

APPELLATE CIVIL

Before Mr. Justice Bennet and Mr. Justice Verma

1938
March, 2

MUHAMMAD SALEH KHAN (DEFENDANT) *v.* NUR FATMA
BEGAM AND ANOTHER (PLAINTIFFS)*

Jurisdiction—Civil and revenue courts—Partition of kothi and some agricultural land appurtenant thereto, situate in a city—Jurisdiction according to whether the house or the agricultural land is the dominant item—Civil Procedure Code, section 66—Benami auction purchase made before the present Code—Whether present Code applies to suit—Proprietary possession for over 12 years by real owner and his heirs—Suit by such heirs—Whether barred by section 66.

A suit for partition of a house and some agricultural land appurtenant to it, situate in the heart of a city but entered in a khewat, will lie in the civil or the revenue court according to whether the house or the land is the dominant item, i.e. whether the dominant characteristic of the property to be partitioned is house property or agricultural property.

A suit now brought in regard to a benami auction purchase, which took place before the present Code of Civil Procedure, is governed not by section 317 of the old Code but by section 66 of the present Code.

Where the facts found were that after a benami auction purchase the real owner was in possession of the house, although the benamidar (who was his wife) also lived with him in it, and thereafter the house was in the possession of the Court of Wards on his behalf for about 24 years, and after his death and on release by the Court of Wards it was in the possession of the defendant on behalf of the heirs of the real owner, but upon a suit being brought by the heirs for partition of the house the defendant changed his front and claimed to be the owner of the house as a donee of the benamidar, it was held that section 66 of the Civil Procedure Code did not bar the suit, as the plaintiffs had acquired an independent title by more than 12 years' proprietary possession.

Mr. A. M. Khwaja, for the appellant.

Mr. M. A. Aziz, for the respondents.

BENNET and VERMA, JJ.:—This is a first appeal by Muhammad Saleh Khan, defendant No. 1, against a

*First Appeal No. 454 of 1935, from a decree of M. A. Nomani, Civil Judge of Aligarh, dated the 16th of July, 1935.

decree of the learned Civil Judge of Aligarh for partition of a building known as the Pili Kothi and a small portion of land, 4 bighas 19 biswas, cultivated, attached to this Pili Kothi. The Kothi and land are situated in what is called the city of Koel, which is really a part of Aligarh city situated in the centre of the city. One of the questions argued on behalf of appellant was that the civil court had no jurisdiction to partition the agricultural land and that a suit should also be brought in the revenue court for partition of the 4 bighas 19 biswas in addition to the present suit in the civil court for partition of the 4 bighas 8 biswas occupied by the Pili Kothi. The argument was based on a cross-examination of plaintiffs' witness Jalaluddin and he admitted that the Pili Kothi was entered in a khewat. All over the province it is common to find that khewats exist for areas which were formerly agricultural but which in some cases are now occupied by houses in towns and cities. We are of opinion that the question of forum should be determined by the dominant characteristic of the property in question. In the present case the Pili Kothi is a property of very considerable value, the valuation of the plaint being Rs.6,000. The Kothi also has 37 shops connected with it. The area of land let for cultivation of a tenant called Chandu is only 4 bighas 19 biswas and even if we applied the high valuation of Rs.100 per bigha the valuation would only be Rs.500. It is clear, therefore, that the kothi is the dominant item in this property and that the agricultural land is merely attached to the Kothi. The map shows that it is in the nature of land appurtenant to the Kothi. The whole property is situated in the heart of the city of Aligarh. We consider that the application of section 233(k) of the Land Revenue Act to determine the forum in the revenue court for the agricultural portion would be a mere technical quibble and that as the dominant characteristic of the property is not agricultural property but house

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property with land attached to the house, the civil court is the proper forum.

The next ground which was argued was that it was proved from the evidence on the record that Mst. Haji Begam was the owner of the property in dispute and the finding of the court below was incorrect.

[A pedigree is here omitted.]

In the plaint it is set out that the Pili Kothi in suit was the property of Yakub Khan and was divided into 78 sihams of which one-third went by a will to Hamida Khatun, the granddaughter of Yakub, and 13 sihams went to the widow leaving a balance of 39 sihams which were divided into 13 shares, 5 brothers taking a double share and 3 sisters taking one share, so that each brother had 6 sihams and each sister 3 sihams. The plaintiffs consist of one sister Nur Fatima, and plaintiff No. 2 Mahmud Ali Khan who claims as having received the shares of two sisters by gifts. The plaint sets out that the zamindari property in villages had been partitioned and the Pili Kothi alone remains joint and should now be partitioned among the heirs of Yakub Khan.

