

SUPREME COURT OF INDIA

Virendra Nath through Power of Attorney Holder R.R. Gupta

Vs.

Mohd. Jamil

C.A.No.4007 of 1999

(Shivraj V. Patil and D.M.Dharmadhikari JJ.)

14.07.2004

JUDGMENT

D. M. Dharmadhikari, J.

1. This appeal has been preferred against the judgment dated 07.8.1997 of the High Court of Allahabad whereby revisional order dated 10.2.1975 passed by the Deputy Director of Consolidation, Allahabad, has been set aside and the order dated 26.3.1974 passed by the Assistant Settlement Officer of Consolidation has been restored.

2. Relevant facts leading to filing of this appeal are as under:-

3. In relation to the lands in question, an objection was filed by Jan Mohammad (represented now by the respondents) in the court of Consolidation Officer under provision of section 9A of *Uttar Pradesh Consolidation of Holdings Act, 1953* [for short the Consolidation Act, 1953] for declaring and recording him on the land as Sirdar in accordance with section 210 of the *Uttar Pradesh Zamindari Abolition & Land Reforms Act, 1950* [for short the Abolition Act]. The claim of Jan Mohammad was on the basis of his alleged adverse possession on the land for long period of 40 years. The Consolidation Officer accepted case of Jan Mohammad and recorded him as Sirdar on the land.

4. The recorded owners of the lands preferred an appeal under section 11 of the Consolidation Act to Assistant Settlement Officer of Consolidation. In the appeal, it was pointed out that in the basic years of Fasali 1359 and 1361 in the revenue papers i.e. Khasras name of Jan Mohammad was recorded in respect of the lands as a mortgagee [Murtheen]. The case of the petitioners before Appellate Authority was that Jan Mohammad came in possession of the property as a mortgagee and could not acquire any title by adverse possession. The appellate authority took the view that the mortgage of the land was for a loan of more than Rs.100/- and the mortgage- deed required compulsory registration. The appellate court came to the conclusion that as the alleged mortgage is not evidenced by any registered document, the oral evidence of mortgage cannot be relied.

5. The Appellate Authority, therefore, dismissed the appeal and maintained the order of the Consolidation Officer directing recording of name of Jan Mohammad as having acquired ownership to the land by adverse possession.

6. The petitioners then preferred a revision under section 48 of the Consolidation Act to the court of Deputy Director of Consolidation, Allahabad. The revisional authority took the view that though the unregistered written mortgage-deed being in possession of the mortgagee, could not be produced, oral evidence was admissible to ascertain the nature of possession of Jan Mohammad on the land.

7. The revisional authority relied on the earliest entries in the Khasaras of basic years to come to the conclusion that Jan Mohammad came into possession of the land as mortgagee. His possession could not be held to be adverse. His possession would be deemed to be only permissive as a mortgagee. The revisional authority, therefore, relying on the entry in khasaras of fasli 1359 where Jan Mohammad is recorded as a mortgagee, allowed the revision and dismissed his claim for being recorded as Sirdar of the land.

8. The legal representatives of Jan Mohammad preferred writ petition to the High Court of Allahabad.

9. The High Court in the writ petition reversed the judgment of the revisional authority on the ground that the plea of relationship of mortgage and mortgagee and the possession of Jan Mohammad to be permissive was raised for the first time in revision. The High Court held that the revisional authority was in error in upsetting orders of the lower authorities.

10. Learned counsel representing the original recorded owner of the lands in this appeal submits that claim of Jan Mohammad was based on alleged adverse possession on the land. It was an error on the part of the High Court to hold that relationship of mortgage and mortgagee never came up for consideration before the Consolidation Officer and Assistant Settlement Office of Consolidation. The order of the appellate authority has been placed on record of this appeal which clearly shows that the alleged relationship of mortgage and mortgagee between the parties was under discussion. Despite the entry in the remarks column of the Khasara of the fasli years 1359 and 1361 showing Jan Mohammad as mortgagee on the land, his possession was held to be adverse and his claim for recording him as Sirdar on the land was allowed.

11. Learned counsel appearing for the respondents has filed written submissions. In opposing the appeal, it is contended that the revisional Authority exceeded its powers of revision under section 48 of the Consolidation Act.

12. After hearing the learned counsel for the parties and perusing the record we find that the High Court had no justification to upset the decision of the revisional Authority. The earliest khasara records clearly show nature of possession of Jan Mohammad on the lands as mortgagee. Even though, mortgage-deed which was unregistered and being in possession of

mortgagee could not be produced by the mortgagor, evidence could be admitted for collateral purpose of ascertaining the nature of possession of Jan Mohammad. There is no evidence that the possession of Jan Mohammad as mortgagee ever became adverse to the knowledge of the original owner that is the mortgagor. The claim for recording Jan Mohammad as Sirdar on the land was filed under section 210 of the Abolition Act which reads as under:-

"210. Consequences of failure to file suit under section 209. -If a suit for eviction from any land under section 209 is not instituted by a bhumidhar or asami, or a decree for eviction obtained in any such suit is not executed within the period of limitation provided for institution of such suit or the execution of such decree, as the case may be, the person taking or retaining possession shall

a) where the land forms part of the holding of a bhumidhar with transferable rights, become a bhumidhar with transferable rights of such land and the right, title and interest of an asami, if any, in such land shall be extinguished;

b) where the land forms part of the holding of a bhumidhar with non-transferable rights, become a bhumidhar with non-transferable rights and the right, title and interest of an asami, if any, in such land shall be extinguished;

c) where the land forms part of the holding of an asami on behalf of the Gaon Sabha, become an asami of the holding from year to year."

13. Provided that the consequences mentioned in clauses (a) to (c) shall not ensue in respect of any land held by a bhumidhar or asami belonging to a Scheduled Tribe. Section 209 of the Abolition Act confers right on a recorded owner of the land to eject persons occupying land without title. In case of a mortgage, the mortgagor has no right in law to eject a mortgagee until the mortgage is redeemed. Even though, the mortgage was not by any registered instrument, it is not disputed that the possession of the land was taken by Jan Mohammad as a mortgagee. If his entry on the land was as mortgagee, nature of his possession would continue to be as mortgagee unless there is evidence to show that, at any point of time, he asserted his adverse title, by repudiating his possession as mortgagee and continued in adverse possession for the prescribed period of more than 12 years to the knowledge of the mortgagor. From none of the orders either of the original or appellate authority, any evidence seems to have been led to establish date or period from which the possession of Jan Mohammad became adverse to the knowledge of the recorded owner. In the state of above evidence on record, the revisional court was fully justified in coming to the conclusion that Jan Mohammad, who came in possession of the land as mortgagee, cannot be recorded as Sirdar or Bhumidar under section 210 of the Abolition Act.

14. The High Court in reversing the order of the revisional Authority erroneously attached undue importance to the fact that there was no specific plea or evidence led on behalf of the recorded owner that the possession of Jan Mohammad on the land was permissive. From the orders passed by the authorities under the Consolidation Act, it is apparent that throughout the stand of the original recorded owner, was that Jan Mohammad came in possession of the

land as a mortgagee. The argument of permissive possession was advanced before the revisional Authority on the plea of mortgage. The High Court committed a serious error in upsetting the judgment of the revisional court on the ground of alleged want of plea of permissive possession by the original recorded owner.

15. Consequently, we allow this appeal, set aside the impugned judgment dated 07.8.1997 of the High Court of Allahabad and restore the revisional order dated 10.2.1975 of Deputy Director, Consolidation.

In the circumstances, we, however, make no order as to costs.