CALCUTTA HIGH COURT

Surja Narain Mandal

Vs

Nanda Lal Sinha

(Geidt and Ormond, JJ.)

13.07.1906

JUDGMENT

Geidt and Ormond, JJ.

1. The subject-matter of this litigation is a chuck named Kirtana Kanali. It was conveyed to one Braja Lal Singh by a deed executed in October 1878. Braja Lal was one of five brothers, the names of the other four being Madan Mohan,. Radha Madhab. Kartic and Nanda Lal. The main question that had to be tried in these suits was whether, by the conveyance of October 1878, Braja Lal became alone entitled to the chuck, or whether it was conveyed to him on behalf of all the five brothers.

2. At the time of the conveyance the chuck was subject to a mokarari lease. In August 1884, three of the five brothers, namely, Braja Lal, Radha Madhab and Kartic, mortgaged the chuck, together with two other properties, to one Surja Narain Gosain. Some two years after words in December 1886 Braja Lal purchased the mokarari interest in execution of a decree obtained against the holders of the mokarari (enure. In 1896 Surja Narain Gosain brought a suit and obtained a decree on his mortgage, and in April 1902 Kirtana Kanali was sold in execution of the mortgage decree and purchased by the appellants. The appellants then took delivery of possession, but they found themselves opposed by Nanda Lal and by the son of Madau Mohan, these being the two out of the five brothers, who had not joined in the mortgage to Surja Narain. They wore also obstructed by Mohesh Mandal, who claimed to have purchased Braja Lal's share in execution of a decree obtained on a mortgage subsequent to that of Snrja Narain Gosain. The obstruction led to three claim cases under Section 335 of the Code of Civil Procedure, and they were all decided against (he present appellants, who accordingly brought three suits, against Nanda Lal, against Madan Mohan's son and against Mohesh Mandal. In all the suits these appellants alleged that Braja Lal was entitled to the whole of the chuck, and the defence was that Braja Lal had only 1/5th of the chuck, which was held by all the live brothers in undivided shares, and that therefore (he appellants had in execution of Surja Narain Gosain's mortgage decree purchased only 3/5ths of the chuck.

3. As regards the suit brought against Mohesh Mandal the appellants also alleged that they were entitled to the possession of it notwithstanding Mohesh Mandal's purchase in execution of his mortgage decree, and they also alleged that Mohesh had lost the light of redemption.

4. Two other suits connected with the above transactions were tried at the same time as the suits brought by the appellants. One of these suits, namely suit No. 324 of 1903, was brought against the appellants by Kulada Prasad Singh, the son of Radha Madhab, one of the mortgagor.?, to have it declared that the mokarari, which Braja Lal had purchased, did not pass by the sale held in. execution of Surja Narain Gosain's mortgage. Another suit was brought against the appellants by Rakhal, son of Madan Mohan, for mesne profits for the period during which he was out of possession in consequence of the present appellants obtaining possession from July 1902 to July 1903.

5. The Munsiff decided all the five suits in favour of the present appellants, but on appeal the Subordinate Judge reversed the Munsiff's decision and dismissed the suits of the present appellants and decreed the suits brought by Kulada and Rakhal. The finding of the Subordinate Judge is that chuck Kirtana Kanali belonged to all the five brothers, and that therefore what the present appellants had purchased was only 3/5ths of the chuck. This is a finding of fact, which binds this Court on second appeal, and the learned vakil for the appellants did not seriously attempt to controvert that finding.

6. Two questions were mainly discussed at the hearing of these appeals. The first was, whether, when Braja Lal purchased the mokarari of the chuck, that mokarari merged in the shikmi tenure, which he and his brothers are found to have held. There is no dispute that Braja Lid's purchase of the mokarari interest was made not on behalf of himself alone, but on behalf of all the five brothers, and the shikmi as well as the mokarari tenures therefore became vested at one time in the same persons. The Subordinate Judge has held that Section 111, Clause (d) of the Transfer of Property Act, does not apply, because the lease was for agricultural purposes, and therefore under Section 117 was excluded from the * operation of Section 111.

7. It appears to us to be doubtful whether the lease was for agricultural purposes or not. There is an expression, which supports the view that the lease was taken for cultivating the land and reclaiming the jungle and digging tanks and therefore was an agricultural lease; but, however that may be, we think that under the authority of the Privy Council in the case of Kishen Datt Ram v. Mumtaz All Khan (1879) I.L.R. 5 Calc. 198, the mokarari interest did merge in the superior tenure. Their Lordships point out that merger would take place under the English law and would be in accordance with the principles of equity, justice and good conscience. We need only quote the passage on page 2C9, which is as follows: "Again, what followed on the purchases? Had they been made by or on behalf of a talukdar holding under an absolute, as distinguished from a mortgage, title, the tenures would, as a matter of course, have merged in the taluk."

8. Further, even if there was no merger, we are of opinion that the effect of the purchase of the mokarari interest would be to enhance the security. It would be an accession to the mortgaged properties under Section 70 of the Transfer of Property Act, and in support of this view we may refer to the case, which has been already cited, decided by their Lordships of the Privy Council as well as to the cases of *Shyama Churn Bhuttacharjee v. Ananda Chandra Das*[1] and *Ajudhia Prasad v. Alan Singh*[2] In our opinion therefore the appellants are entitled to the 3/5ths of the mokarari interest as well as to 3/5ths of the shikmi interest in chuck Kirtana Kanali.

9. The other question discussed at the hearing of these appeals is whether Mohesh Mandal had lost his right of redemption. The ground put forward by the appellants that he had lost the right of

redemption is this That though he was not a party to the mortgage suit instituted by Surja Narain, still be came in after the properties bad been advertized for sale, and he then applied that as he had purchased 1/5th of the chuck, the remaining 4/5ths should be first put up to sale in execution of Surja Narain's decree and his own 1/5th should be sold only in case the other 4/5ths should be found inadequate. After the sale was concluded he also applied * for 1/5th of the sale proceeds. We do not think that these facts deprived Mohesh of his right to redeem. He was no party to Surja Narain's mortgage suit, and therefore could take no objection to the validity or otherwise of the mortgage. We are of opinion that the Subordinate Judge was right in holding that Mohesh Mandal had not lost his right of redemption. At the same time we may observe that the amount on payment of which Mohesh is entitled to redeem is not a matter which can be dealt with in these suits, as Mohesh put forward no claim to redeem.

10. As regards the fifth suit brought by Rakhal for mesne profits, it is conceded that in the view we take as to the extent of. Braja Lal's interest in the chuck, the appeal in that suit must fail.

11. The result therefore is that the appeal from appellate order No. 292 of 1905 is dismissed with costs. In the other appeals the appellants succeed in part. They will be entitled to possession of 3/5ths both of the shikmi tenure and of the mokararl interest in chuck Kirtana Kanali, subject, however, to the right of Mohesh Mandal to redeem the 1/5th share, which he purchased, in a suit properly framed for that purpose. The 1/5th share, which Mohesh is entitled to redeem, is of course 1/5th of the 3/5ths which the plaintiffs appellants are by this decision declared entitled to recover. As the appeals have succeeded in part, we direct that each party do bear its own costs in these appeals, except in appeal No. 292.

Cases Referred.

1(1880) 3 C.W.N. 323
2(1902) I.L.R. 25 All. 46