ALLAHABAD HIGH COURT

Samharu

Vs.

Dharamraj Pandey

Second Appeal No. 4063 of 1962
(Sahai, Yashodanandan and J.S. Trivedi, JJ.)

25.08.1969

JUDGMENT

Jagdish Sahai, J.

1. This defendant's appeal has come to us on a reference made by our brothers W. Broome and G.C. Mathur.

2. The suit giving rise to this appeal was filed by the plaintiffs-respondents for the ejectment of the defendants from certain plots of agricultural land on the allegation that they (the plaintiffs-respondents) were the Sirdars of the plots in suit. It was alleged that about thirty years next preceding the date of the filing of the suit the ancestors of the plaintiffs-respondents had borrowed a sum of Rs. 200/- from the ancestors of the defendants and had executed an unregistered mortgage deed for the same and on the basis of that transaction the defendants' ancestors were put in possession over the land in suit. It has been pleaded that the entire mortgage debt has been satisfied through the receipt of profits of the disputed land by the ancestors of the defendants and thereafter the defendants themselves. Relief of rendition of account and delivery of possession was claimed by the plaintiffs.

3. The suit was contested by the defendants inter alia on the ground that they were sub-tenants of the plots in dispute by virtue of the provisions of U.P. Act XX of 1954 and had by the operation of law become Sirdars of the same.

4. The trial Court dismissed the suit. On appeal by the plaintiffs the first appellate Court decreed the suit, subject to the plaintiffs depositing a sum of Rs. 200/-on the finding that the amount of debt had not been satisfied from the usufruct.

5. The defendant appellant then filed the instant second appeal which came up for hearing before one of us (Yashodanandan, J.), who referred it to a larger Bench which referred it to us.

6. The sole question that features consideration, and that has been canvassed at the bar before us

is whether the defendant-appellant is a mere licensee of the plots in dispute or he has become an Asami thereof.
7. We have heard Mr. K. P. Singh for the defendant-appellant and Mr. Bharatji Agarwal for the plaintiffs-respondents.

8. Section 21 (1) (d) of the U.P. Zamindari Abolition and Land Reforms Act (hereinafter referred to as the Act) reads:

> "21(1). Notwithstanding anything contained in this Act, every person who, on the date immediately preceding the date of vesting, occupied or held land as- ... ...
> (d) a mortgagee in actual possession from a person belonging to any of the classes mentioned in clauses (b) to (e) of sub-section (1) of Section 18 or clauses (i) to (vii) and (ix), Section 19,
> ... ...

shall be deemed to be an asami thereof."

9. Sri K. P. Singh has contended that the word “mortgagee" as occurring in clause (d) of Section 21 (1) of the Act must not be confined in its meaning to valid or legal mortgages only, but should also include cases in the nature of mortgages or akin to mortgages which, even though not valid, have been entered into as transactions of mortgages. Learned counsel relies upon Clause (iv) of Section 19 of the Act which reads:-

> "19. All land, held or deemed to have been held on the date immediately preceding the date of vesting by any person... ... ... as-
> (iv) a hereditary tenant,
> ... ...

shall, save in cases provided for in clause (d) of sub-section (1) of Section 18, be deemed to be settled by the State Government with such person, who shall, subject to the provisions of this Act, be entitled except as provided in sub-section (2) of Section 18, to take or retain possession as a Sirdar thereof." It is significant to note that this provision does not require a hereditary tenant to possess the right of sale as is required by Section 18. Sri K. P. Singh contends that clause (d) of Section 21(1) of the Act should be read as"a mortgagee in actual possession from a person who is a hereditary tenant". Learned counsel contends that under the provisions of the U. P. Tenancy Act, 1939 (hereinafter referred to as the 1939 Act) a hereditary tenant could not create a mortgage of his holding and if the legislature, even after knowing that legal position, has used the word"mortgagee" in relation to a transaction made by a hereditary tenant, it is obvious that the word"mortgagee" has been used in a loose sense so as to include even mortgages which are not valid in the eye of law.

10. On the other hand Mr. Bharatji Agarwal has forcefully contended that in the absence of the word"mortgage" or" mortgagor" or"mortgagee" having been defined in the Act, we must give to these terms the same meaning which they had in the Transfer of Property Act with the result that the expression "mortgagee" as used in clause (d) of Section 21(1) of the Act can only mean a person who is a mortgagee on the basis of a valid mortgage. Mr. Bharatji Agarwal submits that the Court must so interpret the word as to uphold only valid transactions and that normally a Court should discountenance transactions which are invalid in the eye of law. The argument in a general way can be considered to have some force, but it is well known that the Act has in several instances given protection even to trespassers or to persons whose only claim to the plots claimed by them is the entry of their names in respect thereof.

