

SUPREME COURT OF INDIA

Sahibdar Khan

Vs.

Sadloo Khan (Dead)

(A.P. Mishra, N. S. Hegde JJ.)

22.8.2000

ORDER

1. The question raised in this appeal is, whether Smt. Bandi mother of plaintiffs/appellants matured herself as absolute owner over the property left by her husband Sardar Khan by virtue of her being recorded as occupancy tenant in the Fasli Year 1320. If she had whether one of her son Sandloo Khan, defendant No. 1 had any right to gift through registered gift deed dated 18th June, 1971 to his daughters, part of the same property which, Smt. Bandi gifted through gift deed dated 27th March, 1968 in favour of plaintiff-appellant ?

2. In order to appreciate the controversy it is necessary to produce the family pedigree.

PEDIGREE Peer Bux | Sardar Khan Bandi Bibi | _____ | |
Sadloo Khan (R.1) Bubdar Khan D.1 | | _____ | | | | Sahabdar Khan Lal Khan |
(P.1) (P.2) | _____ | | | | Bhug gan Kaloo Phunnan Munnann D.2
D.3 D.4 D.5

3. It is not in dispute that one Peer Bux was the occupancy tenant of the land specified in Schedule 'A' and 'B' to the plaint. After his death it was succeeded by his son Sardar Khan who died on 7th July, 1912 (1320 Fasli). The aforesaid Smt. Bandi the wife of Sardar Khan was recorded for the first time in the Khatani of 1320 Fasli, i.e. , in the same year in which her husband died, as occupancy tenant. The case of the plain tiffs-appellants is, on the date vesting, (1st July. 1952), under the U.P. Zamindari Abolition and Land Reforms Act, 1950, Smt. Bandi became bhumidari of the land with full right to transfer. Thereafter, she executed a gift deed dated 27th March, 1968 in favour of appellants to the extent of her half share and retained the other half for herself. She died within 6 to 7 months after the execution of this deed. After her death appellants claimed share out of her retained share by inheritance, which would be th share in the land of Schedule 'B' property as grandson of Smt. Bandi. Accordingly, they claim to be the Bhumidar owner of the entire land of Schedule 'A' and to the extent of 3/4th share in Schedule 'B' property.

4. On 18-6-1971 Sandloo Khan, defendant No. 1 one of the two son of Smt. Bandi, executed a gift deed in favour of his four daughters who are defendants 2 to 5. This gift deed is subject to challenge by the plaintiff-appellant in this suit. According to the appellant, defendant No. 1 had no interest left in the land of Schedule 'A' and in Schedule 'B' left with only 1th share.

5. On the other hand the case of defendant-respondent is that on the death of Sardar Khan, the tenancy devolved by inheritance upon defendant No. 1 and his brother Hubdar Khan equally. Both

of them were then minors under the guardianship of their mother Smt. Bandi. The Entry of 1320 Fasli showing her as occupancy tenant was incorrect by recorded as after the death of their father she could not be recorded as such. Hence deed of gift dated 27th March, 1968 executed by her is void and would have no effect in law. The trial Court decreed the suit by holding that Sardar Khan surrendered his occupancy right in favour of his wife Smt. Bandi because of which Smt. Bandi was recorded in 1320 Fasli as occupancy tenant in her own right with the consent of the zamindars. The appellate Court also dismissed the appeal filed by the respondents. Aggrieved by the decision of both the Courts below, the respondent filed second appeal before the High Court. The High Court set aside the findings of both the courts below, holding that there was no evidence of any surrender or abandonment by Sardar Khan of his occupancy tenant right in his life time nor there is any evidence to show that the Zamindars consented the occupancy tenant on Smt. Bandi. The High Court records that both the courts below itself found, there is neither any documentary nor oral evidence to conclude about this. In the words of the appellate authority.

Of course there is no direct evidence to import the plaintiffs contention that Sardar Khan had in his life time surrendered the land and the Zamindar conferred occupancy on Bandi Bibi. There is no documentary evidence to that effect. The oral evidence in this respect is of no value. PW 1 Sahabdar Khan, the plaintiff No. 1 has stated so but he is only 40 years old and was not even born when Saradar Khan died. No other witness was produced on this point. Thus we are left only to guess what occurred which resulted the record on Bandi Bibi's name.

6. The High Court further took into consideration the provisions of the North Western Provinces Tenancy Act, 1901 (hereinafter referred to as "1901 Act"), which at the relevant time was applicable to the present case. Section 22 governs the succession of tenancy under which on the death of occupancy tenant his interest devolved on his male lineal descendants in the male line of descent and failing such descendants, on his widow. It further records when Sardar Khan died, the property devolved on his two sons, namely, Sandloo Khan and Hubdar Khan (dead) and not on Smt. Bandi. The High Court referred to Section 18, which lays down extinction of occupancy right and also took into consideration Sections 11 and 16 of the said Act to record Smt. Bandi is not alleged or shown to have held this land continuously for a period of 12 years preceding the death of her husband hence there is no question of occupancy tenancy right being created in her favour in 1320 Fasli Year. Finally it concludes thus the entry in her name, as occupancy tenant could not be treated to be on her own right. Thus she had no right to execute the gift deed dated 27th March, 1968 in favour of the plaintiffs appellants.

