

PRATAP CHAND

v.

RAM NARAYAN AND ANOTHER.

(P. B. GAJENDRAGADKAR, and K. N. WANCHOO, JJ.)

Mortgage—Entire proprietary rights mortgaged—Sir lands not mentioned—If included in the mortgage—Other lands of the mortgagor coming into mortgagee's possession, if accession to the mortgage—Transfer of Property Act, 1882 (4 of 1882), s. 70.

One Ramchandar executed a simple mortgage deed without possession of his share in the property in dispute in favour of the respondents and others the relevant portion of which ran thus:—

"I do hereby mortgage without possession half share, five annas and four pies, area 678'31 acres, jama - sarkar Rs. 326/10/8 together with Khudkashat, chhotaghas, big shrubs, abadi, gair abadi, cultivated and that lying vacant, and the rights and privileges appertaining to water, forests, chahat, gardens, and right of cultivation, malguzari and trees of every kind whether giving fruits or no fruits and prohibited and unprohibited wood with entire rights and privileges appertaining to the village."

After the mortgage Ramchandar's share was sold to the appellants and certain other lands recorded in Ramchandar's mother's name also came into the possession of the appellant.

The main questions arising for decision were whether the mortgage included the *sir* land of Ramchandar and whether the other lands coming into the possession of the appellant were accession to the mortgage.

Held, that as the mortgage deed stood it was a mortgage of all the proprietary rights in the mortgagor's share in the property including the proprietary right in the *sir* pertaining to that share.

As the mortgage was without possession the mortgagor was not losing possession of his *sir* and it was not necessary for him to make an application under s. 50 of the Central Provinces Tenancy Act relating to the reservation of a right of occupancy. Sections 49 and 50 come into play when the proprietor making a transfer loses his right to occupy any portion of his *sir* land temporarily or permanently.

Although in the plaint of the suit based on the mortgage no mention was made of *sir*, the entire proprietary right in *sir*, *khudkashat* etc. relating to the mortgagor's share would be sold on a decree passed in the suit.

The words "all rights pertaining to the share" appearing in the sale certificate following the execution of the decree in the mortgage suit passed in favour of the respondents would include the mortgagor's proprietary rights in the *sir* land and the respondents by their sale certificate would get a right in the *sir* land also.

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As the appellant had purchased the entire share of Ramchandar who was later ejected from his ex-proprietary tenancy which came into the possession of the appellant as lambardar his *sir* land which thus came into the appellant's possession while the mortgage was subsisting became an accession to the mortgage under s. 70 of the Transfer of Property Act and the mortgagees were entitled to half share in the lands which came into the appellant's possession.

The lands recorded nominally in the name of Ramchandar's mother but in the actual possession of the former having also came into the possession of the appellant as lambardar were held by him for the entire body of proprietors and the respondent would be entitled to a share in them. The respondent's claim to those lands were not barred by O. II, r. 2 of the Code of Civil Procedure merely because they were not mentioned in the plaint of the mortgage suit.

Hazarilal v. Hazarimal, A.I.R. 1923 Nag. 130 and *Seth Manakchand v. Chaube Manohar Lal*, A.I.R. 1944 P.C. 46, held not applicable.

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 272 of 1956.

Appeal from the judgment and decree dated June 28, 1954, of the former Nagpur High Court, in First Appeal No. 107 of 1946.

M. C. Setalvad, Attorney-General for India, *Purshotam Trikamdass*, *S. T. Khirwadkar* and *I. N. Shroff* for the appellant.

Achhru Ram, *A. R. Chaubey* and *Naunit Lal* for the respondents.

1961. February 22. The Judgment of the Court was delivered by

Wanchoo J.

WANCHOO, J.—This is an appeal on a certificate granted by the Nagpur High Court. The brief facts necessary for present purposes are these. One Ramchandar Jat originally owned Annas -10/8 share in Mauza Tamalawadi while the rest belonged to others. Ramchandar executed a simple mortgage deed on July 27, 1920, in favour of Seth Ram Jiwan and two minors Ram Narain and Radhey Sham. The plaintiffs-respondents are the representatives of the mortgagees. On August 27, 1926, the defendant-appellant purchased Annas -/5/4 share belonging to the other shareholders in the village. Thereafter, the appellant brought a

suit against Ramchandar who was lambardar of the village for profits, in which a decree was passed against Ramchandar. In execution of that decree the appellant purchased the entire Annas -/10/8 share of Ramchandar in the village about the year 1932. In consequence, the appellant became the owner of the entire village subject to the mortgage of the respondents on Annas -/5/4 share therein. On July 27, 1932, the respondents sued Ramchandar on the basis of their mortgage-deed and a preliminary decree for sale was passed in March, 1937. To this suit the appellant was also a party. The preliminary decree was followed by a final decree and thereafter the property was put to sale and was purchased by the respondents on March 1, 1940. This sale was confirmed on April 12, 1940, and a sale certificate was granted to the respondents. So by the year 1940 the respondents were the owners of Annas -/5/4 share in the village while the appellant was the owner of Annas -/10/8 share. The appellant was also a lambardar.

