

(1936) 12 AHC CK 0025
In the Allahabad High Court

Punjab Sugar Mills Co. Ltd.

APPELLANT

Vs

Lakshman Prasad and Others

RESPONDENT

Date of Decision : 14-12-1936

Acts Referred:

Citation : (1936) 12 AHC CK 0025

Final Decision : Allowed

Judgement

1. This is a plaintiff's first appeal arising out of a suit for possession and declaration. The plaintiff asked for the following reliefs : (a) A decree awarding joint possession over the plots mentioned in list (C) in this plaint, to the extent of a 14 anna share, may be passed in favour of the plaintiff against the defendants first party.... (b) A decree may be passed in favour of the plaintiff against the defendants declaring that the plaintiff is entitled to realize the "tehbazari" dues of the market held on a part of the plots mentioned in list (B) of this plaint situate in Mauza Ponharia, to the extent of a 14 anna share. The facts giving rise to this litigation between the parties can briefly be stated as follows : Upto year 1911, the entire Village Ponhariya tappa Matkopa, was held by a Thakur family, the pedigree of which is given in the plaint at p. 13. This family is now represented by the defendants-second set.

2. The entire village was held by the members of this family as follows : (1) 5 anna 4 pie share by Har Prasad Singh; (2) 5 anna 4 pie share by Bachan Singh, Guchan Singh and Sat Narain Singh in equal shares; and (3) the remaining 5 anna 4 pie share by Kishan Prasad Singh and Madho Prasad Singh in equal shares jointly. On 6th July 1912, Guchan Singh sold out of his 1 anna 9 pie and odd share, 1 anna 3 pie and odd share to Harbans Prasad Tiwari and Trilok Nath Tiwari, the ancestors of the defendants first set. On 11th November 1911, Kishan Prasad Singh sold his 2 anna and 8 pie share to Harbans Prasad Tiwari and Trilok Nath Tiwari. In this manner, as stated in the plaint, the ancestors of the defendants first set became co-sharers in the village to the extent of 3 anna 11 pie and 1 suls share.

3. On the 6th July 1912, Guchan Singh hypothecated his remaining 6 pie share in the aforesaid village to Harbans Tiwari and Trilok Nath Tiwari. In respect of the two sales made by Guchan Singh and Kishan Prasad Singh, as mentioned above, Bachan Singh filed two suits for pre-emption and Madho Prasad Singh filed a suit for the cancellation of the sale deed dated 11th November 1911. On 5th April 1913, Bachan Singh who had filed the pre-emption suits, Madho Prasad Singh who had sued for the cancellation of one of the two sale deeds and Harbans Prasad Tiwari and Trilok Nath Tiwari entered into an agreement to settle their differences.

4. The result of this agreement was : Harbans Prasad Tiwari and Trilok Nath Tiwari became the owners of 2 anna share and the remaining 14 anna share remained with the other co-sharers, viz., the members of the Thakur family. Under the agreement of 5th April 1913, all the co-sharers with the exception of Mt. Surajnath Kunwari, widow of Babu Sat Narains Singh agreed that defendants 1 and 2, the owners of 2 anna share in the village, should hold possession exclusively over the plots mentioned in list (B) and keep them in their exclusive possession and construct a bazaar over this land. The co-sharers of the 14 anna share with the exception of Mt. Suraj, Nath Kunwari, also executed a mortgage deed of their share in favour of Harbans Prasad Tiwari and Trilok Nath Tiwari for a sum of Rs. 53,003-2-2.

