

THAKUR SINGH

v.

RAM BARAN SINGH & ORS.

August 25, 1972

[A. N. RAY AND I. D. DUA, JJ.]

Transfer of Property Act (4 of 1882), ss. 76, 77 and 83—Mortgage providing for payment of government revenue and Cess by mortgagor—Mortgagee in possession paying the same—Deposit of mortgage money by mortgagor—If should include payment by mortgagee—Mortgagee's liability to account.

The appellant-mortgagor tendered to the mortgagees the mortgage money due on their mortgages and, on the refusal of the mortgagees to accept the amount, deposited the mortgage money into court. The appellant thereafter filed suits for redemption and mesne profits. The terms of the mortgage deeds indicated that, (i) the mortgagee shall have the possession and occupation of the mortgaged property and the right to appropriate the produce thereof in lieu of interest on the mortgage money and that the mortgagor shall have no claim to any excess produce or mesne profits; (ii) the mortgagee was to pay to the mortgagor the amount mentioned in each mortgage bond as annual reserve rent; and (iii) the mortgagor was liable for the payment of government revenue or cess. The mortgagees, however, paid the revenue and cess on behalf of the mortgagor. The total amount of revenue and cess paid by the mortgagees each year exceeded the amount due to the mortgagor as reserve rent. The trial court, and the High Court in appeal, held that the amounts representing the government revenue and cess should have been added to the mortgage money and deposited in court, and, since it was not done, there was no valid deposit in court of the money due on the mortgages, and hence, the appellant was not entitled to mesne profits.

Dismissing the appeal to this Court,

HELD: (1) Under the provisions of the Cess Act, 1880, cess is a public demand and linked with rent. Under the terms of the mortgage deed the appellant was liable for the payment of both revenue and cess. Since the mortgagees paid the government revenue or cess on behalf of the appellant and the amount so paid exceeded the amount payable by the mortgagees as reserve rent, the mortgagees were entitled to the excess payment from the appellant and add it to the mortgage money due.

[1020E-F-H]

(2) There was nothing to account on the part of the mortgagees, because, (a) the mortgagees had to pay to the mortgagor a fixed amount as reserve rent; and (b) the mortgages were covered by s. 77 of the Transfer of Property Act and therefore the provisions as to accounts in s. 76(g) are excluded. [1020B-D]

CIVIL APPELLATE JURISDICTION: Civil Appeals Nos. 1038-1040 of 1967.

Appeals by certificate under Article 133 of the Constitution of India from the judgment and decree dated August 7, 1962 of the Patna High Court in Original Decrees Nos. 384/52. 1/55 and 2/55.

A R. C. Prasad, for the appellant

Jagadish Swarup, K. K. Sinha, S. K. Sinha and B. B. Sinha, for respondents Nos. 1-4 (in C.A. No. 1038 of 1967), for respondents 1(a) & 2 (in C.A. No. 1039 of 1967 and for respondents Nos. 1, 2, 4 & 5 (in C.A. No. 1040 of 1967).

B The Judgment of the Court was delivered by

Ray, J. These three appeals are by certificate against the judgment dated 7 August, 1962 of the High Court at Patna. The High Court allowed in part the appeals filed by the appellant by decreeing in part the suits filed by the appellant for redemption of mortgages. The High Court dismissed the appellant's prayer for mesne profits.

C The appellant filed three suits for redemption. Title Suit No. 54 of 1950 filed by the appellant was with respect to *Ijara* bond dated 21 April, 1920 in favour of Ram Baran Singh for Rs. 2,300/-. Title Suit No. 55 of 1950 was filed by the appellant with respect to another *Ijara* bond dated 21 April, 1920 in favour of Inder Singh for Rs. 1293-12-0. The third Title Suit No. 56 of 1950 was filed by the appellant with respect to the third *Ijara* bond dated 21 April, 1920 in favour of Raj Kumar Mahto for Rs. 1,150/-. The bond was subsequently assigned to one Sheo Sharan Singh whose sons were defendants in that suit. These bonds were executed by Maik Nizammuddin. These three bonds were mortgage bonds in respect of certain *Milkiyat* share in village Keoran Mauzume Makhdumpur in the District of Patna.

