(1957) 04 AHC CK 0042

In the Allahabad High Court

Case No : Civ. Miscellaneous Writ No. 1242 of 1955

Sri Ram Sukh Dubey and Others — APPELLANT

Vs

The Board of Revenue — RESPONDENT

Date of Decision : 09-04-1957

Acts Referred:

Constitution of India, 1950 — Article 226
Transfer of Property Act, 1882 — Section 6
Uttar Pradesh Tenancy Act, 1939 — Section 180
Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950 — Section 14, 20, 21

Citation : (1957) 27 AWR 487

Hon'ble Judges : Mehrotra, J;Chaturvedi, J

Bench : Division Bench

Advocate : S.C. Khare, for the Appellant; Lalta Pd., for the Respondent

Final Decision : Allowed

Judgement

Chaturvedi, J.—This is petition under Article 226 of the Constitution p(sic)ing for the quashing of two orders of the Board of Revenue dated 9-8-1954 and 2(sic)-9-1955.

2. One Badri Tewari was the tenant of a number of plots in village Ramgarh, district Sultanpur. He died on 28-9-1949 and the Zamindar then executed a lease of the plots, previously held by Badri, in favour of the Petitioners. It appears that the Respondents Nos. 2 and 3 were in possession of the plots and the Petitioners had, therefore, to bring a suit u/s 180 of the U.P. Tenancy Act for their ejectment. The Respondents took up the position that they were heirs of Badri and had therefore inherited. the plots after Badri''s death This plea was overruled by the Judicial Officer who decreed the Petitioners'' suit on 11-2-1950. The Respondents then filed an appeal before the Addl. Commr. which was also dismissed. They then filed a second appeal before the Board of Revenue and the second appeal came up for hearing on 9-8-194(sic). The Judicial Member of the Board, who was seized of the case, dismissed the second appeal with respect to

all plots excepting one, namely, plot No. 911. The appeal with respect to this plot was allowed and the suit dismissed on the ground that the Respondents Nos. 2 and 3 were entered as mortgagees against these plots and this entry meant an entry as occupant of those plots within the meaning of the word as used in Section 20(b) of the ZA and LR Act. In the opinion of the Judicial Member the Respondents had acquired adhivasi rights by virtue of that entry. The Petitioners then filed an application for review of that order. The application was admitted but was ultimately dismissed on 21-9-1955. It was held that the position subsequently had been made clear by certain decisions of the Board of Revenue that entry as mortgagee was not an entry as ''occupant'' within the meaning of the word as used in Section 20 and it did not confer adhivasi rights on the persons who were entered as mortgagees. He was inclined to think that the previous decision was not legally correct but a mere mistake on a question of law was not sufficient ground for allowing a review application.

3. The learned Counsel for the Petitioners has challenged the legality of Both the above orders.

4. We are inclined to agree with the latter view of the Board, of Revenue that an entry as mortgagee is not an entry as occupant within the meaning of Section 20(b) of the ZA and LR Act. The question was considered at some length by a Division Bench of this Court in the case of Jagdish Prasad v. Board of Revenues 1956 A.L.J.R. 317 : A.W.R. 32 (J). The actual point that arose for decision in that case was whether an entry as sajhidar was entry as occupant within the meaning of Clause (b) of Section 20. In deciding that question it was held that entry as marfatdar or sajhidar meant that the entry was as a licensee and the entry as a licensee was held to be not an entry as occupant. It was held that the word ''occupant'' in Section 20 referred to a person who claimed an exclusive right of occupation of the land on his own behalf to the exclusion of others. And as a licensee did not claim possession on his own behalf, but on behalf of his principal, it was held that entry as a licensee did not mean entry as occupant in Section 20 of the ZA and the LR Act. Applying the Principle of that case to the case before us, if we come to the conclusion that the entry as mortgagee of tenancy rights is entry as a licensee, the entry would not confer the rights of adhivasi u/s 20. The learned Counsel for the Respondents has urged that the entry is not an entry as a licensee because if the tenant was to bring a suit for dispossession of the mortgagee, the suit would be decreed only on the condition that the mortgagee paid the amount due on the mortgage. We do not think that the inference drawn by the learned Counsel from the cases which have laid down the above proposition is justified. The mortgagee is not dispossessed before payment of mortgage money because the courts are in a position to adjust equities between the parties and nor because it was held that the mortgagee had any title to the possession of the land. Section 6 of the Transfer of Property Act actually prohibits transfer of rights of occupancy of a tenant. An ordinary tenant could not either sell or mortgage or gift his rights in the land. In case he did put the mortgagee in possession, the entry as mortgagee would mean that the

person entered in the papers has no legal right to be there but has been permitted by the original tenant to remain in occupation of the plot. There being no right of transfer at all, the right in the mortgagee is not a legal one and it merely means that the tenant has permitted a particular individual to be in occupation of the land on his behalf. We think that the entry as mortgagee of tenancy rights therefore means entry as a licensee and not as an occupant.

5. This result is further strengthened by the fact that the Legislature itself has provided for the rights of mortgagees in Sections 14 and 21 of the ZA and LR Act. Section 14 deals with the rights of mortgagees of proprietary title who were in actual possession of the land and Section 21(d) says that a mortgager in actual possession from a person, belonging to any of the classes of tenants mentioned in the clause, acquires the lights of an asami. This clause would also go to suggest that a mortgagee was not to acquire adhivasi rights.

6. The learned Counsel for the Respondents then argued that the case should be remanded to the Board of Revenue for decision on the question whether the Respondents have acquired asami rights. But we do not find from the judgment of the Board that the Respondents alleged before the Board of Revenue that they were asamis of the land having acquired asami rights u/s 21. This is a new point raised before us for the first time. It would also require determination of the question of fact whether the Respondents were really mortgagees or not. Under the circumstances, we do not think that the case should be remanded to the Board of Revenue.

7. For the above reasons, we think that there is an apparent error in the judgment of the Board of Revenue dated 9-8-1954 dismissing the suit with respect to plot No. 91l. Consequently, we allow this petition and quash the judgment of the Board of Revenue dated 9-8-1954 in so far as it dismissed the suit with respect to plot No. 911 and we restore the judgment of the Addl. Commr. with respect to this plot as well. We also quash the judgment of the Board of Revenue, passed on the review application, dated 21-9-1955. The parties will bear their own costs.