Ramchandar Jat held *sir* land in certain *hasras* with a total area of 252.49 acres. On the sale of Ramchandar's share to the appellant, Ramchandar became an ex-proprietary tenant of his *sir* land. Thereafter Ramchandar was ejected from his ex-proprietary tenancy sometime in 1936 and the lands came into possession of the appellant. There were certain other lands which were nominally recorded as Muafi Khairati in the name of Ramchandar's mother but were actually in the possession of Ramchandar. It appears that Ramchandar was ejected from these lands also and they came into the possession of the appellant. Further the appellant as a lambardar came into possession of certain other lands by surrender or otherwise.

The respondents filed a suit for partition before the Sub-Divisional Officer, Harda, in 1942. In that suit they claimed half share in the lands of Ramchandar and his mother which came into the possession of the appellant. They also claimed a share in other lands which came into the possession of the appellant as lambardar. Their case was that these lands were

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accession to the mortgage in their favour and they were therefore entitled to a proper share in them. This claim was resisted by the appellant before the Sub-Divisional Officer. On October 20, 1943, the Sub-Divisional Officer passed an order which in effect rejected the contention of the respondents and accepted the plea of the appellant.

Thereupon the respondents filed the present suit for a declaration in the civil court in 1944 claiming that they were entitled to a proportionate share in the lands specified in the plaint. The suit was resisted by the appellant and his contention was that the respondents had purchased specific *khudkashat* and *chhotaghas* plots and that they therefore could not be allowed anything more than what was mentioned in the decree and the sale certificate which were the basis of their title. As the specific lands with respect to which the respondents claimed a declaration in this suit were not mentioned in the sale certificate, they were not entitled to any share in them. A large number of issues were framed by the trial court, which decreed a part of the claim put forward by the respondents but dismissed the rest. Consequently, the respondents went up in appeal to the High Court. The appeal was allowed so far as the respondents' claim to one-half share in the *sir* plots held by Ramchandar was concerned. Further, they were allowed one-third share in the lands held by the mother of Ramchandar and also in certain other lands which came into the possession of the appellant as lambardar subject to payment of certain amounts. This was followed by an application by the appellant for leave to appeal to this Court and a certificate was granted by the High Court. That is how the matter has come up before us.

The main contention of the appellant before us is that the mortgage deed of 1920 which is the basis of the title of the respondents did not include the *sir* plots in the possession of Ramchandar nor the plots of Ramchandar's mother. Nor were these plots included in the suit which was brought by the respondents on the basis of the mortgage-deed. Further, the sale certificate also did not include these plots, though

some other plots were mentioned therein. Therefore, the respondents were not entitled to these plots as accession to the mortgage.

This brings us to a consideration of the mortgage in favour of the respondents. The mortgage was without possession and the property mortgaged was mentioned in these terms :

“ I do hereby mortgage without possession half share $-\frac{5}{4}$, five annas and four pies, area 678.31 acres, jama-sarkar Rs. 326/10/8 together with *khudkashat, chhotaghas, big shrubs, abadi, gair abadi, cultivated and that lying vacant, and the rights and privileges appertaining to water, forests, chahat, gardens, and right of cultivation, malguzari and trees of every kind whether giving fruits or no fruits and prohibited and unprohibited wood with entire rights and privileges appertaining to the village.*”

It will be seen that what was mortgaged was the entire half share of Ramchandar in $-\frac{10}{8}$ share which he owned in the village. It is true that the mortgage goes on to describe certain other things but that in our opinion is merely by way of precaution, for even if the part underlined* was not there in the mortgage, the respondents being the mortgagees of $-\frac{5}{4}$ share would be entitled to everything contained in that share. The underlined* part of the mortgage therefore does not cut down the amplitude of the mortgage with respect to the entire $-\frac{5}{4}$ share out of $-\frac{10}{8}$ share of Ramchandar. It is true that *sir* is not specifically mentioned in the mortgage but as the mortgage was of the entire $-\frac{5}{4}$ share out of $-\frac{10}{8}$ share it will include (unless there is a specific exclusion of *sir*) the area of *sir* also pertaining to the share mortgaged. In this connection our attention was drawn to ss. 68 and 69 of the Central Provinces Land Revenue Act, No. II of 1917, which was in force at the relevant time. Section 68 deals with *sir* land and s. 69 with *khudkashat*. *Sir* is defined in s. 2 (17) and *khudkashat* is defined in s. 2 (5) as “ that part of the home-farm of a mahal which is cultivated by the proprietor as such and which is not *sir* land.” Thus though *sir* land may be a part of the home-farm it is a different entity

*Here printed in italics.

