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SAH.

adhered to in the cases referred to above, which are clear instances of the exercise of the right of pre-emption based on custom with regard to mere building sites as distinct from houses. There was also some oral evidence of a general nature in the case. The learned Subordinate Judge on a consideration of the entire evidence came to the conclusion that even if the house had not been transferred to the vendee, the custom relating to *khandhars* (ruined house sites) and house sites had been established. We think that we should not differ from this finding.

The next question is whether the plaintiff made the necessary demands as are required by the rules of the Muhammadan law which are applicable to such a custom in Benares. [The judgment then discussed the evidence on this point and agreed with the lower court that the two demands were duly made.]

The appeal is dismissed with costs.

Before Mr. Justice Boys and Mr. Justice Smith.

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June, 22.

GANGA KALWAR (DEPENDANT) v. BENI MADHO
PRASAD (PLAINTIFF).*

Custom—Landlord and tenant—Transfer of sites of houses by agricultural tenants—Nature of evidence to establish custom.

On the question whether a custom is established in an agricultural village by which agricultural tenants are entitled to transfer their houses together with the sites thereof, a distinction must be made between cases of transfer to another agricultural tenant in the village and cases of transfer to a non-agricultural tenant or to a total stranger to the village. In the former case the zamindar, even if he knows of it, may not feel it worth instituting a suit about it; in the latter case it may be a very serious matter for the zamindar, for if such

* Second Appeal No. 918 of 1930, from a decree of B. S. Kisch, District Judge of Allahabad, dated the 17th of March, 1930, confirming a decree of Muhammad Taqi Khan, Additional Subordinate Judge of Mirzapur, dated the 5th of April, 1929.

a transfer is winked at by him and in course of time a custom comes to be established, he is in danger of losing the whole of the village site to strangers. Where, upon a transfer to a stranger, the question of the existence of a custom arises, the court should be satisfied that the instances of former transactions relied upon to establish the custom were of the same nature as the transaction now in question.

Messrs. *Janaki Prasad and Ambika Prasad Dube*, for the appellant.

Mr. *Shambhu Nath Chaube*, for the respondent.

BOYS and SMITH, JJ. :—This is another of those cases in which the defence, which is so common now-a-days, is made that there is a customary right of transfer of the sites of houses in a village. We are of opinion that, as has often been said, the most cogent evidence is required before such a custom can be held to be established. It is true that zamindars, like everybody else, must be watchful for infringement of their rights, but that is a very different matter from saying that they must be perpetually harassing their tenants and watching them to see every little thing they do. It may constantly happen that a particular tenant may exceed his rights even by the execution of a sale deed purporting to transfer the right to a site, but the transaction may take place in circumstances in which the zamindar is either ignorant of it, or even knowing of it does not think it worth his while to worry about it. We may give an illustration of this. An agricultural tenant may part with his house and purport to part with the site also to another agricultural tenant, and the zamindar, even if he knows of it, may not feel it worth worrying about it, much less worth instituting a suit about it. On the other hand, an agricultural tenant may purport to transfer his house and site to a non-agricultural tenant,—even a total stranger in the village. This may be a very serious matter for the zamindar, for if such a transfer is winked at by him and in course of time a custom is held to be

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established, he is manifestly in danger of losing the whole of his rights in a village site, and having to take up further sites from the agricultural area in order to provide room for his agricultural tenants. Now, in the present case, Bindhyachal is found to be an agricultural village. The transfer, by a perpetual lease, is by an agricultural tenant in favour of a non-agricultural tenant. The defendants seek to justify the lease of the site by the production, we are told, of twenty-two sale deeds and eight mortgages, while the zamindar, on the other hand, has produced fourteen kabuliyats and four instances relating to "parjot". Both courts have held that no custom is established. The transactions relied upon by the defendants are spread over one hundred years, while there are six hundred houses in Bindhyachal. The lower appellate court has, even giving to the defendant full benefit of the transactions upon which he relies, held that they were not sufficient to establish the custom, and we agree. But we may add that even if we had any doubts, we should have to be satisfied that the transactions relied upon by the defendant were of the same nature as that which he endeavours now to maintain. We are told by counsel for the appellant that he has no information as to whether the transactions relied on were transactions between two agricultural tenants, or whether the vendee or mortgagee, as the case may be, was a non-agricultural tenant, or whether he was a stranger to the village. In the present case it is admitted that the lessee is a stranger to the village, that is to say, he is not already a tenant of any description, and it is more than possible that none of the transactions relied on by the defendant would apply to the present case; but for the reasons that we have given we do not think it necessary to enter into this further, or to send down any issue. We agree with the lower appellate court, and the appeal is dismissed with costs.