

Pulloo and anr. Vs. Dy. Director of Consolidation, U.P. and anr.

Pulloo and anr. Vs. Dy. Director of Consolidation, U.P. and anr.

SooperKanoon Citation : sooperkanoon.com/455939

Court : Allahabad

Decided On : Mar-12-1976

Reported in : AIR1976All343

Judge : G.C. Mathur and ;N.D. Ojha, JJ.

Acts : Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1951 - Sections 18, 18(1), 19, 20 and 21(1); Uttar Pradesh Tenancy Act, 1939 - Sections 3(22) and 3(23)

Appeal No. : Special Appeal Nos. 257 and 332 of 1971

Appellant : Pulloo and anr.

Respondent : Dy. Director of Consolidation, U.P. and anr.

Advocate for Def. : B. Dayal, ;V. Sahai, ;M.S. Megi, Advs. and ;Standing Counsel

Advocate for Pet/Ap. : S.S. Verma, ;R.S. Verma and ;Radhey Shyam, Advs.

Disposition : Appeal allowed

Judgement :

N.D. Ojha, J.

1. These two appeals raise similar questions and are, therefore, being decided by a common judgment.

2. Special Appeal No. 257 of 1971 has been filed against the judgment of a learned Single Judge whereby the writ petition filed by the appellants with a prayer to quash the order of the Deputy Director of Consolidation and the Settlement Officer (Consolidation) was dismissed. The appellants claim to be tenure-holders of certain agricultural land. The contesting respondents on the other hand claim to have acquired adhivasi and thereafter sirdari rights in the said land. From a perusal of the order of the Assistant Settlement Officer (Consolidation) dated 3rd June, 1966, Annexure 'B' to the writ petition, it appears that in the Khasras of 1356 Fasli and 1359 Fasli Sri Narain and others were recorded as mortgagors, Murat Singh and others were recorded as mortgagees and Ram Harakh, father of respondents 4 and 5, was recorded in the column of sub-tenant. Sri Narain and others had transferred their interest in the land to one Manawan who in his turn had executed a sale deed in favour of the appellants on 10th February 1961. The appellants claim to be tenure holders on the basis of this sale deed. Ram Harakh on the other hand claimed to have acquired adhivasi rights in virtue of being sub-tenant of the mortgagees under Section 20 (a) of the U. P. Zamindari Abolition and Land Reforms Act (hereinafter referred to as the Act) and in the alternative to have acquired the said right under Section 20 (b) of the Act in view of his entry as sub-tenant. The claim of Ram Harakh was repelled by the Consolidation Officer and the appellants were ordered to be recorded as bhumidhars of the land in dispute. This order was, however, set aside by the Settlement Officer (Consolidation) on 11th May, 1968 and Ram Harakh was ordered to be recorded as sirdar. This order was upheld by the Deputy Director of Consolidation on 23rd January, 1969.

3. Special Appeal No. 332 of 1971 has been filed against the judgment of a learned Single Judge dismissing the writ petition filed by the appellant challenging an order passed by the Board of Revenue. The facts of this case are as follows:--

4. The appellants were the fixed rate tenants of the land in dispute. One Prem Narain Agarwal, predecessor-in-interest of the respondents 2nd set obtained a self-liquidating mortgage of the land from the Civil Court on August 31, 1945, for a period of 20 years with effect from May in 1944, in lieu of his decretal debt. Prem Narain Agarwal subsequently died and the respondents 2nd set came in possession of the land as mortgagees. These respondents granted a lease of the

land to the respondents 3rd set. A suit was filed by the appellants under Section 229-B of the Act for a declaration that they were bhumidhars. In defence it was asserted that the respondents 3rd set being the sub-tenants from the mortgagees had acquired adhivasi rights under Section 20 (a) and in the alternative under Section 20 (b) being recorded occupants in 1356 Fasli. Their claim was repelled by the trial court as well as by the Additional Commissioner who held that the appellants were bhumidhars of the land in dispute and that the respondents 3rd set had not acquired either adhivasi or sirdari rights. The Board of Revenue, however, set aside these orders and took the view that since the respondents 3rd set had acquired adhivasi and thereafter sirdari rights the appellants' interest in the land extinguished and they were not entitled to the declaration that they were bhumidhars of the said land.

