

Gaya Prasad

Vs

Surendra Bahadur Singh (Dead) By Lrs. and Others

Civil Appeals Nos. 1381 and 1382 of 1976

(G. L. Oza, V. Khalid JJ)

05.03.1987

JUDGMENT

V. KHALID, J. (Concurring) -

1. I agree with my learned brother that the appeal has to be allowed. The Act involved in this appeal is an anachronism today because it was enacted to benefit the landholder and zamindars. On a consideration of the facts and circumstances, I feel that equity is in favour of the appellant more than the respondents. The respondents made an application to the Collector, under Section 4 of the Act which was transmitted to the Special Judge, under Section 6 of the Act. He exercised his option under Section 24 and prayed for exemption of the house which is the subject matter of this appeal. This application was allowed as early as March 26, 1943. It was long thereafter, on May 4, 1958, that he entered into an agreement to sell the house to the appellant herein. Subsequently he made an application to include this house also in the properties to be sold in the proceedings under the Act. The appellant on being informed of this, objected to the request. The Collector rejected this request by his order dated June 23, 1961. From this order it is seen that there was an earlier order dated June 14, 1945, by which permission to sell the house was rejected by the Deputy Commissioner. There was a mortgage on the property, but before the agreement a decree on the strength of the mortgage had been passed. Under these circumstances, it comes with little grace from the respondents to contend that the agreement to sell, even granting that it would come within the mischief of Section 7, cannot be accepted. Since the mortgage had been extinguished by its merger into a decree, the charge under it has disappeared and in the proceedings under the Act only a simple decree can be passed. What is more, an order produced before us, dated May 7, 1976 shows that no proceedings are pending under the Act at present. In view of the finality of the matter, we do not propose to go into the questions of law regarding public policy, section 7 contemplated and the authorities bearing on it.

2. Under these circumstances, the judgment of the High Court, in my opinion, is more (sic not) is accord with fair play and justice. The appeal has to be allowed as indicated by my learned brother.

3. However, I am of the view that the respondent has to be compensated in some measure by way of equity. I direct the appellant to pay a sum of Rs. 20,000 to the respondent, taking into account the fact that the property would have escalated in price many time by now. My learned brother had agreed for this direction.

4. Since we are allowing the main appeal, no orders are necessary in the other appeal.

OZA. J. - These appeals have been filed after obtaining leave of this Court against the judgment

passed by the High Court of Allahabad, Lucknow Bench in Civil Second Appeal No. 49 of 1971 decided on April 13, 1976.

6. The facts necessary for the disposal of this appeal are that the appellant filed a suit for specific performance of the contract of sale of the house in dispute situated in Pratapgarh (Uttar Pradesh). The agreement was made by the respondent in favour of the appellant on May 4, 1958 for sale of the house in dispute for the consideration of Rs. 6,000 within 5 years. Rs. 1500 was paid as the earnest money by the appellant to the respondent on the date of agreement. Further a sum of Rs. 2510 was paid on July 7, 1958 and on December 6, 1959 a further sum of Rs. 10 was paid. It appears that this house was earlier mortgaged in favour of Thakur Aditya Prasad Singh by the predecessors of the respondent. The respondent Surendra Bahadur Singh filed an application under Section 4 of the U.P. Encumbered Estates Act (U.P. Act 25 of 1934) ('Act' for short) to the Collector and Collector had transmitted the same to the Special Judge under Section 6 of the Act. Subsequently the respondent-debtor had submitted an application to the Collector that the disputed house may not be sold in the proceedings under the Act and may be exempted as provided in Section 24 of the Act. On March 26, 1943 the Collector in exercise of powers under Section 24 exempted this house from sale in the proceedings under the Act and it is thereafter that the agreement was entered into. It appears that subsequently the debtor-respondent again wanted this house to be included in the property for sale in the proceedings under the Act to which the present appellant objected and this objection was disposed of by the Collector by his order dated June 23, 1961 reiterating the position that by order dated March 26, 1943 this house has been exempted from the proceedings under this Act and therefore that order cannot be reopened. This order dated June 23, 1961 also refers to an order dated June 14, 1945 wherein permission to sell this house which was sought by the respondent under Section 7 of the Act was rejected by the Deputy Commissioner. It appears that the mortgage which was executed by predecessors of the respondents in favour of Aditya Prasad Singh was also considered as a claim under Section 14 of the Act and ultimately a decree was passed in favour of Aditya Prasad Singh by the Special Judge under the Act. As this decree was passed under clause (7) of Section 14 in view of Section 18 of the Act it only remained a money decree and the rights of mortgagee came to an end. The present appellant therefore pressed the respondent for execution of the sale deed in pursuance of the contract and ultimately filed a suit for specific performance of the contract for Sale dated May 2, 1958. Trial court decreed the suit and on appeal the first appellate court also maintained the decree but on second appeal the High Court on the basis of the provisions contained in the Act came to the conclusion that as permission to sell was refused under Section 7 and in view of the prohibition under Section 7 of the Act the contract of sale would be hit by Section 23 of the Contract Act and in this view of the matter the High Court interfered in second appeal and set aside the decree passed in favour of the appellant. Aggrieved by this the present appeal has been filed.

