

Mt. Khatoon And Anr. vs Sripal Singh And Ors. on 5 October, 1950

Equivalent citations: AIR1952ALL650, AIR 1952 ALLAHABAD 650

JUDGMENT

Agarwala, J.

1. This is defts'. appeal arising out of a suit for a declaration that a perpetual lease was invalid & for possession over the property covered by the lease.
2. The facts briefly are as follows: The plff. is a brother of defts-respondent Sripal Singh, Chandrapal Singh & Rampal Singh. His claim was that his brothers Sripal Singh & Chandrapal Singh had executed a perpetual lease of five agricultural plots Nos. 1776, 1777, 1872/1, 1873/1 & 2123, which were included within the under-proprietary holding of the family of the plff. & his brothers & that this perpetual lease executed on 24-7-1931 in favour of Mt. Bibi, wife of Hazrat deft. 4, & on the death of Mt. Bibi inherited by Hazrat, who gifted it to defts-appellants, was wholly void on two grounds, firstly, that the property was ancestral & the family, was a joint Hindu family & the transfer was without any legal necessity &, secondly, that if the family was not a joint family but that the parties were co-owners as tenants in common, then it was executed by one of the co-owners &, as such, was not binding on the others & was indeed void in its entirety.
3. The defence was that the property was not ancestral & the family was not joint & that the perpetual lease was executed by Sripal Singh, who managed the property on behalf of all the brothers & who was competent to execute the lease & that the lease was binding upon the plff.
4. The trial Court held that the property was not ancestral & the family was not joint & that the lease was not executed for legal necessity & since it was executed by one out of several co-sharers, it was an invalid document not binding upon the plff. or anybody else. On appeal by the defts-appellants, the lower appellate Court affirmed the findings of the trial Court.
5. In this second appeal two points have been urged before us. It has been urged that the civil Court had no jurisdiction to try the suit. This plea was not raised in either of the two Courts below, but as it is a plea of jurisdiction we have allowed it to be raised for the first time in this second appeal. Learned counsel argues that since this was a suit by a person who claimed to hold the land under a lease, or, in other words, who claimed to hold tenancy rights, this suit should have been instituted in the revenue Court under Section 180, U. P. Tenancy Act, & reliance has been placed in support of this contention upon a Pull Bench decision of the late Chief Court of Oudh in 'Mahadeo Prasad v. Jokhan Ram', AIR (34) 1947 Oudh 133. The decision in 'Mahadeo Prasad's' case has no bearing upon

the present case. In that case a suit was brought by a person alleging himself to be a grove-holder to recover possession of a grove from a person who was alleged to have dispossessed him, there being no allegation that this latter person was admitted to or allowed to retain possession of the holding by the landholder or any person claiming as landholder to have the right to eject him. It was held that the suit lay in the civil Court & not in the revenue Court. In the present case the suit has been brought by one out of several co-sharers in the proprietary right. The suit cannot lie under the provisions of Section 183, which applies to suits by tenants. The suit also does not lie under Section 180, U. P. Tenancy Act, as it stood before its recent amendment by Act X (10) of 1947, because a co-sharer, who is not authorised by the other co-sharers to act on their behalf cannot be said to be a person "entitled to admit another as a tenant." The suit was, therefore, rightly instituted in the civil Court. The plea of jurisdiction, therefore, has no force.

6. It was next contended that the view of the lower Court that one co-sharer had no right to execute a lease of specific plots in which other co-sharers are also interested without the consent of all the co-sharers, is not correct in law. We think that this contention is sound.

7. The lease in the present case was not an agricultural lease. It was a lease of proprietary rights. The lessee was empowered to realize rents & profits & to be otherwise benefited by the use of the leased property generation after generation, & to be able to transfer their rights by a sale, mortgage, etc. It was provided that the lessor will have no other right except the right of realizing the rent reserved under the lease. The lease was stated to be a permanent lease of under-proprietary rights creating an intermediary tenure with rights of transfer of every kind. Such a lease of proprietary rights is a transfer within the meaning of Transfer of Property Act. Under Section 6 of the Act, property of any kind may be transferred except as otherwise provided by the Act or by any other law for the time being in force. There is no law which prohibits the transfer of under-proprietary rights by means of a perpetual lease. Under Section 44, T. P. Act:

"Where one of two or more co-owners of immoveable property legally competent in that behalf transfers his share of such property or any interest therein, the transferee acquires, as to such share or interest, & so far as is necessary to give effect to the transfer, the transferor's right to joint possession or other common or part enjoyment of the property, & to enforce a partition of the same, but subject to the conditions & liabilities affecting, at the date of the transfer, the share or interest so transferred."

The only exception to this rule is in the case "of a transferee of a share of a dwelling house belonging to an undivided family," when the transferee is not a member of the family. The Oudh Rent Act during the currency of which the lease in question was executed did not contain any provision prohibiting such a transfer by one of the co-sharers in the under-proprietary right. Reliance has been placed on behalf of the respondent upon certain decisions of the late Judicial Commissioner's Court & the Chief Court of Oudh. In *Lal Mohammad Khan v. Amatul Fatima*, 26 OC 239, where one co-sharer had granted a perpetual lease of a specific plot of land belonging to the entire body of co-sharers, it was held that:

"The lease in question is a transfer of specific plots situate in village Jorupur & not of the interest of the lessor in those plots. It is a lease by means of which the lessor carves out a tenure of the nature of an under-proprietary interest. This she could not do without the consent of the other co-owners of the proprietary estate. The plff. is therefore entitled to a declaration that the lease of 28-1-1915 executed by Bibi Batul in favour of Lal Mohammad Ranki deft. 1, is null & void as against the plaintiff.' But she is not entitled to the second part of the declaratory relief which has also been granted to her by the decree of the lower Court. A declaration to the effect that the lessee has no right whatsoever in respect of the leasehold cannot in our opinion be granted to the plff."