5. From the various orders attached to the writ petition giving rise to the Special Appeal No. 332 of 1971 it was not clear as to in what capacity were the respondents 3rd set recorded in 1356 Fasli. A supplementary affidavit was filed on behalf of the appellants on 1st March, 1976, attaching thereto copies of the extracts of 1356 Fasli which had been filed on behalf of the contesting respondents before the revenue authorities. From their perusal it appears that the respondents 3rd set were recorded in column 6. It was not disputed by the learned counsel for the contesting respondents that if the copies filed along with the supplementary affidavit were correct the entries in 1356 Fasli in favour of the contesting respondents would be of sub-tenants or mortgagees recorded in column 6 as contemplated by paragraph 79 of the Land Records Manual. On 1st March, 1976, the arguments were concluded and judgment was reserved and the learned counsel for the contesting respondents was given time to verify as to whether the copies attached with the supplementary affidavit referred to above were correct or not. Learned counsel was required to inform us about the correct situation within ten days. It has, however, not been brought to our notice that these entries are not correct.

6. It would thus be seen that in both these cases only two questions arise for consideration -- (1) whether a lessee from a mortgagee would acquire adhivasi rights under Section 20 (a) of the Act, and (2) whether such lessee would acquire

adhivasi rights by virtue of his being recorded as sub-tenant in column 6 of the relevant extracts of 1356 Fasli which entry is made in pursuance of paragraph 79 of the Land Records Manual.

7. We will first deal with the second question. As seen above in both these cases the entry of the contesting respondents in 1356 Fasli is in column 6, viz. as sub-tenants from a mortgagee made under paragraph 79 of the Land Records Manual. Whether a person so recorded would be a recorded occupant within the meaning of Section 20 (b) (i) of the Act came up for consideration before a Full Bench of this Court in *Basdeo v. Board of Revenue* : AIR1974 All337 . It was held that if a person is recorded in sub-tenants column and another person is recorded as mortgagee in the remarks column, none of them will be deemed to be recorded occupant. In view of the aforesaid decision the claim of the contesting respondents that they acquired adhivasi rights on account of being recorded occupant in 1356 Fasli cannot be sustained.

8. In order to consider the first question whether the contesting respondents acquired adhivasi rights under Section 20 (a) of the Act it would be necessary to notice the provisions of the said sub-section. It reads:

'Section 20. A tenant of Sir subtenant or an occupant to be an adhivasi -- (i) Every person who--

(a) on the date immediately preceding the date of vesting was or has been deemed to be in accordance with the provisions of this Act--

(i) except as provided in Sub-clause (i) of Clause (b), a tenant of sir other than a tenant referred to in Clause (ix) of Section 19 or in whose favour hereditary rights accrue in accordance with the provisions of Section 10, or

(ii) except as provided in Sub-clause (i) of Clause (b) a sub-tenant other than a sub-tenant referred to in proviso to Sub-section (3) of Section 27 of the United Provinces Tenancy (Amendment) Act, 1947, or in Sub-section (4) of Section 47 of the United Provinces Tenancy Act, 1939 of any land other than grove land;

(b)

..... be called adhivasi of the land

9. Before a person can acquire adhivasi rights under the aforesaid section he has to establish that on the date immediately preceding the date of vesting he was or has been deemed to be, in accordance with the provisions of this Act, a sub-tenant of the land. 'Tenant and sub-tenant' have not been defined in the U. P. Zamindari Abolition and Land Reforms Act independently but Section 3 (26) of the Act provides that the words 'tenant' and 'sub-tenant' not defined in this Act and used in the United Provinces Tenancy Act, 1939 shall have the meaning assigned to them in that Act. We have, therefore, to turn for the definition of these two words to the U. P. Tenancy Act. Sub-section (22) of Section 3 of the U. P. Tenancy Act defines 'sub-tenant' and Sub-section (23) defines 'tenant' as follows:--

'(22) 'Sub-tenant' means a person who holds land from the tenant thereof other than a permanent tenure-holder, or from a grove holder or from a rent-free grantee or from a grantee at a favourable rate of rent and by whom rent is, or but for a contract express or implied, would be payable.'

