

## **Nageshwar Upadhyia And Ors. vs Chandra Charuman Tewari And Ors. on 19 February, 1952**

**Equivalent citations: AIR1952ALL698, AIR 1952 ALLAHABAD 698**

### **JUDGMENT**

Agarwala, J.

1. This is a defendants' appeal arising out of a suit for accounting under Section 33 of the U. P. Agriculturists' Relief Act.
2. In 1894 two persons Badriman and Moharman usufructually mortgaged their plots in dispute, which were at that time their sir plots, to Deoki Nandan, Nageshwar and Ram Lagan. Possession over the plots was taken by the mortgagees. In the year 1909, the equity of redemption of the mortgagors was sold at an auction sale and purchased by one Chandrabali Dube. It does not appear that the mortgagors claimed any exproprietary rights on the sale of their proprietary rights in the equity of redemption in 1909. On the 13th September 1944, the suit which has given rise to this appeal was brought by the successors of the original mortgagors against Nageshwar, Indrajit and Ganga Upadhyia sons of Ram Lagan, and Mt. Kunta Upadhyian widow of Deoki Nandan, mortgagees. The plaintiffs' case was that on account of the sale of equity of redemption in 1909, the rights of exproprietary tenancy arose in their favour and as there was an outstanding mortgage upon the property, the exproprietary tenancy right remained in abeyance and that they were still ex-proprietary tenants of the plots and entitled to redeem the mortgage. They, therefore, alleged that they were entitled to sue for accounting under Section 33 of the U. P. Agriculturists' Relief Act.
3. The defence was that no right of ex-proprietary tenancy accrued in favour of the plaintiffs and they were not entitled to sue and further that the purchaser had already recognised the mortgagees as his tenants.
4. The trial Court found that the plaintiffs were entitled to sue because exproprietary tenancy rights had accrued in their favour when the equity of redemption was sold in 1909. It also found that the whole mortgage amount has been satisfied by the usufruct of the mortgage and consequently it was declared that nothing was due under the mortgage deed. This decree was affirmed in appeal by the lower appellate Court. The defendants mortgagees have, therefore, come up in appeal to this Court.
5. During the pendency of the appeal in this Court, two of the appellants died, namely, Nageshwar appellant No. 1 and Mt. Kunta Upadhyian appellant No. 3. Their heirs were not brought on the record and one of the points raised in the appeal on behalf of the respondents was that the appeal had abated on account of the heirs of these two appellants not having been brought on the record. We are satisfied that the appeal has not abated. The suit was for accounting and the appellant No. 2

who is alive, could appeal for setting aside the decree of the Court below on behalf of the other appellants. The appeal can proceed in the absence of the deceased appellants. It is not disputed that the appellants were members of a joint Hindu family. The remaining appellant, represents the interest of the joint Hindu family.

6. The main question in the appeal is whether the plaintiffs-respondents had a right of suit. When the usufructuary mortgage of 1894 was executed, the N. W. P. Rent Act, No. XII (12) of 1881, was in force. Section 7 of that Act dealt with the accrual of expropriatory rights. It has been held by this Court that expropriatory rights did not arise under that section upon the execution of a usufructuary mortgage, vide '*Madho Bharthi v. Barti Singh*' 16 All 337 (F B).

7. When in 1909, the equity of redemption was sold, the N. W. P. Tenancy Act, No. II of 1901, had come into force. Under Section 10 of this Act, expropriatory rights arose in sir land when proprietary rights of a proprietor were transferred.

8. It may be assumed that the mortgagors whose rights were sold at auction in 1909 were proprietors even though they had transferred possession over the sir plots to the mortgagees under the usufructuary mortgage of 1894. By the execution of the usufructuary mortgage they did not cease to be proprietors. It was contended that he ceases to be a proprietor because under the Land Revenue Act the usufructuary mortgagee is considered to be a proprietor and that for purposes of Section 10 the word "proprietor" should be understood as not the holder of the equity of redemption but the holder of full proprietary rights. In support of this contention our attention was drawn to the case of '*Panna Lal v. Roshan Lal*', AIR 1927 All 109, in which Ashworth, J. made an observation to the effect that the persons entitled to the equity of redemption were not proprietors but that the proprietor was the usufructuary mortgagee. Perhaps the learned Judge had the explanation to S. 32, Land Revenue Act, in mind under which the usufructuary mortgagees or lessees are deemed to be proprietors and their names are to be shown in the register of proprietors. But the explanation holds good for purposes of Section 32 only and does not apply to Section 10 of the Tenancy Act.

9. The question, however, is whether the plots were the mortgagors' sir plots on the date of the auction sale. The burden of proving this was on the plaintiffs-respondents because they had to establish their right to sue. The evidence on the record merely shows that in the year 1292 F. before the execution of the usufructuary mortgage, these plots were entered as their sir. In the next settlement of 1323 F. corresponding to 1915-16 the plots in dispute were not recorded as sir. The plaintiffs did not prove that these plots were recorded as or were in fact sir in 1909. In this state of affairs we are not prepared to hold that the plots in dispute were recorded as sir, or but for any error or omission would have been so recorded in the year 1909. This being so, no expropriatory rights arose in favour of the plaintiffs-respondents. Their equity of redemption having been sold and they having not obtained any expropriatory rights, they would have no right to redeem the usufructuary mortgage. If they had become expropriatory tenants, then it might have been that upon the accrual of expropriatory rights in the sir plots, the usufructuary mortgage of proprietary and cultivatory rights in sir plots, which were held in proprietary right in 1894, was converted into a usufructuary mortgage not only of proprietary rights but also of the ex-proprietary rights which might have come into existence in favour of the plaintiffs-respondents. But as already stated, the

plaintiffs-respondents failed to prove that the plots were their sir plots at the time of the auction sale in 1909 and, therefore, failed to establish that any exproprietary rights accrued in their favour. They had, therefore, no right to sue for accounting.

10. The result, therefore, is that we allow this appeal, set aside the decree of the Court below and dismiss the plaintiffs' suit with costs throughout.