
(1938) 05 AHC CK 0002
In the Allahabad High Court

Kashi Kahar

APPELLANT

Vs

B. Asharfi Singh

RESPONDENT

Date of Decision : 09-05-1938

Acts Referred:

Agra Tenancy Act, 1926 — Section 230

Citation : AIR 1938 All 511

Hon'ble Judges : Bennet, J

Bench : Division Bench

Judgement

Bennet, J.—This is a second appeal by a defendant against a decree of the learned District Judge of Benares passed in first appeal dismissing his appeal and upholding the decree of a Munsif for removal of certain constructions by the defendant and an injunction against the defendant making any constructions on the plot in question. The plaintiff is the land-holder of mauza Bhadaini which happens to be within the municipal limits of Benares City. There was a fixed rate tenant of the plaintiff Benarsi Lal and he executed a sale deed dated 15th February 1934 in favour of Kashi, the defendant. That sale deed sets out that Benarsi Lal had purchased at auction sale a fixed rate tenancy of 1 bigha 6 biswas 17 dhurs of land and that he needed money and was not able to sell all the area so he was selling it off in small lots and he sold to Kashi Kahar 1 biswa 31/68 dhurs for Rs. 285. It is a fact that the sale deed does not actually state that the purchase was for building a house but the sale deed does state that the various-purchasers agreed to have a way demarcated for the convenience of all of them.

2. The defendant, Kashi, also in the witness box admitted that the sale was for the purpose of building a house on the whole of it for his residence. The Court below has held that under the Agra Tenancy Act, Act 3 of 1926, Section 3(2) states that "land" means land which is let or held for agricultural purposes, or as grove-land or for pasturage but does not include land for the time being occupied by dwelling houses or manufactories or appurtenant thereto. The Court pointed

out that u/s 109 a fixed rate tenant may make any improvement, but although u/s 3(11)(d) buildings on the holding elsewhere than on the village site were classed with "improvements," this was admittedly not the case here because the defendant was not building the house for the profitable use of the holding. He had merely purchased a portion of the plot for the purpose of building a house on it. The case for the land-holder therefore was that because the definition of "improvement" does not cover the present case therefore the defendant had no right to build the house.

3. The defendant pleaded in the Munsif's Court that the Civil Court had no jurisdiction and he amplified that plea by arguing that the Revenue Court had exclusive jurisdiction. The Munsif accepted this argument and ordered the plaint to be returned to the plaintiff for presentation to the proper Court. A first appeal was brought and the Appellate Court held that the Civil Court had jurisdiction and remanded the suit for disposal on the merits. The Munsif then decreed removal and injunction and an appeal was brought to the District Judge and the District Judge has dismissed that appeal. The defendant has now brought this second appeal and taken as his first ground that the lower Court had erred in holding that the Civil Court had jurisdiction. Learned Counsel for respondent argued that this question of jurisdiction should not now be raised in this second appeal and he argued that the question was finally decided between the parties by the order in appeal of the Appellate Court on the first occasion. Now where a question of jurisdiction was determined and a plaint was returned to the plaintiff for presentation to the proper Court, Order 43, Rule 1(a) provides that an appeal lies under the provisions of Section 104. Now Section 104 (2) provides : "No appeal shall lie from any order passed in appeal under this section." Therefore no appeal lay from the order of the lower Appellate Court the first time, when the jurisdiction question came before it. As the case has now been concluded, a second appeal lies from the decree of the lower Appellate Court. Section 105(1) applies-

where a decree is appealed from, any error, defect or irregularity in any order affecting the decision of the case may be set forth as a ground of objection in the memorandum of appeal.

4. We consider therefore that this question of jurisdiction could be raised now in second appeal before this Court. A further argument was made against the question being raised by a reference to the Agra Tenancy Act, Act 3 of 1926, Sections 268 and 269. Section 268 sets out the case in which that section will apply:

When, in a suit instituted in a Civil or Revenue Court, an appeal lies to the District Judge or High Court, an objection that the suit was instituted in the wrong Court shall not be entertained by the Appellate Court unless such objection was taken in the Court of first instance; but the Appellate Court shall dispose of the appeal as if the suit had been instituted in the right Court.

