PRABHU

v.

RAMDEV & ORS.

February 28, 1966

[P. B. GAJENDRAGADKAR, C. J., K. N. WANCHOO, M. HIDAYATULLAH, J. C. SHAH AND S. M. SIKRI, JJ.]

Transfer of Property Act (4 *of* 1882), *s.* 76(*e*)—*Tenants inducted by mortgagee—When can continue in possession after termination of mortgage.*

The appellant's father created a usufructuary mortgage of the land in dispute and the mortgagee admitted the respondents as tenants. During the continuance of the mortgage and while the respondents were in possession as tenants, the Rajasthan Tenancy Act, 1955, came into force. The mortgage was eventually redeemed but the respondents continued in possession. The appellant therefore sued for possession of the land before the revenue authorities and the Board of Revenue in appeal, held that by virtue of the provisions of s. 15 of the Act, the possession of the respondents was unassailable, that they could be ejected, in view of s. 161, only in accordance with the provisions of the Act, but that, none of the grounds available to the appellant had been proved. The High Court dismissed the writ petition of the appellant challenging the Board's decision.

In appeal to this Court, on the question whether the respondents could be ejected on the ground that the mortgage had been redeemed,

HELD : As a general rule under s. 76(e) of the Transfer of Property Act, a mortgagee cannot create an interest in the mortgaged property which will enure beyond the termination of his interest as mortgagee. But the rights of the tenants inducted by the mortgagee may be improved by virtue of statutory provisions which may meanwhile come into operation, and that was precisely what had happened in the present case. During the continuance of the mortgage, s. 15 of Rajasthan Tenancy Act came into operation and that made the respondents *Khatedars* who are entitled to claim the benefit of s. 161 of that Act. [680 A-D]

Mahabir Gope v. *Harbans Narain Singh*, [1952] S.C.R. 775, explained.

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 323 of 1963.

Appeal by special leave from the judgment and order dated October 20, 1961 of the Rajasthan High Court in D. B. Civil Writ No. 41 of 1959.

B. C. Misra and *M. V. Goswami*, for the appellant.

S. C. Agarwal, for respondent No. 1.

R. N. Sachthey, for respondents Nos. 4 and 5.

The judgment of the Court was delivered by

Gajendragadkar, C. J. The appellant Prabhu is the owner of agricultural land bearing Khasra Nos. 224, 215, 244, 299, 320, 506,

A 617 and 687 situated in village Nilakpur, Tehsil Behror, District Alwar, in the State of Rajasthan. The appellant's father Jora had executed a usufructuary mortgage of the said land in about 1936 for a period of twenty years in favour of one Ganga Din. After the expiry of the period prescribed by the said mortgage, the appellant obtained a decree for redemption on July 16, 1956. This decree B declared that the mortgage and all encumbrances created by the mortgagee or any person claiming under him were extinguished and directed the mortgagee to deliver possession of the mortgaged property to the appellant.

It appears that during the continuance of the mortgage, the C mortgagee Ganga Din had let out the aforesaid land to respondents 1 to 3 Ramdev, Yadram and Nathu respectively.

Meanwhile, on October 15, 1955 the Rajasthan Tenancy Act, 1955 (No. 3 of 1955) (hereinafter called 'the Act') had come into force. On July 28, 1956, the appellant instituted the present suit for possession of the land in question against the three respondents. This D suit was tried by the Sub-Divisional Officer, Behror. In this suit the appellant had alleged that after the redemption decree had been passed in favour of the appellant, the respondents had in fact delivered possession of the property to the appellant, but a few days thereafter they had trespassed into the property and obtained its possession wrongfully. This plea was resisted by the respondents E on the ground that they had not surrendered possession of the property to the appellant as alleged by him and that under the relevant provisions of the Act they were entitled to remain in possession of this property. On these pleadings the learned Sub-Divisional Officer framed two issues. They were:

> No. 1. Whether the respondents are trespassers in F respect of the fields and are liable for ejectment; and
>
> No. 2. to what relief, if any, the appellant is entitled to ?

