APPELLATE CIVIL

Before Mr. Justice R. L. Yorke

1938 December, 16

SITA RAM AND OTHERS (APPELLANTS) *v.* CHHEDA AND OTHERS (RESPONDENTS)*

Oudh Rent Act (XXII of 1886), section 30A—Proceedings by zamindar under section 30A for acquisition of land for certain purposes—Findings by Deputy Commissioner that plots did not exclusively belong to him—Suit for declaration of title in civil court, challenging findings of revenue court, whether maintainable—Res judicata—*Jurisdiction of civil and revenue courts.*

Where for the purposes of making an order in what is practically an executive matter under section 30A of the Oudh Rent Act, the Deputy Commissioner arrived at certain findings those findings cannot operate as *res judicata*, and a suit for declaration of his title and challenging the findings of the Deputy Commissioner is maintainable in the civil court.

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

Mr. *P. N. Chowdhari*, for the respondents.

YORKE, J.:—This is a second appeal by Sita Ram and others defendants in a suit for declaration.

This suit has arisen out of proceedings under section 30A of the Oudh Rent Act. That section relates to the acquisition of land by a landlord for certain purposes and provides that "A Deputy Commissioner shall, unless there are reasonable grounds to the contrary on the application of a proprietor or under-proprietor who is the landlord of a holding, authorize the acquisition of the holding or part thereof for certain purposes." The present plaintiffs, Chheda and Bhola, made two applications under this section with reference to plots no. 223C, 317B and 612A, all situated in patti Bhawani of khata khewat no. 2 of village Bhaithayeen in which the applicants were co-sharers. The applicants themselves in their application had admitted that there were other

*Second Civil Appeal No. 310 of 1936 against the order of Pt. Tika Ram Misra, District Judge of Hardoi, dated the 26th May, 1936.

co-sharers in the patti, but alleged private partition according to which the plots in dispute were said to belong to their share. In order presumably to decide whether the applicants could be held to be the landlords of the holding in question, the learned Deputy Commissioner framed an issue, "Whether there is a private partition between the applicants and the other co-sharer and whether the plot in dispute belongs to the share of the applicants?" I am not concerned with the question whether any such issue was really necessary, which question depends or whether it has been held that to be entitled as the landlord of a holding the applicant must be in exclusive possession as landlord. At any rate this was the issue and on this issue the learned Deputy Commissioner arrived at the finding that private partition was not proved and therefore the plots in dispute could not be said to belong to the share of the applicants, and he accordingly dismissed the application.

The applicants then instituted the present suit in the civil court for a declaration that the said three plots situated in patti Bhawani, mahal Nanga, village Bhithayeen, were in the exclusive possession (*maqbuza khas*) of the plaintiffs, and that the order in question of the Deputy Commissioner had no adverse effect upon the rights of the plaintiffs.

It will be convenient here to dispose of the first ground argued in the present appeal, namely that the civil court had no jurisdiction to decide the present suit. This question was raised in the trial court which decided it in favour of the plaintiffs and against the defendants. It was again raised in the lower appellate court but was not apparently argued as no mention is made of the point in the judgment. It has been argued again with some force in this Court on the basis that this is a suit to set aside the order of the learned Deputy Commissioner, and that a suit in the civil court, whose object is to set aside an order which a revenue court alone had

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jurisdiction to make, is not maintainable. In my opinion there is no force whatever in this contention. For the purposes of making an order in what is practically an executive matter under section 30A of the Oudh Rent Act, the Deputy Commissioner arrived at certain findings but those findings cannot operate as *res judicata*, and learned counsel has not been able to point out to me anything which would otherwise bar the present suit to obtain a declaration that these plots were in the exclusive possession of the plaintiffs under a private partition, and that their rights as zamindars in exclusive possession of those plots are not adversely affected by the incidental finding of the learned Deputy Commissioner.

The next question which arises, goes to the merits of the case. The question for decision was whether the plots in suit appertained exclusively to the share of the plaintiffs, that share having been separated from the only other share in the patti by a private partition. The decision of this question involves an examination of the previous history of the property as a whole, but I am of opinion that the ultimate decision of the matter is a decision on points of fact and nothing else, and that it is not therefore a decision which can be assailed in second appeal. It appears from the record that the property of patti Bhawani, which amounts to $2\frac{1}{2}$ biswas share out of 20 biswas in mahal Nanga, was originally owned by one Hulli, on whose death it was owned by his sons, Ram Din, Bhawani, Dhanna, Nanda and Parmoon in equal shares. It is said that Parmoon died issueless about 1880 or earlier, and his share was mutated in the name of his widow. This lady, however, disappeared within two years and has not been heard of since, but no steps were taken for mutation of the share recorded in her name. In fact however it was owned by the four remaining sons of Hulli in equal shares. It was alleged that there was a private partition between these four sons, and these particular plots now in suit

