ceding paragraph that the income shall be chargeable to income-tax in the name of the agent.

We answer question No. 2 in the affirmative. Learned counsel for the Maharaja informed us that in this view of the case he does not want us to answer questions Nos. 1 and 3 so far as the present assessment is concerned, and as counsel for the department does not insist that the said questions should be answered, we refrain from expressing any opinion on them.

Let a copy of our judgment be sent to the Commissioner under the seal of the Court and the signature of the Registrar. The department must pay the costs of this reference. The hearing of the case lasted for more than a day and counsel for the department is allowed six weeks within which to file the certificate We fix his fee at Rs.200.

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## APPELLATE CIVIL



*Before Mr. Justice Iqbal Ahmad and Mr. Justice Verma*

LACHHMINA KUNWARI (PLAINTIFF) *v.* MAKFULA KUNWARI AND OTHERS (DEFENDANTS)*

*Agra Tenancy Act (Local Act III of 1926), section 266—Agra Tenancy Act (Local Act II of 1901), section 194—Co-sharers in zamindari land—Lease by one co-sharer of khudkasht without consent of others—Whether statutory tenant or unlawful possession—Agra Tenancy Act, section 19—Lease executed during pendency of suit relating to the land*—Lis pendens—*Ejectment as trespasser—Jurisdiction—Civil and revenue courts—Agra Tenancy Act, section 44.*

One of the co-sharers of certain agricultural lands made a gift of his share in 1909 to the other co-sharers, and these became the sole owners, but on the breach of certain conditions attached to the gift the donor sued in 1919 for cancellation of the gift. The suit was dismissed in 1920 but was decreed, on appeal, in 1923. During the pendency of the appeal, in 1921, these other co-sharers gave a perpetual lease of the lands. In 1933 the successor in interest of the co-sharer who had made

*Second Appeal No. 57 of 1936, from a decree of Muhammad Zamir Uddin, Civil Judge of Ghazipur, dated the 22nd of August, 1935, reversing a decree of Brijmohan Lal, Munsif of Mohammadabad, dated the 21st of May, 1934.

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the gift sued in the civil court for the ejectment of the lessees, on the ground that the lease was invalid:

*Held* that as the lessors were not in lawful possession of the gifted share at the time when they executed the lease, they were not competent to grant the lease so far as it affected the donor's share. The mere fact that the suit for cancellation of the gift had been dismissed by the trial court could not render the possession of the donees over the gifted property lawful; the nature of the possession of the donees on the date of the execution of the lease had to be determined by looking at the decree passed by the ultimate court of appeal in that suit, and the lease would be affected by the doctrine of *lis pendens*.

Under section 194 of the former Agra Tenancy Act of 1901, as under section 266 of the present Act, where a plot was owned by two or more co-sharers the right to grant a lease could be exercised jointly by them all, or not at all. A lease granted by one co-sharer without the concurrence or consent of the others would be absolutely invalid, even as regards his own share.

As the lease was unauthorised and invalid the lessees did not acquire the rights of statutory tenants under section 19 of the Agra Tenancy Act, which confers statutory rights upon tenants who are admitted as such by the person having the right to let. At the date of the lease the lessors were not the sole owners of the plots, which they claimed to be their khudkasht but of which their possession was wrongful *qua* the share of the donor, and so they had no right to let the plots without the consent of their co-sharer.

It is open to the proprietor of an agricultural land to sue a trespasser for ejectment either in the civil court or under section 44 of the Agra Tenancy Act in the revenue court.

Mr. *G. S. Pathak*, for the appellant.

Mr. *A. P. Pandey*, for the respondents.

IQBAL AHMAD and VERMA, JJ.:—In the litigation that has culminated in the present appeal the cardinal question at which the parties were at issue related to the validity or otherwise of a perpetual lease dated the 23rd of December, 1921. The lease was with respect to various agricultural plots of land situated in six villages in the district of Ballia. These villages were owned in equal shares by three sets of persons. Rudra Narain Rai, the husband of Lachhmina Kunwari plaintiff appellant, was the owner of a one-third share

