

(1991) 03 SHI CK 0015

In the High Court Of Himachal Pradesh

Case No : Regular Second Appeal No. 192 of 1984

Kirpa Ram (Deceased) through his L. Rs. Smt. Kamla Devi and Others APPELLANT

Vs

kanshi Ram (deceased) through his L. Rs. Smt. Rooko Devi and Others RESPONDENT

Date of Decision : 07-03-1991

Acts Referred:

Himachal Pradesh Tenancy and Land Reforms Act, 1972 — Section 9
Punjab Security of Land Tenures Act, 1953 — Section 2(10), 2(17), 2(6), 4(5)
Transfer of Property Act, 1882 — Section 76

Citation : (1991) 2 ShimLC 189

Hon'ble Judges : Devinder Gupta, J

Bench : Single Bench

Advocate : Chhabil Dass, for the Appellant; R.K. Sharma, for L.Rs. Respondent No. 1, for the Respondent

Final Decision : Allowed

Judgement

Devinder Gupta, J.—This is Defendant's appeal against the judgment and decree passed on September 22, 1984 by District Judge, Hamirpur and Una Districts at Hamirpur, dismissing his appeal and thereby confirming the judgment and decree passed on October 23, 1981 by Sub-Judge, First Class, Hamirpur, decreeing the suit of the Plaintiff-Respondent No. 1, wherein a decree for possession was granted in favour of Plaintiff-Respondent No. 1.

2. Kanshi Ram, Plaintiff-Respondent, who has since died during the pendency of the appeal and is represented by his legal representative, Smt. Rooko Devi, the widow, filed a suit claiming a decree for declaration that he was owner in possession of the land after having redeemed the same on July 23, 1967 by duly paying the mortgage amount to mortgagees Defendants-Respondents No. 2 to 4 and that despite such redemption entries in revenue records were still showing the property under mortgage with Respondents No. 2 to 4 and that taking undue advantage of such wrong entries in the records, threats were being advanced by

the Defendants to interfere with his possession, therefore, by way of consequential relief decree for prohibitory injunction was claimed by him and in the alternative decree for possession was also claimed. Kirpu Ram, Appellant, was arrayed as Defendant No, 4, who alone contested the suit on various pleas, one of which was that he had been in actual possession of the suit property since prior to the mortgage and despite the redemption he still continued to be in occupation of the property as a tenant under the Plaintiff and was not liable to be evicted and that suit for recovery of possession was not maintainable in civil court. The trial Court held the Appellant to be a tenant inducted by the mortgagees during the continuance of the mortgage and further held the mortgage to have been redeemed and that on redemption, rights of Appellant as a tenant inducted by mortgagees came to an end and that Plaintiff was entitled to a decree for actual delivery of possession. Feeling aggrieved, Appellant preferred an appeal before the lower Appellate Court, which was dismissed and the judgment of the trial Court was confirmed by holding the Appellant to have been inducted on the property by mortgagees during subsistence of mortgage and further holding that there was no evidence on record not pleadings to the effect that it was an act of prudent management on the part of the mortgagees to have inducted the Appellant as a tenant, therefore, he was not entitled to any protection. The Appellant filed the present appeal against the said judgment and decree of the Courts below.

3. The appeal was admitted by this Court on the following questions of law:

1. Whether the receipt Ex. PW 3-A was admissible in evidence to prove the redemption of mortgage created by Respondent No. 1 in favour of Respondents 2 to 4?
2. Whether the tenancy of the Appellant under the mortgage automatically came to an end with the redemption of the mortgage?

During the course of arguments, stress was laid by the learned Counsel for the Appellants on question No. 2 only. It was urged that in case of usufructary mortgage of agricultural land, tenancy created by mortgagees with respect to land to which provisions of Punjab Security of Land Tenures Act were applicable, the tenant was entitled to protection u/s 9 of the said Act after redemption of the mortgage and such a tenant would be deemed to be a tenant of the landowner even under the provisions of the Himachal Pradesh Tenancy and Land Reforms Act (hereinafter to be called as the Tenancy Act) and will not be liable to be evicted from the tenancy land except in accordance with the provisions of law and since both the Courts below have concurrently found the Appellant to have been inducted on the suit property by the mortgagees in possession, therefore, he was entitled to protection provided under the Tenancy Act. In support of this contention, reliance was placed upon two decisions of Division Bench of this Court, namely, *Ramji Dass v. Ram Rakha* ILR 1979 HP 536, and *Bhagat Ram and Anr. v. Asha Ram and Ors.* ILR 1986 HP 517 . Support was also sought from a decision of the Supreme Court in *Pomal Kanji Govindji and Others Vs. Vrajlal*

