

Deota Din vs Gur Prasad And Anr. on 20 December, 1954

Equivalent citations: AIR1955ALL292, AIR 1955 ALLAHABAD 292

JUDGMENT

Malik, C.J.

1. This case was referred to a Full Bench of seven Judges by reason of a conflict between certain decisions of the Chief Court at Lucknow and a decision of a Pull Bench of five Judges at Allahabad.

2. The plaintiff filed a suit for joint possession over a Kothri marked in a plan attached to the plaint, for perpetual injunction restraining defendants 1 and 2 from interfering with the plaintiff's possession and enjoyment of the said Kothri, for declaration of his right to build a Sahadra which had fallen down and for recovery of Rs. 70/- the price of the plaintiff's share of the materials of the Sahadra which, it was alleged, had been misappropriated by defendants 1 and 2. The suit was contested by defendants 1 and 2, and the other defendants were more or less 'pro forma'.

3. The learned Munsif decreed the suit in part. On appeal by the defendants 1 and 2, the lower appellate Court set aside the decree of the trial Court and dismissed the plaintiff's suit in its entirety. When the second appeal came up before a learned single Judge, he referred the case to a larger Bench.

4. The plaintiff and defendants 1 and 2 are members of the same family being descended from a common ancestor Daryao. This family had an ancestral house in village Gurha, pargana Kamraon, district Rae Bareli. The common ancestor Daryao had seven sons, and one of his sons Baryar had five sons. Sadho was one of the sons of Baryar. He had two sons Baijnath and Jagannath. In the year 1896 there was a partition in the family and the Kothri and the Sahadra, according to the case in the plaint, fell to the share of Baijnath and Jagan-nath. Later, in his oral pleadings the plaintiff amended this statement and alleged that only half share in the Kothri and the Sahadra had fallen to the share of Baijnath and Jagannath. Baijnath and Jagannath had a share in the Zemindari in village Gurha. This share they had mortgaged on 21-11-1893.

The share ultimately was transferred for payment of the mortgage debt and came into the possession Of one Mani Ram. Hazari Lal filed a suit for preemption and got possession of the property which had been transferred to Mani Ram. Defendants 1 and 2 are the sons of Hazari Lal, who was grandson of Baryar through another son Thakur. In the year 1910 Balgoyind, defendant 6, and three widows, Mst. Jian, Mst. Lachhmin and Mst. Basanti, who had inherited 1/8th share in the half portion of the Kothri and the Sahadra from Baijnath and Jagannath, transferred their share to Bishunath, uncle of the plaintiff, and on the death of Bishunath the plaintiff inherited this portion. Besides this portion which the plaintiff claimed in the manner indicated above, the plaintiff had an

ancestral share in the house with which we are not concerned.

5. The plaintiff's contention was that he was in possession of the Kothri and the Sahadra but in the year 1944 the Sahadra fell down and defendants 1 and 2 misappropriated the materials and also started interfering with plaintiff's possession of the Kothri which compelled the plaintiff to file the suit.

6. The main defence with which we are concerned is the plea that when Baijnath and Jagannath lost their entire Zamindari share in village Gurha, they must be deemed to have ceased to have any interest in the ancestral house, the Kothri and the Sahadra, which must be deemed to have passed to Mani Ram mortgagee and by pre-emption to the contesting defendants.

7. The trial Court held that Baijnath and Jagannath did not mortgage the whole of their interest in village Gurha, and they did not lose their entire Zamindari interest and therefore continued to remain owners of the Kothri and the Sahadra. The trial Court decreed the plaintiff's suit in part. The lower appellate Court, however, disagreed with this finding and relying on certain decisions of Oudh Chief Court held that Baijnath and Jagannath having ceased to own any Zamindari share in village Gurha, their interest in the residential house must also be deemed to have passed to Mani Ram.

8. Another point was raised that in the preemption suit no mention was made of any share in the residential house, and the defendants could not, therefore, claim that they had acquired any share in the residential house by pre-emption. The lower appellate Court, however, held that the plaintiff must rely on his own title, and even if the defendants had not acquired the property under the pre-emption decree, the plaintiff could not get a decree in his favour unless he could establish his title to the property.

9. It is admitted that in the mortgage deed of 21-11-1893, in the suit filed by the mortgagee on the basis of that mortgage and in the preemption suit no specific mention was made about the Kothri and the Sahadra. The point that arises for decision is, therefore, whether on a transfer of the Zamindari, the interest in the residential house must also be deemed, in the absence of anything to the contrary, to have passed to the transferee.

