Asa Ram and Another

Vs

Mst. Ram Kali and Another

Civil Appeal No. 56 of 1956

(P. B. Gajendragadkar, S. K. Das, T. L. Venkatarama Ayyar JJ)

21.11.1957

JUDGMENT

VENKATARAMA AIYAR J. -

The facts material for purposes of this appeal have been stated by us in our order dated February 6, 1957, and may be briefly recapitulated. The suit property is agricultural land of the extent of 10 Bighas, 13 Biswas. On July 8, 1930, the then owners of the land, Ram Prashad and Udairaj, executed a usufructuary mortgage over it and certain other properties, with which we are not concerned in this litigation, in favour of Dwaraka Prashad, Naubat Singh and Munshilal. The lands were originally held in Sir by the mortgagors, but as part of their bargain with the mortgagees, they applied to have their names removed from the Sir, and that was done by an order dated June 18, 1930, the lands being thereafter entered as Khudkasht in the names of the mortgagees. In 1941, Ram Prashad, the surviving mortgagor, filed Suit No. 132 of 1941 for redemption of the mortgage. The suit was contested, but it was eventually decreed, the amount due to the mortgagees being fixed at Rs. 1,860. Subsequent to the decree, Ram Prashad died leaving him surviving, the appellants herein, as his legal representatives. On September 6, 1945, the amount due under the mortgage was paid by them and the mortgage was redeemed. When they should to take possession of the suit properties, they were obstructed by the Govind Sahai and Bhagwan Sahai, who claimed to have been admitted as tenants by the mortgagees. Thereafter, the appellants filed the suit, out of which the present appeal arises, under s. 180 of the U.P. Tenancy Act No. XVII of 1939, hereinafter referred to as the Act, to eject them, treating them as trespassers. The defendants resisted the suit on various grounds, of which only one is now material. They claimed that they were not trespassers but hereditary tenants under the Act, and could not therefore be ejected, and Issue 2 was raised with reference to this plea.

The Revenue Officer, Meerut, who tried the suit held on this Issue that as the lands had been held by the mortgagors as Sir, and that as the mortgagees had been themselves cultivating them as Khudkasht, the defendants could not be held to be hereditary tenants, and passed accordingly a decree in ejectment in favour of the appellants, and this decree was confirmed on appeal by the Commissioner, Meerut Division. The defendants took the matter in appeal to the Board of Revenue (Second Appeal No. 96 of 1948). By its judgment and decree dated February 4, 1954, the Board held that the defendants had been put in possession by the mortgagees under a Kabuliat dated May 26, 1936, that the rent fixed under the Kabuliat, Rs. 112 per annum, was a reasonable rate of rent as the circle rate was Rs. 76-6-0, and that, therefore, the settlement was binding on the mortgagors, as it was for "prudent and economic rent". On this finding, it allowed the appeal and dismissed the suit. Against this judgment, the plaintiffs have preferred this appeal by special leave.

At the original hearing before us, the main contention pressed by the appellants was that the Kabuliat dated May 26, 1936, was not referred to in the written statement, and had not been exhibited at the trial, and that, therefore, no relief should have been granted on the basis of that document in second appeal. We, however, came to the conclusion that as the point had been raised, though not clearly in the written statement, it ought to be tried on the merits, and we accordingly remanded the case to the Board of Revenue for trial on the following two Issues :

> (1) Whether the lease deed dated May 26, 1936, by the mortgagees in favour of the respondents is true and legally valid; and
>
> (2) Whether the said lease is binding on the appellants.

