Meharban Singh

Vs

Bhagwant Singh

Civil Appeal No. 2113 of 1972

(P. N. Shinghal, E. S. Venkataramiah JJ)

17.01.1980

JUDGMENT

SHINGHAL, J. -

1. This appeal of one of the plaintiffs, by special leave, is directed against the judgment of the Madhya Pradesh High Court dated February 10, 1972, by which the suit for possession of the lands, which the plaintiffs had mortgaged, has been dismissed even though the trial Court's decree for redemption has been maintained. As the matter has come up to this Court for the second time, at the instance of the plaintiffs, it is not necessary to state all the facts for they have been mentioned in this Court's earlier decision in Meharbansingh v. Nareshsingh ((1970) 3 SCR 18 : (1969) 3 SCC 542). It will be sufficient to refer to those facts which bear on the present controversy.

2. The suit lands belonged to Samle Singh, father of appellant Meharban Singh, and Jomdar Singh who executed a registered deed of mortgage in favour of Munshi Singh on May 20, 1939, for Rs. 2,242/14. It is not disputed before us that it was usufructuary mortgage of lands within the area of the former Gwalior State. The mortgagors gave a notice to the mortgagee on May 15, 1943, for redemption of the lands but he refused to accept it. The mortgagors filed the suit for redemption on June 15, 1943. As some other persons were alleged to be in possession of the suit lands, they were also impleaded as defendants. The Madhya Bharat Zamindari Abolition Act, 1951 (Samvat 2008), hereinafter referred to as the Act, came into force on October 2, 1951, and leave was granted to the plaintiffs to amend the plaint suitably. The trial Court decreed the suit on October 10, 1958, but disallowed the relief for the grant of mesne profits. Three appeals were preferred against that judgment and decree of the trial Court. The appellate Court dismissed the appeals of the defendants. It held that the suit lands were the khud-Kasht lands of the mortgagors, and allowed the appeal of the plaintiffs for mesne profits from the date of the deposit of the mortgage money. The defendants went in second appeal to the High Court; and the plaintiffs also preferred an appeal for refusal of mesne profits from the date of the cause of action. The High Court partly allowed the defendants' appeal by its judgment dated September 27, 1962. It relied on this Court's decision in Haji Sk. Subhan v. Madhorao (1962 Supp 1 SCR 123 : AIR 1962 SC 1230 : (1962) 2 SCJ 575) and held that the plaintiffs were not entitled to possession. It dismissed the appeal of plaintiff Meharbansingh. He applied to this Court for special leave, and that led to this Court's decision in Meharbansingh case ((1970) 3 SCR 18 : (1969) 3 SCC 542) mentioned above. This Court allowed the appeal and, after considering the relevant provisions of the Act, remitted the case to the High Court for fresh decision after notice to the State on the point whether the suit lands were khud-kasht of the plaintiffs and they were entitled to remain in possession under Section 4 of the Act. The State was therefore allowed to be impleaded as a party and to file a written statement. Certain additional issues were framed by the High Court and the case was remitted to the trial Court for its findings. When it came

to the High Court again, with those findings, it once again took the view that the plaintiffs were not entitled to possession of the suit lands although they were entitled to a decree for redemption. It is against that judgment of the High Court dated February 10, 1972, that plaintiff Meharbansingh has come up to this Court by way of the present appeal.

3. The facts of this case are thus quite simple, and its fate depends upon the answer to the question whether the plaintiffs were entitled to possession of the suit lands under sub-section (2) of Section 4 of the Act.

4. The act made provision for abolition and acquisition of the rights of proprietors in villages, "muhals", "chaks" or blocks settled on the zamindari system. If therefore a person was a "proprietor" within the meaning of clause (a) of Section 2, all his proprietary rights vested in the State free of clause (a) of Section 2, all his proprietary rights vested in the State free of all encumbrances by virtue of sub-section (1) of Section 3 of the Act from the date specified for the purpose in the notification issued by the State Government. It is not disputed that the specified date for purpose of the present case was October 2, 1951.

