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December, 3.

APPELLATE CIVIL.

Before Mr. Justice Chamier and Mr. Justice Piggott.

ABDUL HAQ AND ANOTHER (DEFENDANTS) *v.* DATTI LAL AND ANOTHER (PLAINTIFFS).*

Act No. IV of 1882 (Transfer of Property Act), section 108 (j)—Lessee or licensee—Agricultural land let for building purposes under special agreement and afterwards included in neighbouring town.

Some fifty years ago, by an arrangement between the Government, the zamindars and certain butchers, a certain area of cultivated land adjoining the city of Allahabad was let in plots to the butchers for building purposes at a uniform rent of Rs. 10 per bigha. There was also a proviso against arbitrary enhancement of the rent. Subsequently, the land upon which the butchers had settled was included in the municipal limits of the city of Allahabad, and was called muhalla Atala.

One of the butchers having sold his house, the zamindars sued him and his vendee under the terms of the wajib-ul-arz claiming either one fourth of the price, or, in the alternative, that the site might be cleared and possession made over to them.

Held that in the circumstances these sites were not subject to the ordinary law with reference to village sites occupied by agricultural tenants, but the butchers must be taken to be lessees, and in the absence of a contract to the contrary their rights as such were transferable without reference to the zamindars.

OVER fifty years ago a tract of cultivated land in mauza Atarsuiya, a village adjoining the city of Allahabad, was set apart by arrangement with the proprietors and with the Local Government for the establishment of a colony for the butchers of the city. The butchers settled on the land and built houses thereon. A rent of Rs. 10 per bigha was to be paid by the settlers to the zamindars and this rate of rent was not to be altered except "by orders of the proper authorities." In course of time this land came to be included within the municipal limits of the city of Allahabad and was designated "muhalla Atala." The land, however, continued to form part of mauza Atarsuiya and was treated as such at the partition by the Revenue Court of the mauza in 1902 into three mahals. The plaintiffs are the proprietors of one of the mahals.

*Second Appeal No. 1568 of 1913, from a decree of Ram Chandra Chaudhri, Judge of the Court of Small Causes, exercising the powers of a Subordinate Judge, of Allahabad, dated the 30th of June, 1913, confirming a decree of Rup Kishan Aga, Munsif of Allahabad, dated the 23rd of January, 1912.

The wajib-ul-arz of the mauza prepared in 1875 contained the following provision :—"*Jis qadar kashtkaran bahir hadd shahr ke abad hain unko farokht amla mukan ba adae qimat woh chaharum zamindar ke hasil hai . . . Aur kashtkaran bashindagan shahr ko ikhtiar bai woh rehan mai zamin mukan bila ijazat zamindar hasil hai.*" (Agricultural tenants residing outside the limits of the town are entitled to sell the materials of houses after payment to the zamindar of one fourth of the sale price . . . And agricultural tenants who are residents of the town are entitled to sell and mortgage houses together with the sites without the consent of the zamindar.)

In September, 1910, one Abdul Haq, a butcher resident of the said muhalla Atala, sold his house. Thereupon the plaintiffs within whose mahal the site of the house was situate brought this suit against the vendor and the vendee for the recovery of one fourth of the sale price or, in the alternative, for possession of the site after removal by the defendants of the materials of the house. The defendants set up an absolute right of alienation and denied that the plaintiffs had any other rights than that of realizing the rent of Rs. 10 per bigha. Both the lower courts found that the house was situate in what was called in the wajib-ul-arz of 1875 the "*abadi bahir hadd shahr.*" They refused to grant the first relief, holding that the word "*kashtkaran*" in the wajib-ul-arz referred only to agricultural tenants. They decreed the second or alternative relief. The defendants appealed to the High Court. The plaintiffs had filed a cross-objection in the lower appellate court against the dismissal of the first relief, but none in the High Court.

Mr. *B. E. O'Conor*, (with him Mr. *Zahur Ahmad*), for the appellants.

