APPELLATE CIVIL.

Before Mr. Justice Lindsay and Mr. Justice Kanhaiya Lal.

1922
June, 14

AMINA BIBI AND ANOTHER (DEFENDANTS) *v.* SAIYID YUSUF AND ANOTHER (PLAINTIFFS) AND SAIYID ALI ZAFAR AND OTHERS (DEFENDANTS).*

Jurisdiction—Civil and Revenue Courts—Act (Local) No. II of 1901 *(Agra Tenancy Act), section* 202*—Lease for collection of rent and zamindari dues—Effect on position of lessee of avoidance of lease on the ground of fraud.*

A lease granted for the purpose of collection of rent and zamindari dues is not a lease granted for agricultural purposes within the meaning of section 202 of the Agra Tenancy Act, 1901.

In any case, if a lease is void *ab initio* by reason of fraud or of the unsoundness of mind of the lessor, the lessee thereunder cannot be regarded as a tenant, but is merely a trespasser. *Ali Jafar* v. *Phulmanta Kuer* (1), *Raghunath* v. *Ganesh* (2), and *Debi Bakhsh* v. *Ram Dhani* (3), referred to.

THE facts of this case are fully set forth in the judgment of the Court.

Babu *Piari Lal Banerji*, for the appellants.

Maulvi *Iqbal Ahmad* and Munshi *Kamalakanta Verma*, for the respondents.

LINDSAY and KANHAIYA LAL, JJ. :—The dispute in these appeals relates to a 6 annas 4 pies share of the village Bawanda, which originally belonged to Paighambar Bakhsh *alias* Abdullah, a retired Subordinate Judge of these provinces. He had purchased the entire village in the name of his wife Musammat Allarakhi Bibi. She survived Paighambar Bakhsh and had by him two sons, Saiyid Muhammad and Saiyid Mahmud, and a daughter, Musammat Khudeja Bibi. She died in September, 1906. Her son Saiyid Muhammad had died in her life-time, leaving two sons, Saiyid Husain and Saiyid Mohsin. Musammat Khudeja Bibi had died a few days after her, leaving her husband, Saiyid Muhammad Zuber, as one of her heirs. On the death of Musammat Allarakhi, a dispute arose between her grandsons, Saiyid Husain and Saiyid Mohsin, her son Saiyid Mahmud, and Muhammad Zuber, the husband of Musammat Khudeja Bibi, each of whom claimed a right of inheritance to the said property. It was then disputed whether the real owner of that property was Musammat Allarakhi Bibi or her husband Paighambar Bakhsh. The Revenue Court allowed mutation of names to be effected in

* First Appeal No. 139 of 1920, from a decree of Kameshwar Nath, Subordinate Judge of Ghazipur, dated the 6th of April, 1920.

(1) (1915) 13 A. L. J., 843.

(2) (1919) I. L. R., 42 All., 222

(3) (1916) 19 Oudh Cases, 58.

favour of all the claimants without deciding to what share each of them was entitled.

During the life-time of Musammat Allarakhi, Saiyid Ali Zafar used to look after her property, getting a salary of Rs. 15 per mensem. He was her nephew. After her death, he continued to look after that property on behalf of Saiyid Mahmud and obtained a power of attorney from him on the 15th of February, 1908 (Ex. 53). Saiyid Mahmud was living in the village Salempur. Saiyid Ali Zafar lived in the same village. Saiyid Mahmud was married to Musammat Saleha Bibi, the niece of Maulvi Muhammad Usman, a pleader of Jaunpur. By her Saiyid Mahmud had two sons, Saiyid Yusuf and Saiyid Yamin, the plaintiffs in one of the suits which have given rise to these appeals, and a daughter Musammat Mariam Bibi, the plaintiff in the other suit. Musammat Saleha Bibi died on the 6th of March, 1898. The dower due to her by her husband Saiyid Mahmud had remained unpaid. Saiyid Mahmud is described by the plaintiffs as a man of weak intellect and deranged mind (*fatir-ul-aql*). It was also stated that he was unable to look after his affairs and incapable of managing his property. He neglected to look after the maintenance and education of his sons, who obtained an order against him, under section 488 of the Code of Criminal Procedure, for the payment of a monthly allowance of Rs. 15 to them. This order was not, however, obeyed. An application was then made by Maulvi Muhammad Usman, the paternal uncle of their mother, for his appointment as the guardian of their persons, in the court of the District Judge of Ghazipur. It was granted on the 31st of July, 1908. It was held in that proceeding that Saiyid Mahmud was of eccentric habits and incapable of looking after his children. Maulvi Muhammad Usman was, accordingly, appointed as their guardian. The children, thereafter, lived with Maulvi Muhammad Usman at Jaunpur.

