SUPREME COURT OF INDIA

Shankar Sakharam Kenjale

Vs.

Narayan Krishna Gade

C.A.No.4594 of 2010

(Mohan M.Shantangoudar and R.Subhash Reddy,JJ.,)

17.04.2020

JUDGMENT

Mohan M.Shantanagoudar,J.,

1. The instant appeal arises out of the judgment dated 08.06.2009 passed by the High Court of Judicature at Bombay in Second Appeal No. 439 of 1987. Vide the impugned judgment, the High Court set aside the findings of the Trial Court and the First Appellate Court and directed the Trial Court to draw a preliminary decree of redemption of mortgage in favour of the Respondents herein.

2. The factual background to this appeal is as follows:

> 2.1 The land in question was Paragana watan property/Inam land (hereinafter 'suit land5). Such watan properties and watans were governed by the provisions of the Bombay Hereditary Offices Act, 1874 (hereinafter Watan Act'). Smt. Laxmibai, wife of one Bhawani Raje Ghadge, was the watandar of the suit land. She had inducted one Mr. Ramchandra (successor of the Respondents herein) as a permanent Mirashi tenant of the land. Such tenancy was hereditary in nature.
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> 2.2 On 14.05.1947, the said Ramchandra (hereinafter 'Mirashi tenant—mortgagor') executed a mortgage deed in favour of one Shankar Sakharam Kenjale (hereinafter 'mortgagee') mortgaging the suit land with a condition of sale for an amount of Rs. 900/- advanced by Shankar Kenjale for the purpose of Ramchandra's household and personal sundry expenses. Per the terms of this deed, a period of ten years was envisaged for the repayment of the mortgage money and the mortgagee was placed in possession of the suit land.
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> 2.3 Meanwhile, the Bombay Paragana and Kulkarni Watans (Abolition) Act, 1950 (hereinafter 'the Abolition Act') came into force with effect from 25.01.1951 with a view to abolish Paragana and Kulkarni watans and to make provision for the performance of functions of some of these offices. Under this Act, Paragana and Kulkarni watans were abolished and watan lands were resumed to the Government, subject to Section 4. It is needless to observe that the suit land, being watan property, was also resumed to the Government subject to Section 4, which

empowered the holder of the watan to seek re-grant of the land upon payment of the requisite occupancy price within prescribed period.

2.4 Notably, the original watandar did not seek re-grant of the suit land. However, relying on a Government Resolution dated 17.05.1956 (not placed on record) permitting persons in actual possession of the watan lands to seek re-grant, the mortgagee (successor of the Appellants herein) paid the requisite occupancy price and obtained a re-grant of the suit land in his favour in the year 1960.

2.5 The Respondents herein (successors of the mortgagor) then filed a suit for redemption of mortgage against Shankar Sakharam Kenjale (mortgagee) in Regular Civil Suit No. 190 of 1978 before the Civil Judge, Junior Division, Vaduj. It was contended that they had requested the mortgagee to accept the mortgage money and reconvey the land, but he had failed to do so. Vide judgment dated 09.12.1983, this suit was dismissed. It was observed that the deed dated 14.05.1947 was in the nature of a mortgage by conditional sale and not an outright sale. Further, it was found that with the coming into force of the Abolition Act and the failure of the original watandar and the Mirashi tenant— mortgagor to secure a re-grant of the suit land, the said land stood resumed to the Government and the relationship of mortgagor- mortgagee between the parties ceased to exist. In light of this, it was held that the mortgagor's right of redemption had also extinguished and the subsequent re-grant in favour of the mortgagee could not be seen as one on behalf of the mortgagor so as to pass on the benefits of the same to him.

2.6 The Respondents herein then preferred an appeal before the District Judge, Satara in Civil Appeal No. 25 of 1984. On 24.03.1987, this appeal was dismissed. The District Court reiterated the reasoning of the Trial Court that by virtue of the failure of the watandar and the Mirashi tenant—mortgagor to obtain a re-grant of the suit land in their favour, the said land had been resumed to the Government under the Abolition Act, thereby ending the mortgagor-mortgagee relationship between the parties. Thus, in light of the subsequent re-grant made to the mortgagee, it was found that the Mirashi tenant—mortgagor's right to redeem shall be deemed to have been extinguished.

2.7 Aggrieved, the Respondents filed a second appeal before the High Court of Judicature at Bombay in Second Appeal No. 439 of 1987. Vide the impugned judgment, the concurrent conclusions of the Trial Court and the First Appellate Court were set aside and the suit for redemption was decreed. This was done on the basis that but for the mortgage, the mortgagee would not have been in possession of the suit land and could not have obtained the re-grant order in his favour. Given that such re-grant was premised on the underlying mortgagor-mortgagee relationship, it was held that the benefit obtained by the mortgagee by virtue of such re-grant must accrue to the Mirashi tenant—mortgagor. In this respect, reliance was placed on Section 90 of the Indian Trusts Act, 1882 as well as the decisions of this Court in *Jayasingh Dnyanu Mhoprekar and Another v. Krishna Babaji Patil and Another*[1]*, and Namdev Shripati Nale v. Bapu Ganapati Jagtap and Another*[2]. It is against this judgment that the Appellants have come in appeal before this Court.

