ALLAHABAD HIGH COURT

Mohammad Qamar Shah Khan

Vs.

Mohammad Salamat Ali Khan

(Rachhpal Singh, J.)

28.02.1933

JUDGMENT

Rachhpal Singh, J.

1. The plaintiff-appellant instituted a suit in the trial. Court against the defendant-respondent to recover a sum of ₹ 1,058-9-7 on account of profits. The plaintiff alleged that village Maktul was wakf property of which he and defendant were mutwallis. The plaintiff's share in the wakf property was one-third. In the years in suit the defendant had acted as a lambardar and the plaintiff sued for his share in those years. The defendant in his written statement admitted that the entire village was wakf property and that he and the plaintiff were holding it as mutwalis. He however raised the plea that the mutwallis were not cosharers within the meaning of Section 164, Agra Tenancy Act, 1901 (the suit had been instituted before the passing of the New Agra Tenancy Act) and so he (the plaintiff) could not maintain a suit for profits. This contention was accepted by the Courts below. Both the Courts have held that a mutwalli is not a cosharer and cannot therefore maintain a suit for profits. The plaintiff has preferred this second appeal. Section 226, New Agra Tenancy Act, corresponds to Section 164 of the old Act (Act 2 of 1901). Under the provisions of this section a cosharer may sue the lambardar for settlement of accounts and for his share in profits. Section 229 (corresponding with Section 166, Old Agra Tenancy Act,) lays down that the words:

> lambardar, cosharer, muafidar, assignee of revenue, talukdar and superior proprietors in Ch. 14 include also the heirs, legal representatives, executors, administrators and assignees of such person.

2. The question for the determination is as to whether the view taken by the Courts below, namely, that a mutwalli cannot maintain a suit for profits is sound in law. In a recent case, a Bench of two Judge's of this Court held that for the purposes of suits for profits managers of endowed properties were to be regarded as proprietors and therefore could sue in rent Courts as cosharers. That was a case in which the parties were Hindus but we are of opinion that the principle laid down in that case is applicable to the case before us. The argument of the learned Counsel for the appellant is that any person whose name is recorded in the khewat as holding a share in the village is entitled to maintain a suit for profits regardless of the fact whether or no he

holds it as a proprietor or as a mutwalli. We are in agreement with this contention. In a full Bench ruling reported in *Durga Prasad v.*
Hazari Singh[1] six out of the seven learned Judges held that in suits instituted under the provisions of Ch. 11, Agra Tenancy Act, of 1901, where the plaintiff was recorded as having proprietary title entitling him to institute, the suit, the Revenue Court could not go behind the record, receive evidence and itself try the question of proprietary title. This ruling is authority for the principle on which the' appellant relies that in a case where a person is re-corded as holding a particular share-in a village in the khewat the entry gives him the right to institute suits as a cosharer and it is not open, to the Revenue Court to go into the question as to whether' or not he has, standing the entry in his favour, a "proprietary right" in the share standing in his name.

3. learned Counsel, who appeared for the respondent, has contended that the word "cosharer" means a person who-has a proprietary interest in the share held by him. His argument is that when a wakf is created, the property vests in God and mutwalli's position, is that of a mere manager or superintendent. No estate vests in him and therefore he cannot be said to be SL cosharer. On behalf of the respondent the ruling' of their Lordships of the Privy Council reported in *Mohammad Rustam Ali Khan v. Mushtaq Husain*[2] was cited. In that case, we see that their Lordships of the Privy Council made the following observations:

> A receiver or manager by virtue of his appointment has no estate in the property he is called upon to control; he possesses powers over it but not an interest in it.

4. The sole question for the determination in that case was whether an estate in the property passed to the trustee appointed under the wakfnama. The-view taken by their Lordships was that no estate passed. Another ruling cited by the learned Counsel for the appellant was *Narain Das Arora v. Abdul Rahim*[3] where a Bench of two. Judges of the Calcutta High Court held that a mutwalli of a wakf estate was a mere manager, and in the case of a public charitable endowment, the legal ownership of the property dedicated was in the Divine Being or in the charity created in His name. These rulings, in our opinion, are authorities for the proposition only that a mutwalli holding the wakf property has no estate in it. That is to say, the property in it is not transferred, to him. If the word "cosharer" means only a person who has full proprietary-interest in the share held by him, then.,, certainly the main contention of the-respondent would be sound. On a consideration of the question however we are of opinion that the word "cosharer" for the purposes of the Rent Act should not be given such a narrow interpretation. It will be seen that the term"cosharer" has nowhere been defined in the Agra Tenancy Act. In our opinion, the correct definition of a co-sharer would be:

> a person whose name is recorded in the khewat as a cosharer and who is jointly and severally liable with other cosharers for the land revenue and whose revenue is payable through the lambardar under Section 144, Land Revenue Act.