7. Learned counsel for the appellant contended that the scheme of the Act indicates that in order to protect landholders of their indebtedness and consequent insolvency this Act was enacted and it was provided that whenever the landholder made an application under Section 4 the Collector will pass an order under Section 6 and send the matter to the Special judge. Under the scheme of the Act the Special Judge will consider various claims and determine the liability of the debtor. But if these liabilities are determined they all will be money decree and the earlier rights of creditors will come to an end. It appears thereafter the properties will be put to sale and the debtors may be paid on the basis of priorities i.e. public debts first, then those which were secured debts and thereafter other debts. It was contended that in the scheme of this Act Section 24 provided that the landholder may keep on residential house with furniture and belongings free from all encumbrances which will not be sold in order to discharge the debts and it was competent for the Collector when a application has

been made under Section 4, to exempt such a house under Section 24 of the Act.

8. It was contended that such an application was made by the respondents under Section 24 on the basis of which by orders dated March 26, 1943 the Collector exempted the house in dispute from sale during the proceedings under this Act and this order was reiterated on June 23, 1961.

9. It was further contended that although permission was rejected for sale of the house under Section 7 on June 14, 1945 but it was contended that the prohibition under Section 7 will not apply to an agreement for sale. It was also contended that as the proceedings before the Special Judge have come to an end the objection pertaining to Section 7 for passing of a decree under Specific Relief Act for specific performance will not be available. Learned counsel placed reliance on an order dated May 7, 1976 which was filed in this Court which clearly stated that on this date i.e. May 7 1976 no proceedings are pending and they are over under Section 44 of the Act and on this basis it was contended that to a decree for specific performance objection under Section 7 will not be available to the respondents.

10. Learned counsel for the respondents on the other hand contended that this document which is an order from the court of Collector, Allahabad dated May 7, 1976 on which reliance has been placed by the learned counsel for the appellant has been filed in this Court for the first time and this order itself shown that this was after the judgment of the High Court as the High Court judgment is dated April 13, 1976 whereas this order has been obtained which is dated May 7, 1976 and on this basis it was contended that it could not be said that no proceedings are pending under the Act and the last order passed was dated July 7, 1975.

11. It was also contended that although under Section 24 it is possible for a debtor to obtain an order from the Collector exempting one house from the proceedings under the Act but it was contended that this exemption was nothing but exemption from attachment and sale which otherwise would follow under the scheme of the Act after the claims are determined under Section 14. Learned counsel after examining the scheme of the Act contended that in fact what is contemplated under Section 24 is to allow a debtor-land-holder to have a house and furniture for his residence and use so that he may live in a respectable manner. This, as is not disputed, was in fact the purpose of the Act as indicated by the Objects and Reasons and it is with that view that Section 24 was enacted. It was contended that if a house was exempted under Section 24 it would not be consistent with the scheme of the Act to permit the debtor-landholder to seek an exemption under Section 24 and then sell away the house and pocket the money to defeat the creditors. It was therefore contended that that is why section 7 provides that no property could be sold except with permission under Section 7. It was contended that the language of Section 7 sub-clause (4) is wide enough and even an agreement to sell which created rights in immovable property will be affected by the provision of Section 7.

