

The Central
Bank of India
Ltd.
v.
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whether or not it falls within the category of appealable orders. The order in question declining to issue commission relates merely to mode of proof of a particular fact and is, in my opinion, an order of a procedural nature and not affecting the rights or liabilities of the appellant and, therefore, not an appealable order.

We have been asked to send back the case to the Tribunal to decide whether or not, in the light of the facts and circumstances of this case, the order affects the rights and liabilities of the parties. I do not find any justification for the same, because the entire matter is before us and having regard to the nature of the controversy, I see no impediment in my deciding that the order is not one against which an appeal could be had to the Tribunal.

In the result, this appeal must fail and is dismissed leaving the parties to bear their own costs.

B.R.T.

LETTERS PATENT APPEAL

Before D. Falshaw, C.J. and D. K. Mahajan, J.

JIWAN SINGH,—*Appellant*

versus

RAM KISHAN AND OTHERS,—*Respondents.*

L.P.A. 262 of 1961.

1966.

February 10th.

Punjab Occupancy Tenants (Vesting of Proprietary Rights) Act (VIII of 1953)—S. 3 Widow of last male holder creating occupancy rights in ancestral land—Suit by reversioners of last male holder for declaring the transaction to be void decreed—Alienees acquiring proprietary rights under the Act—Whether entitled to hold such rights only up to the death of the widow—S. 3—Whether nullifies decrees.

Held, that when alienees acquire occupancy rights from the widow of a last male holder, their rights are not only precarious but become void by reason of a declaratory decree obtained by the reversioners of the last male holder. The decree keeps alive their rights so long as the alienor lives. They come to an end on his death and in case he leaves a widow on her death. Therefore, whatever comes by reason of those rights will form part and parcel of the same and will

suffer from the same infirmity with which those rights did suffer. The larger estate created by Punjab Occupancy Tenants (Vesting of Proprietary Rights) Act will not vest in the alienees for whatever title they get to the land under the Act will enure for the life-time of the alienor in terms of the decree and on her death their rights in land would come to an end. They can hold these proprietary rights up to the death of the widow and after the death of the widow, these rights would pass on to the reversionary heirs.

Held, that section 3 of the Act does not nullify decrees, whether they are declaratory or otherwise. The decree cannot be equated with custom. Custom merely gives a right to obtain a decree but it cannot be said that the decree is custom or usage.

Letters Patent Appeal under clause 10 of the Letters Patent from the decree of the Court of the Hon'ble Mr. Justice Mehar Singh, dated the 15th day of May, 1961, passed in R.S.A. 552 of 1957, reversing that of Shri Ram Gopal Kohli, Senior Sub-Judge, with enhanced appellate powers, Hoshiarpur, dated the 14th November, 1955 (decreeing the plaintiff's suit against all the defendants whereby the decree of Shri Avtar Singh Gill, Sub-Judge, IV Class, Hoshiarpur, dated the 29th March, 1956, was reversed, and dismissing the plaintiff's suit and leaving the parties to bear their own costs throughout.

D. N. AGGARWAL, G. R. MAJITHIA, AND MALUK SINGH. ADVOCATES,
for the Appellant.

H. L. SARIN, BALRAJ BAHL, AND ASHA KOHLI, ADVOCATES, for
the Respondents.

JUDGMENT

MAHAJAN, J.—This is an appeal under clause X of the Letters Patent and is directed against the decision of learned Single Judge of this Court reversing the decision of the lower appellate Court which in turn reversed the decision of the trial Court dismissing the plaintiffs' suit. On the facts of this case there is no dispute. One Biroo by four deeds executed on September 28, 1912, and the fifth deed executed on July 13, 1913, purported to transfer occupancy rights in land measuring 68 kanals, 13 marlas of which he was the full owner to the predecessors-in-interest of the defendants. The collaterals of Biroo, the predecessors-in-interest of the present plaintiffs, brought the usual declaratory suit under custom to challenge all the five deeds on the ground that, in fact, the land had

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been sold by Biroo and the sales had been given the garb of creating of occupancy tenancy. It was also alleged that the land in suit was ancestral, and therefore, it was prayed that these sales be held to be inoperative as against the reversionary rights of the collaterals. This suit was contested by the predecessors-in-interest of the present defendants. The only issue in this suit with which we are at the moment concerned is issue No. 1, which is in these terms:—

“Is the transaction of the land in suit tantamount to sale?”

