

Namdev Shripati Nale

Vs

Bapu Ganapati Jagtap and Another

Civil Appeal No. 172 of 1980

(B. P. Jeevan Reddy, K. S. Paripoornan JJ)

11.03.1997

JUDGMENT

PARIPOORNAN, J. –

1. The plaintiff in Civil Suit No. 40 of 1970 - Civil Judge, Junior Division, Vaduj, is the appellant herein. His father one Shripati executed a possessory mortgage of the suit property, RS No. 244/23 situate at Lalgun Taluka Khatav, District Satara, by Exhibit 35-A dated 3-4-1947 for Rs. 1200 in favour of the first respondent, (1st defendant), Bapu Ganapati Jagtap. Pending this appeal, first respondent died on 1-6-1985. His three sons Nivruti Bapusaheb Katkar (Jagtap), Dyandev Bapusaheb Katkar (Jagtap) and Sahelrao Bapusaheb Katkar (Jagtap) have been impleaded as his legal representatives. The second respondent Laxmi Devi Shripati Nale is the appellant's mother. Exhibit 35-A, the mortgage was for a period of 12 years. The mortgagee was to take the income of the property and appropriate the same towards the interest due etc. The appellant's father died in 1953. The appellant was a minor then. The mortgage could not be redeemed within the period fixed. After the expiry of the said period, the appellant caused a notice to be sent agreeing to repay the mortgage amount of Rs. 1200 and sought redemption. The first respondent declined to accede to the request. So, the suit was laid for redemption of the mortgage, Exhibit 35-A. The first respondent pleaded that the transaction Exhibit 35-A was really a sale. In the alternative, he pleaded that the plaint item is an inam and it was abolished by the Bombay Pargana and Kulkarni Watans (Abolition) Act, 1950 (Maharashtra Act 60 of 1950) (hereinafter referred to as "the Act"). The land was resumed by the Government and was regranted to the first respondent (Ext. 26). So, the appellant has no subsisting right to redeem. The first respondent also pleaded that in case of redemption he should be paid compensation.

2. The trial court, by order dated 8-12-1971, dismissed the suit. In appeal the District Judge, Satara, in Civil Appeal No. 29 of 1972, by order dated 30-1-1974, decreed the suit and passed a preliminary decree for redemption and recovery of possession of the property. In Second Appeal No. 514 of 1974, by order dated 19-11-1979, a learned Single Judge of the High Court of Bombay restored the judgment and decree of the trial court. That has resulted in the appellant's coming in appeal before this Court.

3. The trial court, the lower appellate court and the High Court have found that Exhibit 35-A is a deed of mortgage and not a sale. The trial court found that as per the Act the land vested in the Government and was regranted to the first respondent. The appellant has lost his right to redeem the property. The plea that the first respondent was only a trustee and Section 90 of the Indian Trust Act, 1882 was attracted, was repelled. In appeal, the District Judge held that the first respondent-mortgagee failed to remit the occupancy price as enjoined on him, and by putting forward the plea

that he is a tenant, he obtained the regrant and thus gained an advantage; it should enure for the benefit of the mortgagor and so, the right to redeem still vested in the appellant. It is a case where Section 90 of the Indian Trust Act was clearly attracted. In second appeal, the learned Single Judge of the High Court took the view that (1) due to non-payment of the occupancy price by the plaintiff within the period of five years (on or before 25-1-1956) the suit property vested in the Government and this was not challenged; (2) the first respondent was taken to be a tenant and the land was regranted to him, (Ext. 26); and (3) it cannot be said that the first respondent gained an advantage by availing of his position as mortgagee in getting the regrant. In the above premises, the suit for redemption was dismissed.

4. We heard the counsel. The counsel for the appellant urged before us that the first respondent-mortgagee was bound to pay the occupancy price and by failing to do so he brought about the situation, enabling him to obtain a regrant of the property in his name by posing himself as a tenant; in other words, first respondent committed a default or a wrong and by taking advantage of his position, as one in possession of the property, obtained a benefit or advantage. He has committed a wrongful act, in not remitting the occupancy price as contemplated by law. The resultant advantage, obtained thereby should ensure to the benefit of the appellant or, in other words, the resultant advantage should be deemed to have been obtained for the benefit of the appellant. So, the suit for redemption should be decreed. On the other hand, the counsel for the respondents contended that in view of the failure of the mortgagor to remit the occupancy price within the time limited by law, the land vested in the Government; it cannot be said that he committed any default and obtained any undue advantage in the subsequent regrant made in his favour. The provisions of Section 90 of the Indian Trusts Act are not attracted.