Accepting the finding of the lower court that the house is in the *abadi* outside the limits of the town, the incidents and the presumption applicable to tenants' houses in an ordinary agricultural village do not apply to this case. At the outset it is not correct to say that there is any universal law that in every case of an agricultural village a tenant can have no saleable interest in his house. That depends upon the particular circumstances of each case. An example is furnished in the case

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of *Incha Ram* v. *Bande Ali* (1). The presumption weakens when the village is merging into a town. The reason for the general rule as laid down in the case of *Sri Girdhariji Maharaj* v. *Chote Lal* (2) does not exist here. That rule applies to the case of agricultural tenants who "for purposes of cultivation" are permitted by the zamindar to build houses. The present case is one of deliberate transplanting of a large non-agricultural community from the town to a portion of the adjoining village. Here, agricultural land was taken up and given to non-agriculturists (butchers) for an avowedly non-agricultural purpose, namely, building houses; and a special and *quasi*-permanent rate of ground rent was taken. These butchers are not mere licensees; they pay a substantial ground rent and they cannot be turned out so long as they continue to pay the rent. Their status is that of lessees, and as such they can transfer their houses. The reported decisions against the right of tenants of agricultural villages to transfer their houses are cases dealing with mere licensees paying no ground rent. Under these circumstances and in the absence of anything in the wajib-ul-arz in derogation of a right to transfer houses of non-agriculturists the lower courts were not justified in relying upon any presumption against such a right.

The Hon'ble Dr. *Tej Bahadur Sapru*, for the respondents.

On the question of the status of these tenants, the mere payment of ground rent by them would not make them lessees. For example, a man who pays rent for a shop in a market is not a lessee of the site. The distinction between a licensee and a lessee is not the payment or non-payment of rent but the presence or absence of some right or interest in the land. It has not been shown that any interest in the land itself was ever conveyed to or acquired by these tenants. Mere permission to occupy the land, although such permission may have been given for some valuable consideration, would not make them more than licensees. It may be that the zamindars cannot now turn them out at their will, but that furnishes no test as to the status of these tenants: for even a licence cannot be revoked by the grantor where the licensee acting upon the licence has executed at his own expense

(1) (1911) I. L. R., 33 All., 757. (2) (1898) I. L. R., 20 All., 248.

buildings of a permanent character. Even supposing that they are lessees, there is no presumption in law that they have acquired transferable rights. Such rights do not arise independently of the terms of the lease itself. The Transfer of Property Act does not apply to leases of agricultural lands in villages. The inclusion of the land within the municipal limits of the town of Allahabad cannot in any way affect the rights of the proprietor of that land; and upon the findings of the lower courts the general law of the province, as laid down and recognized in the following cases, applies:—*Sri Girdhariji Maharaj* v. *Chote Lal* (1), *Muhammad Usman* v. *Babu* (2), *Ram Bilas* v. *Lal Bahadur* (3), *Chajju Singh* v. *Kanhia* (4), *Raj Narain Mittar* v. *Budh Sen* (5) and *Fateh Chand* v. *Kishan Kunwar* (6).

In this respect there is no distinction between agriculturist and non-agriculturist tenants of a village; they stand on the same footing. If, however, in the opinion of the court the plaintiffs be not entitled to the relief as to possession of the site then the alternative relief as to one fourth of the price should be given to them. The word "*kashtkars*" in paragraph 3 of the *wajib-ul-arz* is not intended to be confined to agricultural tenants only. The butchers come within it. The lower appellate court has not properly gone into the question of our claim as to *chaharum*.

Mr. *B. E. O'Conor*, replied.

PIGGOTT, J.—In this case the plaintiffs are the proprietors of a mahal in village Atarsuiya situated on the outskirts of the city of Allahabad. The second defendant, being the owner of a house situated in the plaintiff's mahal, has executed a deed of sale transferring the same to the first defendant. In the suit as originally framed the plaintiffs simply claimed one fourth of the sale price, on the basis of their alleged customary rights as proprietors of the soil. The plaint was subsequently amended so as to claim another relief in the alternative. This was that the defendants should be ordered to remove the materials of the house within a time to be fixed by the court and that the plaintiffs should thereupon "be put in proprietary possession of the site in question together with the *kachcha*-built walls." I think it

(1) (1898) I. L. R., 20 All., 248.
(2) (1910) 8 A. L.J., 61 (63).
(3) (1908) I. L. R., 30 All., 311.
(4) Weekly Notes, 1881, p. 114.
(5) (1904) I. L. R., 27 All., 838.
(6) (1912) I. L. R., 34 All., 579.

