

Dwarka Das Vs. Rafiuddin

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Court : Allahabad

Decided On : Nov-29-1939

Reported in : AIR1940All218

Appellant : Dwarka Das

Respondent : Rafiuddin

Advocate for Pet/Ap. : Mr. Mehrotra

Judgement :

Bennet, J.

1. This is a second appeal by defendant 1 Dwarka Das against concurring decrees of the two lower Courts in favour of the plaintiff. The facts as found are that there were five brothers, sons of Bandey Husain, a Mussalman, the plaintiff being a minor son. A decree was obtained by Dwarka Das, the appellant, against the four brothers who were of age, a simple money decree, in the Civil Court in original suit No. 221 of 1931. In execution of that decree the decree-holder attached 37 plots including those in dispute which stand recorded as occupancy tenancy of all the five brothers and a house and a well. Ex. 2 is a compromise which was filed in the execution Court on 25th May 1932 between the four brothers and the decree-holder. In this it was provided that until satisfaction of the decretal amount the plots in suit and the house and the well would remain attached. It was provided that instalments should be paid and in default of instalments that there should be sale

of the property attached. There was default and an application for sale was made on 27th October 1934 and the property was sold on 19th December 1934 and purchased by the decree-holder, the appellant. On 12th August 1935, the present suit was brought by the plaintiff Rafi Uddin through his mother as next friend. The plaintiff had not been a party to the Civil Court decree or the execution proceedings. The plaintiff sued for a declaration that the attachment and sale of the occupancy plots and the house and well which were appurtenant thereto in execution of the decree of the appellant was illegal and void. Later, as possession had been taken by the appellant, the Court allowed the plaint to be amended and the relief for possession was added. The Courts below have granted the declaration and possession. It has been held by the Courts below that the house and the well were appurtenant to the holding and that the proceedings in execution sale were contrary to Section 23, Agra Tenancy Act, and that the plaintiff as a co-tenant can question the sale of the entire khata. It was further held that no compromise could be made by the four brothers in regard to the sale of the occupancy holding nor could such a compromise be enforced as it was contrary to Section 23, Tenancy Act. The appellant has filed an appeal asking that the suit of the plaintiff should be dismissed. In ground No. 1 he has urged:

Because the judgment-debtors not having raised any question as regards the liability of the property in dispute to attachment and sale in execution of the appellant's decree, their shares at least were rightly sold and the appellant obtained good title to 4/5ths of the property in dispute.

2. It is to be noted that this case does not appear to have been argued before the Courts below. It is true that issue 4 has as part the question: 'If so, in respect of only his share or of the entire property?' But there is nothing on the point in the judgment of the trial Court. Again, in ground No. 14 of the appeal to the lower Appellate Court it was stated: 'Because the plaintiff was not entitled to sue and in any case for the whole property.' There is nothing in the Appellate Court's judgment on this point, nor is this one of the points which the Court set out as the four points for determination in the appeal. In the High Court this point has been the main subject of argument and the contention for the appellant is that the plaintiff is only entitled to claim possession of 1/5th of the occupancy tenancy and

that he has no right to claim possession of 4/5ths of the occupancy tenancy; that that portion of the occupancy tenancy belonged to his four brothers, that they consented to the execution proceedings and agreed by the compromise that that portion should be sold and that they are unable now to question the validity of that sale in the Courts and the plaintiff cannot question it.

3. At one stage it was argued by learned Counsel for the appellant that the interest of the four brothers was not extinguished and he was referred to the provisions of Section 35, Tenancy Act, for the extinction of tenancies. He argued that the tenancy would not be extinguished under that Section and would not be extinguished at all. It was then pointed out to him that in his ground of appeal No. 1 which he was pressing that he had claimed that the shares of the four brothers were rightly sold to the appellant who had obtained good title to the 4/5ths of the property and that there was an inconsistency between the argument that the appellant owned the 4/5ths share and that some right or title in that share remained with the four brothers. At this stage he admitted that the argument that the four brothers had any right or title in the tenancy could not be sustained. In this case therefore, on the admission that the four brothers had not retained any legal right in the tenancy it appears to me that the plaintiff is entitled to claim that he is the sole legal tenant in the tenancy and that he therefore has a right to sue to eject defendant 1 appellant on the ground that the appellant is a person who has obtained possession of the holding by an auction sale which is contrary to the provisions in Section 23(1), Tenancy Act, and therefore as the Section states that the interest of an occupancy tenant is not transferable in execution of a decree of a Civil or Revenue Court the plaintiff can claim that the appellant is merely a trespasser.

