

APPELLATE CIVIL.

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

DURGA PRASAD AND OTHERS (DEFENDANTS-RESPONDENTS)
v. RAJA RAJGAN MAHARAJA JAGATJIT SINGH
(PLAINTIFF-APPELLANT).*

1928
February,
22.

Settlement court decrees, construction of—Heritable and transferable rights arising under settlement court decrees—Gift by a widow of heritable occupancy rights vested in her—Gift declared invalid by court but donees continue in possession—Sale in execution of a money decree against the donee—Taluqdar's right to recover possession from auction-purchaser—Res judicata—Conclusiveness of a decree in a subsequent case—Civil Procedure Code (Act V of 1908), order II, rule 2—Suit for cancellation of gift as invalid—Proprietor, whether bound to sue for possession too—Subsequent suit for possession whether barred.

Where the tenure acquired in certain land by virtue of a decree of the settlement court is heritable, it is ordinarily transferable, but there may arise circumstances which may convert the heritable and transferable right conferred by such decree into bare occupancy rights, i.e., rights which are heritable but not transferable.

Where it is agreed that the tenure acquired under a settlement decree was heritable tenure and it comes, in the course of succession, to be vested in a widow who makes a gift of it to her daughter's sons and in a suit by the taluqdar the gift is cancelled but the donees are left to continue in possession and to be continually recorded in the village papers as tenants with occupancy rights from year to year, such rights are not liable to sale in execution of a money decree against the donees and if the donees surrender their rights to the taluqdar, the latter is entitled to recover possession from the auction-purchaser.

*Second Civil Appeal No. 264 of 1927, against the decree of Shyam Manohar Nath Shargha, First Subordinate Judge of Kheri, dated the 10th of May, 1928, reversing the decree of Muniruddin Ahmad Kirmani, Additional Munsif of Kheri, dated the 22nd of December, 1926, dismissing the plaintiff's suit.

1928

DURGA
PRASAD
v.
RAJA
RAJGAN
MAHARAJA
JAGATJIT
SINGH.

Where a gift of a right of occupancy made is *ultra vires* and the proprietor sues for cancellation of the gift, he is not under a legal obligation to sue also for the recovery of possession from the hands of the donees and if he omits to do so, his subsequent suit for possession is not barred by order II, rule 2 of the Civil Procedure Code. *Lal Sripat Singh v. Lal Basant Singh* (1), *Hook v. Administrator-General of Bengal* (2), *Ramchandra Rao v. Ramchandra Rao* (3), *Badar Bee v. Habib Merican Noordin* (4), and *Jones Brothers, Ltd. v. Woodhouse* (5), relied upon. *Ajudhia Buksh v. Musamat Rukmin Kuar* (6), referred to.

Mr. *Radha Krishna*, holding brief of Mr. A. P. Sen, for the appellants.

Mr. *Ali Zaheer*, for the respondents.

HASAN and RAZA, JJ. :—This is the defendants' appeal from the decree of the Subordinate Judge of Kheri, dated the 10th of May, 1927, reversing the decree of the Munsif of the same place, dated the 22nd of December, 1926.

The facts are as follows :—

On the 11th of August, 1871, a decree in respect of the plots now in suit together with other immoveable property was passed by the settlement court of the district of Kheri in favour of one Dhondhe Pande as against the taluqdar of the village Kunyan situate in the district of Kheri. The taluqdari rights have now admittedly devolved upon the plaintiff-respondent, the Maharaja of Kapurthala. The interpretation of this decree as to the nature of rights conferred thereby upon Dhondhe Pande is the subject-matter of controversy in the present litigation. This much is agreed that the tenure which Dhondhe Pande acquired in the plots in suit by virtue of the decree of the court of settlement was heritable tenure. Through the course of succession the

(1) (1918) 21 O. C., 180.

(3) (1922) L.R., 49 I. A., 129.

(5) (1923) L.R., Ch. D., 117

(2) (1921) L. R., 48 I. A., 187.

(4) (1909) L.R., A.C., 615.

