

Hamidullah (dead) by his Legal Representatives and Other

Vs

Sheikh Abdullah and Others

Civil Appeal No. 964 of 1966

(C.A. Vaidialingam, K.K. Mathew JJ)

25.11.1971

JUDGMENT

MATHEW, J. -

1. Appeal is an appeal by special leave from the judgment and decree dated September 30, 1963 passed by the Allahabad High Court in Special Appeal 8/1957, reversing the judgment and decree of a single judge of that court in First Appeal 54/51 from the decree of the trial Court in O.S. 69/12 of 1940.

2. The suit was for partition and recovery of the plaintiff's share in the plaint property. The original plaintiff, one Kundan Lal died during the pendency the litigation and he was represented by his son Kunj Behari Lal and widow Shrimati Dallo. The defendants to the action were four in number. Haji Faqir Bux, son of Haji Khuda Bux, and, the two sons of Haji Faqir Bux, namely Abdul Ghafoor and Sheikh Abdullah were defendants I to 3. The fourth defendant was Shrimati Kallo. Haji Faqir Bux died during the pendency of the litigation. Shrimati Kallo also died during the pendency of this litigation and they are represented in the appeal by their legal representatives. The property, of which partition was sought, consists of a big ahata in mohalla Rahimganj in the city of Lucknow.

3. The property originally belonged to Begum Mumtaz Mahal wife of Nawab Ghaziuddin Hyder. She gifted the property to her sister-in-law, Shrimati Mulko, in 1974. Shrimati Mulko sold it to Babu Rahim Bux who was benamidar of his father Babu Khuda Bux. Babu khuda Bux died in 1895; he was succeeded by three sons Rahim Bux, Karim Bux and Nabi Bux, ten daughters and a widow. In 1903, seven out of the ten daughters relinquished their shares in favour of their brothers and mother. In 1904, the three sons, the remaining three daughters and their mother mortgaged with possession the entire estate in favour of the Maharaja of Balrampur by a deed dated February 12, 1904. In 1919, the Maharaja brought a suit on the mortgage and obtained a preliminary decree for sale. Rahim Bux and his two brothers, not being able to pay off the mortgage decree, sold the equity of redemption to one Murlidhar in 1920. Murlidhar redeemed the mortgage by paying off the amount due under the preliminary decree to the Maharaja of Balrampur. Faqir Bux, original defendant I purchased a share in the equity of redemption from the three daughters and the widow of Babu Khuda Bux and then brought a suit for redemption of his share against Murlidhar and ultimately, by paying off the amount due upon his share to Murlidhar, became a co-sharer in the property to the extent of 3 annas, 10 pies and 9 Kirants. This was in the year 1992. By different deeds of transfer, Murlidhar's share passed to Shrimati Kallo original defendant 4, and to Kundan Lal, the predecessor-in-interest of Kunj Behari Lal and Shrimati Dallo.

4. In the suit the main contention of Haji Faqir Bux and his sons Abdual Ghafoor and Sheikh

Abdullah, defendants 1 to 3, was that in addition to their being co-shares of the property, they were permanent lessees of the blue and red marked portions in the plan of the plaint property prepared by the Commissioner appointed in the case. The blue portion belonged to Mumtaz Mahal and there are three shops in it; the red portion belonged to Mumtaz Mahal's successors-in-interest and there are two kotharies 52A and 52B in it. The case of defendants 1 to 3 was that the land included within the blue portion was acquired by Haji khuda Bux in or about the year 1870 from Begum Mumtaz Mahal on a permanent lease for establishing a tobacco factory on a rent of Rs. 12 per month and that thereafter in or about the year 1900 the adjoining land towards the east marked red in the Commissioner's plan was leased on the same terms for the extension of the tobacco factory on a monthly rent of Rs. 2 by the heirs of Babu khuda Bux to Haji Khuda Bux. The further contended that the shops and Kotharies were constructed by Haji khuda Bux and Faqir Bux.

5. The issue regarding the permanent tenancy right was decided against defendants 1 to 3 by the trial Court although the Court passed a preliminary decree for partition. In the appeal by Abdul Ghafoor and Sheikh Abdullah, the learned single Judge of High Court agreed with the findings of the trial Court on the issue regarding the permanent tenancy right set up by defendants 1 to 3. In special appeal, this decision of the learned single Judge was reversed by a Division Bench. The division Bench accepted the case of permanent tenancy up by defendants 1 to 3.

6. There is no dispute in this appeal as regards the respective shares of the parties. The only question for consideration is whether the case of defendants 1 to 3 that they were permanent lessees of the portions marked blue and red in the Commissioner's plan has been established.

