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As Mr. Hardy, on the evidence, has formed an opinion adverse to the accused the case will be laid before the learned District Magistrate who will either try it himself or transfer it to the file of some other Magistrate of the first class.

Reference accepted.

APPELLATE CIVIL

Before Mr. Justice R. L. Yorke

1938

October, 15

SHAIKH BARSATI (DEFENDANT-APPELLANT) *v.* SARJU PRASAD AND OTHERS (PLAINTIFFS-RESPONDENTS)*

Oudh Rent Act (22 *of* 1886), *sections* 108(10) *and* 127—*Specific Relief Act* (*I of* 1877), *section* 31—*Person claiming proprietary rights ejected as tenant by revenue court—Suit for possession in civil court, maintainability of—Jurisdiction of civil and revenue courts—Mutual mistake of fact in sale deed—Purchaser's failure to institute suit for rectification under section* 31, *Specific Relief Act—Purchaser whether deprived of his rights under the sale-deed—Subsequent purchaser with notice of mistake, whether protected by section* 31.

If an under-proprietor can litigate to establish his rights as such in a civil court after he has been ejected by a revenue court, *a fortiori* a proprietor cannot possibly be deprived of that right. A proprietor who has been ejected as a tenant by the revenue court can therefore maintain a suit for possession in the civil court. The civil court cannot set aside the decree of the revenue court but it can, as indicated by the very frame of the proviso to section 108, clause (8) give a decree for possession. *Raja Mohammad Abul Hasan Khan* v. *Prag and others* (1) relied on. *Rustom Singh and others* v. *Mst. Ahmadunnisa* (2) and *Har Nath Singh* v. *Sri Ram* (3) referred to.

Where a sale-deed through the mistake of the parties does not truly express their intention the purchaser is not bound to use for the rectification of the deed under section 31 of the Specific Relief Act. That section being an enabling section the fact that the purchaser did not choose to avail himself of that

*Second Civil Appeal No. 351 of 1936, against the decree of Mr. Hari Kishen Kaul, Additional Civil Judge of Gonda, dated the 30th of July, 1936.

(1) (1917) 20 O.C., p. 8. (2) (1937) O.W.N., 886.
(3) (1929) 6 O.W.N. 1214.

section cannot deprive him of the rights which he obtained under his sale-deed. A subsequent purchaser having notice of the mistake is not protected by the last clause of that section. *Mahadeva Aiyar* v. *Gopala Aiyar and others* (1), *B. Lakshmi Narain and others* v. *Mst. Mohammadi Begam* (2), and *Kesho Singh and others* v. *Roopan Singh and others* (3) relied on.

Mr. *Naim Ullah*, for the appellant.

Mr. *G. D. Khare*, for the respondents.

YORKE, J.:—This is a defendant's second appeal by one Shaikh Barsati in a suit for possession of a cultivatory plot no. 691 in village Ekdanga, district Gonda.

The plaintiffs came into court with a statement that on the 20th February, 1906, they obtained a registered sale-deed Ex. 2, from the defendants 2 and 3 in respect of 13 plots nos. 681 to 693 measuring 8·53 acres. This sale deed therefore included or was intended to include plot no. 691 with an area of 0·90 acre, but by a clerical mistake the number was written in the sale-deed as 651 instead of 691. It was said that the plaintiffs entered into possession of all the plots and remained in possession up to 1935, when they were ejected by the defendant treating them as tenants under section 127 of the Oudh Rent Act. It appears from the evidence that the plaintiffs applied for mutation on the 20th December, 1906, when in spite of the statement of one of the vendors, Ex. 3, in which he admitted that plot no. 691 had been sold and that no. 651 had been written in the sale-deed by mistake, the mutation court by its order of the 28th January, 1907, refused mutation of plot no. 691, telling the vendees plaintiffs that they should get another sale-deed in respect of that plot. The mutation court did not and could not give mutation in respect of plot 651 because that plot was in a different *mahal* and had an entirely different area from that entered in the sale-deed from plot no. 651. This order of the mutation court was made despite the fact

(1) (1911) I.L.R., 34, Mad., 51. (2) (1932) I.L.R., 7 Luck., 454.
(3) (1927) A.I.R., All., 355.

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that the mutation application was not opposed. It is clear that the vendees could at that stage have instituted a suit under section 31 of the Specific Relief Act, but they did no do so, and as has been held in several rulings they were not bound to do so, as that section is an enabling section and the fact of its not being made use of cannot deprive a purchaser of the rights conveyed to him. The only result of this failure on the part of the plaintiffs to institute a suit under section 31 was that they were not recorded in the *khewat* as proprietors of this plot, and in the village *khasra* they were recorded as tenants "bila tasfia lagan", that being the only entry which it was possible for the revenue authorities to make.