Meanwhile, Saiyid Mahmud was making various transfers of the property of his mother, Musammat Allarakhi Bibi, including certain perpetual leases in favour of Saiyid Ali Zafar and other persons. One of these leases was executed on the 22nd of October, 1908, in respect of a 6 annas 4 pies share of the village Bawanda in favour of Saiyid Ali Zafar and Gopal Das, for a period of ten or eleven years. That lease is said to have related to the 6 annas 4 pies share, regarding

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which there was a dispute between Saiyid Mahmud on the one side, and the sons of Saiyid Mahmud and Muhammad Zuber on the other. The latter claimed that the property had really belonged to Paighambar Bakhsh and not to Musammat Allarakhi Bibi, while the case of Saiyid Mahmud was that it was the property of his mother, Musammat Allarakhi. On the same date another lease was granted by Saiyid Husain, Saiyid Mohsin and Muhammad Zuber in respect of the remaining 9 annas 8 pies share in favour of Saiyid Ali Zafar and Gopal Das for a similar period.

When Saiyid Yusuf attained majority, a suit was filed by him, on behalf of himself and as guardian of his minor brother, Saiyid Yamin, for the recovery of the dower due to them and their sister Musammat Mariam Bibi and to their maternal grandfather, Abid Husain, against Saiyid Mahmud. Musammat Mariam Bibi and the heirs of Abid Husain were also impleaded as defendants. Maulvi Muhammad Usman had already withdrawn from the guardianship of Saiyid Yusuf and Saiyid Yamin by an application made by him to the District Judge of Ghazipur on the 1st of May, 1913. The plaintiffs tried to get Saiyid Mahmud declared a lunatic and to have a guardian *ad litem* appointed for the purpose of that proceeding, but the court before which that suit was pending summoned Saiyid Mahmud and, after examining him, came to the conclusion that Saiyid Mahmud was not so devoid of his senses as to be unable to prosecute his defence. It refused, therefore, to appoint a guardian *ad litem* to conduct the defence on his behalf. The suit proceeded to judgment and was eventually decreed on the 22nd of April, 1914 (Ex. KK). In execution of the decree so obtained, an eight-anna share of the village Bawanda was attached, along with some other property belonging to Saiyid Mahmud. During the pendency of the sale proceeding an application (Ex. 24) was made by Musammat Amina Bibi, wife of Saiyid Ali Zafar, alleging that she held a lease in *perpetuity*, granted to her by Saiyid Mahmud, on the 11th of April, 1913, and asking that the existence of that lease might be notified at the time of the sale. She, however, did not produce any evidence in support of her application, which was rejected on the 18th of September, 1915 (Ex. 25). The said property, along with other properties, was sold on the 20th and 21st of September, 1915, and purchased by the present plaintiffs, Saiyid Yusuf and

Saiyid Yamin, for Rs. 41,852, out of which Rs. 17,850 were paid for the eight-anna share of taluqa Bawanda, including certain appurtenant villages.

On the 3rd of December, 1916, the auction-purchasers got possession; but when they applied for the mutation of names in the revenue papers, they were opposed by Musammat Amina Bibi, who claimed to be entitled to remain in possession of the disputed property as a perpetual lessee under the lease of the 11th of April, 1913. Her name had already been entered as a lessee. The Board of Revenue refused to expunge her name. The present suits were thereupon filed, in which the validity of that lease forms the main subject of contention. One of the suits had been filed by Saiyid Yusuf and Saiyid Yamin, the auction-purchasers, the other by Musammat Mariam Bibi, who claims a 1/5th share in the property purchased at auction by the former. She had filed a suit for a declaration of her title to a 1/5th share against her brothers and obtained a decree by compromise against them on the 26th of March, 1917.

