Jayasingh Dnyanu Mhoprekar and Other

Vs.

Krishna Babaji Patil and Another

Civil Appeal No. 1599 (N) of 1971

(E.S. Venkataramiah, R.S. Misra JJ)

17.07.1985

JUDGMENT

VENKATARAMIAH, J. -

1. This appeal by special leave arises out of a suit for redemption. Krishna Babaji Patil (plaintiff 1) and his brother Bandu Babaji Patil were holding a half share in the lands bearing Survey Nos. 221/1, 222/2, 226/8 and 226/12 in all measuring 22 Acres and 13 Gunthas situated at Mouja Shirsi, Peta Shirola, District Sangli as permanent Mirashi tenants and were in actual possession of their share in the said lands. The lands in question were Paragana Watan Inam lands and the Watandars belonged to the family of Kokrudkar Deshmukhs. On May 20, 1947 Krishna Babaji Patil (plaintiff 1) and Bandu Babaji Patil executed a mortgage deed in favour of two persons by name Dnyanu Krishna Mhoprekar and Ananda Santu Mhoprekar (defendant 2) mortgaging their share in the above lands with possession by way of security for a loan of Rs. 1000 which they borrowed under the mortgage deed. The mortgage was for five years. The mortgagees were entitled to appropriate the income from the mortgaged property towards interest. Dnyanu Krishna Mhoprekar, one of the mortgagees, died in or about the year 1953 leaving behind him Jaysingh Dnyanu Mhoprekar (defendant 1) as his heir and the 'Karta' of his joint family. Bandu Babaji Patil, one of the mortgagors, referred to above, died in the year 1955 leaving behind him his son plaintiff 2 and two other sons as his heirs. Plaintiff 2 is the 'Karta' of that branch of the family.

2. The remaining one-half share in the lands comprised in the above survey numbers belonged to Ganu Vithu and Pandu Vithu who were members of the other branch of the family of the mortgagors. They had also mortgaged their share in favour of one Pandu Krishna who was no other than the brother of Dnyanu and the father of Ananda Santu Mhoprekar (defendant 2). Defendant 2 had, however, been given in adoption to Santu. Subsequently Ganu Vithu and Pandu Vithu sold their share in favour of the mortgagee Pandu Vithu sold their share in favour of the mortgagee and Krishna. Thus the family of the defendants was in possession of both the shares in the lands bearing Survey Nos. 221/1, 222/2 226/8 and 226/12.

3. The plaintiffs instituted the suit for redemption in Regular Civil Suit 67 of 1965 on the file of the Civil Judge, Junior Division, Islampur out of which this appeal arises after an abortive attempt to redeem the mortgage in a proceeding under Section 83 of the Transfer of Property Act, 1882 in Misc. Application 44 of 1963. The suit was resisted by the defendants. In the written statement filed by defendant 1 it was pleaded inter alia that since after the abolition of the Watans the mortgaged lands had been granted in favour of Dnyanu (the father of defendant 1 Jaysingh), Ananda (defendant 2) and Pandu Krishna (brother of Dnyanu) by the Government after receiving the occupancy price amounting to Rs. 364.81 on February 5, 1964 the right of the mortgagors and/or their legal

representatives to redeem the mortgage had become extinguished and that the grantees of the land had become absolute owners of the suit lands. After the trial, the suit was dismissed by the Civil Judge. Aggrieved by the decree of the trial court, the plaintiffs preferred an appeal against it before the District Court, Sangli in Civil Appeal 278 of 1966. In that appeal which was heard by the Assistant Judge, Sangli the decree of the trial court was reversed and a decree for redemption was passed. Under that decree the plaintiffs were directed to pay, in addition to the amount of Rs. 1000 borrowed under the mortgage deed a sum of Rs. 182.41 which was equivalent to one-half of the amount paid by defendant 1 and others in order to obtain the grant from the Government. Accordingly an appropriate preliminary decree was drawn up under Order XXXIV, Rule 7 of the Code of Civil Procedure. Aggrieved by the decree of the learned Assistant Judge, Sangli, the defendants filed a second appeal before the High Court of Bombay in S.A. 37 of 1969. The second appeal was dismissed on March 3, 1971 and the decree made by the first appellate court was affirmed. This appeal by special leave is filed against the judgment and decree of the High Court.