11. The Act is not a conventional legislation, but has taken in view practical and pragmatic considerations also.

12. We would have found force in the submissions of Sri Bharatji Agarwal it we had not been cognisant of the provisions of Section 18(1) (d) of the Act. That provision reads:-

> "18(1), Subject to the provisions of Sections 10, 15, 16 and 17 all lands-
> ... ...,
> (d) held as such by
> (i) an occupancy tenant,
> (ii) a hereditary tenant,
> (iii) a tenant of patta dawami or istamarari referred to in Section 17 possessing the right to transfer the holding by sale.,
> ... ...,

It is clear that a hereditary tenant under the provisions of Section 18 of the Act must possess the right to transfer the holding by sale. No such restriction is imposed upon a hereditary tenant under Section 19 of the Act. The result that follows from this is that if a hereditary tenant who is not subject to the restrictions contained in clause (d) of Section 18 has made a mortgage, which is not valid, then the mortgagee would come to acquire rights under Section 21(l)(d) of the Act.

13. It is true that under the provisions of Act II of 1901 as also under the provisions of the Agra Tenancy Act, 1926 an occupancy tenant or a non-occupancy tenant (we are not concerned with ex-proprietary tenant) could not transfer his holding with the result that he could not execute mortgage deeds or enter into transactions which resulted in the mortgage of the holding. This bar continued also under the provisions of the 1939 Act (See Section 33 of that Act). Reading sub-section (2) of Section 33 of the 1939 Act along with Section 251 of the same Act, Mr. Bharatji Agarwal contended that under certain circumstances a hereditary tenant could sell or mortgage his holding and therefore only mortgages by the persons who could so hold be saved under the

provisions of sub-section (2) of Section 33 read with Section 251 of the 1938 Act. Section 251 of the 1939 Act does not deal with a voluntary transfer, but only with auction sales. Sub-Section (2) of Section 33 of the 1939 Act no doubt permits transfers under certain circumstances, but having examined the language of clause (d) of Section 21(1) of the Act we are of the opinion that the word “mortgagee" has been used therein in a comprehensive or a loose sense and the expression is not confined only to valid mortgages. This view of ours is founded upon an analysis of the provisions of Sections 18 and 19 of the Act which we have made earlier in this judgment.

14. Learned coun
sel for the parties have placed reliance upon certain decisions in support of their respective contentions. Mr. K. P. Singh has placed reliance upon *Sukhnandan v. Board of Revenue*[1], Mr. Bharatji Agarwal has placed reliance upon *Harkhoo v. Bindeshwar*[2], *Bodhan v. Bhundal Singh*[3], *Jagat Narain v. Laljee*[4], *Judhisther Prasad v. Shanji Prasad Shukla*[5], an unreported decision of Rajeshwar Prasad and A. K. Kirty, JJ. in *Buddhu Ahir v. Budhram Komhar*[6], *Sri Ram Sakal Singh v. Dy. Director of Consolidation*[7], and *Hamid Hussain v. R. N. Mallah*[8],

15. The main decision in favour of Mr. Bharatji Agarwal's contention is 1963 RD 288 (supra) where a Division Bench of this Court took the view that the word"mortgagee" means a person who is a mortgagee by virtue of a valid mortgage deed. That decision has been followed in other cases relied upon by Mr. Bharatji Agarwal. With great respect to the learned Judges who decided 1963 RD 288 (supra) we find ourselves in disagreement with the view that they have taken. We may point out that the provisions of Sections 18 and 19 of the Act were not brought to the notice of the learned Judges and the point that has been canvassed before us that a mortgage deed executed by a hereditary tenant though not valid in the eye of law has been accepted by the legislature in clause (d) of Section 21(1) of the Act was not raised before the learned Judges. Inasmuch as in the other cases on which Mr. Bharatji Agarwal has placed reliance this aspect of the matter was not placed, we are unable to agree with those decisions also.

16. Coming to Sukhnandan's case, 1968 All WR (HC) 182 (supra), we would like to say that we do not wish to base our decision only on the authority of that case. In the first place there was no categorical finding on the basis of the language of Section 21(l)(d) of the Act by Desai C. J. that even a person who has become a mortgagee by virtue of an invalid transaction of mortgage would be comprehended in the word “mortgagee" as used in clause (d) of Section 21(1) of the Act. Secondly Desai C. J. was considering whether or not a mistake apparent on the face of the record had been committed, when a contrary view was taken, in the order impugned before him.

17. For the reasons mentioned above we are of the opinion that in the instant case the defendant-appellant is an Asami and not a mere licensee of the plaintiffs-respondents. In that view of the matter the suit of the plaintiffs-respondents is bound to fail. We, therefore, set aside the decree passed by the first appellate Court and restore that of the trial Court, but in the circumstances of the case we direct the parties to bear their own costs.

18. We would like to add that the dismissal of the suit would not bar the plaintiffs-respondents, if so advised, from seeking any other remedy either for the recovery of a sum of Rs. 200/- or for an order or decree under Section 202 of the Act. Our decision rests on the circumstance that the suit was not maintainable.

Appeal allowed.

[1]1968, All WR (HC) 182
[2]1964 RD 410
[3]1965 RD 23
[4]1965 All LJ 255 : AIR 1965 All504
[5] AIR 1955 NUC (All) 4171
[6] F.A.F.O. No. 227 of 1966. D/-9-12-1968 (All)
[7]1968 RD 456
[8]1963 RD 288