Before Mr. Justice Stuart and Mr. Justice Sulaiman.

1922
June, 7.

KEDAR NATH AND ANOTHER (DEFENDANTS) v. DATTA PRASAD SINGH (PLAINTIFF) AND MURLI DHAR (DEFENDANT).*

Haq-i-chaharum—*Custom—Vendor and purchaser—On whom rests the liability for payment of* haq-i-chaharum.

Where the existence of a custom of payment of *haq-i-chaharum* to the zamindar on the sale of house property has been proved, and it does not appear that the zamindar's right to such payment is limited to a right to claim it from the vendor alone, it is the duty of the purchaser to see that the *haq* due to the zamindar is duly paid. He cannot relieve himself of his responsibility by simply paying the full sale consideration to the vendor. *Dhandai Bibi* v. *Abdur Rahman* (1) and *Heera Ram* v. *The Hon'ble Sir Raja Deo Narain Singh* (2) referred to.

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

Dr. *Surendra Nath Sen*, for the appellants.

Babu *Sital Prasad Ghosh*, for the respondents.

STUART and SULAIMAN, JJ. :—Second Appeals Nos. 449 and 606 of 1921 are connected. These are cross appeals by the plaintiff and defendants, respectively, arising out of the same suit. The plaintiff zamindar brought a suit to recover one-fourth of the sale-proceeds together with interest, on account of a sale-deed, dated the 14th December, 1916, executed by the defendants second party in favour of the defendants first party in respect of seven shops and two houses, including one ruined house in the form of a *chabutra* or platform. The plaintiff's case was that he is the owner of the sites of all these houses and that under a custom which prevails in the village of Mursan, where the property sold is situated, the zamindar is entitled to claim his *haq-i-chaharum*. On behalf of the defendants the custom alleged by the plaintiff was denied and it was further pleaded that the inhabitants of the village of Mursan which was alleged to be a town and not a mere agricultural village, were absolute owners of their houses and lands and had a right of sale, and it was further pleaded that the defendants had been in adverse possession of the property in suit and the plaintiff was not entitled to any relief.

The court of first instance, in a very careful and well-reasoned judgment, decreed the claim of the plaintiff for recovery of one-fourth of the sale-proceeds together with interest at 6 per cent. per annum, but dismissed the claim as

* Second Appeal No. 606 of 1921, from a decree of Ali Ausat, Subordinate Judge of Aligarh, dated the 17th of January, 1921, confirming a decree of Nawab Husain, Munsif of Hathras, dated the 23rd of August, 1920.

(1) (1901) I. L. R., 23 All., 209.

(2) (1867) N.-W. P., H. C. Rep. (F. B. R.), 63.

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regards the recovery of possession. This decree was affirmed on appeal by the learned District Judge.

The plaintiff in his appeal contends that the decree dismissing his claim as to the recovery of possession was not correct. It appears that in the court of first instance, during the pendency of the suit as well as during the course of its hearing and arguments, it was admitted on behalf of the plaintiff that the owners of houses in this village are also the owners of their sites and that both can be transferred by them to strangers. This admission alone is sufficient to dispose of the appeal of the plaintiff. If the defendants are owners of the sites of the houses, it is quite clear that the plaintiff is not entitled to recover possession of those sites on their sale. Furthermore, there is a good deal of evidence on the record which goes to show that persons whose houses have fallen down have still a right left to them to transfer the sites. It did not, also, appear that this platform had really been abandoned by the last occupier and had become an ordinary piece of *parti* or waste land. In view of all these circumstances, both the courts below were of opinion that the plaintiff was not entitled to get a decree for actual possession of the sites. We think that this view was correct. Second Appeal No. 449 of 1921 accordingly fails.

The other appeal is an appeal by the defendants vendees in which they challenge the finding of the courts below that there is a custom under which the plaintiff was entitled to recover *haq-i-chaharum*. Although there are concurrent findings of both the courts below, nevertheless it is open to the appellant to show to us that the evidence adduced by the plaintiff is legally insufficient to prove the custom relied upon by him.

The evidence to prove the custom appears to be fairly voluminous. On behalf of the plaintiff, in the first instance, there is an entry in the wajib-ul-arz of 1873 which clearly states that in this village the zamindar has a right to recover one-fourth of the sale-proceeds in case of sales of houses by the inhabitants and the agricultural tenants of this village. It is true that at the time when this wajib-ul-arz was prepared, there was a single zamindar, the predecessor in title of the present plaintiff, and it is urged, therefore, that the recital therein was simply dictated by a single proprietor. This would merely reduce the value of the wajib-ul-arz, but there is this additional fact that the wajib-ul-arz was actually verified and attes-

ted by a number of residents and tenants and inhabitants of the village numbering 45 besides the patwari. In addition to this, we have a judgment of the year 1884 in which a claim to enforce this right against the mortgagor was actually decreed. The plaintiff has also produced 28 sale-deeds, on 22 out of which there are actual endorsements to the effect that one-fourth of the sale-proceeds have been paid. In respect of three of them, there are entries in the plaintiff's books that *haq-i-chaharum* was paid. The plaintiff has also produced his account books from the year 1884 up to date of suit, which account books have been accepted by the courts below as genuine, and which go to prove that on each and every occasion when a sale took place, the zamindar did realize one-fourth of the sale-proceeds. In addition to this documentary evidence, there are some 50 witnesses produced to depose generally as to the existence of the custom alleged by the plaintiff and the realization of *haq-i-chaharum* by him and his predecessor.