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worth while to lay stress at the outset on two points regarding the frame of the plaint. One is that the second relief is claimed only in the alternative, in case the first relief be not granted. The other is that the second defendant is described as "resident of muhalla Atala, Allahabad city." The defendants filed a joint written statement. They put their case in various alternative forms, and some of their pleadings come perilously near denying the title of the plaintiffs. They did, however, expressly admit that the plaintiffs are the proprietors of a certain mahal of village Atarsuiya, and that they are entitled to receive a ground rent in respect of the land in suit, calculated at the rate of Rs. 10 per bigha. Nevertheless they pleaded that the house in suit is situated in the city of Allahabad, in a particular quarter of that city which was assigned, a little more than fifty years prior to the institution of the suit, by arrangement with Government and with the local land-holders (including the predecessors in title of the plaintiffs) for the residence of a colony of butchers, and has ever since been known by the designation of muhalla Atala of Allahabad city, as stated in the plaint. They pleaded that the sites of houses in this muhalla are not subject to the same customary law as the sites of houses occupied by cultivating tenants, or members of the village community, in agricultural villages. More particularly they pleaded that they were not subject to any custom affecting the purely agricultural portion of village Atarsuiya, under which the proprietors could claim one fourth of the sale consideration on a transfer. Finally they pleaded that the owners of houses in muhalla Atala had an established right to transfer the houses themselves, and the right of residence therein, to whomsoever they pleased, and that the proprietors of the soil had no right to question any such transfer or to interfere with the owners of the houses, so long as their ground rent of Rs. 10 per bigha was duly paid.

The learned Munsif of Allahabad, before whom the suit was first tried, held that the tenure of the land in dispute (i. e., the site of the house in question) "was subject to the same incidents as the village abadi land elsewhere, and that the defendants had failed to prove anything to the contrary." He held further that a certain clause in the wajib-ul-arz of mauza Atarsuiya which

recognized a right on the part of the zamindars to receive one fourth of the price, on sales of houses situated in that portion of the abadi not within the limits of Allahabad city, referred only to agricultural tenants, to which class the second defendant does not belong. On these findings he dimissed the claim for one fourth of sale price, but decreed the alternative claim for possession of the site after removal of the materials. The defendants appealed, and the plaintiffs filed cross-objections with regard to the dismissal of their claim for one fourth of the sale price. What they meant by this I find it a little difficult to understand. The plaint makes it perfectly clear that the two reliefs were claimed in the alternative. Even if it could be successfully contended on the evidence that the plaintiffs were entitled both to possession of the site after removal of the materials and also to one fourth of the sale price, it would be a complete answer that no such case was set up in the plaint. The lower appellate court in the first intance sent down certain issues for specific findings. Two of these issues relate to a very doubtful plea set up by the defendants, a plea not really consistent with other admissions in their written statement, that the land in suit had been granted to the predecessors in title of defendant No. 2 by the Government, and not by the zamindars of village Atarsuiya. In any case this point is now concluded against the defendants by an express finding of fact and was not pressed before us. The third issue remitted was in the following terms:—

"Is the land in suit in the *abadi* of village Atarsuiya or in the *abadi* which is called in wajib-ul-arz as *shahr* ?"

On this issue there was a finding in favour of the plaintiffs, which as been finally endorsed by the lower appellate court.

The form of the issue requires to be correctly appreciated. It refers to the wajib-ul-arz for village Atarsuiya prepared at the settlement of 1875 A. D. This document draws a distinction between that portion of the village area which is situated within the limits of Allahabad city and the portion outside those limits. Tenants residing within the city are recognized as having a right of transfer in respect of their houses "along with the sites," without reference to the zamindars. Tenants residing outside the limits of the city may sell the materials of their houses after paying

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one fourth of the sale price to the zamindars. The finding of the lower appellate court is that the land in suit is situated outside the limits of the city, as those limits were understood when the settlement record of 1875 was drawn up. I think it would be easy to criticise the reasons given for this finding. The learned Subordinate Judge has regarded it as decisive that the site of the house in suit can be shown to have been cultivated land at the previous settlement of 1839, and that it was part of the area dealt with at the last partition of village Atarsuiya. The latter circumstance is of no weight, unless and until it be further shown that the village area recognized as within the city limits at the settlement of 1875 was not also formally apportioned between the various new *mahals* formed at the last partition. The former seems to me of very slight weight. I think, however, that I am bound to treat the finding as one of fact and to decline to reconsider it in second appeal. I cannot stretch the finding beyond the ground actually covered by it. We were asked to accept it as a finding of a fact that the land in suit must be regarded as situated in a purely agricultural village, and therefore subject to all the presumptions of law which have been laid down, in various published decisions of this Court, as applicable to the sites of houses so situated. An issue of this sort has always been regarded in this Court as a mixed question of fact and of law. It is necessary to examine the facts actually found by the court below, and then to consider whether these justify the conclusions of law upon which the decision of that court is based.

