Budha

Vs

Amilal

Civil Appeal No. 1141 of 1987

(Kuldip Singh, S.C. Agarwal JJ)

21.12.1990

JUDGMENT

S. C. AGRAWAL J

1. This appeal by Special leave relates to agricultural lands bearing Khasara Nos. 711/531 and 390 situate in village Jat Bhagola in Rajasthan. Lands measuring 3 bighas and 15 biswas bearing Khasra No. 711/ 531 were mortgaged by way of usufructuary mortgage with Sheo Ram, the father of the respondent, under mortgage deed dated November 19, 1952 executed by Kallu Ram. Lands measuring 1 bigha and 10 biswas bearing Khasra No. 390 were mortgaged by way of usufructuary mortgage with the said Sheo Ram under mortgage deed dated April 26, 1955, by Kallu Ram and the appellant. The appellant and Kallu Ram were Biswedars in respect of those lands. The case of the appellant is that on the death of Kallu Ram his property devolved on the appellant. On February 12, 1959, the Rajasthan State Legislature enacted the Rajasthan Zamindari and Biswedari Abolition Act, 1959, hereinafter referred to as the 'Act', which came into force on November 1, 1959. In exercise of the power conferred by sub-section (1) of Section 4 of the Act, the Government of Rajasthan issued a notification dated November 3, 1959 whereby the State Government appointed November 15, 1959 as the date for abolition and acquisition of all settled Zamindari and Biswedari estates throughout Rajasthan and vesting of such estates in the State Government. Under subsection (1) of Section 29 of the Act, as from the date of vesting of an estate the Zamindar or Biswedar thereof- became a malik of any Khudkasht land in his occupation on such date and as such malik he became entitled to all the rights conferred and all the liabilities imposed on a Khatedar tenant by or under the Raiasthan Tenancy Act, 1955. On February 27, 1970 the appellant filed a suit for redemption of the aforesaid mortgages against Sheo Ram in the Court of Munsif Magistrate, Kishangarh Bas. The defendant contested the suit and pleaded that on the abolition of Biswedari. the rights, title and, interest in the lands in question stood transferred and vested in the State of Rajasthan and the appellant did not have the right to redeem the mortgage. It was also pleaded that on the date of the creation of mortgage the appellant and Kallu Ram were not in possession of the lands and that the defendant was in possession of the lands as Kashtkar since before the mortgages. An objection to the Jurisdiction of the Civil Court to entertain the suit was also raised by the defendant. On the basis of the pleadings the Munsif framed 7 issues. Issues 1, 6 and 7, which are relevant for the purpose of the present appeal were:

> (1) Whether the defendant was ploughing the fields as' Khudkasht' even 5 years earlier than the mortgage deeds and was in possession of the same as 'Kashtkar'? If so, what is its effect?
>
> (6) Whether this Court had no jurisdiction to try the suit?

(7) whether on account of coming into force of the provisions of Rajasthan Zamindari and Biswedari Abolition Act, 1959 all rights, title and interest of the plaintiff are extinguished and the same vested in the State of Rajasthan and, therefore, he had no right to file this suit for redemption of mortgage deeds?

