Dirgpal Pande Vs Mahadeo Misir and Others

Court: Allahabad High Court

Date of Decision: Jan. 8, 1919

Citation: (1919) ILR (All) 356

Hon'ble Judges: Walsh, J; Piggott, J

Bench: Division Bench

Final Decision: Disposed Of

Judgement

Piggott and Walsh, JJ.
This is a first appeal against an order of remand passed by the District Judge of Gorakhpur in an appeal from a

decision of the Munsif of Deoria. The suit in question arose in the following way. One Gaya Dat Pande was an occupancy tenant in the village of

Kasia, He died in or about the year 1884, A.D., and, in so far as the laud in suit is concerned, it is an admitted fact that this land passed into the

occupation of his widow, Musammat Rajpali, who was recorded as tenant of the same and remained ostensibly in possession as tenant for a long

period of years. The said Rajpali died in 1915, and since her death conflicting claims to the possession of this land have been put forward by

Drigpal Pande, a nephew of the deceased, on the one hand, and on the other hand by the defendants-appellants, who are the daughter and the

daughter"s sons of the aforesaid Gaya Dat Pande and Musammat Rajpali. The case set up in the plaint was essentially this, that Gaya Dat had died

while a member of the same joint undivided Hindu family as the plaintiff Drigpal, that the land in suit had devolved by survivorship on the death of

Gaya Dat upon the said plaintiff, as part of a larger area which formed the joint occupancy holding of the family. The plaintiff alleged that on the

death of Gaya Dat he had obtained peaceable possession of the entire holding, including the land in suit, and had given the widow Rajpali nothing

but what she was entitled to under the Hindu law, namely, maintenance as a widow belonging to the joint family. The plaint goes on to assert that,

some two years after the death of Gaya Dat Pande, there was a dispute between the plaintiff and Musammat Rajpali as to the maintenance to be

enjoyed by the latter, and that the plaintiff then assigned the land in suit to Musammat Rajpali in lieu of the maintenance to which she was entitled.

In effect, therefore, the plaintiff''s case was that the land in suit had continued, as a matter of law, ever since the death of Gaya Dat Pande, to form

part of an occupancy holding, including this and other land, of which the tenant was the plaintiff Dirgpal. He admitted the fact of Musammat

Rajpali''s possession as regards the land in Suit, He pleaded that her possession was permissive only and enjoyed by her in lieu of her right to

maintenance. If so, of course, Musammat Rajpali had no rights as tenant of the land in suit which could devolve upon any one on her death, and the

plaintiff was entitled to resume possession of this land on the death of Musammat Rajpali, merely on the ground that Musammat Rajpali''s right to

maintenance was extinguished by her death and that the plaintiff continued to be, as he had been all along, the occupancy tenant of the land in suit.

Unfortunately, as it has turned out, the plaintiff''s case was complicated by a reference made in the third paragraph of the plaint to a will which

Gaya Dat Pande had left behind him. All that is really said about this will is to the effect that Gaya Dat himself had made it clear in the said will that

the land in suit formed only part of the joint occupancy holding of the family and that, although Musammat Rajpali might after his death be entitled

to maintenance out of the joint occupancy holding, she would not enjoy full rights of ownership over any portion of the same or have any power of

alienation. When the case went to trial it would seem as if the plaintiff was allowed more or less to shift his ground and to set up a right of

succession under the will, independently of, or as an alternative to, the main case outlined in the plaint. The trial court fixed two issues which it

decided together. One of these dealt with the jointness or separation of the family, and the other with the question whether, in any event, any claim

which the plaintiff might have to the land in suit had or had not been extinguished by many years of adverse possession on the part of Musammat

Rajpali. There was further a separate issue on the question of the will. On the two issues, which he tried together, the learned Munsif found against

the plaintiff. He held that the case of jointness set up in the plaint was not proved and that, in any event, Musammat Rajpali had held the land in suit

adversely to the plaintiff from the date of her husband''s death, and had acquired, as against the plaintiff a good title by adverse possession. With

regard to the will the finding was, in the first place, that it had not been proved; in the second place, that the evidence was not sufficient to show

that the land in suit was included in, or formed any part of, the holding referred to in that will, and, in the third place, that the will had never been

acted upon. This last finding seems to be a repetition in another form of the finding in favour of the adverse possession of Musammat Rajpali. The

first court having dismissed the suit, the plaintiff brought the matter before the District Judge in first appeal, In his memorandum of appeal he most

distinctly challenged the finding of the trial court on the question of jointness or., separation between his uncle and himself He further pleaded that

the genuineness of the will should have been presumed and that the court below was in error in supposing that the terms of the will had not been

acted upon, inasmuch as the possession allowed to Musammat Rajpali over the land in suit had been merely possession in lieu of maintenance,

which the will admitted to be her right. The learned District Judge began by presuming the genuineness of the will. It was a document 70 years old

produced from proper custody. We have not been asked to interfere with the presumption in favour of its genuineness drawn by the lower

appellate court. That court, however, was in error in supposing that it could find a short cut to a decision by basing the plaintiff''s case only upon

the will. The learned Additional Judge says that, at the time when this will was executed, there was no statutory prohibition to the transfer of an

occupancy holding, by will or otherwise, He assumes in favour of the plaintiff that the will does refer to the land, in suit, and he interprets it as

bequeathing this land to the plaintiff, subject to a right of maintenance in favour of Musammat Rajpali. Now, to go no further back than the Rent

Act No. XVIII of 1873, it is beyond question that in that year the Legislature expressly prohibited the transfer of a right of occupancy such as that

with which we are concerned in this case by grant, will or otherwise, except as between persons who have become by inheritance co-sharers in

such right. This prohibition was repeated in more general terms in Section 9 of the N.W.P. Rent Act No. XII of 1881, We think it clear, as a

question of law, that these Statutes rendered void the terms of any will in existence on the date on which they were passed, if those terms

contravened the prohibition against transfer by will which was thereby enacted. It follows that the plaintiff cannot succeed in this case on the

strength of the will alone, apart from the case of jointness between himself and his uncle set up in the plaint. The lower appellate court, in spite of

the opinion which it formed regarding the terms of the will, has not decreed the plaintiff''s claim, but has passed an order of remand, because it was

of opinion that further inquiry was needed on a point raised by the defendant''s pleadings, namely, whether the land in suit had actually formed part

of the old occupancy holding as it existed in the life-time of Gaya Dat Pande, or was land in which Musammat Rajpali had herself acquired

occupancy rights by occupation of the same for the statutory period of 12 years. This is really stating in another form the question which the lower

appellate court seemed in a previous portion of the judgment to have decided in favour of the plaintiff, when it assumed that the land in suit was

part of the land referred to by the provisions of the will, However this may be, we are satisfied, in the first place, that the order of remand cannot

he affirmed; in the second place, we are not of opinion that we are in a position to restore the decree of the first court. The plaintiff is entitled to a

finding of fact by a court of first appeal on the question of jointness or separation, and on the question of the nature of Musammat Rajpali''s

possession as tenant of the land in suit, namely, whether the possession was adverse to the plaintiff or permissive on his part. These questions have

not been considered at all by the lower appellate court in consequence of what was in our opinion an erroneous view taken by court as to the

effect of the will. Our order, therefore, is that we set aside the order of remand passed by the learned Additional Judge and remand the case to

that court to be re-admitted to his file of pending appeals and disposed of according to law, subject to the observations made by us in this

judgment. Costs here and hitherto shall abide the event of the suit.