There is, as both the courts below have recognized, another portion of the wajib-ul-arz of 1875 which has an important bearing on the question in issue. In the eighth paragraph of that record reference is made to the butchers' quarter (*abadi qassaban*) in respect of which it is recorded that, inasmuch as the butchers were permitted to build upon land which had been under cultivation at the previous settlement of 1839, they paid rent for the sites of their houses at a uniform rate of Rs. 10 per bigha, which rent could not be reduced and was not liable to enhancement, except by order of some competent authority or court. This entry requires to be considered in connection with other evidence on the record, not perhaps of great value in itself, but important

as explaining the formation of this "butcher's quarter" in village Atarsuiya. The following facts seem to have been treated by the lower appellate court as substantially established; they were not questioned in argument before us, and I think I am justified in treating them as established without discussing the precise evidence on which they rest. Some time shortly after the mutiny of 1857, the estates of one or more co-sharers in village Atarsuiya were confiscated by Government, on account of the disloyalty of the proprietors. The Government was, therefore, for a time a co-sharer in village Atarsuiya. At about the same time a question arose as to the advisability of settling the butchers of Allahabad in some convenient locality on the outskirts of the city. Negotiations must have taken place between the local land-holders, the butchers and the Local Government, the latter probably acting both in its executive capacity and as one of the co-sharers in the village. The result was the arrangement referred to in the eighth paragraph of the wajib-ul-arz of 1875. A certain area previously under cultivation was given up by the proprietary body for the formation of the new "*abadi qassaban.*" The butchers no doubt built their own houses. They covenanted to pay a ground rent, Rs. 10 per bigha, to the proprietors of the soil. This seems to be a substantial rent; I notice that the learned Munsif was of opinion that it is considerably in excess of anything the proprietors could hope to obtain even now by letting this land for agricultural purposes. There was a covenant securing the permanence of this rate of rent; unless it should be lowered or enhanced by some competent authority. This last expression is no doubt somewhat vague; but it is impossible to interpret it as anything but a stipulation against arbitrary enhancement at the will and pleasure of the proprietors. The "*abadi qassaban*" thus formed is what is now known as the Atala Mohalla of Allahabad city, referred to in the plaint as the residence of defendant No. 2. It has long since been included within municipal limits.

Taking these as the facts of the case, it seems to me idle to enter into a discussion of the principles involved in a series of decided cases of this Court which deal with the respective rights of proprietors of the soil and occupants of houses in purely agricultural villages. I accept, as already remarked, the finding of

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the court below that the wajib-ul-arz of 1875 did not intend to include this butcher's quarter within the limits of Allahabad city—the "*abadi shahr*" as it then stood. Even so, it seems to me decidedly questionable whether a court would be justified in applying to an area with such a history as the above the principles laid down for house sites in purely agricultural villages. The decisions of this Court on which the plaintiffs respondents rely all proceed on the assumption that, in the ordinary case of occupiers of house sites in agricultural villages, there is no definite information forthcoming as to the circumstances under which the site came to be occupied. If the occupiers of houses in such villages were to be treated, in the absence of positive evidence to the contrary, as mere squatters, it would necessarily follow that twelve years' occupation would give them an adverse title to the house sites as against the proprietors of the village. It was felt that this would be monstrous, and would lead to all sorts of undesirable consequences. The only alternative was to regard the occupiers of houses in such villages as a peculiar kind of licensees, applying to their case certain presumptions of law which could be based upon general and well-established custom. Now the tenure of a licensee is in its essence non-transferable; and the records of rights in thousands of villages in all parts of the Province could be referred to in support of the proposition that the right of residence enjoyed by the occupiers of houses in ordinary village sites was everywhere regarded as a right, heritable no doubt, but not transferable.

