

ALLAHABAD HIGH COURT

Mahabal Singh

Vs.

Ram Raj

Appln. No. 128 and Second Appeals Nos. 353 and 354 of 1945

(Ghulam Hasan, Harish Chandra, Wanchoo, Kidwai and Brij Mohan Lall, JJ.)

10.04.1950

JUDGMENT

Ghulam Hasan, J.

1. The fundamental question common to the revision and the two connected second appeals relates to the legal effect of a mortgage of tenancy or occupancy rights by a tenant and to the relief, if any, which can be granted to such a mortgagee in a suit brought by the mortgagor. There is also a question as to the appropriate form of action. The controversy arising in these cases will be clearer by a statement of facts in each case. I shall first take up the revision application.

2. This application arises out of proceedings under Section 12, Agriculturists' Relief Act and has arisen in the following manner. On 13th October 1900, Ram Adhin and Digbijai Singh mortgaged an occupancy holding to Sheo Narain for Rs. 1000. The original mortgagors and the mortgagee are dead and are represented by their heirs and legal representatives. The representatives of the mortgagors filed an application under Section 12 for redemption of the mortgage and they claimed redemption on the ground that the entire mortgage money had been satisfied out of the usufruct of the property. The principal defense was that Section 12 did not apply to the case and the application was not maintainable. The issue framed on this point was whether the mortgage deed was void ab initio being in respect of the occupancy tenancy under Section 5, Avadh Rent Act.

3. The Munsif before whom the application was filed held that the land was not an occupancy holding under Section 5 and therefore the mortgage was not void. He allowed redemption upon payment of Rs. 400. The lower appellate Court reversed the view of the trial Court and held that occupancy rights were transferred by mortgage and that the mortgage was void under Section 5 and, having regard to the view held by the Chief Court of Avadh that Section 12 applied to valid mortgages only, it rejected the application as being not maintainable. The applicants filed the present revision application. As the connected second appeals raising a similar question had

already been referred to the Full Bench, it was requested by both counsel that the revision should also be referred to the Full Bench and heard along with those appeals.

4. At the outset, counsel for the mortgagees attempted to argue that the revision application was not competent, as the lower appellate Court had jurisdiction to take any view of the law as it thought fit. This contention is no longer open, to counsel, as when the matter came up for the first time on 1st February 1950, he agreed with the mortgagors' counsel that the revision raised a question which was fit for reference to the Full Bench. Apart from this, there is no force in the contention on the merits either. There is clear case of jurisdiction involved in the case whether Section 12 does or does not apply to invalid mortgages.

5. Before dealing with the conflict, real or apparent, between the views of the late Chief Court of Avadh and the Allahabad High Court before the amalgamation of the two Courts, it would perhaps be desirable to refer to the Avadh cases on the point.

6. In *Dasrath v. Mt. Sandala*¹, a Bench of the Chief Court held that the mortgage of a simple tenancy holding is unlawful, being opposed to the whole spirit of the tenancy law, and the mortgagee is not entitled to the return of the money forming the essence of the consideration for the mortgage transaction, but he would be so entitled if the amount mentioned in the mortgage deed as consideration constitutes an independent transaction of loan between the parties. In this case the suit was brought by the mortgagee. The learned Judges referred to the observations, in relation to the alienation of an ex-proprietary holding in the Agra province, of the Privy Council in *Moti Chand v. Ikram Ullah Khan*²,

"All such devices, arrangements and agreements are in contravention of the policy of the Act and are contrary to law and are illegal and void, and cannot be enforced by the vendee in any civil Court or in any Court of revenue."

In *Gopal Sahu v. Nand Kumar*³, it was held that the sale of an occupancy holding was void and the transaction could be challenged by the person who is entitled to the occupancy rights on the death of the transferor. In this case the suit brought by the heir of the deceased occupancy tenant for possession was decreed. No question as to the return of the money arose in that case. In *Mir Muhammad Husain v. Mohammad Habib Khan*⁴, a distinction was drawn between a transfer of occupancy rights created under Section 5, Avadh Rent Act, and those created by a decree of Court. In the case of the former the transfer was declared to be void ab initio by the statute and in the case of the latter the condition against alienation was for the benefit of the superior proprietor and it was open to the landlord to refuse to recognize the transfer and treat the transferee as a trespasser and eject him but the transferor was bound by the transfer and was consequently estopped from maintaining a suit against the transferee treating him as a trespasser liable to ejectment under Section 127, Avadh Rent Act. That was a case in which the occupancy rights had been acquired by a settlement decree.

