

## **Jokhu Mal And Ors. vs Gopi Mal on 21 December, 1950**

**Equivalent citations: AIR1952ALL251, AIR 1952 ALLAHABAD 251**

### **JUDGMENT**

Agarwala, J.

1. The applicants in the above civil revision and the appellants in the connected Execution Second Appeal were the plaintiffs in a proceeding under Section 12, U. P. Agriculturists' Relief Act.

2. The property in dispute was a half share in Khewat No. 16 of village Sultanpur Baragaon. This Khewat was owned by Gopimal, defendant-opposite party, to the extent of one half and by two other persons Bharosa Mal and Ram Swarup Mal who owned the other half. All these three co sharers had joint Sir and Khudkasht plots in the Khewat. On 14-6-1928, Bharosa Mal and Ram Swarup Mal executed a usufructuary mortgage of their half share in the Khewat in favour of their co sharer Gopi Mal. The mortgagors put Gopi Mal in possession of the mortgaged property including all those joint Sir and Khudkasht plots which were by mutual arrangement in their exclusive possession and did not retain or claim possession by virtue of ex-proprietary rights that accrued to them upon the execution of the mortgage and transfer of possession over the proprietary rights. On 10-3-1937, the rights of the mortgagors were sold at auction in execution of a simple money decree against them and were purchased under the Regulation of Sales Act of 1934 by the plaintiff-applicants Jokhu Lal, Rama Shankar Sheo Shankar and Sheo Narain. The plaintiff-applicants then deposited the mortgage money under Section 83, Transfer of Property Act. On 5-7-1948 they filed a suit for redemption which was later converted into an application under Section 12, Agriculturists' Relief Act.

3. In defence several pleas were raised. But we are not concerned with them. The trial Court decreed the suit for possession. The defendants appealed to the lower appellate Court and the principal point taken in appeal was that the plaintiffs were not entitled to get actual possession of the Sir plots appertaining to the mortgaged share because the mortgagors' Sir rights having become extinguished and they not having claimed ex-proprietary rights, the plots became the exclusive Sir plots of Gopi Mal, the co-sharer. The lower appellate Court upheld this plea and modified the decree of the trial Court by ordering that the plaintiffs will not be entitled to actual possession over the Sir plots. Meanwhile the plaintiffs had executed the trial Court's decree for possession and the defendant raised a similar plea in the execution proceedings. That plea was rejected by the trial Court. The defendant appealed to the lower appellate Court which allowed the appeal and passed an order in conformity with its order in the regular appeal from the decree of the Munsif. Against the decree in the regular appeal a revision application No. 54 of 1947 has been filed in this Court, while a Second Appeal has been filed against the decision of the lower appellate Court in the execution appeal. Both the cases came up for bearing before a Division Bench of this Court which referred the following point for decision to this Full Bench.

"Where a co sharer while mortgaging his zamindari property includes in the mortgage a part of the joint Sir area over which by arrangement between him and his other co sharers, he is in separate possession whether he is entitled to claim back the said area from the mortgagee at the time of redemption or the mortgagee can successfully resist such a claim on the ground that he, being also a co-sharer, the Sir area has become his exclusive Sir land not returnable to the mortgagor."

4. The argument put forward on behalf of the defendant-mortgagee was that the mortgagor not having claimed ex-proprietary rights after the mortgage the rights lapsed and the joint Sir plots became the exclusive Sir plots of the other co-sharer namely, the mortgagee himself and, therefore, the plaintiffs could not recover possession of the joint Sir plots from the defendant who now held them in his capacity as a co-sharer and not in his capacity as a mortgagee. Mr. Kanhaiya Lal Misra answered this contention in two ways. He urged that since the defendant was a mortgagee of the plots and since he obtained possession over the mortgaged property in his capacity as a mortgagee he was bound to restore the property mortgaged to him and to deliver possession over the same in the same condition in which he had obtained it at the time of the mortgage; and secondly, that there is no such rule as is contended for on behalf of the defendant that when ex-proprietary rights are not claimed in joint Sir plots by one co-sharer who mortgages his share in the Khewat the entire area of joint Sir land becomes the Sir of the other co sharer. According to him the other co-sharer remains the Sir-holder only of his share of the Sir plots and the share of the mortgagor co-sharer ceases to be Sir and becomes non-Sir or Khalsa land over which he is entitled to get possession on redemption of the mortgage from the mortgagee.