5. The consequences of the vesting of an estate under Section 3 have been stated in Section 4. We are not concerned with sub-section (3) of that section, and it will be sufficient to refer to clauses (a) and (f) of sub-section (1) and sub-section (2) of Section 4. Clause (a) of sub-section (1) of Section 4 provides that save as otherwise provided in the Act, the following consequences shall ensue notwithstanding anything contained in any contract, grant or document or in any other law for the time being in force :

> (a) all rights, title and interest of the proprietor in such area, including land (cultivable, barren or bir), forest, trees, fisheries, wells (other than private wells), tanks, ponds, water channels, ferries, path-ways, village-sites, buts, and bazars and mela-grounds and in all sub-soil, including rights, if any, in mines and minerals, whether being worked or not, shall cease and be vested in the State free from all encumbrances;

This provision therefore had the effect of terminating the proprietary rights of a proprietor in the estate and in vesting them in the State free from all encumbrances. The legislature his taken care to deal with the fate of mortgages, in clauses (f) of Section 4, which reads as follows :

> (f) every mortgage with possession existing on the property so vesting or part thereof on the date immediately preceding the date of vesting shall, to the extent of the amount secured on such property of part thereof be deemed without prejudice to the rights of the State under Section 3, to have been substituted by a simple mortgage.

So a mortgage with possession, which existed on the date immediately preceding the date of vesting of the property, was deemed to have been substituted by a simple mortgage. That was to be so without prejudice to the rights of the State under Section 3. A mortgagee who was in possession of lands under a deed of mortgage, e.g. a usufructuary mortgagee, thus lost possession of the lands by operation of the law, and his mortgage became nothing more than a simple mortgage from the date of the vesting of the lands in the State. In other words, he lost possession of the lands which were once mortgaged with him with possession, and was left only with the normal right of a simple mortgagee to realise the mortgage money.

6. While that was the fate of the mortgagee under the Act, the fate of the mortgagor, who was once the proprietor of the lands, was even worse, for he lost his proprietary rights in the lands because of their vesting in the State under Section 3 as aforesaid and had, nonetheless, to fulfil his obligation as a mortgagor to the extent of the amount secured under the mortgage. It appears that the legislature therefore thought of alleviating the lot of those of such proprietors whose cases fell under sub-section (2) of Section 4 of the Act. The sub-section reads as follows :

> (2) Notwithstanding anything contained in sub-section (1), the proprietor shall continue to remain in possession of his khudkasht land, so recorded in the annual village papers before the date of vesting.

So only those proprietors were permitted to continue to remain in possession of their lands who had khud-kasht lands and the lands were recorded as khud-kasht in the annual village papers before the date of vesting. The expression 'khud-kasht' has been defined in clause (c) of Section 2 of the Act to mean, inter alia, land cultivated by the zamindar himself or through employees or hired labourers. Clause (a) of Section 2 of the Act states that words and expressions used in the Act, but not defined in it, shall have the same meaning as assigned to them in Qanoon Mal, Gwalior State, Samvat 1983. The expression "zamindar" has been defined in clause (13) of Section 2 of the Qanoon Mal to mean a person who has the rights mentioned in it. It is not disputed before us that the plaintiffs were zamindars under that definition, and were proprietors of their lands. It is also not disputed before us that if a person was a zamindar and cultivated the land himself or through employees or hired labourers, that would be his khud-kasht cultivation within the meaning of clause (c) of Section 2 of the Act. It would follow that if, in a given case, it was shown that a proprietor had khud-kasht land which was so recorded in the annual village papers before the date of vesting of the lands in the State, he was entitled to continue to remain in possession of those lands. This concession to the proprietor was by way of a rider to the rigorous provisions of Section 3 of the Act regarding the vesting of his estate in the State, and if a proprietor was able to establish that he was entitled to its benefit, there could be no reason why it should not be allowed to him. It may be that the provision for the vesting of the estate in the State under Section 3 and, in particular, that relating to the loss of possession of the mortgagee under clause (f) of Section 4, operated harshly on a mortgagee with possession, and he had to content himself with the other provisions in the Act for the satisfaction of the debt owed to him by the proprietor, but the law allowed him nothing more after the date of the vesting of the estate in the State. The lot of the mortgagor-proprietor was in fact far worse, for while the Act divested him of the proprietary interest in the lands held by him and vested those rights in the State, it held him liable as if his mortgage was a simple mortgage and left him only with the remedy of claiming compensation, which was itself overridden with his liability to his creditors. In the plight in which he was placed by the land reforms legislation which was the subject-matter of the Act, it was quite reasonable for the legislature to allow him, notwithstanding anything contained in sub-section (1) of Section 4 which enumerates consequences of the vesting of the estate in the State, the benefit of what sub-section (2) of that section provided, and that also on his satisfying the rigorous conditions of the sub-section mentioned above.