5. It has already been pointed out that Mt. Suraj Nath Kunwari was not a party to this deed of 5th April, 1913. On 18th September 1914, Harbans Prasad Tiwari and Trilok Nath Tiwari got Mt. Suraj Nath Kunwari to execute three deeds, the result of which was that the predecessors of the defendants first set got possession as mortgagees over the entire 14 anna share and Mt. Surajnath Kunwari also agreed to their holding the plots mentioned in list (B) exclusively. On 14th June 1932, the defendants second set executed a possessory mortgage in favour of the plaintiff in respect of their 14 anna share. The plaintiff undertook to redeem the mortgages created by most of the co-sharers on 5th April 1913, and also the mortgage created by Mt. Suraj Nath Kunwari on 18th September 1914. The plaintiff deposited the amount due in respect of both the mortgages to the mortgagees in Court under the provisions of Section 83, T.P. Act. The amount was accepted by the defendants first set and the two mortgages stood redeemed. During the continuance of the mortgage in favour of the defendants first set, the mortgagees ejected several tenants and began to cultivate the holdings themselves. The plaintiff's complaint is that the defendants do not allow them to get possession to the extent of a 14 anna share in these plots. These plots, according to the plaintiff, are mentioned in lists (C) and (B) attached to the plaint. The plaintiff asks for a decree for joint possession in the plots mentioned in list (G) to the extent of a 14 anna share. As regards the land (21.9 acres) which had been given to Harbans Prasad Tiwari and Trilok Nath Tiwari, under the agreement of 5th April 1913, for constructing a bazaar thereon, the plaintiff in his plaint, claimed a declaration that he was entitled to realize the "teh-bazari" dues to the extent of a 14 anna share.

6. The defence of the contesting defendants first set is that during the continuance of their mortgage, they took ejectment proceedings against a large number of tenants and ejected them and that they (the mortgagees) themselves began to cultivate these plots. It is pleaded that in view of the provision of Section 4, Clause (d), Agra Tenancy Act of 1926, the mortgagees acquired the rights of sir-holder over these plots which were in their occupation at the time when the Act came in force and therefore, they are entitled to hold them as their sir exclusively and the plaintiffs cannot sue for joint possession. It is alleged that the only remedy which the other co-sharers in the village have is to sue for partition and thereby obtain other lands by way of compensation in lieu of the sir plots as well as the khudkasht lands in possession of the mortgagees. The defendants pleaded that they ejected the tenants holding land in the village in their own right as owners of 2 anna share and not in their capacity as mortgagees in possession. As regards the land given to the predecessors of the defendants first set under the agreement of 5th April 1913, the defendants contend that the plaintiff cannot get the "teh-bazari" dues in respect of that land.

7. The learned Civil Judge who heard the case accepted the contentions raised by the defendants and dismissed the suit. The plaintiff has now come up in appeal before this Court. The first important point for consideration and about which the parties are at dispute is covered by issue 4. Admittedly the contesting defendants first set are the owners of a 2 anna share in the village and the mortgagors of the plain, tiff are the owners of the remaining 14 anna share. As already pointed out, the 14 anna share had been mortgaged to the defendants first set under the two deeds ; one dated 5th April 1913, and the other dated 18th September 1914. The mortgagors of this 14 anna share created a fresh mortgage in favour of the plaintiff in 1932. The plaintiff got a mortgage in his favour in respect of the 14 anna share and then redeemed the prior mortgages executed by the owners of the 14 anna share. The plaintiff contends that during the possession of the defendants first set as mortgagees they took ejectment proceedings against a large number of tenants and ejected them from their holdings. After that the mortgagees themselves brought these holdings under their own cultivation. These plots are specified in list (C) attached to the plaint. The plaintiff asserts that in these plots, he as the representative of the 14 anna share, is entitled to possession to the extent of 14 annas.

8. The defendants first set admit that during the continuance of their mortgage, they ejected a number of tenants and after ejectment kept the holdings under their own cultivation. Some of the plots are now recorded as their sir, while the others are recorded as their khud-kasht. The defendants first set contest the right of the plaintiff to a share in these plots. The position stands thus : The defendants first set during the continuance of their mortgage ejected a large number of tenants, took possession of the holdings and brought them under their own cultivation. In 1926 the New Agra Tenancy Act came into force. In view of the provisions of Section 4, Clause (d) of this Act, the plots which the defendants first set had been cultivating at the time when the Act came in force,

were recorded as their sir. The contention of the defendants first set is that by virtue of the provisions of Section 4, Clause (d), the land which was in their occupation and which was being cultivated by them at the time the Act came in force, became their sir and that the mortgagors have no right in these plots and the only remedy for them is to sue for partition and get other lands in compensation. It is further contended by the defendants that they cannot be ejected from the land which is shown as their khud-kasht. It is suggested that it should be presumed that the defendants first set got sir rights in the plots from which the tenants had been ejected in their own rights as owners of a 2 anna share and for their own benefit and did not acquire these rights in their capacity as mortgagees.

