

Court No. - 19

Case :- SECOND APPEAL No. - 477 of 1986

Appellant :- Jagannath

Respondent :- Mohd.Bux And Others

Counsel for Appellant :- S.C.Misra,Bireshwar Nath,Raghaw Ram Upadhyay,Shailesh Chandra Tiwary

Counsel for Respondent :- S. Mirza,Abdul Rashid,Arshad Ahsan Siddiqui,Mohd. Haneef,Nirmal Tewari,Ravi Shankar Singh,Shivendra Singh,Virendra Singh

Hon'ble Jaspreet Singh,J.

1. The instant second appeal has been preferred by the defendant assailing the concurrent judgement and decree passed by the trial court dated 27.10.1983 passed in Regular Suit No. 22 of 1981 by Munsif, Raebareli and the first appeal also preferred by the defendant under Section 96 of CPC bearing No. 118 of 1983 connected with civil appeal No. 135 of 1983 was dismissed by the lower appellate court by means of judgement and decree dated 11.8.1986. Consequently, the defendant has approached this Court by means of the instant second appeal.

2. The record indicates that though the instant second appeal was filed in the year 1986 and it was admitted on 2.9.1987. However, no substantial question of law was framed. It is later on 11.7.2014 that a coordinate Bench of this Court had framed the following substantial questions of law which read as under:

"1. Whether the court below erred in law in having failed to distinguish between the co-sharer and the Nambardar, while holding that the consent of all the co-sharers was required for the Nambardar as it was in respect of a co-sharer and in this view of the matter the decision rendered in the earlier suit could not operate as res Judicata because as the dispute in this case was in respect of the co-sharer and not with the Nambardar?

2. Whether the decision rendered in the earlier case ignoring the provisions of Section 4 and Section 16 (1) (b) of the Land Revenue Act is correct and legal decision binding on this suit?

3. Whether the description given in the Wazibul Arj can override the provisions of Land Revenue Act and could annul effect thereto?

4. Whether the court below erred in law in not considering the point that the contents Wazibul Arj which gives only custom but are indirect conflict with the express provisions of the Land Revenue Act cannot override the effect of the express provisions of the Act?

5. Whether the condition in the Wazibul Arj to the effect that Lambardari could not transfer or execute a lease being a co-sharer within the consent of other co-sharers and further without such a condition is bad in law being unreasonable restriction on the right to property?

6. Whether such a condition stated above is violative of Article 14 of the Constitution of India being arbitrary, bad and amounts to unreasonable restriction on the right to property?

3. In order to deliberate on the said questions of law, it would be necessary to take a look at the pleadings and the facts giving rise to the instant second appeal. Before proceeding any further at this juncture, it will be relevant to notice that the original parties expired during the pendency of the proceedings and their legal heirs were brought on record by substitution. However for the sake of convenience, the Court shall be referring to the parties as they were impleaded in the suit.

4. That Mohd. Bux instituted a suit for cancellation of a lease

deed executed by Smt. Kaniz Aisha Begum (the original defendant no. 3) in favour of Jagannath (original defendant no. 1). The said suit was registered as Regular Suit No. 22 of 1981. It was specifically pleaded that the property in question belonged to the plaintiff and was part of their *muhal*. It was further stated that the plaintiff had acquired the property from Smt. Karam Bibi, widow of Mumtaz Ali Khan. It was further stated that certain shops had been created and the plaintiffs wanted to raise two shops over the disputed property and had submitted his building plans to Nagar Palika, Raebareli. It further revealed that Smt. Kaniz Aisha Begum in order to defeat the right of the plaintiff and his predecessor had executed a deed in favour of Jagannath on 17.01.1980. It was stated that the said lease was an outcome of connivance and in any manner, Smt. Kaniz Aisha Begum had no right to execute the said deed and the same was liable to be cancelled.