The appellant Muhammad Saleh Khan claimed in his written statement that the Pili Kothi had been sold by auction in execution of a decree against Yakub Khan and at the auction sale it was purchased by Yakub Khan's wife Haji Begam in 1886 and she became the owner in possession and that the contesting defendant appellant and Haji Begam had been in proprietary possession denying the rights of others. It is remarkable that the written statement does not mention how the appellant came to be in possession but he has produced a deed of gift by Haji Begam in his favour dated the 24th of August, 1921, in which she set out that she had property from her husband by right of inheritance and also by means of purchase at a public auction, and she set out the Pili Kothi as her property. She does not state in the deed how she obtained the Pili Kothi but learned counsel suggests that she obtained it by the auction

sale . . . Learned counsel for appellant contended that the name Pili Kothi was intended but the actual words are Kothi Neel and there is no doubt that Pili Kothi was not written in these two documents . . . We hold that the property in question is the same property which was sold by auction in 1886 to Haji Begam.

The argument for appellant is that the provisions of section 66 of the Civil Procedure Code apply as the suit is brought when Act V of 1908, the present Civil Procedure Code, is in force. Sub-section (1) of section 66 provides: "No suit shall be maintained against any person claiming title under a purchase certified by the court in such manner as may be prescribed, on the ground that the purchase was made on behalf of the plaintiff or on behalf of some one through whom the plaintiff claims." Learned counsel argued therefore that the court below was incorrect in holding that the property belonged to Yakub Khan because the plaintiffs are, according to counsel, barred by this section from claiming the property from Yakub Khan when there is a sale certificate of 1886 in existence in the name of his wife. For his proposition he referred to *Bishan Dial v. Ghazi-ud-din* (1). In that case the plaintiff alleged that property of his was put up for sale in execution of a decree against him and the two defendants at his request purchased the property in their own name and obtained a sale certificate. It was held that the suit could not be exempted from the prohibition contained in section 317 of the Civil Procedure Code of 1882. The section 317 was somewhat narrower than the present section 66 and provided that "no suit shall be maintained against a certified purchaser", whereas the present section 66 states: "No suit shall be maintained against any person claiming title under a purchase certified by the court." The question of whether a suit brought during the currency of the present Civil Procedure Code in regard to an auction sale which took place before that Code is

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governed by it was considered by a Bench of this Court in *Abdul Jalil Khan v. Obed-ullah Khan* (1), and the Bench held that the present Code would apply. That case went to the Privy Council and in *Abdul Jalil Khan v. Obaid-ullah Khan* (2) their Lordships held that it was not necessary to give a decision on this point. Their Lordships alluded on page 684 to a previous decision in *Lokhee Narain Roy v. Kalypuddo Bandopadhyaya* (3) in which it had been held that where the certified purchaser is a plaintiff the real owner, if in possession, and if that possession has been honestly obtained, is not precluded by the corresponding section of the Code of 1859 from showing the real nature of the transaction. They further held: "Now it is clear under these rulings that, while the section protects the certified purchaser, so long as he retains the possession given him by the court, from a suit by the true owner, if he allows the real purchaser 'being the true owner' to get possession, the section does not enable him to sue for possession, because possession has come into the hands of the true owner, who is entitled to it. If then the true owner is subsequently dispossessed by the certified purchaser, is he precluded by the section from suing for recovery of possession? . . . Where, however, as in the present case, the real purchasers have been allowed to remain in adverse possession for more than twelve years before dispossession, they are entitled to sue for possession on the title so acquired under the Limitation Act, and it is unnecessary for them to aver or prove that the auction purchases were made on their behalf."

We now proceed to apply this dictum to the present case. The Pili Kothi was inhabited by Yakub Khan and his wife Haji Begam. When the auction purchase of 1886 took place these two persons continued to live in this house and Yakub Khan died there on the 2nd of June, 1918, and Haji Begam is still living in the house

(1) (1921) I.L.R. 43 All. 416. (2) (1929) I.L.R. 51 All. 675.

(3) (1875) 2 I.A. 154.