On this issue the trial Court found that “the land in dispute has really been sold to defendant No. 2 and the transaction ingeniously clad in the garb of occupancy tenure to be converted into manifest sale at a suitable time in the future to keep off for the present the reversioners and the pre-emptors.” After determining the remaining issues, the trial Court granted a declaratory decree to the effect that after the death of defendant No. 1, that is, Biroo, defendant No. 2, shall have no right in the land in dispute against the plaintiffs. Defendant No. 2 preferred an appeal to the learned District Judge who, by his order dated December 7, 1916, rejected the same. On the question of the nature of the transactions, the learned District Judge gave the following finding:—

“I hold, therefore, that the transactions were not mere leases or acts of management but were out and out sales of proprietary rights made in that guise in order to defeat the reversioners.”

Biroo died on the 7th December, 1916, and was succeeded to by his widow Mst. Gurdevi. Gurdevi died on the 10th October, 1954. On the 15th June, 1952, before the death of Gurdevi, the Punjab Occupancy Tenants (Vesting of Proprietary Rights) Act, 1952 (Act No. VIII of 1953) came into force. This Act made the occupancy tenants owners of their holdings and extinguished the landlords' rights in the occupancy tenancies.

On the death of Gurdevi, the plaintiffs have brought the present suit against the defendants for possession of the land in pursuance of the declaratory decree already

referred to. This suit was dismissed by the trial Court. All the issues were found in favour of the plaintiffs excepting issue No. 7, which is in these terms:—

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“What is the effect of the enactment of Act No. VIII of 1953?”

The trial Court was of the view that as the defendants were recorded as occupancy tenants, they had become the owners of the land by reason of the Punjab Occupancy Tenants (Vesting of Proprietary Rights) Act. The plaintiffs preferred an appeal against this decision to the Senior Subordinate Judge. The learned Judge affirmed the decision of the trial Court on all the issues excepting issue No. 7. The decision on issue No. 7 was reversed and while dealing with this issue, the lower appellate Court observed as follows:—

“The learned Subordinate Judge has relied upon sections 2(f) and 3 of the Punjab Occupancy Tenants (Vesting of Proprietary Rights) Act (No. VIII of 1953) for his finding that the defendants have acquired all ownership of the land and that the plaintiffs' rights in the land stand extinguished. Section 3 runs as below:—

‘Notwithstanding anything to the contrary contained in any law, custom or usage for the time being in force, on and from the appointed day all rights, title and interest (including the contingent interest, if any, recognized by any law, custom or usage for the time being in force and including the share in the Shamilat with respect to the land concerned) of the landlord in the land held under him by an occupancy tenant, shall be extinguished, and such rights, title and interest shall be deemed to vest in the occupancy tenant free from all encumbrances, if any, created by the landlord.’

Section 2(f) defines the occupancy tenant as a tenant who, immediately before the commencement of this Act, is recorded as an occupancy tenant in the revenue records and also includes

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the pre-decessors and successors in interest of an occupancy tenant.

Defendants Nos. 1 to 3 were no doubt entered as occupancy tenants in the revenue records on the date of the passing of this Act but it appears to me that Section 3 of the Act does not govern this case and that the defendants are not entitled to the advantage conferred by this section upon the occupancy tenants. This section excludes the applicability of any law, custom or usage inconsistent with the provision contained therein but does not nullify the decrees, if any, passed by the law Courts with regard to the rights of the parties in any land. The decrees remain operative and are not, in any way, affected by the provisions of this Act. In the present case, there is a decree binding on the parties, to the effect that the creation of the occupancy rights by Bhiru in favour of Labhu was unlawful and that the reversioners of Bhiru would not be bound by the alienation. The effect of this decree is that the rights of Labhu and his successors-in-interest, defendants Nos. 1 to 3, terminated on the death of Bhiru and his widow and the land passed to the reversioners of Bhiru unaffected by the occupancy rights. As held above, this decree is binding on defendants Nos. 1 to 3. So they are not entitled to avoid the decree and claim the advantage conferred upon the occupancy tenants by section 3 of this Act. These defendants had a right to remain in possession of the land only during the lifetime of Bhiru and his widow and are now in possession of the land as trespassers having no rights or interests therein. The finding of the lower Court that the rights of the plaintiff-reversioners of Bhiru have been extinguished by this Act is erroneous and cannot be upheld. This provision terminates the rights of the landlord in the land and the term landlord, as defined in the Act, is as follows:—

*Landlord means a person under whom an occupancy tenant holds land and to whom the

occupancy tenant is or, but for a special contract, would be liable to pay rent for the land, and includes the predecessors and successors-in-interest of a landlord and shall, for the purposes of section 4 include the mortgagee.