5. The suit was contested by the defendant- Jagannath where the plaintiff averments were denied. The reference given by the plaintiff to previous litigations was also denied and it was also stated that the plaintiff was not in possession of the said property. The defence set up by the defendant was that the property belonged to Smt. Kaniz Aisha Begum, widow of Mohd. Yaqoob Khan, resident of Pandari Kala, who was lambardar of Village- Chak Akhtiyarpur, Muhalgair, Khawandigan. Upon his death, his wife Smt. Kaniz Aisha Begum who inherited the rights had the power to lease the property and in this view of the matter, Smt. Kaniz Aisha Begum had executed the lease deed in favour of the defendant. The said lease was of perpetual nature and the other co-owners had no right to question the said lease and, if at all, they had a right and they could seek partition, but the deed in favour of defendant no. 1, Jagannath could not be cancelled.

6. Upon the exchange of pleadings, the trial court framed twelve issues. However, the important issues upon which the parties went to trial were (i) Whether the plaintiff is the owner in possession in respect of the properties shown by ACDF and if so, its effect; (ii) Whether Smt. Karam Bibi was the owner in possession of the property right from the beginning and if so, its effect; (iii) Whether Smt. Kaniz Aisha Begum was the owner in possession of the property and if so, whether she had the right to execute the lease deed in favour of Jagannath on 3.2.1978; (iv) Whether Smt. Kaniz Aisha Begum was the co-sharer of the land bearing No. 1415/1 and if so, its effect?

7. The trial court after considering the oral as well as the documentary evidence found that even earlier the dispute had occurred between the predecessor-in-interest of the plaintiff and that of the defendant no.1. In the said suit, wherein Smt. Kaniz Aisha Begum and her husband Mohd. Yaqoob were also parties. It was found that they did not have the right to terminate a licence which was issued by all the co-owners and without the consent neither one co-sharer could have granted the licence. In the said suit, it was found that since all the co-sharers through their representative had granted the licence, hence one co-sharer could not cancel the same and this suit was carried forward in appeal and it also gave rise to second appeal filed before this Court bearing Second Appeal No. 282 of 1964 "Hafeez Ali Khan vs. Mohd. Ishaq and others", wherein Smt. Kaniz Aisha Begum and Mohd. Yaqoob Khan were also parties and the second appeal came to be decided on 12.5.1977 and in view thereof, the trial court concluded that Smt. Kaniz Aisha Begum could not execute the lease in favour of Jagannath, consequently by means of judgement and decree dated 27.10.1983, the suit came to be decreed and the lease dated 3.2.1978 was cancelled.

8. Against the said judgement and decree dated 27.10.1983, two regular civil appeals came to be filed. One was filed by Jagannath bearing No. 118 of 1983 and the other was filed by Smt. Kaniz Aisha Begum bearing No. 135 of 1983. Both the two appeals were heard by the 1st Additional District Judge, Raebareli and by means of a common judgement dated 11.8.1986, both the appeals came to be dismissed. Smt. Kaniz Aisha Begum did not carry the matter forward in second appeal and it is only Jagannath who had preferred the instant second appeal which is under consideration before this Court.

9. The Court has heard Shri R.R. Upadhyay, learned counsel for the appellant. None has put in appearance on behalf of the respondents and consequently, the Court has heard the appeal in absence of the respondents.

10. The contention of the learned counsel for the appellant is that the property in question initially belonged to the Zamindars and it was part of their *muhal*. The property which is the subject matter is a Non Z.A land (that it was not the land which was affected by the U.P.Z.A. & L.R. Act, 1950 and thus, the Zamindars in respect of Non Z.A. lands continued to hold their rights). It is further submitted that the husband of Smt. Kaniz Aisha Begum namely, Mohd. Yaqoob Khan was a lambardar and after his death, his wife Smt. Kaniz Aisha Begum had the right to execute the lease and she after having taken the premium and the lease rent executed a registered deed dated 3.2.1978. The plaintiff who claimed right from Smt. Karam Bibi did not have a right to seek the cancellation of the lease executed by Smt. Kaniz Aisha Begum and thus, if at all, the plaintiff had any grievance, he could at best seek a partition but could not have sought the cancellation of the lease deed which was executed in favour of Jagannath. It has also been submitted

that once it is not disputed that Mohd. Yaqoob Khan was the lambardar and they had a right in the property, then without seeking the consent of other co-sharers, they could execute the lease and this aspect has not been appropriately considered by the two courts. It is further urged that Wajib-ul-Arj would override the provisions of the Land Revenue Act and even this aspect is not appropriately noticed by the two courts and as such the judgement and decree passed by the two courts is bad in the eyes of law.

