

Smt. Mainia (Dead) Through Lrs.

Vs

Deputy Director of Consolidation and Others

Civil Appeal No. 955 of 1981

(L. M. Sharma, J. S. Verma JJ)

04.08.1989

JUDGMENT

VERMA, J. -

1. This appeal by special leave under Article 136 of the Constitution of India is against the judgment of a learned Single Judge of the Allahabad High Court in Writ Petition No. 3048 of 1973 decided on May 11, 1979.
2. The subject matter of the dispute is a holding comprising of khata No. 141 in village Khera, Laxmipur, Pargana Kashipur in district Nainital of which one Chain Sukh was initially the occupancy tenant. The said chain Sukh died issueless prior to the date of vesting, that is, July 1, 1952 under the U.P. Zamindari Abolition and Land Reforms Act. 1950 (hereinafter referred to as "the Zamindari Abolition Act") survived by his widow, Smt. Sukhia. The interest of Chain Sukh as the occupancy tenant of the holding devolved upon his widow, Smt. Sukhia, in accordance with Section 35 of the United Provinces Tenancy Act, 1939 (hereinafter referred to as "the Tenancy Act") in the absence of any male lineal descendant of Chain Sukh. The appellant, Smt. Mainia, is the sister of deceased Chain Sukh. Even according to the appellant Smt. Mainia, Chain Sukh's widow, Smt. Sukhia, remarried Gopal Singh in "Karwa" form according to the caste custom about two years after the death of chain Sukh and a son, Chander Pal, respondent 4, was born to Sukhia during her wedlock with Gopal Singh. Smt. Sukhia continued to remain in possession of this holding till her death in 1965.
3. A dispute arose between appellant, Smt. Mainia and respondent 4, Chander Pal, during the consolidation proceedings under the U.P. Consolidation of Land Holdings Act in respect of this holding, each of them claiming sole interest therein to the exclusion of the other. Ultimately, the Consolidation Officer, Afzalgarh, by his order dated January 29, 1972 (Annexure III) passed under Section 9-A of the Act dismissed Chander Pal's claim to the holding. The consolidation Officer held that Smt. Sukhia on her remarriage with Gopal Singh lost her interest in the holding and by virtue of Section 171 of the Zamindari Abolition Act. Appellant, Smt. Mainia, being the sister of Chain Sukh inherited the interest in the holding. It was held that Chander Pal, not being the son of Smt. Sukhia from Chain Sukh but the son born to Smt. Sukhia after her remarriage with Gopal Singh, could not inherit as a heir of chain Sukh. The settlement Officer, Consolidation, Nainital dismissed Chander Pal's appeal under Section 11 against the order of Consolidation Officer by order dated February 14, 1972 (Annexure IV). However, the Settlement Officer held that even though Smt. Sukhia lived in the house of Gopal Singh for several years there is no positive evidence of her remarriage with Gopal Singh and, therefore, a legal marriage of Smt. Sukhia with Gopal Singh is not proved. It was held that Smt. Sukhia cultivated the land throughout as the widow of Chain Sukh and therefore

Chain Sukh's sister Smt. Mainia inherited it after the death of Smt. Sukhia. A revision of Chander Pal to the Deputy Director Consolidation, Moradabad, Camp Kashipur, under Section 48 was also dismissed by order dated November 15, 1972 (Annexure V). It was observed that Smt. Mainia in her reply dated December 10, 1970 has stated that Smt. Sukhia did "Karwa" with Gopal Singh but Smt. Sukhia has been shown in the family register as widow of chain Sukh which shows that Smt. Sukhia was treated as a widow of Chain Sukh which shows that Smt. Sukhia was treated as a widow of chain Sukh till the time of her death. It was held that Smt. Sukhia's "Karwa" with Gopal Singh not being proved to be a legal marriage, the succession would be governed on the basis that she was Chain Sukh's widow at the time of her death.

