

ALLAHABAD HIGH COURT

Barhu Singh

Vs.

Kharpattu

Second Appeal No. 1302 of 1951. against decision of Civil J. Banaras,
(Agarwala and Oak, JJ.)

18.07.1951. 30.11.1955

JUDGMENT

Agarwala, J.

1. The facts of the two cases are as follows. One Nepal Singh predecessor-in-interest of the plaintiff-respondents executed a usufructuary mortgage or mortgages in favors of Bacha alias Chenol Singh predecessor-in-interest of the defendant-appellants for a consideration of Rs. 499/-. The exact date of the mortgage or mortgages is not known but they were executed! somewhere in the year 1881-82. The property mortgaged was an occupancy holding. In the year 1945 the plaintiff-respondents filed a suit for accounting under Section 33, U.P. Agriculturists 'Relief Act. They alleged that nothing was due under the mortgage or mortgages as the usufruct of the mortgaged property had satisfied the mortgage money. The defense to the suit was that the mortgage or mortgages were executed more than 60 years ago and this relationship of mortgagor and mortgagee had ceased to exist between the parties and the suit was time-barred and was not maintainable. The trial Court held that the suit having been brought more than 60 years of the execution of the mortgage, the relationship of mortgagor and mortgagee had ceased to exist and the suit was not maintainable. On appeal the lower Court held that the period of limitation commenced to run from the year 1940 when the Debt Redemption Act was passed under which all usufructuary mortgages became self-liquidating mortgages and that all those mortgages which were in force at the date of the commencement of the U.P. Debt Redemption Act would have their period of limitation up to the year 2000. This the lower appellate Court held upon the authority of a decision of a Division Bench of this Court in - '*Ram Prasad v. Bishambhar Singh*¹', It also declared that the mortgage money had been paid off, In the circumstances the suit was decreed with that declaration. Against that decree the defendants came up in second appeal to this Court. This was numbered! as 602 of 1948.

2. While this appeal was pending a Pull Bench of this Court held in - '*Mahabal Singh*

¹ AIR 1946 All 400

² AIR 1950 All 604 (PB)

*v. Ramraj*², that a usufructuary mortgage of an occupancy holding was void and that no suit for its redemption was maintainable but that a suit for possession upon payment of the mortgage money in the Civil Court could be instituted. Though this decision was in respect of a mortgage of an occupancy holding in Oudh the plaintiff-respondents considering that the ruling might apply to the mortgage or mortgages in dispute filed a suit (No. 570 of 1950), for possession over the mortgaged property. In this plaint the plaintiffs alleged that as a mortgage of an occupancy holding was void, they may be awarded possession on payment of the mortgage money. The defense to the suit was that the suit was barred by time under Article 148, Limitation Act. The trial Court relying upon certain observations made in the Full Bench case referred to above held that when the mortgage was void no question of limitation arose in the case and that upon payment of the mortgage money possession can be recovered at any time. In this view of the matter the suit was decreed upon payment of Rs. 499/- to the defendants, and the plaintiffs were given three months 'time to deposit the amount, or in default the suit was to stand dismissed. We are informed that the plaintiffs deposited the amount in Court within the time allowed by the Court. The defendants appealed to the lower appellate Court but were unsuccessful. Hence they filed Second Appeal No. 1302 of 1951 in this Court.

3. When these cases came up for decision before us some time ago we considered that it would be necessary in the case to determine the date upon which the mortgage amount should be deemed to have been paid up by the usufruct under the provisions of the U.P. Debt Redemption Act, and remitted an issue to the Court below for the purpose of ascertaining that date. The lower appellate Court has now found that the mortgage amount was wholly paid up in the year 1884-85. The two appeals are now before us for final disposal.

4. The first question to determine is whether the mortgage or mortgages in question being of an occupancy holding, were void and if void to what extent and if valid with what limitations and qualifications, if any. The mortgage or mortgages in dispute as already stated were made in the year 1881-82 when the N. W. P. Rent Act (No. 12 of 1881) was in force. Section 9 of Act 12 of 1881 provided :

"The right of tenants at fixed rates may devolve by succession or be transferred.

"No other right of occupancy shall be transferable in execution of a decree or otherwise than by voluntary transfer between persons in favors of whom as Co-sharers such right originally arose, or who have become by succession co-sharers therein.

When any person entitled to such last mentioned right dies, the right shall devolve as if it were land : Provided that no collateral relative of the deceased who did not then share in the cultivation of his holding shall be entitled to inherit under this clause."

