1929

DURGA PERSHAD. v. SURAT SINGH.

should be exercised by the court in which the plaint or memorandum of appeal which is deficiently stamped has been filed out by the second portion of the section the same power can be exercised by a court of appeal, reference or revision if in its opinion the question has been wrongly determined to the detriment of the revenue. The court must either be the court in which the plaint or memorandum of appeal has been filed or a court sitting as a court of appeal, reference or revision. Undoubtedly the question could have been raised when the appeal was heard. But the appeal was decided on the 21st of January, 1929, before the question was ever raised. We are not a court of appeal, reference or revision in respect of this question, and the court which decided the matter is now *functus officio*. In these circumstances we can take no action in the matter.

Stuart, C.J., and Raza, J.

APPELLATE CIVIL.

Before Mr. Justice Wazir Hasan.

1929
July, 31.

H. HUNTER AND OTHERS (DEFENDANTS-APPELLANTS) *v.* RAM RATAN AND OTHERS (PLAINTIFFS-RESPONDENTS.)*

Wajib-ul-arz, *interpretation of—Entry of certain rights enjoyed by old zamindars in the* wajib-ul-arz, *effect of—Rights in* abadi *enjoyed by old zamindars after they had lost the village, if enforceable.*

Where a certain village was in the hands of a particular family for a period of over 400 years which afterwards lost that village but when the record of rights, i.e., the *wajib-ul-arz* came to be prepared several rights besides the rights which were decreed in favour of that family by the settlement court came to be recorded in their favour and the record was accepted as correct and valid by the Taluqdar those rights are not to be deemed to have been created for the first time by the entries in the *wajib-ul-arz*, but the entries in respect of them must be taken to be a record of pre-existing rights.

*Second Civil Appeal No. 18 of 1929, against the decree of Syed Ali Hamid, Subordinate Judge of Bara Banki, dated the 4th of October, 1928, affirming the decree of Babu Sheo Charan, Munsif, Ram Sanehighat at Bara Banki, dated the 21st of May, 1928, decreeing the plaintiff's suit.

Where according to such an entry in the *wajib-ul-arz* no tenant could build a new structure in the village *abadi* without the permission of that family those rights were the remnants of the ancient proprietary title of the village, and in that view it could not be considered that the entry of the right was the entry of a custom which being unreasonable could not be enforced.

Mr. *Bishambhar Nath*, for the appellants.

Mr. *A. P. Sen*, for the respondents.

HASAN, J. :—This is the defendants' appeal from the decree of the Subordinate Judge of Bara Banki, dated the 4th of October, 1928, affirming the decree of the Munsif of Ram Sanehighat, dated the 21st of May, 1928.

The subject-matter of controversy in the suit, out of which this appeal arises, is a certain right in the *abadi* of the village Debipur, pargana Haidergarh, in the district of Bara Banki. The defendant No. 1, Mr. H. Hunter, has succeeded to the proprietary title of the village by a purchase at a public auction in execution of a decree against the late taluqdar of the village. The other defendants are cultivators residing in the village of Debipur and have recently started to build a structure on plot No. 84 comprised within the *abadi* of the village. The plaintiffs' case is that a tenant is not entitled to construct a new building on any portion of the *abadi* land without the consent of the plaintiffs. The question in the case therefore is as to whether the plaintiffs are possessed of the right which they claim.

The courts below have answered this question in the affirmative, and after hearing arguments I have come to the conclusion that the decision arrived at by those courts is correct and should be maintained. *Ex facie* it looks somewhat extraordinary that persons who are not proprietors of the village as the plaintiffs are admittedly not should have a right to interfere with the proprietor's mode of enjoyment of lands of which he is the

1929

H. HUNTER v. RAM RATAN.

Hasan, J.

owner. One of such usual modes is to grant permission to tenants to build houses within the *abadi* site of the village either gratuitously or on receipt of consideration. In this particular case, however, when the matter is approached with care and in the light of the history showing the vicissitudes of title in respect of the ownership of the village the extraordinary nature of the proposition disappears.

According to the narrative recited in that portion of the *wajib-ul-arz* which relates to the history of the title, the village of Debipur was originally founded by one Debi Pande, who was admittedly a remote ancestor of the plaintiffs of this suit. Till the year 1249 Fasli both the title and the possession of the village remained with one Loka Pande, a descendant of Debi. In the year 1250 Fasli the village was mortgaged presumably with possession to Chaudhri Lutf-ullah, the predecessor-in-interest of the first statutory taluqdar of the village Chaudhari Sarfraz Ahmad. Soon after the mortgage the village was incorporated in the taluqdari qabuliat of Lutf-ullah, a fate not uncommon to a large number of villages now within the territorial limits of most of the taluqa in the province of Oudh. Finally, the grant of the *sanad* by the British Government at the re-settlement of the province after the Confiscation of 1858 perfected the taluqdar's title in respect of the village of Debipur. It is quite clear from the record of the case, however, that the vestiges of the old title in the Pandes remained with them, and I am happy to observe that at the first regular settlement of the village they were recognized and maintained by the then taluqdar.