2. The Munsif treated Issue No. 7 as a preliminary issue and, by order dated April 12, 1972, he decided the said issue against the appellant and held that in view of Section 5(2)(b) of the Act, the lands stand transferred to the State and have got vested in the State and the appellant does not have any right to file the suit in respect of the same. In view of the said finding on Issue No. 7 the Munsif dismissed the suit of the appellant. The appellant filed an appeal against the said judgment and decree of the Munsif which was allowed by the Additional Civil Judge by order dated February 27, 1973. It was submitted by the appellant that he had acquired Khatedari rights in the lands at the time of the abolition of the Biswedari under the Act since the lands in question were Khudkasht lands of the appellant and, therefore, the appellant is entitled to maintain the suit for redemption and possession. The Additional Civil Judge held that the name of the appellant appeared as holder of Khudkasht in the annual register and that he has acquired Khatedari rights in respect of the lands in question and he could maintain the suit for redemption of the mortgages. The Additional Civil Judge, therefore, set aside the judgment and decree of the trial Court and remanded the matter for trial and while doing so observed that the question of jurisdiction of the Civil Court to entertain the suit could be agitated as a preliminary issue. The defendant filed a second appeal in the High Court which was allowed by judgment and decree dated April 15, 1986*. The High Court held that the appellant did not raise the plea with regard to the lands in question being his Khudkasht lands in the pleadings and any evidence in support of the same could not be looked into. The High Court further held that in paragraphs 1 and 2 of the plaint the appellant has himself pleaded that since the execution of the mortgage deeds, the possession of the lands is with the defendant which clearly shows that the appellant was not in possession of the lands after the execution of the mortgage deeds and therefore the right of the appellant in the lands in dispute stood abolished after the coming into force of the Act and the appellant has no locus stands to bring the suit for redemption and possession of the mortgaged lands. The High Court, therefore, restored the judgment and decree of the Munsif dismissing the suit of the appellant. Feeling aggrieved by the said decision of the High Court, the appellant has filed this appeal.

* Reported in 1986 Raj LW 480

3. Shri Bachawat, the learned Counsei for the appellant, has urged that the High Court was in error in holding that the appellant has no subsisting right in the lands in dispute after the coming into force of the Act. The learned Counsel has submitted that in the Jamabandies of Samvat Years 2013 and 2019 the appellant is shown as Kashtkar of the lands in question and that the said lands were 1 Khidkasht lands of the appellant in view Of the definition of the expression "khudkasht" contained in Section 5(23) of the Rajasthan Tenancy Act, 1955, which definition 'is applicable to the Act by virtue of Section 2(6) of the Act. Shri Bachawat has contended that under Section 29(1) of the Act the appellant has acquired Khatedari rights over thesaid lands which were recorded as his Khudkas lands. The further submission of Shr' Bachawat is that for the purpose of the lands being Khudkasht lands it is not necessary that Reported in 1986 Raj LW 480 the appellant should have been in actual possession of the same and that such possession could also be constructive possession through the mortgagee. Shri Bachawat has placed reliance on the decisions of this Court in Gummalapura Taggina Matada Kotturuswami v. Setra Veeravva, 1959 Supp (1) SCR 968: (AIR 1959 SC 577); Harlhar Prasad Singh v. Must. of Munshi Nath Prasad, 195SCR :(AIR 1956 SC 305) and Kailash Rai v Jai Jal Ram, (1973) 3 SCR 411 : (AIR 1973 SC 893).

4. Shri Brij Bans Kishore, the learned Counsel appearing for the respondent has placed reliance on the admission of the appellant as contained in the plaint that the lands are in possession of the mortgagees and has urged that the said lands cannot be said to be Khudkasht lands of the appellant and the appellant could not acquire Khatedari rights over the same.

4A. With regard to lands bearing Khasra No. 390, in para 1 of the plaint the appellant has expressly stated that defendant is in possession of the said lands as mortgagee from April 26, 1955. Similarly with reference to lands bearing Khasra No. 611/531, it has been stated in para 2 of the plaint that the defendant is in possession of the said lands as mortgagee from December 19, 1952. This means that the case of the appellant, as set out in the plaint, is that on the date of institution of the suit the actual possession of the lands in 1dispute was with the defendant as mortgagee. The suit was instituted on February 27, 1970,i.e after the coming nto force of the Act. The appellant has not pleaded in the plaint that the lands were his Khudkasht lands on the date of vesting under the Act and he has acquired Khatedari rights over the same under the Act. The appellant agitated this question before the lower appellate Court and since the said plea of the appellant was accepted by that Court we have heard learned Counsel for the appellant in support of his plea.

