, -- 'Jagannath Sahu v. Srikant Dube', reported in AIR 1949 AH 589 (A), a judgment marked by his usual lucidity. Seth J. held that the jurisdiction of a Court in deciding an application under Section 12, Agriculturists' Relief Act, whether as a Court of original jurisdiction or as a Court of appeal, was a special jurisdiction conferred upon it by a special provision of the statute and was limited within the four corners of that section. His view was that the only jurisdiction that the Court possessed in an application under Section 12, Agriculturists' Relief Act was to adjudicate upon the question of redemption and no more. According to the view of that learned Judge, it was not open to the Court to determine an adverse claim to tenancy rights by a third person whom the mortgagor alleged to have been put forward fictitiously by the mortgagee. In this case, there is a reference to an earlier but unreported decision of this Court, namely, -- 'Bhagwati Misir v. Ram Ugrah Misir', Civil Revn. No. 544 of 1945, D/- 1-10-1948 (All) (D). The learned Judge admitted that it was a part of the duty of the Court in ordering redemption to put the mortgagor in possession of the mortgaged property. But he referred to a Full Bench decision of this Court in -- 'Ram Shankar Lal v. Ganesh Prasad', 29 All 385 (E) in which it was held that the words "mortgaged property" meant that interest in specific immovable property which the mortgagor professed to transfer, whatever that interest might be. After considering that case and the definition of the "mortgaged property" in the Transfer of Property Act, he came to the conclusion that the delivery of possession of proprietary rights in zamindari property, did not require the dispossession of the tenants in actual cultivatory occupation.

Seth J. also referred to the judgment of Bhargava J. and did not agree with the view of the latter that the question of adverse claim to tenancy rights by a third person whom the mortgagor alleged to

have been fictitiously put up by the mortgagee could be entertained by the Court in proceedings under Section 12, Agriculturists' Relief Act. This decision of Seth J. was followed in the case of 'Ram Datt Singh v. Ajodhia Singh', AIR 1952 All 446 (F), by Ghulam Hasan J. That learned Judge placed reliance upon the reasoning indicated by Seth J. in his judgment referred to above.

6. The question, in our opinion, is also capable of being looked at from a somewhat different angle. We are not prepared to commit ourselves to the view that any substantive change has been introduced in the law relating to redemption by Section 12, Agriculturists' Relief Act. That Act no doubt provides a speedy and efficacious remedy for redemption of usufructuary mortgages in a certain class of cases. But, as we read Section 12, we find that no change in the substantive law relating to redemption has been introduced by it. The question, therefore, is whether under Section 60, Transfer of Property Act defendant 4 was a necessary party to the suit, whose rights must be adjudicated upon by the Court. Section 60, Transfer of Property Act provides : "At any time after the principal money has become due, the mortgagor has a right, on payment or tender, at a proper time and place, of the mortgage-money, to require the mortgagee (a) to deliver to the mortgagor the mortgage deed and all documents relating to the mortgage property which are in the possession or power of the mortgagee, (b) where the mortgagee is in possession of the mortgaged property, to deliver possession thereof to the mortgagor, and (c) at the cost of the mortgagor either to retransfer the mortgaged property to him or to such third person as he may direct or to execute and (where the mortgage has been effected by a registered instrument) to have registered an acknowledgment in writing that any right in derogation of his interest transferred to the mortgagee has been extinguished :

Provided that the right conferred by this section has not been extinguished by the act of the parties or by decree of a Court.

The right conferred by this section is called a right to redeem and a suit to enforce it is called a suit for redemption."

Section 83 directs that -

"Where the mortgagee is in possession of the mortgaged property, the Court shall, before paying to him the amounts so deposited, direct him to deliver possession thereof to the mortgagor and at the cost of the mortgagor either to re-transfer the mortgaged property to the mortgagor or to such third person as the mortgagor may direct or to execute and (where the mortgage has been effected by a registered instrument) have registered an acknowledgment in writing that any right in derogation of the mortgagor's interest transferred to the mortgagee has been extinguished."

7. The question, therefore, in our opinion, really turns upon what is meant by this right to obtain possession. We have been invited to a number of authorities on this point by learned counsel for both the parties. But it is unnecessary to go into them as, in the cases cited, this point does not seem to have been specifically raised and decided. The nearest case to our mind on this point is that of --

'Ram Chand v. Raj Hans', 3 All LJ 517 (G), where a learned Judge of this Court observed : "It is, of course, conceivable that during the term of the mortgage a right of occupancy might have been acquired by lapse of time, in which case the tenants would have been entitled to retain possession of the land....."

In the particular case before him that was not, however, the case.

8. Another case to which attention may be invited is that -- 'Sheo Shankar v. Bhup Singh', AIR 1930 All 413 (2) (H). In this case the learned single Judge held :

"The redemption of the mortgage by the plaintiffs does not put an end to the tenancy created in favour of defendants 3 and 4. It is not necessary for me to consider as to whether the position of defendants 3 and 4 is that of a statutory tenant under Section 19 of, Act 3 of 1926 (local)."

9. Reference may be made in this connection to the provisions of Section 76, Transfer of Property Act. They enable the mortgagee in possession, or as he is generally called the usufructuary mortgagee, to manage the mortgaged property as a person of ordinary prudence would manage his own property. In the course of this prudent management, it is open to a mortgagee to create leases or give the land for cultivation to tenants.

The mortgage deed in this case expressly gives the widest possible powers to the mortgagee in this respect. According to the mortgage deed, it was open to the mortgagee to let out the land for management or do whatever he liked with it. In these circumstances, handing over possession, in our opinion, can only mean such possession as the property is capable of at the time when the redemption takes place.

10. We may also refer to the observations of, a single Judge of the Calcutta High Court in -- 'Rajendra Nath v. Dinu Prodhan', AIR 1930 Cal 738 (I). The learned Judge deciding that case observes that though the mortgagor is entitled to possession under the law, there is nothing contained in any of the provisions of Sections 60 and 62 which in any way militates against the position that he was only entitled to such possession as the land was capable of in accordance with the terms of the mortgage. That being so, we do not think that in a redemption suit it is actually necessary for the Court to put the mortgagor into actual physical possession of the mortgaged property in dispute. The nature of the possession can well depend in each case upon the rights conferred by the instrument relating to the mortgage. For this reason we think it was not necessary to enquire into the question whether the transaction in this case was genuine one or not. That, of course, is a matter which can be fought out in a regular suit between the parties. What the Court was concerned with was to enable the mortgagor to have his property redeemed on payment of the amount found due to the mortgagee.

11. Learned counsel for the applicants contends that in this particular case a specific issue was raised as regards the 'farzi' character or otherwise of the patta in favour of defendant 4 opposite party 1. The learned Judge did not record a finding on the issue raised as he felt -- and in our opinion rightly

-- that he was bound by a later decision of this Court which had laid down that in a suit for redemption under S, 12, Agriculturists' Relief, Act the Court could not go into such a question. In these circumstances, the learned Judge cannot be said to have set aside the finding of the learned Munsif that the transaction was a 'farzi' one and that the defendant did not complete his title to it by adverse possession and that, indeed, he could not do so, having derived his title from the mortgagee. Having regard to this finding, we think it is possible for the applicants, on the assumption that they wish to pursue the matter further, to institute a regular suit and fight the matter out in a regular Court. In this view of the case, we are not disposed in this particular case to exercise the discretionary powers which we possess under Section 115, Civil P. C. in favour of the applicants.

12. For the reasons given above, this application in revision is dismissed. But in all the circumstances of the case we think it undesirable to make any order as to costs.

13. The stay order is discharged.