9. After hearing arguments on both sides, we are of opinion that the contention of the defendants first set is not well founded. In this connexion we may point out that the defendants first set as owners of the 2 anna share. in the village could not eject any tenants. Tenants in a village can only be ejected by the entire body of the co-sharers and one of them alone can, not eject a tenant unless authorized by all the co-sharers to do so. The contesting defendants were able to eject the tenants because they had under the terms of the mortgage-deed, been authorized to do so : see Clause (d), para. 8 at p. 77, which runs as follows:

The mortgagees shall have power to file suits for ejectment of tenants, enhancement of rent, arrears of rent and other suits in the civil and revenue Courts, i.e. the mortgagees and their heirs and representatives shall have all the powers to file suits and take proceedings in the Revenue and Civil Courts in respect of the mortgaged share, which, we the executants 1st, 2nd and 3rd parties, have as owners.

10. The plaintiff's case in respect of the point in issue is stated by him in para. 15 of his plaint as follows:

During the pendency of the mortgage, the defendants first party as mortgagees, "supurdars and amanatdars" of the rights and property of the plaintiff brought the plots of land mentioned in lists (c) and (e) under their cultivation. After redemption, the plaintiff along with the defendants first party, became entitled to get possession and occupation of the said plots to the extent of 14 annas, as mortgagee. The aforesaid plots are in the form of an accretion and the defendants first party, are not entitled to remain in exclusive possession thereof.

11. It will be seen that the plaintiff claims rights in these plots on two grounds. The first is that the rights which defendants first set had acquired in these plots, amount to an accretion and the second is that whatever rights they got in these plots as mortgagees during the continuance of the mortgage, they got them as trustee and those rights were acquired for the benefit of all the co-sharers in the village. We are of opinion that the plots cannot be treated as an accretion and, therefore, Section 63, T.P. Act, is not applicable. We are however clearly of opinion that the provisions of Section 90, Trusts Act (Act 2 of 1882) are

applicable to the case before us. Section 90 enacts as follows:

Where a tenant-for-life, co-owner mortgagee, or other qualified owner of any property, by availing himself of his position as such gains an advantage in derogation of the rights of the other persons interested in the property, or where any such owner, as representing all persons interested in such property gains any advantage, he must hold, for the benefit of all persons so interested, the advantage so gained, but subject to re-payment by such persons of their due share of the expenses properly incurred, and to an indemnity by the same persons against liabilities properly contracted in gaining such advantage.

12. In the case before us the mortgagees in possession ejected tenants from the plots in question during the continuance of their mortgage. Whatever rights they got in the plots in question were obtained by them in their capacity as mortgagees and as owners of a 2 anna share and; those rights were for the benefit of all the 1 co-sharers of the 16 anna share in the village. In other words, the defendants first set gained an advantage in their capacity] as mortgagees. They cannot be permitted to do so having regard to the provisions of Section 90, Trusts Act, which clearly lays down that:

Where a mortgagee by availing himself of his position as such gains an advantage in derogation of the rights of the other persons interested in the property (other co-sharers), he must hold, for the benefit of all persons so interested, the advantage so gained....

13. If the mortgagees in their capacity as owners of a 2 anna share had attempted to eject any of the tenants in the village, their rights to do so could have been successfully resisted by other co-sharers viz., by the mortgagors owning the 14 anna share in the village. If the defendants first set had attempted to take possession over a particular plot without the permission of the mortgagors, the owners of a 14 anna share, the attempt could not have succeeded as the mortgagors could have objected to it successfully. The defendants first set succeeded in ejecting the tenants because they were, during the continuance of the mortgage, representing the entire body of the co-sharers in the village. The case before us is not one in which a co-sharer is in possession of a part of the common lands in the village without objections by the other co-sharers. Had that been the case, the remedy of other co-sharers was by way of partition. In partition, the other co-sharers would be awarded other lands by way of compensation and therefore it could not be said that the possession of one co-sharer over a plot was in derogation of the rights of the other co-sharers. But the whole aspect of the matter is changed where one co-sharer obtains a possessory mortgage and then acts in derogation of the mortgagors. When defendants first set took a possessory mortgage of the 14 anna share, they accepted the position of a trustee to the extent of the share mortgaged to them. During the continuance of the mortgage, the mortgagees cannot possibly be permitted to take advantage of their position and to act in such a manner as to reduce the value of the mortgaged property to the detriment of the mortgagors.