The allegation of the plaintiffs in these suits was that Saiyid Mahmud was mentally unsound and incapable of entering into a contract and that, in any event, the lease in question was unenforceable, because it was executed with the object of defrauding the present plaintiffs of the right to recover the dower debt due by him to their mother, Musammat Saleha Bibi. Among the defendants to these suits were Musammat Amina Bibi, her husband Saiyid Ali Zafar, and Gopal Das. Two other persons, Jhagru Rai and Ganga Rai, were also impleaded on the ground that they had obtained a perpetual lease of certain plots of land situated in Bawanda khas from Musammat Amina Bibi and the other co-sharers of the village. Saiyid Mahmud did not appear, but the other defendants controverted the allegations made by the plaintiffs. The finding of the learned Subordinate Judge was that Saiyid Mahmud was of weak intellect, imbecile and not possessed of the ordinary capability of managing his affairs. He did not consider that he was a lunatic, fit to be sent to an asylum, or an insane person dangerous to society; but he thought that his brain was so far deranged and he was so far incapable of managing his affairs as to render the lease granted by him legally unenforceable. He also found that the lease was granted with-

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out any necessity and for no real consideration, and that the rent reserved by the lease was grossly inadequate. One of the pleas raised by the defendants was that the claim for possession and mesne profits was not cognizable by the Civil Court. His finding on that point was against the defendants. Another plea was that the entire claim was barred by limitation, but on that point too the learned Subordinate Judge found against them.

The present appeals have been directed against these findings. The first question for consideration is whether Saiyid Mahmud was of unsound mind at the time he executed the lease in question, and incapable of understanding the nature of the transaction and of forming a rational judgment as to its effect upon his interests.

[After discussing the evidence, their Lordships proceeded.]

All these circumstances confirm the view that the mind of Saiyid Mahmud was deranged and has been so for 15 or 16 years and that he was mentally unfit and incapable of understanding or realizing the effect of the transaction, which Saiyid Ali Zafar managed to secure from him for the benefit of his wife. The learned Subordinate Judge does not expressly say that the lease was void from its inception, but in view of section 12 of the Indian Contract Act the only conclusion we can come to is that the lease was void for want of competency to contract, due to the unsoundness of mind of Saiyid Mahmud, from its very inception.

Assuming for the sake of argument that the lease in question was executed while Saiyid Mahmud was in a lucid moment, the plaintiffs would still be entitled to avoid the lease, because the object of the execution of that lease was to defraud the plaintiffs of the dower debt, to which they were entitled as the heirs of Musammat Saleha Bibi, the wife of Saiyid Mahmud. There is evidence to show that Saiyid Mahmud was aware that a suit for the recovery of that dower debt was going to be filed.

[Their Lordships, after discussing the facts, continued.]

It is immaterial whether Musammat Amina Bibi shared that intention, for even if she did not do so, the fact that the lease was granted to her in perpetuity without any consideration, on a low rent, is sufficient to justify a presumption that she colluded with her husband, Ali Zafar, and Saiyid Mahmud

in obtaining the lease with the object above stated. The plaintiffs are entitled in the circumstances to avoid the lease.

