(1960) 04 CAL CK 0003

In the Calcutta High Court

Case No : Appeal from Appeallate Decree No. 579 of 1956

Rajabala Dei — APPELLANT

Vs

Titaram Pal — RESPONDENT

Date of Decision : 29-04-1960

Acts Referred:
Trusts Act, 1882 — Section 90, 94

Citation : (1961) 1 ILR (Cal) 589

Hon'ble Judges : Sen, J;N.K. Sen, J

Bench : Division Bench

Advocate : Sarat Chandra Janah and Sachindra Chandra Dasgupta, for the Appellant;Jitendra Nath Guha and Padma Bindu Chaterjee and Tarun Kumar Banerjee, for Deputy Registrar, for the Respondent

Final Decision : Dismissed

Judgement

Sen, J.—This second appeal is by the Plaintiff and arises from a suit instituted by her for declaration of her title and recovery of possession

of the property in suit after evicting Defendant No. 1 from the suit land. The suit land comprises 4,54 acres recorded in Khatian No. 114 of Mouza

Kulia. The suit land comprises a raiyati jote with the rental of Rs. 23-11-1 1/2 gds. and was held by Jhetu and Chaitanya at the time when the

district settlement records were prepared. Jhetu was the son of Chaitanya''s brother. Netai. Both Jhetu and Chaitanya died without leaving any son

to succeed them. Jhetu left a widow, Rajanibala, and two daughters, Basanti and Priyabala, by his predeceased wife. Chaitanya left a widow,

Parashi. He had also a daughter, Kali. Accordingly, on the death of Jhetu and Chaitanya, their surviving widows, Rajanibala and Parashi,

respectively, became the owners of their shares of the jote comprising the suit land, although each one of them had only a widow''s estate. The

landlord obtained a decree for arrears of rent from 1341 to 1344 B.S. in rent suit No. 1091 of 1938 of the First Court of Munsif, Tamluk. The

arrears were due for the period when the widows, Rajanibala and Parashi, were in possession of the property. In execution of the rent decree, the

landlord purchased the jote on December 15. 1939 and the sale was duly confirmed on January 17, 1940. The landlords took delivery of

possession through court on April 20, 1940. Thereupon, according to the case of the Plaintiff. Rajanibala, the widow of Jhetu, alone took

settlement of the entire jote from the landlord by an amalnama, dated April 17, 1940. at the pre-existing rate of rent and about two years later,

namely on September 20, 1942 by the Kobala, ext. 1 she sold the jote to the Plaintiff. The Plaintiff claimed that she was in possession of the lands

of the jote ever since and had been paying rent to the superior landlords, but that she had been dispossessed from the lands on 3rd Pous, 1358

B.S. corresponding to December 18, 1051, by Defendant No. 1, Titaram Pal, who claimed to have purchased the interest of the reversioners of

Jhetu and Chaitanya, namely, Defendants Nos. 10 to 15 and Defendants Nos. 8 and 9, respectively, by two kobalas, both executed on October

3, 1951. Accordingly, the Plaintiff instituted this suit on August 15, 1953, that is, within two years of her dispossession, claiming declaration of title

and recovery of possession.

2. The suit was contested mainly by Defendant No. 1 though Defendants Nos. 8 and 9 and Defendants Nos. 10 to 15 also appeared and filed

written statements supporting Defendant No. 1. These Defendants challenged the rent decree and rent sale as fraudulent and collusive, and also

alleged that Rajanibala had taken no exclusive settlement of the jote. They also claimed that even if Rajanibala had taken such a settlement after

rent sale, it would enure to the benefit of all the co-sharers and, therefore, on the death of Rajanibala, the reversioners of Jhetu and Chaitanya,

namely, Defendants Nos. 10 to 15 and Defendants Nos. 8 and 9 would succeed to the property and, therefore, after the death of Rajanibala, the

Plaintiff could not claim any further interest and, on the other hand, Defendant No. 1, as purchaser from the reversioners, became entitled to the

property and was in rightful possession from after his purchase.