(6) (1883) L.R., 11 I. A., 1.

plots in suit came to be vested in one Musammat Muna. She held them in the year 1899. On the 3rd of July of that year she executed a deed of gift in respect of these plots in favour of Chhanga, Bansi and Gajodhar. The donees were the sons of Musammat Muna's daughter and it is agreed that they were the rightful heirs to the estate possessed by Musammat Muna in the property in suit.

On the 13th of June, 1901, the taluqdar commenced an action in the Court of the Munsif of Kheri for obtaining a declaration as to the invalidity of the deed of gift of the 3rd of July, 1899. The plaint of that action is before us (exhibit A6). Musammat Muna, the donor, and the three donees were impleaded as defendants. The grounds of the claim were that the plaintiff was the proprietor of the village Kunyan and that under the settlement court decree of the 11th of August, 1871, Dhondhe Pande had acquired a heritable but non-transferable tenure in the plots in suit. The lawful possession of Musammat Muna as successor-in-interest to Dhondhe Pande was recognized and it was further stated that though according to the terms of the decree Musammat Muna had no transferable right in the plots decreed to Dhondhe Pande nevertheless she had made a gift of the same in favour of Chhanga, Bansi and Gajodhar, her daughter's sons, and had placed them in possession thereof. The claim for the relief as to the cancellation of the deed of gift of the 3rd of July, 1899, was further strengthened by the allegation that Musammat Muna had no right of transfer and that if the deed of gift were left unchallenged there was a danger of the proprietor's interest being injuriously affected in future. Musammat Muna did not appear to answer the claim for cancellation of the gift. The three donees, however, did appear and filed an application on the 29th of July, 1901, in which they stated that the taluqdar's claim was correct and right and that the applicants desired to enter confession

1928

DURGA
PRASAD
v.
RAJA
RAJGAN
MAHARAJA
JAGADHIT
SINGH.

*Musan and
Raza, JJ.*

1928

DURGA
PRASAD
v.
RAJA
RAJCAN
MAHARAJA
JAGATJIT
SINGH.

of judgment. They prayed that a decree might be passed in favour of the plaintiff (exhibit A7). Accordingly a decree was made on the 29th of July, 1901, in the following terms:—

“ That the plaintiff’s claim be decreed with costs against the defendants Nos. 2, 3 and 4, section 152, and the defendant No. 1, section 100.” (Exhibit 8.)

*Hasan and
Raza, J.J.*

The donees, Chhanga, Bansi and Gajodhar, were left to continue in possession of the plots in suit and have consistently been recorded in the village papers as tenants with occupancy rights from year to year (exhibits A9 to A23).

The defendants-appellants held a simple money decree against Chhanga and his co-sharers and in execution of that decree they attached the plots in question. The plots were sold by public auction on the 22nd of April, 1924, and purchased by the defendants. The defendants have in consequence of the sale at the auction just now mentioned entered into the possession of the plots in suit. In July, Chhanga and his co-sharers surrendered their rights in the plots in question in favour of the plaintiff taluqdar by means of writing (exhibits 1 and 2). The suit, out of which this appeal arises, asks for the recovery of possession of the plots in suit from the hands of the auction-purchasers, the defendants. As already stated by us, the lower appellate court has made the decree prayed for in favour of the plaintiff-respondent.

The substantial question for decision in the appeal is as to whether Dhondhe did or did not acquire transferable rights in the property in suit under the settlement court decree of the 11th of August, 1871. The lower appellate court is of opinion that on the question of the bare construction of that decree it must be held, having

regard to the decision of their Lordships of the Judicial Committee in *Lal Sripat Singh v. Lal Basant Singh* (1), that the settlement court decree did confer transferable right in the property covered by the decree, which admittedly includes the property in suit. The lower appellate court is further of opinion that the effect of the litigation of 1901 was to convert the heritable and transferable rights conferred by the decree of the court of settlement into bare occupancy rights, i.e., rights which are heritable but not transferable.

