

**Ram Singh and ors. Vs. Baldeo Prasad and ors.**

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**Court :** Allahabad

**Decided On :** Jan-12-1932

**Reported in :** AIR1932All643

**Appellant :** Ram Singh and ors.

**Respondent :** Baldeo Prasad and ors.

**Judgement :**

1. This is an appeal by some of the defendants in a suit for redemption of a mortgage and is directed against a judgment of this Court under Section 10, Letters Patent. One Parmanand Lal possessed an occupancy holding in Mauza Bhaipur Kalan, Pargana Bhulli, in the District of Mirzapur which consisted of 27 plots comprising an area of 15 bighas 10 biswas. On 26th June 1885 he executed a usufructuary mortgage of the entire holding in favour of Udit Singh for Rs. 175. Later on Parmanand Lal executed another usufructuary mortgage of the identical plots in favour of one Bhagwan Lal for Rs. 1,475 on 21st January 1901, and left Rs. 175 with the mortgagee for payment to Udit Singh under the earlier mortgage. It was stipulated in this document that this mortgage was to remain in force for 59 years. On 29th April 1904 Bhagwan Lal sold his mortgagee rights to Mukutdhari Lal, son of Udit Singh, for Rs. 499. Mukutdhari Lal was the father of defendants 1 to 3 and grandfather of defendants 4 and 5. On 11th March 1924 the sons of Mukutdhari Lal made a sub-mortgage in favour of defendants 6 to 9. No effect appears to have been given to this sub-mortgage, and on 8th May 1926, they sold the mortgagee rights under the document, dated 29th April 1904, to defendants 6

to 14. On 10th January 1927 the suit which has given rise to this appeal was instituted by Jwala Prasad, Baldeo Prasad, Bameshwar Prasad and Ohaturbhuj for redeeming the mortgage, dated 26th June 1885, on payment of Rs. 175. The plaintiffs claimed to be the heirs of Parmanand Lal. The following genealogical tabla will elucidate the relationship:

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Parmanand Lal Rajpal Gokul Prasad

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Mathura Janki Baldeo

Prasad (dead) Prasad Prasad

| plaintiff. plaintiff.

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Rameshwar Chaturbhuj

plaintiff. plaintiff.

2. Plaintiffs alleged that Parmanand Lal died 29 or 30 years before suit, that Rajpal and Gokul Prasad were alive at the time of his death, that the equity of redemption was inherited by his brothers and that it devolved subsequently upon the four plaintiffs. They further alleged that the usufructuary mortgage bond,, dated 21st January 1901, was collusive, fictitious and without consideration. They also impugned the deed of assignment, dated 29th April 1904 on the same grounds. In 1922, Rani Surajpal Kaur, zamindarni of Mauza Bhulli Kalan, had instituted a suit in the Revenue Court against the present plaintiffs and defendants 1 to 5 for

possession of the occupancy holding. This was Suit No. 543 of 1922. The Rani alleged that Parmanand Lal had died without leaving any heirs and that the occupancy holding had lapsed to her as the zamindari. The present plaintiffs did not contest the suit. The other defendants, who were the successors-in-interest of Udit Singh, in their written statement dated 11th July 1923, resisted the suit on the ground that Parmanand Lal had not, died without leaving any issue, that defendants 1 to 5 were his heirs and that the occupancy holding had not lapsed to the zamindari. These pleas found favour with the Revenue Court, which dismissed the suit on 28th September 1923. Since the dismissal of the suit, defendants 1 to 5 and their transferees have continued to remain in possession of the occupancy holding. Plaintiffs contended that they were entitled to redeem the mortgage as they were the heirs of Parmanand Lal under the personal law and had an interest in the holding under Section 91(a), T.P. Act, that the finding in Suit No. 543 of 1922 that Baldeo Prasad and others were the occupancy tenants of the holding by right of succession to Parmanand Lal operated as res judicata and that the defendants were estopped under Section 115, Evidence Act, from disputing the title of the plaintiffs to redeem.