5. The following statutory provisions are relevant to adjudicate the controversy in this case. They are :

(I) Sections 2(1)(b), 3 and 4 of the Bombay Pargana and Kulkarni Watans (Abolition) Act, 1950 (Maharashtra Act 60 of 1950) :

"2. Definitions. - (1) In this Act unless there is anything repugnant in the subject or context, -

#(a) * * *##

(b) 'code' means the Bombay Land Revenue Code, 1879;

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3. Abolition of certain watans together with the right to office and incidents. - With effect from and on the appointed day, notwithstanding anything contained in any law, usage, settlement, grant, sanad or order -

(1) all Parganas and Kulkarni watans shall be deemed to have been abolished;

(2) all rights to hold office and any liability to render service appertaining to the said watans are hereby extinguished;

(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 such watan land made in accordance with the provisions of Section 5 of the Watan Act or the right of an alienee thereof or any person claiming under or through him;

(4) all incidents appertaining to the said watans are hereby extinguished.

4. Holder of watan land to be occupant. - (1) A watan land resumed under the provisions of this Act shall subject to the provisions of Section 4-A, 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 this Act and the holder shall be deemed to be an occupant within the meaning of the Code in respect of such land and shall primarily be liable to pay land revenue to the State Government in accordance with the provisions of the Code and the rules made thereunder; all the provisions of the Code and rules relating to unalienated land shall, subject to the provisions of this Act, apply to the said land :

Provided that in respect of the watan land which has not been assigned towards the emoluments of the officiator, occupancy price equal to six times of the amount of the full assessment of such land shall be paid by the holder of the land for its regrant :

Provided further that if the holder fails to pay the occupancy price within the period of five years as provided in this section, he shall be deemed to be unauthorisedly occupying the land and shall be liable to be summarily ejected in accordance with the provisions of the Code.

(2) The occupancy of the land regranted under sub-section (1) shall not be transferable or partible by metes and bounds without the previous sanction of the Collector and except on payment of such amount as the State Government may be general or special order determine.

(3) Nothing in sub-sections (1) and (2) shall apply to any land -

(a) the commutation settlement in respect of which provides expressly that the land appertaining to the watan shall be alienable without the sanction of the State Government; or

(b) which has been validly alienated with the sanction of the State Government under Section 5 of the Watan Act.

Explanation. - For the purposes of this section the expression 'holder' shall include -

(i) all persons who on the appointed day are the watandars of the same watan to which the land appertained, and

(ii) in the case of a watan the commutation settlement in respect of which permits the transfer of the land appertaining thereto, a person in whom the ownership of such land for the time being vests."

(II) Sections 65(c) and 76(c) of the Transfer of Property Act are to the following effect :

"65. In the absence of a contract to the contrary, the mortgagor shall be deemed to contract with the mortgagee -

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(c) that the mortgagor will, so long as the mortgagee is not in possession of the mortgaged property, pay all public charges accruing due in respect of the property;

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76. When, during the continuance of the mortgage the mortgagee takes possession of the mortgaged property, -

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(c) he must, in the absence of a contract to the contrary, out of the income of the property, pay the Government revenue, all other charges of a public nature and all rent accruing due in respect thereof during such possession, and any arrears of rent in default of payment of which the property may be summarily sold."

(III) Section 90 of the Indian Trusts Act, 1882 :

"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."

6. The relevant portions of Exhibit 35-A, deed of mortgage dated 3-4-1947 are as follows :

"For repaying the loan mentioned above and for the house expenses (the amount mentioned above) I give my land (as mentioned below) as Mudat Kharadi. I have given the land in your possession for the period 12 years today. So till the period of sale you should pay the assessment and cultivate the land and should take the income of the land. At the expiry of the term of the deed, (I) will pay the Rupaya and will take back the land by ('Sadavun') redeeming the same. If the amount will not be paid within the time then this should be treated as permanent sale and you should enjoy the suit land absolute for yourself and by your heirs. Hence neither myself nor my heirs shall have any right of claim in respect of suit property. You will be full owner of the suit property."

