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the court below. If therefore this annuity was of the nature of a maintenance allowance, the cognizance of the Court of Small Causes was barred. In my opinion it was so barred. I set aside the decree of the court below and in lieu thereof direct an order to be passed returning the plaint for presentation to a regular Civil Court having jurisdiction to entertain the same. The defendant will in any event bear all costs hitherto incurred in the court of first instance and his own costs of this application.

Decree varied.

FULL BENCH.

Before Justice Sir George Knox, Acting Chief Justice, Mr. Justice Tudball and Mr. Justice Muhammad Rafiq.

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July, 17.

MUHAMMAD FAIYAZ ALI KHAN (PLAINTIFF) *v.* BIHARI AND ANOTHER (DEFENDANTS)*

Evidence—Statement in wajib-ul-arz—Suit to recover 'Parjot'.

Plaintiff sued as owner of the *abadi* of a village to recover a certain number of maunds of cotton seed from the defendants, who were banias having shops in the said *abadi*, and his claim was based mainly upon an entry in a wajib-ul-arz framed some fifty years before suit, to the effect that tenants living in the village did not pay '*kiraya*' (rent of a house), but '*parjot*' (ground-rent), which, for banias, was one maund of cotton seed a year for each shop.

Held that the entry in the wajib-ul-arz was reliable evidence of the liability of the defendants to pay '*parjot*' to the zamindar in the manner described, and that the use of the word indicated that the origin of the payment was an agreement between the inhabitants of the *abadi* and the zamindar rather than a custom.

THE plaintiff was the sole zamindar of village Balika and owner of the whole of the *abadi*. The defendants were banias who occupied grocery shops in the *abadi*. The plaintiff alleged that there was a custom according to which the banias of the bazar were liable to deliver to the zamindar one maund of *binaula* (cotton seed) per shop at the end of each year, and that the custom was recorded in the wajib-ul-arz of 1866, prepared at the former settlement. Paragraph 2 of the wajib-ul-arz stated as follows:—"*Reyaya bashinda deh se kiraya nahin liya*

* Second Appeal No. 357 of 1916, from a decree of Durga Dat Joshi, First Additional Judge of Aligarh, dated the 1st of December, 1915, confirming a decree of Kauleshar Nath Rai, Munsif of Bulandshahr, dated the 25th of August, 1915.

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jata hai . . . . Aur babat parjot . . . bashindagan deh se batafsil zail liya jata hai. Babat parjot sal tamam ; baqqalan bazar ji-dukan binaula ek man ; . . . . " No such entry was contained in the *dastur dehi* of the last settlement. The plaintiff claimed 3 maunds *binaula* for the three years preceding the suit, or its value, Rs. 12. The defendants denied the existence of any such custom of realizing *parjot* (ground-rent) from the shops in the village and stated that they had never delivered any *binaula* or its equivalent ; they further stated that the entry in the wajib-ul-arz did neither record nor prove custom, but was a mere statement or expression of the wish of the zamindar ; and that, at the most it evidenced a contract made by the plaintiff, the term whereof expired at the end of the former settlement. The court of first instance held that the entry in the wajib-ul-arz was good evidence of and proved custom ; that the payment claimed was of the nature of a *parjot* or ground-rent and not of a cess ; and that the plaintiff had failed to prove that he had ever realized anything from any shop since 1866, which fact coupled with the absence of any entry in the *dastur dehi* of the last settlement showed that the custom had fallen into desuetude and could not now be enforced. The suit was accordingly dismissed. On appeal, the lower appellate court held that the wajib-ul-arz of 1866 did not record a custom and that the custom was not proved ; and the appeal was dismissed. The plaintiff went in second appeal to the High Court.

Maulvi *Iqbal Ahmad*, for the appellant :—

The entry in question in the wajib-ul-arz of 1866 *primâ facie* recorded a custom. The silence of the later *dastur dehi* on the point did not necessarily disprove the custom. The entry, if it did not evidence a custom, at any rate evidenced an arrangement which was come to 50 years ago. The statement was made as long ago as that and recorded by the settlement officer and allowed to remain unchallenged in wajib-ul-arz. Such an entry was more than the mere statement of the zamindar. There was no reason to suppose that the statement was then made with a view to future fraud. The lower court had failed to appreciate the evidential value of the entry as a statement made by a deceased person long before any controversy arose. The entry

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stood unrebutted. Mere non-receipt of the ground-rent for a number of years did not disprove the zamindar's title to receive it. Secondly, the zamindar was entitled, apart from any question of custom or entry, to reasonable compensation from the defendants for their use and occupation of his land. They did not plead that they had acquired any exemption by the payment of a *nazrana* or otherwise.

