NAGPUR HIGH COURT

Subhan

Vs

Madhorao Narainrao Ghatate

First Appeal No. 89 of 1944

(R. Kaushalendra Rao and Deo, JJ.)

24.04.1951

JUDGMENT

R. Kaushalendra Rao, J.

1. This judgment will also govern civil revision No. 110 of 1945.

2. This appeal is by the fifth defendant in the suit. The suit was instituted by the respondent for possession of seven fields in mahal No. 2 of mauza Wadoda, tahsil and district Nagpur. The suit was decreed by the learned trial Judge and the present appeal is only against the decree in so far as it related to fields Nos. 147 and 154.

3. Ganpatrao who was defendant No. 1 to the suit was the malguzar of -/8/- share in mahal No. 2. He fell in arrears of land revenue. So the -/8/- share of mahal No. 2 was sold in auction for arrears of land revenue. The respondent purchased the share and obtained possession of the same: Vide receipt of possession (Exh. D-3).

4. According to the appellant he was made an occupancy tenant by the lambardar Narayan (5 D.W. 3) in the following circumstances : The respondent entered into possession of the property purchased by him on 23-9-1938 and the case before the Revenue Court was dismissed as fully satisfied. In a suit (Civil Suit No. 26-A of 1940) for partition instituted by Ganpatrao's wife and sons Ganpatrao gave up his right over the entire property existing in his possession in favour of the plaintiffs. Then it was alleged that Ganpatrao's wife and sons surrendered the tenancy fields to the landlord on 23-11-1940. The landlord entered into possession and then leased out the tenancy rights to the appellant on 2-12-1940. Since that date the appellant claimed to hold the fields in occupancy right.

5. It was contended for the appellant that the suit for possession could not have been entertained by the civil Court. Reliance was placed upon Section 220 of the Land Revenue Act read with Section 150 thereof. It is no doubt true that Section 150 empowers the Deputy Commissioner to put the purchaser at a revenue sale in possession of the property sold. In the instant case that was done on 23-9-1938 under Exh. D-3. The respondent obtained formal possession of the -/8/- share

of the mahal purchased by him. Though the respondent alleged that khas possession of the khudkasht fields was not taken because of the request of Ganpatrao that possession would fee given after the reaping of the crops which were then standing on the fields, this was denied by all the defendants. The respondent's servant Diwakar deposed in support of the allegation of the respondent about the omission to take khas possession of the khudkasht lands. We cannot, however, accept his evidence. There is no mention at all in Exh. D-3, the receipt for delivery of possession, about the khudkasht lands. In the circumstances we must hold that only formal delivery of the -/8/- share in the village, whatever that may mean, was taken by the respondent.

6. The mode of delivery of possession of property must necessarily vary according to the nature of the property as mode of possession of different properties varies. It has been held that if the property is zamindari all that need be done for delivery of possession of the property is to go to the property and proclaim in the name of the Court that so and so has been dispossessed and so and so has been put in possession of it. Such delivery of possession is actual and is as effective against the judgment-debtor as his physical removal, say, from a house. The effect of such delivery of possession is to dispossess the judgment-debtor. See '*Rajendra Narayan V. Chintamani*[1]*',* In the instant case Ganpatrao, the proprietor of the -/8/- share in the mahal, was a party to the proceedings for the sale of the property and the formal delivery of possession of the -/8/-share to the respondent had the effect in law of dispossessing Ganpatrao on the 23rd September 1938. In the circumstances, there was nothing further to be done by the revenue officer. We are concerned in the instant case with the wrongful possession of the appellant subsequent to the dispossession of Ganpatrao. Questions arising from such wrongful possession subsequent to the delivery of possession in pursuance of a revenue sale are not left to be determined by the authorities under the Land Revenue Act. Accordingly we hold that section 220 of the Land Revenue Act did not stand in the way of the civil Court's entertaining the suit.