5. The question which, therefore, requires consideration is whether on the date of vesting of his Biswedari estate under the Act the appellant acquired Khatedari rights over the lands in dispute on the basis that the same were his Khudkasht lands although he was not in actual possession of the same on the said date. For this purpose it would be necessary to examine the relevant provisions of the Act. As indicated earlier the expression 'Khudkasht' has not been defined in the Act and in view of sub-section (6) of Section 2 of the Act, the definition of the said expression contained in the Rajasthan Tenancy Act is applicable to the Act. The expression of 'Khudkasht' has been thus defined in clause(23)of Section 5 of the Rajasthan Tenancy Act:

> "'Khudkasht' shall mean land in any part of the State cultivated personally by an estateholder and shall include -
>
> (i) land recorded as Khudkasht, sir havala, niji-jot, gharkhed in settlement records at the commencement of this Act in accordance with law in force at the time when such record was made, and
>
> (ii) land allotted after such commencement as Khudkasht under any law for the time being in force in any part of the State."

6. The expression "land cultivated personally" is defined in clause (25) of the Rajasthan Tenancy Act in the following terms :

> "land cultivated personally", with all to grammatical variations and cognate expressions, shall mean land cultivated on one's own account -
>
> (i) by one's own labour, or
>
> (ii) by the labour of any member of one's family, or
>
> (iii) under the personal supervision of oneself or any member of one's family by hired labour or by servants on wages payable In cash or in kind but not by way of a share in crops:

Provided that in the case of a person who is dew or a minor or is subject to any physical or mental disability or is a member of the military, naval or air service of India or , being a student of an educational institution recognised by the State Government is below the age of twenty-five years. land shall be deemed to be cultivated personally even in the absence of such personal supervision."

7. Section 5 of the Act provides for the consequences of abolition of Zamindari and . Biswedari estates under the Act. Section 5 inter alia lays down:

"(2) As from the date of vesting of any Zamindari or Biswedari estate in the State Government, notwithstanding anything contained in any contract, grant or other document or in any law for time being in force but ave as otherwise provided in this Act

(a) such estate shall stand transferred to and vest in, the State Government free from all encumbrances;

(b) the right, title and interest of the Zamindar or Biswedar, and of every person claiming through him, in such estate, including land (cultivable, waste or barren), grove and, grass land or bits, scrub jungle, forests, trees, fisheries, hills, wells, tanks, ponds, water courses and channels, ferries, pathways, village sites, abadi sites, hats, bazars, melas and mela ground, and in all sub-soil therein, including rights, if any, In quarries and mines, whether being worked or not and an all minerals and mineral products, shall cease and be vested in the State Government, free from all eficumbrances, for the purposes of the State, and every mortgage, debt or charge on any such right, title or interest shall be a charge on the amount of compensation payable to the Zamindar or Biswedar under this Act;

X X X X X

(j) every mortgage with possession existing on such estate or part thereof on the date Immediately preceding the date of vesting shall, to the extent of the amount secured on such estate or part, be deemed, without prejudice to the rights of the State Government under this section, to have been substituted by a simple mortgage.

X X X X X

(4) Notwithstanding anything contained in sub-section (2) the Zamindar or Biswedar shall, subject to the provisions of S. 29, continue to retain the possession of' fits khudkasht, recorded as such in the annual registers before the date of vesting."

8. Section 29 of the Act makes provision for conferring Khatedari rights in Kliudkaslit lands and it reads as under:

"Khatedari rights in Khudkasht land- -

(1) As fiom the date of 'vesting of an estate, the Zamindir or Biswedar thereof shall be a malik of any Khudkasht land in his occupation on such date and shall, as such malik, be entitled to all the rights conferred and be subject to all the liabilities imposed on a khatedari tenant by or under the Rajasthan Tenancy Act, 1955

(Rajasthan Act 3 of 1955).

(2) If there are more persons than one having interest in land held as Khudkasht immediately before the date of vesting, all such persons shall be deemed to be (co-rnalik thereof)."

