

(1925) 02 CAL CK 0007

Calcutta High Court

Case No: None

Subashini Dasi

APPELLANT

Vs

Habu Ghosh and Others

RESPONDENT

Date of Decision: Feb. 18, 1925

Citation: AIR 1926 Cal 247

Hon'ble Judges: Mukerji, J; Greaves, J

Bench: Full Bench

Judgement

Mukerji, J.

The plaintiff is the appellant in this appeal. She is the widow of one Preonath Ghose. Preonath, Gokul and Sahadeb were three brothers. The plaintiff instituted the suit out of which this appeal arises, impleading therein the two brothers Gokul and Sahadeb, their, mother and certain other persons, who, for the sake of convenience, will be called the Kola defendants. The suit was for declaration of plaintiff's title to the 16-annas of the land mentioned in schedule ka of the plaint on the allegation that the said land had been acquired by her husband Preonath after he had separated from his brothers Gokul and Sahadeb. It was also for a declaration of her one-third share in the land mentioned in schedule kha of the plaint and for recovery of possession thereof on partition by metes and bounds on the allegation that her husband had the said share in the said land which belonged to the joint family of which the three brothers were the members. She also prayed for a declaration that the lease which had been granted by Sahadeb in favour of the Kola defendants in respect of some of the lands included in schedules ka and kha was fraudulent, and collusive and not binding upon her, and she, therefore, prayed for a decree for khas possession in respect of those lands, for mesne profits, accounts and other reliefs. The Munsif decreed the plaintiff's suit in part declaring her right to the 16-annas of the properties mentioned in Schedule ka and also declaring her right to an undivided one-third share of the properties mentioned in Schedule kha and awarding her a decree for possession in respect of the said one-third share on partition to be effected by a Commissioner to be appointed for the purpose. As

regards the lease, Ex. A, the Munsif held that the said lease was unauthorized and not binding on the plaintiff. He gave the plaintiff a decree for khas possession in respect of the land of Schedule ka but in respect of the land of Schedule kha he held that she was entitled to partition only and not to a decree for possession as there was no evidence that the defendants had dispossessed her from any particular portion of it. He awarded her a decree for mesne profits in respect of the lands of Schedule ka and gave her liberty to bring a separate suit for future mesne profits and accounts.

2. The defendants thereupon preferred an appeal and the learned Subordinate Judge on appeal declared the plaintiff's title to an 8 annas share in the lands of Schedule ka and to a third share in the lands of Schedule kha and also awarded her a decree for possession by partition of those shares by metes and bounds; and he further ordered that there should be no decree for khas possession in respect of the lands covered by the lease Ex. A. As the said lease was not fraudulent or collusive and as the Kola defendants had bona fide obtained the lease from Sahadeb in their favour. He also set aside the decree for mesne profits.

3. The plaintiff thereupon has preferred this appeal to this Court. The appeal is confined to the lands covered by the lease Ex. A, it being contended that the findings arrived at by the learned Subordinate Judge are not sufficient to disentitle the plaintiff to a decree for khas possession in respect of the lands covered by the lease Ex. A. It is urged that some of the findings arrived at by the learned Munsif on this question have not been touched or reversed by the learned Subordinate Judge and that it is necessary that the matter should be sent back to the learned Subordinate Judge in order that he may arrive at proper findings and pass a proper decree.

4. A preliminary objection has been taken on behalf of the respondents as to the maintainability of this appeal. It is urged that one Kunja Ghose who was one of the minor sons of Gokul, and was so made a party respondent in the appeal, died more than two years ago, and that his heirs have not been substituted in his place; and it is contended that in the absence of substitution of the heirs of Kunja, the appeal is not maintainable. Gokul Ghose, as I have already said, was one of the defendants in the suit, and when the suit was pending in the Court of the learned Munsif he died and thereupon his four sons, Habu Ghosh, Puma Ghose, Ambica Ghose and Kunja Ghose were substituted in his place. These sons of Gokul together with the heirs of Sahadeb and the Kola defendants preferred an appeal from the decision of the Court of first instance; and Kunja was made a respondent in the appeal before us, when the same was originally preferred. On the other hand it is contended on behalf of the appellant that the appeal is maintainable, although there has been no substitution of the heirs of Kunja. It is urged that the present appeal is confined to the question as to whether the lease Ex. A is binding upon the plaintiff. It is also urged that the decree passed by the lower appellate Court, in so far as it purports to

declare plaintiff's title to an 8 annas share in the lands in Schedule ka and a third share in the lands in Schedule kha, or in so far as that decree entitles the plaintiff to a partition of those shares will not be affected by the result of this appeal. So far as the lands of Schedule ka are concerned, upon the findings of the two Courts below it is clear that the heirs of Gokul are not in any way interested therein. As for the lands of Schedule kha, the plaintiff is interested to the extent of a third share of those lands and it may very well be that the heirs of Gokul are interested in some share in the remaining two-thirds. The scope of the present appeal, however, is confined to the question as to whether the Kola defendants are entitled to remain on the land by virtue of the lease which had been granted to them by Sahadeb. It does not, therefore, appear to us that the heirs of Gokul are in any way interested in the result of this appeal; and therefore, we are not prepared to say that the appeal is not maintainable in the absence of the heirs of Kunja who is dead and whose heirs have not been substituted in his place.

