

Balram Misir vs Ram Ratan Misir And Ors. on 22 October, 1954

Equivalent citations: AIR1955ALL610, AIR 1955 ALLAHABAD 610

ORDER

Agarwala, J.

1. This is a plaintiff's application in revision and arises in the following circumstances: The applicant applied under Section 12, Agriculturists' Relief Act for the redemption of a usufructuary mortgage executed by the original zamindars of the plots on 14-3-1920 in favour of the father of the defendant-respondent Ram Ratan Misir for a sum of Rs. 90/-. On 13-3-1928 the original zamindars executed a perpetual lease in favour of the plaintiff-applicant, granting him the right to be in cultivatory possession of the plots in dispute generation after generation. He then applied under Section 12, Agriculturists' Relief Act for redemption of the usufructuary mortgage and alleged that the whole amount of the usufructuary mortgage had been paid up by the usufruct in excess of the legal rate or interest chargeable under the law.

The main defence of the defendants opposite parties was that the plaintiff being a mere cultivatory tenant of the plots had no interest in the mortgaged property or in the equity of redemption to sue for the redemption of the mortgage. The courts below have differed on this question, the lower appellate court holding that the plaintiff had no right to redeem. The only point, therefore, for decision in this revision is whether the court below was right in holding that the plaintiff had no 'locus standi' to sue for the redemption of the mortgage.

The lower appellate court held that the lease in favour of the plaintiff was a mere cultivatory lease and not a lease of proprietary interest, that therefore he had no right to sue for redemption. Learned counsel for the applicant has contended that the lease was a lease of proprietary rights and not of cultivatory rights merely.

The lease recites that it was perpetual, that the lessee would remain in cultivatory possession from generation to generation on payment of the fixed rent, that he may either himself cultivate the land or have it cultivated by sub-tenants, that he was entitled to sink wells or plant a grove and to transfer his rights, that he was not entitled to be ejected except for non-payment of the rent, that the landlord was not entitled to enhance the rent and that the lessee was not entitled to have the rent reduced.

No power was given to the lessee to build on the land or to create tenancies or to let out lands to tenants, that is to say, to persons who would be tenants of the lessor. This was in my opinion a perpetual, hereditary and transferable lease of cultivatory rights and it was not a lease of proprietary rights.

The main distinction between the two leases consists in this that whereas in a cultivatory lease, the lessee is entitled to cultivate himself or have the land cultivated by sub-tenants, in a proprietary lease the lessee is entitled to lease out the land to persons who become tenants of the original lessor or, in other words, who would become tenants-in-chief or and not sub-tenants merely and the lessee is given the power to collect rent from the tenants. In other words, in a proprietary lease the lessee is entitled to become an intermediary between the landlord and the tenants-in-chief.

The mere fact that the lease was permanent, hereditary and transferable is not enough to show that the lease was of proprietary rights. I, therefore, agree with the view of the lower appellate court that the lease in the present case was a cultivatory lease and not a lease of proprietary rights.

2. The question then is whether a lessee of the present type is entitled to redeem the usufructuary mortgage which had been created by the mortgagor after the execution of the mortgage. The answer to this question has to be obtained from the language of Section 91, Transfer of Property Act. That Section reads:

"91. Besides the mortgagor, any of the following persons may redeem, or institute a suit for redemption of, the mortgaged property, namely:

(1) any person (other than the mortgagee of the interest sought to be redeemed) who has any interest in, or charge upon, the property mortgaged or in or upon the right to redeem the same;

.....

The rest of the Clauses are immaterial for the present purpose. Any person having any interest in or charge upon either the property mortgaged or the right to its redemption has the right to redeem it. It is quite obvious from the context in which the words are used, that the words "property mortgaged" have reference to the entirety of the rights which the mortgagor had in the property before it was mortgaged, while the 'right to redeem' the same has reference to those rights of the mortgagor which he retains after the execution of the mortgage.

3. By the lease an interest in the property mortgaged was created in favour of the applicant and since there was an outstanding mortgage he could not exercise the rights given to him by the mortgagor except on the condition that he should get the mortgage redeemed in the first instance. The applicant, therefore, had a vital interest in the mortgaged property and in the right to redeem because as already said without redemption he could not exercise the rights conferred on him by the lease. I have no doubt in my mind that even a cultivatory lessee who has been granted a lease when a usufructuary mortgage has already come into existence has "an interest in the property mortgaged" as also in the right to redeem within the meaning of Section 91, Transfer of Property Act. Under the English, law, the lessee from the mortgagor has been held to be entitled to redeem the mortgage. -- *Tarn v. Turner*, (1888) 39 Ch. D, 456 at p. (462) (A). The word "interest" is not necessarily confined to proprietary interest but includes even the interest of a lessee, -- *Paya Matathil Appu v. Kovamel Amina*, 19 Mad 151 (B). See also -- *Gafur Usman v. Sakharan*, AIR 1940 Bom 15 (C); *Tanna Lal v.*

Rajaram', AIR 1926 Nag 496 (D); 'Kalu Singh v. Hansraj Upadhiya', AIR 1925 Oudh 270 (E); Raghunandan Prasad v. Ambika Singh', 29 All 679 (F); Sheo Saran Rai v. Jaimangal Misir', AIR 1929 All 616 (G); Tulshi Ram v. Mt. Muna Kuar', AIR 1937 Oudh 146 (H); 'Mahomed Husain Khan v. Hanuman', AIR 1918 All 392 (I).

The lessee in the present case had, therefore, sufficient interest in the property to entitle him to redeem the usufructuary mortgage.

4. It was however urged by learned counsel for the opposite parties that even though the court below erred in holding that the applicant had no right to redeem the property this was merely an error of law, which could not be corrected in the exercise of this Court's jurisdiction under Section 115, Civil P. C. This contention has no force. What has happened in the present case, is that by a wrong application of the law the court below has refused to exercise the jurisdiction vested in it to give relief to the applicant as provided for under Section 12, Agriculturists' Relief Act. This was, therefore, a case which fell under Clause (b), Section 115, C. P. C.

5. The application is therefore allowed. The decree of the court below is set aside and that of the Revenue Officer restored with costs to the applicant in all the courts.