The document is a possessory mortgage. The mortgagee is permitted to appropriate the income of the land (towards interest due). It is stated that the income from the property will be Rs. 500-600 per annum. Admittedly, the property is an inam land. By Maharashtra Act 60 of 1950, the land was resumed by the Government (Ext. 26). There was a provision to regrant it to the holder of the land on payment of the occupancy price equal to 12 times the amount of the full assessment of such land within five years from the date of coming into force of the Act. The Act came into force on 25-1-

1951. So the occupancy price should be paid on or before 25-1-1956. The mortgagor did not pay the occupancy price till then. The lower appellate court has found that the first respondent was taken to be a tenant of the land. He paid the occupancy price (on his own) and obtained the regrant from the Government. We are of the view that the occupancy price payable under Section 4 of the Act to obtain a regrant, will be covered by the expression "all public charges accruing due in respect of the property", "all other charges of public nature" as specified in Sections 65(c) and 76(c) of the Transfer of Property Act respectively. In the absence of a contract to the contrary, during the pendency of the mortgage, when the mortgagee was in possession of the mortgaged property, he was bound to pay or remit the occupancy price under Section 4 of the Act for and on behalf of the mortgagor, so as to prevent the happening of the consequences stated in the proviso. The first respondent-mortgagee failed to comply with the aforesaid statutory obligation. He committed a wrong or a default. Whether the default/wrong committed has as its basis a contractual obligation or a statutory obligation, makes no difference. He was taken to be a tenant by the authorities, which enabled him to get regrant in his favour. That was only because the first respondent, as a possessory mortgagee, was in possession of the property. He took advantage of his position as a possessory mortgagee. In so doing he faulted. So, on facts, it is clear that the first respondent obtained regrant in his favour or obtained an advantage in his favour, by availing himself of his position as a mortgagee. In law, the advantage obtained by the first respondent, the qualified owner, must be held to be for the benefit of the persons interested - the mortgagor-appellant. We are of the view that in the totality of the facts and circumstances, the provisions of Section 90 of the Indian Trusts Act are attracted. The first respondent-mortgagee gained an advantage by availing himself of his position as a possessory mortgagee and obtained the regrant. This he did by committing a wrong. He committed a default in not paying the occupancy price within the time limited by law for and on behalf of the mortgagor. The regrant was obtained in his name by posing himself as a tenant, which was possible only because he was in possession of the land (as a possessory mortgagee). The advantage so gained by him in derogation of the right of the mortgagor should attract the penal consequences of Section 90 of the Indian Trust Act. We hold that the default committed by a possessory mortgagee, in the performance of a statutory obligation or a contractual obligation, which entails a sale or forfeiture of right in the property to the mortgagor, will attract the provisions of Section 90 of the Indian Trusts Act. In such cases any benefit obtained by the qualified owner, the mortgagee, will ensure to or for the benefit of the mortgagor. The right to redeem will subsist notwithstanding any sale or forfeiture of the right of the mortgagor. We are of the view that the law on this point has been laid down with admirable clarity by this Court in *Mritunjoy Pani v. Narmanda Bala Sasmal* [(1962) 1 SCR 290 : AIR 1961 SC 1353] and by K.K. Mathew, J. (as his Lordship then was) in *Nabia Yathu Ummal v. Mohd. Mytheen* [1963 KLJ 1177 : AIR 1964 Ker 225]. The said decisions have our respectful concurrence.

7. We, therefore, set aside the judgment of the learned Single Judge of the Bombay High Court rendered in SA No. 514 of 1974 dated 19-11-1979 and restore the judgment and decree of the District Judge, Satara, rendered in CA No. 29 of 1972 dated 30-1-1974. The appeal is allowed with costs throughout. The payment ordered by the District Judge, Satara, in his judgment dated 30-1-1974 inclusive of the amount remitted by the 1st respondent for obtaining the occupancy right, shall be remitted within six months from today and thereupon the appellant shall recover from the respondents' possession of the suit property.