7. Reference in this connection may also be made to Section 37 of the Act, sub-section (1) of which provides that every proprietor who is divested of his proprietary rights shall be "a pacca tenant of the khud-kasht land in his possession and the land revenue payable by him shall be determined at the rates fixed by the current settlement for the same kind of land". In fact, when this Court examined the matter on the earlier occasion, it took notice of the above provisions of the Act and observed as follows : (SCC p. 547, para 7)

The proprietor, however, notwithstanding other consequences of the vesting in a State, is entitled to continue to remain in possession of his khud-kasht land which is so recorded in the annual village papers before the date of vesting. Now it was clearly open to the plaintiffs to show that the land in question was khud-kasht and, therefore, in accordance with Section 4 they were entitled to remain in possession thereof.

In other words, this Court took the view that while the mortgagors (appellants) fulfilled the other requirements of the law, their claim to possession of the khud-kasht lands under sub-section (2) of Section 4 of the Act had to be decided on the basis of the facts, and it was open to them to show that the lands were khud-kasht and they were entitled to remain in possession in terms of sub-section (2) of Section 4. That was the purpose why the case was remanded to the High Court and an opportunity was given to the State to appear and contest the claim of the plaintiffs on that basis.

8. As has been stated, the case went back to the High Court which in its turn, impleaded the State as a party to the suit, permitted it to file a written statement, added certain issues and sent the case to the trial Court for submitting its finding after giving the parties an opportunity to adduce further evidence. And when it went back to the High Court with the findings of the trial Court, the High Court stated as follows in its judgment under appeal :

> After impleading the State as a party, the following issue, inter alia, was remitted to the lower court for recording a finding after giving both the parties an opportunity to adduce evidence :

Whether the land in suit was recorded as khud-kasht immediately before the date of vesting.

The parties filed certain documents but did not adduce any oral evidence on the point. The trial Court has answered the issue in the affirmative. It was not disputed before me that the land was recorded as khud-kasht in the names of the plaintiffs at the time of vesting ....

> There can be no doubt, therefore, that the trial Court recorded the finding, on the basis of the evidence before it, that the suit lands were recorded as the khud-kasht lands of the plaintiffs before the date of the vesting of the estate. That was in fact not disputed in the High Court.

9. All that the High Court had then to do was to decide whether the appellant was entitled to the benefit of sub-section (2) of Section 4 of the Act, for that was the clear direction of this Court in the earlier judgment. It is not disputed before us that the plaintiff were the proprietors of the suit lands, and it cannot be disputed that as they mortgaged them with possession with defendant Munshi Singh, they were themselves in possession up to the date of the mortgage, and as it has been found as a fact that the lands were recorded as khud-kasht lands of the mortgagors in the annual village papers before the date of vesting, they were clearly entitled to a decree for possession in terms of sub-section (2) of Section 4 and there was no occasion for the High Court to examine the consequence of their losing the possession of the lands after the mortgage. It has to be appreciated that possession is always lost by the mortgagor in the case of a mortgage with possession. But when clause (f) of sub-section (1) of Section 4 gave the mortgagor the benefit of sub-section (2) of that section to claim the right to remain in possession of his khud-kasht land which was in his possession up to the date of mortgage, if the strict requirement of sub-section (2) was shown to exist, there could be no reason why it should be denied to the plaintiffs.

10. It may be mentioned in this connection that when the case came up in first appeal before the Second Additional District Judge of Bhind, he examined the statements of Himachal Singh DW 1, Ram Krishan DW 2 and Hanumant Singh DW 3. Himachal Singh was a cousin of mortgagee Munshi Singh, Ram Krishan DW 2 was a nephew of Munshi Singh and Hanumant Singh DW 3 was himself a defendant. On a consideration of their statements, the court of first appeal reached the conclusion that the mortgagors were themselves cultivating the land and thereafter the mortgagee got it cultivated through his relatives. But even if it were assumed that the mortgagee really induced tenants in the lands during the period of the mortgage, their tenure was bound to end on the redemption of the mortgage according to the ordinary law of redemption unless, of course, they could lay claim to protection under any other law. Reference in this connection may be made to the decision of this Court in Mahabir Gope v. Harbans Narain Singh (1952 SCR 775, 778 : AIR 1952 SC 205 : 1952 SCJ 292) where the law has been laid down as follows :

> The general rule is that a person cannot by transfer or otherwise confer a better title on another than he himself has. A mortgagee cannot, therefore, create an interest in the mortgaged property which will enure beyond the termination of his interest as mortgagee. Further, the mortgagee, who takes possession of the mortgaged property, must manage it as a person of ordinary prudence would manage it if it were his own; and he must not commit any act which is destructive or permanently injurious to the property; see Section 76, sub-clauses (a) and (e) of the Transfer of Property Act. It follows that he may grant leases not extending beyond the period of the mortgage; any leases granted by him must come to an end at redemption.