12. Learned counsel by reference to the various provisions and especially to the provisions contained in Section 43 and 44 contended that even when the proceedings under this Act are quashed or an application is dismissed the rights of the creditors are revived. According to the learned counsel, it could not be said that the proceedings have come to an end and in this view of the matter it was contended that the High Court was right in allowing the appeal and setting aside the decree passed.

13. Learned counsel appearing for the appellant further contended that although the order from the Collector has been filed in this Court but it was filed long ago and if the respondents wanted to challenge they could have filed any other order from the Collector. As regards the argument that

under Section 24 a house can be exempted for use of the debtor-landholder and it could not be just a device to obtain exemption, sell the property and pocket the amount to the detriment of the creditors but it was contended that under these circumstances if the debts remain to be satisfied still the sale proceeds can be kept in deposit for being distributed to the creditors. On this basis it could not be said that a decree for specific performance cannot be passed. Learned counsel alternatively contended that even if it is in dispute as to whether the proceedings under the Act are still pending when the provisions contained in Section 7 are attracted the decree for specific performance could be passed subject to a permission under Section 7. Learned counsel for the appellant placed reliance on the decision of this Court in *Mrs. Chandnee Widya Vati Madden v. C. L. Katial* ((1964) 2 SCR 495 : AIR 1964 SC 978). Learned counsel for the respondents however placed reliance on the decisions of this Court in *Behram Khurshed Pesikaka v. State of Bombay* ((1955) 1 SCR 613 : AIR 1955 SC 123 : 1955 Cri LJ 215), *Bashesar Nath v. CIT* (1959 Supp 1 SCR 528 : AIR 1959 SC 149), *Murlidhar Aggarwal v. State of U. P.* ((1974) 2 SCC 472), *Lachoo Mal v. Radhey Shyam* ((1971) 3 SCR 693 : (1971) 1 SCC 619 : AIR 1971 SC 2213) and also on *Raj Narain Jain v. Firm Sukha Nand Ram Narain* (AIR 1980 All 78). Facts are not in dispute. It is also not disputed that U.P. Encumbered Estates Act, 1934 was brought in to give relief to a class of debtors particularly landholders and the Act provides for a scheme for settlement of debts without filing of an insolvency petition. The authorities referred to by learned counsel do not throw any light on the questions involved.

14. Section 4 of this Act provides for making of an application to attract the provisions of this Act and once an application under this section is made, the proceedings are said to have commenced under the provisions of this Act. Section 6 provides for passing of an order and transmission of the application to the Special Judge who has been conferred jurisdiction under this Act to proceed with proceedings. Section 7 of this Act provides :

(1) When the Collector has passed an order under Section 6 the following consequences shall ensue :

(a) all proceedings pending at the date of the said order in any civil or revenue court in Uttar Pradesh in respect of any public or private debt to which the landlord is subject, or with which his immovable property is encumbered, except an appeal, review or revision against a decree or order, shall be stayed, all attachments and other execution processes issued by any such court and then in force in respect of any such debt shall become null and void, and no fresh process in execution shall, except as hereinafter provided, be issued :

(b) no fresh suit or other proceedings other than an appeal, review or revision against a decree or order, or a process for ejectment for arrears of rent shall, except as hereinafter provided, be instituted in any civil or revenue court in Uttar Pradesh in respect of any debts incurred before the passing of the said order but if for any reason whatsoever such a suit or proceeding has been instituted, it shall be deemed to be a proceeding pending at the date of the said order within the meaning of clause (a).

Provided that when a landlord has executed a usufructuary mortgage in respect of any of his land and is in possession of that land as a thekedar of the mortgagee, no fresh process shall issue for his ejectment from that land for arrears of the theka rent.