5. As the mortgage was executed in 1928 when the Agra Tenancy Act III [3] of 1926, was in force the case is governed by the provisions of that Act. Section 14 deals with the accrual of ex-proprietary rights when proprietary rights are transferred. Upon the transfer (including a usufructuary mortgage) of proprietary rights in any mahal or any portion thereof or in any share therein or in any specific area thereof the mortgagor becomes an ex-proprietary tenant in the Sir land appertaining to the share transferred. Sub-section (3) of Section 3 provides that:

"Where there are two or more co sharers in Sir and one of them becomes an ex-proprietary tenant in it under this section, his previous share in it shall be divided off by the officer empowered to fix the rent of the holding under Section 36, U. P. Land Revenue Act 1901, and his interest as ex-proprietary tenant shall be limited to such share."

This sub-section does not have the effect of staying the actual of ex-proprietary rights till the demarcation of the area of the ex-proprietary tenancy under Section 36, Land Revenue Act. The proceedings under Section 36, Land Revenue Act, are merely for purposes of fixing the rent payable by the ex-proprietary tenant and of marking off the specific area of which he shall be deemed to be an ex-proprietary tenant. But the ex-proprietary tenancy arises as soon as the transfer is made or, in the case of a usufructuary mortgage, when possession is delivered.

6. Under Section 7 "Sir shall cease to be Sir when it becomes the subject of an ex-proprietary tenancy provided that if an ex-proprietary tenant regains his proprietary rights in the land held by

him as ex-proprietary tenant, such land again becomes his Sir."

7. Under Section 35 the interest of a tenant including an ex-proprietary tenant is extinguished when the tenant is deprived of possession and his right to recover possession is barred by limitation for recovery of possession of tenancy land under Section 99, Agra Tenancy Act of 1926 was six months.

8. Applying these rules to the facts of the present case the position is that when Bharose Mal and Ram Swarup Mal executed a usufructuary mortgage in favour of Gopi Mal on 14-6-1928 and delivered possession to him over the proprietary rights, Bharosa Mal and Ram Swarup Mal became ex-proprietary tenants of one half share in the joint Sir plots appertaining to their proprietary rights. Since no proceedings under Section 36, Land Revenue Act, were taken no rent was fixed on the ex-proprietary tenancy and its area was not marked off. But that did not prevent the accrual of tenancy rights in half the area of the joint sir plots. Half of the Sir having become subject of an ex-proprietary tenancy that area ceased to be Sir under Section 7.

9. Let us consider this matter a little further.

10. A co-sharer in proprietary right is entitled to joint possession over all the plots in the proprietary Khata. The acquisition of sir rights in certain plots by some of the co-sharers means the acquisition of special rights of exclusive cultivatory possession in their capacity as proprietors. A sir holder, therefore, possesses two qualifications, a special right of cultivatory possession and a proprietary right in the land over which the special right of cultivatory possession is acquired. When joint sir holders possess certain plots as their sir, they have special cultivatory rights over every inch of those plots to the exclusion of other co-sharers so long as the joint sir holders are co-sharers in the proprietary right.

11. Ex-proprietary rights are special rights of cultivatory possession minus the qualification of the holder being a proprietor. When a co-sharer transfers his proprietary rights and thus ceases to be a sir holder and becomes an ex-proprietary tenant of his sir interest, the result is that the erstwhile co-sharer retains his special right of cultivatory possession, though he does not retain his proprietary rights in the sir area.

12. When, therefore, by reason of a transfer of proprietary interest, a co sharer's sir rights are extinguished and ex-proprietary rights arise in their place, the other co-sharer, who retain his sir rights, and the erstwhile co-sharer, who has become ex-proprietary tenant, both jointly retain the special right of cultivatory possession over the plots which were once their joint sir plots.

13. What is the extent of the interest of the co-sharer who retains his sir rights in such a case ? There can be no doubt that in such a case his sir rights extend to a share in the sir plots proportionate to his share in the proprietary rights, as compared with the co-sharer who has lost his proprietary rights.

