

(1928) 02 AHC CK 0007**Allahabad High Court****Case No:** None

Ram Saran Das and Another

APPELLANT

Vs

Chhote Lal and Others

RESPONDENT

Date of Decision: Feb. 27, 1928**Citation:** AIR 1928 All 668 : 110 Ind. Cas. 365**Hon'ble Judges:** Sulaiman, J; Kendall, J**Bench:** Full Bench**Final Decision:** Allowed**Judgement**

Sulaiman and kendall, JJ.

This is a defendants' appeal arising out of a suit for a declaration that the house in dispute is not saleable in execution of money decrees in favour of defendants 1 and 2 against Gobind Prasad, defendant 3. The plaintiff, Chhote Lal, has acquired this property from defendant 4, Narain Das, who has been impleaded as a pro forma defendant.

2. The plaintiff's case in the plaint was that this house originally belonged to one Baldeo Prasad deceased, who died some 26 or 27 years ago, and on his death his widow Mt. Shitabo took possession of it along with other properties as Hindu widow with limited rights. It is further alleged that Gobind Prasad was the brother of Mt. Shitabo, who wrongfully took possession of this house after her death but later on, viz., on 2nd January 1924, he relinquished it in favour of the plaintiff who entered into possession. The contesting defendants in their written statements, when referring to the allegations contained in the plaint, merely stated that it was admitted that Baldeo Prasad was dead and that Mt. Shitabo became the owner. They did not specifically and in express terms deny that Mt. Shitabo took possession of the estate as Hindu widow, nor did they allege that she acquired absolute estate under any gift or will of the deceased. They did, however, put forward the plea that Gobind Prasad, Mt. Shitabo's brother was the owner of the property in dispute under the will executed by the lady. At the trial the pleaders of the defendants

admitted that the house in dispute was an the possession of the plaintiff, though they did not at first admit that he had been in possession in January 1924. Neither party produced any oral evidence and the case was finally disposed of on the documentary evidence as it stood and the suit was decreed.

3. It is clearly established that on 3rd January 1924, before the attachment of this house in execution of the decrees in favour of defendants 1 and 2 took place, Gobind Prasad relinquished his rights in favour of Chhote Lal and put him in possession of this house. The original rent agreement is on the record, and there is no evidence to rebut it. The finding of the Court below that the plaintiff was in possession of the house before the attachment must, therefore, be accepted.

4. The plaintiff led no evidence to prove that his predecessor Narain Das was legally entitled to this house. Narain Das alleged himself to be the son of Baldeo Prasad's mother's brother, and would have been only a bandhu and not entitled to succeed unless nearer heirs were not in existence. The pleaders for the plaintiff, however, offered no evidence in support of his title and requested the Court that the case should be disposed of on the finding on issue 9, i.e., whether the house in dispute was liable for attachment and sale in execution of those decrees.

5. Although the plaintiff did not prove his title, we are of opinion that inasmuch as he was in actual possession of this house before the attachment, which took place on 6th January 1924, he is entitled to seek the declaration asked for. Under Order 21, Rule 60, the Court has to investigate whether the property attached was at the time of the attachment in the possession of the judgment-debtor or of some person in trust for him or in the occupancy of a tenant or other person paying rent to him. If these conditions exist the attachment would be unjustified. If, therefore, Chhote Lal was not holding the property on account of, or in trust for, the judgment-debtor but was in possession on his own account he is entitled to the declaration granted by the Court below.

6. It is obvious that no interest can remain in Gobind Prasad after the death of Mt. Shitabo if the latter held a Hindu widow's estate in the property. The learned advocate for the appellants tried to argue that the burden lay on the plaintiff to establish that Mt. Shitabo was in possession of this property as a Hindu widow and that burden had not been discharged. We are unable to accept this contention. Having regard to the allegations in the plaint and the omission to set up in express terms any such plea in the written statement, it must be deemed that the possession of Mt. Shitabo as a Hindu widow was admitted. In any case when it was admitted that the house originally belonged to Baldeo Prasad and that after his death his widow Mt. Shitabo became the owner then in the absence of any explanation or evidence to the contrary the presumption is that she succeeded to this property as a Hindu widow and held possession as such.

7. After the plaintiff's objection had been disallowed by the execution Court, he deposited the decretal amount on the condition that

the money may be paid to the decree-holder under a guarantee that in case the house is held not saleable in their decrees they will be liable to refund it.

8. The decree-holder took out the money. The plaintiff has in his suit claimed a refund of it. In our opinion when the money was deposited by the plaintiff on the express understanding that the decree-holder would be liable to refund it if it was found that the house was not saleable, the decree for its refund granted by the Court below is quite proper. The appellant must be deemed to have withdrawn it on that condition. No question of voluntary payment by a person not interested in its payment arises in this case and the case of *Ram Prasad v. Salik Ram Singh* [1882] A.W.N. 210 is inapplicable.

9. The appeal is accordingly dismissed with costs including in this Court fees on the higher scale.