He found that the respondents were not trespassers as alleged by the appellant and as such the appellant was not entitled to any relief. In the result, the appellant's suit was dismissed.

G Against this decision the appellant preferred an appeal before the Additional Commissioner, Ajmer. The appellate authority reversed the finding of the trial court and held that the appellant was entitled to eject the respondents. The respondents challenged the correctness of this order by preferring a second appeal before the Board of Revenue for Rajasthan, Ajmer. Their appeal succeed- H ed and in consequence, the order passed by the appellate authority was set aside and that passed by the trial judge was restored. The Board has held that by virtue of the provisions of s. 15 of the Act, the possession of the respondents was unassailable and they could

be ejected only in accordance with the relevant section of the said Act. Since none of the grounds available to the appellant under the Act had been proved, he was not entitled to a claim for ejectment. A

The validity of the Board's decision was challenged by the appellant by moving the Rajasthan High Court in its writ jurisdiction under Art. 226 of the Constitution. It was urged by the appellant before the High Court that the order passed by the Board was plainly erroneous in law and as such should be set aside. This petition, however, failed and was dismissed by the High Court. It is against this decision that the appellant has come to this Court by special leave. B

The relevant facts, in the light of which the question of law raised before us by Mr. Misra on behalf of the appellant has to be considered, are no longer in dispute. The appellant's father created a usufructuary mortgage of the land and during the continuance of the said mortgage the respondents were admitted as tenants. The mortgage was eventually redeemed and in spite of the redemption decree the respondents continued in possession of the land. On these facts the question which arises for our decision is: whether the respondents, who have been inducted into the land as tenants by the usufructuary mortgagee, can be ejected by the appellant on the ground that the mortgage in question has been redeemed. The answer to this question depends upon the effect of s. 15 of the Act. C D

Before dealing with the specific provisions of the said section we may refer to two definitions which are relevant. "Tenant" has been defined by s. 5(43) of the Act as meaning a person by whom rent is or but for a contract, express or implied, would be payable and except when the contrary intention appears, shall include a co-tenant or a grove-holder or a village servant or a tenant of khud-kasht or a mortgagee of tenancy rights but shall not include a grantee at a favourable rate of rent or an ijaredar or a thekadar or a trespasser. That is how the definition stood at the relevant time. The test prescribed by this definition is that the person can claim to be a tenant if it is shown that rent is payable by him in respect of the land. That test is clearly satisfied by the three respondents in the present case. E F

The next definition to which it is necessary to refer is that of a trespasser. The appellant, in his present suit, has contended that the respondents are trespassers. A "trespasser" has been defined by s. 5(44) of the Act as meaning a person who takes or retains possession of unoccupied land without authority or who prevents another person from occupying land duly let out to him. That is how the definition read at the material time. It is plain that the respondents do not fall within the definition of "trespasser" as prescribed by this clause. G H

A Let us now refer to s. 15 as it stood at the relevant time. Section 15 provides, *inter alia*, that subject to the provisions of s.16 every person who, at the commencement of this Act, is a tenant of land, shall, subject to the provisions of this Act and subject further to any contract not contrary to s.4 be entitled to all the right conferred and be subject to all the liabilities imposed on Khatedar tenants B under the Act. In other words, as soon as s. 15 came into operation on October 15, 1955, the possession of the respondents, who had been inducted into the land by the mortgagee was substantially altered and they became Khatedars by virtue of the statutory provisions prescribed by s.15. Section 161 of the Act provides that no tenant shall be ejected from his holding otherwise than in accordance with the provisions of this Act. The position thus is clear that as soon C as the Act came into force the respondents were entitled to the benefits of s.15 and cannot be ejected except under the provisions of the Act in view of s. 161. It is because of these provisions that the appellant was driven to make the plea that the respondents were trespassers inasmuch as they had voluntarily surrendered possession of the land to him after the redemption decree was passed and had D wrongfully entered into possession thereafter. That plea has not been proved and the matter falls to be considered squarely within the provisions of ss.15 and 161 of the Act. It is true that s. 183 of the Act provides for the ejectment of a trespasser but that section has no application to this case inasmuch as the respondents cannot be held to be trespassers at all.

