(1958) 08 CAL CK 0037

Calcutta High Court

Case No: Civil Revision No. 177 of 1955

Surpat Singh		APPELLANT
	Vs	
State of West Bengal		RESPONDENT

Date of Decision: Aug. 5, 1958

Acts Referred:

- Bengal Tenancy Act, 1885 - Section 161
- Constitution of India, 1950 - Article 14, 19, 31, 31(2), 31A
- Estates Acquisition Rules - Rule 6
- Transfer of Property Act, 1882 - Section 73(3)
- West Bengal Estates Acquisition Act, 1953 - Section 2, 4
- West Bengal Premises Tenancy Act, 1956 - Section 40

Citation: (1959) 2 ILR (Cal) 495

Hon'ble Judges: Sinha, J

Bench: Single Bench

Advocate: Jitendra Kumar Sen Gupta and Chandra Nath Mukherjee, for the Appellant;Nirmal Chandra Chakraborty and Smriti Kumar Roy Chowdhury, for the Respondent

Final Decision: Dismissed

Judgement

Sinha, J.

The facts in this case are shortly as follows: Certain properties situate in the district of Nadia were the stridhan properties of one Saratmoni Debi. She had a patni or leasehold interest in such properties. One Deb Nandan Mukherjee, the grandson of Saratmoni Debi, got the properties under the will of Saratmoni Debi. Sometime in September, 1916, these properties were mortgaged to one Saradindu Mukherjee for Rs. 25,000. On June 27, 1928, the Petitioners advanced a sum of Rs. 60,000 to Deb Nandan Mukherjee on the security of these properties. In June, 1939, Saradindu instituted a suit to enforce his mortgage. Decrees have been passed therein but the

amount has not been satisfied. In May, 1950, the mortgaged properties were sold in an astam sale under reg. VIII of 1819. The Petitioners deposited Rs. 50,849-l-3p. and the astam sale was set aside. The Petitioners instituted a suit on the mortgage and the amount advanced by them for setting aside the astam sale, sometime in 1951. A preliminary decree has been passed for a sum of over one lakh of rupees. Petitioner No. 1 has been appointed a receiver. The West Bengal Estates Acquisition Act. 1953. came into operation in 1954 and the necessary notification has been published whereby all estates and rights in all estates in the district of Nadia have vested in the West Bengal Government. Notice has been given to the receiver to submit accounts and returns under Rule 6 of the Estates Acquisition Rules. This Rule has been taken out challenging the notice and it is stated that the provisions of the Estates Acquisition Act mentioned above are invalid and that the Petitioners are not liable to make over possession.

2. The grounds on which this application is founded are as follows:

It is firstly stated that the West Bengal Estates Acquisition Act, 1953 (hereinafter referred as the "Act"), does not contain any provision for paying compensation to the mortgagee of an estate or any right in an estate and, therefore, contravenes the provisions of Article 31(2) of the Constitution, and is, consequently, invalid. Secondly, it is said that the exceptions provided for in Article 31A do not apply to the case of a mortgagee, because -the interest of the mortgagee in an estate or a right in an estate is not by itself to be considered as an estate or a right in an estate, in terms of Article 31A of the Constitution. Lastly, it is said that no notice could be served upon the receiver, because he is not a person in possession, but the property is in the possession of the court.

3. With regard to the first point, it is said, that the Act does not contain any provision for compensation to be paid to the mortgagee. On the other hand, Section 4 of the Act lays down that the State Government may from time to time by notification declare that with effect from the date mentioned in the notification all estates and the rights of every intermediary in each such estate, situated in any district or part of a district specified in the notification, shall vest in the State free from all incumbrances. The word "incumbrance" has not been defined in the Act. But u/s 2(p), expressions as used in the Act and not otherwise defined have the same meaning as specified in the Bengal Tenancy Act, 1885. The word "incumbrance" has been defined in Section 161 of the Bengal Tenancy Act. It has been held in the case of Jognarain Singh v. Badri Das (1911) 16 C.L.J. 156 by Mookerjee, J., that mortgage or a charge is such an incumbrance. The result is that u/s 4 the estate of an intermediary and all rights in the estate vest in the State Government free from all incumbrances, that is to say, in a case like the present one, free from the mortgage. What then happens to the mortgagees? u/s 73(2) of the Transfer of Property Act the mortgages shift to the compensation money. That provision runs as follows:

Where the mortgaged property or any part thereof or any interest therein is acquired under the Land Acquisition Act, 1894, or any other enactment for the time being in force, providing for the compulsory acquisition of immovable property, the mortgagee shall be entitled to claim payment of the mortgage money, in whole or in part, out of the amount due to the mortgagor as compensation.