14. If ex-proprietary rights do not arise at all when sir of one co-sharer is extinguished, e.g. by abandonment or by death without heirs of the co sharer, or where under law exproprietary rights do

not accrue at all upon a transfer of the co-sharer's interest, it is possible to say that joint sir rights of the other co sharer, which extend to every inch of the joint sir plots, are enlarged by reason of his retaining the special right of cultivatory possession over the whole of the plots without there being any one else to share those rights with him; and in such a case it may be said that the joint sir holder takes the entire sir rights in all the plots by survivorship.

15. But this cannot be the result when a co-sharer, who has lost his sir rights, acquires ex-proprietary rights or, in other words, retains the special right of cultivatory possession over the plots in his new capacity of an ex-proprietary tenant. What happens in such a case is that the joint sir holders rights are not augmented at all. He remains what he was a sir holder of a share in the sir area proportionate to his interest in the proprietary rights.

16. Now when it is said that the entire sir area becomes exclusive sir of the joint sir holder when ex-proprietary rights are not claimed by the co-sharer, who has transferred his proprietary interest, it is forgotten that there is no question of claiming or not claiming ex-proprietary rights. We are not considering the case which falls under the second paragraph of Section 15 (5). Agra Tenancy Act, 1926, at the moment because it does not arise in the present case). Ex-proprietary rights accrued as a matter of law under the Agra Tenancy Act, 1926, when there is a transfer of ex-proprietary interests whether a person claims them or not. What happens when a person does not exercise his ex proprietary rights before the period of six months has expired, is that the ex-proprietary rights remain intact and therefore a co-sharer, who has transferred, his proprietary rights, remains entitled to joint cultivatory possession along with the other sir holders till the expiry of the period of limitation.

17. One essential feature of the right of survivorship or joint tenancy is that all the joint tenants must hold the joint property in the same capacity and in the same right. Once there is differentiation in their capacities or in the nature of their rights there can be no joint tenancy and there can be no survivorship.

18. It follows, therefore, that when one co-sharer in a sir area becomes ex-proprietary tenant of his interest, even though both of them are en-titled to hold the land in their joint cultivatory possession, there can be no question of any survivorship between them because they hold the land in different capacities and different rights. When in such a case ex-proprietary rights cease, the sir holder cannot get the interest of the ex-proprietary tenant by survivorship. His interest, therefore, remains as it was and is not increased.

19. Upon the extinguishment of exproprietary rights, the land reverts to the entire body of proprietors as khalsa land or, in other words as non-sir land. When the mortgaged plots were not the exclusive sir of the mortgagor but were joint sir plots over which he was in exclusive possession by virtue of mutual arrangement amongst the joint sir holders, the ex-proprietary rights will arise in the mortgagor's share in all the joint sir plots and the exproprietary tenancy to be demarcated need not necessarily be confined to the plots over which the mortgagor was in exclusive possession, but so long as this demarcation is not done, the mortgagor is entitled to retain or recover possession of the same plots as his ex-proprietary tenancy. But when the ex-proprietary rights are extinguished the

plots in their entirety do not become khalsa land because in the eye of law sir rights of the joint sir-holder to the extent of his share still subsist in those plots, and only that portion of the plots which appertains to the share of the mortgagor will be deemed to have become khalsa land.

20. What happens when the mortgagee is redeemed? The answer depends upon whether the ex-proprietary rights have become extinguished or are still intact. If they have become extinguished, the mortgagee, who is himself the joint sir holder, having got sir rights in the mortgaged plots to the extent of his share, is not liable to be evicted therefrom. He is clearly entitled to the joint possession of the plots along with the proprietors of the khalsa land, in other words, along with the mortgagor. The mortgagor can, therefore, in such a case obtain only joint possession from the mortgagee. It is true that under Section 60, T. P. Act, the mortgagee on redemption is liable to deliver possession of the property to the mortgagor. The rule laid down in Section 60 is, however, subject to the legal effect of subsequent events happening, vide the proviso to the first part of Section 60. For instance, when a mortgagee is in possession, and in the course of management lets out land to a tenant and the tenant acquires hereditary rights by operation of law, the mortgagor on redemption is not entitled to get actual possession of the mortgaged land : He will be entitled merely to proprietary possession. So also when the mortgagor by reason of the extinguishment of the ex-proprietary rights and by the falling through of the mutual arrangement, whereby he was in exclusive possession of the mortgaged plot, loses the right of exclusive possession over those plots, the mortgagee acquires the right of joint possession of the plots along with the mortgagor in his capacity as a co-proprietor or sir holder of the plots.

