

## ALLAHABAD HIGH COURT

Ghassu

Vs

Babu Ram

(Dar, J.)

14.12. 1943

### JUDGMENT

**Dar, J.**

1. This is an application in revision against a judgment and decree dated 26th September 1942, of the District Judge, Mainpuri, by which he affirmed a judgment and decree dated 17th June 1942, of a Revenue Officer of Mainpuri in a suit for redemption under Section 12, U.P. Agriculturists' Relief Act (27 of 1934). On 7th April 1920, Ganga Ram, an occupancy tenant of village Nagla Khujaria Mazra Bajhera, made a usufructuary mortgage of his occupancy holding in favor of Har Sahai for Rs. 300. Both the original mortgagor and the mortgagee are now dead. The plaintiffs alleging that they are the legal representatives of the mortgagor and that the mortgage has been satisfied out of the usufruct, raised an action in the Court of the Assistant Collector, First Class, Mainpuri under Section 12, Agriculturists' Relief Act, for redemption of the above mortgage against the legal representatives of the mortgagee. One of the pleas in defense taken was that the mortgage in suit being of an occupancy holding was wholly void in law and the plaintiffs could not maintain an action under Section 12, Agriculturists' Relief Act, which allowed redemption of valid mortgages only. This plea as also other pleas raised by the defense were overruled by the trial Judge and holding that the mortgage had been satisfied out of the usufruct of the property, he passed a decree for redemption in favor of the plaintiffs. On appeal this decree was affirmed by the District Judge. Against these concurrent decrees this revision has been made and it raises a pure question of law, namely, whether an action for redemption of a mortgage of an occupancy holding under Section 12, Agriculturists' Relief Act, is maintainable or not, and on account of conflict of judicial authorities which exists upon the legal effect of a mortgage of an occupancy holding and the relief which, in certain circumstances, is open to the mortgagor in relation to such mortgage, this case has been referred to this Bench.

2. In successive Rent and Tenancy Acts which were enacted in these provinces, No. 12 of 1881, No. 2 of 1901, No. 3 of 1926 and No. 17 of 1939, varying restrictions had been placed upon the right of the occupancy tenants to transfer their holding. Prior to the enactment of N.W. Tenancy Act, No. 2 of 1901, a distinction was drawn in this Court between the "right of occupancy in" and the "right to occupy" the holding and in *Khiali Ram v. Nathu Mal* ('93) 15 All. 219, a Full Bench of this Court recognising that distinction held that a usufructuary mortgage of an occupancy holding was merely a transfer of the right to occupy which was not prohibited by the

Act and was permissible. After the enactment of the N.W. Tenancy Act, No. 2 of 1901, it has been a settled law in this Court that a usufructuary mortgage of the occupancy holding is void in law, see *Ram Sarup v. Kishen Lal*<sup>1</sup> and this view has been consistently maintained under successive Acts. The Board of Revenue, on the other hand, has consistently taken the view that a usufructuary mortgage of an occupancy holding by a tenant was only voidable against the landlord and as between the mortgagor and the mortgagee was a good transaction to the extent that the mortgagor after making the mortgage could not sue to eject the mortgagee as a trespasser : see *Rup Singh v. Mt. Beera*<sup>2</sup> *Pitai v. Karedin Singh*<sup>3</sup> *Harsaran Pathak v. Abdullah Khan*<sup>4</sup> *Thakur Das v. Nathu Ram*<sup>5</sup> and *Jhurraoo v. Ram Kunwar*<sup>6</sup>