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from *khudkashat* land. Reference was also made to ss. 49 and 50 of the Central Provinces Tenancy Act, No. I of 1920 (hereinafter called the Tenancy Act), which deal with transfer of *sir* land. Under s. 49 (1) a proprietor who temporarily or permanently loses whether under a decree or order of a civil court or by transfer or otherwise his right to occupy any portion of his *sir* land as a proprietor shall at the date of such loss, become an occupancy tenant except where he has obtained a sanction under s. 50 of the Tenancy Act. Further under s. 49 (2) there is a prohibition on the registration of documents which purport to transfer all the rights of a proprietor in his *sir* land without reservation of the right of tenancy specified in sub-s. (1). It is urged for the appellant that the reason why *sir* land was not mentioned in the mortgage deed of 1920 was that otherwise sanction of the Revenue Officer would have been required under s. 50 of the Tenancy Act. Now s. 50 provides that if a proprietor desires to transfer the proprietary rights in any part of his *sir* without reservation of a right of occupancy specified in s. 49(1) he may apply to the Revenue Officer and if such Revenue Officer is satisfied that the transferor is not wholly or mainly an agriculturist or that the property is self-acquired or has been acquired within the twenty years last preceding, he shall sanction the transfer. Sections 49 and 50 in our opinion only come into play when the proprietor making a transfer loses his right to occupy any portion of his *sir* land temporarily or permanently and sanction has to be obtained under s. 50 only where the transfer is to be made without reservation of the right of occupancy. But the mortgage in this case is a simple mortgage and there was no transfer of possession under it. Therefore the proprietor Ramchandrar never lost his right to occupy his *sir* land by this mortgage and there was therefore no necessity for him to make any reservation in that respect or to apply for sanction under s. 50, for he was not losing the right to occupy his *sir* at all. But that does not mean that when he mortgaged his entire share of $-\frac{5}{4}$ out of $-\frac{10}{8}$ share, he was excluding from the mortgage the area of *sir*

corresponding to the share mortgaged. As the mortgage deed of 1920 stands, it is a mortgage of all the proprietary rights in $-\frac{5}{4}$ share including the proprietary right in the *sir* pertaining to that share; but as the proprietor was not losing his right to occupy the *sir* land, the mortgage being without possession, it was not necessary for him to make any application under s. 50 of the Tenancy Act. We are therefore of opinion that the appellant cannot take advantage in the circumstances of the fact that no application was made under s. 50 of the Tenancy Act and therefore there was no effect of this mortgage on the *sir* rights. As we read the mortgage it clearly affected the *sir* right also pertaining to $-\frac{5}{4}$ share and it was not necessary to make an application under s. 50 of the Tenancy Act, for the mortgagor was not losing possession of his *sir* and there would be no question of any ex-proprietary tenancy arising in his favour, to relinquish which he would have to apply under s. 50.

Turning now to the plaint in the mortgage suit we find that the property subject to the mortgage is mentioned in para. 2 thereof in exactly the same terms as in the mortgage deed. In para. 13 it is again recited that the mortgagor mortgaged $-\frac{5}{4}$ share out of his $-\frac{10}{8}$ share. Paragraph 13 then goes on to say that on the date of the mortgage, the mortgagor had certain *khudkashat* and *chhotaghas* lands and both cultivating and proprietary rights in them pertaining to half share only were liable to be sold. No mention was made of *sir* in this paragraph. But that in our opinion was not necessary, for the mortgage included the mortgage of *sir* land also pertaining to $-\frac{5}{4}$ share though without possession. The prayer in the suit was for sale of the mortgaged property together with *khudkashat*, etc.; but this again was a mere matter of precaution, for in any case the entire proprietary right in *sir*, *khudkashat*, etc., relating to $-\frac{5}{4}$ share would be sold on a decree following on the mortgage.

Then coming to the sale certificate we find that it certifies that the respondents had purchased $-\frac{5}{4}$ share in the village with *abadi*, *khudkashat*, *chhotaghas* and all rights pertaining to the share. It is true that

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khudkashat and *chhotaghas* are specifically mentioned in the sale certificate but the words "all rights pertaining to the share" appearing in the sale certificate would include such proprietary rights in the *sir* land as belonged to the share mentioned in the sale certificate. We are, therefore, of opinion that so far as *sir* land is concerned, the proprietary right in it pertaining to $\frac{5}{4}$ share was mortgaged and the respondents by their sale certificate got a right in the *sir* land also.