21. It may be noted that the mortgagor can no longer rely upon the mutual arrangement. The mutual arrangement was between persons who were joint sir holders. Every joint sir holder is entitled to the possession of the whole of the joint sir. By mutual arrangement they agreed that they would hold possession of certain specific plots. This arrangement can last only so long as the parties concerned continue to be joint sir holders. As soon as one of the joint sir holders loses his right to hold the plot in exclusive possession by reason of ceasing to be a sir holder and an ex-proprietary tenant, the mutual arrangement to hold the plot in exclusive possession must fall to the ground. When this happens, the other joint sir holder, who happens to be the mortgagee becomes entitled to joint possession.

22. If, however, exproprietary rights have not been extinguished and have not been demarcated, the same plots, which were by mutual arrangement in the exclusive possession of the mortgagor, must be restored to the possession of the mortgagor.

23. This brings us to the question whether, in the present case, ex-proprietary rights have ceased to exist or still continue. It has been urged that ex-proprietary rights have not ceased to exist. The argument is that the mortgagee having been put in possession of the sir plots by the mortgagor himself, it could not be said that the mortgagee was in adverse possession of the plot or that the mortgagor was deprived of the possession for the statutory period within the meaning of Section 35 (f) or was ejected or prevented from obtaining possession within the meaning of Section 99, Agra Tenancy Act; and reliance has been placed upon the ruling, of *Ram Kishore Singh v. Jai Mangal Singh*, A. I. R. (13) 1926 ALL. 585.

24. Whatever may be said about the position of the mortgagor before his rights were sold at an auction, the position was entirely different after the sale of such rights on 10-2-1937. The mortgagor lost his right of redemption, and if he did not attempt to recover possession of the plots as an ex-proprietary tenant within six months, it could not be said that he was not deprived of possession or prevented from obtaining possession within the meaning of Sections 35 and 99, Agra Tenancy Act. It must therefore, be held that the ex-proprietary rights were lost at least after the expiry of six months from 10-2-1937 and the plaintiffs, who are transferees of the equity of redemption have no right to recover exclusive possession of the plots in dispute to the exclusion of the joint sir holders.

25. There is a bewildering conflict of judicial opinion upon the points under discussion.

26. In general the Board of Revenue has taken the view that when a joint sir holder mortgages his sir plots and does not claim ex-proprietary rights, the plots become the sir plots of the other co sharers upon the principle of survivorship. Knox, J. M., in *Rikhi Singh v. Bajrangi Singh*, 1935 R. D. 355 at p 357, expressed himself as follows: "Now it is clear that prior to partition or to demarcation the interest of two or more coshares in sir extends to every part and portion of the sir. If one of them dies without heirs, his share survives to the others. As stated above the law has provided that the sir right cannot pass by the sale and that in spite of any agreement, an ex-proprietor can claim exproprietary rights, so long as he retains possession, or within six months, if he loses it, It provided further (Section 36 (4), Land Revenue Act) that the landholder or tenant or any co sharer directly interested in such matter may at any time during the continuance of an exproprietary tenancy apply for the issue of such order. If then an exproprietary tenancy is claimed, the Revenue Court is bound to demarcate it, but if the exproprietary right is relinquished before it comes into existence or is never claimed, there is no process by which an exproprietary tenancy can be separated from the sir. This may appear to the vendees and their counsels to be a *causus omissus* but the "result is in accordance with the general principles of the Revenue and Tenancy Acts." These are designed to protect the cultivating proprietor, hence the emphatic expression shall become an exproprietary tenant'. If he does not want the tenancy or is unable to take it up it is natural that the sir right should revert to the joint cosharers."

