Before Mr. Justice Gokaran Nath Misra.

1925 November, 12.

(1) SECRETARY OF STATE FOR INDIA IN COUNCIL (2) CHAIRMAN, MUNICIPAL BOARD, SULTANPUR (DEFENDANTS-APPELLANTS) *v.* MAHANT HARCHARAN DASS (PLAINTIFF), JAGANNATH AND OTHERS (DEFENDANTS-RESPONDENTS).*

Grove-holder—Jurisdiction of civil and revenue courts—Possession, suit for recovery of, against landlord—Civil Proceedure Code, order VI, rule 18 *and section* 107, *clause* (2)—*Amendment of plaint permissible even in appeal—Invalid deed, how far relevant for collateral purposes.*

Held, that a grove-holder, not being liable to pay rent, is not a tenant within the meaning of section 3, clause 10 of the Oudh Rent Act.

Held further, that if a grove-holder has been ejected illegally by a landlord a suit for possession by him lies in the civil court and not in the revenue court.

Held also, that leave to amend a plaint may be granted at any stage of the proceedings. It may be granted even in appeal.

Where the deed of gift in favour of the plaintiff was invalid for want of registration but the plaintiff had been in possession of the grove for about 40 years since the date of the gift, *held*, that the deed may be invalid but it is relevent for a collateral purpose to show the continuous possession of the plaintiff.

The Government Advocate (Mr. G. H. Thomas) for the appellants.

Mr. *H. K. Ghosh*, for Mr. *A. P. Sen*, and Mr. *Naimullah*, for respondent No. 1.

MISRA, J. :—This is an appeal arising out of a suit for possession of two plots brought by the plaintiff, Mahant Har Charan Dass, against the defendants-appellants, the Secretary of State for India in

* Second Civil Appeal No. 201 of 1924, against the judgement and decree of Asghar Hosain, Subordinate Judge of Sultanpur, dated the 13th of February, 1924, setting aside the decree of Zia Uddin Ahmad, Munsif of Sultanpur, dated the 6th of September, 1922.

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Council, and the Chairman, Municipal Board, Sultanpur and 11 others, in the Court of the Munsif of that place. The plots in dispute are Nos. 1659 (10 bisi) and 1685 (4 biswas 17 bisi) situate in mohalla Paltan Bazar of the town of Sultanpur. The plaintiff alleged that one Shankar Lal was the owner of these plots and had made a gift of them in favour of Baba Ram Saran Das, his predecessor-in-title by a deed of gift, dated the 14th of December, 1883 and that he had remained in possession of the said plots throughout. The Municipal Board, Sultanpur gave these plots to defendants Nos. 3 to 12 for building purposes and thus had caused dispossession of the plaintiff. The plaintiff, therefore, claimed a decree for possession of the land as proprietor. The Secretary of State was also impleaded as a co-defendant in the case, because the Municipal Board took possession of these plots as belonging to the nazul. The suit was contested by the Secretary of State and the Chairman, Municipal Board, Sultanpur, defendant Nos. 1 and 2. The defendants Nos. 1 and 2 denied that the plots belonged to Shankar Lal and also the gift made by him in favour of Baba Ram Saran Das. It was also contended that the gift being unregistered was invalid and conveyed no title to the plaintiff's predecessor-in-title. It was also alleged that the said plots of land belonged to defendant No. 1, being nazul property and under the orders of the Government the Municipal Board was entrusted with the management thereof.

The trial court found that Shankar Lal was not the owner of these plots but was merely a grove-holder and that the deed of gift was inoperative, being unregistered.

On these findings it dismissed the suit.

On appeal the learned Subordinate Judge allowed the plaintiff to amend the plaint by allowing him to claim as a grove-holder, and having found that the plaintiff had continuously been in possession of those plots of land he decreed the plaintiff's claim.

