1918

EMPEROR v. RAM DAS

has not referred. The appellant asks for reduction of sentence, on the ground that it was too severe. He called a number of witnesses to allege that he was not there at all and on the other hand, he brought a cross charge against a prosecution witness for assaulting him at the place in question. Under these circumstances, having a reasonable apprehension that he was going to be convicted, he applied for transfer. In my judgement the accused, Ram Das, got a very favourable order out of the District Magistrate, and he is the one person who has no right to complain. I should want to hear considerable argument before deciding that under such circumstances in acting upon the evidence already recorded the Magistrate committed any irregularity which could not be cured by section 537 in the absence of circumstances showing a failure of justice. I entirely agree with my learned brother in the order that this reference must be rejected.

Reference rejected.

APPELLATE CIVIL.

1918. *January*, 16.

Before Mr. Justice Piggott and Mr. Justice Walsh.

KALLU (PLAINTIFF) v. SITAL (DEFENDANT)*

Act (Local No. II of 1901 (Agra Tenancy Act), section 20—Occupancy tenancy acquired by a member of joint Hindu family—Profits thrown into common stock—Member of joint family other than the tenant allowed to cultivate.

A special Statute like the Agra Tenancy Act can and does modify the operation of the ordinary Hindu Law in certain matters.

Where a zamindar admitted as an occupancy tenant a person who was a member of a joint Hindu family it was *held* that such tenant did not, by throwing the profits derived from this land into the common stock of the joint family, cause the tenancy to become part of the joint family property nor did he, by allowing another member of the joint family to cultivate specific plots forming parts of the holding, effect anything more than the creation of a sub-tenancy in favour of such member.

THIS was a suit for a declaration of right to joint possession of certain occupancy holdings.

The facts of the case are shortly as follows:—The plaintiff's father, Ganga, and the defendant's father, Matola, were first cousins. The holding in suit was acquired by Matola in his own

*Second Appeal No. 417 of 1916, from a decree of Austin Kendall, District Judge of Cawnpore, dated the 10th of December, 1915, reversing a decree of Muhammad Junaid, Munsif of Fatehpur, dated the 21st of August, 1915.

name under a lease from the zamindar in 1864. Ever since, the name of Matola, and on his death the name of the defendant, had been recorded in the revenue papers as the occupancy tenant of the holding. The plaintiff's name was recorded as a sub-tenant in respect of half of the holding on a rent which was precisely half of that payable to the zamindar. The defendant sued the plaintiff in the Revenue Court for ejectment as a sub-tenant On the plaintiff's pleading that he was not a sub-tenant, but was an occupancy tenant in his own right, the Revenue Court referred the plaintiff to the Civil Court under section 199 of the Tenancy Act. The plaintiff thereupon brought the present suit for a declaration that he was joint with the defendant in cultivation of one-half of the land in dispute. His case was that the occupancy holding was the joint ancestral property of the parties. Formerly the family was in joint possession, but some years back there had been a partition of it and the holding had been equally divided etween the parties, and they were in possession of their half shares separately. The defendant denied the plaintiff's allegation as to jointness, and urged that the occupancy holding was a self-acquisition of his father, Matola, and had on the latter's death descended to his sons, and the plaintiff was in possession of half of the holding as a sub-tenant. The court of first instance found the facts in favour of the plaintiff and decreed the suit. On appeal the District Judge (Mr. Kendall) held that, as the occupancy holding had been acquired in the name of Matola alone, it was immaterial to consider whether Matola was a member of a joint Hindu family along with the plaintiff and his father. He further held that by allowing the plaintiff to cultivate half of the holding on payment of half of the head-rent the defendant had never intended to give up his occupancy rights nor had the plaintiff been recognized as an occupancy tenant by the zamindar. The suit was accordingly dismissed.

The plaintiff appealed to the High Court. The appeal came on for hearing before WALSH, J., who remitted the following issues to the lower appellate court.

1. Whether Matola, at the time when he acquired the occupancy tenancy in question, was or was not a member of a joint Hindu family ?

1918

KALLU v. SITAL.

2. If the answer to No. 1 is in the affirmative, whether the occupancy tenancy in question, so acquired by him, was self-acquired and if so, how ?

3. Whether in any partition the tenancy in question was allotted wholly to the defendant as part of his share ?

4. Whether the plaintiff is holding the half portion in question as a sub-tenant of the defendant, and if so, under what contract, express or implied, or under what circumstances did he become the sub-tenant or whether the plaintiff is holding as tenant-in-chief in his own right ?

