PRIVY COUNCIL.

P.C.*
1912
June 18, 19,
July 12.

FATEH CHAND AND OTHERS (PLAINTIFFS) v. KISHAN KUNWAR (DEFENDANT).*

[On Appeal from the High Court at Allahabad.]

Second appeal - Questions of law and fact—Construction of document—Wajib-ul-arz, construction of—Civil Procedure Code (1882), *sections* 584, 585—*Landholder and tenant—Rights of zamindars in respect of house sites and groves.*

In a suit for a declaration of the proprietary title of the appellants to certain lands in a village, the first court dismissed the suit on the ground that the respondent was the zamindar, and the appellants only tenants of the lands. The Subordinate Judge found on the construction of the wajib-ul-arz of the village and other documentary evidence that the appellants were the owners of the lands in suit. On second appeal to the High Court it was contended that the Court was bound under section 584 of the Civil Procedure Code, 1882, to accept the finding of the Subordinate Judge as conclusive, the question being one of fact; but the High Court rejected that contention.

Held (affirming that decision) that the Subordinate Judge's finding was arrived at by inferences drawn from a misconstruction of the wajib-ul-arz. The right construction of documents was a question of law which the Court on second appeal was not precluded from considering under sections 584 and 585 of the Civil Procedure Code.

On the true construction it was clear from the documentary evidence that the appellants were only tenants of the land, and not proprietors.

Appeal from a judgement and decree (7th November, 1906) of the High Court at Allahabad, which reversed a judgement and decree (25th July, 1904) of the Subordinate Judge of Aligarh, which latter decree had reversed the decree (22nd September, 1903) of the Munsif of Etah.

The matter in dispute in this appeal was as to the right of the plaintiffs (the present appellants) who were the purchasers, as they alleged, at private sales of the 20th of May, 1900, and the 15th of January, 1901, of certain resumed *muafi*, dwelling houses and groves situate in a village of which the defendant (the present respondent) was the zamindar, to be declared proprietors in possession of the properties and entitled to have their names recorded, as absolute owners, in the revenue papers as against the defendant.

The facts of the case sufficiently appear from the report of the case in the High Court (Sir GEORGE KNOX and RICHARDS, JJ.),

* *Present* :—Lord SHAW, Sir JOHN EDGE and Mr. AMEER ALI.

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which will be found in I.L.R., 29 All., 203; and are also stated in the judgement of their Lordships of the Judicial Committee.

The Munsif dismissed the suit with costs finding that the plaintiffs were at most occupancy tenants without power of sale. The Subordinate Judge on appeal reversed that decision and on the evidence granted the plaintiffs a decree declaring their absolute ownership and giving them possession. On the appeal by the defendant to the High Court it was contended for the plaintiffs that, it being a second appeal, the finding of the Subordinate Judge, being a finding of fact with which the court could not interfere, must be taken to be conclusive under sections 584 and 585 of the Civil Procedure Code (XIV of 1882). The High Court rejected this contention on the ground that the decision of the Subordinate Judge was "founded on erroneous inferences of law drawn from certain documents and the wajib-ul-arz, which were given in evidence." The High Court, therefore, allowed the appeal and set aside the decree of the Subordinate Judge.

An application for review by the plaintiffs, and an application for leave to appeal to His Majesty in Council having both been rejected by the High Court, special leave to appeal was granted by His Majesty in Council.

On this appeal—

B. Dube for the appellants contended that they and their predecessors in title were the owners of the lands in dispute, as had been held by the Subordinate Judge on the construction of the wajib-ul-arz and the other evidence in the case. The High Court, it was submitted, was bound by this finding, the case when before that court being a second appeal, on which, under sections 584 and 585 of the Civil Procedure Code, 1882, findings of facts were to be taken as being conclusive. The High Court was therefore wrong in the construction it put on the wajib-ul-arz and in holding that the appellants had no proprietary rights in the lands. Both the Munsif and the Subordinate Judge had found that Rampur was not an agricultural village, but a town, to which the wajib-ul-arz of the district, it was contended, did not apply. Assuming that the appellants were merely tenants, they had admittedly exercised heritable and transferable rights of ownership over the lands, which had never been disputed. It was a question of custom and

