Before Mr. Justice Iqbal Ahmad and Mr. Justice Bajpai

MANGAN LAL (PLAINTIFF) *v.* BRAHM DATT AND ANOTHER (DEFENDANTS)*

1939
September, 5

Agra Pre-emption Act (Local Act XI of 1922), section 4(7)—Petty proprietor—Owner of resumed muafi plot—No interest in the joint lands or participation in administration—Joint responsibility for Government revenue alone does not make him a co-sharer.

The plaintiff in a suit for pre-emption was the holder of two resumed muafi plots in the mahal, 14 bighas in area, the revenue assessed thereon being Rs.15 odd. In the Khewat, of 1285 Fasli, the revenue of the resumed muafi land and that of the ordinary zamindari land were lumped up together at the bottom. The wajib-ul-arz of that year showed that there were only two co-sharers in the village, that the provision about pre-emption was with reference to them only, that the plaintiff or his predecessor had no interest in the joint lands of the mahal and could have no hand in the appointment of the patwari or the lambardar and could not be asked to share the village expenses, and that in short the plaintiff or his predecessor was not entitled to take part in the administration of the affairs of the mahal: *Held* that the plaintiff was not entitled to pre-emption, being a petty proprietor as defined by section 4(7) of the Agra Pre-emption Act; the mere fact of joint liability to pay Government revenue did not, in the circumstances, amount to taking part in the administration of the affairs of the mahal and make the plaintiff a co-sharer entitled to pre-empt.

Messrs. *G. S. Pathak, Kamta Prasad* and *Shiv Charan Lal,* for the appellant.

Mr. *M. L. Chaturvedi,* for the respondents.

IQBAL AHMAD and BAJPAI, JJ.:—This is an appeal by Mangan Lal whose claim for pre-emption has been dismissed by the learned Additional Civil Judge of Agra. Defendant No. 2 Chaubey Gulzari Lal sold certain zamindari property specified at the foot of the plaint to Chaubey Brahm Datt, defendant No. 1, and the plaintiff Chaubey Mangan Lal alleged that he was

*First Appeal No. 117 of 1935, from a decree of Zamirul Islam Khan, Additional Civil Judge of Agra, dated the 9th of October, 1934.

1939

MANGAN LAL v. BRAHM DATT

a co-sharer in mauza Chandarpur where the property sold was situate and that his name was recorded in the khewat. Defendant No. 1 was said to be a stranger. It is not necessary for the purposes of the present appeal to go into the other allegations of the plaintiff or to discuss the various pleas taken in the written statement excepting one, namely that the plaintiff was not a co-sharer in mauza Chandarpur as required by the Agra Pre-emption Act and that at the most he could be called a petty proprietor of only particular plots. For that reason the defendant vendee alleged that the plaintiff was not entitled to maintain the suit.

The court below has upheld this contention of the defendant and has dismissed the plaintiff's suit. In appeal before us it is contended that the view taken by the court below is incorrect. Two documents are relevant for the decision of this issue. The first document is the wajib-ul-arz of the village prepared in 1285 Fasli and the second one is the khewat for the same year.

Before we discuss the evidentiary value of these two documents it is necessary to refer to certain provisions of the Agra Pre-emption Act. There is no doubt that on the sale of a share of zamindari, if any wajib-ul-arz prepared prior to the commencement of the Act records a custom, contract or declaration recognizing or declaring a right of pre-emption then a right of pre-emption shall be deemed to exist and under section 12 of the Act co-sharers in the mahal in which the property is situate and co-sharers in the village will have the right to pre-empt. Under section 4, clause (1), "co-sharer" means "any person, other than a petty proprietor, entitled as proprietor to any share or part in a mahal or village, whether his name is or is not recorded in the register of proprietors"; and under section 4, clause (7), "petty proprietor" means "the proprietor of a specific plot of land in a mahal, who as such is not entitled to any interest in the joint lands of the mahal, or to take

part in the administration of its affairs". It is thus clear that every person who is entitled as proprietor to a share or part in a mahal or village will have the right to pre-empt unless he is only a petty proprietor and as such petty proprietor is not entitled to any interest in the joint lands of the mahal or to take part in the administration of its affairs, his proprietary right extending only over specific plots of land in the mahal.

