APPELLATE CIVIL.

Before Gosain, J.

BISHNA AND OTHERS,—*Plaintiffs-Appellants.*

versus

SOHNA AND OTHERS,—*Defendants-Respondents.*

Civil Regular Second Appeal No. 114 of 1953.

1958

March, 4th

Punjab Limitation (Custom) Act (I of 1920)—Section 8—Scope of—Who can take benefit of the declaratory decree—Persons who are parties to the alienation—Whether can take benefit of the declaratory decree.

Held, that a declaratory decree obtained at the instance of any reversioner declaring an alienation to be not binding on the reversionary body will enure for the benefit of all persons who are entitled to challenge the alienation. The persons entitled to challenge an alienation are not necessarily those who are entitled to challenge the alienation successfully. For example, an after-born son will be entitled to the benefits of the decree, although he was not in existence and he himself would not have been entitled to impeach the alienation successfully in case there were no reversioners existing at the time of the alienation who were entitled to challenge the alienation. The two factors given above, however, do not mean that the benefits of the decree will be available even to those persons who have by their own conduct, e.g., by joining in the alienation itself or by expressly consenting to the alienation itself, precluded themselves from challenging the particular alienation. Those persons must be deemed to have lost all their rights, title and interest in the property and if they are the only persons who are in existence at the time of the alienor's death, the alienation will become indefeasible.

Mohammad Din and others v. *Fatteh Muhammad and others* (1), *Inder Singh* v. *Mian Singh* (2), *Rahman* v. *Suraj Mal* (3), *and Ali Mohammad* v. *Mt. Mughlani* (4) relied on.

Second Appeal from the decree of the Court of Shri Sham Lal, Senior Sub-Judge, with enhanced appellate powers, Jullundur, dated the 24th day of November, 1952; affirming that of Shri S. S. Kahla, S. Sub-Judge, 3rd Class, Nakodar, dated the 21st May, 1952, dismissing the plaintiffs' suit with costs. The lower appellate Court also allowed costs.

S. D. BAHRI, for Appellants

D. N. AGGARWAL, for Respondents.

JUDGMENT

GOSAIN, J. Bishna, Sohna and Khazana, sons of Alla, made an exchange of their agricultural land measuring 63 *kanals* and 14 *marlas* with

Gosain, J.

(1) 24 P.R. 106 (Civil)
(2) I.L.R. 17 Lah. 20
(3) A.I.R. 1945 Lah. 76(F.B.)
(4) A.I.R. 1946 Lah. 180 (F.B.)

Bishna and others
v.
Sohna and others

Gosain, J.

Achhru predecessor-in-interest of defendants 1 to 7 and obtained the land in dispute. Plaintiffs 3 to 5, sons of Sohna, challenged the said exchange by means of a usual declaratory suit. Their suit was dismissed originally by the trial Court, but on appeal the District Judge granted them a decree on 8th December, 1950. In the judgment of the District Judge, Exhibit P. 9, it was also provided as under:—

> "The plaintiff-appellants shall restore to the alienee defendant respondents or their heirs and legal representatives (as the case may be) upon the death of all the alienors, the possession of the entire land got in exchange. In case the plaintiff-appellants want to have the possession of the original share of any one or more of the alienors (as he or they die) in the land in suit, they shall restore to the alienees or their heirs and legal representatives (as the case may be) the same share of the land got in exchange".

Some time after the aforesaid decree Khazana died. On 7th April, 1951, plaintiffs 3 to 5 filed a suit for possession of one-third share of the land given by Bishna, Sohna and Khazana in exchange to Achhru predecessor-in-interest of defendants 1 to 7. This suit was dismissed on 1st November, 1951, on the ground that the plaintiffs were not able to comply with the terms of the decree in the lifetime of Bishna and Sohna, because they could not possibly return the exchanged land during the lifetime of their father and uncle. They went in appeal to the District Judge but failed there also on 11th January, 1952, on the ground taken by the trial Court as also on the ground that they had no *locus standi* to sue for possession during the lifetime of their father Sohna. The present suit was filed on 2nd June, 1952, by Bishna, Sohna and the