7. In *Sant Ram v. Putti La*⁵ it was held that Section 12, Agriculturists' Relief Act, was meant to apply to valid mortgages and a statutory tenant who had made a mortgage of his holding could not avail himself of the provisions of that section. Reference was made to the previous Avadh cases in support of the

¹³ O. W. N. 217: (AIR 1926 Oudh 270)

³⁷ CWN 438 : (AIR 1930 Oudh 300)

²⁴⁴ I. A. 54: (AIR 1916 PC 59)

⁴1941 CWN 979 : (AIR 1941 Oudh 526)

⁵15 Luck 535: (AIR 1940 Oudh 263)

conclusion that the mortgage of an agricultural holding is void ab initio and also to the case of *Moti Chand v. Ikram Ullah Khan*⁶, The learned Judges also held that as the money had been advanced merely as a consideration for the mortgage, the mortgagee could not claim it as legally due to him. The statutory tenant could not avail himself of the provisions of Section 12 but his remedy lay in a suit for ejectment in the revenue Court. Sant Ram's case, (15 Luck 535 : AIR 1940 Oudh 263) was followed in *Shanti Prasad v. Bachchi Devi*⁷, in preference to the Full Bench decision in *Ghassu v. Babu Ram*⁸, [Iqbal Ahmad, C.J., Allsop and Dar JJ.]. The reasoning adopted in this case was that a mortgage of occupancy holding has no legal existence and Section 12 conferred jurisdiction upon the Court in respect of legal mortgages and not those which were void. It was also observed that although no relief could be given in proceedings under Section 12, the Court could, in an appropriately constituted suit brought by a tenant, adjust the equities between the mortgagor and the mortgagee.

8. There are two Full Bench decisions of the Allahabad High Court which deserve serious consideration. These are *Dip Narain Singh v. Nageshar Prasad*⁹, (Sulaiman, C.J., Mukerji and King, JJ.) and *Ghassu v. Babu Ram*¹⁰ referred to above. In the former case the suit was brought by a mortgagee for recovery of mortgage-money and was resisted on the ground that the whole transaction of mortgage was illegal because a part of the mortgaged property consisted of occupancy plots which were not transferable according to law. It was held that the inclusion of non-transferable occupancy plots along with other properties which could be legally transferred did not make the whole transaction illegal and the plaintiffs could maintain their suit. A clear distinction was drawn between a contract which remains to be performed and specific performance of which may be sought, and a conveyance by which title to property has actually passed. Once a document transferring immovable property has been duly executed and registered, it passes out of the domain of a mere contract into one of conveyance. It is governed by the Transfer of Property Act and Section 24, Contract Act, has no application to it, Sulaiman, C.J. also observed that although occupancy land is declared by the Agra Tenancy Act and by Section 6(1), Transfer of Property Act to be non-transferable, a transfer thereof is not expressly prohibited by law or declared to be otherwise unlawful within the meaning of Sections 23 and 24, Contract Act, or Section 6(h), Transfer of Property Act.

9. In the second Full Bench case of *Ghassu v. Babu Ram*¹¹ the question arose as to the legal effect of a mortgage of an occupancy holding and the relief which in certain circumstance is open to the mortgagor in relation to a such a mortgage. There being conflict upon that question, the case was referred to the Full Bench. Dar, J., who delivered the judgment of the Full Bench, laid

down several propositions which may be summarized as follows:

(1) That the usufructuary mortgage of an occupancy holding by a tenant is void and not voidable.

(2) That a mortgagor after giving possession to the mortgagee cannot recover possession of the holding without paying the money which he had taken from the mortgagee.

⁶(44 I. A. 54 : AIR 1916 PC 59) ⁸ AIR 1944 All 35 : 1944 A. L. J. 1 : ILR (194) All 166 (F.B)

⁷1948 CWN 122: (AIR 1948 Oudh 349) ⁹52 All 338: (AIR 1930 All 1 F. B)

¹⁰(AIR 1944 All 25: ILR (1944) All 163 F.B) ¹¹(AIR 1944 All 25: ILR (1944) All 166 F.B)

(3) 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.

(4) 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.