3. The suit was directed against 14 defendants, defendants 1 to 5 were the grandsons and great-grandsons of Udit Singh, the original mortgagee, defendants 6 to 14 were the puisne transferees in possession. The suit was contested by defendants 6 to 9 and by defendants 12 to 14. They contended that Rajpal was not the brother of the mortgagor, that Parmanand Lal died 13 or 14 years before suit, that Rajpal and Gokul had predeceased him, that the plaintiffs had no interest in the equity of redemption, that the mortgage of 1901 was a genuine transaction supported by consideration and that the mortgage, dated 26th June 1885, had been superseded by the later mortgage, dated 21st January 1901, and that under the last mentioned mortgage, the property was not redeemable before the expiry of 59 years. The Court of first instance dismissed the suit. It came to the following conclusions : (a) Parmanand Lal and Rajpal were own brothers; (b) Rajpal died 20 or 21 years ago; (c) Parmanand Lal died in or about 1324 Fasli; (d) Parmanand Lal had executed the mortgage bond, dated 21st January 1901, but this document and the subsequent document dated 29th April 1904 were not supported by consideration; (e) on the allegation contained in the plaint that Parmanand Lal died

29 or 30 years ago, Rajpal or the plaintiffs did not inherit the holding, having regard to the provisions of Section 9, Act 12 of 1881, as they did not share in the cultivation of the holding along with Parmanand Lal; (f) the judgment in Suit No. 543 of 1922 did not operate as *res judicata*; and (g) the defendants were not estopped under Section 115, Evidence Act, from denying the title of the plaintiffs to the property in dispute. The lower appellate Court reversed the decision and decreed the suit for redemption. It specifically came to a finding that the mortgage, dated 21st January 1901, was a fictitious document and did not supersede the earlier mortgage dated 26th June 1885. No findings were arrived at as to the time of the death of Parmanand Lal and his brothers or whether the inheritance in the occupancy holding devolved upon the plaintiffs. This is clear from the following extract from the judgment:

In my opinion in this case it is not very important to decide when Parmanand Lal died and whether his brothers were alive or not at that time and how the inheritance of Parmanand Lal devolved on his heirs.

4. The lower appellate Court was of opinion that the plaintiffs, or at any rate their father and grandfather, were heirs of Parmanand Lal under the Hindu law, and that fact gave them sufficient interest to maintain a suit for redemption of the mortgage. The Court also found that the judgment in Suit No. 543 of 1922 operated as *res judicata* as against the defendants, and that the defendants, having set up the plaintiffs as the heirs of Parmanand Lal in the occupancy holding in their written statement dated 11th July 1923, were precluded from contesting the plaintiff's claim to redeem. The grounds upon which the judgment proceeds may be reproduced here:

In 1923. Rani Surajoal Kuar, the zamindarni of the plots in dispute, sued Kimta Prasad, Jwala Prasad and Sankbata Prasad, sons of Mukutdttari, and also the brother and nephews of Parmaoaud Lal for ejectment on the allegation that Parmanand Lal had died without leaving any heir; and his brother, nephews and the mortgagees, the sons of Makutdhari were not entitled to remain in possession and she was entitled to possession after ejecting the defendants. Kamta Prasad on his own behalf and on behalf of his brothers filed a written statement on 11th

July 1923 and in it he clearly stated that after the death of Parmanand Lal defendants 1 to 5 (brother and nephews of Parmanand Lal) became the lawful heirs of the occupancy holding in dispute and their names were entered in the village papers 13 or 14 years ago, that it could not be said that Parmanand Lal died without any heir, that the plaintiff had admitted the right of inheritance of the defendants and she could not go against her admission. This ejectment suit was decided on 28th September 1923 and the claim was dismissed on the ground that Parmanand Lal had left heirs who were entitled to inherit under the tenancy law, and they were rightly recorded as occupancy tenants in the village papers.... In the present case the plaintiffs have been recorded as heirs of Parmanand Lal the occupancy tenants of the holding; their right was recognized by a competent Court in a suit for ejectment by the zamindar in which the heirs of the mortgagor and the heirs of the mortgagee both were parties; and as I have stated above, it was on the plea raised by the heirs of the mortgagee themselves. I think this is conclusive and the mortgagee has got no right to open the question and go behind the finding of the Revenue Court or village record. I therefore hold that the plaintiffs have got a right to redeem the holding in dispute.

