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of compensation, even if we assume that improvements were made by the husband of the appellant for which they had not been amply compensated by the user, we are not satisfied that such improvements were made in the *bonâ fide* belief that he was absolutely entitled to the shops. There is a large amount of documentary evidence which goes to show that the defendant's husband had at least notice that the property was alleged to be waqf property.

The result is that we dismiss the appeal with costs.

Appeal dismissed.

FULL BENCH.

1911
June 10.

Before the Hon'ble Mr. H. G. Richards, Chief Justice, Mr. Justice Banerji and Mr. Justice Chamier.

INCHA RAM AND OTHERS (DEFENDANTS) *v.* BANDE ALI KHAN AND ANOTHER (PLAINTIFFS). *

Land-holder and tenant—Presumptions as to land-holder's rights in the abadi *of an agricultural village—House site occupied by a person not an agriculturist nor one of the customary village servants or artizans—Adverse possession.*

In a village which was not a purely agricultural village, but in which, on the contrary, some two-thirds of the inhabitants were non-agriculturists, certain persons, father and son, were in possession of a house-site in the *abadi*. They carried on the occupation of inn-keepers and sellers of tobacco, and there was no evidence of the origin of their possession or that they ever paid rent to the zamindar or acknowledged his title in any way. The site was sold by the son, and some time after such sale, the house or shop thereon having fallen down, the zamindar sued to eject the purchasers.

Held that in the circumstances of the case the defendants and their predecessors in interest, were properly held to have acquired a title to the site by adverse possession. *Chajju Singh* v. *Kanhia* (1) and *Bhaddar* v. *Khair-ud-din Husain* (2) referred to.

THIS was a suit for possession of a plot of land, the site of a house in the *abadi* of a village brought by the zamindars of the village. In the plaint it was alleged that the plot in question was situate in mauza Kamalganj, which was an agricultural

* Second Appeal No. 1069 of 1908 from a decree of Prem Behari Lal, Subordinate Judge of Farrukhabad, dated the 19th of September, 1908, reversing a decree of Shekhar Nath Banerji, Munsif of Fatehgarh, dated the 20th of May, 1908.

(1) Weekly Notes, 1881, p. 114. (2) (1906) I. L. R., 29 All., 133.

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village, that there had been a dilapidated shop on the site, that the defendants 1 and 2 had taken possession of the plot and erected a shed thereon. They claimed that defendant No. 3 had no right to sell the plot in question to the defendants 1 and 2, and that the plaintiffs were entitled to possession. The defendants pleaded (1) that the shop was situate in a new *ganj* which had been established by Mr. Redcock, a Collector, and that the persons who occupied houses and shops in this *ganj* were the owners of their shops; (2) that the shop in question was situate in Qasba Kamalganj, and that Qasba Kamalganj belonged to Government, and that the zamindars had no right to the houses and shops. Lastly they pleaded limitation. The court of first instance decided in favour of the defendants that the suit was barred by limitation, inasmuch as the defendants had been in adverse possession. On appeal the learned Subordinate Judge found that the village was an agricultural village and having arrived at this finding he reversed the decree of the court of first instance and decreed the plaintiff's suit. In second appeal to the High Court the Court was of opinion that the case ought not to be decided on the mere finding that Kamalganj was an agricultural village. Two issues were remitted for determination by the Subordinate Judge. The issues were:—

(1) Are the plaintiffs or the defendants Nos. 1 and 2 owners of the land in dispute ?

(2) Have the defendants or their predecessors in title been in adverse possession of the property in dispute for upwards of 12 years prior to the institution of this suit?

The finding returned was in favour of the appellants. The case was then referred to a larger bench by RICHARDS, C. J., and BANERJI, J.

Dr. *Satish Chandra Banerji* (with him Babu *Girdhari Lal Agarwala*), for the appellants: —

A zamindar stands on the same footing as any other plaintiff. When he brings an action in ejectment he must prove a subsisting title. The title of a zamindar can be extinguished by adverse possession. The appellants are not tenants; they do not belong to the class of artisans or handicraftsmen who usually find a place in agricultural villages; they have never paid rent in cash

or kind to the zamindar, and have never acknowledged his title. No presumption in favour of the zamindars arises in such a case; *Bhaddar* v. *Khair-ud-din Husain* (1), *Nazir Hasan* v. *Shibba* (2). Possession is *primâ facie* exclusive and adverse, and the person out of possession must prove that the defendant's possession is of a permissive character, that he came in as a tenant or as a licensee; *Ramchandra* v. *Narayan Mahadev* (3). Tenants in an agricultural village claim under the zamindar and even where they do not pay rent, they render services of various kinds to the zamindar. Their possession, therefore, under ordinary circumstances, cannot be adverse to the zamindar. But this is not an agricultural village and the defendants are not tenants. Reference was made to the Gazetteer of Farrukhabad district.