At the re-hearing which we directed, the parties have adduced fresh evidence on both the Issues, and the Board of Revenue has submitted its findings thereon. On the first Issue, it has held that no lease deed had been executed by the mortgagees in favour of the lessee, but that the latter and executed a a Kabuliat in favour of the mortgagees on May 26, 1936, and that its truth had not been questioned. On the second Issue, its finding is as follows :

> "Whether the Qabuliat was binding or not depended on the question whether mortgagees had a right to settle the land and whether such settlement was binding on the mortgagors. There was nothing in the mortgage deed which would prevent the mortgagees from settling the land, even though the land was khud-kasht or even if the period of settlement was beyond the period of mortgage. The mortgagees acted in the prudent management of the property settling the land on an economic rent. The action of the mortgagees was, therefore, binding on the mortgagors. Hence the Qabuliat was binding on the appellants."

The appellants attack both these findings as incorrect. As regards the first Issue, their contention is that in view of the finding that the mortgagees had not executed any lease deed, Govind Sahai and Bhagwan Sahai could not claim the status of tenants solely on the strength of the Kabuliat executed by them on May 26, 1936, as that was merely a unilateral undertaking by them to cultivate. But the mortgagees have given evidence that they accepted the Kabuliat and received rent as provided therein. There is, therefore, no substance in this objection, which must be overruled.

The main controversy in this appeal relates to the finding on the second Issue. The appellants complain that the Board has merely repeated its previous finding on the point without reference either to the requirements of s. 76(a) of the Transfer of Property Act, or to the evidence that had been adduced by the parties at the remand. We are constrained to observe that this complaint is well-founded. The law undoubtedly is that no person can transfer property so as to confer on the transfer a title better than what he possesses. Therefore, any transfer of the property mortgaged, by the mortgagee must cease, when the mortgage is redeemed. Now, s. 76(a) provides that a mortgagee in possession "must manage the property as a person of ordinary prudence would manage it if it were his own." Though on the language of the statute, this is an obligation cast on the mortgagee, the authorities have held that an agricultural lease created by him would be binding on the mortgagor even though the mortgage has been redeemed, provided it is of such a character that a prudent owner of property would enter into it in the usual course of management. This being in the nature of an exception, it is for the person who claims the benefit thereof, to strictly establish it.

Now, the question is whether the respondents have proved that the lease of which the Kabuliat dated

May 26, 1936, is a counter-part, is one which a prudent owner would create in the management of his properties. The Board has answered the question in favour of the respondents on two grounds. One is that that the mortgage deed dated July 8, 1930, contains no prohibition against letting of the lands by the mortgagees. If there is such a prohibition, there is the authority of this Court in Mahabir Gope and others v. Harbans Narain Singh and others [[1952] S.C.R. 775] that the lease will not be binding on the mortgagors. But where there is no such prohibition, the only consequence is that the parties will be thrown back on their rights under the Transfer of Property Act, and the lessees must still establish that the lease is binding on the mortgagors under s. 76(a) of that Act.

The second ground on which the Board has based its conclusion that the lease is binding on the appellants is that the rent fixed in the Kabuliat, Rs. 112 is higher than the circle rate of Rs. 76-6-0. But this is not decisive of the matter, as what has to be decided is not whether the rent fixed compares favourable with the circle rate, but whether it is reasonable and fair, having regard to the income which a prudent owner could have got from the lands, and that will depend on proof of the net yield from the land and the ruling price of the produce at that time. The lessees have given no evidence on this point. One of the mortgagees stated that he and his brothers were themselves cultivating the hands till 1936, and that they then gave them on lease, because they were losing Rs. 50 to Rs. 100 per annum over the transaction. But he gave no particulars as to what the gross yield from the lands was, what the expenses of cultivation were, and what the price of the produce was. It is very difficult to believe that the tenants would have agreed to take over lands on the terms contained in the Kabuliat if, in fact, it was a losing concern. It is admitted by the mortgagee that the lessees made no complaint that they were working at a loss. His evidence on this point is vague and unconvincing, and we are not impressed by it. On the other hand, we have evidence which clinches the matter in favour of the appellants. It has been already stated that the Revenue officer, Meerut granted a decree in favour of the appellants for ejectment. In execution of this decree, the appellants obtained possession of the suit properties. On February 4, 1954, the Board set aside the decree of the Courts below, and dismissed the suit of the appellants. Thereupon, the respondents in execution of the decree got back possession of the properties. Then, they applied under s. 144, Code of Civil Procedure for recovery of mesne profits by way of restitution, and obtained a decree for Rs. 7,500 at the rate of Rs. 1,000 per annum. If this figure is any guide for the determination of what income could be got from the properties by a prudent owner, then it is clear beyond doubt that the rent of Rs. 112 fixed in the Kabuliat is unduly low, and it cannot be binding on the mortgagors. It is true that the decree relates to a period much later than date of the Kabuliat, and that prices had greatly risen during that period. But making all allowance for the rise, we think that the transaction is not one which a prudent owner would enter into in respect of his properties.

