

## APPELLATE CIVIL

Before Falshaw, J.

BHAGWAN SAHAI,—Defendant-Appellant,

versus

JAINARAIN AND OTHERS,—Plaintiffs-Respondents.

Civil Regular Second Appeal No. 431 of 1950

*Punjab Restitution of Mortgaged Lands Act (IV of 1938)—Section 12—Suit for redemption of the land mortgaged dismissed as barred by time—Subsequent application for restitution of the land mortgaged under the provisions of the Punjab Restitution of Mortgaged Lands Act—Application allowed and possession obtained—Mortgagee's suit for possession—Suit whether barred by section 12 of the Punjab Restitution of Mortgaged Lands Act.*

1955

October, 13th

Held, that it was not contemplated when the Punjab Restitution of Mortgaged Lands Act of 1938 was enacted that the Collector should be allowed to adjudicate upon and extinguish mortgages which had already been the subject of litigation between the parties in the regular Courts, and which had been declared to be no longer subsisting as being more than sixty years old. The Collector had no jurisdiction to decide the application for restitution and extinguish the mortgage. Therefore, the suit for possession filed by the mortgagee was not barred by section 12 of the Act.

*Rai Brij Raj Krishna and another v. S. K. Shaw and Brothers (1), and Parkash Textile Mills, Ltd. v. Messrs. Muni Lal-Chuni Lal and another (2), distinguished.*

Second Appeal from the decree of the Court of Shri H. C. Mittal, Senior Sub-Judge, with enhanced appellate powers, Gurgaon, dated the 25th day of March, 1950, affirming that of Shri A. N. Bhanot, Sub-Judge, 1st Class, Gurgaon, dated the 29th November, 1949, granting the plaintiffs a decree for possession with costs throughout.

P. C. PANDIT, for Appellant.

H. R. SODHI, for Respondents.

(1) 1951 S.C.R. 145

(2) 57 P.L.R. 107

## JUDGMENT

Falshaw, J.

FALSHAW, J.- The facts in this second appeal are that certain land was mortgaged by Sham Singh, the father of the defendant, in favour of Charan Singh, the grandfather of the plaintiffs, for Rs 400 on the 10th of February, 1883. The mortgage was with possession and the mortgagee and his descendants remained in possession of the mortgaged land. Some time before 1946 the present defendant instituted a suit in the Court of the Sub-Judge for the redemption of the mortgaged land. This suit was dismissed on the 4th of March, 1946, on the ground that it was barred by time since the mortgage was more than sixty years old when the suit was instituted.

This decision was apparently not challenged in appeal but the defendant subsequently filed an application in the Court of the Special Collector under the Punjab Restitution of Mortgaged Lands Act and succeeded in obtaining an order on the 23rd of December, 1946, permitting him to redeem the land on payment of Rs. 469-0. The defendant thereafter obtained possession of the land in pursuance of this order.

The plaintiffs then filed the present suit, at first claiming a declaration that the order of the Special Collector was not binding on them, but their claim was amended to one for possession after the defendant had raised the plea that a mere declaratory suit did not lie.

The Courts below have found that the order of the Special Collector for redemption of the land was obtained by concealing from him the fact that the matter had already been decided *inter parties* by a regular Court and the plaintiffs have accordingly been given a decree for possession of the land

against which the defendant has filed the present appeal.

Bhagwan  
Sahai

v.

Jainarain and  
others

—  
Falshaw, J.

The objection has been taken that issues were not properly framed. In fact the only issue other than the preliminary issue which led the plaintiffs to amend their plaint and claim possession of the land was :—

Is the suit barred by *res-judicata*? which in this context is meaningless, since the defendant's reliance was not on the order of the Special Collector as *res-judicata* but on section 12 of the Restitution of Mortgaged Lands Act of 1938, which provides that no civil Court shall have jurisdiction to entertain any claim to enforce any right under a mortgage declared extinguished under this Act or to question the validity of any proceedings under this Act. The proper issue would, therefore, have been on the question whether the suit was barred by this section, but at the same time it is quite obvious that neither of the parties has been in any way prejudiced by the fact that the issue was not properly framed, and it is obvious that no further evidence could possibly have been led, and no further relevant facts brought to light, if the issue had been differently framed.

It is argued that since by the Act the Special Collector was given sole jurisdiction to decide whether a particular mortgage should be extinguished or not, and in view of the provisions of section 12 of the Act, his order could not be challenged by the present suit, even if it was a wrong order in view of the fact that the mortgage was undoubtedly more than sixty years old when the application was made under the Act and even the Collector was only empowered to deal with subsisting mortgages.

Bhagwan  
Sahai  
v.  
Jainarain and  
others  
—  
Falshaw, J.

On this point reliance is placed on the decision of the Supreme Court in *Rai Brij Raj Krishna and another v. S. K. Shaw and Brothers* (1), and the decision of the Full Bench of this Court in *Parkash Textile Mills Ltd. v. Messrs Muni Lal-Chuni Lal and another*, (2). In the first of these cases it was held that section 11 of the Bihar Buildings (Lease, Rent and Eviction) Control Act, 1947, has entrusted the Controller with a jurisdiction which includes the jurisdiction to determine whether there is non-payment of rent or not, as well as the jurisdiction on finding that there is non-payment of rent to order eviction of a tenant, and, therefore, even if a Controller has wrongly decided the question whether there has been non-payment of rent, his order for eviction on the ground that there has been non-payment of rent cannot be questioned in a civil Court. In the other case Bishan Narain, J. and I held (Kapur J. dissenting) that the status of a displaced debtor who has applied under section 5 or under section 11(2) of the Displaced Persons (Debts Adjustment) Act, 70 of 1951, can be determined only by the Tribunal and cannot be determined by a Civil Court in which proceedings relating to that debt are pending.

As regards the latter case it must be stated at once that Act 70 of 1951, is a very special Act dealing with the difficulties of, and granting certain concessions to, displaced debtors and under the sections of the Act to which the decision referred Tribunals constituted under the Act are given powers to re-open matters already decided between the parties by means of decrees, and even in the case decided by the Supreme Court the case before the learned Judges was not complicated by

(1) 1951 S.C.R. 145

(2) 57 P.L.R. 107

the fact that the very dispute between the parties which was brought before the special Tribunal constituted under the Act had been decided between them beforehand by a regular Court.

Bhagwan  
Sahai  
v.  
Jainarain and  
others

It seems to me that where it is the intention of the Legislature to allow matters already decided between the parties by a regular Court to be re-opened and adjudicated upon by a special Tribunal constituted under an Act of this kind this intention must be clearly expressed in the Act, as was done in the case of Act 70 of 1951. I do not think that it was even contemplated when the Punjab Restitution of Mortgaged Lands Act of 1938, was enacted that the Collector should be allowed to adjudicate upon and extinguish mortgages which had already been the subject of litigation between the parties in the regular Courts, and which had been declared to be no longer subsisting as being more than sixty years old. I am, therefore, of the opinion that the Collector in this case has no jurisdiction to decide the defendant's petition and extinguish the mortgage and that, therefore, the plaintiffs' claim for possession of the land in dispute was rightly decreed. I accordingly dismiss the appeal with costs.

Falshaw, J.