3. Heard the Counsel for the parties.

4. Learned Counsel for the Appellants relied on the decisions of this Court in *Collector of South Satara and Another v. Laxman Mahadev Deshpande and Others*[3], *and Malikarjunappa Basavalingappa Mamle Desai v. Siddalingappa & Others*[4], to argue that once the Abolition Act came into force, the suit land vested with the Government and after its re-grant to the mortgagee, he became the absolute owner of the land and all rights of the Mirashi tenant— mortgagor, including the right to redemption, came to an end.

5. Per contra, learned counsel for the Respondents relied on Section 90 of the Indian Trust Act, 1882 as well as the decisions of this Court in Jayasingh Dnyanu Mhoprekar (supra) and Namdev Shripati Nale (supra) to contend that the benefit obtained by the mortgagee by virtue of the re-grant must accrue to the Mirashi tenant—mortgagor. He also drew our attention to the proviso to Section 3 of the Abolition Act coupled with certain provisions of the Watan Act to argue that the rights of Ramchandra as a Mirashi tenant survived the resumption of land to the Government under the Abolition Act, and therefore his rights as a mortgagor (including the right to redemption) also continued to survive despite the re-grant in favour of the mortgagee.

6. Upon perusing the record and hearing the arguments advanced by the parties, we find that the central issue arising for our consideration in this appeal is as follows: Whether the permanent Mirashi tenant-mortgagor's (Respondents) right of redemption ceased to exist by virtue of the resumption of the suit land under the Abolition Act and its subsequent re-grant in favour of the mortgagee (Appellants)?

7. As mentioned supra, it ,is not disputed that Ramchandra was a permanent Mirashi tenant of the watandar of the suit land. Admittedly, such lease was subsisting as on 25.01.1951, i.e., the day on which the Abolition Act came into force.

8. At this juncture, it may be relevant to note certain provisions of the Abolition Act as well as the Watan Act:

> "Section 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 of such watan land made in accordance with the provisions of Section 5 of the Watan

Act or the rights of an alienee thereof or any person claiming under or through him;

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

Additionally, Section 5 of the Watan Act is notable:

"Section 5. Prohibition of alienation of watan and watan rights.—(1) Without the sanction of [the [State] Government], [or in the case of a mortgage, charge, alienation, or lease of not more than thirty years, of the Commissioner] it shall not be competent-

(a) to a watandar to mortgage, charge, alienate or lease, for a period beyond the term of his natural life, any watan, or any part thereof, or any interest therein, to or for the benefit of any person who is not a watandar of the same watan;

(b) to a representative watandar to mortgage, charge, lease or alienate any right with which he is invested, as such, under this Act.

(2)In the case of any watan in respect of which a service commutation settlement has been effected, either under section 15 or before that section came into force, clause (a)of this section shall apply to such watan, unless the right of alienating the watan without the sanction of [the [State] Government] is conferred upon the watandars by the terms of such settlement or has been acquired by them under the said terms.

It is also relevant to note Section 8 of the Abolition Act:

"Section 8. Application of Bombay Tenancy and Agricultural Lands Act, 1948. If any watan land has been lawfully leased and such lease is subsisting on the appointed day, the provisions of the Bombay Tenancy and Agricultural Lands Act, 1948, shall apply to the said lease and the rights and liabilities of the holder of such land and his tenant or tenants shall, subject to the provisions of this Act, be governed by the provisions of the said Act.

Explanation.- For the purposes of this section the expression 'land' shall have the same meaning as is assigned to it in the Bombay Tenancy and Agricultural Lands Act, 1948."

From a reading of the proviso to Section 3(3) of the Abolition Act, it is clear that the resumption of watan land to the Government under the Abolition Act does not affect the rights of an alienee of the watandar or his representative of such land under the Watan Act or that of any person claiming through or under him. Further, in respect of watan land that has been lawfully leased and wherein the lease is subsisting on the day appointed for the coming into force of the Abolition Act, Section 8 of the Abolition Act accords primacy to the Bombay Tenancy and

Agricultural Lands Act, 1948 (hereinafter 'Bombay Tenancy Act') in governing the rights and liabilities of the holder of such land and his tenant(s).

