

(1917) 03 AHC CK 0054
In the Allahabad High Court

Shah Abul Hasan and Others

APPELLANT

Vs

Makhdum Bakhsh and Others

RESPONDENT

Date of Decision : 14-03-1917

Acts Referred:

North Western Provinces Tenancy Act, 1901 — Section 79

Citation : 39 Ind. Cas. 944

Hon'ble Judges : Tudball, J; Rafique, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

1. The facts of the case out of which this appeal has arisen are clear and undenied. One Girdhari was the owner of a fixed rate tenancy consisting of four plots of land. He hypothecated those plots of land to the predecessor-in-title of the present plaintiffs, who are the respondents before us. Girdhari died leaving a widow. The zemindar obtained a decree against the widow for arrears of rent, Then the mortgagees tendered and actually deposited the decretal amount. It was not accepted and the widow was ejected from the land in execution of the decree. The mortgagees thereupon brought a suit to recover their money by enforcement of the mortgage, and the zemindar was made a party to the suit. He contested the claim but the claim was decreed and the Court directed the sale of the fixed rate tenure, when the property was put up for sale, the zemindar appeared and filed an objection, stating that the fixed rate tenure no longer existed, that there was merely a non-occupancy tenancy and the land should be sold as such. His objection was disallowed but a note of his objection was made on the sale proclamation. The fixed rate tenure was put up for sale and was purchased by the mortgagees themselves. They then applied to the Civil Court for formal delivery of possession and on the 18th of March 1910, they, were formally placed in possession of the land as against the zemindar and the other defendants in the civil suit. On the 16th of April 1910, they applied to the Revenue Court for mutation of names, alleging that they were in possession. The zemindar objected and the Revenue Court refused to enter their names at all. For

three years the mortgagees, that is to say, the plaintiffs-respondents in the present case, did nothing. They then brought the present suit for possession of the fixed rate tenure, giving the numbers and areas of the four plots in dispute. In paragraph 3 of their plaint they say, "subsequent to the ejectment proceedings the ancestor of the plaintiffs brought a suit for enforcement of the hypothecation lien, and in the said suit, both Musammat Sumari and Shah Ali Husain were impleaded. Furthermore, notwithstanding an objection taken by Shah Ali Husain aforesaid, the claim was decreed in the Court of first instance and in the Appellate Court, and the decree was made final. Then execution of the decree for sale of the property in dispute was taken out, as against Musammat Sumari and Shah Ali Husain. Shah Ali Husain took, an objection to the effect that the property sought to be sold, was not saleable, inasmuch as the nature of the tenure was that of a non-occupancy holding. The objection was disallowed and an order was passed directing the sale of the lands in dispute. Then the aforesaid plots of land were sold and the plaintiffs purchased the same, and thereafter, they (the plaintiffs) duly obtained delivery of possession on the 18th March 1910." In paragraph 4 they say "subsequent to their obtaining the delivery of possession, the plaintiffs presented to the fie venue Court an application for the entry of their names, but their application was disallowed." paragraph 5 they say "not withstanding that the plaintiffs obtained delivery of possession, defendants Nos. 1 to 4 deny the right, of. the plaintiffs as auction-purchasers and are in possession of the property in dispute although they have no right of possession as against the plaintiffs." In paragraph 7 they state: "The cause of action for this suit accrued on the 18th March 1910, the date on which possession was delivered to the plaintiffs within the local limits of the jurisdiction of this Court." In paragraph 8(a) they state: "A decree for possession of the lands specified at the foot and of the value of Rs. 530 may he passed in their favour as against the defendants."

2. This suit has been decreed in both the Courts below. The plea was taken in both Courts that the suit was a suit by a tenant for recovery of possession of his holding and was one of a nature contemplated by Section 79 of the Tenancy Act and as such was only cognizable by the Revenue Court. The Courts below relying on a decision of this Court in *Colleston v. Benares* 28 Ind. Cas. 302 ; 13 A.L.J. 329 held that the Civil Court had jurisdiction and decreed the claim. The defendants appeal and the first point taken is that the suit is not cognizable by a Civil Court at all, and that the ruling mentioned above does not apply to the facts of the present case. In our opinion this contention has considerable force. The case mentioned above was one in which the plaintiff, although he had acquired the tenure, never obtained possession constructively, or otherwise. When he went to take possession he was resisted. In the present case there was no resistance. The ejectment of the opposite party was carried out according to law and the plaintiffs were put into possession. Paragraphs 3, 4 and 5 of the plaint clearly allege that the plaintiffs did obtain possession. In their application of the 16th of April 1910 for mutation of names, the plaintiffs again

alleged that they had been in possession from the 18th of March up to the date of their application. The bare fact that the zemindar subsequently refused to allow them to cultivate the land does not alter the fact that the plaintiffs having acquired a fixed rate tenure, did obtain formal delivery of possession as against the zemindars. They, therefore, are tenants who have been ejected by the zemindar otherwise than in due course of law, and this is a suit for recovery of possession of the holding which is one to which Section 79 of the Tenancy Act clearly applies, and the suit was one which was not cognizable by a Civil Court at all. The appeal must prevail. The decrees of the Courts below will be set aside and the suit will stand dismissed. In view of the circumstances of the case, we direct that the parties bear their own costs throughout the litigation.