11. Having considered the aforesaid submissions, at the outset, it may be noticed that the issue which has been raised by the appellant has to necessarily be seen in context with the previous litigations which has taken place between the predecessor-in-interest of the appellant as well as the plaintiffs-respondents. In the suit instituted by Hafeez Ali Khan bearing No. 95 of 1960, wherein Mohd. Ishaq, Mohd. Yaqoob Khan, Smt. Kaniz Aisha Begum, Mohd. Ismail and Mohd. Hanif were defendants. In the said suit filed by the Hafeez Ali Khan seeking possession came to be contested and it was dismissed by means of judgement and decree dated 15.07.1963. Though the suit was dismissed, but it was found that the defendants were mere tenants from month to month and they did not have any right. This matter was again taken forward by filing Civil Appeal No. 74 of 1963 which was again decided by means of judgement and decree dated 19.02.1964 dismissing the appeal. In the aforesaid backdrop, the second appeal came to be filed before this Court bearing No. 282 of 1964 which also was dismissed on 12.05.1977.

12. It will be relevant to notice from the record that in Suit bearing No.95/1960 filed by Hafeez Ali Khan wherein Mohd. Yaqoob Khan and Smt. Kaniz Aisha Begum were defendants

No.2 and 3. In the said case, it was specifically noticed that Wajibularz of the Village in the third settlement did not have any term which entitled the Lambardar to grant a permanent lease without the consent of all the co-sharer. The Lambardar could definitely relates to rent and was entitled to distribute the profits amongst the co-sharer but he could not deal with the land by creating transfers on behalf of other co-sharers. It was clearly held that the permanent lease created by the defendants No.2 and 3 alone (referring to Mohd. Yaqoob Khan and Smt. Kaniz Aisha Begum) is void and ineffectuated.

13. In the said case, the permanent lease created by them were held to be non-est and needless to say this judgment and decree dated 15.07.1963 was subjected to first appeal bearing No.74/1963f which again was dismissed and even the second appeal came to be dismissed. Thus, it would be seen that clear finding was recorded that Smt. Kaniz Aisha Begum and Mohd. Yaqoob Khan could not have created any permanent lease. That being so, the permanent lease created in favour of the present appellant Jagannath also suffered from same vice.

14. Apparently, what this Court finds is in the said litigation which has been mentioned above, the rights of the parties would crystalize and the right of Smt. Kaniz Aisha Begum was noticed in the sense that she did not have a right to exclusively execute a perpetual lease in favour of Jagannath. This aspect was considered by the trial court by taking note of Exb. 14, Exb. 8 and Exb. 9 and found that Smt. Kaniz Aisha Begum could not have executed the lease. These findings have been affirmed by the lower appellate court and another interesting feature that is to be noticed is the fact though Smt. Kaniz Aisha Begum had filed a regular first appeal but she did not file a second appeal, as a result, the findings recorded against her

including her right to execute the lease deed was not challenged any further nor she joined the present appellant, Jagannath nor he has challenged the findings of decision rendered by the lower appellate court relating to the appeal filed by Smt. Kaniz Aisha Begum. Thus in light of the aforesaid, it is not open for the appellant to challenge the judgement and decree of the two courts, especially when it has been held that Smt. Kaniz Aisha Begum did not have a right and she did not assail the said findings. Once the predecessor-in-interest of Jagannath has been held to have no right, he primarily on his own cannot contest the proceedings.

15. In view of the aforesaid, this Court finds that the judgement and decree passed by the two courts require no interference. Apart from the fact that the questions of law which have been framed by this Court may be in an appropriate case can be considered on its merit. But the very fact that the findings returned against Smt. Kaniz Aisha Begum both in the civil suit and in the first appeal having not been challenged in the instant second appeal and the appellant- Jagannath has only come forward only against his dismissal of appeal, accordingly, the instant second appeal cannot survive and is **dismissed**.

16. In the facts and circumstances of the case, there shall be no order as to costs. The record of the court concerned be returned forthwith.

Order Date :- 9.11.2023

Shravan