(2) After the passing of the said order and until the application is dismissed by the

Special Judge under sub-section (3) or Section 8 or proceedings under this Act are quashed under Section 20 or until the Collector has liquidated the debt under Chapter V, no decree obtained on the basis of any private debt incurred by the landlord after the passing the order under Section 6 shall be executed against any of his property, other than proprietary rights in land, which has been mentioned in the notice under Section 11 and the landlord shall not be competent without the sanction of the Collector to make an exchange, or gift of, or to sell, mortgage or lease, any of that property.

(3) After the passing of the order under Section 6 and until the Collector has declared in accordance with Section 44 that the landlord has ceased to be subject to the disabilities of this sub-section or until the passing of the order by the Special Judge, referred to in sub-section (2) of Section 44 no decree obtained on the basis of any private debt incurred after the passing of the order under Section 6 shall be executed against any of the landlord's proprietary rights in the land mentioned in the notice published under Section 11 and the landlord shall not be competent, without the sanction of the Collector, to make any exchange or gift of, or to sell, mortgage or lease those proprietary rights, or any portion of them.

(4) Any transfer made in contravention of the provisions of this section shall be void.

Much of the controversy in the present matter pertains to the effect of Section 7. Sub-clause (1) of this section indicates the consequences that will follow when an order under Section 6 has been passed by the Collector. Sub-clause (2) speaks of restriction on the landlord about exchange, gift, sale, mortgage or lease of any of the properties without the sanction of the Collector. It is not in dispute that after an application under Section 4 was filed by the respondent debtor when (sic) an application under Section 24 was filed for exemption in respect of the house in dispute and the order was passed on March 26, 1943. It is therefore plain that on the day i.e. May 4, 1958 when the agreement was entered into an application under Section 6 and it is not disputed that on the day on which the agreement was made the provisions of Section 7 were attracted and the limitations put on the power of the landlord under Section 7 were applicable to the respondent-landlord in this case. Sub-clauses (2) and (3) of Section 7 provided for restrictions put on the power of the landlord and the restriction is in respect of exchange, gift, sale, mortgage and lease. It is clear that the restrictions pertain to exchange, gift, sale, mortgage and lease and it was contended by learned counsel for the appellant that agreement to sell is not covered by any one of these restrictions and therefore the agreement which was entered into in 1958 could not be said to be bad in law as the High Court appears to have held whereas an attempt was made by learned counsel for the respondents to contend that as the agreement to sell creates some rights in immovable property it will be covered within the language of sub-clause (2) and (3).

15. It is not disputed that at the time when this agreement was entered into the proceedings under this Act were pending and the provisions of Section 7 are attracted. A plain reading of the provisions contained in sub-clause (2) and (3) clearly go to show that agreement to sell has not been included in the restriction which have been imposed on the right of debtor. The terms used clearly go to show that the prohibition is pertaining to the transfer (where rights in immovable property are transferred.) Admittedly an agreement to sell is not a transfer of any rights in immovable property

and therefore the agreement could not be held to be bad in law.

16. Section 24 of this Act provides :

The Collector shall then realise the value of such of the debtor's property other than proprietary rights in land, but including proprietary rights in land in the areas which on the 7th day of July, 1949, were included in a Municipality or a Notified Area under the provisions of the U.P. Municipalities Act, 1916, or a cantonment under the provisions of the Cantonment Act, 1924, or a Town Area under the provisions of the U.P. Town Areas Act, 1914, as shall have been reported by the Special Judge under the provisions of sub-sections (2) of Sections 19 to be liable to attachment of sale :

Provided that the Collector before passing orders under this section of the sale of any property shall hear any objection which the debtor may have to make to the sale of that property.

Provided also not with standing anything in any other section of this Act, the Collector may, if he considers fit, sell, along with any building disposed of under this section, the proprietary rights of the applicant in any land occupied by such building or appurtenant thereto :

Provided further that the Collector shall leave the debtor at least one residential house and necessary furniture thereof if -

(a) the debtor owns such house and furniture and desires to retain it, and

(b) such house and furniture is free from any mortgage or charge

(2) The amount so realized shall be expended by the Collector in discharging the debts in order of priority.