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I am disposed to the view that the present plaintiffs do not come within the definition of 'landlord' because they get the land not as successors-in-interest of Bhiru but on the basis of the decree passed by the Court in 1915. They derived their title in the land from their common ancestor. For these reasons, I set aside the finding of the trial Court on issue No. 7 and hold that the rights and interests of the plaintiffs in the suit land are not, in any way, affected by the provisions of Act No. VIII of 1953 and that they are entitled to succeed to the land on the basis of the decree."

Against this decision, a second appeal was taken by the defendant to this Court. This appeal came before a learned Single Judge of this Court, who reversed the decision of the lower appellate Court on issue No. 7 with the result that the decree passed by the lower appellate Court in favour of the plaintiffs was set aside and their suit was dismissed. The learned Single Judge did not proceed to decide issue No. 7 in the same manner as the trial Court had done. The reasoning adopted by the trial Court has been negatived by the learned Single Judge as will appear from the following passage from his judgment:—

"If the decree can be read as a decision having decided between the parties that the alienations were sales, then in view of a number of decisions of this Court that section 3 of Act No. VIII of 1953 can only apply to a case where in law a party is an occupancy tenant and not to a case where a party in law is not an occupancy tenant but by mistake or by error of circumstances is described as an occupancy tenant in the record of rights, then the argument of the learned counsel for the

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plaintiffs, as I have already stated, is un-exceptional and the plaintiffs must succeed in their suit. However, I do not consider that a declaratory decree of this type can be taken even in a case like the present where the nature of the alienations was disputed and a decision given to have changed the nature of the alienation. So this argument fails."

The other argument that was raised by the counsel for the plaintiff-respondents before the learned Single Judge, namely, that the defendants were not occupancy tenants and, therefore, the provisions of Punjab Act No. VIII of 1953 did not apply, was negated with the following observations:—

"On June 15, 1952, the landlord was Gurdevi and the occupancy tenants were the defendants. Subject to what I have stated with regard to the first argument, they were lawfully entered so in the revenue records. The statute operated immediately upon this relationship. The defendants became full owners of the land leaving Gurdevi to right of compensation under the provisions of it. Then the learned counsel for the defendants points out that as has been done by the first appellate Court that Punjab Act No. VIII of 1953 does not apply to a decree but only applies to rights, title and interest recognised by any law, custom or usage, but a declaratory decree of the type on which reliance has been placed in this case is no more than a statement of the rights, title and interest of the person in whose favour the declaration is made of his having the same under custom or usage and in this case the decree was obtained under custom. Whatever rights, title or interest the plaintiffs have obtained under such declaratory decree these are in fact obtained by them under custom. The Court has done nothing but to give in its decree a recognition of those rights, title and interest as obtaining to the plaintiffs under custom so that this argument is also without force."

On a certificate granted by the learned Single Judge the present appeal under clause X of the Letters Patent has

been filed by Subedar Jiwan Singh, one of the plaintiffs alone.

