

Ram Adhar Singh (Dead) Through Lrs. and Others

Vs

Bansi (Dead) Through Lrs. and Others

Civil Appeal No. 188 Of 1974

(A. P. Sen, V. B. Eradi JJ)

06.03.1987

JUDGMENT

SEN, J. -

1. The short question involved in this appeal on certificate is whether a Division Bench of the Allahabad High Court was right in following the decision of an earlier Division Bench in Barhu Singh v. Kharpattu (1956 All LJ 87 : AIR 1956 All 436 : 1956 All WR 336), which was later reiterated in Samharu v. Dharamraj Pandey (1969 All LJ 943 (FB) : AIR 1970 All 350 : 1969 All WR 714), that a usufructuary mortgage of an occupancy holding was not valid as a mortgage with all its incidents and subject to the provisions of law relating to usufructuary mortgages, but was valid only to the limited extent that the mortgagee was entitled only to retain possession of the land mortgaged till there was repayment of the mortgage debt.

2. The question arose in proceedings in a suit under Section 202 of the U.P. Zamindari Abolition and Land Reforms Act, 1951 for possession on payment of the mortgage money brought by respondent 1 Bansi claiming himself to be an heir of the original mortgagors Sheo Balak and Ram Phal, on the ground that the appellants who were the successors-in-interest of the original mortgagee Bhairo Singh, had become asamis and therefore liable to ejection under Section 21(1)(d) of the Act. The suit was resisted by the appellants on the ground inter alia that the usufructuary mortgage deed dated July 21, 1869 having been executed when the Recovery of Rents (Bengal) Act, 1859 was in force, was a valid one and therefore the right of redemption stood extinguished in the year 1929 as a result of which the mortgagors Sheo Balak and Ram Phal, the predecessors-in-interest of the respondents lost all their right, title and interest in the land and thus the appellants could not be treated as asamis liable to ejection under Section 21(1)(d) of the Act but had indeed become sirdars. That defence of theirs weighed with the Judicial Officer, Varanasi who by his judgment dated May 11, 1960 dismissed the plaintiff's suit. On appeal by the respondents, the Additional Commissioner, Varanasi Division, Varanasi by his judgment dated October 10, 1960 decreed the plaintiff's suit holding that the usufructuary mortgage of occupancy rights was valid only in a qualified sense in that the appellants were entitled to retain possession until the mortgage debt was paid. The learned Additional Commissioner observed that no tenancy law right from the Recovery of Rents (Bengal) Act, 1859 to U.P. Tenancy Act, 1939 ever made the occupancy rights transferable. The appellants preferred an appeal to the Board of Revenue but Shri S. N. Mitra, ICS, Judicial Member, Board of Revenue by his judgment and order dated April 25, 1963 dismissed the appeal. The appellants moved the High Court under Article 226 of the Constitution but a learned Single Judge by his judgment dated February 28, 1966 dismissed the writ petition and upheld the order of the Board of Revenue. On appeal, a Division Bench following the decisions in Khiali Ram v. Nathu Lal (ILR (1893) 15 All 219 (FB)), Barhu Singh v. Kharpattu (1956 All LJ 87 : AIR 1956 All 436 :

1956 All WR 336) and Samharu v. Dharamraj Pandey (1969 All LJ 943 (FB) : AIR 1970 All 350 : 1969 All WR 714), held that the transaction of the present kind was not a mortgage properly so-called but yet was a mortgage within the meaning of Section 21(1)(d) of the Act.

3. Shri Juneja, learned counsel for the appellants, who are successors in-interest of the original mortgagee Bhairo Singh strenuously assails the correctness of that view and contends that both the Board of Revenue as well as the High Court failed to appreciate that the usufructuary mortgage of the occupancy holding in question was executed by Sheo Balak and Ram Phal, the predecessors-in-interest of the respondents, on Asadh Sudi 12 Samvat 1925, corresponding to July 21, 1869 i.e. at a time when the Recovery of Rents (Bengal) Act, 1859 was in force. He presses into service certain observations of Sir Richard Couch, C.J. in Narendra Narayan Roy Chowdhary v. Ishan Chandra Sen ((1974) 13 Beng LR 278) for the submission that a usufructuary mortgage was valid under Section 6 of that Act. We find it difficult to accept the contention.