'(23) 'tenant' means the person by whom rent is, or but for a contract express or implied would be payable and, except when the contrary intention appears, includes a sub-tenant, but does not include a mortgagee of proprietary or under-proprietary rights, a grove holder, a rent-free grantee, a grantee at a favourable rate of rent or, except as otherwise expressly provided by this Act, an under-proprietor, a permanent lessee or a the kadar.'

10. From the definition it is apparent that 'sub-tenant' can only be that person who holds land from the tenant. The question which falls for consideration is whether the mortgagee from a tenant would be a tenant because it is only if he is a tenant that the person holding from him can legitimately claim to be a sub-tenant. Reliance was placed by the learned counsel for the contesting respondents on Section 76(c) of the Transfer of Property Act which inter alia provides that when during the continuance of the mortgage the mortgagee takes possession of the mortgaged property he must in the absence of a contract to the contrary out of the income of the property pay off rent accruing due in respect thereof during such possession as also any arrears of rent in default of payment of which the property

may be summarily sold. It was urged that since in view of Sub-section (c) of Section 76 of the Transfer of Property Act the mortgagee is under an obligation to pay rent in respect of the mortgaged property he becomes a tenant within the said term under the U. P. Tenancy Act.

11. In *Saudagar Singh v. Ganga Singh*, 19 All LJ 702 = (AIR 1921 All 110) a Division Bench of this Court held that the creation of an usufructuary mortgage of a fixed rate tenancy does not operate to extinguish the tenancy, nor does the mortgagee ipso facto become the tenant or enter into any contract or relationship with the zamindar, even though he pays the rent to the zamindar. Payment of rent under such circumstances is not sufficient to create a contract of tenancy, but must be treated as payment made for and on behalf of the mortgagor tenant. In case of the mortgagor's death the tenancy survives in favour of his heir. One of the grounds for taking the aforesaid view was:--

'In the first place it should be pointed out that you cannot have two tenancies at the same time, of the same property, held of the same landholder by two different persons in inconsistent interests. To hold that a mortgagee who in fact pays the rent of the tenancy to the zamindar, thereby becomes a tenant of the zamindar, is equivalent to holding that the tenancy has been extinguished by the operation of law as the result of the granting of the mortgage. This is clearly a fallacy. A mortgage of a tenancy does not extinguish it. The equity of redemption remains with the mortgagor and cannot be destroyed.'

The aforesaid decision came up for consideration in a different context before a Full Bench in *Bandhulal v. Bhagwan Das*, (AIR 1947 All 58). In that case certain property was sold on the basis of a mortgage. The property mortgaged consisted of houses. The mortgagees claimed the benefit of U. P. Agriculturists Relief Act and the question was whether they were agriculturists. Their claim was based on the fact that they were on that date the usufructuary mortgagees from fixed rate tenants of certain plots in the fixed rate tenancy. The benefits of U. P. Agriculturists Relief Act, 1934 which was claimed by the mortgagees in that case, was available only to an agriculturist. An agriculturist within the definition of that Act inter alia was a person who paid rent for agricultural land not exceeding Rs.

