

Chand and ors. Vs. Devia

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Court : Delhi

Decided On : Aug-19-1970

Reported in : 7(1971)DLT90

Judge : Hardayal Hardy and; T.V.R. Tatachari, JJ.

Acts : Punjab Redemption of Mortgages Act, 1913 - Sections 12; Limitation Act, 1908 - Schedule - Article 14

Appeal No. : Letter Patent Appeal No. 9 of 1970

Appellant : Chand and ors.

Respondent : Devia

Advocate for Def. : Mr. Chhabil Dass

Advocate for Pet/Ap. : Ramesh Chand and; Chabildas, Advs

Judgement :

ORDER

: The application of Smt. Musarbu is directed against Janta and Smt. Hiri and mortgage amount of Rs. 294 has been deposited in favor of Janta, mortgagee vide Challan No. 31, dated 11-5-1955. Smt. Hiri states that she will get her half share redeemed on payment of half the amount of mortgage; because applicant and respondent No. 2 are two widows of Dom. Janta mortgagee states that he has no

objection regarding the redemption of the land. therefore, one-third share of land, subject matter of the mortgage as entered in Khata 427 situated in Deoga, Pargana Manjir is allowed to be redeemed half share each in favor of Smt. Hiri and Smt. Musarbu from 'Rabi' 2013 in lieu of Rs. 294. The order is announced in the presence of the parties.

SD.Thakur Dharam Singh.'

(19) The contention urged by Mr. Ramesh Chand, learned counsel for the appellants, is that this is clearly an order under section 10 of the Act and the only reasonable interpretation of the order is that while the mortgagor's claim for redemption was upheld by the Assistant Collector her claim for possession was rejected. The order, therefore, became conclusive against her under section 12 of the Act so far as her right to possession under the mortgage was concerned and her only remedy was to establish her right by a suit in a civil Court for which a time limit of one year has been prescribed under Article 14 of the Limitation Act. She and her representative in interest having failed to do so, the subsequent suit brought by the respondent after the expiry of five years was clearly barred by time.

(20) Mr. Chhabil Dass, learned counsel for the respondent has on the other hand raised a three-fold contention. His first contention is that the remedy of a suit which has been expressly saved under section 12 of the Act is in favor of a party who is aggrieved by an order made by the Collector under any one of the sections including section 10 mentioned therein. In the present case the respondent was not at all aggrieved by the order. On the contrary, his suit was based on that order and was intended to give full effect to it. The Assistant Collector having upheld the mortgagor's right to redeem the property, the order regarding delivery of possession was consequential upon the declaration made by him, and necessarily flowed from it. If by inadvertence or due to any other reason the Collector failed to make that part of the order, the respondent by his suit was merely seeking to implement or give effect to that order. To such a suit, according to Mr. Chhabil Dass, section 12 of the Act can have no application.

(21) The second contention of the learned counsel is that in any case, Article 14 of the Limitation Act is attracted only to a suit which is filed for setting aside the order

of an officer of the Government in his official capacity and not to any and every order made by him. In the present case the respondent neither wanted nor was there any need for him to set aside the order of the Assistant Collector which was in his favor and was in no way prejudicial to him.

(22) The last contention of the learned counsel is that in any event the order made by the Assistant Collector was not in accordance with the provisions of section 10 read with section 6 of the Act. The order was therefore against the statute and ultra vires. According to the learned counsel the Act creates a special jurisdiction and provides for the manner of exercising such jurisdiction. The Collector to whom the Legislature has committed the authority to pass orders for redemption of mortgages of agricultural land, not exceeding a certain area or in which (whatever the area) the principal amount secured does not exceed a certain sum, is an authority clothed with special jurisdiction. His jurisdiction under section 10 is to pass only two types of orders. He may either dismiss the mortgagor's application or if he is not of that opinion then he must make an order as laid down in section 6 (a), (b), (c) and (d) of the Act. Since the order in the present case was not in conformity with clauses (a) to (d) of section 6, it was not an order under the Act whereas the suit envisaged under section 12 is against an order which is made under the Act.

