itself throughout I do not believe that it would have been able to rely upon it with confidence.

In these circumstances I must allow the application for revision, set aside the order of the Judge of the small cause court and direct that the plaintiff's suit be decreed with costs in both courts.

APPELLATE CIVIL.

Before Mr. Justice Mukerji and Mr. Justice Niamat-ullah.

GOPI SHANKAR (PLAINTIFF) *v.* LILAWATI AND OTHERS (DEFENDANTS).*

1931 *November* 17.

Abadi—House of agricultural tenant—Whether appurtenance to his holding—Presumption—Ejectment from house on ceasing of tenancy—Landlord and tenant—Evidence Act (I of 1872), section 110.

There is no presumption of law that the house occupied by a cultivator in a village is an appurtenance to his holding so that the house or at least the site must be given up simply because the tenancy has either been lost or has lapsed by death in favour of the zamindar.

While the circumstances of a particular case may give rise to an inference that a tenant is entitled to occupy part of the village site so long as he is a cultivator in the village, or so long as he cultivates a particular holding, it is not permissible to presume generally that the right to occupy the site of a house in the village abadi ceases when he ceases to cultivate land in the village or is ejected from a particular holding. The landlord must establish by direct evidence, or by proof of circumstances which justify the inference, that the defendant's right to the site is dependent on his right to retain the holding.

Mr. *U. S. Bajpai*, for the appellant.

Mr. *K. C. Mital*, for the respondents.

MUKERJI, J. :—This appeal has been referred to a Bench of two Judges because the learned Judge before whom it came thought that the matter under

*Second Appeal No. 73 of 1929, from a decree of Ratan Lal, Additional Subordinate Judge of Farrukhabad, dated the 22nd of November, 1928, reversing a decree of Sheobaran Singh, Munsif of Kanauj, dated the 17th of December, 1927.

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consideration required careful examination. The plaintiff is the zamindar of the village, and the defendant, who is a minor, is the daughter of a tenant who cultivated some of the plaintiff's lands in the village. The tenant having died, and under the tenancy law the daughter not being an heir to the tenant, the tenancy lapsed to the plaintiff. He, thereupon, brought the suit out of which this appeal has arisen, to recover possession over the house occupied by the late tenant, on the allegation that the house also lapsed to the zamindar. The plaintiff accordingly asked for possession over the house. In the plaint the plaintiff suggested that the court might, if it thought necessary, allow the defendant to remove the materials of the house, leaving the site to be occupied by the plaintiff.

The defence was that the plaintiff had no right to turn the defendant out of the house, that the house had been occupied for a hundred years by the defendant's ancestors and that the mere fact that the tenancy lapsed to the plaintiff would not be any ground for the plaintiff to take possession of the late tenant's house. The court of first instance decreed the suit for possession of the site and allowed the defendant three months' time to remove the materials. On appeal the learned Additional Subordinate Judge of Farrukhabad dismissed the suit in its entirety. He held that the house was not an appurtenance to the holding of the late tenant Girwar.

In this Court it was urged that the presumption of law was that the house was an appurtenance to the holding, especially as the house in dispute was the only one occupied by the deceased. Other points were taken in the grounds of appeal, but they were not pressed.

The only point of law that we have to decide is whether there is any presumption in the case of a house occupied by a tenant cultivating land in the

village that the house is an appurtenance to the holding and when the holding lapses to the zamindar the house also lapses to him, or in any case the zamindar is entitled to take away the site, leaving the lawful heir of the late tenant to remove the materials.

Mukerji, J.

I have always held that whether a house is an appurtenance to a holding or not is not a question of law but is a question of fact. That this must be so ought to be clear on a consideration of what follows.

To enable the residents of a village to receive a supply of their many necessaries of life the zamindar must allow many such people to occupy the site of the abadi as do not cultivate the land. For example, a blacksmith, a carpenter, a presser of oil seeds, a grain parcher, a weaver of cloths and others carrying on similarly useful but humble professions would be needed to be settled in a village. These artisans need not necessarily cultivate land. Some of them, if and when the family grew up, might think of adding to their income by cultivating some land, taking it not necessarily from the zamindar but from tenants of the village or other holders of land. If these artisans should, later on, give up the land which they cultivate, can it be said that their house was an appurtenance to their holding? Again, suppose these artisans *after they have been settled* take a lease of certain lands for cultivation from the zamindar himself, can it be said that their residential houses are appurtenances to their holdings? The answer must be in the negative.