5. The judgment of the lower appellate Court has been affirmed by the learned Judge of this Court substantially on the grounds indicated above. The contesting defendants have appealed to this Court and have challenged the correctness of the findings of all three points. In our opinion the contentions of the defendants are well founded and ought to be accepted. The judgment in Suit No. 543 of 1922 cannot operate as *res judicata*. 'We however do not accept the contention of Mr. Narain Prasad Asthana that the judgment of the Revenue Court was not that of a Court of competent jurisdiction. The defendants were not sued as trespassers, but appear to have been sued as non-occupancy tenants. Under Section 34, Tenancy Act (2 of 1901, local), it was within the competence of the landholder to treat a person occupying land without his consent as a non-occupancy tenant and to sue for his ejectment in the Revenue Court. The landholder could do this under Section 34 coupled with Section 63 of the Act. As pointed out in *Jagardeo Singh v. Ali Hammad* [1918] 40 All. 300.

a person occupying land without the consent of the landlords is a person who enters in possession without the express consent of the landlord and without any previous arrangement with him.

6. The Revenue Court had therefore the jurisdiction to entertain a suit for the ejectment of persons who occupied land without the landlord's consent. Neither the lower appellate Court nor this Court has indicated in its judgment any reasons for holding why the judgment in the former suit should operate as *res judicata* between the co-defendants. Where parties are arrayed on the same side as co-defendants, any adjudication between them does not operate as *res judicata*, unless three conditions are satisfied : (1) there must be a conflict of interest between the defendants concerned; (2) it must be necessary to decide this conflict in order to give the plaintiff the relief he claims and (3) the question between the defendants must have been finally decided. This is settled law and the final pronouncement on this point has been made by the Judicial Committee in *In re Munni Bibi v. Tirloki Nath* . Their Lordships have cited with approval the following observation of Wilgram, V.C. in *Cottingham v. Earl of Shrewsbury* [1843] 3 Hare 627:

If a plaintiff cannot get at his right without trying and deciding a case between co-defendants the Court will try and decide that case, and that the co-defendants will be bound, but if the relief given to the plaintiff does not require or involve a decision of any case between co-defendants, the co-defendants will not be bound as between each other by any proceeding which may be necessary only to the decree the plaintiff obtains.

7. In Suit No. 543 of 1922, the present plaintiffs did not put forward any defence. There was no conflict of interest between them and the other defendants who were arrayed on the same side with them. There was therefore no question at issue between the two sets of defendants nor any final adjudication of any such question. The decision therefore cannot operate as *res judicata*. It has strongly been contended on behalf of the plaintiffs that the defendant-appellants, having in the former suit held out that the plaintiff's were the heirs of Parmanand Lal and as such the occupancy tenants of the holding in dispute, and this defence having