9. In light of this, when we turn to the facts of the present case, we find that the rights of Ramchandra, who was a lawful permanent Mirashi tenant, survive resumption of the suit land to the Government by virtue of the proviso to Section 3(3) as well as Section 8 of the Abolition Act. This is because the tenancy created in favour of the Mirashi tenant subsisted as on the day on which the Abolition Act came into force, thereby implying that his tenancy rights were protected and continued to be governed by the Bombay Tenancy Act despite the introduction of the Abolition Act. This is well-aligned with the general primacy accorded to tenancy laws over other legislations, as is also reflected in Section 8 of the Abolition Act. Thus, it is amply clear that the rights of permanent tenants over watan lands were intended to subsist even after the coming into force of the Abolition Act.

10. At this juncture, it may be useful to note certain other provisions of the Abolition Act, which are as follows:

"Section 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 inrespect 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 by 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."

The above provisions indicate that, with the coming into force of the Abolition Act, watans were abolished and all watan lands vested absolutely with the Government, subject to Section 4. Under Section 4(1), 'holders' of the watans were allowed to pay a certain occupancy price within five years from the date of coming into force of the Act and obtain a re-grant of the land. However, according to the second proviso to Section 4(1) of the Abolition Act, if the holder failed to pay such occupancy price within the five-year period, he would be deemed to be in unauthorised occupation of the land and would be liable to be summarily ejected in accordance with the Bombay Land Revenue Code, 1879.

11. Notably, as mentioned supra, the watandar in the instant case did not exercise her right to seek re-grant of the land under Section 4(1) of the Abolition Act. It seems, the State Government passed orders in G.R.R.D. No. PKA-1056-IV-L dated May 3, 1957 and G.R.R.D. No. 2760-III-48820-L dated November 23, 1960 to grant the lands in favour of persons who were in actual possession. By virtue of the aforesaid orders, wherever the holder or watandar had failed to pay the occupancy price as required by Section 4(1) of the Act before the prescribed period, the lands in question be granted in favour of permanent Mirashi tenants who were in actual possession of lands. But the Mirashi tenant in this matter, namely, Ramchandra did not apply for re-grant pursuant to the said orders. On the other hand, the mortgagee applied for re-grant, though he was not a permanent Mirashi tenant.

12. By an order dated 23.11.1960, the mortgagee (represented by the Appellants herein) obtained a re-grant of the suit land upon paying the requisite occupancy price. It is claimed that this was done on the basis of a Government Resolution dated 17.05.1956 permitting persons in actual possession of the watan lands to seek re-grant. Notably, this Government Resolution dated 17.05.1956 has not been placed on record and nor has it been considered by the three Courts. We hasten to note that the effect of the Government Orders dated 03.05.1957 and 23.11.1960, mentioned supra, was considered by this Court in para 5 of the judgment in Jayasingh Dnyanu Mhoprekar (supra). But the Government Resolution dated 17.05.1956 is not considered by this Court earlier. Be that as it may, it is not in dispute that a re-grant order was made in favour of the Appellants' predecessor and has not been questioned subsequently. Thus, proceeding on the basis that the Government Resolution dated 17.05.1956 existed and the re-grant was made in favour of the mortgagee, we find that the central question to be considered here is the effect of such re-grant on the rights of the Mirashi tenant—mortgagor.

13. In our considered opinion, the failure on the part of the mortgagor to pay the occupancy price and seek a re-grant is not fatal to his rights as a Mirashi tenant as the tenancy in his favour continued to subsist despite the introduction of the Abolition Act, as detailed in our discussion above. Consequently, the mortgage executed by him also survived the resumption of the suit land under the Abolition Act, and it cannot be said that the relationship of mortgagor-mortgagee between the parties ceased to exist by virtue of such Act.

14. It is well-settled that the right of redemption under a mortgage deed can come to an end or be extinguished only by a process known to law, i.e., either by way of a contract between the parties to such effect, by a merger, or by a statutory provision that debars the mortgagor from redeeming the mortgage. In other words, a mortgagee who has entered into possession of the mortgaged property will have to give up such possession when a suit for redemption is filed, unless he is able to establish that the right of redemption has come to an end as per law. This emanates from the legal principle applicable to all mortgages - "Once a mortgage, always a mortgage".

15. In the present case, it is clear that none of the aforementioned conditions in which the right of redemption comes to an end exist with respect to the mortgage deed dated 14.05.1947. As regards the impact of the re-grant on such right of redemption, it must be noted that such re-grant in favour of the mortgagee could not have been made but for the fact that he was in actual possession of the property by virtue of his position as a possessory mortgagee. There is no doubt that had the Mirashi tenant--mortgagor applied for a re-grant, the suit land would have certainly been granted in his favour, as the rights of permanent tenants in watan lands were allowed to subsist even after the coming into force of the Abolition Act. Thus, in our considered opinion, the re-grant to the Appellants' predecessor based on actual possession as mortgagee cannot be divorced from the existence of the underlying mortgagor-mortgagee relationship between the parties. Therefore, any benefit accruing to the mortgagee must necessarily ensue to the Mirashi tenant— mortgagor.