If it had been the case that none but a cultivator of land was necessary in the village economy, it might have been argued that a cultivator settled in the village simply because he is a cultivator and nothing else. I have omitted to mention an important class of people who are found settled in villages and who are very useful as labourers but who do not, necessarily, cultivate lands. These are chamars, sweepers and others

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who mostly work as labourers, and cultivate lands, if ever, mostly as sub-tenants. In their case the cultivation is more or less nominal. The chamars supply the shoes, the leather bags for drawing water, the whips for driving cattle, and they are remunerated sometimes by a share in corn and sometimes by cash and sometimes by being given a few bighas of land to cultivate. It is always a question of fact at what time the cultivator came to live in the village and at what time did he take up the cultivation of land. There is not the least reason to suppose that the cultivation of every man in the village synchronises with his occupation of a site in the village abadi.

On general considerations I feel bound to entertain the opinion which I have always entertained and which I have described above.

Looking to the authorities, I do not find that there is any uniformity in the decisions. In the case of *Dubri Lal* v. *Dholu Rai* (1) the zamindar sued to eject the defendants from their two houses on the allegation that they had been newly built without his consent. The defence was that the defendants were cultivating land in the village, that the houses were more than fifty years old and had been erected with the zamindar's consent. The first court decreed the suit on the ground that the defendants were mere licensees and could be ejected at any time by the zamindar. The lower appellate court dismissed the suit, holding that the houses were more than twelve years old, and the plaintiff appealed. BANERJI, J., remarked that as the defendants were cultivating land in the village they were entitled to live in the village and occupy the sites so long as they cultivated the land. Then he said: "If they are not in possession as tenants, their possession would be deemed to be adverse. In either case the plaintiffs are not entitled to eject them."

(1) (1906) 3. A. L. J., 619.

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This decision recognizes the fact that a person could be occupying a village site otherwise than as a cultivatory tenant. His Lordship did not decide that every cultivator's house was necessarily a part of the holding and must be given up when the holding is lost. In deciding this case BANERJI, J., professed to follow an earlier case, viz., *Nazir Hasan* v. *Shibba* (1). There the suit was for the ejectment of the defendants from a room. The two learned Judges who decided the case said: "Now it is apparent that either the tenants are entitled to the room in question as appurtenant to their holding, or, if it be not appurtenant to their holding, they have acquired it by adverse possession." This observation clearly recognizes that a man occupying a portion of a village site does not necessarily occupy it as a cultivator.

Mukerji, J.

In the case of *Moti Ram* v. *Mewa Ram* (2) it was definitely laid down by BANERJI, J., who had a considerable experience of this part of the country, that there was no legal presumption that every dwelling house belonging to an agriculturist was appurtenant to his holding. He remarked: "A house may or may not be appurtenant to the holding, and the fact that it was appurtenant to the holding must be established in each case upon evidence." A similar view was expressed by RAFIQ, J., in *Net Ram* v. *Tej Ram* (3). The same view was adopted in the case of *Moti Ram* v. *Munna Lal* (4).

No doubt there are cases in which it has been remarked that so long as a tenant cultivates land in a village he is entitled to stick to the abadi land on which his residential house is; but these remarks cannot be construed as meaning that whenever the tenancy is lost the right to the house is also lost. In the Full Bench case of *Saddu* v. *Bihari Singh* (5) there

(1) (1904) I. L. R., 27 All., 81.
(2) 2 U. D., 720.
(3) (1913) 11 A. L. J., 445.
(4) (1912) 10 A. L. J. (Notes), 3.
(5) (1908) I. L. R., 30 All., 282

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was a partition in the village and a tenant's holding fell into the share of one co-sharer and his residential house fell into the share of another co-sharer. The co-sharer in whose mahal the tenant's residential house had fallen demanded rent from the tenant, and in the alternative sought his ejectment. It was held that so long as the tenant cultivated the land in the village he was entitled to occupy the site of his house, and the mere fact that the zamindars co-sharers had divided the village lands could not put the cultivator in a worse position. This case only lays down this, that a person cultivating land in the village *has a right* to occupy his house if one is there in the village, so long as he cultivates the land. As I have said, the converse proposition does not follow, viz., that when the cultivation ceases the house must go.

Devolution of property other than cultivatory holding is regulated by the personal law of the tenant, while the rule as to devolution of a tenancy holding is liable to fluctuate and has indeed been fluctuating from time to time. Under Act XII of 1881 (N. W. P. Rent Act), section 9, the rights of an occupancy tenant devolved "as if it were land". If that law had still been in force, the daughter of the deceased tenant would have inherited the cultivatory holding as much as she has inherited her father's house. The law of inheritance as to cultivatory holdings was changed in 1901 and a daughter was excluded from inheritance. Unless, therefore, it can be established as a matter of fact that the house is nothing but a part and parcel of a tenancy, it cannot be said that the daughter is not entitled to inherit the house. If she is entitled to inherit the house she is entitled to live in it, unless it is proved that there was a contract to the contrary.