It is next contended on behalf of the defendants (appellants) that a suit for possession of the disputed property and mesne profits was not maintainable in the Civil Court, and reliance is placed in support of that contention on the decisions in *Ram Singh* v. *Girraj Singh* (1) and *Sher Khan* v. *Debi Prasad* (2). In the former case a previous attempt had been made by a person who sought to set aside the lease, said to have been granted by his agent, to eject the lessee by means of a suit for ejectment in the Revenue Court. The existence of a tenancy was similarly admitted by the mortgagee and formally declared by the Revenue Court on a reference being directed by the Civil Court in a suit brought by the mortgagee for the ejectment of the person to whom the mortgagor had granted the lease. A reference has also been made to the decisions in *Badri* v. *Khurshed Ali Khan* (3) and *Jagannath* v. *Drigbijay Singh* (4). But in each of these cases the existence of a tenancy had previously been acknowledged or conceded. The plaintiffs here assert that the contesting defendants were trespassers, and that the lease set up by them was void and unenforceable. The tenancy set up by them was never acknowledged or conceded by the plaintiffs, and if the lease granted by Saiyid Mahmud was void or unenforceable, no tenancy can be deemed to have come into existence by virtue thereof. Subject to the provisions of section 202 of the Agra Tenancy Act (U. P. Act II of 1901), where a tenancy is denied by one party, the validity or otherwise of the document of title on which the other party bases his right can always be determined by the Civil Court.

In *Ali Jafar* v. *Phulmanta Kuer* (5) it was held that a Civil Court was competent to give a declaration as to the existence or non-existence of a tenancy, though it was not competent to determine the nature or class to which the tenant belonged. In *Raghunath* v. *Ganesh* (6) it was similarly held that a suit filed for the ejectment of a tenant on the

(1) (1914) I. L. R., 37 All., 41.
(2) (1915) I. L. R., 37 All., 254.
(3) (1917) 20 Oudh Cases, 182.
(4) (1918) 21 Oudh Cases, 210.
(5) (1915) 13 A. L. J., 843.
(6) (1919) I. L. R., 42 All., 222.

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ground that he was a trespasser was cognizable by the Civil Court, though if the defendant set up a tenancy, the procedure laid down in section 202 of the Tenancy Act (II of 1901) would have to be followed in the absence of any previous determination of that matter by a competent court.

In *Debi Bakhsh* v. *Ram Dhani* (1) it was similarly held that the Civil Court was competent to adjudicate upon the validity of a document of title, though it was not competent to declare the nature of the tenancy claimed by virtue of it.

In the present case the lease was void *ab initio* because Saiyid Mahmud was not competent to enter into a contract at the time the lease was granted. The position of a person holding under such a lease is that of a trespasser, and in the absence of any admission or adjudication as to the existence of a tenancy in any previous proceeding, the defendant must be held liable to ejectment by the Civil Court.

It is also urged on behalf of the defendants (appellants) that even if the lease of the 13th of April, 1913 was void, the defendants, Ali Zafar and Gopal Das, could rely on the earlier lease of the 22nd of October, 1908, as establishing their title to the disputed land as tenants; but the term of that lease has expired, and any rights which might have accrued thereunder were released long ago. The lease granted to Musammat Amina Bibi says so, and in a plaint filed by Saiyid Ali Zafar and Gopal Das against Baldeo Rai and others on the 9th of November, 1917 (Ex. 39), it was expressly admitted that the rights under that lease had been surrendered by the lessees when the lease now in question was executed. Ali Zafar and Gopal Das have not, moreover, appealed from the decree which had been passed against them for possession by the court below; and no such plea can, therefore, be entertained.

Another argument urged on behalf of the defendants (appellants) is that the courts below have erred in not following the provisions of section 202 of the Agra Tenancy Act, requiring the defendants to have the question of their tenancy determined by the Revenue Court. That section states that if in any suit relating to an agricultural holding, instituted in the Civil Court, the defendant pleads that he holds such land as a tenant of the plaintiff or a person in possession of the holding from the plaintiff, the Civil Court shall by an order in writing require the defendant to institute within three months

(1) (1916) 19 Oudh Cases, 58.

a suit in the Revenue Court for the determination of such a question. By section 3 of that Act "land" is defined as meaning land which is let or held for an agricultural purpose, and "holding" is defined as meaning a parcel or parcels of land held under one tenure or one lease or engagement. The lease in dispute was taken by Musammat Amina Bibi for the purpose of collection of rent. It comprised, among other things, the right to collect rent and certain zamindari dues. It was not a lease granted for agricultural purposes within the meaning of section 202; and, as held in *Rani Dhandei Kuar* v. *Chhotu Lal* (1), section 202 has no application. The lessee was a *thekadar* and may be considered to be a tenant, but the property comprised in the lease was not an agricultural holding and the suit was, therefore, not one relating to an agricultural holding so as to make that section applicable.