5. Under that Section the right of an occupancy tenant could not be transferred and it is well known that a mortgage is a transfer of an interest in the mortgaged property. But it was held by a Pull Bench of the Allahabad High Court in - '*Khiali Ram v. Nathu Lal*³', that a sub-lease could be

created by an occupancy tenant and that the duration of such lease could, be for any length of time. It was further observed that though the "interest of an occupancy tenant" could not be transferred there was nothing in Section 9 to prohibit the transfer of a right to occupy and as such a usufructuary mortgage of a right to occupy could be made. The Court observed :

"In order that the effect of our opinion may not be misunderstood and our decision be not misapplied, it is necessary to say that it is obvious to us that the interest in an occupancy holding of any person to whom an occupancy tenant sublets, or to whom he grants a usufructuary mortgage of land comprised in his occupancy holding, will determine, if it has not previously determined, on the termination of the right of occupancy, and can subsist no longer than the right of occupancy subsists. Such sub-tenant does not by the subletting become the tenant of the zamindar, who is entitled to receive from his occupancy tenant the rent due to him.

The rights of the zamindar under Act No. 12 of 1881 to obtain an enhancement of the rent payable to him or to obtain an ejectment of his occupancy tenant and of those holding under him, cannot be interfered with or lessened by the fact that his occupancy tenant has by a lease, or other form of sub-letting, or by a usufructuary mortgage, to the granting of which the zamindar was not an actively consenting party, sub-let or mortgaged the occupancy holding or any part of it.

A Sub-tenant or usufructuary mortgagee as such is not entitled to use the land for any purposes other than those for which the occupancy tenant, if in possession, would be entitled to use it."

The Bench further observed :

"We fail to see how the second paragraph of Section 9 of Act No. 12 of 1881 can apply to a usufructuary mortgage, as that word is defined in Clause (d) of Section 58 of Act No. 4 of 1882, of an occupancy holding by the tenant having the right of occupancy. On the other hand, the second paragraph of Section 9 of Act No. 12 of 1881 would, as it appears to us apply to a simple mortgage, a mortgage by conditional sale, or an English mortgage, as such mortgages are defined respectively in Clauses (b), (c) and (e) of Section 58 of Act No. 4 of 1882, as the mortgagee would, if it were not that the second paragraph of Section 9 enacts that 'no other right of occupancy shall be transferable in execution of a decree, and etc, be entitled in case of default to obtain from a Civil Court a decree for sale of all the mortgagor's rights in the property, or a decree for foreclosure which would deprive the mortgagor of all rights in the property.

By reason of the second paragraph of Section 9 of Act No. 12 of 1881 a mortgagee, under a simple mortgage, a mortgage by conditional sale, an English mortgage, or any other form of mortgage under which in other cases a mortgagee could obtain a decree for sale or a decree for foreclosure, granted by a tenant, other than a tenant at a fixed rate, having a right of occupancy,

would take no interest in the occupancy holding, as any such mortgage would be in contravention of the spirit, if not of the letter, of the paragraph in question."

6. The basis of the decision therefore was that a usufructuary mortgage of an occupancy holding could not be made because it could not in any event transfer the occupancy tenant's rights in the holding to the mortgagee. The Full Bench was not then considering the case of extinguishment of the right of an occupancy tenant upon the expiry of the period of limitation fixed for redemption under Article 148, Limitation Act, because under that Article read with Section 28, Limitation Act the right of the mortgagor in mortgaged property is extinguished. After this Full Bench case the view taken in the Province of Agra has consistently been that a usufructuary mortgage of an occupancy holding made under the Act of 1881 was valid. In view of this Full Bench ruling the Legislature amended the law when they enacted the N. W. P. Tenancy Act 2 of 1901. Section 20 of the Act practically reproduced the provisions of Section 9 of the Act of 1881, but Section 21 clearly provided that –

"Where the interest of a tenant is not transferable, he shall not be competent to transfer his holding or any portion thereof, otherwise than by sub-lease as hereinafter provided."

This section however was not retrospective, and the position of mortgages made under the Act of 1881 remained as it had been determined by the Full Bench in 'Khiali Ram's case'.

7. In '*Lallu Singh v. Ram Nandan*⁴', a tenant usufructuarily mortgaged his holding in 1886. Subsequently in 1893 and 1898 he executed a second and a third bond hypothecating the holding in lieu of fresh advances agreeing not to redeem or resume possession without paying not only the sum advanced under the first deed but also the amounts due under the second and the third. It was held by Mukherji, J., that –

"a usufructuary mortgage of an occupancy holding was in the nature of a sub-letting and to that extent the mortgage was allowable. The leading case on the point is that of '¹⁵ All 219 (FB)(C)'. Their Lordships who decided the case put the sub-tenant and a usufructuary mortgagee on the same basis, see p. 230 of the report.