In second appeal the following points were urged on behalf of the Secretary of State:—

(1) that the learned Subordinate Judge was wrong in having allowed the amendment;

(2) that the plots of land did not constitute the grove of Shankar Lal and the plaintiff could not claim the rights of a grove-holder;

(3) that the deed of gift was invalid being unregistered and was, therefore, ineffective to pass any title to the plaintiff: and

(4) that the suit for possession as a grove-holder lay only in the revenue court and not in the civil court.

I now proceed to deal with each of these grounds *in seriatem*.

Regarding the plea of amendment it appears from the record of the lower appellate court that the appeal was set down for hearing on the 11th of December, 1923, on which date the arguments of the parties were heard and the case reserved for judgement. Soon after the conclusion of the arguments the pleader for the appellant put in an application for amendment of the plaint. The court ordered that a copy of the application should be served on the pleader of defendants Nos. 1 and 2 and the case

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was fixed for the hearing of the said application on the 10th of January, 1924. The case came up for hearing on that date and the pleaders of the parties were heard. The pleader for the defendants Nos. 1 and 2 raised no objection to the amendment provided that the plaintiff was not allowed to produce additional evidence. The plaintiff's pleader agreed not to produce any further evidence and the amendment was thereupon allowed. After allowing the amendment the court proceeded to hear the appeal.

It is now urged in appeal that the lower appellate court was not justified in allowing the amendment. I cannot accept the contention. Order VI, rule 18 of the Code of Civil Procedure provides that the court may at any stage of the proceedings allow either party to alter or amend his pleadings in such manner and on such terms as may be just and also such amendments shall be made as may be necessary for the purpose of determining the real question in controversy between the parties. It is, therefore, clear that leave to amend a plaint may be granted at any stage of the proceedings. It may be granted in appeal. Section 107, clause 2 of the Code provides that the appellate court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by this Code on courts of original jurisdiction in respect of suits instituted therein. The learned Subordinate Judge had, therefore, power to allow the plaintiff to amend the plaint. The trial court had held that Shankar Lal was a grove-holder in respect of the plots in suit and there was nothing wrong in allowing the plaintiff to amend his plaint so as to restrict his claim to that of a grove-holder. Moreover, when

the application for amendment came on for hearing on the 10th of January, 1924, no objection was raised on behalf of the present appellants regarding the prayer for amendment made by the plaintiff-respondent. The only objection to the amendment which was raised by the pleader on behalf of the defendants Nos. 1 and 2 was that the plaintiff should not be allowed to put in any further or additional evidence. To this the pleader for the plaintiff-respondent agreed and the amendment was allowed. Under these circumstances I do not see any force in the contention now raised on behalf of the appellants, and therefore decide the point against them.

Regarding the second point it appears to me that the evidence on the record fully justifies the finding arrived at by both the courts below. Exhibit 17 is a copy of the old Settlement Khasra which shows that Nos. 1331 and 1333 belonged to Shankar Lal. No. 1331 is shown as an orchard or *phulwari* containing 16 lemon trees and 50 guava trees. Exhibit 7, which is a copy of the map prepared at the time of the same Settlement shows that the plot of land bore the character of land on which trees then stood. It is established by a comparison of exhibit 7 with exhibit 13 which is a map of the recent Settlement that the new numbers of these plots are 1659 and 1685. It also appears from the report of Peshkar, dated the 4th of May, 1875 (exhibit 9) that the plot No. 1331 was then described as the grove of Shankar Lal. It seems to me, therefore, to be clearly established that the plots in suit bore the character of a grove at the time of the first regular Settlement and that the findings of the courts below on this point are fully justified from the evidence on the record.