7. As all the courts below have disbelieved the oral evidence adduced to establish the permanent leases, we do not think it necessary to deal with the same. So the question is whether the documentary evidence in the case would support the case of permanent leases put forward by defendants 1 to 3.

8. In the deed of gift dated September 18, 1874, executed by Mumtaz Mahal in favour of Mulko, Mumtaz Mahal referred to the ahata as a grove with pucca shops and in her possession. It would seem from that document that nobody else had put up any constructions in this property at the time the gift deed was executed; nor is there any mention of the permanent lease in 1870 in favour of Haji Khuda Bux or his predecessor-in-interest of any portion of the property.

9. On January 16, 1885, Mulko executed the sale deed in favour of Rahim Bux, but this document is not of any help to either of the parties. On February 12, 1904, Rahim Bux, his two brothers, their three sisters and the widow of Babu khuda Bux executed a mortgage deed in favour of the Maharaja of Balrampur. The names of the tenants are mentioned along with the number of the house/shops occupied by them. The serial numbers 8,9, and 10 are the three shops in blue portion. Khuda Bux, tobacco seller, is described as their tenant and rent is Rs. 3/3 for each shop. Serial numbers 35 and 36 are the two compounds. Khuda Bux, tobacco seller is described as their tenant. The rent of compound 35 specified as Rs. 3/3 and of the other compound as Rs. 2 per months. Compound 36 is the portion marked red in the Commissioner's plan and the compound 35 is the portion marked blue there. In this document there is not reference to the nature of the tenancy in favour of Khuda Bux. The total rent of the three shops and the compounds 35 and 36 was Rs. 14/12.

10. Haji khuda Bux executed a will on October 13, 1906. In this will Haji khuda Bux had declared his entire property as waqf property and set apart the income thereof meet the expenses of the repairs of a mosque erected by him and entrusted the management of the business to his adopted son

Faqir Bux. There is nothing in this document to support the case of permanent leases.

11. Thereafter, on July 12, 1909, Haji khuda Bux and Faqir Bux executed a deed of partnership, in which they valued the tobacco business at Rs. 46,000 and they declared themselves as joint owners not only of the business but also of the entire properties specified in the deed whether purchased in the name of Haji khuda Bux or in the name of Faqir Bux. Paragraph 13 of the deed is very material :

"That whatever buildings have been constructed appertaining to the shop situate in Fatehganj, city Lucknow and whatever may be constructed from time to time, those all shall be treated as joint property of us the declarants and if at any time any compensation in respect thereof be realised from the owner of the land, than that too shall be treated as joint property,"

This paragraph is of significance because the executants did not mention that they were holding the land under any permanent lease. They contemplated the possibility that they might have to vacate the land and the shops. They visualised in that event they would be get compensation in respect of the buildings which they had constructed; so they provided that any such compensations obtained or realised from the owner of the land would be treated as their joint property. The clause shows beyond any doubt that the executants did not consider that they were permanent lessees of the land in 1909.

12. In or about the year 1918, when the entire estate was in the possession of the Maharaja of Balrampur as mortgagee, Faqir Bux had made certain constructions on the property and that was objected to by the Maharaja. There was an agreement between Faqir Bux and the Maharaja on the January 29, 1918 (Exhibit 12). The agreement provided that Faqir Bux would continue to occupy the land and the shops on payment of rent which he was paying at that time and that if the land was purchased by the Maharaja and he required Khas possession, then he (Faqir Bux) would vacate the land without any compensation for the buildings or if the mortgagee redeemed the property, he would enter into a fresh agreement with him for continuing his possession of the land and the shops. This is a registered document. Faqir Bux did not admit the execution of the document in the proceedings but it was proved as having been executed by him. This document shows, firstly that rent would continue to be the same, secondly that the lessee was liable to be evicted without payment of any compensation for the constructions if the mortgagee become the owner of the property and required it for his own purposes, and thirdly that in the event of the mortgagee redeeming the property, then he (Faqir Bux) would enter into a fresh agreement with the mortgagee. This document would demolish the case of the permanent tenancies set up by defendants 1 to 3.

13. In 1921, after Murlidhar had redeemed the property from the Maharaja of Balrampur, a suit for eviction of Faqir Bux and his sons was instituted by Murlidhar. Haji khuda Bux had died by this time. Faqir Bux contended that he was occupying the ahata and three shops on a rent of Rs. 14 per month on behalf of Rahim Bux. He pleaded that Haji khuda Bux remained in possession of the land paying rent from 1874 on the basis of featuring chewing and smoking tobacco and that thereafter he continued to own the property that Haji khuda Bux would continue to occupy the land till the subsistence of the factory on payment of a rent of Rs. 12 per month, that Haji Khuda Bux and he had constructed the shops and buildings and that he (Faqir Bux) cannot be evicted from "any portion of the land without payment of the cost of the constructions by way of compensation". No permanent tenancy was set up in the written statement. What was pleaded was that he was entitled to remain in possession till the subsistence of the factory and that he was not liable to be evicted

without payment of compensation for the constructions.