3. But though this Court has constantly taken the view that the usufructuary mortgage of an occupancy holding by a tenant is void and not voidable, nevertheless it has consistently laid down that if the mortgagee had been given possession of the holding and the mortgagor after giving possession seeks to eject the mortgagee as a trespasser, he cannot be allowed to recover possession of the holding without paying the money which he had taken from the mortgagee. So far back as the year 1888 it was laid down in *Fasih Uddin v. Karamat Ullah*<sup>7</sup> that a sir-holder who had sold his sir after stipulating that he would not claim occupancy right in the sir could not claim exproprietary rights without tendering that portion of the purchase money which was the price of the sir and "it would be violating every principle of equity and good conscience to decree the claim without such payment," and this rule was applied to the usufructuary mortgage of the occupancy holding in *Bahoran Upadhya v. Uttamgir*<sup>8</sup> by Banerji and Tudball JJ., and in the case of void leases in *Bisheshar Pathak v. Rup Narain Singh*<sup>9</sup> and in *Kuber Singh v. Ram Chandra Bhunja*<sup>10</sup> As a result of the rule laid down in *Fasih Uddin v. Karamat Ullah*<sup>11</sup> the natural course of action on the part of the mortgagors who had made the usufructuary mortgage of the occupancy holding was to tender the amount which they had received from the mortgagees and to raise an action for redemption and such claims frequently came to this Court and were allowed : see *Ramzan v. Bhukhal Rai*<sup>12</sup> *Durga Chaudhary v. Jagroop*<sup>13</sup> *Mt. Raj Rani v. Gulab*<sup>14</sup> and *Mt. Dukhi v. Inderman Ahir*<sup>15</sup>

4. Questions were raised at one time as to the form of action, whether it was open to a mortgagor to claim redemption when the mortgagee was holding the property under an invalid or void mortgage, but it was generally held that an action for redemption in essence is an action for possession and the form of action was immaterial: see *Annada Hait v. Khudiram Hait*<sup>16</sup> *Appanna v. Venkatasami*<sup>17</sup> and *Baijnath Prasad Singh v. Muneshwar Singh*<sup>18</sup> It has also been the consistent view of this Court that a mortgagee of an occupancy holding by remaining in possession for over 12 years does not extinguish the rights of the mortgagor to redeem him and by such possession the mortgagee only prescribes for mortgagee rights : see *Mahamangal Rai v. Kishun Kandu*<sup>19</sup> *Halka v. Nannhon*<sup>20</sup> and *Mt. Shamrati Koer v. Kalika Singh*<sup>21</sup>

5. Under the authorities of this Court the position then in brief is that a usufructuary mortgage of an occupancy holding is void, but if the mortgagee has been put in possession of the occupancy holding, the mortgagor cannot recover back possession of the holding without returning the consideration which he had received; that it is open to the mortgagor to seek possession of the holding by tendering the consideration which he had received and he may do so by a redemption suit, that the mortgagee by his possession for over 12 years of the holding acquires only the mortgagee's rights and the mortgagor's right to redeem subsists. But the question still remains whether it is open to the mortgagor to call upon the mortgagee to render accounts in cases where

there was contractual liability upon him under the mortgage transaction itself to render accounts or in cases where there was. no contractual liability but a statutory liability has fallen upon him as a result of recent debt legislation in these provinces to render accounts in a redemption suit, and this question arises both with reference to mortgages which are more than 12 years' old as also with regard to the mortgages which are less than 12 years' old. In the cases mentioned above the mortgagors were allowed to redeem on payment of the principal sum due under the mortgage, and the question of accounting by the mortgagee did not arise and it was immaterial whether the action was regarded as one for possession of property on payment of a certain sum of money due in equity to the defendant or whether it was regarded as one for redemption of the mortgage on payment of the principal sum due on the mortgage.

6. Mr. Jagdish Sarup in his able argument has contended before us that under Section 28, Limitation Act (9 of 1908) the title is only extinguished and not transferred and the title which arises in favor of the wrong-doer is a new title and not the old title transferred to him; and that by mere lapse of time what was at its inception a void transaction cannot become a valid transaction in law and the mortgage of an occupancy holding being prohibited by law no length of the possession on the part of the mortgagee and no amount of assertion by him that he was holding under a mortgage would bring a valid mortgage into existence, and for these contentions reliance was placed upon the decision of the Court of Appeal in *Tichborne v. Weir*<sup>22</sup> and in *Bhukhan Mian v. Radhika Kumari Devi*<sup>23</sup> *Tichborne v. Weir*<sup>24</sup> is an authority for the proposition that by prescription the original title is not transferred and when a wrong-doer prescribes for lessee's rights, the covenants made between the lessor and the lessee are not enforceable against the wrong-doer. In *Bhukhan Mian v. Radhika Kumari Devi*<sup>25</sup> it was held by Wort A. C. J. that a person cannot prescribe for a limited interest like tenancy or mortgage as both a tenancy and a mortgage are creatures of contract, and on fundamental principles it is difficult to hold that a contract can be brought into existence by prescription.