10. The learned Counsel on behalf of the respondents had urged that when a house belonging to a co-sharer or a Zamindar is situated inside a mahal in which he has a share as a Zamindar, the presumption must be that the house is appurtenant to the Zamindari, and when the entire Zamindari interest is sold, the house must also pass with it. Reliance is also placed on the provisions of Section 8 of the Transfer of Property Act and it is urged that when land is transferred everything that is attached to that land must also pass along with it and, therefore, on a sale of a Zamindar's interest in a Mahal, his residential house must also be deemed to have been sold.

11. On the other hand, it is urged that a house for residential purposes is not necessarily a part of the Zamindari and is not appurtenant to it. Only such houses as are built for the purposes of the Zamindari and are intimately connected with it and used for purposes of collection etc., may be appurtenant to Zamindari but not necessarily the residential house.

12. The question whether a building is or is not appurtenant to the Zamindari must primarily be a question of fact and intention. The question has to be determined by taking into consideration all the surrounding circumstances. In most of the cases that were cited before us the question was decided on the basis of the facts of the particular case, but in some of the cases the burden was placed on the person who claimed that the house was appurtenant to the zamindari, while in others it was held that the buildings including the residential house must be deemed to have passed with the zamindari, unless the other side could show that it did not.

13. A co-sharer or a sole owner of a mahal owns no doubt every inch of the land within the mahal. There may be within that area buildings which are ordinarily used for the purposes of the zamindari and are owned by the zamindar as such. Houses in the abadi, which are occupied by tenants, collection houses etc., may be appurtenant to the zamindari. Shops and bazars owned by the zamindar as such may be appurtenant to the zamindari but ordinarily a residential house built for the zamindar and the members of his family to live in even though built on land within the zamindari is not necessarily appurtenant to it. A house for residential purposes is built so that a person and the members of his family may live in it and ordinarily such a house cannot be deemed to be appurtenant to the zamindari.

14. It has been held in some cases that a zamindar loses his interest in the residential house when he ceases to be a co-sharer. The view has not been taken that if a zamindar starts selling his interest in a mahal by instalments, a corresponding share in the residential house passes to the transferee with each sale. And there can be no reason for holding that his entire share in the residential house would pass to the last purchaser.

15. In the reported cases that were cited before us stress was always laid on the fact that the zamindar had ceased to own a share in the village and must, therefore, be deemed to have ceased to own the residential house. Even in the case before us the Munsif decided in plaintiff's favour on the ground that Baijnath and Jagannath had left in their possession a fractional share in the zamindari, while the lower appellate Court decided against the plaintiff on the ground that the entire share of Baijnath and Jagannath was transferred. In a case where the entire share is transferred in instalments, the last purchaser could not be deemed to be the owner of the entire share which was held by the transferor and he should not, therefore, be allowed to claim the entire house as his property.

16. While in the case of a tenant who is admitted to the tenancy by the land-lord and is provided either with a house to live in or with land on which to build a house where he can live, there may be a presumption that the house occupied by him is appurtenant to his holding, in the case of a zamindar it is not necessary for the effective ownership of the zamindari that the zamindar should have a house to live in within his zamindari and it cannot, therefore, be said that the residential house of the zamindar, because it is situated within the village area, must be deemed to be appurtenant to the zamindari held by him. We have already said that this presumption will not apply with respect to buildings which he owns for the purposes of the zamindari. In the case of a taluqdar it may be that the Kot or the Qila of a Taluqdar which he owns and possesses, as a Taluqdar for the time being, might be appurtenant to the Taluqa but, as we have already said, it would depend

upon the facts of each case.

17. Dealing with this question in -- 'Kanhaiya Lal v. Sheva Lal', AIR 1936 All 14 (A), Sir Syed Sulaiman pointed out that when a co-sharer builds a residential house on a land of which he is a co-sharer, then his rights can be divided into three parts : (1) a joint right in the site; (2) a proprietary right in the materials, and (3) a right of residence in the house situated on the Site. If his Zamindari is sold, there can be no doubt that his joint right in the site must go with it but it does not necessarily follow that the proprietary right in the materials and his right of residence must also pass. In this connection it may be useful to refer to certain remarks made by their Lordships of the Judicial Committee in -- 'Narayan Das v. Jatindra Nath', AIR 1927 PC 135 at p. 137 (B). Their Lordships said :

"Having special regard to the view held in India respecting the separation of the ownership of the buildings from the ownership of the land, and to the recognition by the Courts in India that there is no rule of law that whatever is affixed or built on the soil becomes a part of it and is subjected to the same rights of property as the soil itself, their Lordships are of opinion that in order to make a house erected upon the land, as well as the land itself, subject to the Government power of sale for arrears of revenue special words indicating the intention of the Legislature to make the building subject to sale would be necessary."