Mr. *W. K. Porter* (with him Maulvi *Ghulam Mujtaba*), for the respondents:

The court below has found that Kamalganj is an agricultural village. The plot in suit admittedly lies within the ambit of the zamindari. There is a presumption that the zamindar is in possession of the entire village site, and all residents of houses thereon are there with his permission or license; *Chajju Singh* v. *Kanhia* (4). In any case, it would be for the defendants to establish their plea of adverse possession by proving that they had actually denied the zamindar's title more than twelve years before suit. There can be no presumption made in favour of squatters whom the zamindar allows to stay on and does not care to turn out. If the law were as the Subordinate Judge laid it down, the title of the zamindars to the bulk of their property in the *abadi* would at once become insecure, if not positively bad; *Jaikishun Singh* v. *Moti Chand* (5), *Framji Cursetji* v. *Goculdas Madhowji* (6), *Panna* v. *Nazir Husain* (7), *Saddu* v. *Behari Singh* (8).

The finding that the defendants have been in adverse possession is one of mixed law and fact, and the High Court is not bound to accept it in second appeal; *Lachmeswar Singh* v. *Manowar Hossein* (9).

(1) (1906) I. L. R., 29 All., 133.
(2) (1904) I. L. R., 27 All., 81.
(3) (1886) I. L. R., 11 Bom., 216.
(4) Weekly Notes, 1881, p. 114.
(5) (1906) 3 A. L. J., 627.
(6) (1892) I. L. R., 16 Bom., 338.
(7) Weekly Notes, 1902, p. 60.
(8) (1906) I. L. R., 30 All., 282.
(9) (1891) I. L. R., 19 Calc., 253.

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Dr. *Satish Chandra Banerji*, was not heard in reply.

RICHARDS, C. J.—This appeal arises out of a suit in which the plaintiffs claimed possession of a plot of ground. In the plaint it was alleged that the plot in question was situate in mauza Kamalganj, which was an agricultural village, that there had been a dilapidated shop on the site, that the defendants 1 and 2 had taken possession of the plot and erected a shed thereon. They claimed that defendant No. 3 had no right to sell the plot in question to the defendants 1 and 2, and that the plaintiffs were entitled to possession. The defendants pleaded (1) that the shop was situate in a new *ganj* which had been established by Mr. Redcock, a Collector, and that the persons who occupied houses and shops in this *ganj* were the owners of their shops; (2) that the shop in question was situate in Qasba Kamalganj, and that Qasba Kamalganj belonged to Government, and that the zamindars had no right to the houses and shops. Lastly they pleaded limitation. The court of first instance decided in favour of the defendants that the suit was barred by limitation, inasmuch as the defendants had been in adverse possession. On appeal the learned Subordinate Judge found that the village was an agricultural village and having arrived at this finding he reversed the decree of the court of first instance and decreed the plaintiff's suit. In second appeal to this Court the learned Judges were of opinion that the case ought not to be decided on the mere finding that Kamalganj was an agricultural village. Two issues were remitted for determination by the Subordinate Judge. The issues were:—

(1) Are the plaintiffs or the defendants Nos. 1 and 2 owners of the land in dispute? and

(2) have the defendants or their predecessors in title been in adverse possession of the property in dispute for upwards of 12 years prior to the institution of this suit?

These issues came before Mr. Gauri Shankar, Subordinate Judge, who had succeeded Mr. Prem Behari.

I think that the facts have now been ascertained pretty clearly, and it remains to consider what should be the decision of the court upon the ascertained facts. It appears that many years ago, before the Mutiny, Mr. Redcock established a *ganj* at Kamal-

ganj. The zamindars appear to have voluntarily given up all claim to the sites and the houses situate in that *ganj*. The occupiers have been accustomed to deal with the sites and houses as their own absolute property. It has been found, however, contrary to the allegation of the defendants that the site in question is not situate in the *ganj* established by Mr. Redcock. Mr. Prem Behari found that Kamalganj was an agricultural village. He does not give any reasons for his finding, nor does it appear what Mr. Prem Behari considered to be an "agricultural village." His finding on this question is very unsatisfactory. We must take it, however, that in Kamalganj there are agriculturists living in the *abadi* who are the tenants of the zamindars. Beyond this I do not think we are bound by the finding of Mr. Prem Behari. The real facts, I think, have been fairly ascertained by Mr. Gauri Shankar when determining the issues referred to him by this Court. He says that according to the evidence of the plaintiffs own witnesses two-thirds of the population of Kamalganj are non-agriculturists. Various businesses are carried on there. Some persons even carry on the business of commission agents. It is quite clear that Kamalganj is not an ordinary agricultural village.