The defendants produced a number of sale-deeds, all of which were prior to the year 1884, and they relied on the circumstance that in four of them, which are originals, there are no endorsements of payment. As to other documents, they are merely copies. The fact that no *haq-i-chaharum* was paid is not proved by these deeds. The four original documents which were produced were prior to the date of 1884, and the plaintiff was not able to produce account books prior to 1884 because those account books had been filed in an earlier suit and were never taken back. Even the defendants' witnesses admitted that the plaintiff tried to realize his *haq-i-chaharum* from each and every person liable for the same, but stated that he realized *haq-i-chaharum* from those vendors who were willing to pay them. The evidence adduced by the plaintiff was voluminous and has been carefully considered by both the courts below. They are agreed in finding that the plaintiff has succeeded in proving an universal and ancient right to recover *haq-i-chaharum*. Nothing has been shown to us in argument which would justify us in differing from the view taken by the courts below. The case has been approached from the right point of view by the courts below and there is no legal defect in the reasoning adopted. We are accordingly unable to differ from the view taken by the courts below. The result is that the finding of fact must be accepted.

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It is, however, contended by the learned advocate for the defendants (appellants) that in any case this right cannot be enforced against the vendees, and that even if there was a custom of *haq-i-chaharum*, the right can only be enforced against the vendor who has been paid the full sale consideration. This point, however, is governed by authority. The rule of law was laid down clearly in the Full Bench case of *Heera Ram* v. *Hon'ble Sir Raja Deo Narain Singh* (1). In that case it was clearly pointed out that "the zamindars' customary due is payable on the transfer by sale of house property; and this equally (after the sale has become absolute) whether the sale was, in its inception, conditional or not. The zamindars' right is to a share of the purchase money; it is not merely a right to claim that share from the vendor. It is, therefore, incumbent on the purchaser, if he would acquit himself of all liability, to see that the zamindar is satisfied in respect of his due, and he cannot discharge himself by a payment to the vendor." The learned Judges in that case pointed out that both the vendor and the vendee were primarily liable to the zamindar and the zamindar had a claim against both, although the vendee may, if he has any such right, ultimately re-imburse himself from the vendor. A different consideration might arise in the case of a right arising out of contract between the zamindar and occupier, but if the right is based on custom, then it has been held that it is the duty of the vendee to see that *haq-i-chaharum* is paid to the zamindar. The vendee cannot get rid of his liability by merely proving that he has paid the whole consideration to the vendor. He ought to see that the one-fourth of the sale price actually goes to the zamindar. If the zamindar had not had his share, a joint decree should be passed against the vendor and the vendee, leaving the matter to be decided in a subsequent suit. This has been followed in a number of cases by this Court. We may only refer to the case of *Dhandai Bibi* v. *Abdur Rahman* (2), where it was pointed out that in the case of a customary right to receive *haq-i-chaharum*, where it did not appear that the zamindar's right to a share of the purchase money was limited to a right to claim it from the vendor alone, the right can be enforced against the vendee also. In the present case we have carefully read the wajib-ul-arz which records the custom relied upon by the plaintiff and we are convinced that the right to

(1) (1867) N.-W. P., H. C. Rep. (F. B. R.), 63.

(2) (1901) I. L. R., 23 All., 209.

recover *haq-i-chaharum* was in no way limited to a claim against the vendor alone. That being so, the joint decree passed by the court of first instance, which was affirmed on appeal by the lower appellate court, was correct. The result is that appeal No. 606 of 1921 also fails.

We accordingly order that both appeals Nos. 449 and 606 of 1921 be dismissed with costs.

Appeal dismissed.

Before Mr. Justice Piggott and Mr. Justice Sulaiman.

BADR-UD-DIN (OBJECTOR) v. MUHAMMAD HAFIZ AND ANOTHER (DECREE-HOLDERS).*

1922
June, 12.

Act No. IX of 1908 (Indian Limitation Act), schedule 1, article 182 (5)—Execution of decree—Limitation—First application for arrest of judgment-debtor—Second application for arrest of judgment-debtor and secondarily of his sureties.

Held that an application for execution of a decree by arrest of the judgment-debtor will operate to save limitation in respect of a subsequent application in which the prayer was, first, for the arrest of the judgment-debtor, and secondly, for the arrest of two persons who had become sureties for the due satisfaction of the decree by the judgment-debtor. *Muhammad Hafiz* v. *Muhammad Ibrahim* (1) referred to.

THE facts of this case sufficiently appear from the judgment of the Court and from the report in the previous case of *Muhammad Hafiz* v. *Muhammad Ibrahim* (1).

Munshi *Sarkar Bahadur Johari*, for the appellant.

Munshi *Narain Prasad Ashthana*, for the respondents.

PIGGOTT and SULAIMAN, JJ. :—This appeal represents a further stage in certain execution proceedings which have been once already before this Court, *vide* the case of *Muhammad Hafiz* v. *Muhammad Ibrahim* (1). The appellant now before us, Sheikh Badr-ud-din Khan Bahadur, is one of the two sureties who bound themselves for the satisfaction of a certain decree. One of the points taken in appeal before us is as to the interpretation of the security bond and the nature of the obligations thereby undertaken by the sureties. We do not say, for a moment, that Sheikh Badr-ud-din Khan Bahadur, who was not a party to the appeal before the Court in the reported case referred to, is not entitled to be heard on this point; but, having heard him, we are still of opinion that the terms of the security bond were rightly interpreted by this Court when delivering the aforesaid judgment. The

* Second Appeal No. 1527 of 1921, from a decree of T. K. Johnston, District Judge of Agra, dated the 10th of August, 1921, confirming a decree of Iftikhar Husain, Subordinate Judge of Agra, dated the 11th of July, 1921.

(1) (1920) I. L. R., 43 All., 152.