In *Dalel* v. *Bhajju* (1) a cultivator used a piece of land for a long time as threshing floor. The zamindar sought to eject the cultivator from his threshing floor,

(1) (1894) I. L. R., 16 All., 181.

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and it was held that the tenant held it as part of the contract of tenancy. This decision implies that what is the contract of tenancy is a question of fact. This decision was followed by myself and SULAIMAN, J., in Letters Patent Appeal No. 121 of 1923, decided on 24th July, 1924.

Mukerji, J.

There can be no doubt that in the case of *Shohrat Singh* v. *Jhagru* (1) KNOX, J., went so far as to lay down, as the general law of the land, that where a tenant is ejected from his tenancy or abandons it, then unless there be some special custom to the contrary the site on which he has built his house reverts to the zamindar and the tenant must remove the materials therefrom. With all respect I am unable to accept this view of the learned single Judge. It lays the burden of proof on the defendant and not on the plaintiff. The village site may be the property of the zamindar, but under section 110 of the Evidence Act when a person is shown to be in possession of any property the presumption is that he is the owner of that property, and any person who asserts to the contrary must prove that fact. In view of the fact that a zamindar is usually the owner of all the village sites, it may be conceded that the zamindar has the proprietary right in the site, but it does not follow that the man in possession of the house is liable to be ejected at the sweet will of the proprietor of the site.

It is not the case here that the plaintiff zamindar is seeking ejectment of the minor daughter of his deceased cultivator on the ground that he is the owner of the site and he has asked the minor to vacate the land, and, therefore, she must prove her right to continue in occupation of the site. It has been proved in this case "that the appellant and her ancestors have been occupying the house since over a hundred years and, on plaintiff's evidence, themselves built it." Even if

(1) (1915) 13 A. L. J., 745.

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the original right to occupy the house started as a matter of license from the zamindar, it may very well be said that, on the basis of the license, a permanent building has been erected and the right to revoke the license has come to an end.

Mukerji, J.

I have so far not considered the case of those persons who were once zamindars of a village and in that capacity lived on the village site, and subsequently lost the zamindari right but continued to cultivate certain lands in the village either as exproprietary tenants or as ordinary tenants with no rights of occupancy. How can it be said in the case of such persons that the house is appurtenant to the tenancy?

Enough has been said to establish, and I hold accordingly, that there is no presumption of law that the house occupied by a cultivator in a village is appurtenant to his holding and either the house or the site must be given up simply because the tenancy has either been lost or has lapsed by death in favour of the zamindar.

In the result I would dismiss the appeal with costs throughout.

NIAMAT-ULLAH, J. :—I agree with the view expressed by my learned brother on the sole question arising in this appeal, namely whether the site of a tenant's house should be presumed to be an appurtenance to his holding, so that, in case he is ejected from the latter or voluntarily relinquishes it without a fresh arrangement with the landlord as regards the site, he must surrender the site also. It is clear to me that if the site of a house occupied by a tenant in an agricultural village is not an appurtenance to his holding, the landlord is not at liberty, in the absence of a custom to the contrary, to require the tenant to vacate the site of his house on payment of the value for the superstructure by the landlord or by requiring him to remove the materials if the tenant so desires.

In such a case the landlord and the occupier of a house on a village site stand in the relationship of licensor and licensee. If, acting upon the license, the licensee executed a work of a permanent character and incurred expenses in the execution thereof, a licensor is not at liberty to revoke the license. Unless the house is of a temporary and inexpensive character a riaya's house is to be deemed as a work of a permanent character; see *Bhaddar* v. *Khair-ud-din Husain* (1). If, on the other hand, the house is an appurtenance to the cultivatory holding of the occupier thereof, it should go with the holding. When it is said that a house is an appurtenance to a holding, what is meant is that the site was let to the tenant for the construction of his residential house on the express or implied understanding that it would go with the holding and that, if he be ejected from the latter or voluntarily relinquished it, his right to occupy the site would cease. It cannot be doubted that landlords in this province allow people to settle in their villages not only because they become tenants, but also for purposes having no reference to cultivation of land. It happens not infrequently that a member of a tenant's family decides to separate from his father or brother and to build a separate house for himself with the permission of the landlord, though he cultivates no land himself for years to come. Similarly where the population of a village is sparse and the landlord desires to increase it by persuading people from outside to settle in his village, not only to give him a larger number of persons willing to cultivate the village lands but to enable him to have a larger supply of labourers, he having a big farm or indigo factory of his own. Even in cases in which tenants cultivating land are also occupiers of houses, such houses are not appurtenant to particular holdings. The holdings of tenants and their sizes frequently change; but the tenants con-