4. At this stage the question arose of what was the original position of the five brothers in the tenancy. Apparently these five brothers succeeded to their father who was the occupancy tenant. Now some argument was made on Section 26, Tenancy Act. In my opinion the meaning of this Section is as follows: The first part of this Section down to 'or otherwise,' refers to persons who are not tenants but are merely joint in estate with a tenant, and states that such persons have no interest in the tenancy. The next part of the Section 'and except...by survivorship'

provides that (on the death of a tenant) no interest passes by survivorship (to the same class of persons who are joint in estate with the deceased tenant, but the succession is determined by Section 24, which would in many cases give a different result). There are two exceptions to this rule and survivorship does apply (1) where there are two or more widows holding the tenancy, and one dies, the others take by survivorship; (2) where a co-tenant dies and leaves no heir entitled to succeed him under Section 24; (presumably his co-tenant or co-tenants take the whole tenancy by survivorship). The last sentence of Section 26 means that where the co-tenants are joint in estate as well as being co-tenants, the jointness in estate does not affect succession, but, on the death of one of the co-tenants, the succession is determined by Section 24. The whole Section means that Section 24 will always apply, except in the two cases mentioned. The present case is not affected by the Section 26 because (a) plaintiff is not a person claiming as joint in estate with his Muslim brothers; (b) plaintiff would not claim on their death by survivorship but by Section 24, Class VII. The nearest collateral male relative in the male line of descent...who shared in the cultivation of the holding at the time of the tenant's death. The argument which was advanced on behalf of the appellant in regard to Section 26 was that the five brothers would be tenants-in-common and that on the termination of the interest of the four brothers the plaintiff would not have any interest in the interest which had belonged to his four brothers. Now in regard to this argument it is to be noted that the sentence in Section 26 referring to tenants-in-common is as follows:

Where the persons possessing such interest are joint in estate, they shall be deemed for purposes of succession to be tenants-in-common.

5. This sentence states that it is for purposes of succession that these persons are to be tenants-in-common. The implication is that for other purposes they are not tenants-in-common. Otherwise, the statement would have been that they are tenants-in-common without any limitation of the purpose. I consider therefore that Section 26 implies that persons who are co-tenants in general are not tenants-in-common and are only tenants in common for the purpose of succession. The obvious intention is that in the case of five brothers as at present, on the death of one of those brothers the succession to that brother will be under Section 24, that

is, Class I on his male lineal descendants in the male line of descent, etc., and that it shall not be in any way by survivorship to the remaining brothers. Section 26 appears to be the only part of the Tenancy Act, which refers to tenants-in-common. The expression used in regard to a number of persons holding an occupancy tenancy is 'co-tenant' which is a general kind of expression. In Section 23 it is provided in Sub-section (1) that the interest of an occupancy tenant is not transferable and Sub-section (2) provides two exceptions, (a) in the case of transfer to Government for public purposes and (b) to release or transfer of his interest in favour of a co-tenant. There is a stringent provision that the co-tenancy must have begun with the tenancy. The provision that there may be release in favour of a co-tenant shows that the framers of Section 23(1) in using the word 'occupancy tenant' had in view the case of an occupancy tenancy held by co-tenants. Now the only part of the Act where there is a definition of tenant is Section 3, Sub-section (6) which states:

'Landholder' means the person to whom and 'tenant' the person by whom, rent is, or but for a contract, express or implied, would be payable.