16. In this regard, it is apposite to note Section 90 of the Indian Trusts Act, 1882, which reads as under:

> "Section 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."

A bare reading of this provision indicates that if a mortgagee, by availing himself of his position as a mortgagee, gains an advantage which would be in derogation of the right of the mortgagor, he must hold such advantage for the benefit of the mortgagor.

17. In the instant case, we find that the conditions stipulated under Section 90 of the Indian Trusts Act, 1882 are satisfied. As mentioned supra, the mortgagee could only obtain the re-grant in his favour by availing himself of his position as a mortgagee, as such re-grant is traceable to the possession of the land accorded to him by virtue of the mortgage deed. Further, the said re-grant was certainly in derogation of the rights of the mortgagor who was the permanent Mirashi tenant and thereby protected by virtue of the subsisting tenancy. The fact that the lessor/Mirashi tenant Ramachandra did not claim re-grant is not relevant inasmuch the right of redemption of a mortgagor is not extinguished by virtue of re-grant in favour of the original defendant inasmuch as the re-grant was obtained and the property was held by the original defendant for the benefit of the mortgagors. Re-grant made in favour of the original defendant is an advantage traceable to the possession of the suit property obtained by him under the mortgage and the said re-grant certainly subserves the right of mortgagor who was a Mirashi tenant in respect of the suit property. As mentioned earlier, Section 90 of the Indian Trusts Act, 1882 casts a clear obligation on the mortgagee to hold any right acquired by him in the mortgaged property for the benefit of the mortgagor, as he is seen to be acting in a fiduciary capacity in respect of such transactions. Therefore, the advantage derived by the Appellants (mortgagee) by way of the re-grant must be surrendered to the benefit of the Respondents (Mirashi tenant—mortgagor), subject to the payment of the expenses incurred by them in securing the re-grant. This is because the Mirashi tenant—mortgagors' right to redeem the mortgage was not extinguished but was protected by virtue of the Abolition Act as well as under the provisions of the Bombay Tenancy and Agricultural Lands Act, 1948; in other words, the tenancy in his favour continued to subsist.

18. This is also supported by the decision of this Court in Jayasingh Dnyanu Mhoprekar (supra) where in a similar factual scenario of the mortgagee obtaining a re-grant in derogation of the right of the mortgagor-Mirashi tenant, this Court held as follows:

> "9 It is seen that the mortgagees obtained the grant in their favour by making an incorrect representation to the Government that they were permanent Mirashi tenants although they were only mortgagees. Section 90 of the Indian Trusts Act, 1882 clearly casts an obligation on a mortgagee to hold the rights acquired by him in the mortgaged property for the benefit of the mortgagor in such circumstances as the mortgagee is virtually in a fiduciary position in respect of the rights so acquired and he cannot be allowed to make a profit out of the transaction. The defendants are, therefore, liable to surrender the advantage they have derived under the grant in favour of the plaintiffs even if the order of grant has become final before the Revenue Authorities, of course, subject to the payment of the expenses incurred by them in securing the grant. The decree of the first appellate court accordingly has directed that Rs 182.41 should be paid by the plaintiffs to the defendants along with the mortgage money."

19. In Namdev Shripati Nale (supra), while dealing with the applicability of Section 90 of the Indian Trusts Act, 1882, this Court observed as follows:

> "6 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 the 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 Trusts 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 enure 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*[5] *and by K.K. Mathew, J. (as his Lordship then was) in Nabia Yathu Ummal v. Mohd. Mytheen*[6]. The said decisions have our respectful concurrence."

(emphasis supplied)

20. The facts in the case of Collector of South Satara (supra) and the case of Malikarjunappa Basavalingappa Mamle Desai (supra) were totally different and these cases were dealing with a different point. The litigation in these cases was not related to the rights of a permanent tenant under watandar. So also, the point involved therein was not related to the effect of the order of re-grant made in favour of the mortgagee. Therefore, we are of the considered opinion that the dictum laid down in the aforementioned judgments is not applicable to the facts of the case at hand.

21. On other hand, in our considered opinion, the question involved in the present litigation is squarely covered by the judgments in Jayasingh Dnyanu Mhoprekar and Namdev Shripati Nale (supra).

22. In view of the foregoing, we hold that the High Court was justified in decreeing the suit filed by the Respondents herein and setting aside the judgments of the Trial Court and the First Appellate Court. We do not find any reason to interfere with the impugned judgment. Accordingly, the instant appeal is dismissed.

Judgment Referred.

[1]*(1985) 4 SCC 0162*
[2]*(1997) 5 SCC 0185*
3(1964) 2 SCR 0048
[4]*(1973) 3 SCC 0180*
[5]*(1962) 1 SCR 0290*
[6]*AIR 1964 Ker 0225*