(5) The relationship which comes into existence as a result of the mortgage of an occupancy holding and its possession being transferred to the mortgagee, though not strictly speaking that of a mortgagor and 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.

A large number of authorities are referred to in support of these conclusions. It follows that upon the question whether the mortgage of an occupancy holding is void, there is no conflict between the Avadh and the Allahabad cases. The only conflict is that while the Avadh Chief Court has consistently held that a mortgagor can recover possession of the occupancy holding without being called upon to return the consideration money he had received from the mortgagee, save where the consideration can be proved independently of the mortgage, the Allahabad High Court has equally consistently held that the mortgagor is not entitled to recover possession without being called upon to return the consideration. The following are some of the cases in which possession was decreed at the instance of the mortgagor on return of the money received by him on principles of equity: *Bahoran Upadhya v. Uttamgir*¹², *Durga Gkowdhuri v. Jagroop*¹³, *Bisheshar Pothole v. Rup Narain Singh*¹⁴, *Mt. Raj Rani v. Gulab*¹⁵, *Mt. Dukhi v. Inderman Ahir*¹⁶,

10. The Full Bench took note of the fact that the Board of Revenue had held that the mortgage of an occupancy holding was void only against the land-holder but it was valid between the mortgagor and the mortgagee. They also did not overlook the fact that if the mortgage was held to be void, it could then be legitimately contended that the mortgagor was entitled to eject the mortgagee without being called upon to return the consideration. They were, however, influenced by numerous transactions having taken place in the past when the mortgagor was allowed to take possession only on payment of the money received by him. These considerations in my opinion are of an overriding character and, as was rightly observed in the Full Bench case, it would be

unsettling the law established for a long number of years to hold the contrary.

11. The only important question which remains for consideration is whether the mortgagor is entitled to seek the relief for possession by redemption under Section 12 or whether he should institute a regular suit in a civil Court for possession. Upon this point, the Full Bench while recognising that it was possible to take a strict view of Section 12, as was taken in Sant Ram's case, (15 Luck 535 : AIR 1940 Oudh 263) and to hold that Section 12 is confined to legal mortgages, yet an action for redemption being in essence an action for possession the mortgagor could maintain an action under Section 12.

12. With all respect, I find it hard to accept this statement of the law. Section 12,

¹²⁸ All LJ 931 : (33 All 779) ¹⁴²⁶ A. L. J. 401: (AIR 116) 1928 All 286) ¹⁶ AIR 1934 All 656 : (153 I. C. 903)

¹³ AIR 1923 All 191 : (79 I. C. 232) ¹⁵ AIR 1928 All 552 : (117 I. C. 831)

Agriculturists' Relief Act, confers upon the Collector, if the principal money secured does not exceed Rs. 500, or if it does, upon the civil Court, jurisdiction of a special character (see Section 10). The word "Court" used in Section 10 includes the Collector and means a civil Court as defined in Section 2(5). The limited jurisdiction conferred upon the Collector to entertain an application under Section 12 cannot have the effect of making him a civil Court for all purposes. Section 12 entitles an agriculturist who has made a mortgage, or any other person entitled to institute a suit for redemption of a mortgage, to apply for redemption. These words appear to contemplate a valid mortgage and not a mortgage which has no existence in the eye of law. A void mortgage does not affect the property mortgaged and does not confer upon the mortgagee any right to enforce the mortgage. Equally clearly the mortgagor is unable to rely upon such a transaction. Besides the mortgagor, the right to apply for redemption is conferred upon any other person, entitled to institute a suit for redemption of a mortgage. The persons so entitled are enumerated in Section 91, Transfer of Property Act, for instance any person who has any interest in or charge upon, the property mortgaged or in or upon the right to redeem the same. To say that the successor of the mortgagor by devolution of interest or by acquisition of the right of the equity of redemption has, in the case of a void mortgage, any interest in, or charge upon, the property mortgaged or in or upon the right to redeem the same, would be hardly statable.

13. Section 12 further says that the application for redemption may be made at any time after the principal money has become due and before a suit for redemption is barred. If a void mortgage gives rise to no legal results, it is obvious that the principal money under it does not become due, nor is a suit for redemption barred under such a mortgage. These words are identical with the language used in Section 83, Transfer of Property Act, which says that

"at any time after the principal money payable in respect of any mortgage has become due and before a suit for redemption of the mortgaged property is barred, the mortgagor, or any other person entitled to institute such suit, may deposit.... the amount remaining due on the mortgage."