The question that we have got to decide is whether the plaintiff is a mere petty proprietor as held by the court below within the meaning of clause (7) of section 4, or whether he is a co-sharer within the meaning of clause (1) of section 4.

Now we come to a discussion of the two documents mentioned in an earlier portion of our judgment. The wajib-ul-arz consists of four chapters. The first chapter relates to the nature of the mahal and property and customs. The second chapter deals with the rights of shareholders *inter se* on the basis of custom and agreement. The third chapter relates to the rights of under-proprietors and the fourth deals with the rights of tenants in general. It is clear that the under-proprietors are relegated to the third chapter and their rights are mentioned in a chapter of its own. At this stage we might mention that it is common ground that the plaintiff is the son of Genda Lal and is entered in the khewat against serial No. 3, under the heading of resumed muafi-holders. His proprietary interest extends over 14 bighas 8 biswas of land with a Government revenue of Rs.15-13-6.

From the wajib-ul-arz it appears that there is no joint land in which the plaintiff might be considered to have any interest. The khewat does not speak of any *shamilat* land. Our attention was not drawn by learned counsel for the appellant to any piece of evidence from which we could infer that the plaintiff was entitled to any interest in the joint lands of the mahal. All that was argued was that he was entitled to take part in the

1939

MANGAN LAL v. BRAHM DATT

administration of its affairs. A reference to the wajib-ul-arz shows that in the case of the appointment of a patwari, which occurs under chapter 1, a patwari is appointed with the consent of co-sharers (*hissedaran*). When we come to the custom as regards the distribution of profits we see that a provision is made that the lambardar shall distribute the profits after payment of Government revenue and village expenses to the *hissedar* in accordance with the share entered in the khewat. When we come to the custom regarding the appointment of the lambardar we find that when the lambardar dies the new lambardar is to be appointed with the consent of the *hissedar*. The translation of the wajib-ul-arz on our record is not very accurate. At several places where the original wajib-ul-arz speaks only of *hissedar* in the singular the translation is co-sharers in the plural. Under chapter 2, paragraph 4 we have the usages relating to the management of culturable fallow lands and of rights appertaining thereto and the provision is that the "management in respect of culturable fallow land is made through lambardar in consultation with the co-sharer" and the same is to be found when we deal with the responsibilities of co-sharers regarding village expenses. Here too it is provided that the village expenses are incurred in the following way through the lambardar; that credit is allowed by the *hissedar* in proportion to his share entered in the khewat. It is not necessary to pursue this point any further. The matter is made clear beyond any doubt when we come to paragraph 13 of chapter 2 where a reference is made to the custom regarding the right of pre-emption. The provision there is that "if any co-sharer wants to dispose of his property, he should transfer it first to the next co-sharer (*hissedar sani*)." The accurate translation would probably be the second co-sharer.

We have dealt at some length with the wajib-ul-arz because the proprietors were really two in 1285 Fasli,

namely Ram Das, son of Nand Kishore, and Mst. Kokla, wife of Mul Chand, a predeceased son of Nand Kishore. The entire wajib-ul-arz is so worded that there is a mention of lambardar and co-sharer. This shows that there were only two co-sharers in the village and the rights of only these two co-sharers were being discussed in the wajib-ul-arz and the appointment of the patwari and the lambardar also rested on that basis It is thus evident that the above two proprietors alone had a right in the administration of village affairs.

The plaintiff's predecessor is a resumed muafi-holder and when we come to chapter 3 which deals with the rights of under-proprietors (the expression in the vernacular is *kabizan matahat*) it is said that there is no muafi land but there are two resumed muafi holdings, one of them being that of the predecessor of the present plaintiff, and there is one provision here which runs counter to the provision in the case of proprietors. As we mentioned before, a right of pre-emption is given to the *hissedar sani* if one co-sharer wants to dispose of his property, but in the case of resumed muafi the proprietors have got all sorts of powers of transfer. They seem to be on a different level from "co-sharer."