in each of the six villages, whereas the remaining two-third share in those villages was owned in equal shares by persons who are now represented in the present litigation by defendants first and second sets respectively. The plots covered by the lease were in possession of several occupancy tenants) but it is common ground that before the execution of the lease all those tenants except one died without leaving heirs entitled to succeed under the Tenancy Act (Act II of 1901). One of the plots covered by the lease was in possession of an occupancy tenant who died leaving one Lachhmi Pande as his heir, and though the plaintiff appellant claimed possession over that plot as well, her suit with respect to that plot was dismissed by the trial court and we are no longer concerned with that plot in the present appeal. It is further a matter of admission that the plots in dispute were by mutual arrangement partitioned between Rudra Narain and defendants first set on the one hand and defendants second set on the other and one-third share in each plot towards the south was allotted to defendants second set and the remaining two-third share was allotted to Rudra Narain and defendants first set.

On the 18th of December, 1909, Rudra Narain Rai executed a deed of gift with respect to his entire one-third share in the six villages in favour of some of the defendants first set and the predecessors in interest of the remaining defendants of that set. By virtue of this transfer defendants first set became owners of a two-third share in all the six villages and therefore owners of two-third share in all the plots in dispute towards the north. The donees under the deed of gift covenanted to pay Rs.2,000 a year on account of maintenance to Rudra Narain and to certain ladies and it was stipulated in the deed of gift that the failure to pay this maintenance would entitle the donor to cancel the gift and to take possession of the gifted properties. The donees made default in payment and

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then on the 7th of November, 1919, Rudra Narain and his wife, the present plaintiff, brought a suit for cancellation of the deed of gift, for possession of the property covered by the same and for mesne profits. In that suit all the donees or their representatives in interest were impleaded as defendants. The suit was dismissed by the trial court on the 20th of August, 1920, and a first appeal was filed by the plaintiffs of that suit in this Court. During the pendency of the first appeal the lease referred to above was executed on the 23rd of December, 1921. It is unnecessary to mention specifically the names of the lessors and the lessees as it is sufficient for the purposes of this appeal to assume broadly that the lease was by defendants first set in favour of defendants third set. The lease was with respect to the two-third share in each plot towards the north and it is admitted that on the execution of the lease the defendants third set entered into possession of the plots in dispute and continued to pay all along the rent reserved by the lease.

The first appeal mentioned above was allowed by this Court on the 3rd of January, 1923, and the claim of Rudra Narain and the present plaintiff for cancellation of the gift and for possession of the property covered by the same together with mesne profits was decreed. The decision of this Court was upheld by their Lordships of the Privy Council on the 11th of March, 1927.

Rudra Narain died during the pendency of the litigation just mentioned and was succeeded by Lachhmina Kunwari, the plaintiff appellant.

In the year 1933 Lachhmina Kunwari commenced the action of giving rise to the present appeal. She prayed that the lessees, viz. the defendants third set, be evicted from the plots in suit and that possession be awarded to her jointly with the defendants first set over those plots. She also claimed a decree for mesne profits but that portion of the claim was dismissed by

the trial court and the decree of that court to that extent has become final.

Briefly stated, the case formulated in the plaint was that the lease was vitiated by the doctrine of *lis pendens* and having been executed by defendants first set, who had no title to the one-third share covered by the deed of gift, was invalid. It was further maintained by Lachhmina Kunwari that the lease was invalid even as regards the one-third share of defendants first set in the said plots as they were not competent, without the concurrence of Rudra Narain who was a co-sharer in those plots, to grant a perpetual lease of the plots.

Various written statements were filed by some of the defendants first set and by some of the defendants third set, viz. the lessees, and a number of pleas in bar of the plaintiff's claim were embodied in those statements. The contesting defendants pleaded that the relationship between the plaintiff and the defendants third set was that of landlord and tenants and the suit was not cognizable by the civil court. They maintained that the lease was not affected by the doctrine of *lis pendens* and was valid in its entirety. In this connection the defendants third set laid particular stress on the fact that one of the lessors was a lambardar and was therefore entitled, in the ordinary course of management of the property, to grant the lease. They also placed reliance on the fact that after the death of the occupancy tenants of the plots the defendants first set took peaceful possession of the same and the plots constituted their khudkasht before the execution of the lease. Lastly it was contended that the lease was in any case good to the extent of the share of the lessors, viz. the defendants first party, in the plots in dispute.

The other pleas embodied in the written statements need not be mentioned as we are not concerned with the same in the present appeal.

