

GOVARDHAN DASS & 8 ORS. A

v.

SMT. SITABAI

May 3, 1968

[J. C. SHAH AND V. BHARGAVA, JJ.] B

*Central Provinces and Berar Tenancy Act, 1883—Mortgage or 'sir' lands—Whether cultivating rights given up by mortgagors—Acquisition of occupancy rights under ss. 12 and 13.*

*Central Provinces Tenancy Act (1 of 1922), ss. 12 and 13, 49 and 50—Acquisition of tenancy rights by mortgagors thereunder—Effect of purchase by mortgagee of the mortgagors rights in insolvency proceeding.* C

The predecessors-in-interest of the respondent executed usufructuary mortgage deeds in 1898 in favour of the predecessors-in-interest of the appellants in respect of certain 'sir' land. In 1940 one of the mortgagors, R, the husband of respondent, was declared insolvent and his share in the proprietary rights which vested in the Insolvency Court was purchased by the mortgagee. Some disputes arose about the amount and the right of redemption under the mortgage between the mortgagee and the other mortgagor S, the matter was referred to arbitration. In pursuance of the decree in this award, the mortgagee purchased the share of 'S' including his rights in 'sir'. R died, and when his widow the respondent was dispossessed from the land in pursuance of the mortgage decree passed in terms of the award, she filed an application to the Revenue Court under s. 12 and s. 13 of the Central Provinces Tenancy Act for restoration of possession of her occupancy rights in the land, which was allowed. Thereupon the appellants filed the suit claiming possession, which was partly allowed. Both the parties appealed and in appeals the suit was dismissed, which in further appeals, was upheld by the High Court. D

**HELD :** The appellants were not entitled to claim possession in this suit. E

The mere mention of the 'sir' land as part of the property mortgaged can only be interpreted as laying down that the proprietary rights in the 'sir' land were subject of the mortgages, so the cultivatory rights continued to remain with the mortgagors. The circumstance was further borne out by the fact that even after execution of the usufructuary mortgages in 1895, the mortgagors continued to cultivate this land and actual possession over this land for the purposes of cultivating it was not obtained by the mortgagee. In these circumstances, it was clear that the mortgagors must have become ex-proprietary occupancy tenants of this land in the year 1895. [273 G, H] F

Even if the mortgagors become ordinary tenants in 1895, it was clear that by the time the Act came into force in the year 1920, they must have become occupancy tenants as defined in s. 10 of the Act. So the claim of the appellants that they acquired rights to possession of this land on the basis of the mortgages in 1895, in these circumstances, must fail. [274 D] G

The appellants' claim that the rights of S passed to them when they purchased his rights in execution of the decree under the award and that the share of R passed to them when his rights were transferred by the Insolvency Court, fails in view of the provisions of s. 12 or s. 49 of the H

- A** Act, as they then stood. As a result of these provisions, the rights of the ex-proprietary occupancy tenant could not have been transferred in favour of the mortgagees. Section 50, as it was at that time, did permit transfer of certain rights of an ex-proprietary occupancy tenant; but, to be valid such transfers required permission of the appropriate revenue authority. In this case, there is no suggestion that, when transfers were obtained by the mortgagees in pursuance of the decree in the award and in pursuance of the insolvency proceedings against R, the transfers purported to be affected were made with the permission of the appropriate authority. Consequently under s. 49 those transfers would be void. [274 H-275 C]
- B**

Section 12 barred the transfer of cultivatory rights of an occupancy tenant in execution of the decree of a civil court or in insolvency proceedings. In fact, such rights did not vest in the Insolvency Court at all under the Provincial Insolvency Act. Consequently, the mortgagees could not acquire title to cultivatory right by virtue of the proceedings taken in execution of the decree in civil suit or in the insolvency proceedings. The right continued to vest in the mortgagors and the respondent, who was entitled as the sole survivor to those rights, was rightly restored to possession by the revenue authorities. [275 E-G]

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- D** The challenge, to the decision of the revenue authorities on the ground that its jurisdiction to grant relief under s. 13 of the Act is confined to cases where one of the co-tenants claims possession on being illegally dispossessed and not in a case where the sole tenant has been dispossessed, was immaterial, because relief from the same revenue authority could be claimed by a sole tenant by an application under s. 100 of the Act. The application filed by the respondent could, therefore, be treated as an application under s. 100 of the Act in case she was the sole tenant, and the grant of relief to her was not without jurisdiction. [275 H]

- E** **CIVIL APPELLATE JURISDICTION:** Civil Appeals Nos. 984 and 985 of 1965.