6. It was argued that the words 'joint tenancy' do not appear in the Tenancy Act. This is incorrect; the words do appear in Section 29(6) proviso. This Section lays down limitations for sub-leases by ex-proprietary or occupancy tenants in (1), by statutory tenants in (2), and by non-occupancy tenants in (5). Sub-section (6) provides:

A female, a minor, a lunatic, an idiot, a person incapable by reason of blindness of practising agriculture, or a person in the military service of Government otherwise than as a reservist shall not be subject to the restrictions laid down in Sub-sections (1), (2) and (5).

Provided that this sub-section shall not apply in the case of a joint tenancy unless all the joint tenants are of one or more of the descriptions specified.

7. It is clear that these words 'joint tenancy' and 'joint tenants' here mean a tenancy held by a number of persons, in other words co-tenants. When the Tenancy Act means any other kind of jointness as in Section 26, it is careful to

state 'joint in estate.' Although English law has not much bearing on the Tenancy Act, I may refer to Halsbury's Laws of England, Edn. 2, Vol. 27, p. 655, Para. 1137, for the distinction between joint tenants and tenants-in-common:

Land can be held by several persons having simultaneous interests.... Thus the co-owners might be joint tenants, tenants-in-common, or coparceners.... Of these ownership in coparcenary has ceased to exist;...and tenancy-in-common can no longer exist at law. But an estate in joint tenancy can still be a legal estate.

8. In Para. 1140 it is stated:

Each joint tenant has an identical interest in the whole land and every part of it. The title of each arises by the same act; the interest of each is the same in extent, nature and duration.

9. In Para. 1282 it is stated of tenancy-in-common:

Under such a tenancy the land was said to be held in undivided shares, and the tenancy differed from a joint tenancy in that it required neither unity of title, interest nor time, but only unity of possession.

10. Paragraph 1283 states:

A tenancy-in-common was formerly created by a severance of a joint tenancy which left the unity of possession untouched.

11. It appears to me that the tenant of the occupancy holding in question included all the five brothers and under the definition of 'tenant' in Section 3, Sub-section (6), Tenancy Act, all the five brothers were liable for the rent. There is no portion of the Act which indicates that co-tenants in an occupancy holding would be liable only each for a share of the rent. The intention of the Act is apparently that each co-tenant is jointly and severally liable for the whole of the rent. The interest of each co-tenant in an occupancy holding is in the whole holding and he has not got merely a right to a share of the holding. No doubt, if there was a division of the holding under Section 37 of the Act then he would have on division only a share allotted to him proportionate to the number of co-tenants, but until there is such a

division his interest is an interest in the whole holding. A tenancy in which there are a number of co-tenants involves not only the joint liability for payment of rent but the right of joint cultivation, that is, the co-tenants have a right to combine their property, labour and skill in the business of cultivation and to share the profits thereof between them in the same way that partnership is defined in Sec. 239 Contract Act. Moreover, in the present case, the plaintiff has under Section 24, Tenancy Act, the possibility of succession to a brother. On the death of that brother he would come under Class VII of Section 24 as a collateral male relative who had shared in the cultivation with his brother at the time of his brother's death. By the illegal transfer from the brothers to the appellant the plaintiff has been deprived of his chance of succession under Section 24, Tenancy Act, to the holding and he therefore has an interest in bringing the present suit.

12. Some argument was made that the plaintiff might succeed in case of the death of the appellant, but he could not succeed under Section 24 because he is not a person in the order of succession laid down in Section 24 on the death of the appellant. He might have some possible chance of succession under the provisions in Section 26 where a co-tenant dies with no heir, but that chance is extremely remote and would not be equivalent for his chance under Section 24. These are however not very important matters but I refer to them merely to show that the interest of the plaintiff in the holding is in regard to his chance of succession under Section 24 and also in regard to the cultivation of the holding and also in regard to the payment of rent. For the respondent reliance was placed on AIR Sheotahal Dube v. Lal Narain Prasad : AIR1931 All695 . This case did not apparently concern a tenancy. It was a case dealing with a number of plots and the plaintiff claimed to be one of the owners entitled to those plots. The mother of the plaintiff was recorded in her own right as one of the co-owners of those plots and she had made a transfer to the defendant. The plaintiff alone brought the suit and proved to the satisfaction of the Courts below that his mother was a mere benamidar and had no right in the land and therefore the sale deed by his mother to the defendant did not convey any right or title to the defendant. The objection was taken that the plaintiff alone as one of a number of co-owners was not entitled to bring such a suit.