3. The learned Munsif accepted the case of the contesting Defendants in full. Thus he held that the rent decree had been obtained collusively, and

that the rent sale was brought about fraudulently and collusively, and that the subsequent settlement with Rajanibala was not a genuine settlement at

all, but the old state of things continued. In the circumstances, the learned Munsif held that any transfer by Rajanibala to the Plaintiff would have the

effect only during the life-time of Rajanibala, and that after her death, Defendant No. 1, who had admittedly purchased the interest of the

reversioners of Jhetu and Chaitanya, had become entitled to the property and, therefore, could not be evicted from the suit land. On these findings,

the learned Munsif dismissed the suit.

4. There was an appeal by the Plaintiff which was heard by the Subordinate Judge, Second Court, Midnapore. The learned Subordinate Judge

observed that there was no evidence to show that the rent decree had been obtained fraudulently or collusively or that the rent sale had been

brought about fraudulently or collusively, but he agreed with the learned Munsif in holding that the settlement in favour of Rajanibala did not appear

to be a bona fide settlement for consideration but was tainted by collusion. In the alternative the learned Subordinate Judge held that even if

Rajanibala obtained a settlement, that settlement must be held to enure to the benefit of all the co-sharers, and that in the circumstances Rajanibala

could get no greater interest than she had before the rent sale and settlement, and therefore on the death of Rajanibala and Parashi, the

reversioners of the last male owners, viz., Jhetu and Chaityana, would succeed to the property. In that view the learned Sub ordinate Judge agreed

with the finding of the learned Munsif that the Defendant No. 1 having purchased the interest of the reversioners had become entitled to the

property and could not therefore be evicted after the death of Rajanibala whose interest had been purchased by the Plaintiff.

5. Against that decision the Plaintiff has preferred this second appeal. Mr. S.C. Janah appearing for the Appellant has urged that in view of the

finding of the learned Subordinate Judge that the rent decree and the rent sale were not collusive, he should have logically drawn the conclusion

that the interest of all the original holders of the jote had become extinguished and that therefore a fresh tenancy had been created in favour of

Rajanibala after the rent sale and therefore there could be no question of the reversioners of the original male owners, Jhetu and Chaityana,

succeeding to the property or having transferred any interest to Defendant No. 1. Mr. Janah has also urged that as regards the alternative case on

which the learned Subordinate Judge decreed the suit, viz., that the settlement in favour of Rajanibala enured to the benefit of all the co-sharers,

such a case was not definitely pleaded by the Defendant and should not therefore have been allowed to have been raised in the lower appellate

court.

6. As regards the finding of the learned Subordinate Judge that the rent decree and the rent sale were not collusive, we must point out that though

the learned Subordinate Judge did make such an observation, his observation in the next paragraph, viz., that the alleged fresh settlement taken by

Rajanibala within four weeks of the delivery of possesion taken by the landlord smaked of collusion, considerably weakens the previous finding

made by the learned Subordinate Judge that the rent decree and the rent sale were not collusive. The further finding of the learned Subordinate

Judge that actually no selami appears to have been paid for the alleged fresh settlement taken by Rajanibala, would also go to the support the

observation made by him that the alleged fresh settlement by Rajanibala appeared to be collusive. The findings of the learned Subordinate Judge on

this point must, therefore, be considered to be somewhat inconsistent, The question whether or not a certain transaction was fraudulent or collusive

is a question of the legal inference from the proved facts and circumstances, and therefore the correctness of a decision by the lower appellate

court on this point may be considered by us. The circumstances are that the two widows Rajanibala and Parashi were in possession of

considerable properties which belonged to their respective husbands the total area of the suit land being 4.54 acres or nearly 13 1/2 standard

bighas. There were very few members of the family to be maintained, because Parashi''s only daughter Kali was married, and Rajanibala had no

child of her own, and her co-wife''s daughters were also married. In the circumstances, there is no reason why, if there was honest management of

the property any arrears of rent should have been allowed to remain for which the landlord could have obtained a rent decree. The facts that the rent decree was allowed to be passed ex parte and the sale was also not sought to be set aside by deposit of the decretal amount, and that within

four weeks of the landlord obtaining delivery of possession through Court Rajanibala purported to obtain a fresh settlement and that there is no

satisfactory evidence of payment of any selami by her and that the rate of rent remained same as before, all go to support the inference which was

clearly made by the learned Munsif and somewhat haltingly made by the learned Subordinate Judge that the rent sale was deliberately allowed to

take place in order that Rajanibala might obtain a fresh settlement and could be in a position to dispose of the property for a better price claiming

to be absolute owner, whereas as her husband''s heir she would be only a limited owner and the holding would be subject to the right of the

reversioners. In this connection it is also relevant to mention that Rajanibala sold the property about 2 years after the alleged fresh settlement to the