4. Admittedly the lands in question were comprised in a Paragana Watan. Under the Bombay Paragana and Kulkarni Watans (Abolition) Act, 1950 (Bombay Act 60 of 1950) (hereinafter referred to as 'the Act') all the Paragana Watans were abolished. Section 3 of the Act provided :

> 3. With effect from and on the appointed day, notwithstanding anything contained in any law, usage, settlement, grant, sanad or order -
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> (1) all Paragana and Kulkarni watans shall be deemed to have been abolished;
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> (2) all rights to hold office and any liability to render service appertaining to the said Watans are hereby extinguished;
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> (3) subject to the provisions of Section 4, all watan land is hereby resumed and shall be deemed to be subject to the payment of land revenue under the provisions of the Code and the rules made thereunder as if it were an unalienated land :
>
> Provided that such resumption shall not affect the validity of any alienation of such watan land made in accordance with the provisions of Section 5 of the Watan Act or the rights of an alienee thereof or any person claiming under or through him;
>
> (4) all incidents appertaining to the said watans are hereby extinguished.

5. Section 4 of the Act provided that a Watan land resumed under the provisions of the Act should subject to the provisions of Section 4-A thereof be regranted to the holder of the watan to which it appertained on payment of the occupancy price equal to twelve times of the amount of the full assessment of such land within five years from the date of the coming into force of the Act and the holder should be deemed to be an occupant within the meaning of the Bombay Land Revenue Code, 1879 in respect of such land and would primarily be liable to pay land revenue to the State Government in accordance with the provisions of the said Code and the rules made thereunder. Under the first proviso to sub-section (1) of Section 4 the occupancy price payable was fixed at six times the amount of the full assessment of such land in certain cases. The second proviso to sub-section (1) of Section 4, however, provided that if the holder failed to pay the occupancy price within a period of five years, as provided therein, he should be deemed to be unauthorisedly occupying the land and would be liable to be summarily ejected in accordance with the provisions of the Bombay Land Revenue Code. Section 8 of the Act provided that if any watan land had been

lawfully leased and such lease was subsisting on the appointed day, the provisions of the Bombay Tenancy and Agricultural Lands Act, 1948 would apply to the said lease and the rights and liabilities of the holder of such land and the tenants would subject to the provisions of the Act the be governed by the provisions of the Bombay Tenancy and Agricultural Lands Act, 1948. After the Act came into force, the Paragana Watan which comprised the mortgaged property also came to be abolished. It appears that the holders of the watan i.e. the members of the Deshmukh family did not pay the occupancy price as provided in Section 4 of the Act within the prescribed time and apply for the occupancy right. Thereupon action was taken by the State Government to grant the lands in favour of the persons who were in actual possession thereof in accordance with the directions contained in the Order passed by the State Government in G.R.R.D. No. PKA-1056-IV-L dated May 3, 1957 and in G.R.R.D. No. 2760-III-48810-L dated November 23, 1960 which directed that wherever the holder or the watandar had failed to pay the occupancy price as required by Section 4(1) of the Act before the prescribed period the lands in question should be granted in favour of the permanent Mirashi tenants who were in actual possession of such lands. In those proceedings the plaintiffs who were permanent Mirashi tenants of the half share in the lands covered by the survey numbers in question deposited in the Government Treasury on July 29, 1963 as per challan Ex. 45 Rs. 182.41 being the requisite occupancy price equivalent to 24 times the assessment requesting that the grant should be made in their favour. The defendants and Pandu Krishna who were in possession of the entire extent of land covered by the survey numbers also deposited the occupancy price claiming the whole land, that is, both the one-half share of the plaintiffs which had been mortgaged by them and the other half share which Pandu Krishna had acquired from Ganu Vithu and Pandu Vithu the other branch of the plaintiff's family. The Prant Officer instead of granting the one-half share of the land which belonged to the plaintiffs in their favour ordered that the entire extent of land measuring 22 Acres and 13 Gunthas should be granted in favour of the defendants and Pandu Krishna as they were possession of the whole land by his order dated February 5, 1964 in WTN/LGL/SR-772. He, however, ordered that Dnyanu (father of defendant 1) would get one-fourth share, Ananda (defendant 2) one-fourth share and Pandu Krishna the remaining one-half share. It may be noted that Dnyanu was dead by then. But his son defendant 1 claimed that he should be treated as the grantee in his father's place. the plaintiffs having questioned the said proceedings before higher authorities, no final decision appears to have been given yet. It appears that a final judgment in those civil proceedings is awaited by the revenue authorities as can be seen from the letter dated December 3, 1965 (Ex. 43) and the letter dated June 6, 1966 (Ex. 44) written by the Mahalkari of Shirala during the pendency of the suit which has given rise to this appeal.

