

APPELLATE CIVIL

Before Mr. Justice Ziaul Hasan

1935

November, 4

MOHAN SINGH AND OTHERS (PLAINTIFFS-APPELLANTS) v.
HIMMAN SINGH AND OTHERS (DEFENDANTS-RESPONDENTS)*

Oudh Rent Act (XXII of 1886), sections 7A and 108(2)—Mortgage by co-sharer of his share—Accrual of ex-proprietary rights—Mortgagor becoming ex-proprietary tenant of entire body of co-sharers—Suit by some co-sharers alone for recovery of rent, whether maintainable—Civil Procedure Code (Act V 1908), order XLI, rule 4—Suit for arrears of ex-proprietary rent—Some defendants entitled to file appeal for themselves and for their co-defendants not joining in appeal—Trial Court's decree, whether binding on them.

A co-sharer, who transfers his share to another, becomes an ex-proprietary tenant not only of his transferee but of the entire body of co-sharers and there can be no distinction between the incidents of ex-proprietary rights arising on a sale and those of such rights arising on a mortgage, because of the fact that a co-sharer is not an absolute proprietor of his *sir* land but owns it jointly with the other co-sharers, and this reason exists both in the case of a sale and of a mortgage. Where, therefore, ex-proprietary rights arise on a mortgage by a co-sharer, some of the co-sharers cannot sue alone for recovery of rent without joining the other co-sharers in the suit. *Chhote Lal v. Ram-adhin* (1), dissented from. *Khanjan Lal v. Paran Singh* (2), *Debi Prasad, v. Bhagwan Din* (3), and *Janki Dass v. Data Ram* (4), followed.

Where some defendants in a suit for arrears of ex-proprietary rent can file an appeal for their own benefit as well as for that of their co-defendants, the fact that one of them has not joined in appeal does not make him bound by the trial Court's decree.

Messrs. *Ram Bharose Lal and Suraj Sahai*, for the appellants.

Mr. *K. N. Tandon*, for the respondents.

ZIAUL HASAN, J.:—These two appeals arise out of two suits brought by the plaintiffs-appellants against the

*Second Rent Appeal No. 75 of 1933, against the decree of Saiyed Ali Hamid, District Judge of Hardoi, dated the 20th of September, 1933, reversing the decree of M. Abdul Majid Khan, Assistant Collector, First Class, Shahabad, Hardoi, dated the 30th of September, 1932.

(1) (1909) 13 O.C., 70.

(3) (1912) 10 A. L. J., 437.

(2) (1922) 1 Luck. Cas., 228.

(4) (1932) 17 R.D., 151.

respondents for arrears of ex-proprietary rent for 1336 to 1339 Fasli under section 108(2) of the Oudh Rent Act. The trial Court decreed both the suits in part but on appeal by the defendants, the learned District Judge set aside the decree of the trial Court and dismissed both the suits on the ground that the plaintiffs were not alone entitled to sue for the ex-proprietary rent of the defendants.

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The plaintiffs in both the suits come here in second appeal and challenge the learned District Judge's finding that they cannot sue to recover the rent in question without joining the other co-sharers in the suit.

There can be no doubt that the law as laid down in *Chhote Lal v. Ramadhin* (1) is no longer good law, and that it is now well established that a co-sharer, who transfers his share to another, becomes an ex-proprietary tenant not only of his transferee but of the entire body of co-sharers—vide *P. Khanjan Lal v. Paran Singh* (2); and *Debi Prasad v. Bhagwan Din and others* (3). The Allahabad case is a decision by the Full Bench and was followed in *Khanjan Lal v. Paran Singh* (2). In *P. Janki Dass v. Data Ram* (4), the Board of Revenue also held that when an ex-proprietary holding falls in, it should be at the disposal of the whole body of the co-sharers and the transferee is not entitled to exercise sole dominion over it.

It is contended by the learned Counsel for the appellants that in all the cases in which it was held that an ex-proprietary tenant is a tenant of all the co-sharers, the ex-proprietary rights arose on account of sale of the zamindari rights and that a distinction should be made between such cases and those in which, like the present case, a co-sharer has only mortgaged and not sold his share. I have heard the learned Counsel's arguments in support of this contention at length, but I am unable to agree with his contention. To my

(1) (1909) 13 O.C., 70.
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mind, there can be no distinction between the incidents of ex-proprietary rights arising on a sale and those of such rights arising on a mortgage. It is because of the fact that a co-sharer is not an absolute proprietor of his *sir* land but owns it jointly with the other co-sharers, that an ex-proprietary tenant has been held to be a tenant of all the co-sharers, and this reason exists both in the case of a sale and of a mortgage. I am, therefore, of opinion that the learned District Judge was right in holding that the plaintiffs could not sue alone for recovery of rent from the defendants-respondents.

Ziaul Hasan,
J.

It was also urged that the respondent No. 4 in appeal No. 76 of 1933 did not join in appeal to the District Judge and that, therefore, he should be held to be bound by the decree of the trial Court. I am unable to agree with this also. Surely some of the defendants could file an appeal for their own benefit as well as for that of their co-defendants and the decree of the learned District Judge should be deemed to govern all the parties.

The appeals are, therefore, dismissed with costs.

Appeal dismissed.

APPELLATE CIVIL

*Before Sir C. M. King, Knight, Chief Judge and
Mr. Justice E. M. Nanavutty*

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CHAUDHRI AMJAD HUSAIN AND OTHERS (PLAINTIFFS-APPELLANTS v. NAWAB ALI AND OTHERS (DEFENDANTS-RESPONDENTS)*)

Civil Procedure Code (Act V of 1908), section 100—Finding of fact based on documents which are instruments of title—Finding, whether can be challenged in second appeal—Settlement Circular No. 20 of 1863—Decree of Settlement Court declaring nature of grant made by Crown, value of—Decree operates as res judicata in subsequent civil suit.

*Second Civil Appeal No. 134 of 1933, against the decree of M. Muhammad Abdul Haq, District Judge of Bara Banki, dated the 23rd of February, 1933, reversing the decree of Pandit Brij Kishen Topa, Additional Subordinate Judge of Bara Banki, dated the 31st of March, 1932.