9. Literally speaking the word "Khudkasht" means personal cultivation. The definition of this expression contained in S5(23) of the Rajasthan Tenancy Act, which is in two parts, indicates that it has been used in the same sense in the Act. In the main part Khudkasht has been defined to mean land cultivated personally by an estate-holder. This is further clarified by clause (25) of S. 5 of the Rajasthan Tenancy Act which defines the expression "land cultivated personally', to mean land cultivated on one's own account (i) by one's own labour, or (ii) by the labour of any member of one's family, or (iii) under the personal supervision of oneself or any member of one's family by hired labour or by servants on wages payable in cash or in kind but not by way of.a share in crops. An exception has been made in the proviso in respect of widows, minors, persons subject to physical or mental disability, members of military, air or naval service of India and students of an educational institution recognised by the State Government who are below the age of twenty-five years and their land is to be deemed to be cultivated personally even in the absence of such personal supervision. By the inclusive part of the definition of "Khudkasht"contained in S. 5(23) of the Rajasthan 'Yenancy Act lands which are recorded as Khudkasht, sir, havala, niji-jot, gharkhed in settlement records at the commencement of this Act in accordance with law in force at the time when such record was made and lands allotted after such commencement as Khudkasht under any law for the time being in force in any. part of the State are to be treated as Khudkasht. Here also the emphasis personal cultivation which is to be inferred from the entry in the settlement records at the commencement of the Rajasthan Tenancy Act or the purpose for which the land was allotted after the commencement of the Act. The expression "Khudkasht", as defined in S. 5(23) of the Rajasthan Tenancy Act, would.. in our opinion, not include land in possession or and cultivated by a tenant or mortgagee.

10. Such a question has been considered by this Court in the context of the Bihar Land Reforms Act, 1950 which uses the expression 'Khas possession" and preserves in the hands of the proprietors such lands as are in their khas possession. In S. 2(k) of the said Act the expression "Khas possession" has been dei'ined to mean possession of the proprietor or tenure-holder by cultivating the land or carrying on horticultural operations thereon himself with his own stock or by his own servants or by hired labour or with hired stock. In Gtirucharan Singh v. Karnla Singh, (1976) 1 SCR 739 (AIR 1977 SC 5) this Court has observed.

> ..... what is meant is actual possession with one's feet on the land, plough in the field and hands in the soil, although hired labour is also contemplated." (p. 745) (of SCR): (at p. 10 of AIR).
>
> "Ordinarily what is outstanding with lessees and mortgagees may not fall within khas possession". (p. 752) (of SCR) : (at p. 15 of AIR).

11. In Ramesh Bejoy Sharma v. Pashupati Rai, (1 980) 1 SCR 6: (AIR 1979 SC 1769) it has been held that land in possession of a tenant-at-will cannot be said to be in khas SC669 possession of the intermediary on the ground that tenant-at-will is not holding possession on behalf of the landlord but he has a vestige of title to it and holds on his own behalf and can set up his possession against the landlord till the formality prescribed by law is undertaken by the landlord and he is evicted. The

possession of a co-sharer in the lands, however, stands on a different footing because, in the absence ouster, the possession of one co-heir is considered in law as possession of all the co-heirs. (See: P. Lakshmi Reddy v. L. Lakshmi Reddyr, 1957 SCR 195 at p. 202 : (AIR 1957 SC 314 at p. 318). In Bhubaneshwar Prasad Narain Singh v. Sidheswar Mukherjee, (1971) 3 SCR 639 : (AIR 1972 SC 225 1) this Court has held that a co-sharer has to be treated in khas possession of land in possession of the other co-sharer. To the same effect is the decision in Kailash Rai v. Jai Ja.i Ram, (AIR 1973 SC 893) (supra). In that case this Court was dealing with the provisions of the U.P. Zamindari Abolition and Land Reforms Act, 1950 and it was held that the possession of one co-sharer is possession both on his behalf as well as on behalf of all the other co-sharers unless ouster is pleaded and established.

12. On behalf of the appellant it is claimed that the present case falls under clause (i) of the inclusive part of the definition of 'Khudkasht' contained in S. 5(23) of the Rajasthan Tenancy Act because in the Jamabandies of Samvat Years 2013 and 2019 the appellant is recorded as'Kashtkar'against the suit lands. In our view the said entry cannot be treated as an entry of 'Khudkasht' envisaged in that clause of the definition especially when it is not the case of the appellant that after the execution of the mortgages the defendant mortgagee had parted with the possession of the mortgaged property in favour of the appellant and had allowed the appellant to cultivate the said lands. On the other hand there is a clear admission by the appellant in the plaint that defendant mortgagee is in possession of the mortgaged property. In these circumstances the lands in question cannot be held to be the Khudkasht lands of the appellant.

