

RAM BHAWAN SINGH AND ORS.

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v.

JAGDISH AND ORS.

AUGUST 22, 1990

[N.M. KASLIWAL AND M. FATHIMA BEEVI, JJ.]

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*Transfer of Property Act, Section 43 Estoppel by deed doctrine inapplicable if the transfer is invalid.*

*U.P. Consolidation of Holdings Act 1954, Section 9—Claiming tenancy rights—Question of applicability of Section 14 of the Limitation Act, 1963.*

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The land in plots Nos. 6385 and 6386 had been in possession of Ram Dayal as mortgagee under Baijnath who was the original tenant. Respondents No. 1-3 are the descendants of Ram Dayal. They made an application under section 9 of U.P. Consolidation of Holdings Act, 1954 before the Consolidation Officer claiming tenancy rights on the basis of the deed dated July 30, 1945, stating that their names had been recorded in Khatauni of 1359 Fasli. They are in cultivatory possession and have become adhivasis and subsequently sirdars. They further contended that the appellants have no right of possession over the land and their names have been wrongly entered in the Khatauni No. 1353 Fasli. The respondents prayed for entering their names as sirdars.

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This application was allowed by the Consolidation Officer vide order dated July 23, 1967. The Settlement Officer (Consolidation) reversed the order and the Deputy Director of Consolidation dismissed the revision filed by the respondents.

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Subsequently the respondents filed a writ petition in the High Court. The High Court allowed the same and quashed the orders of the appellate and the revisional authorities, and maintained the order of the Consolidation Officer in its judgment dated 3rd October, 1972.

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The appellants filed a special leave on 30th November, 1972 against the judgment of the High Court dated 3rd October, 1972 under letters patent. It was not maintainable in view of the U.P. Courts (Abolition of Letters Patent Appeal Amendment) Ordinance, 1972 which came into force on 30th June, 1972. Thus Writ Petition finally culminated in favour of the respondents by High Court order dated 3rd October, 1972.

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- A The appellants instead of challenging the order of the High Court by way of filing any Special Leave Petition before this Court, initiated fresh proceedings by moving an application on 6th July, 1973 before the Settlement Officer (Consolidation) which was rejected on 30th October, 1974. A revision was filed against the said order before the Deputy Director of Consolidation which was also rejected on 21st July, 1975.
- B Thereafter the appellants moved the High Court again, and the Writ Petition filed by them was dismissed by its order dated 18th September, 1975.

- C Since the subject matter had been finally decided by the High Court judgment of 3rd October, 1972 so to start proceedings afresh was not in good faith as none of the authorities of the Settlement or Consolidation could have any right or jurisdiction to set aside the order of the High Court. The second judgment of the High Court dated 18th September, 1975 was challenged in C.A. No. 1003 of 1976 in this Court.

Dismissing the appeal, the Court,

- D HELD: Both the appeals had been filed after the expiry of the period of limitation. The appellants had applied for condonation of delay on the ground that they had been prosecuting the prior proceedings in good faith and on legal advice so the period of more than three years be excluded in computing the period of limitation under section 14 of the Limitation Act 1963. The Respondents filed counter to the application and opposed the same. [961D-E]
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Special leave was granted by this Court on 2nd September, 1976 subject to the rights of the respondents to argue the question of limitation and applicability of section 14 of the Limitation Act at the hearing of the appeals. [961F]

- F The appellants as to the question of limitation submitted that the delay of 1198 days had occurred unwillingly though they had been prosecuting with due diligence before the appellate authorities but there is no proper affidavit either of the appellants or the Counsel in support of the application for condonation of delay. There is also no other material to indicate that the appellants had exercised due diligence in working out their remedies and sought proper advice in the matter. There was no right of appeal against the judgment of the High Court as it quashed the orders of the appellant and the revisional authorities so the proceedings instituted by the party by restoring to the lower authorities for fresh decision are not legal or valid. Hence the appeals are liable to be dismissed as time barred. [961G-H; 962A-B]
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Even on merits, the appellants cannot succeed. Admittedly the original tenant was Baijnath but was dispossessed in execution decree obtained by the landlord in 1944. Thereafter the land was mortgaged in favour of Ram Dayal and the mortgagee obtained the decree against the landlord. The respondents subsequently entered into an agreement setting the claims under the decree and granting patta in favour of the Respondents in deed dated 30th July, 1945. These facts have been accepted by the Consolidation Officer and the deed and title were found to be in favour of the respondents. The tenancy in favour of Baijnath was subsisting when the deed of 23rd November, 1943 was executed. The creation of a tenancy during the subsistence of the earlier one could not confer any right and even before the deed of 2nd August, 1945 patta was already granted in favour of the respondents. [962D-G]

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Even the contention of the appellants that they have a case under section 43 of the Transfer of Property Act, which embodies the rule of estoppel by deed, is not applicable because the transfer under the deed of 23rd November, 1943 became inoperative because the settlement was invalid on account of the subsisting lease in respect of the Land and the landlord could not super impose a second lease in respect of the tenanted property, so no interest could be created in favour of the appellants under that document of 2nd August, 1945 and therefore, there is no question of feeding the estoppel. [963E-G]

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CIVIL APPELLATE JURISDICTION: Civil Appeals Nos. 1002 & 1003 of 1976.