4. A writ petition under Article 226 of the Constitution was then filed by Chander Pal in the High Court which has been allowed by the impugned judgment dated May 11, 1979. The High court has quashed the orders passed by the consolidation authorities and directed the Deputy Director (Consolidation) to decide the revision of Chander Pal afresh on the basis of the decision given in the writ petition. The High Court has held that the consolidation authorities erred in deciding the matter on the basis that Smt. Sukhia's marriage with Gopal Singh was not proved to be legal and, therefore, Smt. Sukhia's possession of the holding till the time of her death was merely as widow of chain Sukh. It was pointed out that in view of appellant Smt. Mainia's clear admission that Smt. Sukhia was remarried to Gopal Singh in "Karwa" form, according to caste custom, after Chain Sukh's death and that they had been living together as husband and wife for several years no further proof of legality of the remarriage was necessary. Reliance was placed by the High Court on a decision of the Supreme Court in *Badri Prasad v. Deputy Director of consolidation* ((1978) 3 SCC 527 : AIR 1978 SC 1557), for reaching its conclusion and it was held that this strong presumption of validity of Smt. Sukhia's remarriage with Gopal Singh was not rebutted by the entry in the family register which continued to show Smt. Sukhia as the widow of Chain Sukh. Consequently, it was held by the High court that the finding of the consolidation authorities that Smt. Sukhia's interest in the holding continued to be as widow of Chain Sukh was a manifest error of law. The High court then proceeded to examine the legal consequences of Smt. Sukhia's remarriage with Gopal Singh prior to the date of vesting, i.e., July 1, 1952 under the Zamindari Abolition Act and her continuous possession over the holding after her remarriage. It was held by the High Court that the effect of the provisions of the Tenancy Act was that her interest in the holding after her remarriage was in her own right and not as widow of Chain Sukh; and therefore, by virtue of Section 180(2) of the Tenancy Act she acquired an independent right which did not devolve upon her death to Chain Sukh's sister, appellant Smt. Mainia, but to her son Chander Pal born to her after her remarriage with Gopal Singh. It is on this basis that the High Court has directed the Deputy Director, Consolidation, to decide respondent 4, Chander Pal's revision afresh. Hence this appeal by special leave.

5. Shri. P. N. Lekhi, learned counsel for the appellant, Smt. Mainia, has assailed the decision of the High court substantially on the ground that Smt. Sukhia's interest in the holding continued till her death only as widow of Chain Sukh since her initial interest in the holding was by devolution as widow of Chain Sukh under Section 35 of the Tenancy Act, Learned counsel for the appellant also contended before us that Smt. Sukhia's remarriage with Gopal Singh was not proved and, therefore, the consequences of remarriage, if any, did not arise. He argued that Smt. Sukhia's name was recorded throughout only as the widow of Chain Sukh which negated the case of her remarriage with Gopal Singh after the death of Chain Sukh. He argued that since the possession of Smt. Sukhia till her death in 1965 was as widow of Chain Sukh, there was no occasion for attracting the provisions contained in Section 180(2) of the Tenancy Act. It was urged that on the death of Smt. Sukhia in 1965 the succession was governed by Section 172 read with Section 171 of the Zamindari

Abolition Act on account of which by virtue of clause (m) Section 171 appellant Smt. Mainia being the married sister of Chain Sukh inherited the interest in the holding instead of respondent 4, Chander Pal by virtue of Section 174 of that Act.

6. In reply, Shri. K. M. Sinha, learned counsel for respondent 4 contended that remarriage of Smt. Sukhia with Gopal Singh after the death of Chain Sukh prior to the date of vesting i. e., July 1, 1952 under the Zamindari Abolition Act being the admitted case of appellant Smt. Mainia herself, the appellant cannot now be permitted to take a contrary stand. It was urged that the conclusion of the High Court is correct and that consequence is obvious from the provisions of the Tenancy Act. ON this basis, it was urged that the possession of Smt. Sukhia in the holding at the time of her death not being as a widow of Chain Sukh but in her own right the succession is governed not by Section 172 but by Section 174 of the Zamindari Abolition Act under which respondent 4, Chander Pal, inherited Suit. Sukhia's interest in the holding as her son.

