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 ULLAH
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allow him to be discharged without paying the costs which he was ordered to pay. An application to this effect has been filed before us today, but it is not supported by any affidavit, and it is not possible for us to investigate the matter as to whether he is possessed of sufficient means or not. After all we are not directing the recovery of this amount by the arrest of Wahidullah; we have only authorised the Collector to realise the amount by proceeding against the movable and immovable property of the defaulter, and, if he is not possessed of such property, execution obviously will be infructuous.

APPELLATE CIVIL

*Before Sir Shah Muhammad Sulaiman, Chief Justice
 and Mr. Justice Bennet*

1935
 August, 20

KANHAIYA LAL (DEFENDANT) v. SHIVA LAL (PLAINIFF)*

Abadi—Co-sharer zamindar's house in abadi—Co-sharer's share in zamindari sold by auction—Position qua house—Ownership of materials, right of residence and right of transfer of house not affected.

When a co-sharer zamindar, who owns a house in the village, loses his share in the zamindari by auction sale and becomes an ex-proprietary tenant, he loses his joint right in the site of the house but does not lose his proprietary right in the materials of the house nor his right of residence in it, nor his right of transfer of the house. A transfer of the house by him conveys a full title in the materials of the house and in the right of residence therein.

Zahur Hasan v. Mst. Shaker Banoo (1), disapproved.

Dr. N. U. A. Siddiqui, for the appellant.

Mr. Panna Lal, for the respondent.

SULAIMAN, C.J., and BENNET, J.:—This is a Letters Patent appeal by a defendant against a decree of a learned single Judge of this Court. The plaintiff is the zamindar of the village and he sued for a decree that the

*Appeal No. 3 of 1934, under section 10 of the Letters Patent.

(1) A.I.R., 1925 All., 29.

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defendant should remove the materials of a house within a specified time and that the site of the house should be given to the plaintiff. The history of the house is as follows. Mst. Jasoda was a co-sharer in the village and she owned this house. There was an auction sale in 1885 by which her zamindari share was sold. She became an exproprietary tenant and was succeeded by Lala Ram, her adopted son, and in May, 1929, Lala Ram sold this house to the appellant. The court below has found that there is no custom by which a ryot can transfer a house. It further found that Mst. Jasoda occupied this house as a ryot and her son Lala Ram also occupied it as a ryot, and that the village in question, Gopalpura, was not an agricultural village but it was a village which is one mile from the town of Agra, and this village Gopalpura is included within the municipal limits of Agra. The majority of the inhabitants of the village are chamars who are engaged in manufacturing shoes and who are not agriculturists. The case as argued before us in Letters Patent appeal involves certain considerations. These considerations are, what are the rights of a zamindar, a co-sharer, when there is an auction sale of his zamindari share? It was argued for the respondent zamindar that the co-sharer was reduced to the level of the other ryots in the village and that the house owned by the co-sharer became non-transferable. This argument was founded on a ruling by a learned single Judge of this Court in the case of *Zahur Hasan v. Mst. Shaker Banoo* (1). The problem appears to us to involve the following factors. When Mst. Jasoda was a co-sharer she had a proprietary title in three things; (1) a joint right in the site; (2) a proprietary right in the materials, and (3) a right of residence in this house on this site. By the auction sale we consider that only No. 1 was transferred, that is, she lost her undivided share in the village abadi. But we do not consider that she lost her proprietary rights in either (2) or (3). In

(1) A.I.R., 1925 All., 29.

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our opinion the sale of her undivided share in the village and in the abadi could not lessen the proprietary title which she had in the materials of the house and could not lessen her right of residence in that site. Before the sale of her share she had a right of transfer of this house. This was apart from her ownership of an undivided share in the abadi. By the auction sale she did not lose her right of transfer of the house but she retained this right of transfer, and the exercise of this right of transfer in May, 1929, by her adopted son conveyed a full title in the materials of the house and in the right of residence in the house to the appellant. We consider that a distinction should be drawn between the position of persons who have been zamindars and who in their capacity as zamindars own houses, and the condition of persons who are mere ryots. In the case of a mere ryot the zamindar grants a licence to the ryot to make a residence. Such a licence remains a licence and the ryot has no right of transfer of the house which he makes in pursuance of such licence. But a house built or bought by a zamindar is a transferable house and such rights of transfer do not cease when the zamindar loses his rights in the village. In regard to the ruling in the case of *Zahur Hasan v. Mst. Shaker Banoo* (1) we cannot accept the proposition of law laid down at the end of the ruling as a proposition of general application, and we consider that in regard to the houses of zamindars who lose their proprietary rights the dictum which we have stated is correct. For these reasons we allow this Letters Patent appeal and we dismiss the suit of the plaintiff with costs in all courts.

(1) A.L.R., 1925 All., 29.