(23) In support of his last contention the learned counsel relies upon the decision of the Judicial Committee of the Privy Council in *Nazir Ahmad v. King Emperor* where Lord Roche who wrote the judgment of the Board cited the observations in the Chancery cause of *Taylor v. Taylor* (1876) 1 Ch.D. 426 to the effect that where a power is given to do a certain thing in a certain way the thing must be done in that way or not at all.

(24) Reliance is also placed by the learned counsel on a Bench decision of Orissa High Court in *Chintamani Padhan and others v. Paika Samal and others* : AIR1956 Ori136 where it was held that an order made without jurisdiction is a nullity and does not require to be set aside and that to such an order Article 14 of the Limitation Act has no application,

(25) It appears to us that there is no merit in any of the three contentions raised by Mr. Chhabil Dass. On the other hand, there is a great deal of force in the arguments advanced by Mr. Ramesh Chand.

(26) The first two contentions of Mr. Chhabil Dass are inter-related and are actually facets of the same argument. We fail to understand how it can be reasonably contended that the plaintiff-respondent was not aggrieved by the order of the Collector. In the application filed by Smt. Musarbu she had asked not only for redemption of the mortgage but also for possession. Since her claim was contested by the mortgage it was incumbent on the Collector under section 10 either to dismiss her application or to grant her the two reliefs of redemption as well as possession as laid down in clauses (a) and (b) of section 6. The Collector, however, gave her only one relief under clause (a). Let us leave out of consideration for the moment whether the other relief under clause (b) was refused by the Collector or it merely escaped his attention. The fact remains that she got only one relief when she had asked for two and when she also considered herself entitled to both the reliefs. Can it be said in such circumstances, that the Collector's order did not adversely effect her so far as her rights under the mortgage were concerned and if it did, is it legitimate to contend that she was not aggrieved by the order?

(27) Mr. Chhabil Dass argues that the words 'any party aggrieved' in section 12 do not mean any party who is disappointed of a benefit which he might have received if some other order had been made. In this connection he has drawn our attention to the following observation made in *Ex Parte Sidebottam* (1880) 14 Ch. D. 458:

IT is said that any person aggrieved by any order of the Court is entitled to appeal. But the words 'person aggrieved' do not really mean a man who is disappointed of a benefit which he might have received if some other order had been made. A 'person aggrieved' must be a man who has suffered a legal grievance, a man against whom a decision has been pronounced which has wrongfully deprived him of something, or wrongfully refused him something, or wrongfully affected his title to something.

(28) In our opinion, the above observations instead of supporting the argument the learned counsel go against it. Can it be urged that as a result of the Assistant Collector's omission to grant the mortgagor the relief of possession she did not suffer a legal grievance or that the Assistant Collector did not wrongfully deprive her of possession or that he did not wrongfully omit or refuse to adjudicate upon her right to possession? If so, then we fail to see in what way the order is not against her and how she is not a party aggrieved by that order within the meaning of section 12 of the Act.

(29) Mr. Chhabil Dass, however, says that even if it is held that the plaintiff was aggrieved by the Assistant Collector's order it was still not necessary for him to have it set aside for it did not hurt him in any way. He contends that the order Ex. P.G. does not even refer to the mortgagor's claim for recovery of possession. It does not state that the mortgagee did not admit the mortgagor's claim for recovery of possession. It merely states that the mortgage amount had been deposited and the mortgagee had no objection regarding the redemption of the land. Upon this the Collector proceeded to direct the redemption of the mortgage. There is, therefore, nothing in this order which requires to be set aside before the Court would grant the plaintiff the relief of possession of the mortgaged property. On the contrary the recovery of possession of the mortgaged property was the legal consequence of such an order.

(30) The argument has found favor with the learned single Judge who has observed:

THIS order cannot be construed as an order of the Collector rejecting the mortgagor's prayer for the recovery of possession of the mortgaged property. There is, therefore, nothing in this order which requires to be set aside before the Court can grant to the appellant the relief of possession of the mortgaged property. On the other hand this order will form the basis upon which such a relief can be granted to the appellant because this order not only recognizes the respective status of the parties as mortgagor and mortgagee but also declares the rights of the mortgagor to redeem the mortgage. The recovery of possession of the mortgaged property is the legal consequence of such an order. therefore, while

the suit filed by the appellant is one under section 12 of the Act still the suit is not hit by Article 14 of the Limitation Act inasmuch as the suit is not filed for setting aside the order of the Collector.