The findings returned on these issues by the District Judge (Mr. Ashworth) were as follows.

1. Yes.

2. Yes, as the letting was to him as an individual and not as representing the family.

3. No.

4. The plaintiff must be deemed to be holding as a sub-tenant of the defendant by reason of the following facts, namely, that the tenancy arose by reason of a transfer by the zamindar in favour of Matola alone and that the plaintiff's right of occupation is derived from Matola's son and not from the zamindar.

In his reasons for the findings on issues 1 and 3 the learned District Judge observed that " the holding was originally considered a joint one and has subsequently been partitioned " and he went on to say that " it appears to me that Matola—although he took the tenancy (so far as zamindar was concerned) as an individual—regarded the property held by him as a part of the property of the joint family. It was for this reason that it was partitioned and half of it was given to the plaintiff : certainly, if there was ever any partition, the land in question was allotted to the plaintiff and not to the defendant." On issue 2, the learned Judge said that " the sole question is, Was the contract of transfer between the zamindar and Matola a contract by the zamindar in favour of Matola as an individual on his own behalf or with Matola as member and representative of the joint Hindu family ? There is no evidence on this point except the fact that Matola has always been entered in the papers as a tenant in his own right and not as the representative of the joint Hindu family.

Matola also alone is entered as tenant in the patta (i. o., acknowledgement of rent and area) given by the zamindar in 1864. Any way, in the absence of evidence to show that he took the property in a representative capacity, the plaintiff, on whom the burden falls of proving the fact, must fail. It may also be mentioned that a zamindar would be very unlikely to deal with a person acting on behalf of an unstable and fluctuating a body like a joint Hindu family."

The plaintiff preferred objections to the findings.

On the hearing after remand WALSH, J., referred the case to a Bench of two Judges.

Babu *Piari Lal Banerji*, for the appellant, submitted that on the findings that Matola was a member of a joint Hindu family, and the profits arising from the holding had been thrown into the joint stock, the holding was the property of the joint Hindu family and the plaintiff should be held to be in possession in his own right and not as a sub-tenant of the defendant. The mere fact that the name of Matola alone appeared on the revenue papers did not show that the holding belonged to him exclusively. Having regard to the state of the family and the dealing with the holding it was clear that it never belonged to Matola alone, and in any case he himself had treated the holding as a part of the joint family property The burden of proving self-acquisition lay upon the defendant, and in the absence of any evidence on the point, the plaintiff ought to succeed. The findings of the lower appellate court were inconsistent, and so far as they were against the appellant, they were arrived at by the Judge misdirecting himself and cannot be binding in this case.

An occupancy holding is property, and like any other property (e. g., a mortgage) can be acquired by an individual member on behalf of the joint family. There is nothing in the tenancy law to modify the well established rules of Hindu Law relating to joint families. He cited and discussed the case of *Mahabir Singh* v. *Bhagwati* (1).

Pandit *Kailas Nath Katju*, for the respondent, submitted that there was evidence on the record to support the finding that the holding had been acquired by Matola for his own benefit. The

(1) (1916) I. L. R., 38 All., 325.

1918

KALLU v. SITAL.

patta stood in his name, and his name, and after his death his son's name, had been continuously recorded in the revenue papers. They had been throughout paying rent direct to the zamindar, and the plain iff's name had never appeared as a co-sharer in the tenancy. If the holding was a self-acquisition of Matola, he was under the law incompetent to transfer it to anybody, whether members of his joint family or not. Such transfer was prohibited by law. The throwing by an individual member of his self-acquisition into the joint stock was but a mode of transfer and would be as illegal as any other. The plaintiff was never recognized as a tenant-in-chief by the zamindar, who had always regarded the defendant as the sole tenant. The plaintiff, having acquired his interest in the holding through the defendant, must, having regard to the definition of the word "sub-tenant" in the Tenancy Act, be deemed to be a sub-tenant. A person did not cease to be a sub-tenant, though he paid a rent which did not exceed or even was less than the head-rent. The lower appellate court had found that the plaintiff was in possession of half of the holding under a private arrangement made at the time of partition of the joint family property between the parties whereby the plaintiff had been allowed to have half of the holding on payment of half of the rent to the zamindar. There was no privity of contract between the zamindar and the plaintiff, and the plaintiff having acquired the holding from the defendant was, in law, his sub-tenant. He referred to sections 20, 21 and 22 of the Agra Tenancy Act, 1901.

