
(1969) 10 AHC CK 0027

In the Allahabad High Court

Case No : Civil Miscellaneous Writ No. 2632 of 1964

Um Deo alias Umapati

APPELLANT

Vs

Board of Revenue U.P. and Others

RESPONDENT

Date of Decision : 31-10-1969

Acts Referred:

Kumaon Tenancy Rules — Rule 8, 9

Citation : (1970) 40 AWR 570

Hon'ble Judges : C.D. Parekh, J

Bench : Single Bench

Advocate : L.M. Pant, for the Appellant;

Final Decision : Dismissed

Judgement

C.D. Parekh, J.—This writ petition has been directed against the order of the Board of Revenue, UP., dated 18-3-1964 Annexure F to the writ petition and also against the order of the Commissioner, Kumaon Division, dated 7-8-1961 Annexure D to the writ petition.

2. The facts of the case are that the Petitioner filed a revenue suit under serial No. 9 of the 1st Schedule of Kumaon Tenancy Rules in the court of the Assistant Collector 1st Class, Ranikhet, against Respondents 3 to 7 for cancellation of a sale deed dated 17-10-1957 executed by Respondent No. 7 in favour of Respondents Nos. 3 to 6. This suit was filed by the Petitioner as a representative suit claiming in himself the same right as the right of other Defendants to the suit. The Plaintiff claimed that he was the representative on behalf of the Khaikars of village Garsari. It was contended by the Petitioner in this suit that Respondent No. 7 did not possess any transferable right in a joint khaikari holding and therefore, the sale deed be avoided and cancelled. Various other grounds were taken in the plaint with which I am not concerned in this writ petition.

3. It was contended on behalf of Respondents Nos. 3 to 6 that the transfer of

Khaikari property to them was not void or voidable as they themselves were khaikars in the village and were not outsiders.

4. The Assistant Collector 1st Class, Ranikhet, held that the transfer in the case has been challenged by the Petitioner (Plaintiff) in a representative capacity on behalf of the Khaikar body as a whole of the village but the Plaintiff cannot get any benefit because the non transferability of the Khaikar tenure is intended to keep out the rank outsiders and not the Respondents 3 to 6 who were Khaikars in the village. In the opinion of the Assistant Collector the rule that the Khaikars cannot sell their holdings does not apply to a transfer in favour of another Khaikar. The suit was thus dismissed by the Assistant Collector.

5. The Petitioner thereafter filed an appeal against the judgment and decree of the Assistant Collector to the Deputy Commissioner, Almora, u/s 12 of the Kumaon Tenancy Rules. This appeal of the Petitioner was allowed by the Deputy Commissioner and the trial court judgment and decree were set aside by order dated 31-10-1960.

6. Respondents Nos. 3 to 6 thereafter preferred a second appeal against the appellate judgment and decree dated 31-10-1960 to the Commissioner, Kumaon Division, under the Kumaon Tenancy Rules. The Commissioner allowed the appeal and held that the transfer by a Khaikar is not void ab initio, but is voidable at the instance of the whole body of Khaikari, if the transfer is to some person who lives outside the Khaikari village. He also gave finding on other matters which are not concerned in this writ petition.

7. The Petitioner thereafter brought a revision u/s 17 of the Kumaon Tenancy Rules to the Board of Revenue UP, Allahabad. The Board of Revenue by its order dated 18-3-1964, dismissed the revision of the Petitioner holding that the Petitioner's suit was not maintainable at all in the revenue courts. The Board of Revenue also held that the suit was not a representative suit on behalf of the Khaikari body as well who alone could challenge the transfer. The Board also held that the Khaikari holdings were not transferable but such transfers could only be avoided at the instance of the Panch Khaikars. The Board of Revenue thus refused to interfere in revision and rejected the revision filed by the Petitioner. The Petitioner has now come to this Court and has filed this writ petition.

8. Learned Counsel for the Petitioner Shri L.M. Pant cited before me three rulings of this Court reported in Gaje Singh v. Uchhabia 1929 ALJ 309, Jaint Singh v. Nand Ram 1938 AWR 48 and Pancham Singh v. Deb Ram 1939 AWR 733 and stated that Pakka Khaikari tenures are governed by certain customary laws which laws are unwritten but have been recognised in all the settlements that have taken place in the Kumaon after 1815. According to the learned Counsel the Pakka Khaikars are representatives of old proprietors who hold the entire area of the village by virtue of having first reclaimed it from waste. According to the learned Counsel the Pakka Khaikars are in all respects equal to proprietors with the exception that they cannot sell their holding and pay a small sum called

Malikana in addition to the quota of revenue due from the land recorded in their names. The proprietors or his sedars have no power to interfere with these Khaikars or their land waste or cultivated and on the death of a Khaikar without direct heirs, the lapsed holding reverts to the whole community of Khaikars and not to the Hissedar. In 1938 AWR 48 Bajpai, J. traced out the nature of the tenure and Khaikari tenure. He quoted a passage from Sir Henry Ramsay's Kumaun Report, page 15, which passage runs thus:

These pucca khaikars are in all respects equal to proprietors with the exception that they cannot sell their holdings and they pay a small sum in addition to the quota of revenue due from the land recorded in their names.