(1) (1906) I. L. R., 29 All., 133

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tinue to occupy their houses. In such cases it is difficult to say that the house occupied by a particular tenant, who has had a shifting and varying holding, is appurtenant to any particular holding. If in such a case the tenant is liable to ejectment from the site of his house, on being ejected from his holding, which is not the same as the one he occupied when he built his house, it can only be on the supposition that he was allowed to build his house on the village site on the understanding that he would vacate it not when he is ejected from his then holding, but when he altogether ceases to be a cultivator in the village. In all these circumstances, it is not always possible to say that the right of occupiers of village sites to retain them depends upon their right to retain their cultivatory holdings. Whether it is so must be found in each individual case, having regard to the character of the village, and the circumstances in which the house was built and the cultivatory holding of the occupier came into existence. In cases of old inhabitants of a village who have cultivated land and occupied houses in the village abadi as far back as living memory goes, it is most difficult for the tenant to establish that his tenure of the site of his house and cultivatory holding had different origins and that his right to occupy the site did not, in any manner, depend upon his cultivating land in the village. On the other hand, it is difficult for the landlord to establish the contrary.

There is no rule of law which raises a presumption that the occupier of a house in village abadi, if he happens to be also a cultivator in the village, is entitled to retain the site so long as he cultivates land in the village. The court may, however, presume the existence of any fact which it thinks likely to have happened, regard being had to the natural course of events, human conduct and public and private business in their relation to the facts of a particular case (section 114 of the Indian Evidence Act). While, therefore, the

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circumstances of a particular case may give rise to an inference that a tenant is entitled to occupy part of the village site so long as he is a cultivator in the village, or so long as he cultivates a particular holding, it is not permissible to presume generally that the right to occupy the site of a house in the village abadi ceases when he ceases to cultivate land in the village or is ejected from a particular holding. I do not think the practice of the landlords to allow people to build houses on village sites on the understanding, express or implied, that the latter would vacate them on ceasing to be cultivators or on being ejected from their holdings is so common as to justify a presumption to that effect. The cases in which it has been definitely held that there is a presumption that a tenant is entitled to occupy the site of his house so long as he retains his holding are decisions by single Judges, whose views are opposed to those by other learned Judges sitting singly in other cases. There is no decision of a Division Bench of this Court on the point; and we are free to accept one or the other of the two views. I am not prepared to accept the proposition that a landlord seeking to eject his tenant from the site of his house after his ejectment from his agricultural holding starts with a presumption in his favour. He must establish by direct evidence, or by proof of circumstances which justify the inference, that the defendant's right to the site is dependent on his right to retain the holding. It is not possible to lay down any general rule. Each case must depend upon its own peculiar features.

I agree with the order which my learned brother proposes to pass.

BY THE COURT:—We dismiss the appeal with costs throughout.

Before Sir Grimwood Mears, Chief Justice, and Mr. Justice Sen.

1931 *November*, 24.

RAI MAHADEO SAHAI (APPLICANT) v. SECRETARY OF STATE FOR INDIA AND OTHERS (OPPOSITE PARTIES).*

Civil Procedure Code, sections 109 *and* 110—*"Final order passed on appeal"—Order of dismissal of appeal for failure to furnish security for costs—Such order is one "affirming the decision of the court below".*

An order dismissing an appeal for the appellant's failure to furnish security for costs under the provisions of order XLI, rule 10, of the Civil Procedure Code is an order which has the effect of confirming the decision of the court below. The words used in section 110 are "affirms the decision of the court" and not "affirms the decision of the court on the merits".

The words "final order passed on appeal" in section 109 *(a)* of the Civil Procedure Code should be construed broadly so as to include an order directing the dismissal of the appeal consequent upon the failure of the appellant to furnish security for the costs of the respondent.

The applicant appeared in person.

Messrs. *U. S. Bajpai* and *Kedar Nath Sinha*, for the opposite parties.

MEARS, C. J., and SEN, J. :—This is an application for leave to appeal to His Majesty in Council from an order of this Court, dated the 17th of June, 1931. The applicant prayed for a certificate under section 109 of the Code of Civil Procedure. An ancillary prayer is contained in paragraph 17 of his petition which is somewhat curious: "That the applicant solicits the favour of appointing a receiver, and the printing and legal charges of both the parties be realised from the estate and justice be done to the case."

The subject matter of this suit consisted principally of a property in Taluqa Imampur, pargana Ungli, in the district of Jaunpur.

* Application No. 34 of 1931, for leave to appeal to His Majesty in Council.