previous three plaintiffs who are the sons of Sohna. The prayer made in this suit was that the possession of the exchanged land to the extent of Khazana's share should go to Bishna and Sohna and, in the alternative, to the previous plaintiffs, i.e.; the sons of Sohna. The defendants contested this suit on the ground that plaintiffs 3 to 5 had previously failed in their suit for possession and that the judgment in the previous suit operated as *res judicata* against them. The defendants, also, contested the right of plaintiffs 1 and 2 to sue for possession on the ground that they had joined in the alienation and had thereby precluded themselves from bringing a suit for possession. The two Courts below have given effect to the pleas taken by the defendants and have dismissed the plaintiffs' suit. All the five plaintiffs have now come in second appeal to this Court.

Mr. S. D. Bahri, learned counsel appearing for the plaintiff-appellants, contends that the previous suit of the sons of Sohna was dismissed mainly because they were not able to restore the land they had obtained in exchange, but the said ground had now vanished when all the plaintiffs have shown their willingness to restore the land and are in a position to do that. He further contends that Bishna and Sohna were certainly entitled to challenge the alienation made by Khazana qua one-third of his property and that section 6 of the Punjab Custom (Power to contest) Act, 1920, was no bar to a suit by them. He admitted that the suit, if brought by them, would not be successful, but he urged that the words 'entitled to impeach the alienation' in section 8 of the Punjab Limitation (Custom) Act, 1920, do not necessarily mean "entitled to impeach the alienation successfully". His contention is that every person, who is entitled to sue, can take advantage of the declaratory decree passed in a suit brought by any reversioner

Bishna and others v. Sohna and others

Gosain, J.

challenging the alienation. He relies for this proposition on section 8 of the Punjab Limitation (Custom) Act, 1920, which lays down as under:—

> "When any person obtains a decree declaraing that an alienation of ancestral immovable property or the appointment of an heir is not binding on him according to custom, the decree shall enure for the benefit of all persons entitled to impeach the alienation or the appointment of an heir."

He also relies on a Full Bench judgment of the Lahore High Court in *Rahman* v. *Suraj Mal* (1). He further urges that if Bishna and Sohna are not entitled to sue for possession on the ground that they are parties to the alienation the sons of Sohna should be allowed to sue for the said relief because of the fact that the succession has opened out on Khazana's death and cannot remain in abeyance. I am unable to agree with any of the above contentions. In my opinion, the sons of Sohna, who are plaintiffs 3 to 5 have certainly no cause of action for a suit for possession during the lifetime of their father Sohna and their suit is liable to be dismissed on this short ground. Bishna and Sohna have precluded themselves both from contesting the alienation to which they themselves were parties and also from taking advantage of the declaratory decree passed at the instance of the sons of Sohna. In *Ali Mohammad* v. *Mt. Mughlani* (2), a Full Bench of five Judges of Lahore High Court had an occasion to consider the effect of an alienation made by a widow with the consent of the next reversioners. Mahajan, J. (as he then was) delivered the main judgment in the case and after considering all the authorities summarises his findings in

(1) A.I.R. 1945 Lah. 76.
(2) A.I.R. 1946 Lah. 180 (F.B.).

four paragraphs at page 193 of the report. In paragraph 3 he observed as under:—

> "A gratuitous alienation by a widow of a part of her husband's ancestral or self-acquired property with the consent of the next presumptive reversioner is not valid. Such an alienation will, however, bind the consenting reversioner and those who derive title from or through him. In a suit for declaration by a remoter reversioner to contest such an alienation, the declaratory decree should clearly provide that it shall not enure for the benefit of the consenting reversioner or persons deriving title from or through him."

In paragraph 4, he observed as under:—

> "A gratuitous alienation by a widow of her husband's self-acquired property with the consent of the next presumptive reversioner, though not valid at the time when made, will become indefeasible if the consenting reversioner outlives the widow and the inheritance becomes vested in him. If a declaratory decree has already been granted in respect of such an alienation that decree will become infructuous and inoperative."

In *Inder Singh* v. *Mian Singh* (1), a Division Bench of the Lahore High Court, observed at page 29 as under:—

> "From the words 'entitled to impeach the alienation' used in section 8, it appears that the Legislature intended to include those persons only who possessed in *praesenti* any right to challenge the alienation and to exclude those who either

(1) I.L.R. 17 Lah. 20.