The only other point pressed before us is that one co-owner cannot obtain possession of the entire plots. Reliance is placed on the case in Rohan Singh v. Ahsani Begam (1913) 10 ALJ 518. On the other hand, there is clear authority in Mannu v. Nasrat Ullah (1901) AWN 36 and Sri Thakurji v. Hira Lal (1922) 9 AIR All 408 to the effect that one co-sharer can sue to eject a trespasser from the joint land. It seems to us that if the property in dispute had been the zamindari share, it might have been possible to argue that the plaintiff should be given a decree of the share to which he himself was entitled and should not get a decree for the shares to which the other co-owners would be entitled. In such a case definite shares can be enjoyed separately. But the property in dispute in the present case consists of entire plots which may be cultivated. A co-sharer has a joint interest in all the entire plots which may be cultivated. A co-sharer has a joint interest in all the entire plots, and has a right to eject a trespasser who is holding them without any right and title. We think that for the purpose of ejecting a trespasser from such plots it is not necessary that all the co-sharers should join in the suit.

13. The rule laid down appears to be correct. There is no doubt that one of a number of co-owners has a right to sue alone for the ejectment of a trespasser. The present case is one where the suit is brought by a co-tenant, and the objection is urged that a co-tenant does not have such a right. To this there appears to be two answers. One is that tenancy as defined in the Rent Act does create a liability for the whole rent, and there is no portion of the Act which limits the liability of a co-tenant to a portion of the rent. The other point is that it is now admitted by learned Counsel for the appellant that on his claim that his client purchased the rights of the four brothers at auction sale those brothers have no right in the tenancy remaining in them. The plaintiff therefore is the sole remaining tenant in this occupancy tenancy and he alone therefore has a right to sue. In the Tenancy Act, Section 266, Sub-section (1) provides:

Except as otherwise provided in Sec. 265, where there are two or more co-sharers in any right, title or interest, all things required or permitted to be done by the possessor of the same shall be done by them conjointly, unless they have appointed an agent to act on behalf of them all.

14. I do not consider that this sub-section would prevent the plaintiff from bringing the present suit. The ejectment of a trespasser cannot be said to be 'a thing required or permitted to be done by the possessor of the tenancy right.' In regard to the illegal possession of the appellant and the fact that he is merely a trespasser, I have already referred to the provisions of Section 23 of the Act. There is also Section 34, Sub-section (1) which provides:

Every transfer, other than a sub-lease, made by the tenant in contravention of the provisions of this Act, and every sub-lease made by a tenant in contravention of the provisions of Section 27, shall be void.

15. This shows that any transfer made by the four brothers would be void. Therefore any argument based on the compromise made by the four brothers is met by the fact that Section 34 provides that any transfer which they might make or consent to would be a void transfer. Section 8 also prevents a tenant from contracting out of his legal rights. Actually the claim of the appellant does not rest on a transfer but on a purchase by auction sale. That purchase is clearly void under the provisions of Section 23, Sub-section (1), Tenancy Act. As the purchase is void the position of the appellant is merely that of a trespasser. The suit by one co-tenant or by a tenant to obtain possession from a trespasser is a suit which properly lies in the Civil Court and the question of jurisdiction has not been raised on behalf of the appellant. Some argument was based for the appellant on the Full Bench ruling in *Genda Lal v. Hazari Lal* : AIR1936 All21 the judgment of Sir Shah Sulaiman stated:

The principle of *res judicata*, as laid down in the Code of Civil Procedure, is contained in Section 11, but that Section in terms applies to a subsequent suit and does not in terms apply to applications for execution.... It is not Section 11, but the principle of estoppel by judgment underlying that Section which has been applied to proceedings in execution with a view to preventing the same point being reargued.