14. In this connection *Raja Kishendatt Ram v. Raja Mumtaz Ali Khan* (1880) 5 Cal. 198 (original) and page 130 of re-published volume, may be referred. The mortgagor was a talukdar who mortgaged certain villages to the mortgagee. In the village birt rights (a kind of under-proprietary right) were exercised by birtias. When the mortgagee got possession all that he could claim was the right to recover from the birtias the under-proprietary rent which the birtias paid to the talukdar mortgagor. During the continuance of the mortgage, the mortgagee purchased the rights of the birtias. A dispute arose between the mortgagor and the mortgagee as regards the birt rights acquired by the mortgagee during his possession. The mortgagee claimed that he was entitled to hold the birt rights which he had acquired and the contention was that these rights had been acquired for his own benefit. On the other hand, the mortgagor contended that he himself was entitled to the birt rights which the mortgagees had acquired. Their Lordships of the Privy Council in deciding the case made the following observations at pp. 209 and 210:

Again, had the mortgagor redeemed before these purchases, he would have resumed his position as talukdar, with the means of dealing on favourable terms with birtias who have proved to have been willing to part with their interests for very-inconsiderable sums. The mortgagee, taking advantage of his position of talukdar de facto, has so acquired the birts and allowed them to merge in the taluk. To allow him now to revive these birts for his own benefit, with the certainty of tenure and increased value which the regular settlement will give them, would obviously alter the position of the mortgagor for the worse by reducing the redeemable estate pro tanto to a mere right to malikana, and possibly rendering the taluk no longer worth redemption.

15. We are of opinion that these observations go against the contentions put forward before us by the contesting defendants first set. He acquired certain rights which he could not have possibly done if he had not been a mortgagee. He now wants to reduce the redeemable estate and thus diminish its value to a considerable extent. As we have already pointed out, the defendants got possession over the plots from which the tenants were ejected not in their capacity as owners of a 2 anna share in the village only but in their capacity if co-sharers of a 2 anna share as well as the mortgagees of a 14 anna share. Now if during the continuance of the mortgage, their names were enlisted in revenue papers in respect of the plots as sir holders, the effect of this entry would be that not only the defendants first set but also all the other co-sharers whom these defendants were representing as mortgagees became sir holders. The principle of the decision in *Thakoor Hurdeo Bux v. Thakoor Jowahir Singh* (1878) 6 I.A. 161 and *Hardeo Bux v. Jawahir Singh* (1877) 3 Cal. 522 is applicable to the case before us. Learned counsel for the defendants first set relied on *Dhaniah Kuer and Others Vs. Jai Jai Ram and Others*, That ruling has no application to the case before us because the question which we have to decide in this case did not arise there at all. The person who had been recorded as sir holder in that case was not a mortgagee on behalf of the other co-sharers. Another case in which reliance

was placed is 1934 Fazal Husain Vs. Muhammad Kazim and Others . One of the points decided there was that:

Where a co-sharer plants a grove on common land without any objection by the other co-sharers, the grove should be considered to belong to the co-sharers who planted it but the site should be considered to be the property of all the co-sharers and at the time of partition the claim of the other co-sharers can be adjusted by allowing to them land of the same quality in lieu of the grove land. The principle of Section 90, Trusts Act, has no application to such a case.

16. In that case the person planting the grove was not a mortgagee-in-possession and therefore it has no application to the case before us. There may be cases in which a co-sharer who is also a mortgagee in possession may be able to establish that a particular advantage obtained by, him was for his own benefit; but the case before us is not one of them. We are clearly of opinion that in this case the defendants first set when they took ejectment proceedings against tenants, did so on behalf of all the co-sharers of the village and if the names of the mortgagee alone were entered as sir holders, the benefit of the same would go to all the co-sharers in the village. The defendants first set owned only a 2 anna share and they got sir rights in some of the plots in their fiduciary capacity viz., the benefit of this entry in the revenue papers will go not only to the mortgagees in possession but also to the mortgagors. The same rule will be applicable to the case if land which is recorded in the name of the mortgagees as their khud-kasht. The mortgagors, the owners of the 14 anna share, are entitled to a decree for joint possession in the plots specified in the list (C) attached to the plaint.

