1921

TANSUKH RAI v. SRI GOPAL.

conclusion on the special circumstances of this case, and not without some hesitation, that the appeal succeeds and that the mortgagee is entitled to execute his decree against the property in question.

WALLACH, J.:—Order XXXIV, rule 14, does not apply unless the decree obtained by the mortgagee is for the payment of money in satisfaction of the claim arising under the mortgage. It must be a subsisting mortgage and not one which by reason of the flow of time or any other like circumstance, has ceased to be enforceable by law. In the case before us it appears that the judgment-debtor, who is respondent, pleaded in the suit which was referred to arbitration, that the conditions of the mortgage were unenforceable in law and were totally void. Although the arbitrator has not said so in so many words, in my opinion he accepted that view and gave a money decree. That being so, the mortgage not being subsisting, and, having been found to be unenforceable in law, the case is clearly one which does not fall under order XXXIV, rule 14. The ruling in the case of *Suraj Narain Singh* v. *Jagbali Shukul* (1) applies and in my opinion, therefore, this appeal should be allowed.

BY THE COURT.—The order of the Court is that the appeal is allowed. The matter should be remitted to the Lower Court according to law in accordance with this judgment, and the appellant must have his costs.

*Appeal allowed.*

---

*Before Mr. Justice Lindsay and Mr. Justice Kanhaiya Lal.*

BECHAI (DEFENDANT) *v.* BADRI NARAIN AND ANOTHER (PLAINTIFFS) AND CHEKHURI (DEFENDANT).*

1921

*May* 23.

*Act No. IX of* 1887 *(Provincial Small Cause Courts Act), schedule II, clause (13)—Suit for recovery of* haq chaharum *not cognizable by a Small Cause Court—Custom*—Wajib-ul-arz—"Halat dehi"—*Value of the* "halat dehi" *as evidence of discontinuance of a custom recorded in the* wajib-ul-arz

A suit brought by a zamindar to recovery money alleged to be due to him on account of *haq chaharum* is not a suit of the nature cognizable by a Court of Small Causes. *Bohra Bhoj Raj* v. *Ram Chandra* (2) referred to.

---

* Second Appeal No. 802 of 1919 from a decree of P. K. Roy, Additional Subordinate Judge of Benares, dated the 7th of March, 1919, confirming a decree of Munir Alam, Munsif of Benares, dated the 20th of June, 1918.

(1) (1920) I. L. R., 42 All., 566. (2) (1920) I. L. R. 42 All. 448.

1921

BECHAI v. BADRI NARAIN.

The evidential value of the document known as *halat dehi* on the question of the discontinuance of a custom recorded in a *wajib-ul-arz* of earlier date discussed.

THE facts of this case are fully set forth in the judgment of the Court.

Munshi *Harnandan Prasad*, for the appellant.

Munshi *Badri Narain*, for the respondents.

LINDSAY and KANHAIYA LAL, JJ. :—Both these appeals have arisen out of suits brought by the plaintiffs respondents for the recovery of what is described as *zar chaharum*. In each case the claim was based upon the sale of a house situated in a *patti* called Deo Narain Singh of which the plaintiffs are admittedly zamindars. It is not disputed that in this *patti* of Deo Narain Singh are included a number of houses which fall within the municipal boundary of the city of Benares and in that particular portion of the city which is known as mohalla Jaitpura.

The plaintiffs based their case upon a custom which was recorded in the *wajib-ul-arz* prepared in the year 1866. The defendants, on the other hand, denied that they were liable to be sued for these sums. They denied that there was any custom of the kind alleged by the plaintiffs and they further relied upon a later statement of custom which, it was said, was prepared at the time of the last settlement of Benares. This later statement of custom has been described in the evidence and in the judgment as the *halat dehi*.

Both the courts below found in favour of the plaintiffs. The court of first instance based its judgment upon what was recorded in the *wajib-ul-arz* of 1866 and also upon certain other evidence showing that there had been cases brought to the notice of the courts, in which the existence of this custom had been recognized and enforced. Those instances for the most part relate to the years prior to the year 1883, but there are instances also which relate to years subsequent to that date.

In the second appeals now before us the defendants come forward and assert that no such custom was proved and that as a matter of fact the present custom is that all persons who occupy houses in this patti are the owners of both the houses and the house sites and are entitled to dispose of them as if they are their full owners.