This seems to us to be somewhat illogical view of the effect of the proceedings of the year 1901. The decision of their Lordships of the Judicial Committee just now mentioned by us would seem to be almost conclusive in favour of the interpretation which the defendants-appellants desire to be placed on the decree of the court of settlement, dated the 11th of August, 1871, had there been nothing else but the words of the decree to guide us. It appears to us, however, that the question of interpretation of the settlement court decree was the direct and substantial question raised between the parties in the litigation of 1901. In the plaint of that litigation (exhibit A6), to which we have already made a reference, the plaintiff taluqdar clearly and without any ambiguity whatsoever interpreted the settlement court decree to have conferred heritable, but not transferable rights on Dhondhe Pande. That interpretation was accepted as correct and proper by the defendants who held possession of the property in suit under the gift made by Musammatt Muna in their favour and the decree in terms of the admission was passed by the court as already stated. It is true that the matter of interpretation of the decree of the settlement court is not *res judicata* by virtue of the provisions of section 11 of the Code of Civil Procedure for the reason that no issue was raised and no decision was given by the court concerned. But it is equally true that

1928

DURGA
PRASAD
v.
RAJA
RAJGAN
MAHARAJA
JAGATJIT
SINGH.

Hasan and
Raza, JJ.

1923

DURGA
PRASAD
v.
RAJA
RAJGAN
MAHARAJA
JAGATJIT
SINGH.

Hasan and
Raza, JJ.

the principle of conclusiveness of a decree is much wider than the terms of section 11 of the Code of Civil Procedure. This has been the repeated pronouncement of their Lordships of the Judicial Committee, and by way of illustration the following decisions may be mentioned:—*Hook v. Administrator-General of Bengal* (1) and *Ramchandra Rao v. Ramchandra Rao* (2). We hold, therefore, that the decree in which the litigation of 1901 resulted is conclusive on the question of interpretation of the settlement court decree of the 11th of August, 1871.

It was argued in support of the appeal that the decree might be conclusive as to the right of the donees to hold the plots in question under the deed of gift executed in their favour by Musammat Muna; but it is not conclusive as to their own right of transfer which devolved on them in the tenure in suit through the course of inheritance. We are unable to give effect to this argument. The finality of the decree must be effective in respect of all the rights of the defendants in so far as the power of alienation is concerned irrespective of the fact whether they profess to hold the property in suit by virtue of the deed of gift or whether the right to hold the same devolved on them by way of inheritance. Estoppel by record operates as an estoppel to the whole right and not to a fragment of it which might be given effect to or repelled by the decree of court:—*Badar Bee v. Habib Merican Noordin* (3) and *Jones Brothers Ltd. v. Woodhouse* (4).

It was also argued that in the present suit the relief of recovery of possession was barred by order II, rule 2, of the Code of Civil Procedure. It was contended that the plaintiff-respondent should have sought the relief of possession as against the donees of Musammat Muna in

(1) (1921) L.R., 48 I.A., 187.

(2) (1922) L.R., 49 I.A., 129.

(3) (1909) L.R., A.C., 615.

(4) (1923) L.R., Ch. D., 117.

the litigation of the year 1901. We find no substance in this argument. On the interpretation of the settlement court decree as concluded by the judgment of 1901 the act of transfer by Musammat Muna was *ultra vires*, and by the force of the same judgment the donees could not be treated to have lawfully entered into the possession of the plots in suit by virtue of that transfer. But the outstanding fact remains that they were in possession and their possession was recognized by the proprietor of the village as the frame of the claim of 1901, and the subsequent events unequivocally establish. It appears to us that the proprietor was under no legal obligation to sue for the recovery of possession of the plots in suit from the hands of Chhanga, Bansi and Gajodhar. Not only that, but they being the rightful heirs to the estate of inheritance which would have opened on the death of Musammat Muna had she died on the date when she put them in possession of the plots in suit it must be held that the estate of inheritance was accelerated in their favour in the circumstances of the case and though the transfer was invalid the nature of their possession in law must be treated as an acceleration of their rights as heirs at law. In this connection we may refer to the principle of the decision of their Lordships of the Judicial Committee in the case of *Ajudhia Buksh v. Musammat Rukmin Kuar* (1). These were the only matters which were argued at the hearing of this appeal.

The appeal fails, and is dismissed with costs.

Appeal dismissed.

1928

DURGA
PRASAD
v.
RAJA
RAJGAN
MAHARAJA
JAGATIT
SINGH.

*Hasan and
Raza, JJ.*

(1) (1888) L.R., 11 I.A., 1.