It was argued by Mr. Sinha for the respondents that the decree passed in restitution proceedings is under appeal before the Commissioner of Meerut, and should not, therefore, be taken into account in determining whether the rent fixed in the Kabuliat was fair and such, as would be binding on the mortgagors. But this decree was passed on the application of the respondents claiming mesne profits at the rate of Rs. 1,000 per annum, assuming that they did not ask for more, and its importance lies not so much in its being an adjudication by the Court as in its evidencing an admission by them as to the net profits which could be realised from the lands.

It would be material in this connection to refer to the character of the lands over which the lease was created. They were held in Sir by the mortgagors and after the execution of the mortgage, entered as Khudkasht in the names of the mortgagees. They were home-farm lands under the direct cultivation of the proprietors, as distinguished from lands which were under cultivation by tenants, and having regard to the special rights which the tenancy laws all over India have recognised in the owner in

respect of such lands, an act of the mortgagee which puts those rights in peril cannot, as held in Mahabir Gope and others v. Harbans Narain Singh and others (supra), be regarded as that of a prudent owner, and it requires exceptional grounds to justify it. Of that, there is no evidence. On the other hand, the uncontradicted evidence on the side of the appellants is that the lands have got facilities of canal irrigation, and are very fertile, and that it would not be economic to lease them to tenants. It also appears that the mortgagees created on the eve of redemption another lease, and that has been set aside on the ground that it was entered into with a view to defeat the mortgagors. Their action in leasing the lands to tenants on the terms set out in the Kabuliat is neither prudent nor bona fide, and on a consideration of the entire evidence, we are of opinion, differing from the Board, that the lease evidenced by the Kabuliat is not binding on the mortgagors.

It was next contended by Mr. Sinha that even if the Kabuliat was not binding on the mortgagors, the respondents would, nevertheless, be hereditary tenants under the provisions of the U.P. Tenancy Act, 1939, and that the appellants would have no right to eject them, and the referred us to the provisions of the Act bearing on the question. Section 29(a) of the Act provides that every person who was at the commencement of the Act a tenant of land shall be entitled to all the rights of hereditary tenants under the Act. Some classes of tenants are excepted from the operation of this provision, and one of them is tenants of Sir lands. Section 30(6) enacts that,

> "Notwithstanding anything in section 29, hereditary rights shall not accrue in - land transferred by a mortgage to which the provisions of the second paragraph of sub-section (5) of section 15 of the Agra Tenancy Act, 1926 apply during the period specified in that paragraph."

The provision in the Agra Tenancy Act, 1926, referred to above, runs as follows :

> "Notwithstanding anything in this section, where the property transferred by means of a mortgage of the kind specified in sub-section (5) of section 14 consists wholly of a specified areas or sir, the mortgagor may by simultaneous agreement in writing waive his exproprietary rights, and in that case the mortgaged land shall, if the mortgagor regains within twelve years of the date of the transfer possession thereof on redemption of the mortgage, resume the character of sir. In such land, statutory rights shall not accrue for twelve years from the date of transfer."