4. That this will be so is abundantly clear from a Bench decision of this Court in the case of Dhirendra Nath De Vs. Naresh Chandra Ray and Others, where Das Gupta, J., stated as follows:

The position, however, is that the property, on which the charge is sought to be created, namely, one-sixth share in the putni, has ceased to exist and its place has been taken by the compensation which is payable to the intermediary, the owner of the one-sixth share of the putni, by the State of West Bengal. It is well settled that where property subject to mortgage or charge undergoes transformation, the mortgage or charge attaches to the form it takes after the transformation.

5. That being the position, it is argued on behalf of the Petitioners, who are the second mortgagees in respect of the patni or lease-hold estate that so far as they are concerned, the Act does not provide for any compensation at all. In my view, this argument is not a proper approach to the question of compensation.

6. It is true that the mortgagee by virtue of the mortgage acquires an interest in the immovable property. But what is the nature of that interest? The matter has been considered in a Bench decision of the Bombay High Court in the case of Prahlad Dalsukhrai and Others Vs. Maganlal Muljibhai Tewar and Another, where Bhagwati, J., stated as follows:

It is not a benefit arising out of land. It is an interest in land itself which is acquired by the mortgagee by reason of the creation of the mortgage in his favour and an interest in immovable property can hardly be stated to be movable property. By reason of the creation of a mortgage the totality of the rights of ownership which is enjoyed by the mortgagor is split up into what are called the mortgagee''s interest in the property and the equity of redemption which the mortgagor, retains in the property. These are two separate interests which are thus carved out by the creation of the mortgage****

7. The compensation that is given under the Act is given in respect of an estate and right in the estate of every intermediary. So far as Article 31A is concerned, it lays down that the acquisition by the State of any estate or of any rights therein may be the subject matter of a law which will not be hit by the provisions of Articles 14, 19 or 31. In Clause (2) of Article 31A, the expression "estate" and "rights" in relation to an estate have both been defined. The expression "estate" has been defined to have the same meaning as that expression of its local equivalent has in the existing law relating to land tenures in force in any particular area where the acquisition has taken place, and includes any jagir, inam or other rights mentioned in the said

clause. Sub-clause (b) of Clause (2) is important and is set out below:

The expression "rights", in relation to an estate, shall include any rights, vesting in a proprietor, sub-proprietor, under-proprietor, tenure-holder, raiyat, under-raiyat or other intermediary and any rights or privileges in respect of land revenue

8. It is admitted that so far as the mortgagor was concerned, he was a tenure-holder. But it is said that the mortgagee of a tenure-holder has neither any estate nor any right in an estate and, therefore, does not come within the definition of Article 31A. As I have said, all these arguments are based upon a wrong approach. The compensation is given with regard to the estate or a right in the estate of an intermediary, but the right, which includes for the purposes of Article 31A the right of a tenure-holder, cannot be separated from the right of a mortgagee. The tenure-holder has a certain right in land and it is that interest which has been split up into two. The mortgagee acquires part of the interest and the mortgagor retains the remainder. Between them they represent the estate or the right in the estate. Therefore, when compensation is given, it would be unreasonable to hold that the Government should pay one set of compensation to the owner of the estate or a right in the estate and also pay the mortgagee separately. The compensation that has to be paid is paid for the whole interest, and under the law, as stated above, the compensation that is paid for it is to be split up between the mortgagor and the mortgagee. It may be that the mortgagee will not, in the circumstances, be able to get full payment out of the compensation money. But I do not see any injustice in it, because he has his recourse against the mortgagor, and such right is not lost. Assuming, however, that the argument which is advanced, namely, that the Act contains no provision for compensation for the mortgagee is correct, the question is whether the Act is rendered void as being violative of the provisions of Article 31(2), because in such an event we have a statute which takes away the interest of the mortgagee in land compulsorily but grants no compensation, nor lays down any principle for calculating the compensation. In such a case, it could only be saved if Article 31A applies. The argument is that it does not apply, because the interest of the mortgagee in a patni mahal cannot be said to be either an estates or a right in the estate as defined in Article 31A. I am unable to accept this argument. It has been admitted that rights in an estate would include the rights of a tenure-holder. I, therefore, do not see why a right which is carved out of the interest of the tenure-holder is not also a right in relation to an estate. It is said that although Article 31A(2)(b) states that the expression "rights" shall "include" some rights specified therein, the list given is exhaustive. Reference is made to a decision of the Court of Appeal, Tarak Chandra Mukherjee and Others Vs. Ratan Lal Ghosal and Others, where it was held by a Special Bench that although the explanation to Section 40 of the West Bengal Premises Tenancy Act, 1956, stated that proceeding "includes any suit, appeal, review "or revision, application for execution or any other proceeding "whatsoever under the said Act," it should, in reference to the context of the Act itself, bear a

