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November 18.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Karamat Husain.

GIRRAJ SINGH AND OTHERS (PLAINTIFFS) *v.* HARGOBIND SAHAI AND OTHERS (DEFENDANTS).*

Land-holder and tenant—Rights of tenant occupying a house in the abadi—Custom—Evidence—Nature of evidence requisite to prove custom—Second appeal.

The High Court, in second appeal, has jurisdiction to consider the evidence given in support of an alleged custom and to determine whether or not that evidence is sufficient in point of law to establish the custom set up; *Hashim Ali* v. *Abdul Rahman* (1) and *Ram Bilas* v. *Lal Bahadur* (2) followed.

THE facts of this case were as follows:—

The plaintiffs were zamindars of a village, named Budhsana, in the district of Meerut. Hargobind Sahai, one of the defendants, was a tenant in that village, and as such occupied the house which is the subject-matter of dispute. On January 12th, 1900, Hargobind Sahai sold the house to Ramji Lal and others, the defendants in this suit. The plaintiffs sued to set aside the sale on the allegation that Hargobind being a tenant in the village had no right to transfer the house without the permission of the zamindar. The defence was that the village was a *kasba* and there was a custom prevailing in the *kasba* that the tenants could sell their houses without the consent of the landlord. The court of first instance, holding that a custom such as alleged by the defendants existed, dismissed the suit. On appeal the learned Additional Judge confirmed the finding of the court below, but added that such sales were limited only to the materials of the house and the right of residence therein. To this extent he modified the decree of the court of first instance. The plaintiffs appealed to the High Court.

Dr. *Tej Bahadur Sapru* (with him Pandit *Moti Lal Nehru*), for the appellants. According to the common law prevailing in these provinces, an agriculturist who builds a house for his occupation in the *abadi*, obtains a mere right to use that house for himself and his family so long as he maintains the house

* Second Appeal No. 1081 of 1907, from a decree of Muhammad Ahmad Ali Khan, Additional Judge of Meerut, dated the 28th of May 1907, modifying a decree of Bhawani Chandar Chakravarti, Officiating Subordinate Judge of Meerut, dated the 19th of July 1904.

(1) (1905) I. L. R., 28 All., 698. (2) (1907) I. L. R., 30 All., 311.

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and does not abandon it by leaving the village. He has the right to occupy the house; he cannot sell it; if he sells it the vendee can get nothing more than the materials of the house; *Sri Girdhariji Maharaj* v. *Chote Lal* (1).

The plaintiff's contention was that the vendee was not entitled to reside in the house. He might be entitled to take away the materials, but to nothing further.

Babu *Durga Charan Banerji* (with him Babu *Harendra Krishna Mukerji*), for the respondents. The lower appellate court has found as a fact that there exists a custom in the village whereby a ryot can transfer his interests in the house which he occupies. The ruling in I. L. R. 20 All., 248, is distinguishable from the present case. In that case the house had been built with the permission of the zamindars, whereas in the present case there is nothing to show such permission. So long as the house stands the tenant or his transferee has a right to occupy the same. Where there is evidence to establish a custom, even the transfer of the site is valid; *Muhammad Usman* v. *Babu* (2).

There is no authority for the proposition that in any case where a tenant transfers his dwelling house, the vendee is entitled only to the materials, irrespective of the fact whether the house has been built either with or without the permission of the zamindar.

Dr. *Tej Bahadur Sapru* replied.

The Full Bench case in I. L. R., 30 All., 311, lays down that the High Court is not bound by a finding of the lower court as to the existence or non-existence of custom as if it were a finding on a pure question of fact. The main ground on which their Lordships proceeded in I. L. R., 20 All., 248, is that an agricultural tenant could not make a transfer of his house in the *abadi*. The question of permission or no permission is not material in the case. The right to occupy is the personal right of the tenant, he cannot introduce a stranger into the house. If the zamindar is the owner of the sites of all the houses in the zamindari it is not open for a tenant to say that he came

(1) (1898) I. L. R., 20 All., 248. (2) (1909) 6 A. L. J., 825.

without the permission of the zamindari; *Chajju Singh* v. *Kanhia* (1).