Plaintiff. In view of the circumstances we would hold that the rent sale was a collusive one and that the subsequent settlement with Rajanibala, if it

was at all made, was also a collusive settlement, and in the circumstances the holding must be deemed to have remained the property of the original

holders and in the circumstances the reversioners would have their interest which they could dispose of after the death of the female owners, viz.,

Parashi and Rajanibala.

7. As regards the alternative case which is based on the principle laid down in Section 90 of the Indian Trusts Act, it is not quite correct to say that

such a defence was not taken by the Defendants in their written statement. A reference to para. 10 of the written statement of the Defendant No. 1

clearly shows that the Defendant No. 1 took the alternative defence that even if there was fresh settlement in favour of Rajanibala, the settlement

enured to the benefit of all the co-sharers and that Rajanibala could not on the basis of such settlement claim an absolute interest in the holding. Mr.

Janah has commented that though such a defence was taken in the written statement no issue on this alternative defence was framed, and the

learned Munsif did not consider this alternative defence because he passed the decree on the finding that the rent sale was collusive and there was

no genuine settlement thereafter in favour of Rajainbala alone. Mr. Janah has pointed out that it was because the learned Subordinate Judge made an observation in the first instance that there was no evidence to justify the finding that the rent decree and the rent sale was fraudulent and collusive

that he had to fall back upon alternative case based upon Section 90 of the Indian Trusts Act. In view of the circumstances we do not think that the

alternative defence being considered for the first time in the lower appellate court really prejudiced the case of the Plaintiff because it is difficult to

see what additional evidence could have been given by the Plaintiff or what additional plea taken if a definite issue had been framed on the basis of

this alternative case.

8. As regards the defence based on the principle of Section 90 of the Indian Trusts Act, Mr. Janah has referred to the decision Khurshed Ali v.

Dina Nath Sarma (1918) 29 C.L.J. 492 , to show that the mere fact that the purchase at rent sale or revenue sale has been made by one of the

co-shavers is not sufficient to give the other co-sharers an equity to obtain reconveyance of their shares or claim that the purchase is for the benefit

of all the co-sharers, and that to support this claim there must be some thing more amounting to sharp practice in the conduct of the co-sharer

purchaser. There can be no doubt as to the correctness of the principle which was laid down in the above case, which in fact follows from the

wording of Section 90 of the Indian Trusts Act which provides that where a tenant for life or a co-owner or other qualified owner of any property,

by availing himself of his position as such gains an advantage in derogation of the rights of other persons interested in the property, he must hold for

the benefit of all persons so interested the advantage which he has gained. Accordingly there must be some evidence or circumstances to indicate

that the co-owner has by availing himself of his position as such gained on advantage in derogation of the rights of others. This amounts to the sharp

practice which is referred to in the decision in the case of Khurshed Ali v. Dina Nath Sarma (supra). In the present case it must be inferred from

the circumstances that Rajanibala did obtain an advantage to the derogation of the interest of the other co-sharer Parashi, because both Rajanibala

and Parashi had interest in 8 annas share of the big jote with the area about 13 1/2 bighas and by the rent sale and the resettlement in the name of

Rajanibala alone if the settlement was a genuine settlement, Rajanibala purported to obtain sole interest in the entire jote to the exclusion of

Parashi''s interest. This was certainly gaining an advantage in derogation of the interest of the co-sharer. Moreover the rent sale if it be held to be

genuine, would destroy the interest of the reversioners, because the rent sale, if genuine, would have the effect of the jote or holding passing to the

landlord and this would effectively extinguish the interest of the reversioners who claimed on the basis of the right of the last male owner. This

would also be gaining an advantage as against the reversioners. Mr. Janah has, however, urged in this connection that reversioners are not persons

interested within the meaning of Section 90 of the Indian Trusts Act, and in support of his proposition he has referred to the Full Bench decision of