It appears that the first regular settlement of the village of Debipur was effected and completed in the year 1870-71. At that time the head of the Pande family was one Sheo Shanker. In the courts of settlement he instituted three claims in respect of his rights

1929

H. HUNTER v. RAM RATAN.

Hasan, J.

in the village: (1) claim for a certain area of *sir* lands; (2) claim for rights in the *abadi* lands of the village, and lastly, a claim for a certain number of groves. Undoubtedly these were modest and reasonable claims and equally reasonably they were all settled amicably, with the result that a compromise petition was presented to the court on the 21st of January, 1871 in the matter of all the three claims. In the present case we are concerned only with the claim as to the rights in the *abadi* of the village. In that behalf the petition of compromise states that Sheo Shanker shall be entitled to under-proprietary rights in one bigha of the *abadi* land which at that time was designated by No. 217. For the rest of his claim in the *abadi* the compromise states that the plaintiff withdraws it on condition that he would be entitled to re-agitate it in a court of law in the event of an interference by ejectment from the residential house by the taluqdar (exhibit B4). The judgment and the decree which follow give effect to the compromise (exhibits B5 and B2).

It is argued on behalf of the appellants that the effect of the compromise was to extinguish all rights of the Pandes in the village *abadi* except that of residence in the house then in their occupation. This interpretation of the compromise is not to my mind altogether devoid of plausibility, but on a careful consideration of the claim and the grounds on which it was made as embodied in Sheo Shanker's petition of the 16th of March, 1870, and of the language of the judgment and the decree following the compromise I have come to the conclusion that Sheo Shanker's claim of rights in the *abadi* of the village was withdrawn from the cognizance of the court and left unadjudicated upon with liberty to re-agitate it should an interference with his existing rights be made by the taluqdar in future; and dispossession from the residential house was to be reckoned to be the symbol

1929

H. HUNTER v. RAM RATAN.

Hasan, J.

of interference. I realize that this is the right interpretation of the records mentioned above when I come to consider the terms of the *wajib-ul-arz* of the village presumably prepared after the settlement operations had been concluded and judicial pronouncements made in respect of claims of title in relation to the village of Debipur. It is true that Pandes lost the village, but when the record of rights, that is the *wajib-ul-arz*, came to be prepared several rights besides the rights which were decreed in favour of the Pandes by the settlement court came to be recorded in their favour and the record was accepted as correct and valid on behalf of the taluqdar as the endorsement by the settlement officer relating to the verification of the *wajib-ul-arz* shows. The *wajib-ul-arz* records the Pandes' rights in the manure and the scattered and stray trees of the village and also their rights in the *abadi* of the village. These rights are not to be deemed to have been created for the first time by the entries in the *wajib-ul-arz*, but the entries in respect of them must be taken to be a record of pre-existing rights. The interpretation of the entry in respect of the Pandes' rights in the *abadi* of the village is not in question. It is agreed that according to that entry no tenant can build a new structure in the village *abadi* without the permission of the Pandes. These rights to my mind are, as I have already said, remnants of the ancient proprietary title of the village which admittedly was for over a period of 400 years in the hands of the Pande family. In this view of the matter the argument that the entry relating to the rights in the *abadi* is an entry of a custom and that the said custom being unreasonable should not be enforced need not be considered by me.

The last argument on behalf of the appellants was that the structure in question had been put up on a piece of land already possessed for some time past by the tenants defendants and therefore the right upon which the

1929

H. HUNTER v. RAM RATAN.

plaintiffs rely cannot be exercised in respect of that structure. This argument is answered by the finding that the encroachment is only a recent one.

The appeal fails and is dismissed with costs.

Appeal dismissed.

APPELLATE CIVIL.

Before Sir Louis Stuart, Knight, Chief Judge, and Mr. Justice Muhammad Raza.

KUBER SARAN (PLAINTIFF-APPELLANT) *v.* RAGHUBAR AND ANOTHER (DEFENDANTS-RESPONDENTS).* 1929 *August*, 8.

Court Fees Act (VII of 1870), section 7(iv)(c)—Declaratory suits, when involve consequential relief—Suit for declaration and cancellation of document, court fee to be levied upon—Specific Relief Act (I of 1877), section 39—Consequential relief—Suit for declaration that certain deeds were voidable and should be cancelled, if a suit for declaration with consequential relief.

While in cases where a declaration alone is sought a stamp of Rs. 10 is sufficient, in a case under section 39 of Act I of 1877 in which not only is a declaration sought but it is further asked that the document shall be delivered up, cancelled, and its registration set aside, an *ad valorem* fee must be paid under the provisions of section 7(iv)(*c*) of the Court Fees Act (VII of 1870).

Certain suits falling under section 39 of the Specific Relief Act are simple declaratory suits and others are declaratory suits in which consequential relief is desired. Where a person asks for a declaration that certain deeds are voidable against him because his consent to their execution has been caused by fraud and misrepresentation and not only asks for a declaration that those deeds are voidable, but also asks that the deeds should be cancelled and delivered up the suit is distinctly a suit for a declaration with a prayer for consequential relief.

*First Civil Appeal No. 38 of 1929, against the decree of Pandit Tika Ram Misra, Subordinate Judge of Mohanlalganj, Lucknow, dated the 20th of March, 1929, rejecting the plaint.