

APPELLATE CIVIL.

Before Mr. Justice Broadway and Mr. Justice Eforde.

JAI KARAN AND OTHERS (DEFENDANTS) Appellants

versus

NATHU RAM AND ANOTHER (PLAINTIFFS)

Respondents.

Civil Appeal No 308 of 1922.

Jurisdiction (Civil or Revenue)—Occupancy holding—held by several tenants in common—Death of one of the tenants—Suit by landlords for the share of the deceased tenant—Jurisdiction of Civil Court—Punjab Tenancy Act, XVI of 1887, section 77 (3), proviso—Doctrine of survivorship—whether applicable.

An occupancy tenant sold her rights to two brothers B and N. C., one-third to the former and two-thirds to the latter. B died without leaving a widow or any issue. N. C.'s descendants claimed to succeed to B's share by survivorship, while plaintiffs as the landlords claimed that the occupancy holding *qua* B's share became extinguished.

Held, that as in this case there was no question as to the existence of an occupancy tenancy which required decision, the suit was cognisable by the Civil Courts, notwithstanding the proviso to section 77 (3) of the Punjab Tenancy Act (added by Punjab Act, III of 1912).

Ghulam v. Jowala Singh (1), and *Karam Dad v. Hussain Bakhsh* (2), referred to.

Wadhawa v. Mst. Hassi (3), *Mihan Singh v. Mst. Bhagwan Kaur* (4), and *Parabh Dayal v. Mst. Radho* (5), distinguished.

Held also, that there is a distinction between a joint tenancy and a tenancy in common, the test being whether definite shares had been specified, and that it is only in the case of a joint tenancy that the principle of survivorship applies and therefore the defendants in this case could not succeed to B's share of the holding by survivorship.

(1) 130 P. L. R. 1918.

(3) 73 P. R. 1915.

(2) (1920) 56 I. C. 458.

(4) 111 P. R. 1916.

(5) (1924) All I. R. (Lah.) 636.

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Hako v. Sultan Muhammad Khan (1), and *Mussammai Utmi v. Nihal Chand* (2), followed.

Mohru v. Mutsaddi (3), referred to

Agar Singh v. Dhana (4), and *Chanda Singh v. Jivan Singh* (5), distinguished.

Second appeal from the decree of Lt.-Col. A. A. Irvine, District Judge, Hoshiarpur, dated the 25th October 1921, affirming that of Lala Gunga Ram Mehta, Munsif, 1st Class, Hoshiarpur, dated the 23rd May 1921, awarding the plaintiffs possession of the land in dispute.

MEHR CHAND MAHAJAN, for Appellants.

BADRI DAS AND JAGAN NATH BHANDARI, for Respondents.

JUDGMENT.

BROADWAY J.—This second appeal has arisen in the following circumstances:—The plaintiffs Nathu Ram and Amar Nath sued the defendants Jai Karn and others for possession of certain land. It appears that this land had been held by a woman *Mussammai Parchono* as occupancy tenant under the plaintiffs. *Mussammai Parchono* had sold her rights in the occupancy holding to two brothers Biba and Nihal Chand. In the deed of conveyance Biba was shown as having bought 1/3rd and Nihal Chand 2/3rds of the entire holding. Biba died without leaving a widow or any issue. Nihal Chand's descendants claimed to take Biba's 1/3rd share by right of survivorship and were recorded in the revenue papers as occupancy tenants of the entire holding. The plaintiffs alleged that the tenancy was a tenancy-in-common and not a joint tenancy and that on the death of Biba without issue the occupancy tenancy *qua* his (Biba's) 1/3rd share

(1) (1921) 60 I. C. 513.

(3) 109 P. R. 1894.

(2) (1921) 60 I. C. 862.

(4) 6 P. R. (Rev.) 1902.

(5) 6 P. R. (Rev.) 1917.

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became extinguished. The Courts below concurred in decreeing the plaintiffs' suit on the ground that the tenancy being a tenancy-in-common the defendants could not succeed by right of survivorship to Biba's 1/3rd share. Against that decision this second appeal has been preferred through Messrs. Tek Chand and Mehr Chand Mahajan.

Before the trial Court an objection was raised to the effect that the Civil Courts had no jurisdiction to try the suit. This question was put in issue and decided against the defendants. The trial Court in this connection remarked "Counsel for the defendants has also not pressed it (this issue) at all." In the appeal by the defendants to the learned District Judge the question of jurisdiction was again raised in the grounds but was not argued at the bar. In the memorandum of appeal filed in this Court the question of jurisdiction was not raised but at the hearing Mr. Mehr Chand Mahajan asked to be allowed to argue it as an additional ground. He was permitted to do so and referred to various authorities in support of this contention. The chief one of these is *Wadhawa and others v. Mussamat Hassi and others* (1). In that decision the suit then under consideration was held to fall within the jurisdiction of the Revenue Courts. There, as is clear from the report, the question was as to the nature of the tenancy, that is to say, whether the tenancy was an occupancy one or not. In *Mihan Singh and others v. Mussamat Bhagwan Kaur* (2) Shah Din J. held that having regard to the proviso to sub-section (3) of section 77 of the Punjab Tenancy Act (added by Punjab Act III of 1912) the question whether the defendants were occupancy tenants of the land concerned

(1) 73 P. R. 1915.