that was a question of fact. Under the circumstances, therefore, the onus was on the respondent to show that the appellants were not entitled to proprietary ownership of the lands in suit. Reference was made to *Lekraj Kuar* v. *Mahpal Singh* (1); *Anant Singh* v. *Durga Singh* (2); Evidence Act (I of 1872), section 35; *Durga Chowdhrani* v. *Jewahir Singh Chowdhri* (3); *Ananga-manjari Chowdhrani* v. *Tripura Sundari Chowdhrani* (4); *Sri Girdhariji Maharaj* v. *Chote Lal* (5); Rule 13 of the Rules of the Allahabad High Court, dated the 13th January 1898; *Parbati Kunwar* v. *Chandarpal Kunwar* (6); *Ramgopal* v. *Shamskhaton* (7); *Lukhi Narain Jagadeb* v. *Jodu Nath Deo* (8); *Nilmoni Singh Deo Bahadur* v. *Kirti Chunder Chowdhry* (9); *Joy Kishen Mookerjee* v. *Doorga Narain Nag* (10); Act IX of 1889 (North-Western Provinces and Oudh Kanungos and Patwaris Act), section 5; *Muhammad Imam Ali Khan* v. *Husain Khan* (11); Act II of 1901 (Agra Tenancy Act); Act III of 1901 (United Provinces Land Revenue Act); Chaukidari Act (XX of 1856); and the United Provinces Gazetteer.

Sir Erle Richards, K. C. and *W. A. Raikes* for the respondent contended that the appellants had entirely failed to prove that they or their predecessors ever had anything beyond tenants' rights in the lands in suit. The lands on which the houses were built had all along been part of the zamindari lands belonging to the respondent's village. Those lands were included in the wajib-ul-arz of the village. They were lands of the zamindar unless something specific was proved as to them which changed the proprietorship. Since 1877 when the question of imposing rent on these lands was considered they had always been assessed with rent. There was no question of fact involved here. The question was as to the true construction of the wajib-ul-arz and other documents. If

(1) (1879) I.L.R., 5 Calc., 744 (750): L.R., 7 I.A., 63 (70).
(2) (1910) I.L.R., 32 All., 363: L.R., 37 I.A., 197.
(3) (1890) I.L.R., 18 Calc., 23 (30): L.R., 17 I.A., 122 (127).
(4) (1887) I.L.R., 14 Calc., 740 (747): L.R., 14 I.A., 101 (109).
(5) (1898) I.L.R., 20 All., 248.
(6) (1909) I.L.R., 31 All., 457 (475): L.R., 36 I.A., 125 (131).
(7) (1892) I.L.R., 20 Calc., 93 (99): L.R., 19 I.A., 228 (233).
(8) (1893) I.L.R., 21 Calc., 504 (512,513): L.R., 21 I.A., 39 (43).
(9) (1893) I.L.R., 20 Calc., 847 (853): L.R., 20 I.A., 95 (97).
(10) (1869) 11 W.R., 348.
(11) (1898) I.L.R., 26 Calc., 81 (92); L.R., 25 I.A., 161 (169).

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in that construction the appellants are proprietors, the respondent fails. What is the right construction? Such a question came, it was submitted, if not under the second part of section 584 (usage having the force of law), then under the first part of that section (question of law). [Lord SHAW referred to *Ramgopal* v. *Shamskhaton* (1) per Lord Watson:—"The facts need not be questioned. It is the soundness of the conclusions from them that is in question, and this is a matter of law."] Reference was made to the Civil Procedure Code, 1882, Ed., by Ameer Ali and Woodroffe, page 391. The cases referred to for the appellant dealt with pure questions of fact, and were not applicable to the present case. As to "usage having the force of law," *Kaharla Abbaya* v. *Venkata Subbaya Rao* (2) was cited. Where matters between landlord and tenant were determined by Government in documents, it is on the right construction of those documents that any dispute between them should be decided.

Dube replied.

1912, *July 12th*:—The judgement of their Lordships was delivered by Sir JOHN EDGE:—

This is an appeal by special leave from a decree of the High Court of Judicature for the North-Western Provinces of India, dated the 7th of November, 1906, which reversed the decree of the Subordinate Judge of Aligarh, dated the 25th of July, 1904, which had set aside the decree of the Munsif of Etah, dated the 22nd of September, 1903, dismissing the suit with costs.

The suit, which related to the proprietary title to lands in Rampur, was brought in the Court of the Munsif of Etah by Lala Fateh Chand, since deceased, and others against Rani Kishan Kunwar and others to obtain the cancellation of an order of the 4th of January, 1902, of a Court of Revenue; for a declaration that the plaintiffs were the proprietors in possession of the lands in the plaint mentioned and as such were entitled to have their names entered in the revenue papers as proprietors, and for consequential reliefs. Some of the lands in question consisted of lands in the *abadi* of Mauza Rampur. Upon those lands in the *abadi* houses had formerly stood. It is not clear from the record whether or not all of those lands in the *abadi* had been cleared of houses and had been

(1) (1892) I.L.R., 20 Calc., 93 (99); L.R., 19 I.A., 228 (238).

(2) (1905) I.L.R., 29 Mad., 24.

brought into cultivation, but apparently they had been brought into cultivation before suit. It is, however, not necessary to ascertain whether or not all of those lands in the *abadi* had been brought into cultivation, as it is the proprietary title to the land, whether covered with houses or not, and not the title to the houses, if any, standing upon those lands which is in question in this suit. The remainder of the lands to which the suit relates were lands under groves. Rani Kishan Kunwar was the zamindar of the whole Mauza Rampur, and she alone defended the suit. By her written statement Rani Kishan Kunwar put in issue the alleged title of the plaintiffs as proprietors.