(3) For the purpose of execution against property outside Uttar Pradesh the decrees passed by the Special Judge shall be deemed to be decrees in favour of the Collector.

(4) For realising the value of the debtor's property under this section the Collector may exercise all the powers of a civil court for the execution of a decree.

The proviso to this section with sub-clauses (a) and (b) clearly indicated that Collector has the authority to exempt one residential house and necessary furniture and the exemption for such a house and furniture once granted will be free from any mortgage or charge.

17. Much emphasis was laid on the terms of the order passed by the Collector on June 23, 1961 wherein it was observed that "house in question should remain exempted from attachment and sale" and it was contended by the learned counsel for the respondents that this exemption only pertains to its exemption from attachment and sale. The original order dated March 26, 1943 only talks of the house and personal effects to be excluded. We have no hesitation in saying that it is not the language of the order which is material but the language of the provision under which the order is material but the language of the provision under which the order was made as it is not disputed that an order under Section 24 exempting the house in dispute was passed on March 26, 1943 which was only reiterated in the order dated June 23, 1961. It is therefore clear that once this order is passed the house in question was free from any mortgage or charge.

18. It was contended by the learned counsel for the respondents that the scheme of the Act clearly shows that what was provided in Section 24 was only with a purpose to allow the debtor to have a residential house with necessary furniture to permit him to have a respectable living but it did not mean that the debtor was at liberty to sell away this property and pocket the money to defeat the creditors and on this basis an attempt was made to contend that during the pendency of the proceedings the rights of a mortgagee survived in spite of an order passed under Section 24 or in spite of an order under clause (7) of Section 14 having been passed.

19. So far as Section 24 is concerned and the effect of the order under this section is concerned it is clear that once an order exempting the property under this provision is passed by Collector the house and furniture about which such an order is made is free from any mortgage or charge and therefore it leaves no doubt that after the order under Section 24 having been passed in the present case i.e. on March 26, 1943 the mortgage which was in existence before the proceedings under this Act commenced ceased to be effective and this property was free from any mortgage or charge.

20. Section 14 clause (7) provides for determination of debts. It reads as under :

(7) If the Special Judge finds that -

(a) no amount is due, he may pass a decree for cost in favour of the landlord;

(b) an amount is due to the claimant he shall -

(i) pass a simple money decree, having regard also to the provisions of Section 3 of the U.P. Zamindars Debt Reduction Act, 1952, for such amount together with any costs which he may allow in respect of the proceedings in his court and of proceedings in any court stayed under the provisions of the Act together with pendente lite and further interest at a rate not higher than 4 1/4 per cent per annum; and

(ii) also certify the amount, if any, of such decree which in accordance with the provisions of Section 8 of the U.P. Zamindars Debt Reduction Act, 1952, is not legally recoverable otherwise than out of the compensation and rehabilitation grant payable to the landlord :

Provided that no pendente lite interest shall be allowed in the case of any debt where the creditor was in possession of any portion of the debtor's property in lieu of interest payable on such debt for the period he was so in possession.

Sub-clause (b) of this clause (7) clearly provides that the amount which is found to be due to the claimant, a money decree shall be passed and what will be the effect of this money decree having been passed under clause (7) of Section 14 has been provided in Section 18. Section 18 reads :

Subject to the right of appeal or revision conferred in Chapter VI, the effect of a decree of the Special Judge under sub-section (7) of Section 14 shall be to extinguish the previously existing rights, if any, of the claimant, together with all rights, if any, of mortgage or lien by which the same are secured and, where any decree is given by the Special Judge to substitute for those rights a right to recover the amount of the decree in the manner and to the extent hereinafter prescribed :

Provided that secured debts, which, in accordance with the provisions of Section 8 of

the U.P. Zamindars Debt Reduction Act, 1952, are not legally recoverable otherwise than out of the compensation and rehabilitation grant payable to the landlord shall be recoverable from the compensation and rehabilitation grant aforesaid as though the security had not been extinguished.