In the present case we have fairly definite information as to the circumstances under which the predecessors in interest of the second defendant came to occupy this site. The whole transaction by which this "*abadi qassaban*" in village Atarsuiya came to be created amounts on the face of it to a letting of the soil on building-leases at a uniform ground rent, with a stipulation against arbitrary enhancement at the pleasure of the proprietors. The contract is essentially one of lease; and the rights of a lessee, in the absence of express stipulation to the contrary, are in themselves transferable, *vide* the Transfer of Property Act (No. IV of 1882), section 108 (*j*). The only real question to my mind is whether a stipulation to the contrary can be inferred from the

evidence before us. I do not think so. Even the plaint in this case, as originally drafted, shows that the plaintiffs at first desired to bring their suit within the scope of the provision in the wajib-ul-arz of 1875, which gives to tenants residing outside the city limits a right of transfer, subject to payment of one fourth of the sale price to the proprietors of the soil. It was evidently after the plaint had been filed that a difficulty was felt by reason of the fact that this passage of the record of rights refers to "*kashtkaran*," a word which as it stands must be rendered "cultivating tenants." The plaintiffs then amended their claim so as to ask for alternative reliefs. They said, in effect:—"The second defendant is either a *kashtkar* in the sense in which this expression is used in the third paragraph of the wajib-ul-arz, or he is not. If he is, he can transfer his house with the right of residence therein, but he must pay us one fourth of the sale price: if he is not, he has no right of transfer at all, and we claim forfeiture and possession of the soil, after the purchaser has removed the materials of the house." It was only when they filed their objections in the lower appellate court that the plaintiffs for the first time suggested that the clause of the wajib-ul-arz in question must be interpreted as meaning that a *kashtkar* residing outside the limits of the *abadi shahr* can only transfer the materials of his house without any right of residence in the house thus transferred, and even then must pay one fourth of the sale price to the proprietors of the soil. The lower appellate court has very properly ignored this plea. Having come to the conclusion that the second of two alternative reliefs must be decreed, the learned Subordinate Judge contented himself with remarking that the question of the plaintiff's right to the first relief did not arise. I note this point because I have felt some difficulty about the present position of the plaintiffs with regard to this first relief. They have filed no cross-objections in this Court, and are obviously precluded from claiming that both reliefs ought to have been decreed. Can they ask this Court to consider their claim to the first relief asked for, in the event of the Court's holding them disentitled to the second? I incline to the opinion that it is open to them to do so. The conclusion I come to on this point is that the plaintiffs have an arguable case, but one which ought

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not to be accepted on the record as it stands. If the suit had gone to trial on the plaint as originally framed and upon issues arising only in respect of the claim for one fourth of the sale price, I think it just possible that the courts might have come to the conclusion that the word *kashtkaran* in this particular passage of the wajib-ul-arz was not used in its strict sense of "cultivating tenants," but was intended to apply to all occupiers of houses situated outside the limits of the "*abadi shahr.*" As the case now stands, the question is much complicated by the fact that the plaintiffs have succeeded in the courts below upon a precisely opposite contention, namely, that the second defendant and the other butchers residing in the "*abadi qassaban*" are not *kashtkars* within the meaning of the wajib-ul-arz. If the second defendant, as lessee of the land in suit, has in fact a transferable right in respect of the house in suit and the right of residence therein, it is for the plaintiffs to satisfy the Court that this right is subject to a provision entitling the ground landlords to claim one fourth of the sale price on each transfer. The case in favour of a loose interpretation of the word "*kashtkaran*" is partly rebutted by the proof on the part of the defendants of several instances of transfers in which no claim seems to have been preferred by the landholders to any portion of the sale price. On the record as it stands I am not prepared to dissent from the finding of the first court that this particular provision of the wajib-ul-arz refers to "cultivating tenants" only, and does not affect the rights of the butchers occupying houses in the "*abadi qassaban.*"

The rights of these butchers are in my opinion those of lessees holding under building leases, and in the absence of evidence to the contrary, they must be held entitled to transfer their rights as such lessees.

I would therefore set aside the decrees of both the courts below and dismiss this suit with costs in all courts.

CHAMIER, J.—I agree.

BY THE COURT:—The appeal is allowed. The decrees of both the courts below are set aside and the plaintiffs' suit is dismissed with costs throughout.

Appeal allowed.