7. The principal contention of the appellant is that the respondent did not acquire under the sale the khudkasht land in mahal No. 2. It is clear from Exh. P. 1, the certificate of sale in favour of respondent No. 1, that what was sold and purchased was a half share in mauza Wadoda, mahal No. 2. The appellant submitted relying upon '*Gangaram V. Mst. Kanchanbai*[2]*', 'Jamshed V. Burjorji*[3]*',* and *'Safdar Ali V. Maksudali Beg*[4]*',* that the circumstances surrounding a sale and the subsequent conduct of the respondent showed that the khudkasht lands were not included in the sale of the village share. There is nothing in the bid-list (Exh. D-2) to support the suggestion that the khudkasht lands were excluded from the sale. Evidence was given by Damodhar (D. W. 1) and the appellant that the Tahsildar or the clerk explained that the khudkasht lands were being excluded from sale. Narayan (5 D. W. 3) was also present at the time of the sale. He did not support Damodhar or the appellant in their version of what happened at the time of the sale. Narayan only deposed that it was his impression that the khudkasht lands were excluded. No weight can be attached to this statement. As the learned trial judge rightly remarked, it was extremely unlikely that Ganpatrao and Narayan who are both lawyers would not have taken care to exclude the khudkasht lands if in fact that was the intention of the
officer conducting the sale. The subsequent conduct relied upon by the appellant is that the respondent did not obtain khas possession of the khudkasht lands. Having regard to the fact that what was purchased was an -/8/- share in the mahal, the respondent might well have been content with obtaining formal possession of the property.

8. The question to be determined is: what is it that passed to the respondent under the sale

certificate (Exh. P. 1)?

9. It is well settled by a long line of decisions that, in the absence of exclusion or reservation of khudkasht lands, a sale of a mahal or a share in it either by the proprietor himself or under a decree against a proprietor passes the khudkasht lands to the purchaser. See *'Hazarilal V. Hazarimal[5]', 'Umabai V. Dattatraya[6]', 'Balkrishna V. P.P. Deo[7]', 'Krishnachanda V. Sakharam[8]',* and *'Shatruhansingh V. Sakharam[9]',* See also *'Mst. Ramkunwar Bai V. Mst. Chhitia Bai[10]',* The principle of these decisions is equally applicable when a mahal or a share in it is sold for arrears of land revenue. Under Section 2(5) of the Land Revenue Act 'khudkasht' means that part of the home-farm of a mahal which is cultivated by the proprietor as such and which is not sir land. The khudkasht land therefore forms part of the mahal and goes with it.

10. In *'Umabai V. Dattatraya[11]',* Bose, J., (as he then was) went so far as to say that there could be no reservation of khudkasht rights when a share in a mahal is sold. For the purpose of the instant case it is not necessary to take such an extreme position as we have held that there was no reservation of the khudkasht rights.

11. The learned counsel for the appellant, however, contended on the basis of two decisions of their Lordships of the Privy Council in *'Narayan Das v. Jatindra Nath[12]',* and *'Chattra Kumari v. W.W. Broucke[13]',* that all that passes to the purchaser in a revenue sale is only the right to collect the revenue. In *'Narayan Das v. Jatindra Nath'*, (supra), the question which their Lordships of the Privy Council had to consider was whether on a revenue sale of a piece of land the purchaser acquired title to a building which was standing on it. Their Lordships observed that on the failure of an owner to pay the Government assessment, his estate or interest in the land is forfeited or rather determined and that by a sale held under the Bengal Land Revenue Sales Act, Act 11 of 1859, what was sold was not the interest of the defaulting owner, but the interest of the Crown subject to the payment of the Government assessment. On an examination of the relevant provisions their Lordships held that the interest of the Crown which was subject to the Government assessment was the land subject to the payment to the Government of an annual sum. The Government's power of sale for arrears of revenue was thus limited to the land. Their Lordships approved of the statement of Sir Barnes Peacock in '*Thakoor Chundra Paramanick v. Ram Dhone[14]',* that it is no part of the laws or customs of this country that whatever was affixed or built on the soil becomes

a part of it, and is subjected to the same rights of property as the soil itself. In short, the maxim which is found in English Law "quicquid plantatur solo, solo cedit" has at the most only a limited application in India.