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Regarding the third point relating to the invalidity of the deed of gift (exhibit 12) it is no doubt clear that the said deed having been executed on the 14th of December, 1883 after the passing of the Transfer of Property Act (IV of 1882) was invalid for want of registration. It is, however, equally clear that the plaintiff-respondent has been in possession of the grove ever since the date of gift right up to the date of suit for a period of close about 40 years. The deed may be invalid but it is relevant for a collateral purpose to show the continuous possession of the plaintiff. It is clear that Shankar Lal or his heirs could not have claimed back the grove from the plaintiff respondent or his predecessor-in-title after the expiry of twelve years from the date of the execution of the deed of gift. The right to possession became perfected after the expiry of twelve years from the date of the gift. I am supported in this view by a ruling of their Lordships of the Privy Council reported in *Varda Pillai* v. *Jeevarathnammal* (1). At page 249 the following observations in the judgement might well be quoted :—

> "It was not contended before the Board that the above transaction effects a valid gift of the property to Duraisami for such a gift must under section 123 of the Transfer of Property Act, be made by registered deed. Nor having regard to section 91 of the Evidence Act can the recitals in the petitions be used as evidence of a gift having been made. But the defendants' case is that Duraisami, although she may have acquired no

(1) I.L.R., 43 Mad., 243.

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legal title under the transaction referred to, in fact took possession of the property when it was transferred into her name and retained such possession until her death in December 1911, after which date it passed to the defendant, as her successor, and accordingly that the plaintiffs' claim is barred by upwards of twelve years' adverse possession. The High Court upheld this contention, and their Lordships, after considering the evidence, have arrived at the same conclusion."

It is, therefore, clear that by virtue of the fact that the plaintiff respondent and his predecessor-in-title remained in continuous possession of the grove from 1883 right up to the end of 1921, when the suit was brought, they acquired the status of a grove-holder, a status to which Shankar Lal was clearly entitled. I am, therefore, of opinion that although the deed of gift was invalid, being unregistered, yet the defect was cured by the plaintiff having been in continuous possession for more than twelve years.

Regarding the plea of jurisdiction, I am also of opinion that it has no force. The plea depends on the determination of the question as to whether a grove-holder is a tenant as defined in the Oudh Rent Act. In section 3, clause 10 of the Oudh Rent Act a "tenant" is defined as a person, not being under-proprietor, who is liable to pay rent. Shankar Lal being a grove-holder was not liable to pay rent, nor was his predecessor-in-title liable for the same. The plaintiff cannot, therefore, be considered to be a tenant of the plots in suit. I am

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supported in this view by the decision of Pandit KANHAIYA LAL, A. J. C. in *Durga Prasad* v. *Ram Charan* (1). It was held in that case that a grove-holder could not be considered a tenant until there was a contract between him and the landlord to pay rent and that he was entitled to hold possession so long as the land retained the character of a grove and the mere fact that the land was liable to resumption or assessment of rent if brought under cultivation did not make the grove-holder a tenant liable to ejectment. It is, therefore, clear that if a grove-holder, has been ejected illegally by the landlord a suit for possession by him lies in the civil court and not in the revenue court. I, therefore, decide the plea of jurisdiction also against the appellants.

Having decided all the pleas against the appellants, I dismiss the appeal with costs.

Appeal dismissed.

Before Mr. Justice Wazir Hasan and Mr. Justice Muhammad Raza.

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SANT SAHAI (APPLICANT-APPELLANT) *v.* CHHUTAI KURMI AND ANOTHER (OPPOSITE PARTY).*

Civil Procedure Code, section 144—*Execution application—Application for restitution under section* 144 *of the Code of Civil Procedure is an application for execution.*

The respondents obtained a decree for redemption of a usufructuary mortgage against the appellant on payment of a certain sum of money, deposited the amount within the time fixed and obtained possession. On appeal the decree was varied in so far that the amount of the redemption money was raised. The respondents paid the additional amount also

* First Execution of Decree Appeal No. 74 of 1924, against the order of Mahmud Hasan Khan, Subordinate Judge of Fyzabad, dated the 22nd of September, 1924, dismissing the application for restitution under section 144 of the Code of Civil Procedure.

(1) 5 O.L.J., 639.