

mere simple money creditor. By the mortgage an interest in immovable property is transferred to the mortgagee and by virtue of that transfer he is entitled to the possession of immovable property. The sale of the rights of a usufructuary mortgagee conveys to the auction purchaser the right to the possession of immovable property mortgaged. In other words, the sale is not only of the debt due to the mortgagee but also of his right to possession of immovable property. The property sold, viz. the mortgagee rights, is, therefore, immovable property. It follows that the plaintiffs acquired good title to the mortgagee rights by their auction purchase of the year 1929 and the sale in favour of the defendant appellant conveyed no right to him.

For the reasons given above we dismiss this appeal with costs.

*Before Sir John Thom, Chief Justice, and Mr. Justice
Ganga Nath*

BHOOP SINGH (DEFENDANT) *v.* SRI RAM (PLAINTIFF) AND
RAM CHARAN SINGH (DEFENDANT)*

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May, 8

Grove—Trees—Grove planted by sole zamindar—Execution sale of the zamindari—Trees of the grove pass by the sale along with the land—No grove-holder's rights are left with the zamindar.

Where a sole proprietor has planted a grove, the trees pass along with the land upon an execution sale of his zamindari.

Where there are more co-sharers than one, a co-sharer may have inferior rights as a grove-holder if he has planted any grove. But in the case of a sole proprietor he can not have inferior rights as a grove-holder as well as full proprietary rights as a zamindar in the land in which he has planted a grove. His rights in the groves or trees planted by him merge completely in his zamindari rights. The trees form part of the soil, and they pass with it.

Mr. *B. S. Darbari*, for the appellant.

Mr. *Sri Narain Sahai*, for the respondent.

*Second Appeal No. 1176 of 1937, from a decree of N. U. Alvi, Civil Judge of Aligarh, dated the 30th of January, 1937, confirming a decree of Ambika Prasad Srivastava, Munsif of Haveli, dated the 22nd of November, 1935.

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THOM, C.J., and GANGA NATH, J.:—This is a defendant's appeal arising out of a suit brought against him and Ram Charan Singh, defendant respondent No. 2, by Sri Ram, respondent No. 1, to recover Rs.200 for the price of the trees alleged to have been cut away by the defendants and for an injunction to restrain them from cutting away any more trees from plots Nos. 59, 60 and 62 of khewat No. 1. The plaintiff's case was that the trees were planted in these plots by the defendants' father Kalyan Singh, who was the sole proprietor of khewat No. 1 in which the plots are, that half of the share of the defendants in the zamindari, including the trees, was sold in an auction sale and purchased by the plaintiff in 1930 and that in May, June, and July, 1935, the defendants cut away some of the trees. The defendants contended that the trees did not pass to the plaintiff with the sale of the zamindari and that they still belonged to them. Both the courts have concurrently found that the trees passed with the zamindari and they belonged to the plaintiff. The plaintiff claimed the price of all the trees which had been cut away by the defendants. The plaintiff's share was only half. Therefore the lower courts awarded him a decree for Rs.50 for half the share in the trees in dispute.

It has been contended by learned counsel for the appellant that the groves did not form part of the zamindari which was sold in execution sale and was purchased by the plaintiff. The trees in these groves remained the property of the defendants even after the plaintiff's purchase. He has relied on *Umrao Singh v. Khacheru Singh* (1). This case deals with the question of proprietary interest of a co-sharer of a zamindari in his residential house. It has no bearing on the present case.

As a rule all the trees belong to the zamindar. In *Khar, Chand v. Chandun* (2) it was observed: "I take it

(1) I.L.R. [1939] All. 607.

(2) (1914) 24 Indian Cases 81.

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to be established by a number of rulings of this Court, of which the cases of *Lachman Das v. Mohan Singh* (1) and of *Ganga Dei v. Badam* (2) may be taken as specimens, that the trees planted by tenants on their holdings will be the property of the zamindars and the tenants will have no transferable right therein. At any rate this will be presumed in the absence of evidence to the contrary."

There is no reason for making a distinction between the trees planted by the zamindar himself and by other persons, except a grove-holder to whom the land has been let out for the specific purpose of planting a grove. Where there are more co-sharers than one, a co-sharer may have inferior rights as a grove-holder if he has planted any grove. But in the case of a sole proprietor he cannot have inferior rights as a grove-holder as well as full proprietary rights as a zamindar in the land in which he has planted a grove. His rights in the groves or trees planted by him merge completely in his zamindari rights. The trees form part of the soil, and they pass with it.

In *Onkar Das v. Chote Lal* (3) it was held: "The grove was clearly an appurtenant to the zamindari and, in the absence of anything to the contrary, the ownership thereof passed to the purchaser at the sale of October, 1898."

The same view was taken in *Hasan Ali Khan v. Azharul Hasan* (4). There the mortgagor had purchased shares in certain groves in an execution sale. He thereafter executed two mortgages hypothecating his entire sixteen anna zamindari together with all appurtenances without any exception or reservation. At the time of the mortgages he was the sole zamindar. The mortgagee brought a suit for sale on the basis of the mortgages, and in execution of the decree for sale she purchased the entire property herself. She then sold all her

(1) (1912) 9 A.L.J. 672.

(2) (1908) I.L.R. 30 All. 134.

(3) (1911) 11 Indian Cases 192.

(4) (1918) I.L.R. 41 All., 45.

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rights to the plaintiff, who brought a suit for possession of the groves. The plea raised in defence was that Ali Mazhar's rights as grove-holder were separate from his zamindari and were not comprised in the mortgages, and consequently had not passed by purchase to the plaintiff. It was observed: "The argument put forward on behalf of the defendants is that this interest was an interest separate altogether from the zamindari and it did not form portion of the mortgaged property, and consequently did not pass to the plaintiff when he purchased under the mortgage decree. It seems to us that this contention is not sound . . . Ali Mazhar was the sole owner of the sixteen anna mahal. At that time there was no reason why it would in any way be for the benefit of Ali Mazhar to keep outstanding the interest of the grove-holders. It is absolutely clear under the circumstances of the present case that the interest of the grove-holders, purchased and acquired by Ali Mazhar, merged in his estate as zamindar."

In a Full Bench case, *Muhammad Sadiq v. Laute Ram* (1), one of the questions was whether the trees standing on a land formed part thereof. It was observed: "In the present case the application for partition distinctly shows that what was asked for was a partition both of the land and of 'everything appertaining to the above land,' which would include trees I think that when the revenue authorities allotted to the defendants the land forming Nos. 143/2 and 143/3, they must be understood to have also awarded to them the trees standing on those lands as part thereof, and that they had jurisdiction to do so."

We, therefore, hold that the groves in dispute appertained to the zamindari, half of which was purchased by the plaintiff. There is no force in the appeal. It is, therefore, ordered that it be dismissed with costs.

(1) (1901) I.L.R. 23 All. 291.