D The appellant was the purchaser of the *Milkiyat* share of Nizammuddin from his heirs by a deed dated 22 May, 1946. The appellant alleged as follows. There are *bakshat* lands within the said *Milkiyat* share covered by the *Ijara* bonds. These *bakshat* lands were the subject matter of the mortgage. After the purchase the appellant tendered the *Ijara* money to the respondents who were *ijaradars* or mortgagees. The respondents refused to accept the money. The appellant thereupon deposited the mortgage money. The appellant served notice of the deposit on the respondents. The respondents did not withdraw the *ijara* money, they did not deliver possession of the *Milkiyat* share and the *bakshat* lands to the appellant. The appellant therefore filed suits for redemption and for possession. The appellant also claimed mesne profits.

E The respondents in the written statements denied that there was any *bakshat* land. It was also denied that there was any mortgage of *bakshat* land. It was alleged that the lands were *raiya* lands in possession of several tenants and therefore those lands could not be redeemed. The further defence was that the

Ijara bonds were really sale deeds and therefore the appellant had no right of redemption in respect of the milkiyat interest. The respondents denied that the appellant tendered the mortgage money.

The trial Court held that the appellant was entitled to a decree for redemption but not for mesne profit. The reason given was that the appellant did not deposit in court under Section 83 of the Transfer of Property Act the money due on mortgage. The mortgagees had from time to time paid the Government revenue and cess in respect of the mortgage property. The Government revenue and cess should have been paid by the mortgagor. The amounts representing the Government revenue and cess should have been added up in the mortgage money. The deposits in court did not cover those amounts.

The appellant preferred appeals to the High Court. The High Court upheld the finding of the trial Court that certain lands were bakasht lands. The High Court set aside the finding of the trial Court as to other lands which were found by the trial Court not to be bakasht lands. The High Court upheld the finding and conclusion of the trial Court that there was no valid deposit in court of money due on mortgage. The appellant was therefore not entitled to mesne profits. The High Court found that the amount of revenue and cess was never less than the amount of haq-ajri (meaning thereby 'annual reserve rent') payable to the mortgagor. The result was that the amount of revenue and cess paid by the mortgagees was always higher than the haq-ajri and therefore there was no case of accounting.

Counsel for the appellant contended that the appellant was entitled to mesne profits from the dates of deposit of mortgage money in court under section 83 of the Transfer of Property Act. The amounts were deposited in court of First Munsif, Patna on 26 May, 1947. Notice under section 83 of the Transfer of Property Act was served on the respondents on 30 May, 1947 in two cases and on 3 June, 1947 in the third case. The suits were filed for redemption of mortgage and mesne profits in the month of June, 1950.

The relevant terms of the ijara bond (mortgage bond) in favour of Ram Baran Singh were these :

"It is desired that the said Mustajir should enter into possession and occupation of the ijara property, himself cultivate the land, appropriate the produce thereof in lieu of interest on the peshgi money, I, the executant, or my heirs and representatives, neither have nor

A shall have any claim for excess produce and mesne profits etc. against the said Mustajir or his heirs and representatives, except to get a sum of Rs. 12/- (rupees twelve) in king's coins, as annual reserve rent till this deed remain intact. Expenses over dispute regarding the milkiyat property and boundary limit and payment of Government revenue and road cess and Public works cess etc. are entirely the concern of me, the executant. B The said Mustajir neither has nor shall have any connection and concern therewith".

C The terms of the other two ijara deeds were identical. The only difference was that in the case of the ijara bond in favour of Inder Singh the annual reserve rent (haq-ajri) was Rs. 6-12-0 and in the case of Raj Kumar Mahto the annual reserve rent (haq-ajri) was Rs. 6/-.

