

## Naubat Singh vs Hira And Ors. on 5 March, 1951

**Equivalent citations: AIR1951ALL654, AIR 1951 ALLAHABAD 654**

ORDER

Brij Mohan Lall, J.

1. This is a revn. by the mtgees. against whom a claim for redemption Under Section 12, U. P. Agriculturists' Relief Act (XXVII [27] of 1934) has been decreed by both the Cts. below.
2. It appears that Hira Lal, Naubat Singh & some other persons were co-sharers in a proprietary Khata in village Sikri of Pargana Jalalabad in the district of Meerut. By an arrangement of convenience arrived at between the co-sharers Hira Lal was in exclusive possession of an area of one bigha of joint Khata consisting of plots NOS. 976 (present No. 1035) & 982 (present No. 1036), These two plots measured 15 biswas & 5 biswas respectively.
3. On 2-7-20 Hira Lal executed a possessory mtge. of the aforesaid two plots in favour of Naubat Singh & Ranjit & put the mtgees in actual physical possession of the said two plots. In sub-sequent years these plots came to be recorded first as Naubat Singh's Khudkasht & later on as his sir. Sometime afterwards Naubat Singh applied for partition in revenue Ct. Partition proceedings continued for several years & were finally confirmed on 19-9-32. As a result of these proceedings, Naubat Singh's share was completely separated & formed into a separate Khata which bore No. 25. Thus Naubat Singh became sole proprietor of the entire land in this Khata. The two aforesaid mortgaged plots were also included in this Khata.
4. Hira Lal's entire proprietary rights consisted of one bigha. This area was not sufficiently large to form a separate Khata. Therefore, he & several other petty co-sharers were grouped together & they were allotted shares in a separate Khata which was numbered 38. In this Khata Hira Lal was shown as owner of one bigha share & the said share was shown subject to a mtge. in favour of Naubat Singh & Ranjit.
5. In 1946, Hira Lal started the proceedings which have given rise to this revn. for redemption of the mtge. of 1920. He claimed that on payment of the amount due from him he might be delivered possession over the aforesaid two mortgaged plots. Naubat Singh (who is since dead & is represented by his sons) had no objection to redemption being made. But he contended that as a result of this redemption Hira Lal would not be entitled to secure possession over the aforesaid two plots which had by partition been allotted to his Khata as his exclusive property. According to his contention, the result of redemption would be the release of one bigha share of Khata No. 38 from encumbrance.

6. Both the Cts. below have overrd. this defence & have awarded possession to Hira Lal over the two specific plots which had been mortgaged by him in 1920.

7. I have heard the learned counsel on either side & I am of the opinion that the view taken by the Cts. below is erroneous. The question involved in this case related to the law of substituted security. The attention of neither of the two Cts. below appears to have been drawn to this aspect of the case. Both. Cts. have discussed Section 23(SIC) (k), Land Revenue Act. There was no reference to this section in the written statement. But it seems that perhaps the learned counsel representing the mtgees. raised the point at the time of arguments.

8. If a mtgee. accepts as security a property which is owned jointly by his debtor along with Other & if, as a result of a subsequent partition, the said property is allotted to the share of the debtor's cosharer, the mtgee. cannot pursue that property any more. He has to be content with the property which is allotted to the share of his debtor. The mtge. is transferred from the property originally mortgaged to the property allotted to the mtgor's share at the time of partition. It is this latter property which gets impressed with the mtge. & the property originally mortgaged gets free from the mtge. Just as the mtgee. cannot pursue the property originally mortgaged, similarly the mtgor. also cannot, after the partition, treat the property originally mortgaged as his. Nor can he claim that property after redemption. The property which will become free from mtge. after redemption & over which the mtgor. would become entitled to get possession is the property which was allotted to him at the time of partition.

9. It makes no difference in principle if the mtgee. happens to be one of the co-sharers. Even in such a case the same principle holds good.

10. There is over whelming authority in support of the above view. The P. C. case of Mohammad Afzal Khan v. Abdul Rahman, A.I.R. (19) 1932 P. C. 235 lays down that if the mtge "is followed by a partition, & the mortgaged properties are allotted to the other co-sharers, they take those properties, in the absence of fraud, free from the mtge. & the mtgee. can proceed only against the properties allotted to the mtgor. in substitution of his undivided share."

It was suggested in the Cts. below that the mtgee. had been guilty of fraud in getting the plots in dispute described in revenue papers as his Khudkasht & sir. No such plea is open now to the mtgor. who was a party to the partition proceedings & who had full opportunity of disclosing the fraud, if any, committed by the mtgee. & who had every right & opportunity to object to the mortgaged plots being allotted to the mtgee's share. At that time he acquiesced in the distribution of the joint property in a particular manner. He cannot challenge that partition now on the ground of fraud.

11. The F. B. case of Ram Raj v. Rajendra, A.I.R. (30) 1943 ALL. 247 is also to the same effect. It was held in that case that where by an arrangement between several joint sir-holders one single individual has been put in separate possession of what before the arrangement was a joint sir plot, he becomes entitled to transfer the said plot by means of a usufructuary mtge. deed & the mtgees. are entitled to continue in peaceful possession of the plot, but when that arrangement comes to an end by reason of partition, the mtgees, become entitled, by the doctrine of substituted security, to

the proprietary rights of the mtgor. in the other joint sir plots which are allotted to the mtgor's. share.

12. To the same effect is the case of Bhup Singh v. Chedda Singh, 18 A. L. J. 807 where it was held that " It is an incident of a mtge. of an undivided share in joint property that the mtgee. cannot follow his security into the hands of a co-sharer of the mtgor, who has obtained the mortgaged share upon partition ; the mtge. lien is transferred to that portion of the joint property which the mtgor. obtains at the partition."

13. This doctrine has been pushed forward to a still greater length in cases where the mtge. security has ceased to exist & is substituted by cash. In such cases the mtgee's right is restricted to a simple money decree out of the cash. This was held in the F. B. case of Girdhar Lal v. Alay Hasan, A. I. R. (25) 1938 ALL. 221.

14. In all the above cases it was the mtgee. who was enforcing the security. The present is a converse case in which the mtgor. comes forward to enforce his rights. But the principle is the same. It is the property, which has been substituted in place of the property originally mortgaged, that will be treated as mortgaged property.

15. It is true that ordinarily a mtgee. cannot deny the mtgor's. title. But when the mtgor. & the mtgee. agree to divide the property & to substitute another property in place of the property originally mortgaged the aforesaid rule of estoppel ceases to operate. Now it is the mtgor. who, having accepted a different property in lieu of his original undivided share, is estopped from turning round & claiming the property originally mortgaged as his own. By doing so he will be perpetrating a fraud In the first place, he will be nullifying the partition & secondly, he will be augmenting his original share of one bigha to two bighas. If his contention is allowed to prevail, he will have the two plots Nos. 976 (1035) & 982 (1036) & also the area of one bigha out of Khata No. 38. He cannot be permitted to put forward any such claim.

16. I am, therefore, of the opinion that the mtgor. is not entitled to recover possession of the aforesaid two plots over which possession was delivered by him to the mtgees. in 1920. All that he is entitled to is that his share in Khata No. 38 will become free from mtge.

17. The revn. is, accordingly, allowed & the decrees of the Cts. below are modified to this extent that possession over plots Nos. 976 (1035) & 982 (1036) shall not be delivered to the mtgor. but his share in Khata No. 38 shall become free from mtge. The appcts. shall get their costs from the opposite parties.