27. It is to be noted that the learned Junior Member failed to take account of the existence of exproprietary rights for six months. Before the expiry of the period of limitation upon the transfer of proprietary rights in sir land, exproprietary rights accrue and the accrual or continuance is not prevented either by the transferor taking no steps to have them demarcated or because he wishes to relinquish them which he by himself cannot do in law. Therefore, during the period exproprietary rights continue to exist, the other sir holders can claim to hold sir over their shares only in the joint sir and not over the whole, and when the exproprietary rights over the whole, and when the exproprietary rights are extinguished, there can be no survivorship because the exproprietary tenant and the sir holders were not joint holders of a common estate, and there is no survivorship in the case of persons holding different kinds of rights. Further it was not noticed that upon the creation of exproprietary tenancy the ex-proprietor becomes tenant of the entire proprietary body and upon the extinguishment of the exproprietary tenancy the land reverts not to the joint sir holder but to the entire proprietary body.

28. In *Bhagwan Singh v. Mst. Parbati*, 1941 R. D. 745, the Board itself seems to have taken a different view. It was held that:

"Where separate plots of joint sir have been treated by the co-sharers as their severally and one co-sharer sells the plots forming his severally, the other co-sharers cannot claim sir rights in them."

29. In the High Court itself no consistent view has been taken.

30. In *Abu Jafar v. Mahomed Kazim*, 1930 ALL. L.J. 1413 a certain khewat was owned by several co sharers one of whom was Mohammad Kazim whose share was 13/16th. There were joint sir land of all the co-sharers. Mohammad Kazim transferred his share in the khewat and gave up the proprietary rights. Sir Lal Gopal Mukherji delivering the judgment of the Bench observed :

"When the vendors of Mohammad Kazim relinquished their ex-proprietary tenancy, the portion of the area which they held as sir land, ceased to be sir land and Abu Jafar could not be the sir holder of the entire area for the simple reason that the 13/16th of the area ceased to be sir land. The second reason against this view would be that the sir holders were not tenants, so that it might be said that when some of the tenants died, the surviving tenants became the tenants of the entire holding. Sir lands are held by proprietors and not by tenants. The particular privileges under which a particular proprietor is allowed to hold certain portions of the land in khewat are summed up in the phrase "sir land". When the proprietor loses the right of a proprietor, he acquires the right to hold the lands on certain easy terms. This privilege he may give up. When he does so, the whole body of co-sharers become entitled to hold the land. But none of the proprietors can hold the land as their air."

31. In *Ram Raj Singh v. Rajendra Singh*, 1943 ALL L. J. 213 F. B., certain joint sir belonged to a number of cosharers. By a mutual arrangement they held the plots in their exclusive possession. One of the plots was in possession of one Balkaran Singh who had 1/6th share in the joint sir plots. He mortgaged the plot to a stranger. One of the joint sir holders purchased Balkaran Singh's right, title and interest in the proprietary right at an auction sale. He sued the mortgagee for possession of the plot that had been mortgaged to him without redeeming the mort-gage upon the ground that the mortgage was invalid because one joint sir holder could not mortgage a joint sir plot, even though he be in exclusive possession thereof and that, in any case, the mortgagee is not entitled to hold possession of the joint sir plot as against the joint sir holder. It was held by the majority in the Full Bench.

(1) that one joint sir holder could mortgage his proprietary rights in the plot to a stranger.

(2) That he could put the mortgagee in possession of the plot of which he was in exclusive possession and (3) that the possession of the mortgagee could not be disturbed so long as the mutual arrangement under which the parties were in

separate possession subsisted.

In the course of discussion only three Judges out of five expressed their opinion as to the effect of the transfer of his interest by one joint sir holder, upon the sir rights of the other joint sir holder. Two of the learned Judges, namely, Iqbal Ahmad C. J. and Bajpai J. expressed the opinion that upon the transfer of proprietary rights by a joint sir holder and upon his relinquishing, or failure to claim ex-proprietary rights which accrued in his favour upon such transfer, sir interest of the joint transferor survived to the joint sir holder and the entire sir area became sir of the latter. Mr. Justice Dar, however expressed a contrary opinion. The other two learned Judges did not express themselves upon this point at all.

