

(1928) 02 AHC CK 0031
In the Allahabad High Court

Mamraj and Others

APPELLANT

Vs

Murki

RESPONDENT

Date of Decision : 24-02-1928

Acts Referred:

North Western Provinces Tenancy Act, 1901 — Section 201(3)

North Western Provinces Tenancy Act, 1901 — Section 201(3)

North Western Provinces Tenancy Act, 1901 — Section 201(3)

Citation : 114 Ind. Cas. 904

Hon'ble Judges : Kendall, J; Iqbal Ahmad, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

1. This appeal must prevail. The suit giving rise to the present appeal was occasioned by a suit for profits having been filed in the Revenue Court by the defendants of the present suit against the plaintiff-respondent. That suit was for a share of the profits of khewat No. 62 in village Tatiri in Meerut District. The defendants appellants before us were recorded co-sharers in that khewat and they brought the suit for their shares of the profits. The plaintiff-respondent resisted that suit on the ground that the names of the defendants appellants were fictitiously entered in the khewat, and as such, they were not entitled to their shares of the profits of khewat No. 62. This plea of the plaintiff was, in view of the provisions of Section 201(3) of the Agra Tenancy Act (II) of 1901, overruled by the Revenue Court and the suit for profits filed by the defendants appellants was decreed. This led to the institution of the suit giving rise to the present appeal by the plaintiff-respondent. The suit was for a declaration that the plaintiff is owner in possession of a 5/12th in khewat No. 62 and that the defendants' names with respect to that share were fictitiously entered in the khewat and in the alternative for possession of that share and for an injunction against the defendants directing them not to put the decree for profits obtained by them into execution.

2. There is no controversy about the facts. The parties are descended from a common ancestor named Sita Ram. The defendants are descendants of two sons of Sita Ram named Tulshi Ram and Dula Ram. The property in dispute admittedly is the ancestral property of the parties to the suit. About 50 years prior to the institution of the present suit, the ancestors of the defendants-appellants left their native village and settled in Delhi, where they carried on some business. It has been found by both the Courts below that at times they paid visits to their ancestral village but they never claimed nor received any portion of the profits of the khewat in dispute.

3. The plaintiff maintained that inasmuch as the defendants' ancestors had left the village and had no connection with the share in dispute, their right to the same was extinguished and the plaintiff-respondent was solely entitled to the entire ancestral share in khewat No. 62. In support of this contention the plaintiff placed reliance on the Wajib-ul-arz of It 1860 of the Settlement known as Nisar Ali Khan. In that wajib-ul-arz, it is laid down that, if any "mafroor" returns to the village, he shall be entitled to the possession of his property only with the consent of the possessor and not, if the latter refuses. The defendants, on the other hand, relied on an extract from the Wajib-ul-arz of the Settlement of Mohar Singh (1870). It is provided in that wajib-ul-arz that "now in this village Yado son of Dayala is "mafroor" and Dungarson of Sahib Singh is in possession. The agreement is that whenever the "mafroor" or his descendants returned to the village then without any regard to the question of profits or loss he or they shall be entitled to possession of their property and no objection shall be taken thereto." Reliance was also placed by the plaintiff on a decision of a learned Judge of this Court, dated the 29th May, 1919. It is as well to state here that it has been held by both the Courts below that the decision just referred to does not operate as res judicata in the present litigation.

4. It appears that, though the plaintiff did not in specific terms assert in the plaint that he had acquired a title to the share in dispute by adverse possession for more than 12 years an attempt was made on his behalf at the time of argument in the trial Court to substantiate his case on the basis of the plea of adverse possession. The learned Munsif refused to allow that point to be raised for the first time in argument. In our judgment the learned Munsif was perfectly right in refusing to allow the plaintiff to take the defendants by surprise by arguing that they had acquired a prescriptive title to the share in dispute by adverse possession for more than 12 years, for no such assertion was made in the plaint and the defendants had no opportunity of adducing evidence on the point.

5. Moreover, there was no substance in the belated plea of adverse possession raised by the plaintiff. It is abundantly clear from the facts admitted by the plaintiff and found by the Courts below that the property in dispute is the joint ancestral property of the parties to the suit and therefore, there is no escape from the conclusion that the defendants-appellants and the plaintiff are co-

owners of the khewat in dispute. That being so the defendants' title to the share in dispute could only be extinguished, if there was an open denial of the defendants' title followed by their dispossession. It was not alleged by the plaintiff that there was ever by him a denial of the defendants' title to the share in dispute and, therefore, in view of the decision of their Lordships of the Privy Council in *Corea v. Appuhamy* (1912) A.C. 230 : 81 L.J.P.C. 151 : 105 L.T. 836 the plea of acquisition of title to the defendants' share by adverse possession was bound to fail.

6. The learned Munsif rightly observed that the evidentiary value of the entry in the *Wajib-ul-arz* of the Settlement of Munshi Nisar Ali is discounted by the entry in the *Wajib-ul-arz* of Mohan Singh and we hold that he was justified in holding that, if the latter *wajib-ul-arz* was before the learned Judge, who decided the case referred to above, his decision might have been the other way. Be that as it may, it is clear that the entry in the *Wajib-ul-arz* of Munshi Nisar Ali cannot be taken to be a decisive factor in this case in view of the diametrically opposite entry to be found in the *Wajib-ul-arz* of the Settlement of Mohar Singh.

7. The learned Munsif held that, notwithstanding the fact that the defendants had not received their shares of the profits from the plaintiff, their title to the shares recorded against their names in the khewat has not been extinguished and on that finding dismissed the plaintiff's suit.

8. The lower Appellate Court by the mere fact that "the defendants were for so long entered in the revenue papers as absconding and that although they visited the village from time to time they never took any action to assert their rights or to get the entries in the papers corrected" inferred that the defendants "had abandoned their rights" and on that finding reversed the decree of the trial Court and decreed the plaintiff's suit.

9. We are unable to agree with the decision of the lower Appellate Court. As already stated it has been found by both the Courts below that though the defendants' ancestors settled in Delhi about half a century ago they at times visited their native village; in other words their whereabouts were known and, therefore, the entry in the revenue papers to the effect that they were *mafroor* was obviously wrong. Further even if their whereabouts were not known and even if they could be styled to be *mafroor* they could not, in view of the entries in the *Wajib-ul-arz* of the Settlement of Mohar Singh, be deprived of their proprietary rights unless some body was able to establish as against them a title to their property by adverse possession for the statutory period. This, as already stated, has not been done in the present case. By the mere fact that they did not claim their profits, they did not look their right to the shares in the khewat in dispute recorded in their names.

10. For the reasons given above, we allow this appeal, set aside the decree of the lower Appellate Court and restore the decree of the trial Court with costs in all Courts.