

APPELLATE CIVIL

Before Mr. Justice Bisheshwar Nath Srivastava, Chief Judge

DURGA AND OTHERS (DEFENDANTS-APPELLANTS) v. KHAGGA

AND OTHERS (PLAINTIFFS-RESPONDENTS)*

1937
March, 16

United Provinces Land Revenue Act (III of 1901), section 118

—*Partition of mahal—Land occupied by building of one co-sharer allotted to another co-sharer—Rights of co-sharer formerly in occupation of building—Right of co-sharer who has been allotted land containing building on partition.*

Where an *abadi* plot is part of a mahal which was the subject of partition and certain land forming part of it was occupied by a building which at that time was in possession of the defendants who were co-sharers of the mahal, but on partition this land is included in plaintiff's patti, then in the absence of anything to the contrary in the record of the partition case the defendants are under section 118 of the Land Revenue Act entitled to retain it with the building thereon and the plaintiffs have no right to dispossess them. The fact that rent was not assessed on the land would not deprive the defendants of their right to obtain possession of the house. The plaintiffs would however be entitled to the tree standing on the plot and also to possession of any portion of the land which may not be occupied by the buildings. *Sarup Lal v. Lala* (1), relied on.

Mr. D. K. Seth, for the appellants.

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

SRIVASTAVA, C.J.:—This is a second appeal by the defendants against the appellate decree of the learned District Judge of Unao reversing the decree of the learned Munsif of Safipur in that district. It arises out of a suit for possession of the *abadi* plot No. 7 in patti Mula, village Atwa with the constructions and a *nim* tree standing thereon. The parties are agreed before me that there was a perfect partition of the village in 1898 as a result of which the village was divided into

*Second Civil Appeal No. 101 of 1935, against the decree of Raghubar Daval, Esq., I.C.S., District Judge of Unao, dated the 23rd of February, 1935, reversing the decree of Saiyed Hasan Irshad, Munsif of Safipur at Unao, dated the 30th of October, 1934.

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several mahals one of them being mahal Bhikhari in which the parties to the present suit were co-sharers. In 1922 there was an imperfect partition of mahal Bhikhari into several pattis. As a result of this partition the plaintiffs became the owners of *patti* Mula and the defendants became co-sharers in *patti* Bhikhari and *patti* Baqia. It has been found by the lower court, and the finding has not been disputed before me, that the *abadi* plot in suit, namely, No. 7 was allotted at this partition to *patti* Mula. The learned District Judge therefore found that the plaintiffs are the owners of the plot in suit and that the defendants have failed to establish their title to it. He has accordingly decreed the plaintiffs' suit for possession of the plot together with the buildings and the tree on it.

The only contention urged on appeal is that in view of the provisions of section 118 of the United Provinces Land Revenue Act the lower appellate court was wrong in giving the plaintiffs a decree for possession of the plot. It is pointed out that the house No. 4 standing on the plot in suit was formerly in possession of Pancham who sold it to one Sanwal Singh and that on 11th May, 1921, a compromise was arrived at between Sanwal Singh and the defendants as a result of which Sanwal Singh withdrew his possession from the house and delivered possession of it to the defendants. On the basis of these facts it is contended that at the time of the partition of 1922 the defendants were in possession of house No. 4 standing on *hata* No. 7 in suit and could not therefore be ejected from possession of it in view of the provisions of section 118 of the Land Revenue Act. The fact of Pancham having been in possession of the house No. 4 and *hata* No. 7 as a *riyaya* is proved from the *khasra abadi* of the partition of 1898. This fact is also not disputed before me and was so found by the learned District Judge. It has however been argued that there is no evidence to establish the sale of the house by Pancham to Sanwal Singh and that Sanwal Singh had

therefore no title to the house. This may be so but the fact of possession of the house having been transferred by Pancham who was in occupation of it as a *riyaya* to Sanwal Singh and by Sanwal Singh to the defendants is sufficiently clear from the terms of the compromise exhibit A1, dated the 11th of May, 1921. The learned District Judge also while emphasising that Sanwal Singh did not own the house does not appear to deny the possession having passed from him to the defendants. It is also the plaintiffs' own case that the defendants are in possession of the house and have made some additions to it. I have therefore no doubt that at the time of the partition of 1922 the house was in possession of the defendants who were co-sharers in mahal Bikhari though they had acquired possession from a person who was not the owner of the house but at best possessed only the rights of a *riyaya* in it. The question therefore is whether in such circumstances section 118 of the Act will apply to the case and if so whether the civil court should refuse to give the plaintiffs possession when the partition court did not make any order under that section and did not fix any ground rent payable to the co-sharer in whose patti the land was included. As regards the application of section 118 there can be no doubt that the *abadi* plot No. 7 is part of mahal Bikhari which was the subject of partition and that the land forming part of it was occupied by a building which at that time was in possession of the defendants who were co-sharers of the mahal. It seems to me immaterial how they acquired the possession whether by constructing the building themselves or by acquiring it from the *riyaya* who had been in previous occupation of it. Thus in my opinion the conditions requisite for the application of section 118 were satisfied in the case. In *Sarup Lal v. Lala and others* (1), it was held that "where a partition has been effected under the provisions of the United Provinces Land Revenue Act, 1901, and the site

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of the house of one co-sharer has been allotted to the share of another co-sharer the presumption is that the owner of the house was to retain possession of the house. The mere fact that ground rent has not been assessed cannot deprive the owner of the house of his right to it." The same presumption would arise in the present case also. In the absence of anything to the contrary in the record of the partition case the defendants would under section 118 be entitled to retain it with the buildings thereon. The plaintiffs had therefore no right to dispossess them. The fact that the rent was not assessed should not deprive the defendants of their right to obtain possession of the house. The plaintiffs would however be entitled to the tree standing on the plot and also no possession of any portion of the land which may not be occupied by the buildings. With these remarks I allow the appeal with costs, and modify the decree of the lower court to this extent that the plaintiffs' suit is dismissed for possession of the land occupied by the building.

Appeal allowed.

REVISIONAL CRIMINAL

Before Mr. Justice H. G. Smith

1937
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SITA RAM (APPLICANT) v. KING-EMPEROR THROUGH
 RAM DAYAL (COMPLAINANT-OPPOSITE PARTY)*

Criminal revision—Indian Penal Code (Act XLV of 1860), section 70—Revision—Death of applicant—Abatement—Revision against sentence of fine, whether abates by reason of applicant's death.

A revisional application against a sentence of fine would not abate by reason of the death of the applicant. Under the provisions of section 70 of the Indian Penal Code the death of an offender does not discharge any property which would, after his death, be legally liable for his debts, from liability to discharge any fine due from him.

Mr. S. S. Chaudhri, for the applicant.

Mr. G. G. Chatterji, for the opposite party.

*Criminal Revision No. 150 of 1936, against the order of W. Y. Madeley, Esq., I.C.S., Sessions Judge of Lucknow, dated the 8th of October, 1936.