A preliminary objection was taken to the hearing of these appeals, based upon the provisions of section 102 of the Code of Civil Procedure. It was argued that the suits were of the nature of Small Cause Court suits and that as the amounts in dispute were under Rs. 500, no second appeal lay. After hearing counsel on this point we decided that the preliminary objection could not be sustained and that the hearing of the appeals must proceed.

In this connection we need only refer to clause 13 of the second schedule of the Provincial Small Cause Courts Act (IX of 1887). That clause exempts from the jurisdiction of Small Cause Courts all suits to enforce payment of the allowance or fees respectively called *malikana* and *haq*. The concluding portion of the clause relates to claims for cesses and other dues with which we are not concerned here. It is perfectly obvious that what the plaintiffs are claiming in these suits are what is described as "*haq*" in the clause just referred to. There was cited before us a decision of a single Judge of this Court, *Bohra Bhoj Raj* v. *Ram Chandra* (1). All we need say is that if the learned Judge in that decision meant to lay down that a suit of this kind, that is to say, a suit for a *haq*, was cognizable by a Small Cause Court, we are unable to agree with him.

To come to the merits of the case. We have already mentioned that in support of the custom under which they were claiming, the plaintiffs relied upon the *wajib-ul-arz* of 1866. That document, which professes to be a record of custom, lays down that in the case of persons who are described as *parjotdars* selling the materials of their houses, the zamindars are entitled by way of *haq chaharum* to a one-fourth share of the sale proceeds. That the declaration contained in this document was intended to be a declaration of custom appears to us to be clear from the concluding words, in which the zamindars said that they would realize all their zamindari *haqs* "in accordance with the custom."

We have also been referred to the evidence which was produced before the first court showing instances in which the custom had been observed and enforced.

(1) (1920) I. L. R., 42|All., 448.

1921

BECHAI v. BADRI NARAIN.

To turn now to the main argument which was put forward on behalf of the defendants, namely, the argument based upon the document known as the *halat dehi*. We were referred in this connection to paragraphs 46 and 47 of the official Report on the Survey and Revision of Records of the Benares district. This report which was compiled at the last settlement of Benares was printed in the year 1887.

In dealing with the record prepared at this revision of settlement the Settlement Officer, at page 46 of the report, states that the principal papers in the record are the map, the *khasra*, the *jamabandi*, the *khewat* and the *halat dehi*. In paragraph 47 referring to the *halat dehi* he describes it as being of the least importance. He mentions how this document was directed to be prepared by way of a substitute for the old *wajib-ul-arz* and shows how the first intention was that the *wajib-ul-arz* was to be done away with entirely. He then goes on to describe the nature of the entries contained in the *halat dehi*, showing that it mentions the method by which the instalments of the Government revenue are to be paid, and the rents collected, how cesses are taken, and other matters of local interest, such as the rights of irrigation. In short, the paper is described as being a memorandum of the existing customs as ascertained by the settlement officials during the progress of the settlement arrangements.

According to what is stated in the *halat dehi* in these cases (Exhibit 24) we find from clause 10 of the document that in the area of *patti* Deo Narain Singh, in respect of which the document was prepared, the general rule observed was that the zamindars were entered as the owners, and the house owners were entered as tenants of the zamindars. These entries profess to have been made in accordance with certain instructions given by the Settlement Officer prior to the year 1885. We have, unfortunately, no copy of these instructions before us and are unable to say for what purpose or in what circumstances they were issued.

After this reference to the manner in which the entries were made, the document goes on to say that persons who are in occupation of houses are the owners both of sites and of the houses

and that they have powers of transfer just as the zamindars have, and that the zamindars have no connection with the houses.

We are asked to hold on the basis of this document that any custom which found a place in the record prepared in 1866 has been abrogated. It would be very difficult in our opinion to come to any such conclusion on evidence of this kind. There is not a word in this *halat dehi* about the existence or non-existence of the custom of *haq chaharum*. All that can be said is that the provision by which the occupants of houses are declared to be the owners is inconsistent with the existence of any such custom as was recognized in the *wajib-ul-arz* of 1866.