D Broadly stated, these terms indicate three features. First, the mortgagee shall have possession and occupation of the mortgaged property and appropriate the produce thereof in lieu of interest on the mortgage money and the mortgagor had no claim to any excess produce or mesne profits against the mortgage. Secondly, the mortgagee was to pay to the mortgagor the amounts mentioned in each ijara bond the annual reserve rent or haq-ajri. Thirdly, the mortgagor was liable for payment of the Government revenue or cess. E

F The High Court found that the mortgagees paid the revenue and cess out of haq-ajri. In Title Suit No. 54 of 1950 the High Court held that the total amount of revenue and cess came to Rs. 15-9-3. The haq-ajri in that suit was Rs. 12/-. It therefore followed that every year the mortgagee paid Rs. 3-9-0 in excess of the amount haq-ajri. The mortgagor was liable to the mortgagee for the excess payment. Similarly, in Title Suit No. 55 of 1950 the mortgagee paid revenue and cess amounting to Rs. 9-13-3. The haq-ajri under the ijara bond in that suit was Rs. 6-12-0. The result was that every year the mortgagee paid Rs. 3-1-3 in excess. The mortgagor was liable to the mortgagee to pay that excess amount. G Again, in Title Suit No. 56 of 1950 the High Court found that the mortgagee paid every year revenue and cess amounting to Rs. 7-12-0. The haq-ajri there was Rs. 6/. The mortgagee therefore paid annually Rs. 1-12-0 in excess of haq-ajri. The mortgagor was liable to pay the excess amount to the mortgagee.

H In the present appeals, the mortgagor had undertaken the liability to pay the revenue and cess. The mortgagor failed to pay the same. The mortgagees paid the revenue and cess on be-

half of the mortgagor. The mortgagees were entitled to the excess payment of the amount of revenue and cess, because the mortgagor was liable to pay the same. A

The mortgage bonds in the present case provided that as long as the mortgagee was in possession of the property the receipts from the mortgaged property shall be taken in lieu of interest on the principal money. That amounts to a stipulation that the receipts from the mortgaged property will be taken in lieu of the interest on the principal money. That is section 77 of the Transfer of Property Act. The provisions as to accounts contained in section 76(g) of the Transfer of Property Act are excluded in cases where section 77 of the Transfer of Property Act applies. Section 77 of the Transfer of Property Act applies to the present appeals. Further, the mortgages had to pay to the mortgagor a fixed amount, namely, the haq-ajri. There was nothing to account on the part of the mortgagees in relation to payment of haq-ajri. On the contrary, the mortgagor was liable for the payment of Government revenue and cess. B C

Under section 76(c) of the Transfer of Property Act the mortgagee in possession, in the absence of a contract to the contrary, must pay the Government revenue and other charges of a public nature and arrears of rent in default of payment of which the property may be summarily sold. In the present case, the mortgagor was liable for payment of both revenue and cess. Therefore, the mortgagees were entitled to add to the mortgage money the amount for which the mortgagor under the terms of the mortgage was liable. D E

Section 4 of the Cess Act, 1880 defines 'annual value of land' to mean the total rent which is payable or, if no rent is actually payable, would, on a reasonable assessment, be payable, during the year by all the cultivating raiyats of such land in the actual use and occupation thereof. Section 5 of the Cess Act, 1880 states that all immovable property to which the Act applies shall be liable to the payment of a local cess. Section 6 of the Cess Act, 1880 provides as to how the cess is to be assessed. Section 38 of the Cess Act, 1880 provides as to how rate of local cess on the annual value of land is to be fixed. Section 98 of the Cess Act, 1880 enacts that the amount which may become due under the provisions of the Cess Act in respect of arrears of cess shall be deemed to be a public demand. Section 99 provides that the Collector may recover dues out of rent and the Collector's claim to have priority. These provisions show that cess is linked with rent. Cess is payable on annual value of land. Annual value is linked with rent. Cess is deemed to be a public demand. The mortgagee were entitled to add the amounts paid by them towards revenue and cess on the mortgage money. F G H

A The High Court was correct in refusing the mesne profits.

On behalf of the respondents it was mentioned in their statement of case that the appellant after having deposited the further amount after the decree of the High Court had taken possession of the land. This statement was not challenged and denied by the

B appellant. This indicates that the appeals have now become academic.

The appeals therefore fail and are dismissed. The respondents will be entitled to one set of costs in this Court.

V.P.S.

Appeals dismissed.