On the 12th December, 1932, the defendants 2 and 3, that is the plaintiffs' vendors executed a sale-deed, Ex. A-1, in respect of the whole of their 2 annas 8 pies share whose area is 16·03 acres with the exception of the area mentioned in the prior sale-deed, Ex. 2 in favour of Noor Mohammad the predecessor of the defendant no. 1, the present appellant. The recital in the sale-deed is that in the share of 2 annas 8 pies transferred, the plots in accordance with the *khewat* and the sale-deed in favour of Sarju Prasad and others are exempted, the whole of the rest of the rights and share of 2 annas 8 pies are sold to the vendees, and it is further on stated that the area of the whole 2 annas 8 pies share is 16·03 acres.

In November 1934, the defendant no. 1 issued a notice of ejectment for arrears of rent against the plaintiffs recorded tenants of plot no. 691. He apparently took steps to eject the plaintiffs, treating them as tenants "bila tasfia lagan" under the provisions of sections 53(2), 54 and 55 of the Oudh Rent Act. It appears that the plaintiffs did contest this notice by instituting on the 28th April, 1935, a suit under section 59 to contest the notice, but this they withdrew on the 24th November, 1935, probably in view of the fact that there was little point in proceeding with it as

they had previously on the 25th April, 1935, instituted a declaratory suit in the civil court for a declaration that they were in possession of plot no. 691 as proprietors. This suit had been subsequently changed into a suit for possession by an application of the 11th June, 1935, after the defendant no. 1 had obtained formal possession of the plot.

In answer to the plaintiffs' suit to recover proprietory possession of this plot, the defendant denied the plaintiffs' title under the sale-deed of 1906, and claimed that he was owner of the plot under the sale-deed of 1932. He further claimed protection under section 31 of the Specific Relief Act, and pleaded that the suit was barred by article 96 of the Limitation Act, and that the civil court had no jurisdiction to try the suit. The trial court decided that plot no. 691 had been sold to the plaintiffs as alleged by them. It held that no question of adverse possession arose and gave no finding on the issue which dealt with that question. It held that the suit was not barred by limitation and that it was cognizable by the civil court, but it held in favour of the defendant on the view that his predecessor in title was a purchaser of the property in good faith and for value, and therefore defendant no. 1's right could not be interfered with.

The learned Civil Judge agreed with the finding of the trial court that plot 691 was sold to the plaintiffs under their sale-deed of 1906. It went on to hold that that plot was not sold to the defendant under his sale-deed, Ex. A-1 of 1932, and it further held that even if it were to be held that that plot, which had already been transferred to the plaintiffs and defendants nos. 4 and 5, was also transferred to defendant no. 1's predecessor, Noor Mohammad, under the subsequent sale-deed, it was impossible on the evidence on the record to hold that Noor Mohammad had no notice of the prior sale. It follows that he could not be said to be a purchaser of the property in good faith.

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The question of limitation was not apparently argued before the lower appellate court and has not been argued before me, and from the judgment of the lower appellate court it does not appear that the question of the cognizability of the suit by the civil court was argued before it.

Yorke, J.

The first point which I propose to deal with is the question whether this suit was cognizable by the civil court. Learned counsel contended that the suit for ejectment of the present plaintiffs was a suit under section 127 of the Oudh Rent Act, read with section 108(2) of the same Act, which was cognizable only by the revenue court. He said that in that suit the defen-dants could plead that there was no relationship of landlord and tenant between them and the plaintiffs of that suit, and that they were in possession as land-lords, but he has omitted to notice that the rent court under the Oudh Rent Act has no power to decide that question, and is bound by its own records. It is no doubt a fact as held in *Rustom Singh and others* v. *Mst. Ahmadunnisa* (1) that when a matter exclusively within the jurisdiction of a court of revenue has been tried and decided by the court as between the parties, no subsequent suit would lie in the civil court having for its sole object the annulment of the decree passed by the court of revenue, but it is quite plain that although a revenue court in Oudh is competent to decide a question between a tenant and a sub-tenant exclusively as was done in the case reported in *Har Nath Singh* v. *Sri Ram* (2) a case in which there was a dispute between a tenant and a sub-tenant who himself claimed to be the tenant in chief, section 108, clause (10) directly proves that "nothing in this section shall operate to debar any person claiming to be an under-proprietor who has been ejected under the provisions of section 60 from bringing a suit for possession in a civil court." If an under-proprietor can litigate to

(1) (1937) O.W.N., 886. (2) (1929) 6 O.W.N., 1214.

establish his rights as such in a civil court after he has been ejected by a revenue court, *a fortiori* a proprietor cannot possibly be deprived of that right, and that appears quite clearly from the notes at page 463 of Mata Prasad's Rent Law in Oudh (7th Edition), and the decision of the Privy Council reported in *Raja Mohammad Abul Hasan Khan* v. *Prag and others* (1) where it was held that "in Oudh the court of revenue has the exclusive jurisdiction to determine what is the status of a tenant of lands, and what are the special or other terms upon which such tenant holds, and that the civil courts have the exclusive jurisdiction to decide whether or not a person in possession of lands holds a proprietary or under-proprietary right in the lands."

