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KARBALAI BEGUM

v.

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MOHD. SAYEED AND ANR.

October 7, 1980

[P. N. BHAGWATI AND S. MURTAZA FAZAL ALI, JJ.]

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U.P. Consolidation of Holdings Act, 1953, sections 9 & 49—Non-Participation by a co-sharer in rents and profits of land—Whether amounts to an ouster—Whether other co-sharer obtains title by adverse possession.

The appellant a widow and defendants nos. 1 and 2 were her husband's cousins. They were in joint possession of the plots in dispute, being co-bhumidars. The parties had a joint Khewat upto 1359 Fasli. The plaintiff filed a suit for joint possession over her share contending that she was living with her sons at Lucknow and defendants were looking after the agricultural land and groves and that she was given her share by the defendant from time to time. She also went to the village from time to time and got her share. She alleged that the defendants assured her that her share would be properly looked after and protected by them. The plaintiff further alleged that it was only 3 years before the suit that she came to know that her name had been deleted from the Khewat, and the entire property was mutated in the consolidation of holding proceedings, in the name of defendants of which she was never informed. The defendants contested the suit on the grounds that, they were in separate occupation of the land in dispute, the plots in dispute were occupied by Adhivasi who acquired the Sirdar rights under the U. P. Zamindari Abolition and Land Reforms Act, 1950, the plaintiff lost her title by operation of law, and denied the allegation of fraud.

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The trial court dismissed the suit but on appeal the District Judge decreed the suit for joint possession in favour of the plaintiff in respect of two plots of the land. The High Court accepted the appeal of the defendants.

Allowing the appeal this Court,

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HELD: 1. The grounds on which the High Court reversed the decision of the District Judge are not sustainable in law and the judgment of the High Court cannot be allowed to stand. [869F]

2. Another fact which emerges from the admitted position is that if defendants 1 and 2 were co-bhumidhars with the plaintiff in the Khewat and had also sirdari tenants under them, how could the sirdari tenants occupy the land of one of the co-sharers leaving the defendants alone so that the plots were reallotted to them. [867C]

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A 3. It is well settled that mere non-participation in the rent and profits of the land of a co-sharer does not amount to an ouster so as to give title by adverse possession to the other co-sharer in possession. Even if this fact be admitted, then the legal position would be that defendants nos. 1 and 2 being co-sharers of the plaintiff, would become constructive trustees on behalf of the plaintiff and the right of the plaintiff would be deemed to be protected by the trustees. [867D]

B In the instant case it is manifest that the position of the defendants apart, from being in the nature of constructive trustees, would be in law the possession of the plaintiff. [867E]

4.(i) The finding of the District Judge that a planned fraud was made to drop the appellant's name from the revenue records was a clear finding of fact and even if it was wrong (though it is absolutely correct) it was not open to C the High Court to interfere with the finding of fact in second appeal. [868B]

4.(ii) The High Court proceeded on the basis that there was nothing to show that any fraud was practised upon the consolidation authorities so as to make the order a nullity. The High Court here completely misunderstood the case made out by the plaintiff. [868G]

D 5. The finding of fact of the District Judge that there was no evidence on the record to prove that the plaintiff was not given any share out of the produce and, therefore, the conclusion that the plaintiff should be deemed to be ousted from possession, was binding in second appeal. [868C-D]

6. The High Court committed an error of record because the clear evidence of the appellant is to the effect that she was not at all informed about the consolidation proceedings and was assured by the defendants that they E would take proper care of her share in any proceedings that may be instituted. [868F]

7. It is well settled that unless there is an express provision in the statute barring a suit on the basis of title, the courts will not easily infer a bar of suit to establish the title of the parties. [869B]

F *Suba Singh* v. *Mahendra Singh and Ors.* A.I.R. 1974 S. C. 1657 referred to.

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1204 of 1978.

Appeal by Special Leave from the Judgment and Order dated 5-4-1978 of the Allahabad High Court (Lucknow Bench) in Second G Civil Appeal No. 90/75.

R. K. Garg, V. J. Francis and *Sunil Kumar* for the Appellant.
Uma Datta, Prem Malhotra and *Kishan Datt* for the Respondents.

The Judgment of the Court was delivered by

H FAZAL ALI, J.—How dishonest cousins, looking after the lands of their brother's widow, situated far away from the place where the widow was living, taking undue advantage of the confi-

dence reposed in them by their widowed sister-in-law and having painted a rosy picture of honestly managing the property and giving her due share, cast covetous eyes on their sister-in-law's share and with a deplorable design, seek to deprive her of her legal share and deny her legal rights is not an uncommon feature of our village life. That this is so is aptly illustrated by the facts of this case where the sister-in-law was driven by the force of circumstances to indulge in a long drawn litigation in order to vindicate her legal rights in wresting her share of the property from the hands of her cousins. This is the unfortunate story of the poor and helpless appellant, Karbalai Begum, who having failed to get justice from the High Court of Allahabad was forced to knock the doors of the highest Court in the country and has, therefore, filed the present appeal in this Court after obtaining special leave.

