Before Sir Lal Gopal Mukerji, Acting Chief Justice, and Mr. Justice Niamat-ullah

1932
November, 25.

RATAN BARHAI (DEFENDANT) *v.* KISHEN DEI (PLAINTIFF) *

Landlord and tenant—Abadi land—Sahan darwaza *or courtyard outside the house of a raiyat—Raiyat's right to build on the* sahan darwaza *appurtenant to his house—License.*

A raiyat in a village abadi is not entitled to build as of right and without the consent of the zamindar on land which he has been using as an outer *sahan* or courtyard appurtenant to his house.

The question whether he has a right to build on any land appertaining to his house and not enclosed within it is one of fact to be determined on proof of the terms of the license, by direct evidence or by inference from the conduct of the parties and the use to which the land has been put.

Mr. *Shiva Prasad Sinha*, for the appellant.

Mr. *L. M. Roy*, for the respondent.

MUKERJI, A. C. J.:—This second appeal raises an important point of law, and there is unfortunately no case decided by a Bench of this Court which may be directly to the point. The point raised is whether a raiyat in a village abadi in this part of the country has a right to construct a building on land which he was using as an outer "*sahan*" appurtenant to his house.

The plaintiff, who is a zamindar, came with the allegation that the defendant had constructed a building without her consent, and sought the ejectment of the tenant from the land and demolition of the building. The learned Judge of the appellate court found that a part of the building was old, that the rest was new and that the new portion had been erected on what had been the defendant's *sahan* or courtyard, outside the house. On this finding he decreed the suit. In this Court it has been contended that a raiyat is entitled to

* Second Appeal No. 168 of 1930, from a decree of Jagan Nath Singh, Additional Subordinate Judge of Basti, dated the 19th of December, 1929, modifying a decree of Krishna Chandra, Munsif of Basti, dated the 22nd of June, 1929.

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build on the open space which he enjoys as his courtyard appurtenant to his house.

Before we examine such authorities as may be on the point, let us consider the situation from the legal point of view. A raiyat holds either under a lease or under a license. If there is a lease and if the lease contains a term entitling the raiyat to build on any land that may be in his possession, the terms have to be proved. In this case no such lease has been pleaded and no terms like those have been established. In the absence of the lease we can regard a raiyat only as a licensee, who has been allowed, with the implied consent of the zamindar, to build on the zamindar's land. This further implies that the license that was granted to the raiyat was a permission to use the land in his occupation in the way in which he has been allowed to use. In other words, where there is a house existing on a portion of the land, it will be presumed that he was allowed to build on that portion of the land; and where the land is vacant, it will be presumed that he was allowed to occupy that land as his courtyard, without any building thereon. I am not aware of any third method of a raiyat in a village abadi holding land.

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If this be the right view of the position of the raiyat, he cannot certainly build on what was his outer *sahan*.

Coming to authorities, it has been held by a Bench of this Court that a tenant can dig a well in his courtyard; *Mahadeo Rai* v. *Jan Muhammad* (1). This case does not establish the proposition for which the appellant contends—that he can build on the land. A well usually occupies a very small portion of land, and further it is necessary for supply of the essential necessity for life, water. The very existence of man depends on a supply of water, and there cannot be any difficulty in implying that the contract or license under which the raiyat holds included the right to construct a

(1) (1925) L.L.R., 47 All., 541.

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well. If a man has to live on a piece of land, he may do all that is necessary for the purpose.

We have got a few other cases decided by single Judges of this Court; but most of them may be distinguished. In one case, *Padarath Tewari* v. *Baz Singh* (1), it was found that a piece of land was being used for making jaggery and there was already some sort of shed over the place. It was presumed that the land had been given for the purpose for which it was being used and that the tenant could build a house on that land for the same purpose for which the land had been used. This case is, in my opinion, distinguishable. The license was already there to use the land in a particular way. There cannot exist any sugarcane press and cattle trough or cattle shed without the zamindar's permission. That permission might be taken, in a particular case, as implying further permission to erect a more substantial building than a mere thatch. In *Ram Pratap Singh* v. *Lal Bahadur Singh* (2), which was again decided by a single Judge, the headnote runs as follows: "A raiyat in a village is entitled to put the *sahan* of his house to such use as suits his convenience, provided that by doing so he does not, in any way, adversely affect the proprietary rights of the zamindar." The qualifications quoted above, under which a raiyat may construct a building on a portion of land occupied by him, are sufficient to show that the raiyat has no right to do with the land what he pleases. The constructions in this case were a stable, a pigeon house and a cattle trough. If this case may be taken as going beyond the position which I have taken under the general principles of law, I have to respectfully dissent from this case. I can point out that in this country nobody can live in a house without having some land in front of his house for the purposes of using it as a *sahan*. We find that in cities

(1) (1915) 29 Indian Cases, 264. (2) (1927) 100 Indian Cases, 597.