Babu *Piari Lal Banerji*, in reply, referred to *Babu Hiradas* v. *Pandit Sheo Dat Tewari* (1) and *Parmanand Singh* v. *Mahant Ramnand Gir* (2).

PIGGOTT, J.—In this case the plaintiff Kallu and the defendant Sital are related in this way that their paternal grandfathers were own brothers. Sital is the recorded tenant of a certain occupancy holding. Kallu is actually cultivating certain plots of land, making up one-half of the area of the holding, and is paying for the use and occupation of these plots approximately one-half of the rent recorded as payable by Sital to the zamindar. Sital took proceedings in a Revenue Court to eject Kallu on the allegation

(1) Select Decisions of the Board of Revenue, No. 19 of 1912.
(2) (1913) I.L.R., 35 All., 474.

that the latter was holding as his sub-tenant. Kallu replied that he was a joint tenant with Sital of the entire holding; that they had apportioned the fields between them merely for convenience of enjoyment, and that the half share of the rent payable by him was paid to the zamindar and not to Sital. On this the Revenue Court directed Kallu to establish his title as co-tenant of the holding by a suit in the Civil Court. This order purports to have been passed under section 199 of the Tenancy Act, (No. II of 1901). The propriety of the order is not in question before us, and I merely mention this in order that I may not be regarded as committed to the view that this section was really applicable to the facts above set forth. Kallu's suit for a declaration of his title as joint tenant of the holding to the extent of an undivided half share was decreed by the court of first instance and dismissed by the District Judge in first appeal. On a second appeal filed in this Court by Kallu certain issues of fact were remitted for trial to the lower appellate court and findings have been received. The third issue as drafted would seem only to arise in the event of the findings on the first and second issues being other than what they were, and therefore need not be considered. On the first two issues remitted the findings are that this occupancy holding was acquired by Matola, father of Sital; that Matola was at that time a member of a joint undivided Hindu family along with the descendant or descendants of his paternal uncle Dariyao. The letting was to Matola alone and not to Matola as representing the joint family. On the fourth issue a finding was returned that the tenancy enjoyed by Kallu was the result of a contract between himself and Sital, to which the zamindar was no party, and that it amounted in law to a sub-letting by Sital in favour of Kallu of the particular plots occupied by the latter. In a petition of objections presented to this Court under order XLI, rule 26, the plaintiff appellant has challenged the finding on the second issue, but, curiously enough, has not challenged the finding upon the fourth issue. In argument before us it has been contended that the reasoning upon which the learned District Judge has arrived at his finding on the second issue remitted to him is defective, that it proceeds upon an error of law and that it has been arrived at by mislaying the burden of proof. With regard

1918

KALLU v. SITAL.

to the abstract question of law sought to be raised on this appeal, I can only say that I could wish it had arisen in a case in which its consideration was not complicated by other circumstances. However, the position, as I understand it, taken up by the learned District Judge, seems to me substantially correct. It was proved that the letting of the land in question by the zamindar to Matola had taken place many years ago. There was a lease granted as long ago as the year 1864, which is one of the exhibits in the case. Matola, according to the District Judge, was at that time living as a member of a joint Hindu family along with his uncle Dariyao or his first cousin Ganga, or both. He took this land on lease from the zamindar and he threw the profits derived from the land into the common stock of the joint family of which he was a member. The District Judge says that no such action on the part of Matola could have the effect in law of changing the tenancy from a tenancy in favour of Matola to a tenancy in favour of the entire joint family of which Matola was a member. The interest of a non-occupancy tenant or of an occupancy tenant is not transferable except under the restrictions laid down by section 20 of the Tenancy Act (No. II of 901). If it were held that the conduct ascribed by the District Judge to Matola in the present case amounted to throwing his rights as occupancy tenant into the common stock of the joint family, and thereby under the Hindu law making those rights parts of the joint assets of that family, it seems to me that the court would in effect be sanctioning a tranfer of the holding by Matola to a body of persons, namely, the members of the joint family to which Matola at that time belonged. A special Statute like the Local Tenancy Act can and does modify the operation of the ordinary Hindu law in certain matters. The scheme of inheritance laid down by section 22 of that Act is other than that prescribed by the ordinary rules of Hindu law, and no one denies that, within the scope of its operation, section 22 aforesaid overrides and prevails against the ordinary Hindu law of inheritance. It seems to me that by a parity of reasoning it follows that, when the zamindar concerned accepted Matola as his tenant, he could not be compelled by reason of any action taken by Matola to accept the entire joint family as his tenant. Our attention has been drawn in argument