The issue whether the position of defendants third party was that of plaintiff's tenants was, in view of the

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provisions of section 273 of the Agra Tenancy Act (Act III of 1926), referred by the trial court to the revenue court and that court decided the issue in the negative. On receipt of the finding of the revenue court the trial court overruled the remaining pleas raised in defence and decreed the plaintiff's claim for joint possession along with defendants first set over the plots in dispute.

Most of the contesting defendants appealed in the lower appellate court and that court reversed the decree of the trial court and dismissed the plaintiff's suit. The only question which was argued before, and was decided by, the learned Judge of the lower appellate court was whether the lessees could be ejected by the civil court and whether they were entitled to resist the claim for ejectment. The learned Judge held that, as on the date of the execution of the lease the defendants first set were in possession of the entire two-third share in the plots in dispute, they were, in view of the provisions of section 266 of the Agra Tenancy Act, competent to execute the lease. He observed that the gift executed by Rudra Narain was not a void transaction but was only voidable at the option of Rudra Narain and, as on the date of the execution of the lease no decree for cancellation of the gift had been passed, the possession of defendants first set to the extent of Rudra Narain's share was not wrongful. He emphasised the fact that the plots leased were the khudkasht of defendants first set and held that they had the right to lease out the plots to defendants third set. He disagreed with the finding of the revenue court that the position of the defendants third set was that of trespassers and held that the defendants third set were the statutory tenants of the plots in dispute and could not be ejected by the civil court.

In our judgment the decision of the lower appellate court is bad in law and cannot be sustained.

The decision of the lower appellate court proceeds on the assumption that on the date of the execution of the lease the possession of defendants first set over the share gifted to them was not wrongful. This assumption appears to us to be wholly unfounded. It may be that the failure of the donees to pay the maintenance rendered the gift merely voidable at the option of the donor and not wholly void, but the option to avoid the gift had been exercised by Rudra Narain, the donor, long before the date of the execution of the lease. He had, as already stated, filed the suit for cancellation of the deed of gift and for possession of the gifted property on the 7th of November, 1919. That suit, though dismissed by the trial court, was on appeal decreed by this Court. The mere fact of the dismissal of the suit by the trial court could not render the possession of the donees over the gifted property lawful. In order to determine the nature of the possession of the donees on the date of the execution of the lease one must look to the decree passed by the ultimate court of appeal in the suit filed by Rudra Narain. It has already been stated that Rudra Narain was ultimately granted a decree for possession by ejectment of the donees and for mesne profits. That decree related back to the date of the cause of action with respect to which the suit was brought. It is therefore clear that the possession of the donees over the gifted property from at least the date of the suit filed by Rudra Narain was wrongful.

As defendants first party were not in lawful possession of the gifted share they were not competent to execute a perpetual lease with respect to the same. It is only within the competence of the rightful owner of a property to lease out that property and a trespasser has no such right. The lease, so far as it affects the share of Rudra Narain, is therefore void and not binding on the plaintiff appellant.

The question then arises whether the lease is good to the extent of the share of the lessors, i.e. the defend-

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ants first party. The lease was executed when the Agra Tenancy Act (Act II of 1901) was in force. Section 194 of that Act corresponds to section 266 of the present Tenancy Act (Act III of 1926) and provided that where there were "two or more co-sharers in any right, title or interest, all things required or permitted to be done by the possessor of the same shall be done by them conjointly unless they have appointed an agent to act on behalf of them all." This rule was subject to certain exceptions provided for by that section, but those exceptions have no application to the case before us and need not be considered. The granting of a lease of agricultural plots is permitted by the Tenancy Act and every owner of an agricultural plot of land is therefore competent to grant a lease of the same. But if the plot is owned by two or more co-sharers the right to grant a lease can be exercised jointly by them all or not at all. Each co-sharer has the right to enjoy possession of joint agricultural plots in conjunction with his other co-sharers, but has not the right, without the concurrence of the other co-sharers, to introduce a tenant on the joint plots. It is this principle that has been given legislative sanction by section 194 of the former and by section 266 of the present Tenancy Act. The lease by the defendants first party *qua* their share was, therefore, also invalid.