I now come to the history so far as it could be ascertained, of the piece of land in dispute. The first person found in possession was one Chingi. The origin of Chingi's possession has not been ascertained, nor is there any evidence as to who was there before him. Chingi was succeeded by his son Nanhe. After the death of Chingi the site was sold on the 12th of December, 1901. The transfer was effected by a registered sale-deed. Nanhe executed it on behalf of himself and as the certificated guardian of his minor son and two minor sisters. The sanction of the District Court was obtained to the transfer. It has been clearly found that neither Chingi, nor Nanhe, nor the defendants 1 and 2 were ever at any time agriculturists. The main business of Chingi and Nanhe was that of inn-keepers and sellers of tobacco. The court finds, and I think it was perfectly justified in finding, that neither Chingi, Nanhe, nor the defendants Nos. 1 and 2 ever paid rent in cash or kind. In the Full Bench case of *Chajju Singh*

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v. *Kanhia* (1), it is laid down that "the zamindars of a village are, as a rule, and presumably, the owners of all the house sites in their village." I entirely agree with this proposition. In the ordinary agricultural village there are a number of persons occupying the *abadi*. In a great many cases it would be impossible for the zamindar to prove the origin of the occupation or the payment of rent either in cash or kind. The agriculturists pay no rent for their houses as such. There are persons carrying on certain trades who invariably reside in the village without payment of rent. In my opinion in an ordinary agricultural village there is a very strong presumption that the sites of the houses belong to the zamindar. I think it would be wrong as a general rule to hold that a zamindar loses his proprietary title in a site within the ambit of a zamindari by reason merely of the fact that he is unable to prove that the person who last held the land or his predecessors in occupation were agriculturists or carried on some one of the recognized village trades, or the payment of rent in cash or kind. In many cases it might be that a person who was either an agriculturist or village trader and as such, in occupation of a site, has given possession to some relative or friend. If it were held that the moment any person who was not an agriculturist or village trader began to occupy a village site without the express permission of the zamindar, he began to acquire a title against the zamindar, the position of the latter would be well-nigh intolerable, and he would be driven to perpetually harass the occupiers of the village to the detriment of the whole village community.

There is no doubt that in many villages the occupiers have acquired certain rights and privileges by usage, but the zamindar remains proprietor subject to the usage.

Great reliance was placed by Dr. *Banerji* on behalf of the defendants in the case of *Bhaddar* v. *Khair-ud-din Husain* (2). In that case the suit of the plaintiff in which he sought to recover possession of the site of a house within the municipal limits of the city of Allahabad was dismissed by the court of first instance. A Bench of this Court set aside the decree of the court of first appeal which had reversed the decree

(1) Weekly Notes, 1881, p. 114. (2) (1906) I. L. R., 29 All., 183.

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of the court of first instance. The learned Judges restored the decree of the court of first instance. Independent judgements, however, were delivered by STANLEY, C. J., and RUSTOMJEE, J., and the reasons given by each of the Judges are not quite the same. STANLEY, C. J., held that either a title had been acquired by adverse possession or that leave and licence to build the house must be inferred: whichever view was accepted, the plaintiff's suit failed. I have referred to this case because I do not think that we ought to lay down any hard and fast rule as to the presumption which arises in any particular case. In my opinion this question of adverse possession ought to be decided on the facts proved, and surrounding circumstances of each case. I think the finding of Mr. Gauri Shankar is a finding that the defendants and their predecessors in title have acquired a title by adverse possession. I think that we ought to accept this finding unless we think that the finding is a finding which could not legally be arrived at upon the evidence. In other words, the question is whether or not there was evidence before the court which would justify the finding of adverse possession. The learned Subordinate Judge says :—"Possession is *primâ facie* evidence of ownership and is presumed to be adverse unless it is proved to have been otherwise." I think that this is hardly a correct way of approaching the consideration of the case. It seems to me that *primâ facie* the zamindars are in possession of the whole of their zamindari. The possession *primâ facie* of all the occupiers of houses and sites in the *abadi* is the possession of the zamindar. But this presumption is capable of being rebutted. It is a very strong presumption in the case of an ordinary agricultural village. The presumption is not so strong in the case of a village like the present where the large majority of the population are non-agriculturists.