Shri Pant learned Counsel for the Petitioner laid stress that the Khaikars cannot sell their holdings. I tried to get this report from the High Court Library but it could not be made available. The quotation in my mind as it appears in the report does not help the Petitioner. In ray opinion it relates to the whole body of Khaikars and does not cover the case of a transfer between Khaikars inter se. According to the learned Counsel for the Petitioner the word Khaikars as used in this quotation can be read in singular and should not be read in plural. But if we read the whole sentence it appears that it relates to the body of Khaikars and not a Pakka Khaikar individually. This clause on the right of transfer of Khaikars appear to be quite reasonable if we look to the background of this Khaikari tenure. The Khaikari tenure is known as Pakka Khaikari and Kachcha Khaikari. In the case reported in 1938 AWR 48 report of Mr. E.K. Pauw on the 10th Settlement of the Garhwal district has also been quoted. This report is based on Mr. Traill who made a settlement of Kumaon Division in the year 1817, i.e., immediately after the conquest of Kumaon by the Britishers. The quotation is as under:

Where the land granted was already held in property by others, those occupant proprietors, if they continued on the estate, sank into tenants of the new grantee, who, moreover, by the custom of the country, was permitted to take one-third of the estate into his own immediate cultivation or Sir. of the remainder of the estate, the right of cultivation rested with the original occupants, who were now termed Khaikars or occupants in distinction from that was or proprietor.

The observation of Mr. Pauw has further been quoted thus:

It would appear that if the grantee did not at once exercise his right to take part of the village into his on immediate cultivation, he was subsequently debarred from getting a footing there at all and remained entitled merely to his manorial dues.

It was thus deduced from these quotations by Bajpai, J. that former class of village where the grantee or Sayana or the Hissedar took a portion of the estate into his immediate cultivation became a kachcha khaikari village and the second class of village where the grantee did not at once exercise his right to take a part of the village into his own in mediate cultivation became a pucca khaikari village.

Judging the remarks of Sir Henry Ramsay's report in this background it appears to me that a Khaikar can transfer his rights in any holding to another Khaikar alone in the same Khaikari body and the clause as it appears from the quotation of the Ramsay's report relate to a transfer contemplated by Khaikars to persons other than Khaikars. It is the admitted case of the parties in this case that the vendor and the vendees are both pukka Khaikars and belong to the same Khaikari body. In these circumstances in my opinion the Board of Revenue has correctly held that the Plaintiff is incompetent to challenge the transfer in dispute.

9 The learned Counsel for the Petitioner could not show me that the Petitioner, when he filed the suit Under Order 1, Rule 8 CPC could obtain permission of the court. This was a condition precedent for binding those persons who formed the body of Khaikars and who were parties to the proceedings. This essential condition having not been fulfilled in my opinion the suit was not a representative one and was not maintainable and as such, in my opinion the court rightly decided the matter against the Petitioner.

10. The Petitioner himself came with the plea that there was a community of interest as between himself and other Khaikars whom he made a party Under Order 1, Rule 8. That is who (?) a circumstance against the Petitioner and it establishes that the Petitioner himself the ought that the whole body of Khaikars had a community of interest in getting this transfer avoided and he alone could not have avoided the transfer. In these circumstances as well the Khaikari incidence of the property appears to be one which is only to be enjoyed by the whole community of Khaikars and not by any single individual.

11. Under Item No. 9 of the Schedule to Rules 8 and 9 of the Rules framed for revenue courts dealing with rent and tenancy matters in Kumaon a suit for cancellation of illegal transfer or surrender or sub-lease or agreement to transfer, surrender or to sub let can be filed within one year when the transfer or agreement becomes known. This heading admittedly contemplates the cancellation of illegal transfer or surrender. According to the learned Counsel for the Petitioner the illegality is that a Khaikar under the customary law of Kumaon cannot sell his holding and therefore, according to the learned Counsel the transaction is void ab initio. I do not agree with the learned Counsel for the Petitioner that the transaction is void ab initio. It is a voidable transaction and can be avoided by the whole body of Khaikars as has been stated by me in the earlier part of my judgment but not by any individual as it has been done in this case. In my opinion neither the Commissioner nor the Board of Revenue has committed any illegality in passing the impugned orders. At least there is no manifest error apparent on the face of the record.

12. The writ petition fails and I dismiss it with costs.