But it is contended on behalf of the respondents that as defendants first party were in cultivatory possession of the plots leased and those plots constituted their khudkasht when the lease was executed the lease was valid. We find it impossible to accede to this argument. It has already been pointed out that the possession of the defendants first party over the gifted share on the date of the lease was in the capacity of trespassers. It is therefore clear that a wrongful act of defendants first party, viz. the trespass committed by them, enabled them to enjoy cultivatory possession of the plots and to convert the same into their khudkasht. No trespasser

can be allowed to take advantage of his own wrong and therefore the defendants first party could not be clothed with the right to grant a perpetual lease of the plots simply because they were in cultivatory possession of the same.

In *Kunwar Singh* v. *Abdul Ali Khan* (1) it was held that where a co-sharer took some of the joint land in his cultivatory possession and cultivated it for two years as his khudkasht and subsequently executed a perpetual lease of the land without the consent of the other co-sharers, such co-sharers were entitled to joint possession without setting aside the lease. This case is an authority for the proposition that a perpetual lease of a plot cannot be granted by a co-sharer without the consent of his other co-sharers. Much less is a co-sharer who is in wrongful possession of the share of his other co-sharers competent to grant a perpetual lease of the joint plots. The perpetual lease granted by the defendants first party was therefore wholly void.

It remains to consider whether the lower appellate court was right in holding that notwithstanding the invalidity of the lease the position of the defendants third set was that of statutory tenants and they could not be ejected by the civil court. The creation of tenancy is "permitted" by the Tenancy Act and, therefore, the right of a co-sharer to confer tenancy rights in a joint plot is controlled by the provisions of section 194 of the former and section 266 of the present Tenancy Act. In the case before us defendants first party were not the sole owners of the plots in dispute and they could not without the consent of Rudra Narain admit defendants third set as tenants of the said plots. The defendants third set could not, therefore, acquire the rights of statutory tenants in the plots. This was the view taken by this Court in *Panchanan Banerji* v. *Anant Prasad* (2). It was held in that case that where land belonging to three co-sharers was let to the defendant by the agent

(1) A.I.R. 1928 All. 525. (2) (1932) I.L.R., 54 All., 738.

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of only one of them without the consent of the other co-sharers, the defendant, not having been admitted to tenancy by all the three co-sharers, did not acquire the rights of a statutory tenant and was not entitled to retain possession as such.

Moreover, the defendants first set being in wrongful possession of Rudra Narain's share could not confer tenancy rights in the plots so far as Rudra Narain's share was concerned. A person in wrongful possession of land has no right to let that land and cannot consequently create statutory rights by admitting others as tenants. In *Sukhan Singh* v. *Uma Shankar Misir* (1) it was held that section 19 of the Tenancy Act confers statutory rights upon tenants who are admitted as such by the person having the right to let. In the present case the defendants first set had absolutely no right to let out the plots to defendants third set so far as the share of Rudra Narain was concerned and they had similarly no right to let out the plots to the extent of their share without the consent of Rudra Narain.

The learned counsel for the respondents placed reliance on the decisions in *Basdeo Narain* v. *Muhammad Yusuf* (2), *Aziz Fatma* v. *Mukund Lal* (3), *Tapesar Singh* v. *Chhabi Ahir* (4), and *Maula Dad Khan* v. *Radha Kant Thakur* (5), in support of his argument that defendants third set had at least acquired the rights of statutory tenants in the plots in dispute. The cases relied upon by the learned counsel are no authority for the proposition advocated by him. The decisions in *Basdeo Narain* v. *Muhammad Yusuf* (2) and *Tapesar Singh* v. *Chhabi Ahir* (4) relate to the creation of tenancy rights by managers of joint Hindu families and lay down that managers of joint families have the right to let out agricultural plots of land to tenants in the ordinary course of management of the zamindari property. It

(1) [1934] A.L.J. 1229.
(2) (1928) LL.R. 51 All. 285.
(3) [1932] A.L.J. 572.
(4) A.I.R. 1933 All. 631.
(5) [1935] A.L.J. 645.