It has never been held under that section that a mortgagor under a void mortgage can deposit the money for redemption of the mortgage. The procedure prescribed in subsequent sections in the Agriculturists' Relief Act also negatives the inference that such a procedure could be validly adopted in the case of a void mortgage. Under Section 16 of the Act, after the deposit, the Court is required to hold an enquiry to determine whether the applicant is entitled to redeem the mortgage. No such right to redeem can possibly arise in respect of the mortgage which is void. A suit for redemption may, in essence be a suit for possession but the Legislature, in providing a summary and speedy relief under Section 12, Agriculturists' Relief Act, could hardly have contemplated the case of a void mortgage, nor could it have contemplated that, in such summary proceedings, the Court like regular proceedings in a suit for ejectment in the civil Court, be called upon to adjust equities between the parties.

14. The Full Bench in Ghassu's case, (AIR 1944 Allahabad 25 : ILR (1944) All 166 F. B.) was careful to mention that a void mortgage does not strictly speaking give rise to the relationship of a mortgagor and a mortgagee, but it is analogous to that relationship. Similarly the action raised by the mortgagor to recover possession of the holding on payment of the money due to the mortgagee, though not strictly speaking in the nature of a redemption, is analogous to a redemption. Having regard to the plain meaning and the object underlying Section 18, I am unable to extend the scope of that section to suits which are not suits for redemption simpliciter but analogous thereto, nor do I feel justified in holding that it would apply not only to the case of a mortgagor and a mortgagee but also a case which can be characterized as analogous thereto.

15. The cause of action in a suit for redemption is quite different from the cause of action in an ordinary suit for ejectment or possession, where the mortgagor under a void mortgage offers to restore the benefit he has received from the mortgagee. There is neither reason nor principle in widening the scope of Section 12 to cases other than those which fall strictly within the purview of that section. I would, therefore, hold that although the mortgagor is entitled to seek the relief for possession against the mortgagee in a properly constituted suit in the civil Court, it is not open to him to obtain that relief by redemption under the restricted and special jurisdiction conferred upon the Court under Section 12, U.P. Agriculturists' Relief Act. It is scarcely necessary to emphasize that such a relief can be sought against the mortgagee in all cases whether he has been in possession for over 12 years or for any period short of it. It is well-settled that the mortgagee prescribes no more than the mortgagee's interest.

16. I hold, therefore, that this revision application fails and it is dismissed with costs.

17. The two Second Appeals Nos. 353 and 354 of 1945 arise out of two Suits Nos. 138 and 137 of 1944 respectively. The defendants to the suit were the same while the plaintiffs were different. In the former suit ten plots were in dispute. Seven of these plots were mortgaged under two mortgage deeds in 1915 and 1920 by Chandika, the predecessor of Jagdei plaintiff, in favour of the predecessor of the defendants. One plot No. 73 was mortgaged by Chandika in 1328 to

Panchu Ahir, who transferred the mortgagee rights to the defendants. Two other plots, namely Nos. 177/8 and 449 were put in possession of the defendants on a bond being executed in their favour in 1941 by Jagdei and Ram as, the nephew of her husband. The suit was brought by Jagdei against the defendants for possession and damages. The plaint made no mention of the mortgages but stated that she was the hereditary tenant of the land and the defendants were in unlawful and forcible possession of it. She claimed damages for three years on account of the loss of possession. The cause of action was alleged to accrue from the date of the defendants' possession and the date of their refusal to surrender possession. The defendants stated that they were in permissive possession and had been in possession for more than 12 years in lieu of interest. They referred to the mortgages under which they had obtained possession. They pleaded that the suit was barred by limitation. They did not set up adverse possession.

18. The trial Court held that the mortgage of tenancy land was void and Article 144, and not Article 142, applied to the case. The suit for possession was decreed. The lower appellate Court applied Article 142 and dismissed the suit except in regard to two plots Nos. 177/2 and 449, in respect of which the suit was held to be within time.