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From the Judgment and Order dated 3.10.1972 and 18.9.1975 of the Allahabad High Court in Civil Misc. Writ No. 2726 of 1970 and Civil Misc Writ Petition No. 9943 of 1975.

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Satish Chander, S.N. Singh, T.N. Singh and H.L. Srivastava for the Appellants.

J.P. Goyal, M.R. Bidsar and S.K. Jain for the Respondents.

The Judgment of the Court was delivered by

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FATHIMA BEEVI, J. These appeals by special leave are directed against the judgments of the High Court of Allahabad. The land in plots Nos. 6385 and 6386 measuring 5 bighas and 4 biswas had been in the possession of Ram Dayal as mortgagee under Baijnath who was the original tenant. Respondents 1 to 3 are the descendants of Ram

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- A Dayal. They made an application under section 9 of the U.P. Consolidation of Holdings Act, 1954 before the Consolidation Officer. They claimed tenancy rights on the basis of the deed dated 30.7.1945 and they stated that their names had been recorded in the Khatauni of 1359 Fasli; they are in cultivatory possession and have become adhivasis and subsequently sirdars. They alleged that the names of the appellants herein have been wrongly entered in the Khatauni of 1353 Fasli and that the appellants have no right or possession over the land. The respondents prayed for entering their names as sirdars and scoring off the names of the appellants.

- C This application was allowed by the Consolidation Officer by order dated 23.7.1967. The order was reversed by the Settlement Officer (Consolidation). The Deputy Director of Consolidation dismissed the revision filed by the respondents. However, the writ petition filed by the respondents as C.M.W.P. No. 2726 of 1970 was allowed by the High Court by its judgment dated 3.10.1972 and the orders of the appellate and the revisional authorities were quashed thereby maintaining the order of consolidation Officer. Civil Appeal D No. 1002 of 1976 is directed against the judgment dated 3.10.1972 of the High Court.

- E The appellants had filed a Special Appeal on 30th November, 1972 against the judgment dated 3.10.1972 of Single Judge of the High Court in C.M.W.P. No. 2726 of 1970. However, the said Letters Patent Appeal was not maintainable and ultimately dismissed in view of the U.P. High Courts (Abolition of Letters Patent Appeal Amendment) Ordinance, 1972 which came into force on 30th June, 1972. This completes the narration of the fate of the writ petition No. 2726 of 1970 which finally culminated in favour of the respondents by order F dated 3.10.72.

- G The appellants did not challenge the order of the High Court dated 3.10.72 by taking any further steps of filing any special leave petition before this Court. On the contrary, on some mistaken and totally wrong advice of some counsel the appellants again initiated fresh proceedings by moving an application on 6.7.73 before the Settlement Officer Consolidation. That application was rejected on 30.10.74. A revision was filed against that order before the Deputy Director of Consolidation which was also rejected by order dated 21.7.75. Thereafter the appellants filed C.M.W.P. No. 9943 of 1975 before the High Court on 7.8.75 against the order of the Deputy H Director Consolidation. This writ petition came to be dismissed by

order dated 18.9.1975. This judgment of the High Court is challenged in Civil Appeal No. 1003 of 1976. When the High Court in the earlier Writ Petition No. 2726 of 1970 on the same subject matter had finally decided the matter in favour of the respondents by order dated 3.10.1972, there was no question of giving any advice by any counsel in good faith to start proceedings afresh by moving a fresh application before the Consolidation authorities. No counsel could have given such advice in good faith to start proceedings afresh before the Consolidation authorities and then to claim benefit of such period under section 14 of the Limitation Act. It was elementary for any counsel of whatever standing to have known that none of the authorities of the Settlement or Consolidation department could have any right or jurisdiction to set aside the order of the High Court dated 3.10.1972. The Settlement Officer (Consolidation) as such was justified in dismissing the application by his order dated 30.10.1974, and thereafter the revision by the Deputy Director (Consolidation) by order dated 21.7.1975. The appellants then under the same mistaken advice not in good faith filed C.M.W.P. No. 9943 of 1975 which came to be dismissed by the High Court on 18.9.1975. The second judgment of the High Court is now challenged in Civil Appeal No. 1003 of 1976.

Both the appeals had been filed after the expiry of the period of limitation. The appellants had applied for condonation of delay on the ground that the appellants had been prosecuting the prior proceedings in good faith on legal advice and the period of more than three years taken in prosecuting the proceedings is liable to be excluded in computing the period of limitation under the provision of section 14 of the Limitation Act, 1963. The respondents had filed counter to the application and opposed the same.