to one or two reported decisions of this Court.* One of these clearly recognizes the fact that a Hindu joint family as such may in its corporate capacity be the tenant of a holding. This proposition I have no desire to dispute. A tenancy of this sort might easily come into existence in favour of the sons of the tenant who originally acquired occupancy rights. And I see nothing in the Tenancy Act to conflict with the view that, if those sons lived together as members of a joint Hindu family, the family as such could be regarded as in possession of the tenancy. In the present case, apart from the abstract question of law involved, we have to meet this difficulty. The findings returned by the learned District Judge are clear and explicit, and the objections taken to them are objections against the train of reasoning by which the District Judge has arrived at those findings. That is what I mean by saying that the question of law involved arises in this case in a complicated form. For the purpose of deciding this case it seems to me sufficient to say that the finding of the learned District Judge on the second of the two issues remitted to him is not inconsistent with his finding on any of the other issues, and is not shown to be vitiated by any error of law. There remains also the finding of the District Judge on the fourth issue. I understand the finding to be in substance this. The joint family has now admittedly been broken up, and apparently this separation took place between Kallu and Sital. At that time Sital recognized that Kallu had a claim upon him in respect of the profits enjoyed by him from this holding, by reason of the fact that Matola had always thrown those profits into the common stock of the joint family. He therefore entered into an arrangement by which he gave Kallu the right to certain specific plots, making up one-half of the area of the holding, and undertook not to demand from Kallu more rent than he would himself have to pay to the zamindar on account of this one-half of the entire holding. The rent to the zamindar continued to be paid by Sital and receipts were made out in his name. In the absence of any plea in the appellant's petition before us, presented under order XLI, rule 26, against the finding on the fourth issue, I am not sure that the appellant is entitled to ask us to hold that that finding

1918

KALLU v. SITAL.

proceeds upon an error of law. Assuming that point, however, in his favour, it seems to me that the reasoning of the District Judge is correct. For the sake of argument, take the case of an ordinary creditor of an occupancy tenant. That creditor is pressing for payment and is willing to take in satisfaction of his claim such profits as he may be able to make out of one-half of the occupancy holding. The tenant is forbidden by law to transfer his interests as such tenant; but he can sub-let, or he can make an assignment of the profits from year to year. Suppose that he gives his creditor the right to occupy and cultivate for his own benefit certain specific plots, forming part of his holding, and agrees only to take in the way of rent the same sum which he will himself have to pay to the landlord on account of those plots. The transaction amounts virtually to a sub-letting in favour of the creditor. The creditor thereby acquires no rights as against the zamindar, and his rights as against the occupancy tenant are limited by the terms of the contract between them. I think therefore that the finding of the District Judge on the fourth issue remitted to him is correct in law and is decisive of the appeal now before us. I would therefore dismiss the appeal with costs.

WALSH, J.—I agree.

BY THE COURT.—The order of the Court is that the appeal is dismissed with costs.

Appeal dismissed.

1918
January, 16.

Before Sir Henry Richards, Knight, Chief Justice, and Mr. Justice Tudball.

MUHAMMAD NIAZ KHAN, AND OTHERS (PLAINTIFFS) *v.* MUHAMMAD IDRIS KHAN AND ANOTHER (DEFENDANTS)*

Muhammadan law—Pre-emption—Sale disguised as a lease in order to defeat pre-emption—Device not permissible under the Muhammadan law.

In a suit for pre-emption, whether the right is claimed under the Muhammadan law or by virtue of a custom of pre-emption, it is the duty of the Court, if the question is raised, to consider and decide whether the transaction in respect of which the claim is brought is or is not in substance a sale, though it may be disguised in some other form, as for instance, in that of a lease.

There is no rule of Muhammadan law which renders it permissible for a transaction of sale to be framed as a lease so as to avoid claims for pre-emption.

THIS was a suit for pre-emption under the Muhammadan law. A plot of land in the town of Zamania in the district of Ghazipur

* Second Appeal No. 1280 of 1915, from a decree of Ram Prasad, District Judge of Ghazipur, dated the 4th of May, 1915, reversing a decree of Muhammad Muzaffar Imam, Munsif of Ghazipur, dated the 17th of December, 1914.