5. Learned Counsel argued that because a question of jurisdiction had been raised in the Court of the Munsif therefore an appeal lay to the District Judge. There is more than one error in this argument. In the first place the appeal from the decision of the Munsif about jurisdiction was not heard by the District Judge : it was heard by a Small Cause Court Judge. Such a forum has no jurisdiction at all under the Agra Tenancy Act as an Appellate Court. Section 242 of that Act only refers to the Court of the District Judge and not to a Court such as the Court of the Small Cause Court Judge. But even if the matter has been decided by the District Judge there is the Pull Bench ruling of this Court in Ram Iqbal Rai Vs. Telessari Kuari and Another in which the limits of Section 268 were considered and it was held that it applied only to cases in which if rightly instituted in a Civil or Revenue Court, an appeal lies to the District Judge according to law and cannot consistently with other provisions of the Act (Section 230 and Section 242) be applied to suits wrongly instituted in a Civil Court in which if rightly instituted in the Revenue Court an appeal would have lain on the revenue side. In that particular case the facts were similar to the present. The Munsif had returned the plaint for presentation to the proper Court on the ground that jurisdiction lay in the Revenue Court. An appeal was brought in the Court of the District Judge who held that the suit was triable by the Munsif and remanded the case for disposal according to law. It was held that the order of the District Judge was not an order which could be defended by a reference to provisions of Section 268. For these reasons therefore, we consider that the appellant can raise this point of jurisdiction in this second appeal.

6. Now the question of jurisdiction arises u/s 230, Agra Tenancy Act which provides that all suits and applications of the nature specified in Schedule 4 shall be heard and determined by the Revenue Courts, and the Explanation states that if the cause of action is one in respect of which adequate relief might be granted by the Revenue Court, it is immaterial that the relief asked from the Civil Courts may not be identical with that which the Revenue Court could have granted. In the present case the allegation of the plaintiff is that the defendant has no right to erect his house because of the provisions of the Agra Tenancy Act and he bases his objection on Section 3(11). Now if this objection is correct there are various Sections of the Agra Tenancy Act which would give the plaintiff relief. Section 34(1) provides:

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

and Section 82 (1) provides:

If a tenant (a) transfers his holding or any portion thereof contrary to Sub-section (1), Section 34...both he and any person who may have obtained possession of the whole or any portion of the holding in pursuance of any such attempted illegal transfer, or under any such voidable sub-lease shall be liable to ejectment at the suit of the landholder.

Section 85(3) provides:

Notwithstanding anything contained in this Section, a landholder may in addition to, or in lieu of suing for ejectment, sue, (b) for an injunction with or without compensation, or (c) for the repair of the damage or waste, with or without compensation.

7. There is also another provision in Ch. 7 which deals with "improvements" and this provision in Section 120(1) is:

If a question arises between a tenant and his landholder, (a) as to the right to make an improvement, or (b) as to whether a particular work is an improvement...the Assistant Collector in charge of the sub-division shall on the application of either party, decide the question.

(2) The decision of the Assistant Collector on questions arising under Clauses (a) and (b) of sub Section (1) shall be final.

8. Now learned Counsel attempted to answer these provisions by saying that he did not want to raise any question of "improvement," but his objection as contained in his plaint is that the defendant being a transferee from a fixed rate tenant has only got a right to make a building which is in conformity with the law in the Tenancy Act providing for "improvements." Now when we turn to Schedule 4, we find that in Group B No. 10 is Section 82 and in Group D No. 5 is Section 120(1)(a). Now Section 242 does not allow an appeal to the District Judge in either of these cases as the appeal to the District Judge is only in Group A of Schedule 4 and not in Group B or Group D. The matters therefore which would be raised in a suit in the Revenue Court would not come to the District Judge even in appeal and the questions in this case therefore both original and appellate are for the Revenue Court. Another point which may be noted is that Section 37 provides that a division of a holding...can only be made (a) by agreement between the co-tenants or (b) by a decree in a suit between co-tenants. The present area of the fixed rate tenancy was held by a single individual Benarsi Lal and he had no co-tenant with whom he purported to make any division. What he did purport to do was to transfer portions of his holding. That is clearly contrary to Section 37 which only allows a division in two particular cases. This is another reason for considering that the case would lie in the Revenue Court as the acts alleged would be contrary to Section 37 and Section 34 and Section 3(11) and therefore the suit for ejectment u/s 82 or for injunction u/s 85(3) would lie in the Revenue Court. For these reasons, we allow this second appeal with costs throughout and we direct that the plaint be returned to the plaintiff for presentation to the proper Court.