

1929  
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 AFSAE  
 BAGOUM  
 v.  
 SAHYED  
 MUHAMMAD  
 YUSUF.  
 Hasan and  
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Act. It is not necessary for us to decide the question whether the section applies to auction sales, but assuming that it does, there is absolutely no evidence that the plaintiff made any inquiry to ascertain the title of Ghulam Qasim and to prove that he acted in good faith. It might also be pointed out that the plea based on section 41 formed the subject matter of issue No. 3 in the trial court. The parties' pleaders agreed in the trial court that the issue should be struck off. It was therefore hardly open to the plaintiff to raise the plea again in the lower appellate court, but even if it was open to the plaintiff to do so we are satisfied that it has no substance.

We must therefore allow the appeal, set aside the decision of the lower appellate court and dismiss the plaintiff's suit with costs in all the courts.

*Appeal allowed.*

### APPELLATE CIVIL.

*Before Sir Louis Stuart, Knight, Chief Judge and Mr.  
 Justice Wazir Hasan.*

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 October, 30. MUSAMMAT MAHARAJI KUNWAR AND ANOTHER  
 (DEFENDANTS-APPELLANTS) v. COURT OF WARDS  
 DEARA (PLAINTIFF-RESPONDENT).\*

*Oudh Rent Act (XXII of 1886), sections 127, 108(2) and 32(B)—Grove brought under cultivation after the trees disappeared—Suit for rent and ejectment under section 127, Oudh Rent Act—Wajib-ul-arz containing a provision that tenant grove-holder is entitled to cultivate land after grove ceases to exist on payment of rent—Tenants not trespassers—Oudh Rent Act, section 127, applicability of.*

Where the defendants were grove-holders of a certain grove of which the trees disappeared and then the land was

\*Second Rent Appeal No. 32 of 1929, against the decree of Thakur Rachhpal Singh, District Judge of Fyzabad, dated the 12th of March, 1929, setting aside the decree of Kunwar Lal Bahadur, Assistant Collector, 1st Class, district Sultanpur, dated the 31st of October, 1928.

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brought under cultivation and the plaintiff then brought a suit under section 127, Oudh Rent Act for arrears of rent and ejectment, *held*, that on a construction of the *wajib-ul-arz* of the village which contained a provision entitling tenant-grove-holders after the trees had ceased to exist to cultivate the land at a rate payable by tenants of the surrounding land the defendants were not trespassers and section 127 had no application but the suit can be treated as a suit for arrears of rent under section 108(2) read with section 32(B) of the Oudh Rent Act, 1886. *Pancham Lal v. Sardar Nihal Singh* (1), referred to.

Mr. *E. R. Kidwai*, for the appellants.

Messrs. *G. H. Thomas* and *H. K. Ghose*, for the respondents.

STUART, C. J. and HASAN J.:—This appeal presents some difficulty. The facts are these. The defendants-appellants are two widows, who had the rights of grove-holders in a certain grove in the village of Govindpur in the Sultanpur district. It is admitted on both sides that the trees of this grove have disappeared and that the land has been brought under cultivation. The plaintiff, who is the proprietor, brought a suit in the Rent Court against the two defendants for Rs. 8-10-0 as representing the arrears of rent with interest for three years. The plot in question is 10 biswas in area and the rent demanded was only Rs. 2. He instituted this suit under the provisions of section 127, Act XXII of 1886 as amended, treating them as persons retaining possession of land without being entitled to it. His case was that he was entitled to eject them as trespassers but that he preferred to treat them as tenants and hold them liable for the rent of the land at such rate as the court might determine to be fair and equitable. In addition he applied in his plaint to eject them as unprivileged tenants. The learned Assistant Collector who tried the case dismissed it on the ground that there was a special provision in the *wajib-ul-arz* of the village which entitled tenant-grove-holders after the grove had ceased to exist

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to cultivate the land at a rate payable by tenants of the surrounding land. An appeal was filed to the learned District Judge of Fyzabad who placed a different construction on the *wajib-ul-arz* and following a decision of the Board of Revenue in *Pancham Lal v. Sardar Nihal Singh* (1), which decided that, where land has ceased to be grove-land and has been brought under cultivation, the landholder is at liberty to treat the occupier as a tenant, reversed the decree of the lower court and decreed the suit. We do not consider that the decision in question is sufficient for the decision of this particular appeal. It may well be that in many instances a grove-holder would be considered a trespasser, when remaining in occupation of the land after the trees have disappeared, and in those circumstances the provisions of section 127 of the Oudh Rent Act would apply and the landholder could treat such a person either as a trespasser or as a tenant within the meaning of section 127. But here on our construction of the *wajib-ul-arz* the defendants-appellants are not trespassers. They have become entitled to cultivate the land at the prevalent rate of rent. Thus section 127 has no application. In the interests of the defendants-appellants themselves it appears better to determine the matter of the rent once for all. Their learned Counsel tells us that they have no objection to paying the rent. What they fear is ejection on the ground that they are trespassers. We consider that we can meet this difficulty by treating this suit, which does not lie under section 127, as lying under section 108(2) read with section 32(B). There is no difficulty as to fixing the rate of rent. The plaintiff claims rent at Rs. 2 a year and the defendants say they are ready to pay rent at that rate. We accordingly convert the decree into a decree for arrears of rent payable by a tenant. We leave the amount at Rs. 8-10-0 and we set aside that portion of the decree which provides

(1) (1920) 8 O. L. J., 60.

for the defendants-appellants' ejection. The parties will bear their own costs throughout these proceedings.

*Appeal allowed.*

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### APPELLATE CIVIL.

Before Mr. Justice Bisheshwar Nath Srivastava and Mr.  
Justice A. G. P. Pullan.

NAWAB KHAN (DEAD AND ON HIS DEATH) MOHAMMAD  
SHARIF KHAN AND ANOTHER (PLAINTIFFS-APPELLANTS)  
v. ACHHAIBAR DUBEY AND ANOTHER (DEFENDANTS-  
RESPONDENTS).\*

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*Pre-emption—Oudh Laws Act (XVIII of 1876), section 9, clauses (2) and (3)—Sale of under-proprietary land—Superior proprietors and under-proprietors both have equal rights of pre-emption as members of village community—"Village community" under section 9, clause (3) Oudh Laws Act—"Under-proprietary mahal", meaning of—Onus of proof to establish preferential right of pre-emption under clause (2), section 9.*

In a suit for pre-emption by a plaintiff, who held under-proprietary rights in one khata of a village, on a sale of another under-proprietary khata in the same village, if the plaintiff claims preferential right under clause 2 of section 9 of the Oudh Laws Act the onus lies on him to establish that there was an under-proprietary mahal of which he was a co-sharer. The necessary elements for the purpose of making out the existence of a mahal are the existence of a separate record of rights and the joint liability for rent. *Sheoraj Kunwar v. Harihar Bakhsh Singh* (1), relied on.

In the case of a sale of under-proprietary land a superior proprietor and an under-proprietor in the same village are both members of the village community within the meaning of clause 3 of section 9 of the Oudh Laws Act and both have an equal right of pre-emption. *Drigbūjāe Singh v. Court of Wards, Ramnagar Estate* (2), *Hon'ble Raja Ali Mohammad*

\*First Civil Appeal No. 5 of 1929, against the decree of M. Ziauddin Ahmad, Officiating Subordinate Judge of Gonda, dated the 24th of September, 1928, dismissing the plaintiffs' suit.

(1) (1910) I. L. R., 32 All., 351.

(2) (1901) 5 O. C., 266.