

Joginder Singh and Others

Vs

Mst Chanan Dei W/O Anant Singh and Others

Civil Appeal No. 4182 of 1989

(Dr. T.K. Thommen, R. M. Sahai JJ)

31.07.1991

JUDGMENT

R. M. SAHAI, J.

1. Mortgagee, of occupancy tenant of grade 'A' as defined in clause (a) of sub-section (1) of Section 3 of the Jammu and Kashmir Tenancy Act, 1980 (1923 A.D.) Act 2 of 1980, is aggrieved by decision of the High Court affirming the order of the Jammu and Kashmir Special Tribunal holding that the mortgagee was not entitled to ownership rights under Big Landed Estates Abolition Act of 2007 (1950 A.D.) (referred as Abolition Act) as he was not tiller of the soil being not in cultivatory possession in Kharif 2007, the material date under the Act consequently the mortgagor was entitled to restoration of possession in pursuance of decree passed for restitution of possession under Jammu and Kashmir Restitution of Mortgaged Properties Act of 2006 (1950 A.D.) (in short 'Restitution Act').

2. Litigation, for the land in dispute, extends nearly to four decades. This period also witnessed various State legislations, dealing with agricultural land, resulting in various proceedings before different authorities. Mortgage was, admittedly, made under Tenancy Act of 1923. In 1949 Jammu and Kashmir Distressed Debtors Relief Act was passed to grant relief to distress debtors. The Authority to decide claim was designated as Debt Conciliation Board. In February 1950 Restitution Act was passed to grant relief to the poor and destitute debtors. It provided summary procedure for restitution of mortgaged properties. It was not disputed that the mortgagor obtained a decree for restitution of the property against the mortgagee under this Act in 1956. It is not clear if the proceedings were commenced or were pending on the date the Abolition Act came into force, as the Act was passed in the same calendar year in which the Restitution Act was passed. However mutation proceedings appear to have started in 1957. The Tehsildar directed transfer of ownership in proportion of half and half in favour of both the mortgagor and the mortgagee. What happened between 1957 and 1968 is not clear. But in June 1968 the earlier mutation was cancelled and the entire land, that is the proportion directed to be recorded in name of the mortgagee was also directed to be transferred and mutated in favour of the mortgagor. This order appears to have been set aside by the Financial Commissioner in 1970 and the Tehsildar was directed to decide the proceedings afresh. After remand the village came under consolidation and the Tehsildar Consolidation once again directed mutation of entire land in favour of the mortgagor. The order was set aside by the Settlement Officer Consolidation in 1972 who directed Tehsildar to pass fresh orders in light of Agrarian Reforms Act of 1972. In pursuance of this order, and probably on application of the mortgagee, the Collector Agrarian Reforms called for a report from Tehsildar who submitted the same in August 1979. After narrating the history of litigation the Tehsildar held :

"The case has come for consideration of the undersigned on the application of the plaintiff. Since now the matters falls under the Agrarian Reforms Act, 1976, the Tehsildar Consolidation has lost his jurisdiction in case which vested in 1971 and the case of Kharak Singh has taken a new turn since it is not within the jurisdiction of the undersigned and Hon'ble A.C. (Assistant Collector) Agrarian Reforms now has jurisdiction to pass the orders on the case.

So far as the claims in respect of development of land is concerned, the appellant has filed appear in the High Court which is pending and it is expected that the same shall be referred to the Assistant Collector under the Agrarian Reforms Act, 1976. Therefore, the file is submitted to A.C. (Assistant Collector) Agrarian Reforms Jammu for passing appropriate orders and Tehsildar Consolidation may be informed accordingly."

The order was set aside by the Collector who remanded the case to Tehsildar on December 9, 1980. He observed :

"Tehsildar is competent to decide this case under the B.L.E.A. Act keeping in view the possession of the parties. The parties eligible to get proprietary rights as occupancy tenant under the B.L.E.A. Act should be given the rights accordingly to their eligibility and the tillers who were cultivating the land prior to 2007 be conferred ownership rights after thorough enquiry under rules. The case is returned to the Tehsildar Jammu for further action."

On remand the Tehsildar restored the mutation order passed in 1957 and directed part of land to be recorded in name of the mortgagor. It is claimed that appeal and revision filed by the mortgagor and mortgagee are pending before appropriate authorities. While these proceedings were going on the mortgagor moved the civil court in 1968 for execution of the decree under Restitution Act which was allowed by the City Judge in September 1972 directing for issuance of warrant of possession. The order was upheld in appeal by the District Judge. The second appeal against this order was decided in 1979 by the High Court and it was held that civil courts having decided rights of parties the question of possession may now be decided by the Collector Agrarian Reforms Act. As directed by the High Court the Collator Agrarian Reforms decided the dispute on July 21, 1980 and held :

"Since the mortgagee has obtained the benefit from the mortgagee property more than the amount due to him to the shape of mortgage money for the period and more than 10 years has since expired from the beginning of mortgage, it is, therefore, ordered that under Section 10 of the Agrarian Reforms Act the mortgage of land comprising of Kh. Nos. 87, 87 Min 256, 50, 40 measuring 71 kanals 8 marlas to be deemed as extinguished. Excluding the residential building raised by the mortgagor the possession of the land be handed over to Shri Anand Singh etc. mortgagors. Regarding the residential building separate orders will be issued."