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In order to understand the facts of the case, it may be necessary to give a short genealogy of the parties which will be found in the judgment of the District Judge and is extracted below :

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Mir Tafazzul Hussain

Syed Khadin Husain		Syed Sadiq Husain	
Syed Laek Husain (widow Karbalai Begum —Plaintiff)		Mohd. Bashir (Defdt. No. 1)	Mohd. Rasheed (widow Smt. Shakira Bano, Defdt. No. 2)

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The appellant Karbalai Begum was the widow of Syed Laek Husain and defendants No. 1 and 2 were her husband's cousins. The admitted position seems to be that the plaintiff and the defendants were in joint possession of the plots in dispute, being co-bhumidars, because after the abolition of the zamindari by the Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950 the plaintiff-appellant, Mohd. Bashir and Mohd. Rasheed became bhumidars of the plots in dispute. It is also not disputed that upto 1359 Fasli both the parties had a joint khewat, as would appear from the extract of the khewat produced by the appellant. The plaintiff's case was that she was living with her sons at Lucknow and her husband's cousins were looking after the lands which consisted of agricultural lands and groves and she was given her share by her cousins from time to time. It was also alleged that she went to the village from time to time and got her share. In her statement before the trial court, she has clearly stated that the defendants, Mohd. Bashir and Mohd. Rasheed used to manage the properties which were joint and used to give her share and assured her that her share would be properly looked after and protected by them. Thus,

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A having gained the confidence of the plaintiff the first and the second defendants went on managing the properties and off and on gave her share so that she may not suspect their evil intentions. The plaintiff further alleged in her statement that during the consolidation proceedings, separate plots were carved out and she was never informed about any proceedings by the defendants and was under the impression that her share was being properly looked after. It was only three years before the suit that the plaintiff came to know that her name had been deleted from the khewat and the entire property was mutated in the consolidation of holding proceedings in the name of the defendants. Hence, the suit by the plaintiff for joint possession over the share.

The suit was dismissed by the trial court but on appeal, the district judge decreed the suit for joint possession in respect of Chakbandi plot Nos. 201 and 274 only. As regards plot Nos. 93, 94 and 106 the dismissal of the plaintiff's suit by the trial court was upheld. In the instant case, therefore, we are concerned only with Chakbandi plot Nos. 201 and 274. Plot No. 201 was carved out of plot Nos. 158, 159, 164, 165, 167, 166, 168, etc. and plot No. 274 was formed out of plot Nos. 267, 268, 272, 273, 276, 277, 278, 279 and 280.

The suit was contested by the defendants mainly on the ground that the defendants were in separate occupation of the land or plots in dispute and the plaintiff had absolutely no concern with them. It was further averred that although at some time before, the lands in dispute were joint but during the consolidation proceedings the plots in possession of the plaintiff were occupied by Adhivasi who having acquired the rights of a Sirdar under the Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950, the plaintiff lost her title by operation of law. The allegation of the plaintiff that the defendants had committed fraud was stoutly denied.

The learned trial court accepted the allegations of the defendants and dismissed the case of the plantiff. The District Judge, however, found that on the admitted facts even after the abolition of zamindari, the position was that in 1357 Fasli the plaintiff's name was clearly recorded as a co-sharer with the defendants and continued to be so until 1359 Fasli as would appear from Ex. 2. The learned District Judge further found that the name of the plaintiff was suddenly deleted after 1359 Fasli and there was no order of any authority or court to show the circumstances under which the plaintiff's name was suddenly deleted nor were there any judicial proceedings under which the name of the plaintiff as a co-bhumidar was

deleted. The learned District Judge, after a careful consideration of the documentary evidence, came to the clear conclusion that some sort of fraud must have been committed by Mohd. Bashir, and Mohd. Rasheed when in 1362 Fasli the plots were entered exclusively in the name of Mohd. Bashir and Mohd. Rasheed. Even if no share was given to the plaintiff by the defendants, as the defendants were co-sharers, unless a clear ouster was pleaded or proved the possession of the defendants as co-sharers would be deemed in law to be the possession of the plaintiff. A B

Another obvious fact which emerges from the admitted position is that if Mohd. Bashir and Mohd. Rasheed were co-bhumidars with the plaintiff in the khewat and had also sirdari tenants under them, how could the sirdari tenants occupy the land of one of the co-sharers leaving the defendants alone so that the plots were re-allotted to them. It is well settled that mere non-participation in the rent and profits of the land of a co-sharer does not amount to an ouster so as to give title by adverse possession to the other co-sharer in possession. Indeed even if this fact be admitted, then the legal position would be that Mohd. Basir and Mohd. Rashid, being co-sharers of plaintiff, would become constructive trustees on behalf of the plaintiff and the right of the plaintiff would be deemed to be protected by the trustees. The learned counsel appearing for the respondent was unable to contest this position of law. In the present case, it is therefore manifest that the possession of the defendants, apart from being in the nature of constructive trustees, would be in law the possession of the plaintiff. C D E