32. The learned Chief Justice observed as follows :

"The component parts of sir rights are (1) proprietary rights, and (2) cultivatory rights. The law permits the transfer of proprietary right but, speaking generally, forbids the transfer of cultivatory rights and, therefore, on the transfer of a sir plot, the transferee acquires the proprietary rights of the transferor but not his cultivatory rights. The cultivatory rights remain in the transferor and it is this right which, after the transfer, the law secures to the transferor in the shape of ex-proprietary rights.

The propositions set out above lead to the irresistible conclusion that, in the event of a transfer by one of several joint sir holders of his interest in a joint sir plot, the transferee acquires the proprietary interest of his transferor in the plot and the transferor, by operation of law, becomes entitled to claim exproprietary rights. If he does claim exproprietary rights the law (Section 36, Land Revenue Act) provides the method by which the area in which he has acquired such rights are to be demarcated. It is, however, open to a person to forego his right and, therefore, if the transferor does not claim exproprietary rights those rights are extinguished. In such a case the question arises whether the remaining sir holders do or do not acquire sir right over the whole plot. The Board of Revenue has held that they do and, after giving my best consideration to the question, I am in entire agreement with the Board on this point."

The learned Chief Justice, after having dealt with the accrual of exproprietary rights and their extinguishment, simply agreed with the Board of Revenue in holding that the remaining sir holders acquired sir rights over the whole sir plots. His Lordship did not give any reasons of his own and seems to have agreed with the reasons given by the Board of Revenue.

33. Bajpai J. was of the same opinion, and observed.

"If exproprietary rights are not claimed by the quondam landlord (Balkaran), then is it that the joint sir holders (Ram Raj and others) lose their sir rights qua one-sixth ?. The contingencies mentioned in Section 7 under which 'sir shall cease to be sir have not arisen. The Board of Revenue have consistently held that the non-transferring cosharers will in a case like the present get the sir rights over one sixth by



survivorship, but Mukerji and Bonnet JJ. in *Abu Jaffar v. Mohammad Kazmi*. 1930 All. L. J. 1413 have held that one sixth of the plot will become Khalsa. This view omits the consideration of Section 7 of the Act. If the view of the Board of Revenue is correct, Ram Raj and others can eject the mortgagee if the mortgagee has obtained possession under the mortgage deed and the rights of the mortgagee will be confined to getting his proportionate share of the profits in a profits suit, but he cannot claim to remain in possession."

Then after quoting the observations of Knox J. M., in *Rikhi Singh v. Bajrangi Singh*, (1935 R. d. 855) his Lordship proceeded to observe, "The mortgagee by obtaining transfer of proprietary rights qua one-sixth could not claim the acquisition of the possessory and cultivatory rights over the one sixth, Bam Raj and others who had before the mortgage rights over every inch of the land had not lost their rights over one-sixth and I feel inclined to agree with the view of the Board of Revenue that they have obtained the same by survivorship, Balkaran having not claimed any exproprietary rights."

If we may say so with great respect, there is no question of claiming any exproprietary rights under the Agra Tenancy Act of 1926. The rights accrue in law or they do not accrue. If they accrue they accrue whether they are claimed or not.

34. We have no hesitation in agreeing with the learned Judge in his following observations.

"It is the policy of the Legislature that although proprietary rights of a sir holder may be transferable his cultivatory rights are not transferable and these two rights have got to be kept distinct. In *Dwarka Das v. Rafiuddin*, 1940 All. L. J 810, Bennet J. evolved a number of propositions regarding the rights of co-tenants; and joint sir holders, so far as their possessory rights are concerned, are co-tenants for all practical purposes like exproprietary, occupancy of statutory tenants and *mutatis mutandis* (1) a number of persons holding sir are co tenants (2) these co-tenants are joint tenants and not tenants in common except for succession, (3) if one co-tenant dies his interest does not pass by survivorship to the other co-tenants whether they are joint in estate with him or not, but it passes to his successors according to the order of succession, for, it is provided in Section 5 of the Act that on the death of a sir holder his sir right shall devolve on the person who succeeds to his proprietary interest in the sir, (4) if there is no such heir the interest passes by survivorship to the remaining co tenants."