The mortgage of 1885 can therefore be upheld only as a mere sub-letting on the part of the mortgagors to the mortgagee. As the result of consistent decisions in this Court, based on the Full Bench ruling quoted, a first usufructuary mortgage of occupancy holding has been accepted as a valid transaction and it would be too late in the day to question it; see the case of - '*Brij Mohan v. Algu*⁵',

King, J., observed :

"The right of an occupancy tenant to make a usufructuary mortgage of

⁴ AIR 1930 All 136 (FB)

⁵1903 All WN 192

his holding during the currency of U.P. Act 12 of 1881 was recognised in the Full Bench decision in - '*Khiali Ram v. Nathu Lal*, . The learned Judges took the view that, although the 'right of occupancy' was declared to be not transferable, the Legislature did not intend to prohibit the occupancy tenant from transferring the 'right to occupy', or the right of possession, by way of sub-lease or usufructuary mortgage.

This leading case, which was decided so long ago as 1893, has been uniformly followed ever since without any expression of doubt or dissent and we are bound to take it as laying down the correct law on this point."

Niamatullah, J., was of the opinion that a usufructuary mortgage as such of an occupancy holding under the Act of 1881 was invalid but that '*Khiali Ram's*, decision must be accepted. He further held that the ratio decidendi of that case so far as it related to usufructuary mortgages of occupancy holding was that such mortgages were valid only to the extent that right to occupy is transferred on condition that possession is to be retained by the creditor till money is paid and that it was invalid so far as it may give a right to the creditor to realize his money by sale of the property. He further observed that in '*Khiali Ram's* Case, the learned Judges held such mortgages to be valid so far, and no further, as they amount to a contract which in their view is a valid one by which an occupancy tenant agrees to allow the creditor to retain possession till his money is paid and that the so-called redemption suit is no more than a suit for possession in terms of an agreement and not the usual suit for redemption in which a decree for redemption can be passed directing sale of the property in the event of nonpayment, as provided by Order 34, Rule 8, Civil Procedure Code. The terms mortgage, redemption etc., may be conveniently used as their Lordships of the privy Council did in - '*Nidha Sah v. Murli Dhar*⁶', but they are not such in the legal sense.....

"Regarded as sub-letting the position is the same, viz., that the mortgage of occupancy holding is not valid as a mortgage but as something else, i.e., sub-lease, and to that extent only, with a covenant superadded that the sub-tenant shall not be ejected till a certain sum of money is paid, which has been held to be valid and enforceable."

8. In '*Ghassu v. Babu Ram*⁷', the Question was whether a suit for redemption under Section 12, Agriculturists 'Relief Act would lie in respect of a usufructuary mortgage of an occupancy holding executed under the N. W. P. Tenancy Act (No. 2 of 1901). As already shown a usufructuary mortgage under that Act even though it was of a right to occupy was void in law. The Full Bench held that after 12 years of occupation by the usufructuary mortgagee a right analogous to that of a mortgagee was created by the void mortgage and that a suit for redemption could be permitted under Section 12, Agriculturists 'Relief Act.

9. In ' AIR 1950 Allahabad 604 (FB), it was held that no suit under Section 12, Agriculturists'Relief Act could lie when the mortgage was invalid because the
625 All 115 (PC)
7 AIR 1944 All 25 (FB)

mortgage contemplated under that Section was a valid mortgage.

10. Upon a consideration of all these cases in my opinion it must be held that a usufructuary mortgage of an occupancy holding created when the N. W. P. Act No. 12 of 1881 was in force must be treated as a valid transaction but in a qualified sense, i.e., in the sense of sub-letting with a covenant that the mortgagor will not be entitled to recover possession without payment of the mortgage money and further that a transfer of the occupancy holding was not created by the mortgage but a mere right to occupy the holding was created upon certain covenants. In this view of the matter it must be held that the mortgagee of an occupancy holding under the Rent Act of 1881 would have no right to claim an extinguishment of the mortgagor's interests in the property by the enforcement of the rights created by the mortgage. If the mortgagee does not get any interest in the occupancy holding he cannot claim to obtain that interest by expiry of the period of limitation fixed for the redemption of the mortgage. The right of redemption of the mortgagor in a usufructuary mortgage of this nature will therefore not be deemed to have become barred by lapse of time under Article 148, Limitation Act and the mortgagor can institute a suit for possession at any time upon payment of the mortgage money because his cause of action for recovery of possession would accrue upon his demand for possession upon payment of the mortgage money and refusal thereof by the mortgagee. In my opinion the suit for possession was rightly decreed.

11. There is no force in this appeal and it is dismissed with costs.

BY THE COURT :

12. For the reasons given in our concurring judgments this appeal is dismissed with costs.

Appeal dismissed.