In the circumstances of the present case I do not think that it was necessary that the defendants should prove that they expressly set up adverse possession more than twelve years before the institution of the suit as contended by Mr. *Porter* for the respondents. In considering the nature of the possession of Chingi and Nanhe, I think that the court below was entitled to take into consideration the fact that the majority of the population

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were non-agriculturists. It was entitled to take into consideration the fact that the occupiers of shops in the *ganj* established by Mr. Redcock had become the actual owners, and that there would be a natural tendency for others to assert a similar right, although they did not occupy the new *ganj*. I think also that the court was entitled to consider the circumstances of the sale of the present site in 1901. It was sold in the most public way for a considerable sum of money. The leave of the court was obtained to the sale, and the defendants 1 and 2 openly purchased the site. The circumstances of this sale tend to show that people generally in the district would look upon Nanhe as the owner of the site.

Lastly, I think that the court was entitled to consider the long continued user of the premises for purposes which were not part of the ordinary machinery of an ordinary agricultural village.

In my opinion on the evidence the court was quite justified in finding that the defendants and their predecessors had been in adverse possession for more than twelve years before the institution of the suit. I would therefore allow the appeal with the exception mentioned in the finding of Mr. Gauri Shankar dated the 8th April, 1911.

BANERJI, J.—I agree in the order proposed by the learned Chief Justice. No doubt, in an agricultural village the zamindar is presumably the owner of all the sites in the *abadi*; but it does not follow from this that adverse possession cannot be acquired of any particular plot of land. Each case must be determined with reference to its own peculiar circumstances. In the case of an agricultural tenant or a handicraftsman or trader whose presence is necessary for the requirements of the village, the presumption is that his occupation of the site of his house is with the permission of the landlord. In their case the quantum of evidence required to prove adverse possession would be greater than in the case of other persons. But where, as in this case, it is not proved that the occupation of the site in question was with the leave and licence of the landlord, but it is proved that the occupier belonged to a class of persons, such as an inn-keeper, who ordinarily found no place in an agricultural village, that he

never acknowledged the landlord's title and never paid rent or any other due to him for the occupation of the site, the ordinary rule that every plaintiff against whom limitation is pleaded must prove a subsisting title not barred by limitation will, in my opinion, apply even when the plaintiff happens to be the zamindar. In the case before us the court below has found on evidence which it was entitled to take into consideration that the possession of the defendants and their predecessors in title was adverse to the plaintiffs. That finding must be accepted in second appeal. I am unable to agree with the contention of the learned counsel for the respondents that the finding should be held to be erroneous in law, simply because the land in suit lies within the ambit of the plaintiff's zamindari. In view of the finding the claim must be held to be time barred, except as to the strip of land mentioned in the judgement of the learned Subordinate Judge.

CHAMIER, J.—I also agree in the order proposed by the learned Chief Justice. The facts have been stated fully by him and I will not repeat them.

The ordinary rule is that a plaintiff in a suit for possession of property against whom limitation is pleaded must prove a subsisting title not barred by limitation; and this he generally does by evidence that he has title and that he has been in possession within limitation. I apprehend that the rule applies as much to a zamindar suing for possession of land lying within his zamindari as to any other person. In the case of waste land and in some other cases possession by the plaintiff beyond limitation may be presumed to have continued until the contrary is proved. There can be no doubt that in the case of a suit by a zamindar for possession of land in an *abadi* which has been occupied by an agricultural tenant or by a person belonging to the village community such as the village *lohar*, the barber and the like, the zamindar is entitled to rely on the presumption, the strength of which varies with the circumstances of the case, that such person held possession by leave or licence of the zamindar. This presumption may, perhaps, be made, in other cases also. Where such a presumption can be made, the burden of proving adverse possession lies on the defendant, and even when the presumption

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cannot be made, very little evidence is required in some cases of the kind to shift the burden of proof on to the defendant. But in the present case the circumstances were peculiar. It has been held that the village was an agricultural village, but two-thirds of the inhabitants are said to have been non-agriculturists. There seems to have been no proof and no ground for presuming that the zamindar had been in possession of the land at any time during the last forty years, or that the defendants or their predecessors held under him in any sense, and I think that the case might have been disposed of on that ground. Assuming, however, that the burden of proof lay on the defendants to prove that their possession was adverse, I think that the lower appellate court was right in inferring from the proved facts that the possession of the defendants and the persons through whom they claim, has been adverse to the zamindars for considerably more than twelve years.

BY THE COURT.—The order of the Court is that the appeal is allowed, the decree of the lower appellate court is set aside and the decree of the court of first instance restored, save to the extent of the strip of land mentioned in the finding of Mr. Gauri Shankar, dated the 8th of April, 1911. The appellant will have his costs in all courts.

Appeal allowed.