The order was set aside in appeal by the Commissioner Agrarian Reforms in April 1982 and it was held that even though the resumption order in favour of mortgagor was correct the order of restoration of possession could not have been passed as tenants who were recorded in revenue records and were necessary parties had not been impleaded. This order was set aside by the impugned order of Tribunal. It was found as a fact that the mortgagee was not in cultivatory possession in 2007 Kharif. The tribunal further found that since tenants were entered in relevant

year the mortgagee could not get any right as tiller of the soil. But as the tenants abandoned their possession in subsequent years and did not claim any right under Abolition Act the mortgagor was entitled to restoration of possession as directed by the Collector. The order was upheld by the High Court in writ jurisdiction. The finding about possession is based on entries in revenue records. It is, therefore, a finding of fact which is not liable to interference by this Court. An attempt was made to assail it by producing an extract of subsequent years incorporating an order correcting the entry. This document was not produced before the High Court. Even the copy of the order directing correction was not produced before this Court. It is, therefore, not possible to place any reliance on it. The submission that the tribunal did not afford any opportunity to rebut it, also, could not be substantiated.

3. What survives, thus, is the legal submission that the orders passed by the High Court, the tribunal and Agrarian Reforms Collector were nullity. No such argument was raised before any of the authorities. Neither objection to jurisdiction nor to non-applicability of provisions of Abolition Act or Restitution Act or even Agrarian Reforms Act, 1976 was ever raised. However it was urged if the orders were nullity then any concession or implied acquiescence of his client should not result in non-suiting him. How far this argument is correct need not be gone into unless it is found that the claim of mortgagee on his own showing has some semblance of acceptability. It was argued that Agrarian Reforms Act could not apply to land in dispute and, the decree obtained under Restitution Act could not be executed in view of clause (d) of Section 9 of Abolition Act. But none of these objections were raised before the High Court in second appeal. Rather the mortgagee agreed that proceedings may be decided by Collector Agrarian Reforms under Act of 1976. Objection was not taken even before Collector Agrarian Reforms. Moreover from the orders extracted above it is apparent that even revenue authorities seized of the case were of opinion that after coming into force of 1976 Act rights of parties could be decided under 1976 Act only as it had overriding effect. And Section 42 of 1976 Act made inapplicable various tenancy legislations including Abolition Act, so far as they were inconsistent with provisions of the Act. Right of the mortgagor under section (sic) 1976 Act is unassailable. But since its applicability to the land in dispute was, seriously disputed and there is no decision of the High Court to indicate how the provisions have been applied and understood in the State for nearly fifteen years it appears appropriate to leave the issue open and examine if the mortgagee could get any right either because the decree obtained under the Restitution Act was nullity or it could not be executed after enforcement of the Abolition Act or the authorities committed any error or jurisdiction in deciding that the mortgagee being not in physical possession in 2007 Kharif did not become owner under the Abolition Act.

4. To get over the decree passed under the Restitution Act it was urged that the decree stood abated under the Abolition Act and the mortgagor could not claim any right on it. Learned counsel submitted that the orders by civil courts and revenue authorities were thus contrary to provisions of law and liable to be ignored. Whether a decree obtained by a tenant mortgagor under Restitution Act abated on enforcement of Abolition Act is very doubtful. But it is not necessary to decide it as the submission founded on clause (d) of Section 9 of the Abolition Act which provided for abatement of all suits and proceedings pending in any court on the date of commencement of the Act and all proceedings taken upon any decree or order passed in any such suit or proceeding is devoid of any merit as the proceedings for restitution appear to have been initiated by the mortgagor after enforcement of the Act. At least the mortgagee did not bring any material on record not it could be made out from various orders filed as annexure that the proceedings were pending or the decree for restitution was passed in a suit pending on the date the Act came into force. There was thus no question of abatement of the decree for restitution. That is why this objection was never raised before civil courts when the decree was put in execution.