Munshi *Panna Lal*, for the respondents :—

The claim as set forth in the plaint was founded solely and purely upon an alleged custom. The custom having failed, the suit was bound to fail with it, and the plaintiff was not entitled to fall back upon anything else. The entry in the wajib-ul-arz relied on by the appellant was the statement of a single zamindar who owned the whole village and could not be considered as evidencing a custom. As for its evidencing an arrangement, the respondents or their predecessors in interest were no parties to the settlement and could not be bound by any statement made by the zamindar at the settlement. They were not even aware of what was being stated or entered. At all events the entry was no evidence that any such arrangement continued after the expiry of the former settlement and existed after 1887. There was no similar entry in the *dastur dehi* of 1887. Further, the alleged arrangement was never enforced or acted upon. Whatever might have been the intention when the statement was made it did not appear that the " arrangement " was ever acted upon. Another point was whether the payment was not of the nature of a cess, and as such irrecoverable under the prohibition of section 56 of the Land Revenue Act. The following cases were referred to :—*Sis Ram* v. *Asghar Ali* (1), *Sadanand Pande* v. *Ali Jan* (2).

Maulvi *Iqbal Ahmad*, in reply, referred to the case of *Balwant Singh* v. *Shankar* (3).

KNOX, A. C. J., and TUDBALL and MUHAMMAD RAFIQ, JJ. :—This appeal arises out of a suit brought by Nawab Mumtaz-ud-daula Faiyaz Ali Khan, who in his plaint sets himself out as, and who is further admitted to be, the sole zamindar of the village to

(1) (1912) I. L. R., 35 All., 19. (2) (1910) I. L. R., 32 All., 193.

(3) (1908) I. L. R., 30 All., 235.

which this appeal relates. The respondents are in the plaint described as the village banias and as being shop-keepers in the said village. The plaintiff is claiming 12 maunds of cotton seeds or the value thereof. It is true that in the plaint the plaintiff set out that there was a custom of such payment in the village. This amount of seed is payable for each shop occupied by the banias in the bazar. But in the written statement, which was filed, we note that the respondents themselves alleged that at the most the entry in the wajib-ul-arz amounts to an agreement between themselves and the plaintiff, the terms of which expired at the end of the former settlement of 1866. As the case went on it was evident that the courts below tried the question between the plaintiff and the defendants as a question of *parjot*. The court of first instance held that the payment of this *parjot* was a custom proved. He says that it is *parjot*, or ground-rent, and not a cess, and cannot be called illegal, and the wajib-ul-arz of 1866 is good evidence of the custom set up by the plaintiff; but the court went on to hold that the custom had fallen into desuetude, and dismissed the claim of the plaintiff. The plaintiff went in appeal to the District Judge of Aligarh. That court took a different view from the court of the first instance, and held that the custom to take ground-rent had not been proved. It therefore dismissed the appeal. The plaintiff comes here in second appeal, and the first plea taken by him is that the entry in the wajib-ul-arz is a record of custom and proves the custom set up by the plaintiff appellant, and a further plea is taken that in any case the plaintiff appellant is entitled to get a reasonable rent of the land in the possession of the defendants respondents. We are of opinion that the word 'custom' throughout has been wrongly used. In case of an agreement between the plaintiff and the defendants it can never be said for a moment that the rent they paid was rent payable by force of custom. The word used in the wajib-ul-arz is *parjot*, and points to the fact that if the payment of anything from the respondent to the appellant was due, it was a matter based upon some agreement in the first instance. At first sight the way in which this payment was to be made may strike one as somewhat strange, but it is not so strange as to be impossible. The definition of rent

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sanctions the view that rent may be something paid in cash and also something paid in kind. When this is borne in mind we are of opinion that the lower appellate court has approached the evidence it had to consider from a wrong point of view. There is on the record the wajib-ul-arz of 1870. We had that wajib-ul-arz read to us and we see nothing in the language which will justify the inference that the matters recorded in paragraph 2 were unlikely or improbable. We look upon that paper as a statement made fifty years ago more or less, by a person who was qualified and had the knowledge necessary to make it. It is not a statement narrating a tradition, but it is a statement by a person possessing an interest and an existing right in the village. It is extremely improbable that the person was making a statement to perpetrate a fraud or was making a statement which was false to be used fifty years afterwards. There was nothing to rebut that statement, and we hold that the payment of *parjot* by the respondent to the appellant is proved thereby.

We accordingly set aside the decrees of both the courts below and decree the plaintiff's claim with costs in all courts and future interest at the usual rate.

Appeal decreed.

APPELLATE CIVIL.

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July, 23.

Before Mr. Justice Piggott and Mr. Justice Walsh.

MUHAMMAD ISA KHAN (PLAINTIFF) *v.* MUHAMMAD KHAN (DEFENDANT).*

Act (Local) No. II of 1901 *(Agra Tenancy Act), sections* 154 *and* 158—*Muafi land—Suit for resumption—Portion of muafi grant converted into a grove but restored to the position of agricultural land before suit.*

Where a certain area had been held rent-free for fifty years and by two successors to the original grantee, but part of the area had at one time been occupied by a grove, which, however, had ceased to exist some fifteen years before suit, it was *held*, on suit for resumption, that there was no justification for drawing a distinction between that part of area which had at one time been a grove, and the rest, which had all along been culturable land, and

* Second Appeal No. 1793 of 1915, from a decree of W. F. Kirton, Second Additional Judge of Aligarh, dated the 17th of August, 1915, reversing a decree of Muhammad Azim-ullah, Assistant Collector, First Class, of Aligarh, dated the 7th of April, 1915.