7. In our opinion, the contention of learned counsel for the appellant cannot be accepted and on the case set up by Smt. Mainia herself no fault can be found with the reasoning or conclusion of the High court.

8. It is obvious even from the orders of the consolidation authorities that Smt. Sukhia's remarriage in "Karwa" form according to the caste custom with Gopal Singh a couple of years after the death of Chain Sukh was pleaded by Smt. Mainia herself in her reply dated December 10, 1970 as mentioned in the order dated November 15, 1972 (Annexure V) by the Deputy Director (Consolidation) while deciding Chander Pal's revision. The controversy between the parties before the consolidation authorities was at best only about the validity of the remarriage and not its factum. Moreover, the order of the Consolidation Officer dated January 29, 1972 (Annexure III) also indicates that before the Consolidation Officer appellant, Smt. Mainia, did not dispute even the validity of Smt. Sukhia's remarriage with Gopal Singh and the case of the appellant before the Consolidation Officer was put up on the basis of Smt. Sukhia being remarried to Gopal Singh and Chander Pal being the son born to Smt. Sukhia after her remarriage so that Chander Pal could not claim to be a legal heir of Smt. Sukhia's first husband Chain Sukh. The High Court was, therefore, right in taking the view that the matter must be decided on the basis of Smt. Sukhia being remarried to Gopal Singh a couple of years after the death of her first husband Chain Sukh and the question of factum or validity of Smt. Sukhia's remarriage with Gopal Singh did not really arise. This being so, the mere fact of Smt. Sukhia's name being shown in the family register as widow of Chain Sukh till the time of her death in 1965 did not have the effect of continuing Smt. Sukhia's status as widow of Chain Sukh even after she had become the wife of Gopal Singh as a result of her remarriage.

9. The effect of the statutory provisions on the continued possession of Smt. Sukhia in this altered status has, therefore, to be examined.

10. The relevant provisions of the Tenancy Act may now be noticed Admittedly, succession to the interest of Chain Sukh on his death was governed by Section 35 of the Tenancy Act according to which the interest of Chain Sukh in the holding devolved upon Smt. Sukhia as his widow in the absence of any male lineal descendant in the male line of descendant. Section 36 of the Tenancy Act is as under :

"36(1) When a female tenant, other than a tenant mentioned in Section 34, who either before or after the commencement of this Act has inherited an interest in a holding as a widow, as a mother, as a step-mother, as a father's mother, or, as a daughter dies or

abandons such holding, or surrenders such holding, or a part of such holding or, in the case of a tenant inheriting as a widow or as a daughter, marries such holding or such part of such holding shall, notwithstanding anything in Section 45, devolve in accordance with the order of succession laid down in Section 35 on the heir of the last male tenant, other than a tenant who inherited as a father's father under the provisions of that Section....."

The applicability of Section 36 in the present case was disputed by the learned counsel for the appellant. We are unable to agree, Section 36 clearly provides for succession to a female tenant holding an interest inherited as a widow in the case of her marriage thereafter, or in other words, remarriage. The learned counsel for the appellant contends that this is not so. In our opinion, the argument overlooks the clear words " in the case of a tenant inheriting as a widow. .. marries" which show that the situation where a female tenant who inherited as a widow marries, or, in other words, remarries is specifically covered by Section 36. The contrary construction placed on Section 36 by the learned counsel for the appellant would render these words redundant. The word 'marries' instead of the word 'remarries' has been used for the obvious reason that it refers both to a widow as well as a daughter.

11. We have, therefore, no doubt that Section 36 was attracted in the present case when Smt. Sukhia remarried Gopal Singh after the death of Chain Sukh Section 36 also overrides Section 43 since it clearly says, "notwithstanding anything in Section 45" which provides generally for extinguishment of the interest of a tenant in the manner specified therein. The argument of the learned counsel for the appellant that clause (a) of Section 45 deals with the situation of death of a tenant and, therefore, was attracted in the present case, on the death of Smt. Sukhia in 1965 is untenable in view of the express provision made in Section 36.

