

APPELLATE CIVIL.

1906
November 7.*Before Mr. Justice Sir George Knox and Mr. Justice Richards.*KISHAN KUNWAR (DEFENDANT) v. FATEH CHAND AND OTHERS
(PLAINTIFFS).**Land-holder and tenant—Rights of zamindars in respect of house-sites and grove-lands—Wajib-ul-arz—Construction of document.*

The plaintiffs purchased six plots of land consisting partly of groves and partly of land formerly the sites of houses, but since brought under cultivation, and, failing to get their names recorded as absolute owners of the plots, brought a suit virtually for a declaration of their proprietary title.

It was shown in evidence that the inhabitants of the village in which the plots in suit were situated were in the habit of selling and transferring their houses. The *wajib-ul-arz* set forth that the occupiers of houses had this power, but all through the entries the zamindar was recognized, and it was stated that if a new house was to be built the permission of the zamindar must be obtained. The entry in the *wajib-ul-arz* as to groves was to the effect that isolated trees and clumps of bamboos planted by tenants might be cut by them; as to rent-free groves, if the trees should die out and the land be brought into cultivation, rent must be paid, and that if a new grove was to be planted the leave of the zamindar must be obtained.

Held that the inference of law derivable from the facts stated above was that the plaintiffs were not the absolute owners of the plots purchased by them.

THE facts of this case are as follows :—

The plaintiffs purchased six plots of land in a village called Rampur. The plots consisted partly of groves and partly of plots of land which had once been the sites of houses, but had, since the demolition of the houses, been brought under cultivation. The plots so purchased were situated in a mahal the sole zamindar of which was one Kishan Kunwar. After their purchase the plaintiffs applied in the Revenue Court to be recorded as absolute owners and proprietors of these plots. Their application was refused. They then instituted the present suit, which was in effect a suit for a declaration of their title as against the defendant zamindar. The Court of first instance (Munsif of Etah) dismissed the suit; but on appeal by the plaintiffs the lower appellate Court (Subordinate Judge of Aligarh) reversed the Munsif's decision and decreed the plaintiffs' claim. The defendant thereupon appealed to the High Court.

* Second Appeal No. 1235 of 1904, from a decree of Maulvi Muhammad Ahmad Ali Khan, Subordinate Judge of Aligarh, dated the 25th of July 1904, reversing a decree of Munshi Chhajju Mal, Munsif of Etah, dated the 22nd of September, 1903.

1908

KISHAN
KUNWAR
o.
FATEH
CHAND.

The Hon'ble Pandit *Sundar Lal*, The Hon'ble Pandit *Madan Mohan Malaviya* and *Munshi Gokul Prasad*, for the appellant.

Mr. *B. E. O'Connor*, *Maulvi Ghulam Muftaba* and Dr. *Satish Chandra Banerji*, for the respondents.

KNOX and RICHARDS, JJ.—The facts of the suit out of which this appeal arises are undisputed. The plaintiffs purchased six plots of land consisting partly of groves and partly of plots of land which were formerly the sites of houses in Rampur but which have since been brought into cultivation after demolition of the houses standing thereon. The defendant is entered in the revenue papers as the zamindar of the entire mahal in which the plots so purchased are situate. After the purchase, the plaintiffs applied to the Deputy Collector to be entered as the absolute owners and proprietors of the plots so purchased. They were opposed by the defendant as zamindar and the application was refused. The plaintiffs then instituted the present suit to cancel the order of the Deputy Collector refusing to enter the names of the plaintiffs as proprietors. Apart from the question of form, the object of the suit is to obtain a declaration that the plaintiffs are the absolute owners and proprietors of the purchased plots of land and to establish their title thereto against the defendant.

The Court of first instance dismissed the suit. The lower appellate Court allowed the appeal and decreed the plaintiffs' claim. From the judgment of the lower appellate Court it appears that it is founded on inferences of law drawn by the learned Subordinate Judge from certain documents and the *wajib-ul-arz*, which were given in evidence. The documents show that the owners of houses in Rampur had been in the habit of selling and transferring their houses. The *wajib-ul-arz* sets forth that the occupiers of houses had this power, but all through the entries the zamindar is recognised, and it is stated that if a new house is to be built the permission of the zamindar must be obtained. The entry in the *wajib-ul-arz* as to groves is to the effect that isolated trees and clumps of bamboos planted by the tenant can be cut by him, and as to rent-free groves, if the trees should die out and the land be brought into cultivation, rent must be paid, and that if a new grove was to be planted the leave of the zamindar

must be obtained. The inference of law that the Subordinate Judge has drawn from this evidence (about which there is no dispute), is that the groves and the land which had been the sites of houses were the absolute property of the persons who occupied and used them. In our judgment this inference is a wrong and impossible inference and the decision of the learned Subordinate Judge based thereon is clearly wrong. It was argued that the finding was a finding of fact and that this Court in a second appeal could not interfere. The learned vakil for the appellant stated that he had been through the record and was prepared, if necessary, to give a certificate that there was no evidence to support the finding of the lower appellate Court. We, however, think that on the existing grounds of appeal it is open to us to set aside the decision of the Court below. There is no dispute about the facts of the case or any finding of fact arrived at by the learned Subordinate Judge. The decision is based entirely upon a totally erroneous inference of law drawn from facts and evidence about which there is no dispute. We allow the appeal, set aside the judgment of the lower appellate Court, and restore the judgment of the Court of first instance with costs in all Courts.

Appeal decreed.

1906

KISHAN
KUNWAR
v.
FATEH
CHAND.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Sir William Burditt.

1906
November 21.

LALMAN (PLAINTIFF) v. MOHAR SINGH AND OTHERS (DEFENDANTS).*

Act No. IV of 1882 (Transfer of Property Act), section 88—Mortgage—Charge—Suit for sale of property subject to a charge.

There is no objection to the sale, in execution of a decree for sale on a mortgage, "subject to the charge" of property which is liable to a charge for maintenance in favour of a particular person. *Mate Din Kasodhan v. Kazim Husain (1)* distinguished.

THIS was a suit for sale based upon a mortgage executed on the 19th August 1896 by one Mohar as managing member of a joint Hindu family. The plaintiff admitted in his plaint that the property mortgaged was, along with other property, subject to a charge for the payment of Rs. 40 per mensem to a widow, Musammatt Gulabi, and he sought to have the property sold subject to

*First Appeal No. 245 of 1904 from a decree of S. P. O'Donnell, Esq., Subordinate Judge, Dehra Dun, of the 31st of May 1904.