5. If a person is liable for the payment of the land revenue along with other cosharers in the village then he Zmust be deemed to be a cosharer in spite of the fact that the estate in the share may not vest in him. It has been held that a mortgagee in possession whose name is recorded as such in the khewat can, sue for profits: See *Lachman Pande v.*

[1](1911) 33 All 799 [3] AIR 1920 Cal 379

[2] A.I.R. 1921 P.C. 105

Trebeni Sahu. According to the view taken in this case it appears that all that is necessary is to see whether or not the name of the man is recorded as cosharer. If it is recorded then Section 201, Clause (3), Agra Tenancy Act, would apply. It may also be mentioned that a special manager of the Court of Wards is permitted to institute suits for rent and profits though the estate does not vest in him. If the arguments of the learned Counsel for the respondents were accepted many curious result? would follow. Take the case of two mutwallis who hold the entire village which is wakf property. If they institute' rent-suits again their tenants, then, it would be open to the tenants to say,, if the argument of the respondent is accepted, that they cannot recover rents as they are not cosharers in the village. Take another case. One mutwalli realizes the entire rent. When he is sued by the other it would be open to him to defeat the claim in the rent Court by saying that the other is not. a cosharer as he does not own any proprietary right in the share recorded in his name.

6. One more case. Suppose that there are several cosharers in a village. One of them holding a share which is wakf happens to be a lambardar. Under the scheme of the Land Revenue Act, the Government realizes the entire land revenue from him. The rents have been realized by other cosharers. When he sues the cosharers for the land revenue, then, according to the argument of the learned Counsel for the respondent, it would be open to the other cosharers to say that no suit would lie in the Revenue Court as the lamhardar was holding the share standing in his name only as a mutwalli of the wakf and had no proprietary interest in the same. The mutwallis would not be able to eject their tenants as they would be met with the plea that they (the mutwallis) were not cosharers. In other words, the provisions of the U. P. Land Revenue Act and Agra Tenancy Act would not, be applicable' to those persons holding shares in wakf villages. We are not prepared to hold that this is a sound view of Rent Law.

7. In Mahomedan law, there are two classes of wakf. One is public and the other is private. A public wakf is one for a public religious or charitable object. A private wakf is one for the benefit of the settlor's family and his. descendants. Under the Musalman Wakf Validating Act of 1913 a Mahomedan. may settle' the whole income of the-endowed property for the maintenance-and support of himself and his descendants from generation to generation,., provided that there is an ultimate gift, to charity. To hold that a mutwalli. holding a wakf property in a wakf of this kind is not a cosharer for the purposes of the Rent Act would be taking, a very narrow view. It is true that according to the view taken in *Mohammad Rustam All Khan v. Mushtaq Husain*[4] and *Narain Das Arora v. Abdul Rahim*[5] the estate in the wakf property vests in God after the creation of ; a public wakf. But, we doubt if it ' can be argued in private wakfs the estate vests in God. The correct view would be to hold that the estate vests in the beneficiaries. In case of private wakfs the mutwalli is practically speaking the owner, with one limitation and that is that he cannot make a transfer of the wakf property. But in every other respects his position is the same as that of an owner. A mutwallj holding a property in the case of a private wakf cannot be said to be a mere manager or a superintendent. A manager holds the property during the pleasure of the proprietor. But the mutwalli in private wakfs holds the property during his life. After his death mutwalliship. will go to his legal heirs. ; If they are several heirs they will all be entitled to the profits of the wakf estate. The mutwalli in the case of

[4] A.I.R. 1921 P.C. 105

[5] A.I.R. 1920 Cal. 379

a private wakf would not be accountable to any outsider in respect
of the income of the wakf property. We are unable to accept the contention of the respondent that a mutwalli cannot be-said to be a cosharer. Nor are we; prepared to accept the argument of the learned Counsel for the respondent that no one who is not a proprietor can be said to be a cosharer within the meaning of Section 226, Agra Tenancy Act.

8. In our opinion, any man whose name is recorded in the khewat as a co-sharer will be deemed to be such wi-thin the meaning of Section 226, Agra Tenancy Act. For the purposes of the Agra Tenancy Act, it is not necessary for the Revenue Court to decide as to whether the person recorded as a cosharer in the khewat is a proprietor or mortgagee in possession or a mutwalli. We agree with the view taken by a Bench of learned Judges of this Court in *Manhori Saran v. Sambhu Nath*[6] that for the purposes of suits for profits managers of endowed properties should be regarded as proprietors. We hold that the plaintiff was entitled to maintain his suit for profits against the defendant. For the reasons given above, we allow the appeal reverse the decrees of the Courts below and remand the case to the Court of first instance through the lower appellate Court, with directions that the suit should be readmitted at its original number and then the Court should give its finding on the three issues which were not decided as yet. The plaintiff will be given a decree for the amount of profits which might be 'found due to him. The respondent will pay the costs of the appellant in this 'Court as well as in the lower appellate Court. The costs, in the Court of the first instance will abide the result of the suit.

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[6] Second Appeal No. 133 of 1930 Decided on 10th February 1933,