(31) With very great respect, the argument of Mr. Chhabil Dass which has prevailed with the learned single Judge is entirely fallacious. In the first place, the order Ex. P.O. cannot be read in vacuo. It has to be read in the context of the mortgagor's application under section 4 of the Act, the relief claimed therein and the nature of resistance offered by the mortgagee. In view of the defense put up by the mortgagee the issues before the Assistant Collector were whether the mortgagor Smt. Musarbu was entitled to redeem the mortgage and if so what amount should be deposited by her and also if an order for delivery of possession should be made in her favor. These are all questions relating to the rights of the parties in respect of the mortgage. The Assistant Collector allowed the mortgagor's claim in respect of redemption of the land. He also fixed the amount to be deposited by her, but said nothing about her claim for possession. The order so far as the Collector was concerned was obviously final because section 13 bars a second application, and section 12 says that subject to the result of a suit which the mortgagor may file to establish her rights in respect of the mortgage (which in the present case would evidently mean the right to recover possession) the order shall also be conclusive.

(32) Is not then the order which so far as the Collector is concerned, finally determined the rights of the mortgagor in respect of the mortgage and which the section makes conclusive, an impediment in the way of the mortgagor which must be got rid of? Can that impediment be got round by adopting the stratagem of phrasing the prayer in the suit differently or by calling it a suit for possession based on the right of the mortgagor flowing as a necessary consequence of the Collector's order? In substance and reality the suit is one for setting aside the order of the Assistant Collector and it makes no difference that a prayer to that effect is not expressly made in the plaint. An almost similar argument was advanced and repelled by a Bench of the Lahore High Court in *Kaura and another v. Ram Chand and another* (2nd 6 Lahore 206) where Le Rossignol J. who wrote the judgment of the Bench consisting of Sir Shadi Lal C.J. and himself, observed :

Alitigant merely by attaching a label to his suit cannot bring it under a different Article of the Limitation Act from that under which it would come on a true interpretation of the suit.

(33) The above observations were quoted with approval by Tek Chand J. in the Full Bench judgment of the same High Court in *Ganga and others v. Maharaj Das and others* IL.R. 15 Lah 389 (i) to which we have already referred to in the earlier part of this judgment.

(34) The facts in those two cases were no doubt dissimilar from those in the present case but the arguments of the counsel are almost similar and have the same ring. As observed by Le Rossignol J. in 2nd 6 Lah 206 (and approved by the Full Bench in 2nd 15 Lah 389) the suit referred to in section 12 is to establish the 'erroneous nature of the Collector's order.' Now is not an omission to give the mortgagor the full relief to which he or she is entitled an error in the order?

(35) Mr. Ramesh Chand, learned counsel for the appellants, submits that it is the substance of the order that has to be seen and not its form. The learned counsel seems to us to be perfectly right and his submission has also the support of the Full Bench of the Lahore High Court in 2nd 1944 Lah 1, where the contrary observations in the Division Bench judgment of the same High Court in *Prabhu Mal v. Chandan* and another A.I.R. 1938 Lah 512 were held to be erroneous.

(36) Our opinion, therefore, is that whenever the Collector makes an order which comes within the ambit of sections 6 to 11 of the Act, regard being had to the substance of the order and not merely to its form, the order is one contemplated under section 12 of the Act and if that order adversely affects the rights of the parties in respect of the mortgage, the only remedy of the aggrieved party is to establish his or her rights by filing a suit for which the time limit prescribed under Article 14 of the Limitation Act is one year from the date of the

(37) We are also of the opinion that for the purpose of this argument it is wholly immaterial whether the error in the order of the Collector is the result of refusal of the relief in whole or in part or of omission. The conclusiveness of the order does not depend on any such consideration.