was further held in these cases that the authority of a manager of a joint Hindu family did not extend to the granting of perpetual lease, but the person to whom such a lease was granted did, notwithstanding the invalidity of the lease, acquire the rights of a tenant. The decisions in these cases turned upon the peculiar position of the managers of joint Hindu families. Such managers represent the entire joint family and are to all intents and purposes agents authorised to act on behalf of the entire family within the meaning of section 194 of the former and section 266 of the present Tenancy Act. The decision in *Maula Dad Khan* v. *Radha Kant Thakur* (1) is also distinguishable on similar grounds. In that case a perpetual lease was granted by the manager of an endowed property. After the death of the manager his successor in office brought a suit for the cancellation of the lease on the ground that the lease was without legal necessity and that the deceased manager had no right to grant the same. He also prayed for possession of the property leased. The lease was declared to be "void and ineffective after the death of" the manager who had granted the same. Nevertheless this Court held that the position of the lessees was not that of trespassers but that of tenants because the late manager had the legal right to admit them to the occupation of the land. This Court, therefore, dismissed the suit for possession and held that the suit against the lessees in regard to possession and mesne pofits was cognizable by the revenue court. The possession of the late manager over the endowed property on the date of the execution of the lease by him was lawful, and, as such, he had the authority to let out the plots leased to tenants. He had, however, exceeded his power as manager by granting a permanent lease. To the extent that he had exceeded his power his action could not be binding on the manager that succeeded him. But as he had the right to let out the land to tenants during his tenure of office as a manager

(1) [1935] A.L.J. 645.

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the position of the lessees could not be that of trespassers. The suit for possession against them was therefore dismissed by this Court. In the case before us the facts are essentially different. It has been pointed out above that the position of defendants first party *qua* the share of Rudra Narain was that of trespassers and therefore they could not admit defendants third party as tenants of the plots in dispute. The decision in *Aziz Fatma* v. *Mukund Lal* (1) was strongly pressed upon us by the respondents' counsel. In that case, during the pendency of a suit for sale of certain zamindari property on the basis of a deed of simple mortgage, the equity of redemption owned by the mortgagors was put to sale in execution of a simple money decree and was purchased by one *H*. The mortgagee eventually obtained a final decree for sale and in execution of the same put the mortgaged property to sale. A notice of the impending sale was served on *H* and within a week of the service of the notice *H* executed a lease of certain plots of land in favour of one *I* for 20 years at a favourable rate of rent. The mortgaged property was thereafter sold and purchased by one *M*. *M* then brought a suit in the civil court for a declaration that the lease was void and for the ejectment of *I*. It was held that the lease could be challenged under the terms of section 52 of the Transfer of Property Act and *M* was therefore granted a declaration that the lease was void as against him. The claim of *M* for possession of the plots leased was, however, dismissed on the ground that the position of *I* was that of a statutory tenant and he could be ejected only under the provisions of the Tenancy Act. This decision is in no way inconsistent with the view that we have expressed above. A mortgagor, notwithstanding the pendency of a suit for sale, remains the owner of the equity of redemption and is in rightful possession of the mortgaged property. He as such has the right, in the ordinary course of the management of the zamindari property, to admit or to

(1) [1932] A.L.J. 572.

eject tenants. This right of the mortgagor comes to an end only after the mortgaged property is sold. In *Aziz Fatma's* case *H* by purchasing the equity of redemption stepped into the shoes of the mortgagors and was rightfully in possession of the plots which he let out to *I*. *I* was, therefore, introduced as a tenant by a rightful owner, and, as such, acquired the rights of a statutory tenant.

Lastly it was contended on behalf of the respondents that the remedy of the plaintiff was by means of a suit under section 44 of the new Tenancy Act and the suit was not cognizable by the civil court. The Full Bench decision of this Court in *Muhammad Muslim* v. *Maharania* (1) furnishes a complete answer to this contention. It was held in that case that a suit by the proprietor of an agricultural land for the ejectment of the defendant on the ground that the latter was a trespasser was entertainable by the civil court notwithstanding the fact that the defendant pleaded that he was a tenant of the plaintiff. The Full Bench pointed out that section 44 was probably enacted in order to allow facilities to an owner of agricultural land in seeking a speedy remedy through the revenue court. In short, it is open to the proprietor of agricultural land either to sue a trespasser for ejectment in the civil court or to avail himself of the speedy remedy provided by section 44 of the new Tenancy Act and to file a suit for ejectment and for damages in the revenue court.

For the reasons given above we allow this appeal, set aside the decree of the lower appellate court and restore the decree of the trial court with costs in all courts.

(1) (1927) I.L.R. 50 All. 130.