One other provision to which reference was made is the second proviso to s. 11 of the U.P. Tenancy Act, 1939, which is as follows :

> "Provided further that if on redemption of a mortgage the mortgagor regains possession of land which under the provisions of the Agra Tenancy Act, 1926, ceased to be sir and to which the provisions of the second paragraph of sub-section (5) of section 15 of that Act applied, such land shall again become his sir."

Now, the argument of the respondents is that though the suit lands were originally held in Sir, they ceased to be such when the mortgage was executed on July 8, 1930, that s. 29(a) of the Act therefore applied, that s. 30(6) and s. 11 of the Act and s. 15 of the Agra Tenancy Act, 1926, had no application, as the mortgage comprised also lands which were not sir, and as further, possession had not been regained within twelve years of the mortgage. It is accordingly contended that the respondents who were in possession as tenants on January 1, 1940, when the Act came into force, had acquired the status of hereditary tenants under s. 29(a) of the Act, and the decision in Jai Singh v. Munshi Singh [(1955) A.L.J. 834] is relied on, in support of this contention.

The error in this argument lies in the assumption that Govind Sahai and Bhagwan Sahai became by virtue of the Kabuliat dated May 26, 1936, tenants for purposes of s. 29(a) of the Act. The true scope of sub-s. (a) of s. 29 is that it posits that there is on the date of the commencement of the Act a person who is lawfully a tenant and proceeds to confer on him certain rights. It is therefore a condition precedent to the application of this provision that the person must have been admitted as tenant by a person who had the right to do so. Where, however, the person who purports to grant the lease has no authority to do so, whatever the rights inter se between the lessor and the lessee, as against the true owner the latter does not, in law, acquire the statute of a tenant, and s. 29(a) has no application to him. Thus, if A is the owner of certain lands and B trespasses on them and grants a lease to C, sub-s. (a) of s. 29 does not operate to confer any rights on C as against A. The crucial question for determination, therefore, is whether the person who claims rights as a hereditary tenant under s. 29(a) was admitted as tenant by a person who had the right to do so. An owner will of course be entitled to admit a tenant, and a mortgagee in possession would have a right to do so, either if he is authorised in that behalf by the deed of mortgage, or if the transaction is one, which is protected by s. 76(a) of the Transfer of Property Act. But where the transaction is not one which could be upheld under s. 76(a), then there is no admission of tenant by any person having authority to do so, and such a transaction though valid as between the mortgagee and the lessee, cannot form the foundation on which any rights under s. 29, sub-s. (a) of the Act could be based.

In Mahabir Gope and others v. Harbans Narain Singh and others (supra), it was held that when a usufructuary mortgagee created a lease in spite of the prohibition against letting, contained in the mortgage deed, the tenant acquired no occupancy rights under the provisions of the Bihar Tenancy Act, even though he had been in possession for over 30 years, and that the same consequences would follow if the lease was not binding on the mortgagor under s. 76(a) of the Transfer of Property Act, or if it was not bona fide. On the same principle, and on our finding that the Kabuliat dated May 26, 1936, is not binding on the appellants, we must hold that Govind Sahai and Bhagwan Sahai acquired no rights as hereditary tenants under s. 29(a) of the U.P. Tenancy Act. In Jain Singh v. Munshi Singh (supra), relied on for the respondents, it was held that "the agricultural lease granted by the mortgagee in favour of Jai Singh was a lease granted in the ordinary course of management", and that, accordingly, the tenant acquired the rights of a hereditary tenant. That decision has no application when the lease is, as held by us, not a prudent transaction binding on the mortgagors. In this view, the questions raised by Mr. Sinha on the construction of s. 30(6) and s. 11 of the Act and s. 15 of the Agra Tenancy Act, 1926, do not arise for decision.

In the result, the appeal is allowed, the decree passed by the Board is set aside, and that of the Revenue Officer, Meerut affirmed by the Commissioner, restored. The respondents will pay the costs of the appellants throughout, including the costs of the remand.

Appeal allowed.

</html