4. We find that it has been the consistent view of the Allahabad High Court that a usufructuary mortgage of an occupancy holding was not valid as a mortgage with all its incidents and subject to the provisions of law relating to usufructuary mortgage but was valid only in a qualified sense i.e. in the sense of subletting with a covenant that the mortgagor will not be entitled to recover possession without payment of the mortgage money, and further that under such a mortgage there is no transfer of the right of an occupancy tenant and consequently no suit for redemption was maintainable nor was there any extinguishment of the right of an occupancy tenant upon the expiry of the period of limitation fixed for redemption under Article 148 of the Limitation Act, 1908. There is a long catena of decisions dealing with the question starting from Khiali Ram v. Nathu Lal (ILR (1893) 15 All 219 (FB)), down to Samharu v. Dharamraj Pandey (1969 All LJ 943 (FB) : AIR 1970 All 350 : 1969 All WR 714). It follows that it has been the settled law as administered in the then United Provinces that a usufructuary mortgage of an occupancy holding was invalid and there was no transfer of an interest by the occupancy holding was invalid and there was no transfer of an interest by the occupancy tenant and the mortgagee acquired no right other than the right to retain possession and fall back upon the stipulation in the so-called mortgage bond till his money was paid. As pointed out in the Full Bench decision in Samharu v. Dharamraj Pandey (1969 All LJ 943 (FB) : AIR 1970 All 350 : 1969 All WR 714), the view that a usufructuary mortgage by an occupancy tenant was not valid in the eye of law has been accepted by the legislature in clause (d) of Section 21(1) the U.P. Zamindari Abolition & Land Reforms Act, 1951. The matter stands concluded by the doctrine of stare decisis. If we were to subscribe to the contention advanced by the learned counsel for the appellants, it would imply not only unsettling the law which has stood the test of time for over 100 years but have the effect of reopening transactions past and closed and unsettling titles all over the State.

5. We also find no substance in the contention advanced. There is nothing in Section 6 of the Recovery of Rents (Bengal) Act to suggest that a usufructuary mortgage of an occupancy holding like the transaction in question was permissible. Sir Richard Couch, C.J. in the course of his judgment in Narendra Narayan Roy Chowdhary case ((1974) 13 Beng LR 278) has referred to Section 6 of that Act which, in terms, made the holding of an occupancy tenant a non-transferable tenure. After referring to the provision contained in Section 6 which provided for conferral of occupancy rights on a ryot who was in cultivating possession of his land for a period of 12 years, the learned Chief Justice unequivocally stated that the occupancy rights were not transferable :

The ordinary construction of the word appears to me to be, that the right is only to be in the person who has occupied for 12 years, and it was not intended to give any right

of property which could be transferred.

After holding that the right of occupancy tenant was not transferable under Section 6 of the Act, the learned Chief Justice went on to observe that in case of such a transfer, the tenant would be deemed to have abandoned the holding and therefore the right of an occupancy tenant cannot be set up by the purchaser in defence to a suit for ejection by the zamindar :

Now, if a ryot having a right of occupancy endeavours to transfer it to another person, and, in fact, quits his occupation, and ceases himself to cultivate or hold the land, it appears to me that he may be rightly considered to have abandoned his right, and that nothing is left in him which would prevent the zamindar from recovering the possession from the person who claims under the transfer.

That very eminent Judge explained this in another way :

(I)f the right which is given by the law is one which exists only so long as he holds or cultivates the land, when he ceases to do that, by selling his supposed right and putting another in his place, his right is gone and cannot stand in the way of the landlord's recovering possession.

6. We fail to appreciate how these observations can be of any avail to the appellants. The view expressed by Couch, C.J. that the right of an occupancy tenant under Section 6 of the Recovery of Rents (Bengal) Act does not lay down any contrary principle. As to the question of abandonment, the relationship of the parties was regulated by the stipulations contained in the mortgage bond and under the terms the appellants were entitled to retain possession till the mortgage debt was paid off. We wish to point out that under the U.P. Debt Redemption Act, 1940 all usufructuary mortgages became self-liquidating mortgages. As held by the High Court in Ram Prasad v. Bishambhar Singh (AIR 1946 All 400 : 1946 All LJ 175 : 227 IC 541), the mortgage money would be deemed to have been paid off.

7. For these reasons, the appeal must fail and is dismissed with costs.

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