16. Certain propositions were laid down on page 1200. It cannot be said that the action of the judgment-debtors in agreeing to a compromise amounted to a decision that the property was transferable. There was no judgment of the

execution Court on the point nor was that point raised before the execution Court and decided by it. In my opinion therefore res judicata under this ruling does not apply to the execution proceedings. In any case, it could not apply to the plaintiff because he was not a party to those proceedings. Whether the brothers could or could not challenge the validity of the transfer is not a matter which is now before us, and it is not necessary to consider that point in the present case. The question is whether the plaintiff is entitled to bring the present suit and in my opinion the proceedings in the execution Court do not bar him from bringing the present suit in any way.

17. In regard to the action of the four co-tenants out of five co-tenants in the tenancy in the present case, I may point out that if these four co-tenants had surrendered to the land-holder under Section 103, Tenancy Act, this would not have deprived the plaintiff of his right in the tenancy, nor is there any provision in that Section to the effect that a surrender by some co-tenants would result in the remaining co-tenant only having a right in the portion of the tenancy which he would obtain in a division under Section 37. Similarly, if the four brothers had abandoned the holding under Section 107, Tenancy Act that would not affect the right of the plaintiff to remain in possession of the holding. The only result of such action by the brothers would be that the plaintiff would become the sole occupancy tenant instead of being one of a number of co-tenants. That this is the intention of the Act is shown by the provision in Section 107, Sub-section (2), where it is provided that if the tenant ceases to cultivate his holding and leaves in charge of his holding any person on whom, in the event of the tenant's death the tenant's interest would devolve, he shall, if he does not resume cultivation within five years, lose his interest in the holding, and the person left in charge thereof shall succeed to the holding as a tenant of the same kind. Where the framers of the Act have been so careful as to provide that the occupancy tenancy shall continue to a person who would be a mere successor on the death of a tenant who abandons the holding, it is clear that the Act contemplates that abandonment by some co-tenants will leave the remaining co-tenants in possession of the whole tenancy. The argument therefore appears to be reasonable that if the surrender or abandonment by the four brothers would leave the plaintiff in possession of the whole holding as the sole tenant, then by the proceeding of execution sale of the

interest of the four brothers, which is claimed to be final against them, the plaintiff has been left as the sole occupancy tenant on his proving that the sale was illegal and void. I trust that it will be of some use if I summarize my conclusions on co-tenants. From a consideration of the passages which I have quoted from the Agra Tenancy Act, 1926, I find that under the Act, for male ex-proprietary, occupancy, or statutory tenants, who are dealt with in the same manner by the Act for these purposes:

1. A number of persons holding a tenancy are co-tenants. 2. These co-tenants are joint tenants, and not tenants-in-common, except for succession. 3. Each co-tenant is jointly and severally responsible for the whole rent of the holding, and entitled to share in the joint cultivation of the holding. 4. If one co-tenant loses his interest in the holding by surrender, abandonment, or in any other way except by death, the rights of the remaining co-tenants are not affected but they remain as joint tenants of the whole holding. 5. If one co-tenant dies, his interest does not pass by survivorship to the other co-tenants, whether they are joint in estate with him or not, but it passes to his successors according to the order of succession in Section 24. 6. If there is no such heir, the interest passes by survivorship to the remaining co-tenants. I consider that the decrees of the Courts below were correct and I would dismiss this second appeal with costs.

Verma, J.