Yorke, J.

To my mind therefore there is no room for doubt on this point. No doubt the civil court cannot set aside the decree of the revenue court but it can, as indicated by the very frame of the proviso to section 108 clause (8), give a decree to the present plaintiffs for possession.

The second point, which has been urged, is set out in ground no. 3 of the grounds of appeal where it is stated that the learned Civil Judge has misconstrued the sale-deed. Ex. A-1, in holding that the defendant appellant is not the owner of the plot in dispute. There is really nothing to discuss in this point as it has been thrashed out already at great length by the learned Civil Judge. It is quite clear that what was sold to the plaintiffs and defendants nos. 4 and 5 under their sale-deed, Ex. 2, was a series of plots from 681 to 693 with an area of 8·53 acres. It is equally clear that there was a slip of the pen by the writer of this sale-deed whereby no. 691 was incorrectly written as no. 651. In the light of the admission of the vendor, Ex. 3, and the fact that the plaintiffs were in possession of this plot without payment of rent from 1906 to 1932, there can be no room for doubt that the plot had been transferred to the plaintiffs. It remains then to consider the sale-deed of the defendant. By this sale-deed the defend-

(1) (1917) 20 O.C., p. 8.

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ant was sold a share (not plots) having an area of 16.03 acres less the property consisting of plots transferred to Sarju Prasad and others plaintiffs. A reference to the plaintiff's sale-deed was obviously enjoined upon the purchaser Noor Mohammad, defendant no. 1's predecessor, by the very wording of his own sale-deed, and that the sale-deed, Ex. 2, showed an area of 8·52 acres already transferred to the plaintiffs. It further appears from the evidence of the defendant's own witness, D.W. 1, that at the time of the execution of the defendant's sale-deed what was considered was only the area sold, and that inquiry was made from the plaintiffs also. The defendant was therefore perfectly well aware that the only area which he could get and was getting by his sale-deed was 7·50 acres. It seems to me that the learned Civil Judge was fully justified in coming to the conclusion that the defendant was not a transferee of plot no. 691 at all by virtue of his sale-deed, Ex. A-1.

The third point raised is the question whether the last clause of section 31 of the Specific Relief Act has any application to the present case. In view of what has been said already, it seems to me to be clear that the vendee under the sale-deed of 1932 could not but be aware of the whole situation in regard to plot no. 691. He must have looked up the *khewat* and the mutation proceedings and he could not but be aware that the plaintiffs were in possession of plot no. 691, ever since the date of their sale-deed. It seems therefore that the vendee of the 1932 sale-deed did nothing more than gamble on the existence of this known mistake in the plaintiffs' sale-deed, hoping to be able to make a profit out of it. It has been held in *Mahadeva Aiyar* v. *Gopala Aiyar and others* (1) that "a second mortgagee who has advanced money with the knowledge of a mutual mistake of fact between the mortgagor and the first mortgagee as to the subject matter of the first mortgage has notice of that mistake of fact and cannot

(1) (1911) I.L.R., 34 Madras, 51.

plead that he acquired his rights in good faith under section 31, of the Specific Relief Act." It was also held that "where a plaint alleges a mutual mistake of fact extrinsic evidence of such mistake is admissible although no rectification thereof is prayed for." The fact that the plaintiffs did not seek rectification of their sale-deed within 3 years of their knowledge of the mistake cannot be of any assistance to the appellant because as held in *B. Lakshmi Narain and others* v. *Mst. Mohammadi Begam* (1), section 31 is an enabling section and therefore the fact that the plaintiffs did not choose to avail themselves of that section at the time cannot deprive them of the rights which they obtained under their sale-deed. The same view was taken in *Kesho Singh and others* v. *Roopan Singh and others* (2). In my view the learned Civil Judge rightly held that even if this plot was to be held to have been transferred to Noor Mohammad under the sale-deed of 1932, he was not protected by the last clause of section 31 of the Specific Relief Act inasmuch as he was not a purchaser of this property without notice.

In my opinion therefore the lower appellate court rightly allowed the appeal before it and decreed the plaintiffs' suit with costs. There is no force in the present appeal which fails and is dismissed with costs.

Appeal dismissed.

(1) (1932) LL.R., 7 Luck., 454. (2) (1927) A.I.R., All., 355.