E

Mr. Misra, however, contends that there are two decisions of this Court which support his case that tenants introduced by the mortgagee during the continuance of the mortgage can have no claim to remain in possession of the land after the mortgage itself has been redeemed and he argues that the said principle would justify the F appellant's claim for ejecting the respondents in the present case. In *Mahabir Gope and Others* v. *Harbans Narain Singh and Others*(1), this Court has held that as a general rule a person cannot, by transfer or otherwise, confer a better title on another than he himself had. A mortgagee cannot, therefore, create an interest in the mortgaged property which will enure beyond the termination of his interest as mortgagee. In consequence any lease granted by a morgagee in G possession must come to an end at redemption. A mortgagee, cannot, during the subsistence of the mortgage, act in a manner detrimental to the mortgagor's interests such as by giving a lease which may enable the tenant to acquire permanent or occupancy rights in the fields thereby defeating the mortgagor's right to khas possession; such an act would fall within the provisions of s. 76, sub-H clause (e) of the Transfer of Property Act. It is on these observations that Mr. Misra founds his argument.

(1) [1952] S.C.R. 775: A.I.R. 1952 S.C. 205.

It must be remembered that these observations were made by reference to the normal relationship between the mortgagor and the mortgagee and their respective rights and obligations as determined by relevant provisions of the Transfer of Property Act. Having made these observations, however, this Court has taken the precaution to point out that even in regard to tenants inducted into the land by a mortgagee cases may arise where the said tenants may acquire rights of special character by virtue of statutory provisions which may, in the meanwhile, come into operation. A permissible settlement by a mortgagee in possession with a tenant in the course of prudent management and the springing up of rights in the tenant conferred or created by statute based on the nature of the land and possession for the requisite period, it was observed, was a different matter altogether. Such a case is clearly an exception to the general rule prescribed by the Transfer of Property Act. It will thus be seen that while dealing with the normal position under the Transfer of Property Act, this Court specifically pointed out that the rights of the tenants inducted by the mortgagee may conceivably be improved by virtue of statutory provisions which may meanwhile come into operation. That is precisely what has happened in the present case. During the continuance of the mortgage s. 15 of the Act came into operation and that made the respondents Khatedars who are entitled to claim the benefit of s. 161 of the Act.

The other decision on which Mr. Misra relies is *Harihar Prasad Singh & Another* v. *Must. of Munshi Nath Prasad & Others.* (1) In that case it was held that the persons inducted by mortgagees could be raiyats within the meaning of s. 5(3) of the Bihar Tenancy Act so as to acquire any rights of occupancy under s. 21 of the said Act. This conclusion, however, flows from the basic fact that the mortgagees who inducted the tenants into the land were neither proprietors nor tenure holders as defined by the said Act. Section 5(3) of the said Act provides that a person shall not be deemed to be a raiyat unless he holds land either immediately under a proprietor or immediately under a tenure-holder; and so, when tenants claimed the status of a raiyat, in that case it became necessary to consider whether they held the land under a proprietor or under a tenure-holder, and since it was clear that the mortgagees were neither proprietors nor tenure-holders, the tenants inducted by them could not claim the benefit of s. 5(3). It would thus be seen that this decision turns inevitably upon the relevant provisions of the Bihar Act and the said provisions show that no statutory benefit had been conferred on the tenants as claimed by them under s. 5(3) of the said Act. This decision therefore does not lay down any general proposition on which Mr. Misra can possibly rely.

(1) [1956] S.C.R. 1

A In the result, the view taken by the Board about the status of the respondents is right and the High Court was, therefore, justified in dismissing the appellant's writ petition filed before it. The appeal therefore fails and is dismissed with costs. Costs in favour of
B respondent No. 1.

Appeal dismissed.