Allahabad High Court, viz., Sri Ram Jankiji Birajman Mandir through Ganga Dayal Vs. Jagdamba Prasad, . It is true that in the course of the

judgment it was observed by their Lordships of the Allahabad High Court that the words ""person interested"" in Section 90 of the Indian Trusts Act

cannot be held to apply to the case of the reversioner, because such a reversioner has no vested interest in the estate which is in the possession of

a widow, because it is not known when the widow may die and who will be the actual reversioner on the death of the widow. The case before

their Lordships however was whether an additional item of property which had been acquired by the widow by saving from the income of her

husband''s estate which she had inherited would be deemed to be part of the husband''s estate to which the reversioner had interest or whether the

widow was entitled to make an absolute dedication of such property acquired out of the savings of the income of her husband''s estate. In such a

case it has always been held that if the widow has treated the acquired property as part of her husband''s estate, the reversioners shall have interest

therein, but if she treated the acquired property as her own property the reversioners have no claim thereto. In the particular case the widow was

treating the acquired property as her absolute property and purported to dedicate it permanently to an idol. It was held in the circumstances that it

would not be part of the husband''s estate and therefore the reversioners did not have any interest. Incidentally, their Lordships observed that

reversioners were not ""other persons interested in the ""property"" within the meaning of Section 90 of the Indian Trusts Act and that section was not

applicable to the particular facts before their Lordships, and therefore the observation relating to the reversioners not being persons interested in the estate within the meaning of Section 90 of the Indian Trusts Act cannot be given so much value. Mr. Guha appearing for the Respondent has

pointed out that apart from the provisions of Section 90 of the Indian Trusts Act there are also further provisions in Section 94 of the Act which

provides that in any case not coming within scope of any of the preceding sections, where there is no trust, but the person having possession of the

property has not the whole beneficial interest thereto, he must hold the property for the benefit of the persons having such interest or the residuary

interest thereof as the case may be. Even if it is considered that the case of reversioners does not properly come within the scope of Section 90 of

the Indian Trusts Act, it would in any case come within the residuary Section 94. We are, however, inclined to hold that the case of reversioners

conies even within Section 90, because Section 90 refers to a qualified owner gaining advantage to the derogation of other persons interested in

the property, and illustration (a) to the section refers to a tenant for life of leasehold property renewing the lease in his own name so as tq obtain

absolute interest therein. This is a case similar to the case before us, viz., where the owner of a limited estate, viz., the widow who has interest for

her life only, obtains a renewal of the lease in her own name so as to try and obtain an absolute interest therein. In the circumstances there appears

to be no reason to hold that the case of reversioners is not covered by the provisions of Section 90 of the Indian Trusts Act.

9. That being so and in view of our inference that the circumstances of the case go to show that Rajanibala did gain an advantage by virtue of her

possession as a limited co-owner to the derogation of the interest of other persons, viz., the other co-sharer having a limited interest and the

reversioners of the estate, we must hold that the principle of Section 90 of the Indian Trusts Act does apply and in the circumstances Rajanibala

could not claim an absolute interest even if she did obtain a fresh settlement from the landlord after the rent sale. The position would remain as

before. Rajanibala might have life interest and during her life time the transferee from her would be entitled to enjoy the property. After her death,

the reversioners or the transferee from the reversioners would certainly have better title, and when the transferee from the reversioners obtained

possession by some means or other, such transferee could not be ejected on the suit of the Plaintiff.

10. Mr. Janah has referred to the dakhiJan exts. 5A to 5E. showing that since the purchase the Plaintiff paid rent for the suit land and was in

possession of the suit land, whereas the Defendants did not produce any dnkhila to show that after 1940, they paid any rent. It may be conceded

that from the date of her purchase in 1942, up to the death of Rajanibala, the Plaintiff was in actual possession and did pay rent to the superior

landlords. In fact she was entitled to possession during the life time of Rajanibala. During that time the Defendants did not appear to be in

possession and naturally they did not pay rent. This, however does not give the Plaintiff any right to claim present possession or title to the property

in suit. Accordingly, we find that the Plaintiff Appellant is not entitled to any relief in this appeal. This appeal is therefore dismissed. In view of the

circumstances no order is made as to costs in this Court.

N.K. Sen, J.

11. I agree.