7. The prohibition against the transfer of an occupancy holding has not been made in the interest of the State; it has been made in the interest of the landholder and possibly also in the interest of the tenant. The transfer of an occupancy holding in the words of the late Sir Shah Sulaiman in *Dip Narain Singh v. Nageshar Prasad*<sup>26</sup> has been merely declared to be void on the ground of the incompetency of the tenant to make the transfer and has not been actually forbidden or prohibited by law or declared to be otherwise illegal. There is abundant authority in this country for the proposition that an unalienable property can be subject of adverse possession and that by remaining in possession for over 12 years under a void mortgage the transferee acquires the status of a mortgagee. See *Sundara Gurukkal v. Subramania Archakar*<sup>27</sup> *Budankayala Balakrishnamma Subudhi v. Vinayaka Rama Singi*<sup>28</sup> *Sayyapureddi Abbaya v. Sayam Appanna*<sup>29</sup> *Sontayana Gopala Dasee v. Rami*<sup>30</sup> *Appanna v. Venkatasami*<sup>31</sup> *Javerbhai Jorabhai v. Gordhan Narsi*<sup>32</sup> *Abdul Jabbar Khan v. Gulab Khan*<sup>33</sup> and *Baijnath Prasad Singh v. Muneshwar Singh*<sup>34</sup> In *Baijnath Prasad Singh v. Muneshwar Singh*<sup>35</sup> Wort J. held that in a mortgage transaction whether the mortgage is valid or not, the position of the mortgagee is that of a mortgagee and nothing more unless adverse title is set up by him.

8. It is well settled that a wrong-doer cannot prescribe for any greater interest than that of the person against whom he has prescribed and he cannot prescribe for a greater interest than which he claims to prescribe. If a mortgagee enters into possession of a property under a void mortgage and he claims to hold the property under the terms of a void mortgage, he can only after the expiration of the period of limitation hold the property as a mortgagee under the terms of the

mortgage. If the assertion of the title by the transferee can be examined to find out the quantum of interest which he was setting up in the property to the extent whether he was claiming as a proprietor or as a mortgagee, then for the same reasons in order to determine the very quantum of interest which he was setting up in the property, the terms of the mortgage on which he was claiming to hold the property could also be examined. This is the view taken in *Sontayana Gopala Dasee v. Rami* ('21) 8 A.I.R. 1921 Mad. 410(SUPRA) where the mortgagee was held liable to render accounts, and in *Appanna v. Venkatasami* ('24) 11 A.I.R. 1924 Mad. 292 at p. 212(Suupra) where Venkatasubba Eao J. observed as follows:When it is said that a mortgagee's interest may be prescribed for, the statement implies that the mortgagee's interest is definite and precise. If the question is, has a person prescribed for a mortgagee's interest in respect of Rs. 100 or Rs. 10,000, the document may be looked at for ascertaining the quantum of interest which the adverse possessor has been claiming or has prescribed for.

9. If the matter had been *res integra* and it might have been permissible to examine the question on first principles, it could have been legitimately contended in accordance with the view of the Board of Revenue that a mortgage of an occupancy holding between the mortgagor and the mortgagee was void only against the landholder and as between the persons who made the mortgage it was a valid transaction, and when once the view was taken that the mortgage was void, as it was taken by this Court, it could have been legitimately contended that the mortgagor was entitled to eject the mortgagee and to recover possession of the holding on his title without being called upon to return the consideration. But, on the faith of the authorities of this Court, numerous transactions have taken place and it will be unsettling the law to go back to first principles and on the state of authority in this Court it must be held that a mortgage of an occupancy holding which has ripened by 12 years' adverse possession is liable to be redeemed.