In the year 1897 it is admitted and proved that Yakub Khan's property was put under the charge of the Court of Wards and this Pili Kothi was included in that property. No protest was made by Haji Begam at that period that Pili Kothi belonged to her and not to her husband. On the 1st of June, 1917, although the property was still under the Court of Wards Yakub Khan made a will of one-third of his property in favour of Hamida Khatun, the daughter of the appellant Saleh Khan, and he gave her the whole of the Pili Kothi which he considered as his property and equivalent to one-third of the residential property. That will was the subject of litigation, suit No. 264 of 1918, brought by Hamida Khatun minor daughter of the appellant under the appellant as her certified guardian. In that case on behalf of his daughter the appellant advanced her claim under this will of Yakub Khan, thereby basing his claim on the ground that Pili Kothi in 1917 belonged solely to Yakub Khan. The case was decreed in favour of the will by the court below and by the High Court in appeal except that the share of Pili Kothi awarded was one-third. This decree has been taken into account in the present plaint. Now there is an agreement dated the 25th of May, 1921, signed by the appellant Saleh Khan and Yusuf Khan, another heir of Yakub Khan, by which the Court of Wards released the property of Yakub Khan in favour of the legal heirs of Yakub Khan and these two persons took possession of different parts of the property, the appellant taking possession of the Pili Kothi with shops and agricultural land. The agreement was that these two persons were to hold possession and manage the property on behalf of the ten heirs of Yakub Khan. This document was followed in the same year on the 24th of August, 1921, by the deed of gift by Haji Begam in favour of the appellant Saleh Khan of the Pili Kothi. In suit No. 273 of 1932 a claim for share of profits was brought by Isa Khan, one of the heirs, against Saleh Khan appellant and on the

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17th of June, 1932, the appellant filed a written statement. This document sets out in paragraph 9 that Pili Kothi was the residential property of the deceased Yakub Khan and that it was being held by the appellant under the agreement for the heirs of Yakub Khan as set out in paragraph 10, and in paragraph 11 it was stated that the Kothi has not yet been formally partitioned. Now even in 1932 this attitude was taken up by the appellant that his possession was on behalf of the heirs of Yakub Khan. Throughout that suit for profits he never suggested that he was holding on behalf of himself as the donee of Mst. Haji Begam. It is not until the written statement was filed by the appellant in the present case on the 4th of March, 1935, that we have for the first time any claim that the possession of the appellant was on behalf of himself and not on behalf of the heirs of Yakub Khan. Evidence as regards possession is given by some of the witnesses for the plaintiff . . . Evidence was given by Nageshwar Prasad, head clerk of the Court of Wards, in regard to the Pili Kothi having been held by the Court of Wards for the period 1897 to 1921, 24 years. The appellant did not enter the witness-box to give evidence that he had ever been in possession of the property on his own behalf or that his alleged predecessor Haji Begam had been in possession on her own behalf. We consider that the evidence is overwhelming that Haji Begam was never in possession of the property and that for the period of 24 years the property was in possession of the Court of Wards on behalf of Yakub Khan alone and after his death on the release of the property from the Court of Wards it has been in possession of the appellant on behalf of all the heirs of Yakub Khan. Clearly therefore the possession of the property at present is that of the heirs and the plaintiffs are entitled to bring the present suit. The case is an even stronger one as regards possession than that before their Lordships of the Privy Council because in the present case the heirs are still in possession whereas in the case before their

Lordships the heirs had lost possession and the possession was with the representatives of the nominal auction purchaser. 1938

For these reasons we consider that the decree of the court below was correct and we dismiss this first appeal with costs. MUHAMMAD
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FULL BENCH

Before Mr. Justice Bennet, Mr. Justice Iqbal Ahmad, Mr. Justice Collister, Mr. Justice Bajpai and Mr. Justice Ganga Nath

DULAR PANDEY AND ANOTHER (PLAINTIFFS) v. NANDA
BADHAI AND ANOTHER (DEFENDANTS)* 1938
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Agra Tenancy Act (Local Act III of 1926), sections 24, 25—Occupancy tenant—Succession—Widow succeeding to tenancy during Tenancy Act II of 1901—Widow dying after present Act came into force.

Held by the Full Bench (BAJPAI, J., dissenting) that where an occupancy tenant died while the Agra Tenancy Act of 1901 was in force and was succeeded by his widow under section 22 of that Act, and the widow died after the Agra Tenancy Act of 1926 had come into force, then on her death the devolution of the tenancy would be governed by sub-section (1), and not by sub-section (2), of section 25 of the Agra Tenancy Act, 1926, and accordingly the tenancy would devolve upon the nearest surviving heir of the last male tenant, such heir being ascertained in accordance with section 24.

Mr. *Janki Prasad*, for the appellants.

Mr. *D. P. Malaviya*, for the respondents.

BENNET, J.:—This is a second appeal by the plaintiffs zamindars who brought a suit for ejectment of two persons Sarju and Ram Lal from an occupancy tenancy. The two courts below have dismissed the suit of the plaintiffs. As an important question of law has arisen the second appeal has been referred to a Full Bench of five Judges.

*Second Appeal No. 1163 of 1934, from a decree of S. Nawab Hasan, Additional Civil Judge of Gorakhpur, dated the 14th of July, 1934, confirming a decree of Nilaz Ahmad, Munsif of Gorakhpur, dated the 31st of August, 1932.