We have made it clear from what we have said above that the plaintiff or his predecessor had no interest in the joint lands of the mahal and we have been endeavouring to show that the plaintiff or his predecessor were not entitled to take part in the administration of its affairs. The plaintiff could not have any hand in the appointment of the patwari or the appointment of the lambardar, nor could he have been asked to pay the village expenses. It is, however, argued strenuously that the liability to pay Government revenue was joint and that fact, according to the appellant, is enough to take the plaintiff out of the category of such petty proprietors as are not entitled to pre-empt. It is said that that in itself is taking part in the administration of the affairs of the mahal. Our attention in this

1939

MANGAN LAL v. BRAHM DATT

connection is drawn to the khewat of 1285 Fasli where the Government revenue of the resumed muafi land and of the ordinary zamindari is lumped up at the bottom and the contention is that that is an important circumstance in order to decide the crucial point whether the plaintiff has a right to take part in the administration of the affairs of the mahal. Our attention has been drawn to *Sheo Balak Ram* v. *Mathura Prasad* (1) and *Prahlad Prasad* v. *Chameli Kuar* (2). In these two cases the plaintiff was held entitled to pre-empt, but a reference to the facts of the two cases will show that the liability to pay Government revenue jointly was not the deciding factor and the history of the title of the plaintiffs was traced and it became abundantly clear that the predecessors of the plaintiffs in the two cases were co-sharers in the strict sense of the term. It is no doubt true that in certain places SULAIMAN, C. J., said that it might be necessary to find out whether a person takes part in the administration of the affairs of the mahal if the liability to pay Government revenue is joint. On behalf of the respondents our attention was drawn to a decision of their Lordships of the Privy Council in *Ramjimal* v. *Riaz-ud-din* (3) and to a decision of a Bench of this Court in *Munna Lal* v. *Bahadur Lal* (4). There is nothing of importance in the Privy Council case which might have a bearing so far as the point under discussion is concerned, but the dictum of two learned Judges of this Court in *Munna Lal's* case is undoubtedly to the effect that the joint responsibility for Government revenue is not at all a relevant factor in deciding the status of a co-sharer. It is not necessary for us to commit ourselves to this latter view because we have shown above that the entire scheme of the wajib-ul-arz points unhesitatingly to the conclusion that the resumed muafi-holder was not to be on the same footing as a co-sharer and that his status was in no case better than that of a petty proprietor without the right of

(1) [1930] A.L.J. 343.
(2) [1937] A.L.J. 751.
(3) [1935] A.L.J. 973.
(4) [1939] A.L.J. 337.

1939

MANGAN LAL v. BRAHM DATT

having any interest in the joint lands of the mahal or in the administration of its affairs. The khewat also shows that the 20 biswas were all entered against Ram Das and Mst. Kokla and they alone had management of the unculturable land. The two khewats of resumed muafi-holders related only to specific plots of land with specific Government revenue entered against them.

We have given the case our anxious consideration and we have come to the conclusion that the view taken by the court below is correct. We accordingly dismiss this appeal with costs.

APPELLATE CRIMINAL

Before Mr. Justice Mulla

EMPEROR *v.* AKBAR HUSAIN KHAN*

1939 *September*, 11

Criminal Procedure Code, sections 195(3), 476B—*Complaint under section* 476 *by Civil Judge sitting as Special Judge under the U. P. Encumbered Estates Act—Appeal—Forum.*

An appeal from a complaint, made under section 476 of the Criminal Procedure Code, by a Civil Judge sitting as Special Judge under the U. P. Encumbered Estates Act lies to the District Judge and not to the High Court. In taking the action under section 476 the Special Judge acts only as a civil court, irrespective of the fact that the court is further invested with special powers under the U. P. Encumbered Estates Act, and does not pass an order under the Encumbered Estates Act which would be appealable to the High Court under section 45 of that Act. It is merely an order under section 476 of the Criminal Procedure Code by a civil court, and according to the provisions of section 476B read with section 195(3) of the Code the appeal would lie to the District Judge and not to the High Court.

Mr. *M. A. Aziz,* for the appellant.

Appeal heard *ex parte.*

MULLA, J.:—This is an appeal under section 476B of the Criminal Procedure Code. It appears that the appellant Akbar Husain gave evidence in the court of

*Criminal Appeal No. 619 of 1939, from an order of Mathura Prasad, Special Judge of Mirzapur, dated the 8th of July, 1939.