Apart from this, the fact remains that the District Judge has come to a clear finding of fact after consideration of the evidence that a clear fraud was committed during the consolidation operation either by the defendants or by somebody else as a result of which the rights of the plaintiff were sought to be extinguished. In this connection, the learned District Judge found as follows :— F

> "This shows that a planned fraud was made to drop the appellant's name from the revenue records and full advantage was taken of the consolidation operations in the village by the respondents. In para 20 of the written statement, paper 31A, it was pleaded by the respondents that they acquired the suit plot through litigation and the plaintiff's right extinguished during the consolidation proceedings. There is no evidence before me to show that there was any litigition with the sub-tenants and the defendants acquired the plots exclusively. Even G H

A if it is accepted for the sake of arguments that the respondents did obtain the plots through litigation, even then it cannot be said that the plaintiff's rights extinguished."

This finding of the learned District Judge was a clear finding of fact and even if it was wrong (though in our opinion it is absoB lutely correct) it was not open to the High Court to interfere with this finding of fact in second appeal. Furthermore, the District Judge at another place found that there was no evidence on the record to prove that the plaintiff was not given any share out of the produce and, therefore, the conclusion that the plaintiff should be deemed to be ousted from possession, was not correct. In this connection, the C learned Judge obsrved as follows : —

"The argument advanced by the counsel for the respondents that there is no evidence on the record that the plaintiff was given any share out of the produce and, therefore, the plaintiff should be deemed to be ousted from possession, is D fallacious."

This was also a finding of fact which was binding in second appeal. The High Court seems to have relied on the fact that there was no evidence to prove that the plaintiff was prevented from filing a petition under s. 9 of the U.P. Consolidation of Holdings Act, E 1953 or that the defendants assured the plaintiff that her name shall be entered in the record during the consolidation proceedings. Here also, the High Court committed an error of record because the clear evidence of PW, Karbalai Begum, is to the effect that she was not at all informed about the consolidation proceedings and was assured by the defendants that they would take proper care of her share in F any proceedings that may be instituted. This was accepted by the District Judge and should not have been interferred with by the High Court in second appeal.

The High Court proceeded on the basis that there was nothing to show that any fraud was practised upon the consolidation authoG rities so as to make the order a nullity. Here the High Court completely misunderstood the case made out by the plaintiff. It was never the case of the plaintiff that any fraud was committed on the consolidation authorities. What she had stated in her plaint and in her evidence was that the defendants had practised a fraud on her by giving her an assurance that her share would be properly looked H after by them and on this distinct understanding she had left the entire management of the properties to the defendants who also used to manage them. The trial court did not fully appreciate this part

of the case made out by the plaintiff and the District Judge in clear terms accepted the same. In these circumstances, therefore, the finding of the High Court regarding fraud having been committed in the consolidation proceedings was not legally sound.

The last ground on which the High Court non-suited the appellant was that after the chakbandi was completed under the U.P. Consolidation of Holdings Act, the suit was barred by s. 49 of the said Act. It is well settled that unless there is an express provision barring a suit on the basis of title, the courts will not easily infer a bar of suit to establish the title of the parties. In *Subha Singh* v. *Mahendra Singh & Ors.*(1) this Court made the following observations :—

> "It was thus aboundantly clear that an application for mutation on the basis of inheritance when the cause of action arose, after the finalisation and publication of the scheme under Section 23, is not a matter in regard to which an application could be filed "under the provisions of this Act" within the meaning of clause 2 of Section 49. Thus, the other limb of Section 49, also is not attracted. The result is that the plea of the bar of the civil courts' jurisdiction to investigate and adjudicate upon the title to the land or the sonship of the plaintiff has no substance."

In view of the clear decision of this Court, referred to above, the High Court erred in law in holding that the present suit was barred by s. 49 of the U.P. Consolidation of Holdings Act.

Thus, the grounds on which the High Court reversed the decision of the District Judge are not sustainable in law and the judgment of the High Court cannot be allowed to stand.

We, therefore, allow the appeal with costs throughout, set aside the judgment of the High Court, decree the plaintiff's suit for joint possession as far as plots Nos. 201 and 274 are concerned and restore the judgment of the District Judge. The cost allowed by this Court would be set-off against the sum of Rs. 15,000/- (fifteen thousand only) deposited by the respondents in the High Court and paid to the appellant and the balance may be refunded to the respondents.

N.K.A. *Appeal allowed.*

(1) A.I.R. 1974 SC 1657.