

1935

GULAI
v.
SIRPALZatul Hasan,
J.

name alone in respect of the plot in question. What is very significant is that the defendant-respondent had to admit that he never paid rent for the plot in suit, and the plaintiff's evidence shows that it is he who has been paying rent to the zamindar.

In view of all the above circumstances, I am clearly of opinion that the finding of the trial Court was correct. The appeal is, therefore, allowed with costs, the decree of the lower appellate Court set aside and that of the Court of first instance restored.

Appeal allowed.

APPELLATE CIVIL

Before Sir C. M. King, Knight, Chief Judge

1936
March, 17

BHIKHARI SINGH (DEFENDANT-APPELLANT) v. BADRI,
PLAINTIFF, AND ANOTHER (DEFENDANT-RESPONDENTS)*

Oudh Laws Act (XVIII of 1876), section 9(1)—Pre-emption—Under-proprietary khata—Sub-division of under-proprietary tenure—Co-sharers in khata, whether co-sharers in sub-division—Pre-emptor, whether has prior right if a relation of vendor—"Sub-division", meaning of—Sub-division, whether includes under-proprietary khata.

An under-proprietary *khata* is a component part of the under-proprietary tenure and is a sub-division within clause (1), section 9, Oudh Laws Act. So when the property sold forms part of an under-proprietary *khata*, and both the pre-emptor and the vendee are co-sharers in that *khata*, they are co-sharers in a "sub-division" of the under-proprietary tenure under the said clause (1), but the pre-emptor, if he is a relation of the vendor, has a preferential right over the vendee who is not such relation. *Mohammad Abdul Aziz v. Bhagwan Das* (1), followed.

The word "sub-division" in section 9(1), Oudh Laws Act, should be literally construed so as to include an under-proprietary *khata* which is a unit or component part of an under-proprietary tenure in a *mahal*.

*Second Civil Appeal No. 255 of 1934, against the decree of Babu Gauri Shankar Varma, Subordinate Judge of Gonda, dated the 22nd of May, 1934, upholding the decree of Babu Mahesh Chandra, Munsif of Utdaula at Gonda, dated the 28th of February, 1934.

Mr. S. N. Srivastava for Mr. Radha Krishna Srivastava,
for the appellant.

1936

BHIKHARI
SINGH
v.
BADRI

Mr. H. H. Zaidi for Mr. Hyder Husain, for the respondents.

KING, C.J.:—This is a defendant's appeal arising out of a suit for pre-emption. A certain plot No. 1426 in an under-proprietary *khata* No. 4 was sold by Ghirrao to Bhikhari the appellant. One Badri sued for pre-emption and his suit has been decreed.

It is admitted that both Badri, the pre-emptor, and Bhikhari, the vendee, are co-sharers in the under-proprietary *khata* No. 4. The Courts below have concurred in giving preference to the pre-emptor, under the first clause of section 9 of the Oudh Laws Act, on the ground that the pre-emptor is a relation of the vendor whereas the vendee is not a relation.

The only question is whether the provisions of the first clause of section 9 are applicable to the facts of this case.

Under section 9, the right of pre-emption is given on the occasion of the sale of an under-proprietary tenure, or of a share thereof, "1st to co-sharers of the sub-division (if any) of the tenure in which the property is comprised, in order of their relationship to the vendor."

The appellant's argument is that under-proprietary *khata* No. 4 is a separate entity or tenure and is not the *sub-division* of a larger under-proprietary tenure, and therefore clause (1) does not apply.

It is contended that although the pre-emptor is certainly a co-sharer of the under-proprietary tenure in which the property is comprised, he is not a co-sharer of a *sub-division* of that tenure, because there is no sub-division, the tenure or *khata* being a separate entity which has not been divided.

There is undoubtedly some difficulty in applying the language of clause (1) to the facts of the case. Both the Courts below have relied upon the ruling in *Mohammad*

1936

BHIKHARI
SINGH
v.
BADRI

King, O. J.

Abdul Aziz v. Bhagwan Das (1). In that case the property sold was a three-fourths share of an under-proprietary *khata* in which the pre-emptor was a co-sharer. It was held that the language of the first clause was applicable. This amounts to holding that an under-proprietary *khata* can be regarded as a "sub-division" of an under-proprietary tenure, within the meaning of the first clause, although there was no express finding to this effect. It seems to have been assumed that a co-sharer in an under-proprietary *khata* was a co-sharer of a "sub-division" of an under-proprietary tenure, within the meaning of the first clause. The meaning of the word "sub-division" was not discussed.

In the present case the evidence shows that there are five under-proprietary *khata*s in the *mahal*. I think that one under-proprietary *khata* (i.e. *khata* No. 4 in the present case) may be fairly regarded as a "sub-division" of the under-proprietary tenure in the *mahal*. Each *khata* is a component part of the under-proprietary tenure, and it may be held to be a "sub-division" of that tenure without any undue straining of the language. This view is supported by the decision in the ruling cited, although the point now raised was not considered or expressly decided. I think this view is also in accordance with the spirit of the law of pre-emption. When the property sold is included in a small unit, such as a *patti* or *khata*, then the co-sharers in that small unit are given a right of pre-emption in preference to co-sharers of a larger unit, such as a *mahal*, in which the small unit is comprised. So when the property sold forms part of an under-proprietary *khata* it seems reasonable to hold that a co-sharer in that *khata* has a right of pre-emption under the first clause. The word "sub-division" should be liberally construed so as to include an under-proprietary *khata* which is a unit or component part of the under-proprietary tenure in the *mahal*.

In my opinion the decision of the Courts below is correct and I dismiss the appeal with costs.

Appeal dismissed.