Karsandas Purohit and Others, by urging that judicial notice may be taken of the fact that the mortgagees in possession had inducted the Appellant as tenant to enable him to cultivate, the land and the very process of cultivation with a view to bring input and improving the fertility of the soil would be a bona fide act of prudent management and the case of the Appellant was covered by the exception to the general rule that tenancy created by mortgagees would come to an end on its redemption.

4. The learned Counsel for the Respondent, on the other hand, placed reliance upon Mahabir Gope and Others Vs. Harbans Narain Singh and Others, and Hanumant Kumar Talesara v. Mohan Lal AIR 1988 SC 249 and urged that the act of Respondents No. 2 to 4, the mortgagees, in creating tenancy in favour of Appellant, which had the effect of enuring, beyond duration, of mortgage could not be said to be an act of prudence and thereby binding upon the Plaintiff and that even such a plea that the tenancy was binding could not be entertained in the absence of such a plea having been raised in the pleadings.

5. I have given my careful consideration to the arguments advanced by the learned Counsel for the parties and have also gone through the records. Though a mortgagee in possession is free to settle the land but the general rule is that he cannot do so beyond the terms of the mortgage. This rule is based upon the principle that a person cannot confer upon another an estate which he himself hasn't got This principle enshrined in Clause (a) of Section 76 of the Transfer of Property Act applies both to the agricultural and urban properties There, however, is an exception to the general rule that if the lease is one made of the mortgagee of the agricultural property in the course of prudent management, it would be binding on the mortgagor notwithstanding the redemption of mortgage. This being in the nature of exception it is always for the person, who claims its benefit to strictly establish it by making appropriate pleadings to these effect and prove the same. The general rule, aforementioned is also subject to another exception which has now been well recognised, as has been held in Meharban Singh Vs. Bhagwant Singh, that the rights of the tenant inducted by the mortgagee might be improved by virtue of statutory provisions which meanwhile, come into operation.

6. The facts, which have been found in the present case, are that the agricultural land was mortgaged orally for which report was made in the Roznamcha Waqiyati Halqa Patwari, copy of which has been proved on record as Ex. P-3 and effect thereto was duly given in the revenue records through mutation of mortgage No. 139 attested on April 20, 1947. The mortgage was with possession and the mortgagees immediately after the mortgage inducted the Appellant as a tenant, who had been cultivating the entire land. The mortgage was redeemed on payment of the mortgage amount of Rs. 700 vide receipt Ex. P W. 3-A, dated July 23, 1967. The Appellant continued to remain in occupation of the property. It was Punjab Tenancy Act, 1837, which was applicable to the area where the land in question is situate. Tenant has been defined in Sub-section (5) of Section

4 of the said Act as under:

"Tenant" means a person who holds the land under another person, and is, or but for a special contract would be, liable to pay rent for that land to that other person ; but it does not include--

(a) * * * * (b) * * * * (c) * * * * (d) * * * *

Another legislation was enacted with a view to provide for the security of land tenures and other incidental matters, namely, the Punjab Security of Land Tenures Act, 1953 which continued to apply till the coming into force of the Himachal Pradesh Tenancy and Land Reforms Act, 1972. At the time when the property was redeemed, it was the Punjab Security of Land Tenures Act, which was applicable Sub-section (6) of Section 2 of the said Act provides that tenant would mean as it is defined in the Punjab Tenancy Act, 1887. Admittedly, the Appellant was a person who held the land under the mortgagees, therefore, he was a person who held the land under another person and was also liable to pay rent for that land to the other person, namely, mortgagees. In view of the decisions rendered in Ramji Das's and Bhagat Ram's cases (supra), the Appellant will be covered by the definition of a tenant