Appeals by special leave from the judgment and decree dated April 28, 1961 of the Madhya Pradesh High Court in Second Appeals Nos. 176 and 177 of 1969.

- F** *H. R. Gokhale, S. T. Khirwadkar and I. N. Shroff*, for the appellants.

*R. S. Dabir, O. P. Malhotra, P. C. Bhartari and J. B. Dada-chanji* for the respondent.

The Judgment of the Court was delivered by

- G** **Bhargava, J.** The appellants brought a suit against the respondent for possession of a plot Kharsa No. 1227 having an area of 58.35 acres of Mouza Shahpur, Tehsil Burhanpur in November, 1950 on the ground that they had been unlawfully dispossessed from this land. This land formed part of the property of one Laxmanrao who had two sons Vishwasrao and Krishnarao. Krishnarao had two sons Dinkerrao and Shamrao. Shamrao was adopted by Vishwasrao in the year 1895. The rights in certain village properties, including 'Sir' lands, vested in this joint family consisting of Vishwasrao, his adopted son Shamrao, and
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his nephew Dinkerrao. The three of them jointly executed two mortgage deeds in that year, and, in the mortgage deeds, mentioned that they were mortgaging the property which was described as 'Malguzari Mouzas and Sir land of Tehsil Burhanpur District Nimar', and 'Mausi Government land' situate in certain villages in Pargana Jainabad, Tehsil Burhanpur. The mortgages were in favour of the predecessors-in-title of the appellants. In the year 1928, there was a partition in the joint Hindu family of the mortgagors. By this time, Dinkerrao had died leaving two sons Ramachandraraao and Wamanraao. Vishwasrao and Shamrao had also died and Shamrao left an adopted son Shankerrao alias Narayanrao, who was the natural son of Dinkerrao, but had been adopted by Shamrao. The parties to the partition were, therefore, Shankerrao, the adopted son of Shamrao, Ramachandraraao and Wamanraao the sons of Dinkerrao. Shankerrao received  $\frac{1}{2}$  share in the property, while Ramachandraraao and Wamanraao received  $\frac{1}{4}$  share each. In that partition Wamanraao separated from Shankerrao and Ramachandraraao who continued to be joint, and, with the consent of the mortgagee, the mortgage liability was not continued against the share of Wamanraao. The liability under the mortgages was undertaken entirely by Shankerrao and Ramachandraraao. On this partition, in the property remaining joint with Shankerrao and Ramachandraraao, Shankerrao had 2/3rd share and Ramachandraraao had 1/3rd share, because, originally, before partition Shankerrao was entitled to  $\frac{1}{2}$  share and Wamanraao to  $\frac{1}{4}$  share.

In the year 1939, the proprietary rights of Shankerrao were purchased by one Vinayakrao, so that, under the law then existing, Shankerrao became the ex-proprietary occupancy tenant of his share in the 'Sir' plot No. 1227. In 1940, Ramachandraraao was declared insolvent and his share in the proprietary rights, which vested in the Insolvency Court, was sold and purchased by the mortgagee. The result was that Ramachandraraao also became ex-proprietary occupancy tenant of his 'sir' plot No. 1227, so that this plot became a co-tenancy of Shankerrao and Ramachandraraao in the capacity of ex-proprietary occupancy tenants. Thereafter, there was some dispute about the amount and the right of redemption under the mortgage between Shankerrao and the mortgagee, and this dispute was referred to an arbitrator, Sri Vipat, who gave his award, on the basis of which a decree was passed by the Court of Additional District Judge, Khandwa. In pursuance of that decree, Shankerrao's 2/3rd share, including his rights in the 'sir' plot No. 1227, was purchased by the mortgagee. In 1940, Ramachandraraao had died and his ex-proprietary occupancy rights in that plot No. 1227 had vested in his widow, Sitabai, the respondent in these appeals. In 1942, when she was dispossessed from this plot No. 1227 in pursuance of the mortgage