13. Even if it is assumed that the lands in dispute have to be treated as Kbudkasht lands of the appellant by virtue of clause (i) of the inclusive part of the definition of 'Kliudkasht' contained in S. 5(23) of the Rajasthan Tenancy Act, the appellant cannot succeed in his claim that he has acquired Khatedari rights in respect of those lands on the basis of the provisions contained in sub-s. (4) of S. 5 and sub-s. (1) of S. 29 of the Act. Sub~ section (4) ot'S. 5 provides that notwithstanding anything contained in sub-s. (2) of S. 5 the Zamindar or Biswedar shall subject to the provisions of S. 29, continue to retain the possession of his Khudkasht, recorded as such in the annual registers before the date of vesting. The words "continue to retain the possession", imply that lands which are recorded as Khudkasht in the annual register before the date of vesting should also'be in possession of the Zamindar or Biswedar on the date of vesting and if he is in possession of such lands he can continue to retain the possession of the same subject to the provisions of S.29. Sub-section(l) of S.29 prescribes that as from the date of'vesting of an estate, the Zamiiidar or Biswedar thereof shall be a malik of any Khudkasht land in his occupation on such date and shall, as such malik, be entitled to all the rights conferred and be subject to all the liabilities imposed on a Khatedar tenant by or under the Rajasthan Tenancy Act. Under this provision Khatedari rights have been conferred on a Zamindar or Biswedar as from the date of the vesting of the estate in respect of Khudkasht lands 'In the occupation of such Zamindar or Biswedar on such date. The words "in his occupation on such date" postulates that the lands, though Khudkasht, should be in the occupation of the Zamindar or Biswedar on the date of vesting of the estate. It would thus appear that in view of sub-s. (4) of S. 5 and sub-s. (1) of S. 29 of the Act the mere fact of recording of the land as Khudkasht in the settlement records on the date of vesting would not be enough for a Zamindar or Biswedar to acquire Khatedari rights over the said lands and it is further required that the Zamindar or Biswedar should be in possession/ occupation of the said lands on the date of vesting of the estate under the Act, The Possession/ occupation envisaged by sub-s. (4) of S. 5 and sub-s.(1) of S. 29 of the Act is actual possession/ occupation and the possession of a mortgagor through the mortgagee cannot be held to be possession or occupation as postulated in sub-s. (4) of S. 5 and sub-s. (1) of S. 29 of the Act.

14. In the present case the appellant has come forward with a specific case in the plaint that the defendant is in possession of the lands in dispute as a mortgagee from the date of the two mortgages. In other words the appellant was not in possession/ occupation of the said lands on the date of vesting of the estate of the appellant under the Act. The appellant cannot, therefore, claim Khatedari rights in respect of the lands in dispute.

15. In Kotturuswami v. Veeravva, (AIR 1959 SC 577) (supra) this Court, while construing the provisions of S. 14(1) of the Hindu Succession Act, 1956, has held that the expression "property possessed by a female Hindu" is not confined to actual physical possession or occupation but would include constructive possession also, viz., possession of a licensee, lessee or a mortgagee. Keeping in view the context of the provisions of the Act and the object underlying the said provisions whereby Khatedari rights have been conferred on the Zamindar or Biswedar in respect of his Khudkasht lands, we are of the opinion that the decision in Kotturuswami v. Vecravva, (supra) can have no application.

16. In Harihar Prasad, Singh v. Must. of Munshi Nath Prasad, (AIR 1956 SC 305) (supra) the question for consideration was whether the tenants of the mortgagee could claim occupancy rights in the mortgaged property. The said decision has no application to the present case.

17. For the reasons aforesaid the suit filed by the appellant must fail. The appeal is, therefore, dismissed with costs.

Appeal dismissed.

</html