7. The next question, which arises for consideration, is as to what is the effect of the provisions of the Tenancy Act by which the Punjab Security of Land Tenures Act was repealed. In the Tenancy Act, "tenant" has been defined in Sub-section (17) of Section 2, as under:

"tenant" means a person who holds land under a landowner, and is, or but for a contract to the contrary would be liable to pay rent for that land to that landowner and includes--

xx xx xx xx xx xx xx xx

The only difference in the definition of tenant herein is that the word "landowner" has been substituted in place of "other person". Sub-section (10) of Section 2 says that "landowner" means a person defined as such in the Himachal Pradesh Land Revenue Act, 1954 or the Punjab Land Revenue Act, 1887, as the case may be. In both the "Landowner" is defined as under:

"Landowner" does not include a tenant or an assignee of land revenue, but does include a person to whom a holding has been transferred, or an estate or holding has been let in farm, under this Act, for the recovery of an arrear of land revenue or of a sum recoverable as such an arrear, and every other person not hereinbefore in this clause mentioned who is in possession of an estate or any share or portion thereof, or in the enjoyment of any part of the profits of an estate.

8. From the above definition of landowner it can be said that tenant and assignee of land revenue have expressly been excluded from the definition of "landowners" but the meaning has been enlarged by including those who enjoy

the possession of the estate or any share or portion thereof or are in the enjoyment of any part of the profits of an estate A simple mortgagee with whom the property is mortgaged without possession will not be covered by the definition of "landowner" but a mortgagee with possession will definitely fit in the definition of "landowner" although he is not an owner of the land. Landowner as defined under the Land Revenue Act has wider meaning than the owner of the land. On the ratio of the decisions in Ramji Dns's and Bhagat Rani's case (supra), the Appellant, who had been inducted as a tenant, by the mortgagees, will be deemed to be a tenant even under the provisions of the Tenancy Act and entitled for protection provided under it. He will not be liable to be ejected otherwise than in due execution of the decree passed under the said Act.

9. Looking from another angle, the very act of the mortgagees inducting the Appellant as tenant upon the land in or about the year 1947 with a view to cultivate the land and thereby improving the fertility of the soil will be deemed to be an act of prudent management. This aspect of the matter was duly considered by the Full Bench of the Gujarat High Court in Lalji Purshotam v. Madhavji Meghaji AIR 1976 Guj 161 after considering various decisions of the Supreme Court. The decision in Lalji Purshotam's case, in particular, the following passage was approved by the Supreme Court in Pomal Kanji Govindji's case (supra):

In our opinion, on the general aspect of the matter based on facts of which judicial notice can be taken, it is clear that so far as leases of agricultural lands are concerned, when a lessee cultivates land by the very process of cultivation he brings inputs and improves the fertility of the soil. Constant and continuous cultivation by proper manuring etc. would improve the fertility of the soil and on the determination of the lease, that fertility would still remain in the land. It is, therefore, necessary that security of tenure should be given to the tenant of agricultural land so that by his proper husbandry and agricultural practices, he himself may derive good benefits from the land and also improve the fertility of the soil. It is because of this aspect that in all countries legislation has been enacted to protect the actual tiller of the soil, fixity of tenure has been given and all the different measures of tenancy legislation regarding agricultural lands have provided for sufficiently long leases and protection of his tenure so as to induce the agriculturist to put in his best efforts and best inputs and they are called now-a-days, during the term of the lease. A prudent owner of property would, therefore, see to it that the term of lease which he grants in respect of agricultural land is sufficiently long to induce the tenant to put in the best efforts which would incidentally benefit the owner of the land by improving the fertility of the land itself...

10. The Supreme Court, while recording its findings, also took note of the decision in Mahavir Gope's case (supra), cited by the learned Counsel for the Respondent herein. The decision in Hanumant Kumar's case (supra) relied upon by the learned Counsel for the Respondent will be of no consequence, as it was a case pertaining to urban property and a clear distinction has been made out for

the applicability of the principles enunciated above with respect to two types of properties. No other point was urged before me.

11. In view of the above, the only question, which was urged before me, is answered in the negative. The appeal is accepted. The judgment and decree passed by the courts below are set aside and the suit of the Plaintiff-Respondent No. 1 is dismissed.

Parties are left to bear their own costs.