This Court granted special leave vide order dated 2.9.1976 in both matters subject to the right of the respondents to argue the question of limitation and the applicability of section 14 of the Limitation Act at the hearing of the appeals.

The first question that we have to decide is that of limitation. The delay of 1198 days according to the appellants had occurred unwillingly and the appellants had been prosecuting with due diligence the earlier proceedings before the appellate and the revisional authorities and on the basis of the advice given by their counsel. There is no proper affidavit of either the appellants or the counsel in support of the application for condonation of delay. There is also no other material to indicate that the appellants had exercised due diligence in work-

A ing out their remedies and sought proper advice in the matter. When the party had no right of appeal, the proceedings instituted before the High Court challenging the judgment in the writ petition cannot be considered to be one in good faith. The subsequent proceedings are also not legal or valid. When the decision of the High Court in the writ petition was one quashing the orders of the appellate and the revisional authorities, the party could not proceed on the basis that the matter was restored to the lower authorities for fresh decision. We are therefore not satisfied that there is any merit in the ground urged by the appellants for getting over the bar of limitation. The appeals are liable to be dismissed as time barred.

C We find that even on the merits, the appellants cannot succeed. The respondents based their claim on the patta in their favour under the deed of 30.7.1945. The Consolidation Officer accepted the genuineness of the deed and found title with the respondents. The appellants had claimed right under the subsequent document of 2.8.1945 in continuation of an earlier deed of 23.11.1943. The land was admittedly in the possession of Baijnath, the original tenant and he was dispossessed in execution of the decree obtained by the landlord in 1944. The tenancy in favour of Baijnath was subsisting when the deed of 23.11.1943 was executed. The creation of a tenancy during the subsistence of the earlier one could not confer any right. Before the deed of 2.8.1945 patta was already granted in favour of the respondents. The circumstances under which the same was granted also weighed in finding title in favour of the respondents. The landlord had obtained a decree against Baijnath when the land was mortgaged in favour of Ram Dayal. The mortgagee later on obtained the decree against the landlord for an amount of Rs.214 being the value of the crops in the land. An agreement was subsequently entered into between the landlord and the respondents settling the claim under the decree and granting patta in favour of the respondents. These facts have been found in favour of the respondents by the Consolidation Officer. The High Court in quashing the orders of the appellate and the revisional authorities was of opinion that there was apparent error on the face of the record. The appellate authority was found to be wrong in its conclusion that the respondents lost their right by the continued possession of the appellants. The High Court noticed that even before the Consolidation Officer, the appellants did not press their claim on the basis of the patta of 1943 and has also found that the deed of 23.11.1943 was not a valid settlement *inasmuch* as the land was in the possession of the sitting tenant. It was also noticed that soon after the deed of 2.8.1945, dispute arose regarding possession, that the

appellants had been dispossessed on the basis of the decree obtained by the respondents setting aside the order of a criminal court. Before the decree became final pending litigation, the U.P. Zamindari Abolition Act came into force. In view of the subsequent legislation, the respondents have proceeded under the U.P. Consolidation Act and the proceedings culminated in the present appeals.

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In the light of the definite findings of the competent authority that the respondents have derived valid title as tenants under the deed of 30.7.1945 and the apparent mistake in the proceedings of the appellate and the revisional authorities as found by the High Court, it is not now open to the appellants to contend that they are rightful tenants entitled to possession of the land. Though the claim based on deed of 23.11.1943 had not been pressed before the lower authorities, it has been contended before us that the appellants have a case on the principle contained in section 43 of the Transfer of Property Act. The learned counsel for the appellants maintained that even if the deed of 23.11.1943 was inoperative or was not valid for the reason that the landlord had no possession since they obtained possession on 30.6.1944, the appellants acquired tenancy right and that has been confirmed by the deed of 2.8.1945. The argument, though attractive, is not acceptable.

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Section 43 of the Transfer of Property Act embodies the rule of estoppel by deed. The section enables the transferee to whom a transfer is made on fraudulent or erroneous representation to lay hold at his option of any interest which the transferor may subsequently acquire in the property provided by doing so he does not adversely affect the right of any subsequent purchaser for value without notice. Thus when a lessor erroneously represents that he is authorised to lease a property and creates a lease of it and afterwards acquires that property, the lessee is entitled to have the property from the lessor. This principle has no application if the transfer is invalid. The transfer under the deed of 23.11.1943 became inoperative not on account of any fraudulent or erroneous representation. The settlement was invalid and inoperative on account of the subsisting lease in respect of the land and as the landlord could not super impose a second lease in respect of the tenanted property, no interest could be created in favour of the appellants under that document and, therefore, there is no question of feeding the estoppel. The execution of the deed dated 30.7.1945 in favour of the respondents negatives the claim of the appellants having acquired any right after the property was taken delivery of in 1944. We therefore reject the contention.

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A We accordingly hold that there is no valid ground to interfere with the decision of the High Court. We therefore dismiss the appeals. In the facts and circumstances of the case, we direct the parties to bear their respective costs.

S.B.

Appeals dismissed.