In the case before their Lordships which arose out of a revenue sale, their Lordships laid stress on the intention of the Legislature as expressed in the statute. When a property is transferred by private treaty or by auction sale, the intention is to be gathered from the treaty or by auction sale, the intention is to be gathered from the terms of the agreement or from the documents relating to the auction sale held by the Court. The intention, according to their Lordships, had to be clearly expressed by special words indicating an intention that the building was also subject to sale. Similarly, the burden should be on those who say that the intention was that not only the zamindari share but also the residential house was transferred.

18. In this connection it may be useful to refer to Section 118 of the U. P. Land Revenue Act (Act 3 of 1901). The section is not directly applicable. It only indicates the manner in which a dwelling house is to be dealt with on a partition of a mahal. The section provides that "If in making a partition it is necessary to include in the portion allotted to one co-sharer the land occupied by a dwelling house or other building in the possession of another co-sharer, the latter shall be allowed to retain it with the buildings thereon, on condition of his paying for it a reasonable ground rent to the co-sharer in whose portion it may be included."

It would thus appear that though the land is partitioned, the building is treated as the separate property of the co-sharer whose dwelling house it is. If, on the other hand, it was to be treated exactly in the same manner as if it was a part of the Zamindari, then the dwelling house and other buildings in the possession of the co-sharer should also be partitioned with the partition of the zamindari and compensation paid to those who spent money on the constructions.

19. Reliance is placed on Section 8 of the Transfer of Property Act. The first part of the section is general and deals with transfer of property, and provides that when property is transferred in the absence of any intention which is express or is necessarily implied, the transfer passes forthwith to the transferee all the interest which the transferor is then capable of passing in the property and in the legal incidents thereof. Under this clause when a Zamindari share is transferred, along with the transfer must pass interest which the transferor had in that share and in the legal incidents thereof so that anything appurtenant to the zamindari share must go along with it. This will not advance the case of the respondents any further as it would have to be decided whether a residential family house is or is not appurtenant to the zamindari. Reliance is, therefore, placed on the second clause that "Such incidents include, where the property is land, the easements annexed thereto, the rents and profits thereof accruing after the transfer, and all things attached to the earth."

20. "Attached to the earth" mean (see Section 3 of the Transfer of Property Act) "(a) rooted in the earth, as in the case of trees and shrubs;

(b) imbedded in the earth, as in the case of walls or buildings; or

(c) attached to what is so imbedded for the permanent beneficial enjoyment of that to which it is attached."

It is urged that Section 8 read with Section 3 makes it clear that where land is sold, the buildings situated on it must be deemed to have been sold along with it. Two things have to be kept in mind in this connection. The section is subject to the exception that this result, would not follow if a different intention is expressed or is necessarily implied.

There is no rule of law in India, as was pointed out by their Lordships of the Judicial Committee in Narayan Das's case (B), that whatever is affixed or built on the soil becomes a part of it and is subject to the same rights of property as the soil itself. Unless the transfer makes it clear that the residential house of the zamindar was intended to be included, it must necessarily be implied that it was not intended that it should be included. Moreover the sale of a share in a mahal or even the sale of the entire mahal is not necessarily a transfer of land, at least, it is not a transfer of land as such. "A Zamindar has got certain rights in a mahal. These rights may give him the right to remain in possession of certain lands situated within that area but when a share in the mahal is sold, it cannot be said that it is a sale of any specific plot of land. The section deals with the sale of land as such and in the case of a sale of a plot of land there is a presumption that everything that is attached to the earth goes with it but the same presumption does not necessarily arise where a share in a mahal or even the whole mahal is sold.

21. In some cases distinction was drawn between an auction sale and a sale by private treaty and it was held that Section 8 of the Transfer of Property Act would not apply to an auction sale by reason of the provisions of Section 2(d) of the Act. By an auction sale the right of the mortgagor in the property mortgaged is sold and if a mortgage of a Zamindari share includes the residential house by reason of the provisions of Section 8, then by the auction sale of the property mortgaged the residential house must also be deemed to have been sold to the auction purchaser. It is, therefore,

not necessary to distinguish between an auction sale and a voluntary sale. To our minds the same principle should govern both.