restrictive meaning. In other words, it must be held that the explanation gave an exhaustive definition of the word "proceeding" and the word "includes"' has been used in the same sense of "means and includes". The learned Chief Justice was, however, careful to say that this conclusion was reached only in the context of the particular Act which he was interpreting. He said that is was undoubtedly true that a definition clause so expressed is ordinarily not exhaustive but it could be so in certain context. Coming to the present case, I do not think that the definition of the word "rights" in Article 31A should be given a limited scope. It is an expression used in the Constitution, and it is well established that the Constitution must be construed liberally. It is well known why it was necessary to introduce these definitions. The definition of "estates or rights in estates" in the various acquisition Acts gave rise to disputes and it was intended by the amendment of the Constitution to give these expressions very liberal meaning and to include all kinds of rights in estates, rather than exclude any of such rights. The basic idea was that the land and all rights in it should vest in Government, so that it could be distributed amongst the actual tillers of the soil. It was not intended to keep any interest in land outstanding. In my opinion, the interest of a mortgagee would be included in the word "rights in an estate" as used in Article 31A. That being so, even if it is found that the statute contains no provision for compensation to the mortgagee, still the law is saved by the provisions of Article 31A of the Constitution.

9. Next, an argument is advanced which had been made by Mr. P.R. Das in the Darbhanga case and negatived by the Supreme Court in The State of Bihar v. Kameshwar Singh (1953) S.C.A. 53. In that case the Patna High Court declared the Bihar Land Reforms Act to be unconstitutional and void on the ground of infringement of Article 14 of the Constitution. The State of Bihar appealed to the Supreme Court. During the pendency of the appeal against the decision of the High Court, the Constitution (First Amendment) Act, 1951, came into operation. The zamindars filed petitions in the Supreme Court under Article 32 of the Constitution impugning the Amendment Act itself as unconstitutional and void. Being faced with this amendment, which excluded the operation of Articles 14, 19 and 31, Mr. Das advanced an argument which may be summed up as follows. He argued that the State law was made in terms of item No. 36, List II of the Seventh Schedule to the Constitution. But this was expressly subject to item No. 42 of List III of the concurrent list, and under the latter item, compensation must be given. Therefore, it was argued that in any event we come back to the position that a law dealing with acquisition or requisition without compensation was beyond the jurisdiction of the State Government. It was pointed out by Mahajan, J''., that acquisition by the State was under item No. 36 in List II and it was not necessarily connected with item No. 42 in List III. Therefore, if the State legislature made a law regarding acquisition or requisition, saying nothing about compensation, it would not necessarily be bad. But if there was a Central Act dealing with compensation and the State law was in conflict with it, then the State law may become bad by reason of the fact that item

No. 36 in List II was subject to item No. 42 of List III. But certain sections of the Bihar Act were declared invalid, because in the Bihar Act compensation was being paid, but with regard to certain items, like arrears of rent, the provisions of the Act were such that the Court came to the conclusion that it was a mere colourable legislation, and a fraud on the statute itself. In other words, the compensation that was being offered was illusory. The general argument that, in every case of acquisition under a State law, item No. 42 in List III must be considered, and if there was no compensation the statute should be struck down, was not accepted, but on the other hand rejected. The same conclusion was reached in the case of K.C. Gajapati Narayan Deo and Ors. v. The State of Orissa (1954) S.C.A. 1.. I am unable to see how in the latter case the Supreme Court departed from the view originally propounded in the Darbhanga case (supra). That being the real position, the point taken is of no assistance to the Petitioners. Mr. Sen Gupta on behalf of the Petitioners has advanced the same argument which was advanced by Mr. P.R. Das and was rejected. He stated that item No. 36 of List II is so connected with item No. 42 of List III that any State legislation which does not provide for compensation would automatically be avoided. That, however, is not the position. If the State Act provided for some compensation which was merely colourable and a fraud on the statute, then, of course, it could have been struck down. But it cannot be struck down on the ground that it does not provide for compensation and, therefore, contravenes item No. 42 in List III. As has also been pointed out in the Darbhanga case (supra), the provisions as to compensation are not dealt with in the items in the Seventh Schedule but in the articles themselves, and we must inevitably come to Articles 31 and 31A for finding out as to what the position is in law. That position, I have already described above.

10. The last point taken is to mind of no substance. It is true that the court is in possession through the receiver, but the receiver as an agent of the court can be served with notice and, I think, it would be unusual for Government to serve notice on the court. Notice is to be served on whoever is in actual possession and in that sense the receiver is in possession, although he is the hand of the court.

11. The result is that the points taken have all failed and in my mind no grounds have been made out for interference.

12. The application is, accordingly, dismissed and the Rule is discharged.

13. Interim order, if any, is vacated.

14. There will be no order as to costs.

15. So far as the opposite parties are concerned, they will be at liberty now to take what steps they might be advised for recovery of the amount realised by the receiver during the period of the subsistance of the interim injunction.

16. The operation of this order will remain in abeyance for a period of three weeks from date in order to enable the Petitioners to prefer an appeal. Further stay, if any, must be obtained from the appellate court, if an appeal is filed.