STANLEY, C. J., and KARAMAT HUSAIN, J.—In the suit out of which this appeal has arisen the plaintiffs claimed to have a sale-deed, executed and registered on the 12th of January, 1900, set aside as being void and also on account of breach of conditions on the part of the defendant in possession of a certain house. The house in question is situate in the village of Badhsana in the Meerut district. That village belongs to the plaintiffs, who are the zamindars. The defendant No. 1, Hargobind Sahai, was a tenant of the plaintiffs, and he sold the house in question and the site of it to the defendants 2 to 5. The plaintiffs allege in their plaint that the defendant No. 1 constructed the house in dispute with the permission of the plaintiffs, and that under the terms of the *wajib-ul-arz* of the village no ryot was entitled to sell, or mortgage, or make a gift of any house or enclosure in the village, and that, despite this provision of the *wajib-ul-arz*, the defendant without the permission of the plaintiffs sold the house in question to Bansidhar, the ancestor of the defendants 2 to 5. The court of first instance dismissed the plaintiffs' claim, being satisfied on the evidence that a custom prevailed in the village whereby tenants were empowered to sell their houses and the site of them so long as the houses stood. On appeal the learned Additional Judge found that the custom alleged by the defendants was fully established by a great mass of evidence, including a large number of deeds of sale and mortgage. He was of opinion that the *wajib-ul-arz* on which the plaintiffs relied was prepared at the instance of the zamindar and therefore did not embody the custom prevailing in the district. Accordingly in his decree of the 28th May, 1907, he upheld the decree of the court below, save that he declared that "the sale of the enclosure does not affect the land in any way." An appeal was preferred to this Court, and upon the hearing of it the Court was at a loss to understand what the modification in the decree of the court below meant, and accordingly allowed the hearing to stand adjourned so that the parties might have an opportunity of

(1) Weekly Notes, 1881, p. 114.

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applying to the court below to frame a decree in conformity with the findings in the judgment. This has been done, and the learned Additional Judge has in pursuance of the application of the parties passed an order to the effect that the transfer of the house in question was limited to the sale of the materials of the house and the right of residence only, and he directed that this modification should be made in his decree. The case now comes before us for final determination. Whether or not a custom prevails in this village whereby the tenants of houses are empowered to sell the materials of their houses and the sites of the houses so long as the houses are standing is no doubt to some extent a question of law. This Court has jurisdiction to consider the evidence given in support of such a custom and determine whether or not that evidence is sufficient in point of law to establish a custom. This was so pointed out by our brother RICHARDS in the case of *Hashim Ali* v. *Abdul Rahman* (1). In the case of *Ram Bilas* v. *Lal Bahadur* (2) a Full Bench of this court, of which one of us was a member, held that where a question arises as to the existence or non-existence of a particular custom and the lower appellate court has acted upon illegal evidence or on evidence legally insufficient to establish an alleged custom, the question is one of law, and the High Court is entitled in second appeal to consider whether the finding is based on sufficient evidence. In the case before us the applicants did not raise any question in their grounds of appeal as to the sufficiency of the evidence upon which the decrees of the courts below are based. We think that a custom such as is sought to be set up in this case ought to be established by clear and cogent evidence. The courts below examined a great number of documents, both sale-deeds and mortgages, and in addition to these, they had before them decrees, including a decree of this Court, in which the right claimed was recognised. A mass of evidence was adduced in support of the alleged custom. In view of the evidence, we are not prepared to say that the decision of the courts below that the custom set up does prevail was based on insufficient or on illegal evidence, and

(1) (1906) I. L. R., 28 All., 698. (2) (1907) I. L. R., 30 All., 311.

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therefore we do not see our way to reverse it. According to that custom a tenant occupying a house in the *abadi* of the village is entitled to sell the materials of his house and also the right to occupy the site of the house so long as the house is standing. We therefore declare that the sale-deed of the 12th of January, 1900, is valid and binding so far as it purports to transfer to the vendee the materials of the house in question and the right of residence in that house so long as it stands. Beyond this the transferee has acquired no interest in the property. The appellants have substantially failed and must bear the costs of this appeal as also the costs in the courts below.

Objections have been filed, but are not pressed. We dismiss them, but without costs.

Appeal dismissed.

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November 29.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Banerji.

GHAFUR-UD-DIN (PLAINTIFF) *v.* HAMID HUSAIN AND OTHERS (DEFENDANTS).*

Civil Procedure Code (1882), sections 244, 283—Property attached in execution of decree purchased while under attachment—Decree set aside—Purchaser not the representative of the judgment-debtor.

Where a decree is set aside in appeal everything done in pursuance of that decree comes to an end. Hence where property which was subject to an attachment was purchased, but the decree under which the attachment was levied was set aside, it was held that the purchaser was not the representative of the judgment-debtor within the meaning of section 244 of the Code of Civil Procedure, 1882.

THE facts of this case are as follows:—

The plaintiff, Ghafur-ud-din, brought a suit against one Fakhr-ud-din on the 15th of March, 1897, to recover a dower debt due to his sister Musammat Shakur-un-nissa, who had died in 1904. His suit was decreed *ex parte* on the 19th of January, 1898. After the decree Ghafur-ud-din applied for execution and got certain properties of Fakhr-ud-din attached on the 17th of February, 1898. The judgment-debtor appealed against the *ex parte* decree, and it was subsequently set aside by the High Court in March 1898. The High Court remanded the case to the

* First Appeal No. 28 of 1908 from a decree of Girraj Kishor Datt, Subordinate Judge of Bareilly, dated the 26th of November, 1907.