5. Coming to Abolition Act it was enacted as is clear from the Preamble to provide for the abolition of big estate and their transfer to actual tillers. The legislation was in keeping with the agrarian reforms of the time sweeping the entire country even though the constitutional provisions of fundamental rights etc. were extended to State of Jammu and Kashmir later on. The right of ownership held by a proprietor in land was extinguished under Section 4 of the Act and the land ceased to vest in him from the date the Act came into force. What was included in the land of a proprietor for purposes of sub-section (1) of Section 4 of the Act was specified in Section 7 of the Act. It included amongst others, lands of any class held or acquired in ownership by the proprietor and land mortgaged with or without possession or leased out by the proprietor. Since the land was leased out to predecessor in the interest of mortgagor by the land holder the ownership of the proprietor in land extinguished under Section 4 read with Section 7 of the act. Extinction of proprietor's interest was not in dispute. Who, then, among the mortgagor and mortgagee became owner of the land ? Land could be mortgaged either by proprietor or tenant. The proprietor's mortgagee were dealt with in Section 10 of the Abolition Act. But the right and interest of mortgagor and mortgagee in a land, the value of which did not exceed Rs 10,000 were subject matter of the Restitution Act. The Act came into force few months before the Abolition Act to relieve the poor and destitute debtors. It applied to all mortgages of immovable property the value in cash or kind of which did not exceed Rs 10,000. Section 6 of the Act entitled a mortgagor to file petition for restitution, within four years from the date the Act came into force, which was to be allowed under Section 9 directing extinction of the mortgage and restoration of possession to the mortgagor if the mortgagee had enjoyed the mortgage as provided in sub-section (1) and if the enjoyment was not complete then on payment under sub-section (2). It was under this Act that the order was passed in favour of the mortgagor in 1956 directing restoration of possession.

6. Was this right affected by the Abolition Act ? Did the decree become infructuous or non-applicable ? Did the mortgagee acquire any rights despite the decree under the Restitution Act, under the Abolition Act ? Could the mortgagee of a tenant become a tiller under the provisions of Abolition Act ? The Act did not make the provisions of Restitution Act inapplicable. None of the sections deal with right of any class of tenants, occupancy or protected etc. of 1923 Act. As is clear from Preamble its objective was to eliminate big estates and confer the benefit of ownership on actual tillers of the soil, that is, the rights between the proprietors and the tillers were provided for. The ownership of the proprietor was extinguished under Section 4 if he held land in excess of what was provided in sub-section (2) of Section 4 and such excess land was transferred to tiller under Section 5. A tiller could be a tenant or a sub-tenant or a mortgagee. Section 10 provided that when any land of which the ownership was extinguished under Section 4 was found to have been mortgaged or leased by the proprietor then it was to be transferred to tiller and if such tiller was a mortgagee or lessee then he became owner free from any encumbrance. The Act was doing away with big estate holders and not tenants. Rights of ownership were conferred on tillers of land, 'held by a proprietor' as is clear from the definition of tiller. In fact sub-section (1) of Section 10 was an exception insofar as it created right of ownership in favour of mortgagee as opposed to the Restitution Act and the subsequent Agrarian Reforms Act which were enactments where ownership rights were conferred on mortgagors and the mortgagees' interest extinguished if the mortgage was satisfied by usufruct or if something remained then on payment. The intention of the legislature in enacting Big Landed Estates Abolition Act could not have been to eliminate the mortgagor and extinguish his rights in the land in dispute even if the mortgage was of value of less than Rs 10,000 as that would have been contrary to the spirit of the Restitution Act which was meant to grant relief to poor and destitute debtor. After the Restitution Act considered a mortgagor of immovable property for value of Rs 10,000 to be a destitute and poor debtor it would be ironical to hold that the

mortgagee of such a mortgagor became owner of the land under Abolition Act. Even Section 10-A which deals with determination of right of mortgage by Collector makes it subject to provisions of Section 10, that is, it does not operate independently. It could apply only to that land which is subject matter of Section 10.

7. Much emphasis was laid on sub-section (6) of Section 5 of the Abolition Act which provides for apportionment between persons possessing right of occupancy. It was urged that since mortgagee was in possession he was possessed of right of occupancy and was therefore entitled to ownership right. Sub-Section (6) which is material is extracted below :

"5. (6) Notwithstanding anything contained in sub-section (1) or any other provision of this Act -

(1) a person who possessed a right of occupancy in land, of which the right of ownership is extinguished, shall be granted in ownership right an unit of - ..."

8. The language of the section or the intention of the legislation does not support the submission. The Abolition Act neither repealed the Restitution Act nor made it inapplicable. Moreover right of occupancy has to be understood in the sense it was used in Tenancy Act. Under that Act right of occupancy in land could be transferred under Section 60 by mortgage. But once a decree for restitution was passed and the mortgage extinguished under sub-section (1) of Section 9 of the Act the right of occupancy stood determined. Nothing survived to be apportioned.

9. Therefore, the orders were neither nullity nor were without jurisdiction. The impugned order of the tribunal and the High Court do not suffer from any error of law.

10. In the result this appeal fails and is dismissed. But there shall be no order as to costs.

</html