succeeded, with the result that they had continued to remain in possession of this property since 1922, they are precluded from disputing the plaintiffs' title to redeem. The plaintiffs take their stand upon Section 115, Evidence Act, and also upon a rule of estoppel founded upon general principles. Section 115, Evidence Act, does not exhaust the doctrine of estoppel. We are however of opinion that the defendants are not estopped from questioning the plaintiffs' title either by reason of Section 115 or by recourse to any doctrine founded upon general principles. In order to operate as estoppel under the aforesaid section, three conditions must be fulfilled : (1) there must be a representation made by the opposite party with a view to cause belief (2), the representation should have been believed under circumstances that its falsity could not be ascertained in spite of due diligence and (3) actions arising out of such belief. There can be no estoppel where truth is accessible. Again, there can be no estoppel in the absence of representation or conduct amounting to such. Further, there can be no estoppel where a party is not misled and has not been induced to do something detrimental to his interest owing to the action of the other party. The defendant-appellants, when they filed their written statement in the aforesaid case on 11th July 1923, made no representation to the plaintiff-respondents. The plaintiff-respondents did not contest the suit for their ejection. Whether or not they were the legal heirs of Parmanand Lal was a matter as much within their knowledge and accessible to search or inquiry as it was to the other co-defendants. The written statement filed by the other defendants did not in any way mislead them or induce them to alter their position to their injury or detriment. Section 115, Evidence Act, is therefore clearly inapplicable to the case. This matter is concluded by the pronouncement of the Privy Council in *Ram Saran Singh v. Ram Peary* [1870] 13 M.I.A. 551. The facts of this case present many common features. In a former suit, certain co-defendants combined and made a false statement in respect of an alleged mortgage transaction with a view to defeat the plaintiffs' claim. A foreclosure suit was subsequently brought by one of these defendants against the other defendant founded on such alleged mortgage. The defendants contested the suit and denied the mortgage. The plaintiffs pleaded that the defendants were estopped from denying the mortgage which gave the plaintiffs the right of action. It was held by Lord James, J., that:

there was nothing whatever to prevent the defendant from showing the real truth of the transaction

and that:

it was equally clear that a pleading by two defendants against the suit of another plaintiff never could amount to an estoppel as between them.

8. This ruling was applied by Turner and Oldfield, JJ., in *Praram Singh v. Lal Ji Mal* [1875-78] 1 All. 403. Lastly, it was contended that the plaintiff-respondents were the heirs of Parmanand Lal under the Hindu law and were entitled to redeem, as being persons having an interest in the right to redeem the mortgaged property under Section 91 (a), T.P. Act (4 of 1882). An occupancy tenure is the creation of Statute, and where a special rule of succession has been laid down in the Statute, it is the Statute which regulates the devolution of inheritance and not the personal law of the tenant. The interest referred to in Section 91 can accrue either by succession, conveyance or contract. No right accrued to the plaintiffs by conveyance or by contract. In order to determine whether the right devolved by inheritance, we have got to look into the Statute, which was in force at the time when the succession opened. If Parmanand Lal died before 1902, Section 90 Act 12 of 1881, applied and regulated the inheritance. Under this Act, his brothers and nephews are no heirs to the holding, if they did not share in its cultivation jointly with Parmanand Lal. If Parmanand Lal died after 1902, inheritance would be governed by Section 22, Act 2 of 1901 and his brothers would be entitled to succeed to his holding even though they did not share the cultivation with him. In the absence of a finding as to the time of Parmanand Lal's death, it is impossible to determine whether or not the plaintiff-respondents had any title to the property by succession to Parmanand Lal. The appeal has not been tried on the merits. We have however not the slightest doubt in holding that the personal law of the parties was not applicable to the case of succession to an occupancy holding see *Bhura v. Shahabuddin* [1908] 30 All. 128. If therefore the plaintiffs are not the heirs to Parmanand Lal under the Tenancy Law in force at the time when the inheritance opened, they cannot maintain a suit for redemption. They acquired no interest in the holding under their personal law. The 'interest' referred to in Section 91, T.P.



Act, is interest in the property sought to be redeemed. As the appeal has not been heard and disposed of on the merits as we are reversing the findings of this Court and of the lower appellate Court upon preliminary points, this appeal must go back for trial on the merits. We accordingly allow the appeal, set aside the judgment and decrees of this Court and of the lower appellate Court and remand the case to the lower appellate Court under Order 41, Rule 23, Civil P.C., for its reinstatement under its original number and disposal according to law. Costs here and heretofore shall abide the event.

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