(38) We may now take up the third contention of Mr. Chhabil Dass. The learned counsel concedes that there is a distinction between 'want of jurisdiction' and 'error in the exercise of jurisdiction'. Where the officer has no jurisdiction at all the act or order would be 'ultra vires'. To such an order Article 14 will obviously have no application because an order made without jurisdiction is a nullity and does not require to be set aside. (See Narendra Lal Khan v. Jogi Hari I.L.R. 32 Cal 1107 and Peary Lal v. Secretary of State : AIR1924 Cal913. But where the officer has jurisdiction to deal with the matter and in the exercise of his jurisdiction he decides or acts in a particular manner and makes any mistake, the order may be wrong and in a sense, it may also be illegal, it cannot be regarded as a nullity.

(39) Mr. Chhabil Dass, however, argues that the Collector's jurisdiction under section 10 of the Act is either to dismiss the mortgagor's application or to make an order as laid down in section 6(a), (b), (c) and (d) of the Act. He has jurisdiction to grant only a part of the relief to which the mortgagor is entitled and to refuse or omit to grant the other relief. In the present case the Collector has made an order granting the relief of redemption under section 6(a) but he has omitted to grant the relief of possession under section 6 (b). Such an order he was not empowered to pass.

(40) In support of his argument, besides relying upon the decision of the Privy Council in Nazir Ahmed's case to which we have already referred, reliance is also placed by the learned counsel on Sir Wasif Ali Mirza v. Saradindu Narain Rai and others : AIR1925 Cal953 where it was held that the order under Article 14 must be such an order as the officer is empowered under the law to pass and which would be effective unless set aside, and which further is an order which under the ordinary law, is liable to be set aside by a suit in the civil Court. The order in the present case, the learned counsel argues, is one which the Collector was not empowered to pass. The argument appears to us to be wholly misconceived. It is not as if the Assistant Collector was not empowered to pass the order which he did.

(41) There is nothing in section 10 which lays down that if the Collector does not make an order in terms of all the four clauses (a) to (d) of section 6, his order will

be an order without jurisdiction and ultra vires. In our opinion, the utmost that can be said about such an order is that it is an erroneous order and the only remedy of the party adversely affected by it is to file a suit within one year from the date of the order. Neither of the two cases relied upon by the learned counsel have, therefore, any bearing on the case.

(42) Mr. Chhabil Dass next relies on a Privy Council decision in (Raja) Dhakeshwar Prasad Narain Singh v. Mt. Gulab Kuer and others A.I.R. 1926 PC 60. This was a case of an action in ejectment and their Lordships of the Judicial Committee observed that the suit was not brought for the purpose of setting aside an order of the Revenue Court. It was simply an action in ejectment, its main purpose being to recover possession of certain lands allotted to the plaintiff. An examination of the judgment shows that the question for determination in that case was, first, whether the entry in the record of rights was correct, and, secondly, what was meant by bakasht lands. There was thus no question of any order of the Revenue Officer under the Bengal Tenancy Act, the provisions of which were under discussion in that case. The case has, therefore, no bearing on the question which arises in the present case.

(43) Mr. Chhabil Dass lastly submits that the conclusion reached by us about the nature and effect of the Assistant Collector's order would operate harshly and deprive a mortgagor of his right to obtain possession of the land which after the payment of the mortgage amount fixed by the Collector already stands free of mortgage since 11-11-1955. To that argument the only reply we can give is to quote what Le Rossignol J. said in 2nd 6 Lahore 206. The learned Judge said :

HOWEVER that may be, an individual who takes advantage of a summary procedure must suffer its disadvantages as well as enjoy its benefits. To refer again to the summary procedure provided by the Code in Order 21 we find there the same results. A person who does not take advantage of the summary procedure may bring a suit within the ordinary period of limitation; but if he does take advantage of the summary procedure he must, if unsuccessful, bring his suit to establish his rights within the comparatively short period of one year from the date of the order.

(44) The result is that the appeal succeeds, the judgment of the learned single Judge is set aside and that of the first appellate Court below upheld with costs throughout.

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