14. The learned single judge, after considering these documents, found that the defendants 1 to 3 failed to establish the permanent tenancy set up by them. The main ground on which the Division Bench interfered with the finding of the learned single judge was that no weight could be attached to the admission contained in the recitals in the agreement made between Faqir Bux and the Maharaja of Balrampur. It may be recalled that the recitals in that agreement (Ex 12) was that Faqir Bux was occupying the land and the shops on payment of rent and he and Haji Khuda Bux had erected structures on land with their own funds with or without the permission of Balrampur Estate, that rent was to continue to be the same and could not be compensation if the mortgagee became the owner of the property and required it to be vacated or if the mortgagor redeemed the property, there would be a fresh agreement of tenancy between the lessee and the mortgagor. The Division Bench was of view that the admission implied in the recitals had not evidentiary value as the lease of the land and shops had originally been obtained by Haji Khuda Bux, that he died only on May 10, 1918, and when this agreement was entered into on January 29, 1918 khuda Bux was alive and was the virtual owner of the shops and the lessee of the land. The Division Bench held that since Faqir Bux had not legal interest in the property or the shops at the time, the admission implied in the agreement that there was not permanent leases in favour of Khuda Bux cannot behind Khuda Bux or his heirs after his death. This view of the Division Bench might be technically correct. But that would not help the respondents. The point to be considered was whether there was evidence to show the permanent leases in favour of Haji Khuda Bux of the two plots. If as a matter of fact Haji Khuda Bux was a permanent tenant of the two plots, it was highly improbable that Faqir Bux would have entered into an agreement of this nature with the Maharaja of Balrampur. The question was not whether the admission implied in the recitals in the agreement was binding on the legal representative of Faqir Bux as admission; the question was whether in the facts and circumstances of the case, Faqir Bux would have entered into Appeal an agreement of this nature with the Maharaja of Balrampur if as a matter of fact Khuda Bux was a permanent lessee of the plots by virtue of permanent leases set up by defendants 1 to 3. We do not think that Faqir Bux, who was practically managing the business under the partnership deed would have entered into an agreement of this nature, had Haji Khuda Bux been a permanent lessee of these plots.

15. The onus of proving the permanent leases set up was upon defendants 1 to 3. The two alleged leases were oral. The only person who could have deposed to the two agreements of lease was Faqir Bux. But he did not go to the witness box to swear to the case.

16. In this case the origin of the tenancies is known and, therefore, it is not a case of tenancies of which the origin is not known. No question of lost grant arises in the case. It would appear that the rent remained constant with a slight variation. It also appears that Haji Khuda Bux and Faqir Bux have been making at first kachcha constructions on the vacant piece of land in their possession, sometimes with the permission of the owner or the mortgagee and sometimes without their permission. Most of the pucca constructions were made after 1992 when Faqir Bux acquired a share in the property.

17. The mere fact that an uniform fixed rent had been paid for a long time or the fact that Haji Khuda Bux and Faqir Bux had been in possession of the land for a long time and making constructions on land at their own cost would not, in the circumstances of this case raise a presumption that the permanency of tenancy is a question of fact depending upon the facts of permanency of tenancy is a question of fact depending upon the facts each particular case. In *A. S. N. Nainapillai Markayar v. T. A. R. A. Rm. Ramanathan Chettiar* (AIR 1924 PC 65 : 51 IA 83 : 82

IC 226 : 46 MLJ 546) it was ruled that the onus of proving that a occupation at a fixed rent does not raise a presumption of permanent occupation at a fixed rent does not raise a presumption of permanent tenancy. The same view was held in Subrahmanya Chettiar v. V. P. Subrahmanya Mudaliyar (AIR 1929 PC 156 : 56 IA 248 : 116 IC 601 : 57 MLJ 1). In Bejoy Gopal Mukherji v. Pratul Chandra Ghose (1953 SCR 930 : AIR 1953 SC 153 : 1953 SCJ 195), this Court said that neither possession for generations at uniform rent nor construction of permanent structures by itself is conclusive proof of permanent tenancy. It is the cumulative effect of these circumstance coupled with several other facts that may lead to an inference of permanent tenancy. In the circumstances of the case we think that the learned single judge was right in his conclusion and that the Division Bench went wrong in reversing the judgment and decree of the Division Bench and restore decree passed by the singly Judge. In the result we allow the appeal with costs.

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