The courts below found in these cases that the defendants are *parjotdars*, in other words, that they are persons who occupy house-sites on land which belongs to the zamindars. We have been referred to the *jamabandi* which was prepared at the recent settlement, and from this it is evident that at that time the plots with which we are now concerned were recorded as *bila lagan*, that is to say, not assessed to rent. In the column of remarks we find two entries showing items of Rs. 2-8-0 and Rs. 2-4-0 respectively. We are unable to say what these figures are intended to represent. Beyond the bare figures there is nothing else in the column of remarks. It is a fair inference from the document as it stands that these lands with which we are now concerned were recorded at the time of the last settlement as not liable for payment of any rent. The lower courts, however, have agreed in holding that these lands are nevertheless *parjoti* lands, and it has been urged that this is a finding of fact with which we are not entitled to interfere in second appeal. We do not propose to interfere with it and we must proceed on the assumption that the lands are in fact *parjoti* lands.

In this connection we might usefully refer to paragraph 86 of the settlement report. In this it is stated that over and above the various kinds of cultivatory holdings described in the preceding portion of the report there is an area of 322 acres recorded in the *jamabandi* as *parjoti* holdings. The settlement officer said that all this land is in the immediate vicinity of the city of Benares and consists of small plots cultivated and assessed to rent

1921

BECHAI v. BADRI NARAIN.

at the last settlement and on which, subsequent to the preparation of the 1840 record, houses and buildings had been erected. The report goes on to say that ground rent amounting to Rs. 5,278 is still collected on some of these plots aggregating in all 184 acres. In these cases rent had been assessed by the consent of the landlord and tenant and had been entered in the column of remarks in the *jamabandi* and in the *halat dehi* in compliance with the provisions of section 66 of Act No. XIX of 1873. It is further stated that the 134 acres entered as rent-free include all *parjoti* plots on which rent was entered in the former *jamabandi*, but on which rent is now either admittedly not collected or its realization disputed.

All we are entitled to infer from this is that at the time the settlement was being revised a portion of the land which had previously been recorded as *parjoti* land was recorded as rent-free, either because of an admission that no rent was paid or because there was some dispute as to whether the rent was payable.

This plea does not appear to us to touch the question which is raised in this case, namely, the existence of a custom. It is obvious from what has been stated in paragraph 86 that the land may be *parjoti* land although it is not recorded as paying any rent. We have no doubt, therefore, that the courts below were, on the evidence before them, entitled to say that the land in dispute was *parjoti* land. On this point we need only further observe that in the *jamabandi* these lands are shown as being held by persons described as *parjotdars* and we might further add that at least in the sale-deeds with which we are concerned the lands were described as *parjoti* lands.

That being so, we are not disposed to interfere with the decision of the court below on the question of custom. It would in our opinion not be reasonable to say that the record of custom which was made in the year 1866 has been abrogated by the preparation of a condensed *wajib-ul-arz* which now goes by the name of *halat dehi* and regarding which we have very little information. We do not see how the settlement officer conducting the settlement operation could by the preparation of a document

of this kind abrogate an existing custom which he found recorded in documents prepared at an earlier settlement.

We are asked to say that this Court had decided in one case, namely, S. A. No. 7 of 1914 decided on the 17th of May, 1915, that the *halat dehi* had wiped out the *wajib-ul-arz* which had been prepared in earlier times and that it was therefore to be considered as the only reliable record of existing custom. In this connection it is to be observed that the case which was before the Court on that occasion was not a case in which *haq chaharum* was being claimed on the basis of custom. That was a case in which the suit had been brought to recover rent from persons on the ground that they were *parjotdars*. Any observation to be found in the *halat dehi* which is relevant to a case in which ground rent is being claimed must not necessarily be treated as relevant when we are dealing with the question of custom by which zamindars claim to realize *haq chaharum*. We cannot, therefore, treat this case as an authority for the proposition which has been advanced on behalf of the appellants. On the evidence we are satisfied that the courts below were right in holding that, so far as the plots in dispute are concerned, the zamindars have by custom a good right to claim *haq chaharum*. Before concluding the judgment we think that it may fairly be observed that the document described as *halat dehi*, prepared for the *patti* Deo Narain Singh, must necessarily refer to lands other than *parjoti* lands, because we find that there is a provision made for the instalments in which land revenue is to be paid; in other words, it is clear that in this *patti* there are revenue-paying lands which must be distinguished from *parjoti* lands. Consequently it cannot, we think, be contended that the provision of the document which lays down that the occupants of the houses are the owners of the houses and the sites and have full power of transfer necessarily relates exclusively to *parjoti* lands. The result of all this is that both appeals fail and are dismissed with costs.

*Appeals dismissed.*