Now what happened after the mortgage deed in favour of the respondents was that the appellant purchased the entire $\frac{10}{8}$ share of Ramchandar subject to the mortgage of the respondents in 1932. At that time Ramchandar became an ex-proprietary tenant of his entire *sir* relating to this share under s. 49 of the Tenancy Act. In 1936 Ramchandar was ejected from the ex-proprietary tenancy which came in the possession of the appellant as lambardar and has apparently since then remained in his possession. The case of the respondents is that in 1936 their mortgage was subsisting and the *sir* land which thus came into the possession of the appellant on the extinction of the ex-proprietary tenancy became an accession to the mortgage and, therefore, they as mortgagees were entitled to half share in the lands which thus came into the possession of the appellant. We have already pointed out that the mortgage covered the *sir* plots also so far as the proprietary rights in them were concerned. Therefore, when Ramchandar's ex-proprietary rights came to an end and the land came into the possession of the appellant and became *khudkashat*, the mortgage would cover this *khudkashat* land to the extent of the mortgagees' share therein. It is true that if Ramchandar's ex-proprietary tenancy had continued, the mortgagee would have no right to ask for half share in it; but when the ex-proprietary tenancy was extinguished and this land came in the possession of the lambardar (mortgagor) it was an accession to the mortgage under s. 70 of the Transfer of Property Act and the mortgagees could claim a share in it. It was however urged that accession to be available to

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the mortgage must be a legal accession. We however see no illegality in the accession which took place. There is also no doubt that the accession took place when the mortgage was still subsisting. Therefore, we agree with the High Court that on the ex-proprietary tenancy being extinguished, the *sir* land which would otherwise have remained in the exclusive possession of Ramchandar as an ex-proprietary tenant became an accession to the mortgaged property and the respondents would be entitled to half of it on their purchasing the $\frac{1}{5}$ share in execution of the decree on the mortgage. The fact that the rent of an ex-proprietary tenant is due to the person whose ex-proprietary tenant he becomes by virtue of the sale or mortgage with possession would make no difference after ex-proprietary tenancy is extinguished, for on such extinction the land would go to the entire proprietary body and would thus in this case be an accession to the mortgage to the extent of the share mortgaged.

This brings us to the lands in the name of Ramchandar's mother. It appears that these lands came into the possession of Ramchandar after the mortgage but before the institution of the mortgage suit. They were nominally recorded in the name of his mother and in 1932 after his entire share was purchased by the appellant he was recorded as an occupancy tenant of these lands. Later the appellant came into possession of them apparently as a lambar-dar. It is not clear when and how the appellant got possession of them. There can be no doubt however that his possession was for the entire body of proprietors and the respondents would be entitled to a share in them. But it was urged that the claim of the respondents to these lands was barred by O. II, r. 2 of the Code of Civil Procedure, because they were not specified in the plaint based on the mortgage deed of 1920. Reliance in this connection is placed on *Hazarimal v. Hazarimal* (1) and *Seth Manakchand v. Charube Manoharlal* (2). These cases in our opinion do not apply, because they are cases of foreclosure while in

(1) A.I.R. 1923 Nag. 130.

(2) A.I.R. 1944 P.C. 46.

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the present case the respondents' suit was for sale of the share mortgaged with them. Further in the plaint, when specifying the *khudkashat* plots it was made clear that they were *khudkashat* on the date of the mortgage; the respondents thus did not specify the *khudkashat* plots on the date of the plaint. Though they had specified some plots in the plaint which were mentioned in the sale certificate also, the suit was for the sale of the entire $\frac{1}{5}$ share and that would include *khudkashat* lands pertaining to the share existing at the time when the suit was filed. It is not necessary in a suit for sale to specify the lands in the possession of the mortgagor specifically and they would pass on sale along with the share sold. The claim, therefore, would not be barred under O. II, r. 2, on the ground that these plots entered in the name of the mother of Ramchandrar were not specifically mentioned in the plaint.

This leaves certain lands which came into the possession of the appellant as a *lambardar* in the ordinary course of management. The respondents would clearly be entitled to a share in these lands also on payment of proportionate expenses incurred by the appellant in the course of suits in which he came into possession. This is what the High Court has ordered and we see no reason to disagree with that view.

The appeal, therefore, fails and is hereby dismissed with costs.

Appeal dismissed.