Fateh Chand, the deceased plaintiff, had applied to the Revenue Court to have his name entered as that of the proprietor of the lands in question in the revenue papers relating to Mauza Rampur. On the 4th of January, 1902, the Assistant Collector rejected that application with costs, and on the 9th of January, 1903, the plaintiffs brought this suit in the Civil Court. The Munsif of Etah, having found as a fact that the defendant Rani Kishan Kunwar was the zamindar of Mauza Rampur, and that the plaintiffs were tenants and were not proprietors of the lands in the plaint mentioned by his decree of the 22nd of September, 1903, dismissed the suit.

From that decree of the Munsif the plaintiffs appealed, and in their grounds of appeal alleged that they were the owners in possession of the plots in suit, and that in Qasba Rampur the zamindar is not the owner of the *abadi*, but the lower class of people, who are her ryots, are the owners. The plaint and the grounds of appeal to which their Lordships have referred put it beyond doubt that the title which the plaintiffs claimed in the Munsif's Court and on appeal from the Munsif's decree was the proprietary title to all the lands mentioned in the plaint, and was not any inferior title. The Subordinate Judge of Aligarh in the appeal found on his construction of the wajib-ul-arz and other documentary evidence that the plaintiffs were the owners of the lands in respect of which the suit was brought, and by his decree declared that the plaintiffs were the owners in possession of the property, and decreed the plaintiffs' claim. From that decree of the Subordinate Judge the defendant Rani Kishan Kunwar appealed to

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the High Court of Judicature for the North-Western Provinces of India at Allahabad.

At the hearing of the appeal in the High Court it was urged in argument on behalf of the plaintiffs that, the appeal being a second appeal to which sections 584 and 585 of the Code of Civil Procedure applied, the High Court was bound to accept as conclusive, and was precluded from questioning, the correctness of the finding of the Subordinate Judge that the plaintiffs were the proprietors of the lands in respect of which the suit was brought. Sir George Knox and Richards, JJ., who heard the appeal, overruled the objection, and on their construction of the wajib-ul-arz and other documents in the suit in their judgement stated and found:—

"From the judgement 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 occupiers of the groves and of the land which had been the sites of the houses were the absolute property of the persons who occupied and used them. In our judgement this inference is a wrong and impossible inference and the decision of the learned Subordinate Judge based thereon is clearly wrong."

The High Court by its decree allowed the appeal and restored the decree of the Court of the Munsif. From that decree of the High Court this appeal to His Majesty has been brought. The principal ground of this appeal is that the decree of the Subordinate Judge is right and that the plaintiffs are the owners of the lands in dispute.

On the hearing of this appeal the learned counsel on behalf of the appellants contended that the Judges of the High Court should have accepted the findings of the Subordinate Judge on the question of title as correct and as binding on them in second appeal and were not at liberty to find that the plaintiffs were not the proprietors of the lands in question. He also contended that the Judges of the High Court had misconstrued the wajib-ul-arz and

the other documentary evidence and had come to a wrong conclusion. He further contended that the wajib-ul-arz of Mauza Rampur, which was made in the settlement which commenced in 1872 and extracts from which are on the record of this suit, cannot be treated as applying to the *abadi* of Mauza Rampur, the contention being that Rampur, owing to the number of its inhabitants, many of whom are not agriculturists, and owing to the fact that the Government has applied the Chaukidari Act (Act No. XX of 1856) to Rampur, must be regarded as a town and not as a purely agricultural village, to which, according to the learned counsel's contention, a wajib-ul-arz is alone applicable. The answer to the contention that the wajib-ul-arz does not apply to the *abadi* of Mauza Rampur appears to their Lordships to be that the wajib-ul-arz to which reference has been made was prepared by the settlement officer for the whole Mauza Rampur including the *abadi*, and that all those who were interested were at the time given the opportunity of objecting to the statements contained in it, and further that the Government by applying the Chaukidari Act to Rampur did not alter and could not have altered proprietary rights in Mauza Rampur or in any part of the mauza. The wajib-ul-arz is in their Lordships' opinion cogent evidence of the rights as they existed when it was made of those holding proprietary or other rights of property within the mauza, and it has not been shown that the wajib-ul-arz to which reference has been made in this suit differs in any material respect from the wajib-ul-arz which their Lordships have been informed by counsel was made in the more recent settlement.