Care was taken to state further in that case if during the permissible settlement by a mortgage in possession with a tenant in the course of prudent management, any right sprang up in the tenant by conferral or creation by statute, that would be a "different matter altogether", for that would then be an "exception to the general rule".

11. The decision in Mahabir Gope case (1952 SCR 775, 778 : AIR 1952 SC 205 : 1952 SCJ 292) was applied or was followed in Harihar Prasad Singh v. Must. of Munshi Nath Prasad (1956 SCR 1, 14 : AIR 1956 SC 305 : 1956 SCJ 279) where it was held as follows :

As the mortgagees are neither proprietors nor tenure-holders as defined in the Act, the tenants holding under them could not claim to be raiyats as defined in Sections 5(2) and 5(3), and no occupancy rights could therefore be acquired by them under Section 21 of the Act.

That decision was again followed in Asa Ram v. Mst. Ram Kali (1958 SCR 988, 992 : AIR 1958 SC 183 : 1958 SCJ 575) also, and it was held as follows :

> 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 Section 76(a) of that Act.

Reference may also be made to Prabhu v. Ramdev ((1966) 3 SCR 676, 680 : AIR 1966 SC 1721 : (1967) 1 SCJ 60) where again reference was made to the decision in Mahabir Gope (1952 SCR 775, 778 : AIR 1952 SCJ 292) and the legal position was reiterated as follows :

> Having made these observations, however, this Court has taken the precaution to

> point out that even in regard to tenants inducted into the land by a mortgagee cases may arise where the said tenants may acquire rights of special character by virtue of statutory provisions which may, in the meanwhile, come into operation. A permissible settlement by a mortgagee in possession with a tenant in the course of prudent management and the springing up of rights in the tenant conferred or created by statute based on the nature of the land and possession for the requisite period, it was observed, was a different matter altogether. Such a case is clearly an exception to the general rule prescribed by the Transfer of Property act. It will thus be seen that while dealing with the normal position under the Transfer of Property Act, this Court specifically pointed out that the rights of the tenants inducted by the mortgagee may conceivably be improved by virtue of statutory provisions which may meanwhile come into operation. That is precisely what has happened in the present case. During the continuance of the mortgage Section 15 of the Act came into operation and that made the respondents khatedars who are entitled to claim the benefit of Section 161 of the Act.

It is therefore well settled that the normal law of mortgage would apply and tenants inducted by the mortgagee would go out of the lands on redemption of the mortgage if, in the meanwhile, law has not been shown to intervene for their protection. As, in the instant case, the law expressly gave the benefit of sub-section (2) of Section 4 to a proprietor like the appellant, the tenants inducted by the mortgagee will have no statutory right of possession. A vain attempt was made to invoke Section 41 of the Act for the protection of the tenancy rights of the mortgagees, but their learned counsel was unable to show how they could claim the benefit of that section in face of the clear provision of sub-section (2) of Section 4 of the Act. In fact all that Mr. Bhandare was able to contend on behalf of the respondents was that their case was covered by this Court's decision in Haji Sk. Subhan case(1962 Supp 1 SCR 123 : AIR 1962 SC 1230 : (1962) 2 SCJ 575). That decision formed the basis of the earlier decision of the High Court dated September 27, 1962, but this Court clearly pointed out in its earlier decision that the High Court was "in error in allowing the appeal before it and in dismissing the plaintiff-appellants' suit for possession on the authority of this Court's decision in the case of Haji Sk. Subhan (1962 Supp 1 SCR 123 : AIR 1962 SC 1230 : (1962) 2 SCJ 575). It is therefore not necessary for us to say, once again, why that decision cannot govern the present dispute.

12. In the result, we allow the appeal and restore the decree of the court of first appeal with costs.

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