35. Dar J. was of a different opinion and observed :

"Except in certain specified cases the right by survivorship in relation to person or property is unknown to law in India. Admittedly the right of a joint sir holder on his death passes by inheritance and not by survivorship. Admittedly on a transfer of joint sir, exproprietary tenancy automatically comes into existence and the interest of transfer does not pass by survivorship to remaining co sharers. If exproprietary

tenancy is not claimed and is allowed to lapse why should in the absence of any statutory provision the doctrine of survivorship, now come into play and change what has been all along a tenancy in common into a joint tenancy and give to remaining cosharers rights which they never possessed. It is also possible to take the view that Section 7, Clause (a) which provides for extinction of sir only demands that "sir shall cease to be sir when it becomes subject of an exproprietary tenancy" and on a transfer of joint sir by a cosharer the sir by force of law becomes subject of exproprietary tenancy and on a transfer of sir the condition laid down in the statute is satisfied and it is not necessary that ex proprietary tenancy should also arise in fact and it is sufficient for the purpose of the statute that exproprietary tenancy may arise in law, though it may not be claimed in fact and though it may be lost subsequently by abandonment or by adverse possession.

It is also open to doubt whether apart from and irrespective of Section 7, of Agra Tenancy Act (3 of 1926) sir may not cease to be sir by abandonment or by adverse possession. On a transfer of joint sir when exproprietary tenancy is claimed if these rights have to be demarcated and the joint plot can be split up in two portions one containing sir and the other non-sir land, there seems to be no insurmountable difficulty in splitting up the joint plot in two areas even when no exproprietary tenancy is claimed and in any case the argument of inconvenience is hardly conclusive on a question of legal rights of parties."

36. We respectfully agree that when once exproprietary rights have accrued, the joint sir holder cannot take the interest of the exproprietary tenant by survivorship.

37. On a review of these authorities, we think that the more correct and the more authoritative view with which we respectfully agree is that when one joint sir-holder mortgages his plots in his exclusive possession by mutual arrangement, ex-proprietary tenancy arises at once under the Agra Tenancy Act of 1926 and the other joint sir holders cannot claim that the land so mortgaged became their sir. Only in those cases where the sir of one co-sharer becomes extinguished and no ex-proprietary rights arise, as may well happen by abandonment or by death without heirs, can the other joint sir-holders claim that their sir right has been extended to the area which was the sir of the co-sharer who had abandoned it or died without heirs. But once ex-proprietary rights have arisen under the law in favour of the co-sharer who mortgages the sir plote in his exclusive possession, the other joint sir-holders cannot claim sir rights in that area. There can be no question of survivorship because the other joint sir-holders cannot claim the interest of the co-sharer who has become ex-proprietary tenant by operation of law, inasmuch as there can be no question of joint tenancy when some persons in possession are ex-proprietary tenants, while others are sir holders.

38. What will then be the rights of the mortgagor when he redeems the mortgage will depend upon whether the ex-proprietary tenancy, which arose in his favour, is subsisting or has become extinguished. If the ex-proprietary tenancy subsists, the mortgagor will naturally get back possession of the area mortgaged by him. If, on the other hand, the ex-proprietary tenancy has been extinguished and in consequence the mutual arrangement by which certain co-sharers were in

exclusive possession of certain plots has come to an end, the area corresponding to the share of the mortgagor becomes non sir or khalsa land in which all the co-sharers have a right and the mortgagor or his transferee can only get joint possession.

39. Our answer to the question referred to us, therefore, is that where a co-sharer, while mortgaging his zamindari property to a joint sir-holder includes in the mortgage a part of the joint sir area over which by arrangement between him and his other co-sharers, he is in separate possession he is entitled to claim back the said area from the mortgagee at the time of the redemption only if he, having become an exproprietary tenant of the area in dispute, still retains his ex-proprietary rights at the time of redemption. But if he has lost his exproprietary rights, then he or his transferee can only obtain joint possession with the mortgagee who is also a co-sharer over that portion of the sir area which becomes khalsa land, that is to say, over the portion which corresponds to the share of the mortgagor or his transferee in the proprietary rights.