5. Turning now to the contentions which have been put forward on behalf of the appellant, they amount to this: that the findings of the learned Subordinate Judge are not sufficient to dispose of the matter. The plaintiff's case, as laid in the plaint, was to the effect that Sahadeb, in collusion with the Kola defendants, fraudulently executed a lease in their favour in order to deprive the plaintiff of these lands and that the lease was merely a paper transaction which had not been acted upon. The learned Munsif found that in the document Sahadeb completely ignored the right of the plaintiff and described the entire land as his own ancestral mourasi mokarrari niskar land and that the lease, therefore, was one which had been executed by Sahadeb in denial of the plaintiff's right; and in that view of the matter he held that it was a fraudulent and collusive document which is not binding upon the plaintiff. The learned Subordinate Judge has found in his judgment that Sahadeb was, at the time when he executed the lease, managing the properties of the plaintiff and that the Kola defendants bona fide obtained the lease in respect of the lands and came to be in possession thereof. He found that the transaction was not fraudulent or collusive. He recorded a further finding to the effect that Sahadeb executed the lease on behalf of himself and the plaintiff. On what basis the last finding was made it is not very clear, for the document itself shows that it purported to have been executed by Sahadeb alone for himself; and not only that, he expressly stated in the document that the property was his own mourasi mokarrari niskar land. The question is whether these findings are sufficient for the purpose of holding that the Kola defendants are entitled to remain on the land, or, in other words, whether the lease, under the circumstances, can be said to be binding as against the plaintiff. Taking the findings of the learned Subordinate Judge at their highest they mean that Sahadeb executed the document as the manager of the joint family and that the Kola defendants bona fide obtained the lease from Sahadeb and came to be in possession of the land by virtue of the lease. This finding, in our opinion, is not sufficient for the purpose of holding that the lease was binding on the plaintiff. The

mere fact that a certain person is the manager of a joint family is not enough to make his acts binding upon the other members of the family and it must be shown by the party relying upon the acts of the manager and seeking to bind the other members of the family, that the acts were done by the manager either for the benefit or for some interest of the family. It is true that the case put forward in the plaint was to the effect that the document was a fraudulent and collusive document and one which had not been acted upon. This case, no doubt, may be taken to have been disposed of by the finding of the learned Subordinate Judge. This finding, however, does not seem to us to be sufficient for the purpose of the case. To hold that the plaintiff was bound by the transaction it must be found that it was for the benefit of the family or for some interest of the family. Such a finding is all the more necessary in the present case in view of the fact that there is nothing to show that the plaintiff was aware of the transaction when it was made, and it has been proved that she was a young widow living under the care of Sahadeb.

6. There is a further matter which appears upon the defence set up by the Kola defendants. The lease was for a period of three years which has expired long ago. In their written statement they alleged that they were the settled raiyats of the village for a series of years before they came to be in possession of this particular land by virtue of the lease and that after they had come to be in possession of this land, they acquired a right of occupancy therein. It is necessary, therefore, that there should be a finding recorded by the learned Subordinate Judge on the question as to whether the Kola defendants by virtue of; their status have acquired such rights as would entitle them to remain on the land in spite of the fact that the lease may not be binding upon the plaintiff.

7. We think, therefore, that the decree of the learned Subordinate Judge passed in this case should be set aside and the matter should go back to him in order that he may arrive at his conclusions upon the two questions set out above.

8. In the event of both the questions being answered in her favour, the plaintiff will be entitled to a decree for khas possession of the lands allotted to her by evicting the defendants therefrom. In the event of the first question only being answered in her favour she will be entitled only to a declaration that the lease is not binding on her. In other cases the decree passed by the lower appellate Court will stand.

9. It will be open to the learned Subordinate Judge to allow the parties to adduce further evidence if he thinks fit; but the rest of the decree already passed in the suit by the Court of appeal below will not be allowed to be reopened and the learned Subordinate Judge will dispose of the case finally in accordance with the direction given above.

10. Costs of this appeal will abide the result.

Greaves, J.

11. I agree.