18. The plaintiff Rafiuddin, a minor suing through his mother as his next friend, and Munir Uddin, Wali Uddin, Fazal Uddin and Wahid Uddin, defendants 2 to 5, are brothers, being the sons of one Bandey Husain, deceased. They are tenants of the plots in dispute which have been found by both the Courts below to constitute an occupancy holding. In all likelihood the tenancy came to them by succession. The appellant, Dwarka Das, obtained a decree for money in Suit No. 221 of 1931 against defendants 2 to 5 and in execution thereof had the plots in question attached on the allegation that the land was a grove. In the course of those execution proceedings defendants 2 to 5 entered into a compromise with the appellant and agreed to pay the decretal amount by monthly instalments of Rs. 20. It was further stated in the petition of compromise that if any three consecutive

instalments were not paid the decree-holder would be entitled to put the property to sale. It was agreed between the decree-holder and the judgment-debtors that the plots in dispute were to remain under attachment until the decretal amount was paid off in full. Default in payment having been made, the appellant had the plots in question sold, and purchased them himself on 19th December 1934. The present suit was thereupon filed by Rafi Uddin, who, as indicated above, was not a defendant in Suit No. 221 of 1931 in which the appellant had obtained the decree for money, for a declaration that the property in question was occupancy tenancy and was not saleable and that the auction sale of 19th December 1934 was null and void and conveyed no title to the decree-holder purchaser. Subsequently, a prayer for possession was also made. The principal plea of the appellant in defence was that the property in question was grove and that the allegation of the plaintiff that it was occupancy tenancy was incorrect. As already stated, it has been found by both the Courts below that the land in question is occupancy tenancy. It has further been held by both the Courts below that the compromise between defendants 2 to 5 and the appellant is not binding on the plaintiff. The suit for possession of the entire holding has been decreed.

19. The only question raised by Mr. Mehrotra, appearing for the appellant, holding the brief of Mr. Pathak, is that the plaintiff is not entitled to a decree in respect of the entire holding but only in respect of a one-fifth share in it. In my opinion, the argument based on the Full Bench case in 1935 ALJ 11895 is irrelevant for the purposes of the question raised. It also seems to me that Section 26, Tenancy Act, is not of any assistance in the decision of the point raised. It seems to me that the whole object of the Legislature in enacting Section 26 is to make it clear that even in the case of persons who are joint in estate, they shall be deemed to be tenants-in-common for purposes of succession so far as tenancy rights dealt with by the Agra Tenancy Act are concerned. I do not think that the Section can in any way be read to mean that even in the case of persons among whom there is no jointness in estate, for example, members of a Mahomedan family, any of the occupancy tenants will have rights in the occupancy holding which can in any way be analogous to the rights of coparceners in a joint Hindu family.

20. The question that has been raised is not in my opinion free from difficulty and during the arguments I felt doubtful as to the correctness of the decree passed by the Courts below. On the one hand, in view of the finding that the property in question is occupancy tenancy, it is obvious that it was not transferable in execution of the appellant's decree and the sale in his favour is clearly void. On the other hand, I confess that I am not in complete agreement with all the reasons which have been given by my learned brother for dismissing this appeal. The expression 'joint tenant' is not used in the Tenancy Act anywhere. The word used is 'co-tenants.' But, although I do not agree with all the reasons given by my learned brother, I am not prepared to differ from him so far as the conclusion, that the appeal be dismissed, goes. Apart from other reasons, I am influenced by the consideration that in view of the finding of fact that the land in question is occupancy tenancy, there is an element of unreality about the efforts of the appellants to have his auction purchase upheld. It is obvious that the execution proceedings taken by the appellant are not at all binding on the landholder and that the appellant has absolutely no right to be recognized as an occupancy tenant by the landholder. I agree therefore that the appeal should be dismissed.

21. I should like to say a few words as to one portion of the arguments advanced by Mr. Mehrotra. He was asked if it was his case that the interest of defendants 2 to 5 in the occupancy holding had been extinguished. In reply he said things which at first created the impression that his argument was that the interests of defendants 2 to 5 had not been extinguished. But he subsequently made it clear that what he intended to convey was that the portion of the tenancy rights which had, before the sale, vested in defendants 2 to 5, had not been extinguished as they had now passed to the appellant by virtue of the auction sale. I do not think he intended to argue that defendants 2 to 5, inspite of the auction sale, still retained their interest in the tenancy. The impression created on my mind is that he did not clearly appreciate the question put to him. I do not think he intentionally advanced contradictory arguments.

22. Let the appeal be dismissed with costs.