21. Sub-clause (7) of Section 14 uses the phrase "pass a simple money decree" and in our opinion this terminology "simple money decree" has been used with some significance and if any doubt is left it has further been cleared by providing Section 18. This provision clearly indicated that once a decree has been passed by the Special Judge under sub-section (7) of Section 14 the effect of it will be to extinguish the previously existing right in any of the claims or mortgage and the decree passed by the Special Judge will substitute all those rights. It is therefore clear that once the claim of a creditor even if he is secured is determined by the Special Judge under Section 14 sub-clause (7) and a money decree is passed the rights of the creditors even if it was under mortgage come to an end although the scheme of the Act indicates that such debts which are secured may get priority over the debts which were not secured and on the basis of these provisions and the provisions contained in Section 44 an attempt was made by learned counsel for respondents to contend that although the rights of the mortgagee may be extinguished but so long as the proceedings are pending they are not completely extinguished as in the event of quashing of the proceedings the scheme of the Act indicated a revival of such rights. But it could not be doubted that so long as they are not revived they come to an end and we have no hesitation in view of Section 24, sub-section (7) of Section 14 read with Section 18 that this house in dispute at the time when the suit was filed for specific performance of the contract was free from all encumbrances and there was no mortgage or charge against this property.

22. It is therefore clear that what learned counsel for the respondents contended on the basis of provisions contained in Sections 43 and 44 only is that in cases where proceedings are quashed under Section 20 the rights of the creditors in they were of a mortgagee may revive and the time spent in these proceedings may be exempted but it is nobody's case that the proceedings have been quashed under Section 20 and admittedly the respondent during these proceedings at no time has not (sic) raised a plea that the proceedings have been quashed under Section 20. On the contrary the order that has been put on record by the learned counsel for the appellant clearly goes to show that the proceedings have been concluded and therefore question of revival does not arise.

23. Learned counsel for the respondents vehemently contended that the scheme of the Act does not mean that when the house which has been exempted only for the purposes of living of the debtor, could not be sold away and money pocketed defeating the claims of the creditors. Even if this argument is accepted it does not carry the matter further except that if any claim is still remaining to be settled the sale proceeds which the respondent-debtor will get out of the decree for specific performance could be kept apart for distribution to the creditors.

24. It was also contended that sub-section (4) of Section 7 quoted above clearly provides that any transfer in contravention of provisions of this section will be void and therefore even a transfer under a decree would be void if it is in contravention of the provisions of Section 7 whereas learned counsel for the appellant frankly conceded that although as the order dated May 7, 1976 discloses that the proceedings are over under this Act and therefore effect of Section 7 has come to an end and a decree for specific performance for sale could be passed without any objection under Section 7 but even if the proceedings are pending, the decree could be subject to a permission from the Collector under Section 7. Although it was vehemently contended by the counsel for the appellant that if the respondent wanted to challenge the order dated May 7, 1976 which was filed by the appellant in this

Court clearly indicating that the proceedings are over under Section 44 of the Act and it was open to them to file any further order indicating that the proceedings are still pending and as no such order has been filed it has to be accepted that the proceedings are over and the limitation put on transfer by Section 7 has ceased to be effective.

25. The language of Section 7 as quoted above is clear enough that this is effective only during the pendency of the proceedings under this Act and the order dated May 7, 1976 filed by the appellant in this Court clearly goes to show that no proceedings are pending and the case has been consigned to the record. There is nothing to indicate that any proceedings are pending nor anything to indicate that any claim of any creditor still remains to be satisfied. In the absence of any proceedings pending the effect of clause (4) of Section 7 will be of no avail. In our opinion therefore a decree for specific performance could be passed. The High Court therefore was in error in allowing the appeal and setting aside the judgment and decree passed by the learned courts below. It is no doubt open to the respondent to approach the executing court to retain the sale proceeds if they are in a position to satisfy the court that any part of the claim still remains to be satisfied. The appeal is therefore allowed, the judgment and decree passed by the High Court is set aside. Instead the decree passed by the trial court and maintained by the appellate court is restored. In the circumstances of the case, parties are directed to bear their own costs.

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