

Krishna Sharan Shukla And Anr. vs Bali Bhadar Shukla And Ors. on 21 September, 1950

Equivalent citations: AIR1952ALL140, AIR 1952 ALLAHABAD 140

JUDGMENT

P.L. Bhargaya, J.

1. This is a defendants' appeal. It arises out of a suit, under Section 33, United Provinces Agriculturists' Relief Act, for determination of the amount due under a usufructuary mortgage, dated 28.5.1902 and three subsequent mortgages, two of them executed on 12.2.1914, and one on 16.1.1919. The trial Court (Munsif of Basti) made "a preliminary decree directing accounts to be taken" and appointed a commissioner for the purpose. The commissioner filed his report. Certain objections thereto were filed by the parties and, in view of those objections, the commissioner was asked to review the calculations made by him. Then, the commissioner filed a revised report and in accordance with that report the Court declared that a sum of Rs. 1,336 and odd was due on the four mortgages. The defendants-mortgagees preferred an appeal in the Court of the District Judge of Basti challenging the mode of calculation of profits adopted by the commissioner, but the appeal was dismissed.

2. The trial Court had calculated the profits of the land in the cultivation of the mortgagees at "five times the circle rate rental minus 25 per cent, as cost of production". This mode of calculation was approved by the lower appellate Court. In this appeal, on behalf of the defendants appellants, the mode of calculation adopted or approved by the Courts below has been challenged again; and reliance has been placed upon a case reported in *Kalpu Ahir v. Mukat Nath*, 1949 ALL.. L. J. 200 which was decided by one of us.

3. In this case it is not disputed that it is not possible to determine the amount of actual profits which might have been received by the mortgagees from the mortgaged property. The present case is from Basti, and *Kalpu Ahir's* case (1949) ALL, L.J. 200) was also from the same district.

The mode of calculation of profits adopted in *Kalpu Ahir's* case, which was a suit for redemption of a usufructuary mortgage under Section 12, Agriculturists Relief Act, was the same as adopted in the present case. That was the mode usually adopted by the Courts in Basti. The reason for adopting that mode has been pointed out by the learned Dist. J. in the judgment under appeal. He has stated:

"This method of calculation of profits is the general & established practise of this district in such cases & which is based on mature experience of local condition & the rental as entered in village papers. It is not possible in such cases to find out actual profit of every plot in every year on the basis of produce, & a general formula

must be found out for calculating profits in such cases. Five times the circle rate rent should be the actual value of the produce."

But that mode has been disapproved by this Court in various cases referred to in Kalpu Ahir's case, & also in Mt. Pran Dei v. Ganga Prasad, A.I.R. (36) 1948 ALL. 54.

4. There is a later Bench decision of this Court reported in Nand Kumar v. Kuberalal, A. I a. (37) 1950 ALL 192 to which one of us was a party. In that case, which was from Basti, it was impossible to find out the actual usufruct from the mortgaged property & it was observed:

"Failing this, there are only two other ways in which, under the law, the Courts below could discover what profits had accrued to the mortgagees out of the land in their actual cultivation; (1) by taking oral evidence or (2) by finding out what the mortgagees could have got, if they had let the land at the highest possible rate i.e. at the rate payable by sub-tenants. The Courts below, however, did not follow either of these methods for arriving at the usufruct. They have invented a rule of their own for arriving at the profits This rule was to multiply the annual rental value which was arrived at on the basis of circle rates by five. From this forty per cent, was deducted as production costs and rest was considered to be the profits. We are of opinion that this was a fanciful method of calculating.....,"

5. We may notice here another Bench decision reported in Kashi Prasad v. Raghunandan A.I.R. (35) 1948 ALL. 314 in which one of the learned Judges seems to have approved of the mode of calculation adopted by the Courts in Basti, but the learned Chief Justice did not express any opinion about it. What the learned Judges decided in that case was that the lower Court's calculation of net profits based, as it was, on oral evidence should not be disturbed,

6. In our opinion, therefore, the appellants contention that the mode of calculation adopted by the Courts below was wrong must be upheld. As it is no longer possible to determine the actual profits with reference to the value of the produce of the land, the profits received by the mortgagees shall now be calculated at the rate of rent on which the land mortgaged could be let out to non-occupancy tenants.

7. Another point urged on behalf of the appellants is that the trial Court should have itself determined the profits and not entrusted that work to a commissioner. Learned counsel for the appellants has referred to an unreported Bench decision of this Court in Jumman Beg v. Tameshar Prasad Shukul, S. A. No. 2293 of 1943. That was also a case from Basti and the trial Court had ordered "a preliminary decree directing accounts, to be taken under Section 9 of Act XIII [13] of 1940, to be prepared". It was held in that case that a commissioner, with powers to examine witnesses and to determine profits on the basis of their evidence, could not be appointed either under the provisions of the Code of Civil Procedure or under the Agriculturists' Relief Act and that the procedure adopted by the trial Court was entirely wrong,

8. We are inclined to agree with the view expressed in the unreported decision. There is no provision in the Agriculturists' Relief Act for the appointment of a commissioner for determination of profits. In the Code of Civil Procedure there are provisions in Order 26 for the issue of commission to examine witnesses; but the commissioner has to submit the statements recorded by him on commission to Court & the Court has then to consider it along with the other evidence in the case. We do not find any provision in Order 26 which goes to show that the commissioner has the power to record his findings on the basis of the evidence recorded by him on commission. The procedure adopted by the trial Court in the present case in passing a "preliminary decree" and then entrusting the work of determination of profits to a commissioner was, therefore, not warranted by any provision of law.

9. Accordingly, we allow this appeal, set aside the decree of the trial Court, which has been confirmed by the lower appellate Court, and remand the suit to the trial Court, through the lower appellate Court, with a direction to readmit it to its original number and to dispose of the same in accordance with law. Costs here and hitherto will abide the ultimate result. The court-fee paid on the memorandum of appeal shall be refunded.