12. In *'Chattra Kumari v. Broucke[15]',* their Lordships had to construe the word "malguzari" in a lease deed. Their Lordships held that the word ordinarily means revenue and not rent. The two decisions cited cannot advance the case of the appellant.

13. Under Section 128(f) of the Land Revenue Act an arrear of land revenue may be recovered by selling the share of a co-sharer who has not paid the land revenue payable by him. Sub-section (1) of Section 138 says that the purchaser of any estate, mahal, share or land sold for arrears of land revenue acquires it free of all incumbrances imposed upon it. The khudkasht land

is thus a part of the mahal on which the revenue is assessed and is not something apart from it. So where the mahal is sold for arrears of land revenue the khudkasht land which forms part of it goes with the mahal in the absence of any express reservation. As the interest of the proprietor in a mahal must be held to be determined on a sale of the mahal for arrears of land revenue, his interest in the khudkasht land cannot be held to survive after the passing of the mahal. The express saving of rights in Sir land under Section 137(1) of the Land Revenue Act during the execution of any of the processes mentioned in Section 128, clauses (c), (d) and (e) of the Act and the express provision for the accrual of tenant right in sir on the loss of the proprietary right in them under Section 49 of the Central Provinces Tenancy Act go to reinforce the conclusion we have reached.

14. We therefore hold that the two fields in question passed to the respondent as part and parcel of mahal No. 2 purchased by him.

15. There is no force in the contention of the appellant that as an occupancy tenant he was not liable to be ejected. It was suggested by the appellant that Ganpatrao had no exclusive or separate interest in the fields in suit. This suggestion is baseless in view of the decree passed in civil suit No. 10-A of 1937 (Exh. P. 2). According to that suit there was division of mahal No. 2 of mauza Wadoda between Ganpatrao and Narayan. Each obtained an -/8/- share and along with the -/8/- share the fields in suit fell to the share of Ganpatrao. Narayan admitted as 5 D. W. 3 that from the date of the decree i.e. the 25th October 1937 the khudkasht land in suit was exclusively cultivated by Ganpatrao. That being so, Narayan could not lease out the fields which under the decree were held in severalty by another co-sharer. See *'Sheikh Dangu v. Narayan'*[16], and *'Jaitram v. Girdhari*[17]*',* In fact Narayan could not have obtained any interest from the surrender of defendants 2, 3 and 4. The relinquishment (Exh. D-8) by Ganpatrao in civil suit No. 26-A of 1940 of his rights in favour of defendants 2, 3 and 4 could not pass any interest in the khudkasht lands as on the 3rd September 1940 he himself had no interest left in the lands in suit.

16. The appellant put forward a claim to compensation to the extent of Rs. 5,000 on account of improvements made by him to the lands in dispute. The claim was
negatived by the learned trial judge. The appellant had no equity to raise against the respondent - which entitled him to compensation. It was not pleaded that the compensation was due because the respondent had acquiesced in the improvements being made by the appellant. It is not the case that the appellant made the improvements under a mistaken view as to his right or that he was encouraged in such a mistake by the inactivity of the respondent. That being so, there is no provision of law entitling the appellant to compensation. Section 51 of the Transfer of Property Act is not of any avail to the appellant. Reference may be made to what was observed in '*Perumal Gramani v. Mahamad Kasim Sahib*[18]*',*

> "The Legislature has chosen to grant the right to claim compensation only to the man who makes improvements believing in good faith that he is "absolutely entitled" to the land on which he effects improvements and not to a person who merely believes that he has got a permanent right of occupancy over a building site."

It has been repeatedly held that the section cannot be invoked by a person claiming to hold the land in tenancy right. See '*Narasayya v. Raja of Venkatagiri', 37 Mad 1*, *'Ismail Khan Mohomed*

v. Jaigun Bib[19]*i''Nundo Kumar v. Banomali*[20]*', 'Sidh Nath v. Har Narain*[21]*',* and *'Banmali v. Nihal Singh*[22]*',*

17. The appellant's claim to hold the lands in occupancy right being without any legal basis, his possession was wrongful. The claim to compensation was rightly rejected.