Mr. H. L. Sarin, learned counsel for the defendants-respondents, has raised a preliminary objection that the appeal has abated by reason of the death of Achhar Singh and Sadhu Ram, who are respondents Nos. 5 and 8 in the present appeal. Achhar Singh died on the 11th December, 1961, and Sadhu Ram died on the 15th March, 1965. The application for impleading the legal representatives was filed on the 2nd November, 1965. It is not disputed that this application would be barred by time unless the delay in filing the application is condoned and the abatement is set aside. The only reason given for not making the application within the period of limitation by the appellant is that he was not aware of the death of Achhar Singh and Sadhu Ram. It is stated in paragraph 3 of the application that the appellant resides at village Manj Kala, tehsil Dasuya, district Hoshiarpur, which is 40 miles away from village Janauri. In the affidavit of Jiwan Singh, he gave his own address in village Janauri. In the memorandum filed by the appellant the residence of the two deceased respondents is given as Janauri. In the counter-affidavit filed by the defendants it is stated that the appellant is the cousin brother of Achhar Singh and Sadhu Ram deceased and that he was fully aware about their death. He also attended the Kirya ceremony of the above deceased respondents. It is further pointed out that the appellant receives his pension regularly at Janauri. After considering the affidavit of the appellant and the counter-affidavit as well as the other circumstances of the present case, we are clearly of the view that there is no justification to condone the delay in making the application for impleading the legal representatives of the two deceased respondents.

In spite of the death of the two respondents mentioned above, we are of the view that their death has no effect whatever on the plaintiff Subedar Jiwan Singh's appeal. The plaintiffs are entitled to, according to the law of inheritance, the estate of deceased Biroo in equal shares. They have only a right to the possession of the property left by him which falls to their share. Each plaintiff has an independent right to his share alone. He has no right to the share of the other plaintiff. In such circumstances, all the plaintiffs could have filed separate suits for

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possession to the extent of their share in the inheritance. The mere fact that they have filed one suit will not in any manner affect the question of abatement. In such circumstances it will be taken for granted that the plaintiffs have filed separate suits and the decrees in their favour are really separate decrees. Subedar Jiwan Singh can only succeed to the extent of his share. If he had filed a separate suit, the death of his co-plaintiffs, that is, respondents Nos. 5 and 8, would not have caused abatement of his suit. The mere fact that his co-plaintiffs are parties to the suit will not in any manner affect his suit because some of his co-plaintiffs have died. The position might have been different if one of the defendants had died and his legal representatives had not been impleaded within the period of limitation. Therefore, we are clearly of the view that the death of the other co-plaintiffs does not in any manner affect Jiwan Singh's appeal, which has got to be decided on the merits. The preliminary objection is, therefore, repelled.

So far as merits of this case go, we have not the least doubt that the appeal must succeed. The learned Single Judge made a wrong assumption that the declaratory decree changed the nature of the alienation. In fact, what the declaratory decree has done is that it has declared the real nature of the alienation. The impugned alienations were given the garb of occupancy tenancies whereas, in fact, they were sales. This is what was held by the two Courts which dealt with the declaratory suit. On a correct reading of the decree it must be held that the decree granted two declarations (1) that the impugned transactions or alienations were, in fact, sales and (2) that those alienations were without necessity and thus inoperative after the death of the alienor. It is not disputed, and indeed could not be, that if the impugned transactions in the declaratory suit were sales, the provisions of section 3 of Act VIII of 1953 would not come into play. Moreover, it is well settled that a person, who is erroneously shown to be an occupancy tenant in the revenue records, cannot get the benefit of section 3 of Act No. VIII of 1953. Only those persons are entitled to the benefit of section 3 who are, in fact, occupancy tenants. The previous decision, which was *inter partes*, clearly ruled that the defendants

were not occupancy tenants but were vendors. This decision binds the parties who are also parties to the present litigation hand and foot. It is not open to the defendants to raise the plea that they are occupancy tenants. This really puts an end to the entire controversy in the present appeal. But as the learned Single Judge has proceeded to examine another argument raised by the counsel for the plaintiffs in support of the decision of the lower appellate Court, it will be proper to advert to that matter as well before parting with this case. The learned Single Judge has proceeded on the basis that Gurdevi became the landlord and the defendants became the occupancy tenants because of the five alienations. According to the learned Single Judge the declaratory decree did not change the nature of the alienations which were not sales but merely created occupancy tenancy in favour of the defendants. It is on these bases that the learned Single Judge proceeded to apply section 3 of Act No. VIII of 1953. In our opinion this approach is wholly erroneous. Even if it is assumed that the five transactions merely created occupancy tenancies, it was open to the reversioners to challenge their creation as opposed to custom inasmuch as no alienation of ancestral immovable properly is valid unless it is for necessity.