19. Similarly, Suit No. 137 of 1944 was a suit not possession of two plots Nos. 406 and 407 covered by two mortgages executed in 1923 by the appellants' predecessor in favour of the defendants' predecessor, and damages. The trial Court held that the mortgages were void and Article 144 applied. The suit for possession was decreed. It was held that the consideration of the mortgage being unlawful, the mortgagor was entitled to possession without payment. The lower appellate Court, however, dismissed the suit holding that Article 142 applied and the plaintiffs had not proved their possession within limitation.

20. According to the view of law enunciated above, it is clear that the mortgagors are entitled to recover possession subject to the payment of the money received from the mortgagees and no question of limitation arises in the case. The possession of the mortgagees was a permissive possession and the only right they have is to be allowed to claim the money which the mortgagors had received. The plaint as framed, however, does not justify the granting of this relief to the plaintiffs in the two cases. Both the cases conveniently ignored the mortgage transactions and the plaintiffs put themselves forward as hereditary tenants of the land and treated the mortgagees as trespassers. They sued not only for possession but damages also. The cause of action was also wrongly stated. The plaintiffs did not offer to restore the benefit which they had received from the mortgagees as a condition precedent to their obtaining the relief for possession. Upon the present allegations in the two plaints, it is not possible to grant the relief for possession to the plaintiffs against the defendants. The cases will, therefore, go back to the trial Court and the plaintiffs of the two cases will be allowed to amend their plaint in the light of the above observation. The defendants will be allowed to raise such pleas in defence as may be open to them, and the parties will be entitled to produce such additional evidence as may appear necessary. The Court will then pass a proper decree according to law.

21. It is true that the appellant's Suit No. 138 of 1944, which gave rise to Appeal No. 353 of 1945, stood decreed with respect to plots Nos. 177/2 and 449 and was dismissed with respect to the other plots in suit. Her second appeal was therefore confined to plots other than the aforesaid two plots decreed in her favour. As I have held that the mortgagors can get possession only upon payment of the money received from the mortgagees, it is just and equitable that the decree in the said suit should be set aside in its entirety. Such a course, it cannot be doubted, is justified by Order 41, Rule 23, Civil Procedure Code As the plaintiffs Game to Court on false allegations and suppressed the truth, they shall not be allowed any cost hitherto incurred by them.

Wanchoo, J.

22. I agree.

Kidwai, J.

23. I fully concur in the judgment of my learned brother Ghulam Hasan, J., and have nothing to add.

Brij Mohan Lall, J.

24. I have read the judgment delivered by my learned brother Ghulam Hasan, J. I agree with what he has said. I have nothing to add.

Harish Chandra, J.

25. I agree with my brother, Ghulam Hasan, so far as the Revision Application No. 128 of 1945, is concerned and for the reasons given by him in his judgment would dismiss it with costs.

26. So far as the two second appeals are concerned, it would appear that the appellant's suit in Second Appeal No. 353 of 1945 stood decreed with respect to plots Nos. 177/2 and 449 but was dismissed with respect to the other plots in suit. Thus her appeal was with respect to the remaining plots only and in second appeal the decree so far as it relates to plots 177/2 and 449 cannot be considered. I would, therefore, set aside the judgments and decrees of the Courts below in so far as they relate to the remaining plots in dispute and send back the case to the trial Court for fresh trial. The appellant will be allowed to amend her plaint in the light of the observation made by this Court, the respondents will be allowed to raise such further pleas in defence as may be open to them and the parties will be entitled to produce such additional evidence as may appear to them to be necessary. The Court will then pass a decree according to law. The appellant will not be allowed any costs higher to incurred by her. The respondents' costs will be costs in the suit.

27. In second Appeal No. 354 of 1945I would set aside the judgments and decrees of the Courts below and send back the case to the trial Court for fresh trial. The appellants will, as in the other cases, be allowed to amend their plaint in the light of the observations made by this Court, the respondents will be allowed to raise such further pleas in defense as may be open to them and the parties will be entitled to produce such additional evidence as may appear to them to be necessary. The appellants will not be allowed any costs hitherto incurred by them and, as in the other case, the respondents' costs will be costs in the suit.

28. I have since read the reasons given by my learned brother Ghulam Hasan for setting aside the decree in its entirety under Section 33 of 41, Civil Procedure Code But no argument was addressed to us on this point and when there was no appeal with respect to plots 177/2 and 449 my view is that this Court would not be justified in acting aside the decree of the Court below with respect to those plots also. I, therefore, do not agree that the decree should be set aside as its entirety.

Revision dismissed.