18. After the learned trial Judge decreed the claim of the respondent, the appellant applied under Order 47, Rule 1 of the Code of Civil Procedure for review of the decision on the ground of discovery of new and important evidence which would affect the decision of the case on merits. The evidence relied upon was that since the filing of the suit the respondent's agent and kamdar at Wadoda had passed receipts for rent in respect of the fields in suit. The receipts which are filed on record are dated the 24th April 1943 and 26th February 1944. They do not mention specifically the fields in suit. In rejecting the application for review the learned trial Judge held that the application was an attempt to raise a plea which the applicant had not pleaded in the original suit. The suit was instituted on the 14th October 1942. The Court returned the plaint for presentation to the proper Court on the 9th September 1943. On the 10th January 1943 the plaint was represented in the Court of the third Sub-Judge, 1st Class. Nagpur. The written statement was filed on the 4th January 1944. The defendant went in the witness-box on the 8th July 1944. The defendant resides in Nagpur and mauza Wadoda is about 12 miles from Nagpur. The learned trial Judge held that the appellant had not been diligent. It is difficult to accept that when litigation was going on with respect to the fields the havildar of the appellant would not apprise him of the fact that the respondent had recognized the appellant as a tenant by accepting the rent.

19. Besides, as the learned trial Judge rightly pointed out, the mere fact that an agent accepts rents is not sufficient to establish a tenancy against the landlord unless the agent was specially authorized to grant leases in addition to recover rents. See *'J AIR am v. Laxman*[23]*',* and *'Biseshwar Dass v. Sashinath Jha*[24]*',* In this case there is no allegation that the agent was authorized to grant leases. In the am-mukhtyarnama given by the respondent to his agent Tulsiram there is an express prohibition against the granting of leases by the agent. The decision of the learned trial Judge on the application for review is correct. Besides there is no question of jurisdiction involved. The application for revision is not maintainable and is accordingly dismissed.

20. Along with the appeal the appellant also made an application for amendment of the written statement on the basis of rent receipts granted by the kamdar of the respondent. We have discussed this aspect of the matter in dealing with the question of the review application filed before the trial Judge and the revision in this Court. Even after the finding of the learned trial Judge that the am-mukhtyarnama did not authorize the kamdar to grant leases, there is no allegation that he was authorized to do so. So the appellant cannot improve his case by the amendment sought.

21. In all the circumstances of the case we are of the view that the application for amendment is a mala fide attempt to expose the respondent to the brunt of a new but futile attack. The application for amendment is rejected.

22. The decision of the Court below is correct. The appeal and the revision application are dismissed with costs. Appeal and revision dismissed.

Cases Referred.

[1] AIR 1939 Pat 151 At P. 153
[2] I.L.R (1936) Nag 60
[3] AIR 1915 Pc 83
[4]26 Nag Lr 119
[5] AIR 1923 Nag 130
[6]1942 Nag Lj 177
[7] Misc. S.A. No. 75 Of 1943, D/-3-8-1943 (Nag)
[8] S.A. No 362 Of 1944, D/-16-11-1944 (Nag)
[9] S.A. No. 182 Of 1944, D/-30-1-48 (Nag)
[10] I.L.R (1937) Nag 367 At P. 373
[11]1942 Nag Lj 177
[12]54 Cal 669 (PC)
[13] AIR 1927 PC 250
[14](1866) 6 WR 228 (*Cal)*
[15] AIR 1927 PC 250
[16] AIR 1925 Nag181
[17] AIR 1928 Nag 16
[18] AIR 1916 Madras 502
[20]29 Cal 871 at p. 884
[19] 27 Cal 570 at p. 586
[21] AIR 1937 Oudh 446
[22] AIR 1918 Nag 210 at p. 213
[23] AIR 1926 Nag 6
[24]22 Pat 133 at p. 147