17. As regards the second prayer of the plaintiff the position stands thus : The plaintiff in his plaint prayed that it be declared that he is entitled to realize the "teh-bazari" dues of the market held on a part of the plots mentioned in list (B) of the plaint to the extent of a 14 anna share. In this Court however this claim was modified and we were told by learned Counsel appearing for the plaintiff-appellant that the plain, tiff confined his case to getting a declaration that he was entitled to "teh-bazari" dues of this land to the extent of one. ninth share. In connexion with this relief it is necessary to set forth here certain facts. The predecessors of the defendants first set had acquired more than a 2 anna share in this village. Two pre-emption suits and one suit to cancel one of the two sale deeds had been instituted by some of the co-sharers. There was a settlement between the co-sharers of the 14 anna share with the exception of Dulhan Surajnath Kunwari, and the predecessors of the defendants first set under which the above mentioned suits were compromised. The defendants first set became the owner of a 2 anna share and the other co-sharers remained owners of the remaining 14 anna share in the village. To the deed of 5th April 1913, all the co-sharers in the village except Mt. Surajnath Kunwari, were parties. They agreed between themselves that the predecessors of the defendants first set should remain in possession of 21.9 acres of land described in list (B). This land was

given to them in their capacity as co-sharers of the 2 anna share in the village. The deed is printed at p. 75 and onwards. Here it is necessary to bear in mind the stipulations contained in paras. 6 and 7. As we have pointed out, Mt. Suraj Nath Kunwari who was the widow of Sat Narain Singh, one of the co-sharers in the 14 anna share, was not a party to this deed of 5th April 1913. The predecessors of the defendants first set got this lady to execute three deeds on 18th September 1914. One of them is printed at pp. 100 to 104. Under this deed, she mortgaged with possession 1 anna 3 pie and 1 suls share out of her 1 anna 9 pie and 1 suls share in order to pay certain prior debts.

18. As regards the 29.1 acres of land, she executed an agreement authorizing the defendants first set to keep possession over it and to construct a bazar thereon. The deed is in the form of a lease under which the defendants first set agreed to pay her Rs. 50 as premium and Rs. 5 yearly as rent. She agreed, like the other co-sharers, that in lieu of this land she will get other lands at the time of partition. Another deed which she executed is a lease in respect of the 6 pie share which still remained with her. This is printed at p. 45. Mt. Suraj Nath Kunwari died in 1921. Bachan Singh became entitled to the estate of Sat Narain Singh, the husband of Mt. Suraj Nath Kunwari after her death. He along with the other co-sharers executed a mortgage deed in favour of the plaintiff in 1932 under which the entire 14 anna share including the share which was in possession of Mt. Suraj Nath Kunwari as a Hindu widow was mortgaged to the plaintiff. The plaintiff, in his plaint attacked the deed of agreement under which Mt. Suraj Nath Kunwari agreed to give exclusive possession over 21.9 acres of land. Mt. Suraj Nath Kunwari could have objected to the arrangement made by all the other co-sharers; but somehow or other she did not, and she also executed a deed under which she agreed to defendants first set holding this area of 21.9 acres of land. The question as to whether or not the lease which she executed under which she agreed to this term is valid after her life, does not call for decision in this. It is enough to say that a Hindu widow in possession of her husband's share is fully competent to enter into an agreement under which some of the co-sharers would remain in exclusive possession of certain plots. This is her act in the course of the management of the estate and cannot be objected to by the persons succeeding to her husband's estate after her death as his reversioners. The rights of the reversioners are not in any manner affected because at the time of partition, it will be open to them to get other lands by way of compensation. We do not see any reason for allowing the plaintiff to upset an arrangement made by the widow during her possession.

19. It is also to be borne in mind that the reversioners of the husband of Mt. Suraj Nath Kunwari themselves agreed that the defendants first set should remain in exclusive possession of the plots covering an area of 21.9 acres of land and their position is not in any manner improved by the death of the widow. Even if we assume that the agreement under which Mt. Suraj Nath Kunwari permitted the defendants first set to have exclusive use of this 21.9 acres of land is a perpetual lease and as not binding on the reversioners after her death the defendants first

set are nevertheless entitled to remain in possession of the land. The reversioners themselves were party to an agreement under which the defendants first set were given exclusive right in this land. They permitted the defendants first set to build constructions on this land. Mt. Surajnath Kunwari also entered into a similar agreement in 1914 without any objection from the reversioners of her husband.