(2) 111 P. R. 1916.

having arisen the suit should have been referred for decision to a Revenue Court. The same learned Judge in *Ghulam v. Jowala Singh* (1), a case the facts of which are very similar to the case now before us, held that the Civil Courts had jurisdiction, the reason being that no question as to the existence of an occupancy tenancy had arisen in the suit which related only to the devolution of the occupancy tenancy. He referred to *Mihan Singh v. Mussammat Bhagwan Kaur* (2) and distinguished it. Reference was not made however, to *Wadhawa v. Mussammat Hassi* (3). A similar question arose in *Parabh Dayal v. Mussammat Radho* (4), a case to be found only in an unauthorised report, where Mr. Justice Abdul Raof, while saying that he was inclined to agree with the view expressed in *Ghulam v. Jowala Singh* (1), felt himself bound by the Division Bench decision in *Wadhawa v. Mussammat Hassi* (3). Mr. Badri Das on behalf of the respondents emphasized that in the present case there was no question involved as to the existence of the occupancy tenancy, the question being only as to whether the defendants-appellants had succeeded by right of survivorship to Biba's 1/3rd share of the holding. He further contended that the question of jurisdiction had to be decided entirely on the allegations in the plaint. In support of his contention he cited *inter alia*, *Karam Dad v. Hussain Bakhsh* (5). No doubt, this proposition is to a large extent correct but having regard to the proviso to section 77 (3) referred to above, it is perfectly clear to my mind that when in a suit instituted in a Civil Court a plea is raised which necessitates a decision as to whether an occupancy tenancy exists, that question has to be decided by a Revenue Court.

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After a consideration of all the authorities I am of opinion that the facts of this case are quite different from those in *Wadhawa v. Mussammat Hassi* (1), and that no question as to the existence of an occupancy tenancy requires decision. All that has to be decided in this case is whether on the death of Biba without issue the defendants-appellants are entitled to succeed to his 1/3rd share. Turning to this question it has been found by the Courts below that there was no joint tenancy as between Biba and Nihal Chand, the position between the two brothers being that of a tenancy-in-common. This is a question of fact and Mr. Mehr Chand has not attempted to challenge it. He has urged, however, that the real way to regard the case is to hold that Biba and his brother formed one "tenant" and *qua* the landlord the occupancy tenancy continued in regard to the entire holding. He further contended that an occupancy tenancy was not a true joint tenancy and that even assuming that it was a tenancy-in-common the right of survivorship entitles the defendants-appellants to succeed. In this connection he referred to *Mohru v. Mutsaddi* (2); *Agar Singh v. Dhana* (3) and *Chanda Singh v. Jivan Singh* (4). It is true that some of the remarks made by the Financial Commissioners support Mr. Mehr Chand's contention, but after a careful examination of the judgments in those cases it seems to me that all that was decided in each case was that there had been no partition of the joint tenancy. On the other hand, Mr. Justice Chevis in *Hako v. Sultan Muhammad Khan* (5) and *Mussammat Utmi v. Nihal Chand* (6), after a consideration of the authorities already referred to, came to the conclusion that there was a

(1) 73 P. R. 1915.

(2) 109 P. R. 1894.

(3) 6 P. R. (Rev.) 1902.

(4) 6 P. R. (Rev.) 1917.

(5) (1921) 60 I. C. 513.

(6) (1921) 60 I. C. 862.

distinction between a joint tenancy and a tenancy-in-common, the test being whether definite shares had been specified, and that it was only in the case of a joint tenancy that the principle of survivorship applied. This view appears to me to be correct. There can, in my opinion, be no doubt that when *Mussamat Parchono* sold her occupancy holding to Biba and Nihal Chand, Biba purchasing 1/3rd and Nihal Chand 2/3rds of the entire estate, the tenancy became a tenancy-in-common and that the principle of survivorship did not apply. The view taken by the Courts below is therefore correct and I would dismiss this appeal with costs.

FFORDE J.—I agree.

C. H. O.

Appeal dismissed.

APPELLATE CIVIL.

Before Mr. Justice Broadway and Mr. Justice Fforde.

DEO KARAN DAS (OBJECTOR) Appellant

versus

THE SECRETARY OF STATE, Respondent.

Civil Appeal No. 2327 of 1922.

Land Acquisition Act, I of 1894, sections 30, 54—Three persons claiming to be interested in the property—Dispute as to apportionment referred to District Judge who refused to decide the question as a civil suit was pending between two of the claimants—Whether an appeal is competent from the order of the District Judge and whether that order is legal.

Three persons claimed to have an interest in the land and factory in dispute. One person accepted the award made by the Collector, but the other two objected to it. The Land Acquisition Officer referred the matter to the District Judge including the question as to the apportionment of the amount awarded. The District Judge affirmed the award as to the amount of compensation, but declined to adjudicate on the question of apportionment on the ground that a civil

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