7. Learned Counsel for the appellants submits with vehemence that the High Court should not have interfered with the concurrent findings of both the courts below and even otherwise, in law the entry in the name of Smt. Bandi continued for a long without any objections or challenge hence the High Court should not have concluded against the said entry without its challenge. He also submits that, in the present case defendant No. 1 himself is the attesting witness of the gift deed dated 27th March, 1968 in addition he had full knowledge of her mother Smt. Bandi receiving the Bhumidari Sanad in the year 1968, yet no challenge was made by him or by any respondents. In view of this long entry and the finding of fact recorded by both the courts below that she hold the suit land in her own right the High Court in second appeal fell into error in finding to the contrary thus it suffers from patent illegality by interfering with it which is liable to be set aside. On the other hand, learned Counsel for the respondents specifically took us to various points considered by the High Court and supporting its reasoning contends that the High Court was right to interfere with the concurrent findings. The submission is, at the time when the name of grand mother was recorded in the 1320

Fasli year, their father and uncle were minors of the age of 5 years and 3 years, respectively, hence it was not possible to object to the said entry and as they grew under the mothers roof they did not object to the said entry which continued even thereafter. The submission is, however, if in law they are entitled and Smt. Bandi was not entitled to be recorded as such the High Court judgment should not be interfered with.

8. Having heard learned Counsel for the parties we find it is not in dispute that entry in the name of Smt. Bandi for the first time was recorded in 1320 Fasli which is the same Fasli Year in which her husband died and the said entry continues to be recorded thereafter. It is true both the courts below records that the case that Smt. Bandis name was recorded as her husband surrendered his occupancy right and zamindars consented, there is lack of evidence. However, the High Court disbelieved this part of appellants' case to hold such entry to be illegal. Now we proceed to test this in the light on the facts and law of this case. It is true, when the entry was made both his sons were minor. But the fact remains even when they became major they did not challenge this entry. We also find when she executed the gift deed dated 27th March, 1968 , defendant No. 1 himself was the attesting witness. At this point of time he was of about 58 years. She even earlier received Bhumidhar Sanad making her absolute transferable right under the 1950 Act before the execution of the gift deed which was in the knowledge of Defendant No. 1 but still till this date he has not been challenged it. This entry continued in her name throughout unchallenged. This suit is filed in 1971, that is more than 48 years after the entry in 1320 Fasli in her favour. Still no challenge through any suit or communication by the defendants. The High Court with reference to the aforesaid 1901 Act which interpreting Sections 11 and 16 did not accept the said entry in favour of Smt. Bandi, as Court felt that it could only be valid, if she continued as an occupancy tenant for 12 years or more preceding the death of her husband. It is at this point of time the High Court committed the error. The said 1901 Act does not require that such an entry to proceed for twelve years preceding entry of 1320 Fasli when admittedly her husband was occupancy tenant preceding this Fasli Year. So even if it could be said that on the date of her recording in 1320 Fasli Year she may not have matured her right as occupancy tenant but, thereafter when such an entry continued for more than 12 years with no objection to such an entry then by virtue of the said Section under 1901 Act she becomes the occupancy tenant. So even if there be any right of defendants, if no challenged for almost more than 48 years, cannot claim now that Smt. Bandi could not become occupancy tenant or that she had no right to execute the aforesaid gift deed. Once entry in her favour continued for all this long period , defendant No. 1 the sole objector himself being the witness of the said gift deed in the year 1968 which conduct shows instead of objecting he recognises her absolute right as owner, in her own right, coupled with the grant of Bhumidhari Sanad to her, the High Court fell into error in set aside the concurrent findings recorded by both the courts below.

9. In the case of Wali Mohammed (deceased) By Lrs v. Ram Surat , this Court held with reference to Section 20(b) of the aforesaid Act No. 1 of 1950 that entry in khatauni as occupancy tenant even if incorrect can be taken into consideration for deciding, whether a person is bhumidar or not, Fictitious or fraudulent entry has no legal effect which cannot be considered. In other words long standing entry even if it could be construed to be illegal, if not challenged and there being no allegation of it being recorded fraudulently or fictitiously such as entry would have weight for drawing inference in favour of person in whose favour such an entry is recorded. Thus on the facts of the present case, entry of Smt. Bandi as occupancy tenant, could be treated to have acquired validity as it was not challenged by the parties. Accordingly, she became the owner with transferable right after coming into force of the aforesaid Act, when she acquired Bhumidar right.

10. Accordingly, we hold that the gift deed dated 27th March, 1968 was valid and Smt. Bandi was competent to execute the same. Consequently the registered gift deed dated 18th June, 1971 by defendant No. 1 in favour his four daughters to the extent it encroaches the right of appellants flowing from the gift deed dated 27th March, 1968 cannot be sustained. Therefore, we hold that his later gift deed by defendant No. 1 falls to the extent it affects the right of the appellants gained through the gift deed dated 27th March, 1968. However, to the extent of right of defendant No. 1 received through inheritance out of half share of his mother the later gift deed dated 18th June, 1971 is valid.

11. With the aforesaid observation the present appeal succeeds. We set aside the order passed by the High Court and restore the judgment of the first appellate Court dated 5th Sept. 1974, though on different reasoning. Costs on the parties.