20. If a co-sharer in a village gets exclusive possession over any plot without any objection by the other co-sharers, his possession will be maintained. Such possession by one co-sharer does not put an end to the rights of the other co-sharers because at the time of partition, the other co-sharers will get other lands in compensation in lieu of their shares in the land over which one co-sharer has got exclusive possession. The land remains the property of all the co-sharers but they cannot dispossess the co-sharer who has taken the exclusive possession. Nor can they be permitted to obtain a decree declaring that they are entitled to the profits in that land. The remedies of the co-sharers are well known. If one of the co-sharers takes exclusive possession over a piece of land in a village without the consent of the other co-sharers, it is open to them to take immediate steps for assertion of their rights. If however they allow a co-sharer to take possession exclusively over a plot and raise no objection whatsoever for a number of years, it is not open to them to ask that a decree should be given to them entitling them to make realization to the extent of their respective shares in the plot. When however accounts are taken between the co-sharers, the rent of the land held by a co-sharer exclusively will be taken into account. A co-sharer may take possession over a plot and if no objection is taken by the other co-sharers, then at the time of partition the other co-sharers will be given other lands in the village by way of compensation.

21. The case of the defendants first set here as regards their land is much stronger. Here they have been in possession of this 21.9 acres of land with the consent of all the co-sharers and hence in a case like this it would not be right to grant a decree for declaration entitling the other co-sharers to obtain a share in the income of the land. Mt. Surajnath Kunwari, the widow of Sat Narain Singh, agreed to this arrangement sometime after the death of her husband and similarly all the other co-sharers had also agreed to certain arrangement authorizing the defendants first set to keep possession over this 21.9 acres of land and to make constructions thereon. The reversioner of Surajnath Kunwari was one of the persons who agreed to this arrangement and he cannot now complain if the widow also entered into a similar arrangement. As we have already remarked, the question as to whether a perpetual lease is binding on the reversioners after the death of the widow does not arise in this case. It is enough to say that defendants first set are in possession under an agreement made by all the co-sharers and therefore the plaintiff who represents the co-sharers of the 14 anna share cannot be given a decree for declaration even to the extent of the share which was in possession of Mt. Surajnath Kunwari as a Hindu widow because there is an agreement between all the co-sharers that at the time of

partition the co-sharers of the 14 anna share will get other lands in exchange in lieu of their shares in the land given to the defendants first set. For these reasons we hold that the plaintiff's suit must fail in respect of his relief for a declaration.

22. The defendants first set had pleaded that suit of the plaintiff for recovery of joint possession in the plots mentioned in list (C) to the extent of 14 annas was barred by the rule of acquiescence and estoppel. The learned Judge of the Court below accepted this contention and decided issue 3 against the plaintiff. In our opinion he was wrong. It is however not necessary to deal with this matter because before us learned Counsel appearing for the appellant abandoned these pleas and could not support the judgment of the learned Judge. In our opinion the suit of the plaintiff for joint possession over the plots specified in list (C) is maintainable and the finding of the learned civil Judge cannot be accepted and has not been supported before us. We may mention here that there was some controversy about the accuracy of lists (B) and (C) attached to the plaint. The matter however has been set at rest now. Both the parties made a joint application and asked us to amend the two lists. This has now been done and the decree which we are passing will be prepared with reference to the amended plaint.

23. For the reasons given above, we allow this appeal, set aside the decree passed by the Court below and grant the plaintiff a decree for joint possession over the plots mentioned in list (C) (as amended under our order) attached to the plaint to the extent of a 14 anna share. The plaintiff is further decreed mesne profits from the date of the suit till the date on which he gets joint possession over the plots mentioned in list (C) to the extent of a 14 anna share. From the date of the suit till the date on which he gets possession, the mesne profits will be determined by the Court below and a final decree for the amount which may be found due will then be passed in his favour against the contesting defendants. The plaintiff's claim for relief (b) in respect of a declaration of his rights to recover "teh-bazari" dues in the plots mentioned in list (B) is dismissed. No orders are necessary in respect of the relief about pendente lite and future interest specified in relief (d) because the mesne profits will include interest and the lower Court in determining the mesne profits is competent to grant interest to the plaintiff. The parties will pay and receive costs in both the Courts according to success and failure.