It is common ground now before us that the creation of occupancy rights in ancestral land could only stand if it was justified by necessity. The declaratory decree declared the creation of such a tenancy invalid *vis-a-vis* the plaintiffs and the defendants. The plaintiffs could only take the benefit of the decree at the time when the succession would open out and if they were the heirs at law to the subject matter of the declaratory decree. It is a settled rule of custom as well as of Hindu Law that a male owner lives so long his widow lives and the succession only opens out on the death of the widow. But if there is no widow left by the last male-holder, the succession does open out at the time of the death of the last male-holder. In the present case, the succession opened out on the death of Gurdevi. The defendants' interest in land had become merely contingent, i.e., on the death of Gurdevi they will lose that interest. As soon as Gurdevi died, they were left with no interest in the land. The question then arises whether the coming into force of the Punjab Act No. VIII of 1953 does make any difference. In our

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opinion, it does not. Whether the law diminished those rights or increased those rights, will not matter because the basis for the increase or the decrease were the five transactions which had been declared void as between the plaintiff and the defendants. The learned counsel for the respondents at this stage pressed into service the decision in *Harnam Kaur and another v. Sawan Singh and others* (1), for the proposition that the ownership rights are not accretion to the occupancy rights, when by operation of law such rights are annihilated. This proposition was laid down while determining the question whether the vesting of proprietary rights in the widow, who before the Act was merely an occupancy tenant, kept the ancestral character of those rights. It was not the case where the question, as has arisen in the present case, fell for determination. Those observations must, therefore, be confined to the facts of that case.

In the present case, the alienees acquired occupancy rights. Those rights not only became precarious but also became void by reason of the declaratory decree. The decree kept alive those rights so long the alienor lived. They had to come to an end on his death and in case he left a widow, on her death. Therefore, whatever comes by reason of those rights will form part and parcel of the same and will suffer from the same infirmity with which those rights did suffer. The larger estate created by the Act will not vest in the alienees for whatever title they get to the land under the Act will enure for the lifetime of the alienor in terms of the decree and on his death their rights in land would come to an end. Therefore, it hardly matters that the defendants acquired the proprietary rights. They could only hold those proprietary rights up to the death of the widow and after the death of the widow, those rights would pass on to the reversionary heirs. Moreover, section 3 does not deal with decrees. It does not nullify decrees whether they are declaratory or otherwise. The decree cannot be equated with custom as the learned Judge seems to have done. Custom merely gives a right to obtain a decree but it cannot be said that the decree is custom or usage. The decree had set at naught the alienation so far as the plaintiffs and the defendants

(1) I.L.R. 1959 Punj. 2333.

are concerned. That decree binds them unless its binding force is taken away by law.

In whatever perspective the matter is examined, we are clearly of the view that the defendants could not defeat the plaintiff's suit. Their title was precarious and it endured only so long as the life of the alienor endured. Whether that life came to an end with his own death or with the death of his widow did not matter. The alienation was *non est* so far as the plaintiffs are concerned. It was voidable at their instance and moment they avoided it, it became void. Therefore, as between the plaintiffs and the defendants it is futile for the defendants to urge that they are occupancy tenants and thus become the full proprietors of their occupancy tenancy.

The learned counsel for the appellant contended that the appeal should be allowed with regard to all the plaintiffs and he wanted to press into service Order 41, rule 4 of the Code of Civil Procedure. In the first instance, Order 41, rule 4 has no applicability to the facts of the present case. In the second place, we do not think it a fit case where we should interfere under order 41, rule 4 of the Code of Civil Procedure. While dealing with the question of abatement, we have dealt with the rights of the plaintiffs. Plaintiffs do not possess a joint right. Their right is wholly severable and individual. It was open to any one of the plaintiffs not to claim possession of his share of the land or having claimed possession, and failed, not to press the matter in appeal. Therefore, we see no reason to reverse the decision so far as the other plaintiffs are concerned, as they have not appealed against it. The only person, who has appealed against it is Subedar Jiwan Singh, and it is his appeal alone which we have dealt with and which is being allowed. The decision of the learned Single Judge with regard to the remaining plaintiffs will stay.

For the reasons recorded above, we partly allow this appeal, set aside the decision of the learned Single Judge only so far as Subedar Jiwan Singh is concerned and in his case restore that of the lower appellate Court with costs.

D. FALSHAW, C.J.—I agree.

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