It is clear that the learned Judicial Commissioners who decided that case held the lease to be not binding upon the plff. of that suit, who was not one of the lessors. But they definitely held that the lease as a whole could not be considered to be void in its entirety. Undoubtedly if a lessor grants a lease of property not belonging to him, he cannot bind by his action owners of such property. Where the lessor grants a lease of a plot of land in which he is owner along with others, his action cannot bind the others but there is no reason to hold that his action does not bind himself. The lease must in such a case be confined to the interest which the lessor could transfer.

8. In 'Dukhi Singh v. Sarju Dei', 4 O W N 1225, a member of a joint Hindu family who was never in exclusive possession of a plot had executed a deed of "birt" in respect of the whole of the plot. The transferee could not be put in possession &, therefore, a suit was brought for possession as against the co-owners of the lessor. The suit was dismissed. The decision was obviously, if we may say so with respect, absolutely correct. The lessee had no right to oust the other co-sharers from the possession of a joint plot when the lease was executed by one of the co-sharers alone who was out of possession. The following observation of the learned Judge has been relied upon:

"The deed in question shows clearly that deft. 2, attempted to make deft. 1 an under-proprietor of the plot in suit & gave her a heritable & transferable right of property in the plot by the deed. He had no power to do so when the plot in suit was the joint property of the plffs. & deft. 2."

These observations must be read with reference to the facts of the case. The inability of one co-sharer was adverted to because the deed could not affect the title of the other co-sharers, who were no parties to the lease. It was not intended to lay down that the lease was invalid even against the lessor.

9. In 'Wajid Ali v. Mohammad Nazir Uddin Husain', 1937 O W N 1036, there was an exchange by one out of several co-sharers with a stranger. The co-sharer who made the exchange was not in exclusive possession of the plot in respect of which the exchange was made. The transferee filed the suit to regularize his possession over the plot. The learned Judge who decided that case, relying upon several decisions of the Allahabad High Court in 'Sital Prasad v. Amtul Bibi', (7 All 633.) and 'Adit Singh v. Bai Bindayal Sahu'. (AIR (23) 1936 All 456), held that a transfer by one of the co-sharers of joint property was invalid & that the transferee did not become a co-sharer by reason

of the transfer. With great respect, we think that this view is unsound in law. The rulings upon which reliance was placed by the learned Judge have been discussed in a later Full Bench decision of the Allahabad High Court in 'Ram Raj Singh v. Rajendra Singh', 1943 A L J 213. We shall discuss this case a little later.

10. In 'Debi Prasad Singh v. Surjan Singh', 1941 O W N 989 one co-sharer transferred a specific Joint plot over which he was not in exclusive possession to a stranger. The other co-sharers were in possession of the plot. The transferee sued the other co-sharers for possession of the plot. The suit was dismissed. It was observed in the course of the judgment that since:

"the lease purported to transfer specific area in the plot in question authorising the lessee to take possession of that area & to exercise all conceivable rights of property over the same, the lease is void & inoperative in law."

Reliance was placed upon 26 O.C. 239, 4 O W N 1225 & 1936 O W N 1036. It should be noted that the plff. in that case not having obtained a transfer from all the co-sharers had no right to eject the other co-sharers.

11. Reverting now to the Pull Bench decision of the Allahabad High Court of which reference has already been made, it was a case in which one joint 'sir' holder had transferred a specific 'sir' plot of which he was in possession under the mutual agreement between the joint 'sir' holders & had put the transferee in possession of the plot. The other co-sharers sued for the ejectment of the transferee. The contention raised on behalf of the plffs. was that the transfer being of a joint 'sir' plot in which the transferor was a co-sharer along with other co-sharers, the transfer was void in its entirety & reliance for this view was placed upon a long series of decisions commencing from 'Sital Prasad's case' 7 All 633. 'Sital Prasad's case' & other cases following it were overruled & it was held that "one co-sharer was entitled to transfer his own proprietary interest in the plot & that though the transfer of a specific plot owned by several co-sharers is invalid in respect of the shares of the other co-sharers, it is valid 'qua' the interest of the transferor."

It was further held that "where the transferor is in exclusive possession of specific plot of land under a mutual agreement between the co-sharers, he is entitled to put his transferee in possession of that plot & the other co-sharers have no right to eject him so long the mutual arrangement subsists."

12. In our view, the transfer in this case not being a transfer merely of cultivatory rights, was good to the extent of the interest of the transferor. By the transfer, the transferee is entitled to exercise the rights of the transferor in the plot transferred to him, which rights the transferor could exercise for his own benefit. The lease in the present case was made by Sripal Singh deft.-respondent, who was in possession of the plots leased & who put the lessee in possession of the same. The transferee has been in possession since 1931, for over ten years before the institution of the suit & now for over 12 years. The plff. can have the lease avoided only in so far as he is interested & not with regard to the shares of the other co-sharers. Furthermore the lessee is not liable to be ejected, because his lease being valid to the extent of the share of the transferor, he has stepped into the shoes of his transferor & is entitled to remain in occupation of the plots in the same manner as his transferor was in

possession.

13. The result, therefore, is that we allow this appeal in part modify the decree of the Court below & decree the plffs'. suit for a declaration that the perpetual lease dated 24-7-1931, is not binding on him & is invalid so far as his interest is concerned. The plff. is also entitled to be in joint possession of the plots in suit along with the defts.-appellants, but he is not entitled to eject the defts.-appellants. The plff's. suit for damages is also dismissed. The plff. shall get one-fourth of his costs from the defts.-appellants & the defts.-

appellants shall get three-fourths of their costs from the plff. in all the Courts.