500/- per annum. It is in this context that a question arose for consideration as to whether the mortgagee who was paying rent not exceeding Rs. 500/-per annum was an agriculturist or not. Relying on the decision in Saudagar Singh's case (supra) it was urged that since the mortgagee was not paying rent on his own behalf but was paying it on behalf of the mortgagor, it cannot be said that the mortgagee was an agriculturists within the meaning of U. P. Agriculturists Relief Act. Disagreeing with the opinion in Saudagar Singh's case on this point it was held that since a fixed rate tenancy was transferred under the law and the mortgagee was bound to pay the rent he was an agriculturist within the meaning of U. P. Agriculturists Relief Act. The learned Judges however hastened to point out--

'In view of the definition in the Agriculturists Relief Act, however, we are not really concerned with the question whether the mortgagee can properly be described as a fixed rate tenant.'

The decision in Bandhu Lal's case (supra), therefore, cannot be taken as an authority for the proposition that a mortgagee from a tenant becomes a tenant within the meaning of the U. P. Tenancy Act.

12. It would be seen that the reasoning in Saudagar Singh's case to the effect that you cannot have two tenancies at the same time, of the same property, held of the same landholder by two different persons in inconsistent interests was not disturbed by the Full Bench in Bandhu Lal's case (AIR 1947 All 58) (FB). In our opinion, in order to determine whether a mortgagee from a tenant becomes a tenant or not in so far as agricultural land is concerned the aforesaid reasoning is of considerable importance. In that context we have to go through the scheme of the U. P. Zamindari Abolition and Land Reforms Act to find out as to who has been recognised as tenant by the said Act, viz., the mortgagor or the mortgagee. Section 18 of the Act inter alia provides that subject to the provisions of Sections 10, 15, 16 and 17 all lands held by a fixed rate tenant or a rent free grantee as such and certain other classes of tenants, possessing the right to transfer the holding by sale on the date immediately preceding the date of vesting shall be deemed to be settled by the State Government with such tenants or grantees as the case may be who shall, subject to the provisions of this Act, be entitled to take

or retain possession as a Bhumidhar thereof. Likewise Section 19 confers sirdari rights on certain other classes of tenants. It has not been argued for the contesting respondents, and in our opinion rightly, that under Sections 18 and 19 it is not the mortgagor but the mortgagee who would become the bhumidhar or sirdar, as the case may be, of the land subject to a mortgage. It would be further seen that on confirmation of sirdari rights on a person under Chapter IX-A of the Act the rights title and interest of the landholder in the land ceases and vests in the State free from all encumbrances. Under Section 240-A here again it is not the right, title and interest of the mortgagee but of the mortgagor that ceases and vests in the State. The most important section, which demolishes the argument that a mortgagee would be the tenant for the purposes of the Zamindari Abolition and Land Reforms Act, is Section 21 (1) (d) of the Act. It provides that notwithstanding anything contained in this Act, every person who, on the date immediately preceding the date of vesting, occupied or held land as a mortgagee in actual possession from a person belonging to any of the clauses mentioned in Clauses (b) to (e) of Sub-section (1) of Section 18 or Clauses (i) to (vii) and (ix) of Section 19 shall be deemed to be an asami thereof. The clauses of Sections 18 and 19 referred to in Section 21 (1) (d) refer to the various classes of tenants including a fixed rate tenant. If the mortgagees from these tenants become tenants themselves with the meaning of Section 3 (23) of the Tenancy Act, they would have acquired bhumdhari or sirdari rights under Sections 18 and 19 of the Act as the case may be. The intention of the framers of the Act was clearly not to confer such rights on them and to confer asami rights is apparent from Section 21 (1) (d). From the scheme of the Act, therefore, there seems to be no manner of doubt that the mortgagee of a tenant has not been recognised to be the tenant of the holding for purposes of the Act. A person holding from such a mortgagee cannot, therefore, claim to be subtenant of the holding and even if such a person was in possession of the holding on the date immediately preceding the date of vesting he cannot acquire adhivasi rights under Section 20 (a) of the Act.