The Judges of the High Court rightly overruled the objection that they were bound to accept as correct the finding of the Subordinate Judge that the plaintiffs were the proprietors of the lands to which this suit referred. That finding of the Subordinate Judge was the result of his having misconstrued the wajib-ul-arz. The right construction of documents is a question of law which Judges in second appeals are not, by sections 584 and 585 of the Code of Civil Procedure, precluded from considering by any finding of a lower appellate Court, based upon such documents. The Subordinate Judge arrived at his finding by inferences drawn upon an incorrect construction of the wajib-ul-arz, and the Judges in second

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appeal consequently were not bound by his finding that the plaintiffs were the proprietors of the lands.

In the wajib-ul-arz it is stated that Mauza Rampur "is a mahal of Zamindari Khalis (held by a single person), and Raja Ram Chandar Singh is the only proprietor without any co-sharer." Raja Ram Chandar Singh was the husband of the defendant Rani Kishan Kunwar, the present zamindar. There is no documentary evidence to show that the plaintiffs or their predecessors in title ever were proprietors of any of the lands to which this suit relates; on the other hand, the *jamabandi* shows that predecessors in title of the plaintiffs paid rent as tenants for some of those lands, and in the *khasra* for 1297 Fasli the defendant Rani Kishan Kunwar is entered as the proprietor of some of these lands, and predecessors in title of the plaintiffs are entered as the tenants. The zamindar was not affected by any transfer of lands to which he was not a party, and in the wajib-ul-arz neither the plaintiffs nor any predecessors of theirs are shown as tenants who had special rights which were heritable and transferable.

The following paragraphs of Chapter IV of the wajib-ul-arz relate to groves and houses, and are important:—

"Paragraph 3.—Relating to the rights of tenants in respect of groves and scattered trees.

"A tenant has power to cut down the grove or the scattered trees planted by him in his neighbourhood.

"If the land is rent-free and the trees have been removed therefrom and the land is brought under cultivation, the tenant shall have to pay the rent. If in future a grove is planted, it can be planted with the permission of the zamindar.

"Paragraph 4.—Relating to the rights of the tenants in respect of the houses in the village and of those which are built.

"A person residing in a house is owner thereof and he has power to transfer it; but in future a new house shall be built with the consent of the zamindar.

"The tenants of the lower class have no power to transfer their houses."

There is evidence on the record that when land in the *abadi* is brought under cultivation the tenant has to pay rent for it. In their Lordships' opinion the Judges of the High Court rightly construed the wajib-ul-arz and drew the legitimate inference from it and the other documentary evidence in the suit.

On behalf of the plaintiffs appellants in their appeal the learned counsel who appeared for them pressed their Lordships to advise that the plaintiffs appellants should be declared to have heritable

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and transferable rights in the lands in suit and for that purpose admitted that the plaintiffs appellants were tenants of those lands. Apart from other considerations it is sufficient for their Lordships to say that that is not the claim in respect of which this suit was brought.

Their Lordships will humbly advise His Majesty that this appeal should be dismissed and the decree of the High Court be affirmed. The appellants must pay the costs of the appeal.

Appeal dismissed.

Solicitors for the appellants :—*Barrow, Rogers & Nevill.*

Solicitors for the respondent :—*T. C. Summerhays & Son.*

J. V. W.

APPELLATE CIVIL.

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May, 31,

Before Mr. Justice Karamat Husain and Mr. Justice Tudball.

KUBER NATH AND OTHERS (PLAINTIFFS) *v.* MAHALI RAM AND ANOTHER (DEFENDANTS).*

Act No. IX of 1872 *(Indian Contract Act), sections* 23, 27—*Agreement between several firms to fix rates for ginning and baling cotton and to share profits—Agreement neither in restraint of trade nor against public policy.*

Held that an agreement, whereby certain firms fixed the rates to be charged for ginning and baling cotton, and further as to the manner in which the profits should be shared by the parties thereto, was an agreement neither in restraint of trade nor opposed to public policy.

Haribhai Maneklal v. *Sharafali Isabji* (1) and *Frazer & Co.* v. *The Bombay Ice Manufacturing Co.* (2) followed.

The facts of this case were as follows :—

The managers of five ginning firms came to an agreement, whereby they fixed the rates to be charged for ginning and baling cotton, thus forming a combination, and agreed that for a certain definite period the profits of ginning would be 7 annas 6 pies and of baling 1 anna 6 pies per maund. They further agreed that the profits were to be divided, and that those for baling were to be divided equally, while those for ginning were to be divided in proportion to the ginning capacity of the various factories. A dispute as to the ginning capacity of the factories arose and the suit was instituted by the

* Second Appeal No. 840 of 1911 from a decree of H. M. Smith, Additional Judge of Aligarh, dated the 3rd of May, 1911, modifying a decree of Shikhar Nath Banerji, Additional Subordinate Judge of Aligarh, dated the 8th of August, 1910.

(1) (1897) I. L. R., 22 Bom., 861. (2) (1904) I. L. R., 29 Bom., 107.