Bishna and others v. Sohna and others

Gosain, J.

possessed no such title or having possessed it had lost it by their own act or by the operation of law. A right once lost cannot be regained and any decree obtained by those whose right subsists cannot entitle those who have lost their right to obtain possession on the basis of that decree. By no stretch of language, therefore, can the word 'entitled' be taken to include those whose title is not alive. In its ordinary grammatical sense also the word 'entitled' is not equivalent to "were entitled" or 'had been entitled' or 'may have been entitled' and it will be straining the language too far if the signification of this word is so extended as to cover that title also which no longer exists and has been extinguished before the decree is obtained."

In the Full Bench case reported in *Rahman* v. *Suraj Mal* (1), the only point was whether the son of an alienor, born after the alienation was entitled to take advantage of the decree for declaration passed at the instance of other collaterals who were in existence at the time of the alienation. The son had obviously not precluded himself from suing by any act of his and if he had been in existence at the time of alienation, he would have certainly been entitled not merely to impeach the alienation but to impeach it successfully. The observations referred to above, as have been made in *Inder Singh* v. *Mian Singh* (2), were brought to the notice of the Full Bench in *Rahman* v. *Suraj Mal* (1), and with respect to them it was observed in the last paragraph of the report as under:—

In this case the plaintiffs had already lost their right when the declaratory decree

(1) A.I.R. 1945 Lah. 76.
(2) I.L.R. 17 Lah. 20.

was obtained. Obviously for the benefit of persons who had already lost their right a representative suit could not have been brought and, therefore, the declaratory decree obtained could not enure for the benefit of persons whose title had already become extinct.

Bishna and Sohna, having joined in the alienation as alienors had certainly lost their right to sue and, therefore, they were the persons whose title had already become extinct before the passing of the declaratory decree in favour of the sons of Sohna. According to the view taken in *Inder Singh* v. *Mian Singh* (1), as also in *Rahman* v. *Suraj Mal* (2). the declaratory decree cannot enure for their benefit, and they cannot, therefore, sue for possession of one-third of the property on the death of their brother Khazana. This view is also supported by the case reported as *Muhammad Din and others* v. *Fatteh Muhammad and others* (3), which was relied upon by the Division Bench in *Inder Singh* v. *Mian Singh* (1), as also by the Full Bench in *Rahman* v. *Suraj Mal* (2). It is true that a declartory decree obtained at the instance of any reversioner declaring an alienation to be not binding on the reversionary body will enure for the benefit of all persons who are entitled to challenge the alienation. It is also true that the persons entitled to challenge an alienation are not necessarily those who are entitled to challenge the alienation successfully. For example, an after-born son will be entitled to the benefits of the decree, although he was not in existence and he himself would not have been entitled to impeach the alienation successfully in case there were no reversioners existing at the time of the alienation who were entitled to challenge the alienation. The two factors given above, however, do

(1) I.L.R. 17 Lah. 20.
(2) A.I.R. 1945 Lah. 76 (F.B.)
(3) 24 P.R. 1906 (C).

Bishna and others v. Sohna and others

Gosain, J.

not mean that the benefits of the decree will be available even to those persons who have by their own conduct, e.g., by joining in the alienation itself or by expressly consenting to the alienation itself, precluded themselves from challenging the particular alienation. Those persons must be deemed to have lost all their rights, title and interest in the property and if they are the only persons who are in existence at the time of the alienor's death, the alienation will become indefeasible. As shown above, in the present case Bishna and Sohna were themselves alienors and had expressly consented to the exchange of one-third of the property by Khazana by being active parties to the said alienation itself and they must be deemed to have lost their rights of challenging the alienation in question and, as such, they are not the persons entitled to derive benefit of the declaratory decree obtained by the sons of Sohna. As they are the only heirs of Khazana, the alienation must be deemed to have become indefeasible and none of the plaintiffs should, therefore, be entitled to get possession of the property from the alienees.

In the result, I dismiss the second appeal with costs.

B.R.T.