- A decree passed in terms of the award, she filed an application to the Revenue Court under sections 12 and 13 of the Central Provinces Tenancy Act I of 1920 (hereinafter referred to as "the Act") for restoration of possession of her occupancy rights in this plot No. 1227. The Revenue Court allowed her claim and restored her to the possession of this plot. Thereupon, the appellants filed the suit claiming possession of this plot as mentioned above. The suit was partially decreed by the trial Court granting to the appellants the right to joint possession with Satabai on the basis that they had 1/3rd share in the plot, while Satabai continued to be entitled to the remaining 2/3rd share. Both parties filed appeals to the Court of the District Judge, Khandwa. The lower appellate Court dismissed the appeal of the appellants in respect of the 2/3rd share in this plot No. 1227, and allowed the respondent's appeal in respect of the 1/3rd share of the same plot, with the result that the whole suit of the appellants stood dismissed. The appellants then filed two appeals before the High Court of Madhya Pradesh. The High Court dismissed both the appeals and consequently, the appellants have now come up to this Court against that judgment of the High Court in this appeal by special leave.

The High Court in its judgment held that the finding of fact recorded by the lower appellate court that the mortgagees in the year 1895 did not get possession over cultivatory rights in this plot was decisive of the claim put forward in this case on behalf of the appellants. The Court was of the view that, not having obtained possession over the cultivatory rights, the appellants were not entitled to claim actual possession from the mortgagors, who had become occupancy tenants of this plot. We consider that this decision arrived at by the High Court is perfectly correct.

- F It is true that the two mortgages of the year 1895 were both usufructuary mortgages and they included mortgage of the 'sir' land. There was, however, no express mention in those mortgages that the mortgage was to operate in respect of the cultivatory rights also in this 'sir' land. The mere mention of the 'sir' land as part of the property mortgaged can only be interpreted as laying down that the proprietary rights in the 'sir' land were the subject of the mortgages, so that the cultivatory rights continued to remain with the mortgagors. This circumstance is further borne out by the finding of fact recorded that, even after the execution of the usufructuary mortgages in 1895, the mortgagors continued to cultivate this land and actual possession over this land for purposes of cultivating it was not obtained by the mortgagee. In these circumstances, it is clear that the mortgagors must have become exproprietary occupancy tenants of this land in the year 1895.
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Learned counsel appearing on behalf of the appellants put before us one provision of the C.P. and Berar Tenancy Act of 1883, which was then in force, to show that the rights of ex-proprietary tenant could only accrue if the proprietary rights in 'sir' land were transferred by sale and not if they were transferred by usufructuary mortgage. The whole of that Act was not placed before us and, consequently we have been handicapped in our effort to determine what rights accrued to the mortgagors when the usufructuary mortgages were executed by them, but possession over cultivatory rights in the 'sir' land was retained. In the circumstances, we considered it advisable to examine the position on the basis of both alternatives. One alternative is that they became ex-proprietary occupancy tenants when the usufructuary mortgages were executed. The other alternative is that the rights of ex-proprietary tenants—did not accrue, but they did become tenants of the mortgagees in whom the proprietary rights vested because of the usufructuary mortgages. Even if the mortgagors became ordinary tenants in 1895 it is clear that, by the time the Act came into force in the year 1920, they must have become occupancy tenants as defined in s. 10 of the Act. Section 10 lays down that "Every tenant who is not an absolute occupancy tenant or a sub-tenant is an occupancy tenant." Clearly, the mortgagors were not sub-tenants nor is it the case of any party that they were absolute occupancy tenants of this plot No. 1227. Consequently, they must be held to be occupancy tenants of this plot under the Act. Long before the year 1939, therefore, the mortgagors must be held to have become occupancy tenants of this land or ex-proprietary occupancy tenants of it. The claim of the appellants that they acquired rights to possession of this land on the basis of the mortgages of 1895, in these circumstances, must fail.

