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in view of the terms of order XX, rule 14, to have directed the plaintiff to deposit the defendant's costs. No doubt the court should have done so in the circumstances. It did not, however, so order, and the plaintiff in fact did comply with the order passed.

Upon the whole matter we are satisfied that the defendant's objection should be dismissed.

We accordingly allow the appeal, set aside the order of the learned single Judge in second appeal, and restore the order of the lower appellate court with costs throughout.

Before Mr. Justice Bennet and Mr. Justice Verma

FATEH (DEFENDANT) *v.* HAR BILAS (PLAINTIFF)*

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November, 23

Landlord and tenant—House of agriculturist in the abadi of a village—Rights of the agriculturist and of the zamindar in such house—Customary law—"Abandonment of house"—Usufructuary mortgage.

Under the customary law of these provinces relating to the respective rights of the zamindar and of a ryot occupying under him a house in the village abadi, as laid down in the case of *Sri Girdhariji Maharaj* v. *Chote Lal* (1), the house together with the site reverts to the zamindar when the ryot abandons the house though he may not have left the village; also, the ryot has no more right to make a usufructuary mortgage of the house than he has to make a sale thereof. The principle on which the custom rests is that when a zamindar allows a person to build a house on his land he is entitled to insist that that person and the members of his family alone should occupy the house and that he or they should not be entitled to transfer the house and thus force a stranger on the zamindar.

Mr. *J. Swarup*, for the appellant.

Mr. *Baleshwari Prasad*, for the respondent.

BENNET and VERMA, JJ.:—The suit which has given rise to this appeal was brought by the respondent for

*Second Appeal No. 960 of 1935, from a decree of Raghunath Prasad, Civil Judge of Agra, dated the 14th of February, 1935, reversing a decree of S. M. Ahsan Kazmi, Additional Munsif of Fatehabad, dated the 2nd of August, 1934.

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possession over a house by ejectment of the appellant, for a perpetual injunction restraining the appellant from interfering with the plaintiff's possession over the house, and for future mesne profits. The trial court dismissed the suit but the lower appellate court has reversed that decree and has passed a decree for possession over the house in favour of the plaintiff respondent. The defendant has come up to this Court in second appeal.

The allegations of the plaintiff were that he was the sole zamindar of mahal $7\frac{1}{2}$ biswas situated in village Gopalpura *alias* patti Saktara, that one Dhumi, who was a Kachhi by caste, had been occupying a house within the abadi of that village as the plaintiff's ryot, that Dhumi died and his widow lived in the house after him, that the widow also had died and as Dhumi left no issue the house reverted in law to the zamindar, and that the defendant had taken possession of the house without any title and was liable to ejectment. The defendant appellant admitted that the plaintiff was the sole zamindar of the village, but pleaded that one Nathay was the adopted son of Dhumi, that Nathey, along with one Palua, a collateral of Dhumi, had made a usufructuary mortgage of the house in favour of the defendant by means of a registered deed dated the 6th of June, 1928, and had put him in possession and that therefore the defendant could not be ejected. In paragraph 16 of the written statement the defendant further pleaded that in this village the occupiers of houses were entitled to transfer their houses together with their sites, and that therefore the allegation of the plaintiff that the site of the house in question had reverted to him as zamindar was not correct. The defendant also alleged that the house in question was not situated within the zamindari of the plaintiff.

The trial court held that the house was situated within the zamindari of the plaintiff, that Nathay was the

adopted son of Dhumi, that the defendant had failed to prove a custom by virtue of which the occupiers of houses in this village could transfer their houses together with their sites, that as Nathay had executed a usufructuary mortgage in favour of the defendant he could not be said to have abandoned the house and that therefore the zamindar was not entitled to resume possession. Accordingly it dismissed the suit. The plaintiff appealed to the lower appellate court and that court has agreed with the findings of the trial court as to Nathay being the adopted son of Dhumi, and as to the non-existence of any custom which could entitle the occupiers of houses in the village to transfer their houses together with their sites. It has also expressed the opinion that as Nathay had put his mortgagee in possession of the house and as the mortgagee could take care of the same, Nathay could not be said to have abandoned the house. It has, however, held that as there was no custom prevailing in the village by virtue of which the occupiers of houses could transfer their houses together with the sites, Nathay was not authorised to give a usufructuary mortgage and put the mortgagee in possession and that the plaintiff was therefore entitled to succeed.

The learned counsel for the defendant appellant has first urged that the village in question is not an agricultural village but is a town and that the law which applies to houses in the abadi of agricultural villages should not be applied to the house in dispute. It is apparent, however, that no such plea was raised in the courts below and no issue was ever framed on this point. The learned counsel has further urged that there is no finding by the courts below that Dhumi was an agriculturist. This plea also was never raised in the courts below. As a matter of fact, the plea raised by the defendant in paragraph 16 of his written statement, mentioned above, and the issues framed in the case clearly show that the case proceeded in both the courts below on the footing that the village was an agricultural village and that Dhumi

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was an agricultural tenant, but that, according to the defendant, there was a custom prevailing in the village according to which Nathay was entitled to make the transfer in question. It may also be pointed out that the usual occupation of Kachhis is agriculture. For these reasons we are unable to entertain this argument of the learned counsel.

The next point urged by the learned counsel is that the fact that Nathay has made a usufructuary mortgage of the house and has put the mortgagee in possession does not show that he has abandoned the house. His contention is that it is absolutely necessary that the ryot must be found to have left the village before it can be held that he has abandoned the house, and that unless such abandonment is established the mere fact of a transfer does not entitle the zamindar to sue for possession. The law on the subject is well established. We may refer to the case of *Sri Girdhariji Maharaj* v. *Chote Lal* (1), where it has been laid down: ". . . . according to the general and well known custom of these provinces, a custom so well established that it may be treated as the common law of the provinces, a person, agriculturist or agricultural tenant, who is allowed by a zamindar to build a house for his occupation in the abadi, obtains, if there is no special contract to the contrary, a mere right to use that house for himself and his family so long as he maintains the house, that is, prevents it falling down, and so long as he does not abandon the house by leaving the village. As such occupier of a house in the abadi occupying under the zamindar, as in this case, he has, unless he has obtained by special grant from the zamindar an interest which he can sell, no interest which he can sell by private sale or which can be sold in execution of a decree against him, except his interest in the timber, roofing and woodwork of the house." The learned counsel does not deny that this is the law prevailing in these provinces,

(1) (1898) I.L.R. 20 All. 248.

but he emphasises the words "by leaving the village" and the word "sell" in the above passage. His contention is that the law as laid down here applies only to transfers by sale and no other forms of transfer, and further that an abandonment can take place only if the occupier of the house has left the village. In our opinion these contentions of the learned counsel are not correct. In order that the occupier of a house in the abadi of a village may be held to have abandoned the house it is not absolutely necessary to show that he has left the village. The point is in our opinion so obvious that we do not consider it necessary to deal with it at any length. Numerous instances of abandonment of a house are easily conceivable even though the occupier has not actually left the village and gone elsewhere. The argument that the zamindar has a right of suit only if the transfer in question is a sale ignores the principle on which the custom, which has been spoken of as the common law of these provinces in the passage quoted above, rests, namely, that when a zamindar allows a person to build a house on his land he is entitled to insist that that person and the members of his family alone should occupy that house and that they should not be entitled to transfer the house and thus force a stranger on the zamindar. In our opinion a usufructuary mortgage also is a transfer of the kind which the law does not permit occupiers of houses standing on the zamindar's land to make. In our opinion the decree of the lower appellate court is correct and no interference is called for.

For the reasons given above we dismiss this appeal with costs.