No question of limitation arises, because the lease was void from its very inception. The claim for possession is within time.

It only remains to consider the claim set up by Jhagru Rai and Ganga Rai on the strength of the lease in perpetuity of 15 bighas of land granted to them by the co-sharers of a 9 annas 8 pies share, and by Musammat Amina Bibi as a lessee of the remainder, on the 16th of July, 1914. The learned counsel who appears for the plaintiffs (respondents) states that the rights of the persons in possession need not be disturbed if those rights can be enforced against the shares of the lessors who own the remaining shares in the village. The plaintiffs have no right to disturb their possession so far as they hold under other co-sharers, but these defendants have no right to hold possession under Musammat Amina Bibi.

We dismiss the appeal accordingly, subject to the reservation that the rights of Jhagru Rai and Ganga Rai under the lease granted to them by certain co-sharers jointly with Musammat Amina Bibi on the 16th of July, 1914, will not be affected, except in so far as that lease was granted to them by Musammat Amina Bibi, nor will they be liable to ejectment in pursuance of this decree unless the land comprised in their lease is allotted by partition to the share of the plaintiffs. The plaintiffs (respondents) will get their costs from

(1) (1921) 19 A. L. J., 890.

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the defendants (appellants). The defendants (appellants) will bear their own costs.

Appeal dismissed.

Before Mr. Justice Walsh and Mr. Justice Ryves.

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PIARI LAL AND OTHERS (DEFENDANTS) *v.* SUNDAR SINGH AND OTHERS (PLAINTIFFS) AND CHHEDA LAL AND OTHERS (DEFENDANTS).*

Hindu Law—Joint Hindu family—Dispute as to alienation of family property —Burden of proof.

Although in the case of a disputed alienation or mortgage of joint family property by the father or *karta* of the family the burden of proving the legality of the transaction rests primarily on the creditor, yet in the case of transactions which go back beyond the stage at which direct evidence can possibly be expected from the creditor, and in the absence of evidence tending to shake confidence in the transactions themselves or in the conduct and care of the manager or of the creditor, the burden is shifted back on to the sons or members of the family who desire to repudiate them. *Banga Chandra Dhur Biswas* v. *Jagat Kishore Acharjya Chowdhuri* (1) referred to.

THE facts of this case sufficiently appear from the judgment of the Court.

Dr. *Surendra Nath Sen*, for the appellants.

The Hon'ble *Syed Raza Ali*, for the respondents.

WALSH and RYVES, JJ. :—In our view this appeal fails. It raises in form a nice question of onus in a case where the law has uncontrovertibly placed the onus of proof to support a mortgage of family property upon the shoulders of the creditor. It is sufficient for the purpose of the preceding statement to refer to the judgment of SIR JOHN STANLEY in the case of *Chandradeo Singh* v. *Mata Prasad* (2), which has received the expressed approval and adoption, if one may use the term of the Privy Council, more than once, and particularly in the case of *Sahu Ram Chandra* v. *Bhup Singh* (3), and we of course faithfully adhere to that decision, which may be said to have a force in India equivalent to statute law.

We adopt also the principle laid down by the Privy Council, as expressed in the concluding words of the opinion of their Lordships delivered by LORD SHAW in the case of *Sahu Ram Chandra* v. *Bhup Singh* (3), where he says that in order to validate a transaction of mortgage of family property by the father or manager there must be not only formal antecedency, but antecedency in date combined with real dissocia-

* First Appeal No. 195 of 1920, from a decree of Hanuman Prasad Varma, Subordinate Judge of Budaun, dated the 31st of March, 1920.

(1) (1916) I. L. R., 44 Calc., 186 : L. R., 43 I. A., 249.

(2) (1909) I. L. R., 31 All., 176.

(3) (1917) I. L. R., 39 All., 437.