13. Reliance was then placed by the learned counsel for the contesting respondents on the decision of a Division Bench of this court in Second Appeal No. 944 of 1959 connected with Second Appeal No. 980 of 1959 (*Birju v. Seopher*) decided on 23-5-1963 (All). In that case a plot of land had been usufructuarily

mortgaged by its fixed rate tenants in favour of one Drigpal whose legal representatives sold their mortgagee rights to one Adi Sahu. This plot was subsequently let out by Adi Sahu to Ghurhoo upon whose death his son Birju succeeded him as sub-tenant. On May 8, 1950, the mortgagors executed a mortgage by conditional sale in favour of Birju and one Lurkhur. In the suit giving rise to the second appeals Birju claimed adhivasi and thereafter sirdari rights in the said plot. The case of the mortgagors on the other hand was that in view of the mortgage dated May 8, 1950, the sub-tenancy rights of Birju merged into the mortgagee rights and were accordingly extinguished under Section 46 of the U. P. Tenancy Act and on this basis it was argued that Birju could at best acquire asami rights. This plea was repelled. A perusal of the aforesaid judgment indicates that it seems to have been taken for granted that if the plea of that mortgagors that Birju acquired only asami rights failed he would necessarily acquire adhivasi and thereafter sirdari rights. The question whether a sub-tenant from a mortgagee is entitled to the benefit of Section 20 (a) was not considered independently in that case. In *Shama Rao v. Union Territory of Pondicherry* : [1967]2SCR650 it was held that a decision is binding not because of its conclusion but in regard to its ratio and the principle laid down therein. In this view of the matter the decision in Birju's case (*supra*) cannot be taken as an authority for the proposition that a sub-tenant of a mortgagee is entitled to the benefit of Section 20 (a) of the Act.

14. It was next urged relying on a decision of a Full Bench of this Court in *Manzoor Husain v. Mir Khan* : AIR1974 All234 that a tenancy which had been created during the continuance of a valid mortgage could enure even after its redemption if the same had been contracted in the course of prudent management. It was urged that if a tenancy created by the mortgagee becomes binding on the mortgagor even after redemption of the mortgage in case it had been contracted in the course of prudent management, it should be held to be binding on the mortgagor even during the subsistence of the mortgage. No authority has been cited before us for the proposition and in our opinion there is no substance at all in the aforesaid submission on principle. Till the mortgage subsists even if the letting out by the mortgagees is not in the course of prudent management, the relationship between the mortgagee and his lessee remains binding. So far as the mortgagor is concerned until the mortgage is redeemed he is really out of the picture so far as

the management of the property is concerned and has no say in the matter. The provisions of Section 76(a) of the Transfer of Property Act which fell for consideration in Manzoor Husain's case (supra) are to the effect that a mortgagee in possession must manage the property as a person of ordinary prudence would manage as if it were his own. The question as to whether a lease created by such a mortgagee would be binding on the mortgagor on the ground that it had been executed by the mortgagee in the course of prudent management would, therefore, arise only on the redemption of the mortgage. It may be that if a mortgage had been redeemed, before coming into force of the U. P. Zamindari Abolition and Land Reforms Act and yet the sub-tenant from the mortgagee continued in possession and was in possession on the date immediately preceding the date of vesting in that capacity he may acquire adhivasi rights under Section 20 (a) provided the tenancy had been created by the mortgagee in the course of prudent management. In the instant case, however that is not the position. Here it is not the case of the contesting respondents in either of these two appeals that the mortgage had been redeemed before the date of vesting.

15. In view of the foregoing discussions we are of opinion that the contesting respondents, viz., the sub-tenants from the mortgagees did not acquire adhivasi rights either under Section 20 (a) or 20 (b) (i) of the Act. The authorities below in each of the two cases committed manifest error of law in taking a contrary view.

16. In the result Special Appeal No. 257 of 1971 is allowed and the judgment of the learned Single Judge is set aside. The writ petition is allowed and the orders of the Settlement Officer (Consolidation) and the Deputy Director of Consolidation are quashed. Special Appeal No. 332 of 1971 is also allowed and the judgment of the learned Single Judge is set aside. The writ petition is allowed and the order of the Board of Revenue is quashed. The parties will, however, bear their own costs of the appeals as well as writ petitions.

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com