(1954) 10 AHC CK 0031

In the Allahabad High Court

Case No : Second Appeal No. 2189 of 1948

Net Ram and others — APPELLANT

Vs

Jagbir Singh and 4 others and Mst. Tirbeni and 2 others — RESPONDENT

Date of Decision : 12-10-1954

Acts Referred:
Encumbered Estates Act, 1934 — Section 35, 47

Citation : (1954) 24 AWR 609

Hon'ble Judges : R.N. Gurtu, J

Bench : Single Bench

Advocate : Jagdish Sahai and H.C. Sharmas, for the Appellant; S.B.L. Gaur, for Respondents., for the Respondent

Final Decision : Allowed

Judgement

R.N. Gurtu, J.—The facts giving rise to this second appeal are as follows:

2. The Plaintiffs are the representatives of Mukhtar Singh who is dead. Mukhtar Singh applied u/s 4 of the U.P. Encumbered Estates Act and, after his death, the Plaintiffs were brought on the record in his place. The written statement submitted by Mukhtar Singh u/s 8 of the Encumbered Estates Act showed that Mukhtar Singh was the owner of Mohal Mukhtar Singh, Khewat No. 1, village Talibpur alias Kanakpur. The area of this mohal is 163 bighas and 19 biswas. The written statement also gave particulars concerning the debts of Mukhtar Singh and indicated that plot No. 67 measuring 6 bighas and 13 biswas was subject to a possessory mortgage executed in favour of the ancestors of the Defendants for Rs. 1,600/ - on 6th July 1928. In due course, simple money decrees were passed in favour of the creditors including a decree in favour of the Defendants and the record was then sent to the Collector u/s 19 of the Encumbered Estates Act. The nature and extent of the properties of Mukhtar Singh was mentioned and the decrees were also mentioned and transmitted. On 16th October, 1943, the Defendants along with other creditors applied to the Collector that the amount due from the debtor might be liquidated by the grant of a mortgage to them This

request was accepted and on 29th March, 1944 a mortgage deed was executed in favour of the creditors including the Defendants (the mortgagees of the deed dated 6th July, 1928, The statutory mortgage created u/s 25 of the Act was in respect of 120 bighas and 4 biswas in mohal Mukhtar Singh and the mortgage was for a period of twenty years. Delivery of possession was given of the property covered by the mortgage on 8th October, 1944. The names of the creditor-mortgagees were recorded over 120 bighas and 4 biswas. The mortgagees'' names, however, continued to be recorded over 6 bighas and 13 biswas out of the land originally mortgaged to them. It appears that the Plaintiffs (Mukhtar Singh''s representatives) did not immediately apply for possession of the area covered by the mortgage deed dated 6th July, 1928 after the passing of the simple money decree dated 21 st August 1943 in favour of the Defendants but waited. After the mortgage in favour of the creditors had been executed u/s 25 of the Encumbered Estates Act, they applied for the recovery of 6 bighas and 13 biswas (which was originally subject to the mortgage of 1928). The application was made u/s 35 of the Encumbered Estates Act. The Collector refused to restore possession on the ground that the said 6 bighas and 13 biswas had been included in the mortgage liquidation scheme and that these were included in the statutory mortgage granted u/s 25.

3. The learned Commissioner on appeal dismissed the appeal holding that objection should have been taken at the time when the scheme for liquidation was prepared.

4. Having failed to get possession from the Collector the Plaintiffs filed the present suit which was decreed and they were ordered to get possession over 6 bighas and 13 biswas area of plot No. 67 situate in khewat No. 1 in village Talibpur alias Kanakpur.

5. An appeal was then preferred by the Defendant, the original mortgagees'', who are in possession. The appeal was dismissed with costs. The view of the lower appellate court was that the decision of the Collector that the Plaintiffs were not entitled to possession over the 6 bighas and 13 biswas area was ultra vires and beyond the jurisdiction of the Collector and was a nullity. It pointed out that Section 35 clearly stated that when a person is entitled to possession of any property, he might apply to the Collector to be put in possession over it and the Collector shall deliver possession of the property to him and that it is not open to the Collector to refuse to deliver possession. At the same, time, the lower appellate court held that there was no provision u/s 35 or in any other section of the Act that in case the applicant''s application u/s 35 is dismissed or in case no application is made under that section, that the applicant is debarred from suing for possession for all times.

6. Now it appears that the reason why the Collector and the Commissioner refused to restore possession was that the area had been included in the statutory mortgage granted u/s 25. It is not absolutely clear whether the Collector and Commissioner also thought that they had no jurisdiction u/s 35 at

that stage or whether they refused restoration on the merits because the area, according to them, had been included in the mortgage granted u/s 25 of the Act. It appears that after a mortgage has been created u/s 25, the Collector may, u/s 42, restore the property upon the expiry of the period for which the mortgagees are entitled to hold the property. That period not having expired, the Collector, once the property had been included in the mortgage, could not restore possession to the Plaintiffs under the provisions of the Encumbered Estates Act.