12. The result is that according to Section 36 on the remarriage of Sukhia with Gopal Singh the interest devolved in accordance with the order of succession laid down in Section 35 on the heir of the last male descendant, that is, Chain Sukh but appellant Smt. Mainia, married sister of Chain Sukh, not being one of the heirs of Chain Sukh according to Section 35 of the Tenancy Act, the interest did not devolve on Smt. Mainia.

13. The continued possession of Smt. Sukhia thereafter attracted Section 180 of the 'Tenancy Act, the relevant portion of which is as under :

"180. (1) A person taking or retaining possession of a plot of land without the consent of the person entitled to admit him to occupy such plot and otherwise than in accordance with the provisions of the law for the time being in force, shall be liable to ejection under the section on the suit of the person so entitled, and also to pay damages which may extend to four times the annual rental value calculated in accordance with the sanctioned rates applicable to hereditary tenants :

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(2) If no suit is brought under this section, or if a decree obtained under this section is not executed, the person in possession shall become a hereditary tenant of such plot, or if such person is a co-sharer, he shall become a khudkasht-holder, on the expiry of the period of limitation prescribed for such suit or for the execution of such decree, as the case may be :

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14. Admittedly, no suit as contemplated by sub-section (2) of Section 180 of the Tenancy Act was brought at any time against Smt. Sukhia and the prescribed period of limitation for such a suit expired prior to her death in 1965, Sub-section (2) of Section 180 was, therefore, clearly attracted and Smt. Sukhia had become a hereditary tenant by virtue of Section 180(2) of the Tenancy Act with the further consequences flowing therefrom. The case of the appellant is based on the applicability of Section 172 of the Zamindari Abolition Act which governs succession in the case of a woman holding an interest inherited as a widow etc. on the ground that Smt. Sukhia's interest up to the time of her death was only as the widow of Chain Sukh. It is by virtue of Section 172 that the claim is made by the appellant, Smt. Mainia as the married sister of chain Sukh under clause (m) of Section 171. We have already indicated that the foundation of Smt. Mainia's claim is non-existent. In such a situation, the appellant's claim was rightly negated by the High Court.

15. The learned counsel for the appellant referred to the decision of this court in Ram Jivan v. Smt. Phoola. ((1976) 3 SCC 119 : AIR 1976 SC 807 : (1976) 3 SCR 262). In view of the above conclusion, obviously that decision has no application. The learned counsel also referred to two Single Bench decisions of the Allahabad High court, namely, Jagannath v. Deputy Director of Consolidation ((1976) AWC 654 : AIR 1977 All 176), and Chiddoo Singh v. Deputy Director of Consolidation (1976 AWC 809 : (1976) 2 ALR 664). The first decision did not involve this point. The learned single Judge in the other decision under provisions of the Agra Tenancy Act took the view that when a widow initially enters into possession as a limited owner, the character of her subsequent possession after remarriage cannot change in the absence of evidence of a change in her animus. It was held that in such a case it is for the widow to show that later she had asserted her absolute right and was possessing adversely as an absolute owner in order to prescribe for absolute ownership. It is sufficient for us to say that the legal consequence flowing from Sections 36 and 180 of the U.P. Tenancy Act is enough to indicate that the character of widow's possession after her remarriage altered by operation of law and any further animus is not required to bring about the effect of the statutory provisions which ensue on expiry of the limitation prescribed for a suit to evict her. That decision does not indicate consideration of the effect of a provision like Section 180(2) of the Tenancy Act, assuming there was such a provision in the Agra Tenancy Act and also that Section 24 of the Agra Tenancy Act was similar to Section 36 of the U.P. Tenancy Act. These decisions are clearly distinguishable. However, if the other decision under the Agra Tenancy Act is read as taking a contrary view, we are unable to subscribe to that view.

16. In the result, the appeal fails and is dismissed. However, in the circumstances of the case, we make no order as to costs.

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