The alternative claim put forward on behalf of the appellants was that, under the decree passed on the basis of the award, and in the proceedings for insolvency of Ramachandrarao, the rights in this land were acquired by the mortgagees through the proceedings taken by the courts. The claim was that the rights of Shankerrao passed to the mortgagees when the mortgagees purchased his rights in execution of the decree in Civil Suit No. 12-A of 1942 of the Court of Additional District Judge, Khandwa passed on the basis of the award given by Sri Vipat, while the remaining 1/3rd share of Ramachandrarao also passed to them when his rights were transferred by the Insolvency Court. This claim, clearly, fails in view of the provisions of s. 12 or s. 49 of the Act as they stood at the relevant time. Section 49 deals with the right of transfer of lands cultivated by an ex-proprietary occupancy tenant, while s. 12 deals with the right of transfer of lands cultivated by an occupancy tenant. We need not go into

- A the question whether the expression "occupancy tenant" in s. 12 does or does not include an ex-proprietary occupancy tenant. If it be held that the mortgagees had become ex-proprietary occupancy tenants of the land in 1895 as a result of the execution of usufructuary mortgages, the provisions of s. 49 would apply. As a result of those provisions, the rights of the ex-proprietary occupancy tenant could not have been transferred in favour of the mortgagees. Section 50, as it was at that time, did permit transfer of certain rights of an ex-proprietary occupancy tenant; but, to be valid, such transfers required permission of the appropriate revenue authority. In this case, there is no suggestion that, when transfers were obtained by the mortgagees in pursuance of the decree in Suit No. 12-A of 1942 and in pursuance of the insolvency proceedings against Ramachandraraao, the transfers purported to be effected were made with the permission of the appropriate authority. Consequently, under s. 49, those transfers would be void.

- D Taking the case of the second alternative that the mortgagors did not become ex-proprietary occupancy tenants in 1895 and were occupancy tenants simpliciter when the Act came into force, the transfers in favour of the mortgagees under the decree in Civil Suit No. 12-A of 1942 and in the insolvency proceedings would be in contravention of s. 12 of the Act. It appears that the revenue authorities, in restoring possession to Satabai on her application purporting to be under s. 13 of the Act, proceeded on the basis of this second alternative that the rights of the mortgagors were governed by s. 12 of the Act. We are unable to hold that, in this proceeding, the revenue authorities committed any error. Section 12 barred the transfer of the cultivatory rights of an occupancy tenant in execution of the decree of a civil court or in insolvency proceedings. In fact, such rights did not vest in the Insolvency Court at all under the Provincial Insolvency Act. Consequently, the mortgagees could not acquire title to cultivatory right by virtue of the proceedings taken in execution of the decree in civil suit or in the insolvency proceedings. The right continued to vest in the mortgagors and the respondent, who was entitled as the sole survivor to those rights, was rightly restored to possession by the revenue authorities.
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- H The decision of the revenue authorities was challenged on one other ground *viz.*, that the jurisdiction to grant relief under s. 13 of the Act is confined to cases where one of the co-tenants claims possession on being illegally dispossessed and not in a case where the sole tenant has been dispossessed. It appears to us that this is immaterial, because relief from the same revenue authority could be claimed by a sole tenant by an application under s. 100 of the Act. The application filed by Satabai for restoration of possession could, therefore, be treated as an appli-

cation under s. 100 of the Act in case she was the sole tenant, and the grant of relief to her was not without jurisdiction. In these circumstances, it is clear that the appellants are not entitled to claim possession in this suit.

The appeals fail and are dismissed with costs. One hearing fee.

Y.P.

*Appeals dismissed.*

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