7. It was, however, argued before me that the Collector had no jurisdiction whatsoever to pass any orders in respect of the 6 bighas and 13 biswas because, according to the contention of the Appellants, plot No. 67 was not specifically mentioned in he list of properties belonging to the Plaintiff which was sent down to the Collector u/s 18 of the Act. It appears that plot No. 67 is not specifically mentioned in the written statement filed u/s 8 of the Act, but the mohal in which this plot is admittedly situate was shown in the written statement. Moreover, since the mortgage in favour of the Defendants was also shown and this area was undoubtedly covered by the mortgage, it cannot be said that this area was not brought into the proceedings under the Encumbered Estates Act. The court undoubtedly had jurisdiction to pass a simple money decree in respect of the mortgage deed and once a simple money decree was passed the mortgaged plots became released and could have been taken into possession by the Plaintiffs, if they had made an application immediately u/s 35 but they waited and allowed the plots to be re-included in the statutory mortgage. It is now too late for them to say that the Collector could not pass any orders within reference to these 6 bighas and 13 biswas

8. The next question is whether the refusal of the Collector to return the 6 bights and 13 biswas can be questioned in proceedings in the civil court ? Section 47 of the Act lays down as follows:-

Except as provided in Sections 45 and 46, no proceedings of the Collector or Special Judges under this Act shall be questioned in any Court.

9. It would seem, prima facie, therefore, that restoration of possession of these 6 bighas and 13 biswas cannot now be obtained from the civil court. The lower appellate court has, however, relied upon a ruling reported in Bishnath Singh and Others Vs. Basdeo Singh, which was given under the Bundelkhand Land Acquisition Act, for the view that Section 35 of the Encumbered Estates Act also merely provides a summary remedy and that it does not, in any way, take away the right of the proprietor to obtain possession in any other way allowed by law. The Bundelkhand Encumbered Estates Act is a piece of legislation which was enacted to protect encumbered estates in Bundelkhand. Under that Act, the rights conferred and the procedure to be followed are substantially similar to the rights and procedure laid down in the U.P. Encumbered Estates Act, 1934.

10. The facts of Mst. Beti Bai''s case were that two out of five co-mortgagors had made an application under the Bundelkhand Act. They had failed to show a

particular mortgage in their application and the mortgagees had not themselves filed any claim either, in respect of that mortgage, obviously because the mortgagees were in possession of the mortgaged property. u/s 12 of the Bundelkhand Act, every claim against the applicant-proprietor in respect of a private debt, unless made within the time and in the manner required by the Act, is deemed, for all purposes and on all occasions, to have been duly discharged. Section 18 of the Bundelkhand Act provides that:-

When any person whose claim has been......under Section 12,.........deemed to be discharged, has as mortgagee........obtained possession of any land of the proprietor as security for his claim, and continues in possession of that land, the Special Judge may order him to be ejected therefrom.

11. The two co-mortgagors not having shown the mortgage in their application took no steps to have the mortgagees, who were in possession, ejected u/s 18 of the Act. Thereafter all the five co-mortgagors brought a suit in the civil court for possession of the mortgaged property. They were met with the plea that the mortgage had been discharged by virtue of Section 12 of the Bundelkhand Act and that from the date of discharge the mortgagees were in adverse proprietary possession and that, therefore, the mortgagors could not get back their lands. The view taken by this Court was that as against the applicant-mortgagors, the mortgage debt must be deemed to have been discharged out from that mere fact adverse possession could not be found in favour of the mortgagees, as adverse possession must be asserted to the knowledge of the proprietors, It was, therefore, held that the two co-mortgagors were entitled to recover possession of their share of the property without paying any money whatsoever on the ground that their liability had been discharged and that the Defendants had no established their adverse possession as against them. The non-applicant co-mortgagors were held entitled to redeem the remaining share either singly or jointly as the integrity of the unredeemed portion of the mortgaged property had not been broken up. The question whether they would be required to pay only the proportionate amount of the mortgage debt was not decided because the non applicant co-mortgagors were prepared to pay the entire mortgage amount. It was while discussing the question of adverse possession that the learned Judge remarked as follows:

Furthermore, I am of opinion that the remedy provided by S. 18 of the Act (Bundelkhand) is not the exclusive remedy which a proprietor is entitled to have recourse to. This is a summary remedy provided, and it does not in any way take away the right of the proprietor to obtain possession in any other way allowed by law.

12. It does not appear that in the Bundelkhand Encumbered Estates Act there is any provision barring the questioning of all proceedings of the Collector in any court as is the case with Section 47 of the U.P. Encumbered Estates Act. Section 30 of the Bundelkhand Encumbered Estates Act which has been referred to as being identical to Section 47 of the U.P. Encumbered Estates is not identical. It

only makes the decision of the Commissioner, on appeal from the decision of the Special Judge, final subject to the right of the Board of Revenue to revise that decision. It does not, in express words, state that the proceedings of the Special Judge are not to be questioned in any court. Moreover, in Mst. Beti Bai''s case(I) no proceedings u/s 18 had been taken at all. In other words, the jurisdiction given to the Special Judge u/s 18 was not invoked.

13. In the present case, however, the jurisdiction given to the Collector u/s 35 of the U.P. Act has been invoked. It may be that Section 35 of the U.P. Act provides an alternative remedy but it is difficult to hold that once a party has availed himself of the provisions of Section 35 it can still go behind the order passed under this section by coming to the civil court. To permit this to be done would be to disregard the provisions of Section 47 of the Act. Therefore, in my view, the position, at least, is this, that if proceedings have been initiated u/s 35 of the U.P. Act and orders have been passed, those orders can only be challenged in the manner provided for in the U.P. Encumbered Estates Act and they cannot be challenged by subsequent proceedings in the civil court.

14. Under the circumstances, this appeal must be allowed and the order of the courts below must be vacated and the suit must be and is dismissed. Parties will bear their own costs throughout.

15. Leave to appeal to a division bench is asked for and refused.