6. The only question which arises for decision in this cases is whether by reason of the grant made in favour of the defendants the right to redeem the mortgage can be treated as having become extinguished. It is well-settled that the right of redemption under a mortgage deed can come to an end only in a manner known to law. Such extinguishment of right can take place by a contract between the parties, by a merger or by a statutory provision which debars the mortgagor from redeeming the mortgage. A mortgagee who has entered into possession of the mortgaged property under a mortgage will have to give up possession of the property when the suit for redemption is filed unless he is able to show that the right of redemption has come to an end or that the suit is liable to be dismissed on some other valid ground. This flows from the legal principle which is applicable to all mortgages, namely "Once a mortgage, always a mortgage". It is no doubt true that the father of the first defendant and the second defendant have been granted occupancy right by the Prant Officer by his order dated February 5, 1964 along with Pandu, the uncle of defendant 1. But it is not disputed that the defendants would not have been able to secure the said grant in their favour but for the fact that they were in actual possession of the lands. They were able to be in possession

of the one-half share of the plaintiffs in the lands in question only by reason of the mortgage deed. If the mortgagors had been in possession of the lands on the relevant date, the lands would have automatically been granted in their favour, since the rights of the tenants in the watan lands were allowed to subsist even after the coming into force of the Act and the consequent abolition of the watans by virtue of Section 8 of the Act. The question is whether the position would be different because they had mortgaged land with possession on the relevant date.

7. At this stage it is appropriate to refer to Section 90 of the Indian Trusts Act, 1882 which reads as under :

> 90. Advantage gained by qualified owner. - Where a tenant for life, co-owner, mortgagee or other qualified owner of any property, by availing himself of his position as such, gains an advantage in derogation of the rights of the other persons interested in the property, or where any such owner., as representing all persons interested in such property, gains any advantage, he must hold, for the benefit of all persons so interested, the advantage so gained, but subject to repayment by such persons of their due share of the expenses properly incurred, and to an indemnity by the same persons against liabilities properly contracted, in gaining such advantage.

8. Illustrations (b) and (c) to Sections 90 of the Indian Trusts Act, 1882 read thus :

> (b) A village belongs to a Hindu family. A, one of its members, pays nazrana to Government and thereby procures his name to be entered as the inamdar of the village. A holds the village for the benefit of himself and the other members.
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> (c) A mortgages land to B, who enters into possession. B allows the Government revenue to fall into arrear with a view to the land being put up for sale and his becoming himself the purchaser of it. The land is accordingly sold to B. Subject to the repayment of the amount due on the mortgage and of his expenses properly incurred as mortgagee, B holds the land for the benefit of A.

9. An analysis of Section 90 of the Indian Trusts Act, 1882 set out above shows that if a mortgagee by availing himself of his position as a mortgagee gains an advantage which would be in derogation of the right of a mortgagor, he has to hold the advantage so derived by him for the benefit of the mortgagor. We are of the view that all the conditions mentioned in Section 90 of the Indian Trusts Act, 1882 are satisfied in this case. The mortgagees i.e. Dnyanu, the father of defendant 1 and Ananda the second defendant could each get one-fourth share in the total extent of land measuring 22 Acres and 13 Gunthas only by availing themselves of their position as mortgagees. The grant made in their favour in an advantage traceable to the possession of the land which they obtained under the mortgage and that the said grant is certainly in derogation of the right of the mortgagors who were the permanent Mirashi tenants entitled to the grant under the Government orders referred to above. The defendants could not have asserted their right to the grant of the land when the plaintiffs had deposited the requisite occupancy price well in time. It is seen that the mortgagees obtained the grant in their favour by making an incorrect representation to the Government that they were permanent Mirashi tenants although they were only mortgagees. Section 90 of the Indian Trusts Act, 1882 clearly casts an obligation on a mortgagee to hold the rights acquired by him in the mortgaged property for the benefit of the mortgagor in such circumstances as the mortgage is virtually in a fiduciary position in respect of the rights so acquired and he cannot be allowed to make a profit out of the transaction. The defendants are, therefore, liable to surrender the advantage

they have derived under the grant in favour of the plaintiffs even if the order of grant has become final before the Revenue authorities, of curse, subject to the payment of the expenses incurred by then in securing the grant. The decree of the first appellate court accordingly has directed that Rs. 182.41 should be paid by the plaintiffs to the defendants along with the mortgage money.

10. It was, however, argued on behalf of the appellants before us that since Pandu Krishna, the other grantee, has not been impleaded no relief can be granted to the plaintiffs. There is no merit in this contention because the order of the Prant Officer makes the grant in specific shares. Dnyanu, the father of defendant 1 and Ananda (defendant 2) are granted one-fourth share each and only the remaining one-half share is given to Pandu Krishna. We are concerned in this case only with the half share granted in favour of the mortgagees. This decree relates only to that one-half share which had been mortgaged. Pandu Krishna, the other grantee, can have no interest in the one-half share which is the subject matter of these proceedings. This contention is, therefore, rejected.

11. The High Court was, therefore, right in affirming the judgment of the first appellate court. The appeal fails and it is dismissed with costs.

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