10. On similar considerations I am also of opinion that a usufructuary mortgage of less than 12 years' standing is also liable to be redeemed. This Court has taken the view that a mortgagor cannot recover possession of the holding without returning the consideration which he had received under the mortgage and in a case in which the mortgagee had gone into possession and liability to account exists either on the contract or under the statute, it is not possible to find out what sum is due to the mortgagee which the mortgagor should return in equity without examining the accounts, and the same equity which demands that the mortgagor should not recover possession and keep the consideration, also demands that the mortgagee should not receive the consideration a second time when he has already received the consideration which he had advanced by the usufruct of the property. It seems to me that in order to adjust equity between them an examination of accounts would be necessary and in doing so, though in one sense the Court may be regarded as enforcing the terms of a void mortgage really and substantially the Court is not enforcing the terms of a void mortgage but is really adjusting equities between the parties having regard to the situation which has arisen on account of a transfer having taken place and possession having passed under it which has to be restored.

11. There remains now the question of the form of the action. The relationship which comes into existence as a result of a mortgage of an occupancy holding and its possession being transferred to the mortgagee, though not strictly speaking that of a mortgagor and of a mortgagee, is analogous to that relationship and the action which is raised by the mortgagor to recover possession of the holding on payment of the money due to the mortgagee, though not strictly in the nature of a redemption, is analogous to a redemption suit. This Court as also other Courts in

India, have expressed the view that an action for redemption in essence is an action for possession and mortgagors in the past had frequently been allowed to recover holdings in actions which in form were in the nature of redemption suits. The action permitted by Section 12, Agriculturists' Relief Act, is in the nature of a redemption suit and it is possible to take a strict view of the section as was taken in *Sant Ram v. Putti Lal* (40) 27 A.I.R. 1940 Oudh 263(*supra*) and to hold that Section 12 is confined to legal mortgages and it excludes the redemption of an occupancy holding. But the Oudh Court has not taken the same view as this Court with regard to the rights of the mortgagor to recover possession of an occupancy holding if the mortgagee had been put in possession of the holding. That Court did not insist on making the mortgagor return the consideration money and it allowed the mortgagor to recover possession without making any payment. We have followed in this Court a different view of law and consistently with that view I do not think it will be straining the statute unduly if we were to permit actions under Section 12, Agriculturists' Relief Act, in relation to occupancy holdings also and to apply Section 12 to transactions which are not strictly legal mortgages but which are analogous to mortgages and in substance partake of their nature. I would therefore hold that this action was rightly raised and decreed by the Court below and this application in revision should be rejected.

**Iqbal Ahmad, C.J.**

Cases Referred.

1('07) 29 All. 327  
2('18) 2 R.D. 305 (B.R)  
3('33) 17 R.D. 370 (B.R)  
4('37) 1937 R.D. 58 (B.R)  
5('38) 1938 R.D. 249 (B.R)  
6('41) 1941 R.D. 585 (B.R)  
7('88) 1888 A.W.N. 128  
8('11) 33 All. 779  
9('28) 15 A.I.R. 1928 All. 286  
10('36) 23 A.I.R. 1936 All. 215  
11('88) 1888 A.W.N. 128  
12('18) 5 A.I.R. 1918 All. 226  
13('23) 10 A.I.R. 1923 All. 191  
14('28) 15 A.I.R. 1928 All. 552  
15('34) 21 A.I.R. 1934 All. 656  
16('14) 1 A.I.R. 1914 Cal. 894  
17('24) 11 A.I.R. 1924 Mad. 292  
18('36) 23 A.I.R. 1936 Pat. 63  
19('27) 14 A.I.R. 1927 All. 311  
20('32) 19 A.I.R. 1932 All. 259  
21('35) 22 A.I.R. 1935 All. 578  
22(1893) 67 L.T. 735  
23('38) 25 A.I.R. 1938 Pat. 479  
24(1893) 67 L.T. 735  
25('38) 25 A.I.R. 1938 Pat. 479  
26('30) 17 A.I.R. 1930 All. 1 at p. 341  
27('12) 16 I.C. 960 (Mad)  
28('03) 26 Mad. 72

29('30) 123 I.C. 195 (Mad)  
30('21) 8 A.I.R. 1921 Mad. 410  
31('24) 11 A.I.R. 1924 Mad. 292  
32('15) 2 A.I.R. 1915 Bom. 102  
33('33) 20 A.I.R. 1933 Pat. 288  
34('36) 23 A.I.R. 1936 Pat. 63  
35('36) 23 A.I.R. 1936 Pat. 63