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were allotted to the share of Nanda. On the death of Nanda his son, Gobrey sold his one-fourth share to the plaintiffs nos. 1 and 2 who are the successors-in-interest of Ram Din and Bhawani. These plaintiffs thus became the owners of three-fourths share in the whole patti Bhawani. It was inaccurately mentioned in the plaint that Dhanna sold his share to the father of defendant no. 5, Maharaj Singh, but it has been shown as a fact that what happened was that he mortgaged his one-fourth share in favour of Maharaj Singh, who got a foreclosure decree in October, 1896, and ultimately foreclosed and came into possession of the share. It has been clearly established by reference to the documents that the share mortgaged and foreclosed amounted to one-fourth of the whole patti Bhawani. Defendant no. 5, Shiama Kumar Singh was in possession of that share. In defence defendants 1 to 4 who are recorded as co-sharers of 1/20th in the patti, and defendants nos. 6 to 8, who were the tenants in possession of the plots, pleaded that the plots in suit were owned by the plaintiffs jointly with defendants 1 to 4 and the tenant defendants paid part of their rent to the plaintiffs and part to the defendants nos. 1 to 4. It was also alleged that the suit was not cognizable by a Civil Court and a plea of *res judicata* was taken. That plea is however no longer pressed. The learned Deputy Commissioner himself relying on oral and documentary evidence held that there had been a private partition between Ram Din, Bhawani, Dhanna and Nanda and the plots in suit had been allotted to Nanda, from whom they had come to the plaintiffs, hence the plaintiffs besides being the zamindars or owners were exclusively in possession of the plots in suit.

The learned District Judge discussed at some length the question whether there had been a partition as alleged and whether the plots in suit were allotted to Nanda. He has not discussed separately the question of the allotting of these plots to Nanda which presum-

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ably was not argued before him, but after considering the arguments on this question of partition he held that the oral evidence about the alleged partition, that is the actual act of partition, was worthless and could not form the basis of a finding that there was a partition between the four brothers and the said plots fell to the share of one of them. He however agreed with the finding of the Munsif which was based on the fact that Dhanna, the grandfather of defendants nos. 1 to 4, owned not more than a one-fourth share in the patti and mortgaged the whole of that one-fourth share which was foreclosed in favour of the defendant no. 5, Shiama Kumar Singh, with the result that Dhanna had no remaining share in the patti. It was proved by evidence on the record that the whole of the cultivatory share of Dhanna was in the tenancy of one Meharban, from whom alone defendant no. 5 above collected rent. Defendant no. 5 had no connection with the other cultivatory plots situated in the patti and it must necessarily follow that such cultivatory plots, whether they were tenancy plots or in the personal cultivation of the zamindars, were in the exclusive possession of the plaintiffs. It seems to me that although the lower appellate court has not stated the point in very clear terms, it has quite clearly maintained the finding of fact that there was a private partition, and that it was as the result of that private partition that Dhanna mortgaged the whole of his share, and Shiama Kumar Singh came into exclusive possession of that share. It followed that the defendants nos. 1 to 4 had no subsisting interest whatever in the patti and the defendants nos. 6 to 8 could not be heard to say that they were the tenants of defendants 1 to 4 as well as of the plaintiffs. The statement that they paid rent to defendants nos. 1 to 4 was evidently rejected. In my opinion this was certainly a finding of fact which cannot be assailed in second appeal, but I may deal with the chief argument put forward by learned council. His

argument was based on a misreading of the plea of defendant no. 5. Defendant no. 5 stated that the whole of his cultivatory land was in the tenancy of Meharban. The khatauni entries however show the area of Meharban's tenancy land as 2 bighas 19 biswas out of 3 bighas 15 biswas which is the area of the whole share. Hence learned counsel contended that 16 biswas land are not accounted for as having been mortgaged by Dhanna but the very papers to which he has referred, show that there are 15 biswas of grove land entered in the name of Shiama Kumar Singh, and it is clear that this area represents the balance of the area corresponding to the one-fourth share of the original mortgagor Dhanna.

The only other point suggested by him is that Dhanna was not competent to mortgage the whole one-fourth share because the widow of Parmoon had disappeared, but the fact remains that he did do so, and that the defendants nos. 1 to 4 who are the only persons who could make any claim in respect of this act of Dhanna, admitted that Dhanna had mortgaged the whole of his one-fourth share. The defendants appellants as it seems to me can derive no inference in their favour from an argument based on the effectiveness or otherwise of the mortgage by Dhanna to dispose of the whole of the property covered by it. That mortgage has in fact effectively disposed of that property and the appellants are not concerned with that fact.

On the merits also therefore it appears to me that the lower appellate court rightly dismissed the appeal of the defendants. There is no force in this appeal which therefore fails and is dismissed with costs.

Appeal dismissed.