people have to put their *charpais* or cots on the streets in order to have a little breath of fresh air. If a raiyat be entitled, as a matter of right, to build upon his *sahan*, he would require a portion of land beyond this building for use as a piece of open *sahan*, and he would naturally have to trespass on his zamindar's land, unless he is able to get that land by the consent of the zamindar. It is, therefore, to the interest of the zamindar to see that the *sahan* land, which was granted to the raiyat for use as open and vacant land is not utilised, permanently, by being built upon. The third case that was cited before us is that of *Farhatullah* v. *Mohammad* (1). This is again a decision by a learned single Judge and perhaps goes a little too far. I have already noticed the case of *Mahadeo Rai* v. *Jan Muhammad* (2), where it was held that a tenant was entitled to sink a well in his courtyard.

Having regard to all the circumstances of the case I am of opinion that the appellant was not entitled, as a matter of right, and without the consent of the zamindar, the plaintiff, to build on what was the raiyat's outer *sahan* of his house.

A question of limitation was also raised in the course of hearing; but we could not allow it to be raised, because sufficient material did not exist on the record. The argument was that article 32 of the Limitation Act applied; but to apply article 32 we have to find out when the plaintiff became aware of the existence of the perverted use of the land. As to that there was no allegation and there was no finding. The defendant has not shown that the plaintiff was aware of the construction more than two years before the institution of the suit. All that the plaintiff stated in the plaint was the date of the construction, which need not necessarily coincide with the date of her knowledge of the factum of construction.

In the result I would dismiss the appeal with costs.

(1) A.I.R., 1930 All., 89. (2) (1925) I.L.R., 47 All., 541.

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NIAMAT-ULLAH, J. :—I agree entirely with what has been said by my learned brother on the main issue arising in the case. I would add a few remarks of my own to emphasise the point whether as a general rule a raiyat in a village is entitled to make constructions on what is popularly called "*sahan darwaza*".

The land in question in this case is an open space lying to the north of the defendant's house. To the east of that land is the defendant's cattle shed. The new construction is on the northern boundary of the open space of land above referred to. The defendant does not claim to be more than a raiyat, that is, a licensee. There is no evidence of the terms of the grant of license under which he became entitled to construct his house or to occupy the land in front of his house. We must, therefore, infer the conditions on which he was allowed to occupy the site of his house and the land in dispute from the conduct of the parties and the use of the land. So far as the site of the house is concerned, there can be no doubt that the license extended to the defendant a right to build on any portion of it. As regards the open space in front of his house, the defendant has merely used it as a courtyard. The fact that he has got a cattle shed to the east of it does not give rise to the inference that the open space in question is an integral part thereof. There is no justification for the assumption that the courtyard was not in the occupation of the defendant under a license of a different character from that under which he constructed his residential house. It is at least possible that the landlord allowed him to make constructions on the site of his house and allowed the open space to be merely used as a courtyard. The defendant may be in occupation of the site of the house and of the *sahan* under two different licenses. It is likewise possible that the license in respect of the latter may be only implied in the acquiescence of the landlord. If the

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defendant claims a right to make constructions on the courtyard, he must adduce evidence to establish that permission to build extended not only to the site of the house but to the open space in question. The mere fact that he is in possession of both does not justify the inference that seems to have been made in some of the reported cases to which my learned brother has referred, namely, that he is entitled to make construction on every portion of the land which is in his occupation. If the terms of the grant have to be inferred from the use of the land in dispute, there is nothing in the circumstances of this case which can justify the inference that the defendant is entitled to construct on any portion of the courtyard in his possession. I am clearly of opinion that no general rule can be laid down as regards a riaya's right to build on land, not within the enclosed portion of the house which is generally called "*sahan andaruni*", which may appertain to his residential house. The question whether he has a right to build on any land appertaining to his house is one of fact to be determined on proof of the terms of the license, by direct evidence or by inference from the conduct of the parties and the use to which the land has been put. For these reasons I concur in the order dismissing the appeal with costs.

Niamat-ullah J.

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

KALLAN AND OTHERS (DEFENDANTS) *v.* MUHAMMAD NABI KHAN (PLAINTIFF) *

1932 *November*, 29.

Limitation Act (IX of 1908), articles 142 and 144—Suit for possession of immovable property based on title—Defendant alleging ownership but not proving any title—Adverse possession—Burden of proof on defendant.

Article 144 of the Limitation Act, and not article 142, is applicable when plaintiff sues for possession of immovable property on the basis of title; and where the plaintiff proves his

* Second Appeal No. 154 of 1931, from a decree of Pran Nath Agha, Additional Subordinate Judge of Moradabad, dated the 30th of October, 1930, reversing a decree of Kaustubha Nand Joshi, Munsif of Moradabad, dated the 14th of June, 1930