22. A number of cases have been cited by learned counsel.

23. In -- 'Abu Husan v. Ramzan Ali', 4 All 381 (C), a Qila belonging to one Kadir Ali Khan was sold and it was held that he held it 'qua Zamindar'. From the brief report that is available no further facts appear and if the Qila was held by Kadir Ali Khan qua Zamindar and was a part of his Zamindari, with the sale of the Zamindari and Qila would naturally go with it.

24. In -- 'Banke Lal v. Jagat Narain', 22 All 168 (D), it appears from the judgment that the house property was specifically included in the application for execution. The only question was whether it had in fact been attached & the learned Chief Justice expressed the opinion that the Kothi & the garden which were the subject-matter of dispute in that case had been attached & had been sold. There is nothing in the judgment from which it would appear for what purpose the Kothi and the garden were used. It is not said that they were the family residential house of the Zamindar. It might well be that the Kothi w'as what is known as a collection house or the Kot of the Zamindar. It is significant that the learned Chief Justice dealing with the case remarked that even in such a case it is possible to give evidence "of the circumstances connected with the acquisition, construction, or user of the ouildings, from which it may properly be inferred that they are not appurtenances of the Zamindari", and then he went on to remark that there was "no evidence showing for what purpose or in what manner either the Hawkins Kothi or the Kothi in Begam Bagh was used at any time up to the sale of 20-11-1885."

The case cannot be said to lay down any general principle and must be confined to the facts of that particular case. We have already referred to the decision of sir Shah Sulaiman Chief Justice and Bennet, J. in AIR 1936 All 14 (A), which we have followed.

25. The next case that was cited to us, --'Umrao Singh v. Kacheru Singh', AIR 1939 All 415 (FB) (E), was a decision of a Full Bench of five Judges which necessitated this reference to a Pull Bench of seven Judges. Mr. Justice Alisop took a contrary view and the whole of his decision is based on the provisions of Section 8 of the Transfer of Property Act. The learned Judge assumed that a transfer of a share in a Zamin-dari is transfer of a plot of land and held that all buildings situated on that land passed with it. Moreover as was pointed out by Iqbal Ahmad, J., the section is subject to any express or implied intention to the contrary and, if we may say so with respect, he was right in his view that it must be implied that the house was not included. That was a case of a usufructuary mortgage and even after the mortgage the mortgagor had continued to be in possession of the residential house. It is a matter of common knowledge that when a zamindar makes a usufructuary mortgage of his zamindari share, though the mortgagee may get possession of the collection house and other such buildings which are appurtenant to the zamindari, the possession of the residential family house is never given to the mortgagee.

26. The cases of Oudh that were cited to us were -- 'Krishna Kumari v. Rajendra Bahadur', AIR 1927 Oudh 240 at p. 253 (P). The learned Judge followed the decision in 4 All 381 (C), and held that the

house built inside the Taluqa must go with the Taluqdari but the house built outside the Taluqa must be deemed to be non-Taluq-dari property. The question in that case was what was Taluqdari property and what was non-Taluqdari property which had been dealt with by the previous Taluqdar under a will. The learned Judge purported to rely on two decisions of the Privy Council -- 'Mst. Bhagbutti Daee v. Bhola-nath Thakoor', 2 Ind App 256 at p. 262 (PC) (G) and -- 'Asghar Reza Khan v. Mahomed Mehdi Hossein Khan', 30 Ind App 71 at p. 76 (PC) (H), but neither of those two cases are really of much help or even relevant.

In Mst. Bhagbutti Daee's case (G), it was held that a Hindu widow had no greater power of alienation over the profits than she had over the corpus of her husband's estate and that the property acquired by the widow from the income of her husband's estate could not be alienated by her and must be deemed to be of the same nature as the rest of the property. This decision is no longer good law as in later decisions their Lordships of the Judicial Committee have held that a Hindu widow has full rights of disposal over the profits from the estate of her deceased husband. In Asghar Reza's case (H), the property dealt with was a bazar and the question was when the entire rights in the zamindari were sold, the erstwhile Zamindar could claim that he was still the owner of the bazar. It was pointed out that the bazar was held on the land situated within the zamindai-i and it was appurtenant to the zamindari itself and must go with it. The case did not relate to the family residential house of a zamindar.

27. We are, therefore, of the opinion that the question in each case must depend upon the facts but the presumption must be that in a case of a residential house it is not necessarily appurtenant to the zamindari and unless it can be established from evidence that it was intended to be transferred along with the rest of the zamindari, the house must be deemed to have remained the property of the erstwhile Zamindar.

28. The result, therefore, is that this appeal must be allowed, the decree of the lower appellate court set aside and the decree of the trial Court restored with costs in this court and the lower appellate Court.