

APPELLATE CIVIL

Before Mr. Justice Muhammad Raza

RAGHUNANDAN (DEFENDANT-APPELLANT) v. KRISHNA
DUTT AND ANOTHER (PLAINTIFFS-RESPONDENTS)*

1933
October, 9

Zar-i-chaharum—Custom to pay zar-i-chaharum to zamindar on sale of a grove—Mortgage by conditional sale—Mortgagee becoming owner under a compromise—Foreclosure decree—Zamindar, if entitled to zar-i-chaharum on compromise decree for foreclosure.

Where the custom of a grove-holder's liability to pay *zar-i-chaharum* to the zamindar upon a sale of his grove is established, such custom is not limited to private sales but extends also to a case where there has been a foreclosure as the result of a compromise between the parties to the mortgage on the basis of which the mortgagee's claim is decreed by the court against the mortgagor and he becomes the owner. *Sanai Prasad v. Balak Ram* (1), *Utri Din v. Munshi Prag Narain* (2), and *Hira Ram v. Deo Narain* (3), referred to and relied on.

Mr. *Rudra Datt Sinha*, for the appellant.

Mr. *Hyder Husain*, for the respondents.

RAZA, J.:—This is an appeal from a decree of the learned Subordinate Judge of Sitapur, dated the 17th of March, 1932, setting aside a decree of the learned Munsif of Sitapur, dated the 18th of November, 1931.

The facts of the case are sufficiently set out in the judgment of the learned Subordinate Judge, and it is not necessary to repeat them in detail, in disposing of this second appeal.

The dispute in this case relates to *zar-i-chaharum*. The plaintiffs-respondents, Krishna Dutt and Bhairon Dutt, are zamindars of village Bhirya in the district of Sitapur. Kandhai, defendant No. 2, was in possession of two groves in Bhirya as a grove-holder and "ryot." He mortgaged these groves to Raghunandan, defendant

*Second Civil Appeal No. 93 of 1932, against the decree of Babu Gouri Shankar Varma, Subordinate Judge of Sitapur, dated the 17th of March, 1932, reversing the decree of Babu Gopal Chandra Sinha, Munsif of Sitapur, dated the 18th of November, 1931.

(1) (1913) 1 O.L.J., 78.

(2) (1907) 11 O.C., 64.

(3) (1867) N.-W.P., H.C., Full Bench Rulings, 63.

1933

RAGHU-
NANDAN
v.
KRISHNA
DUTT

Raza, J.

No. 1 (appellant), some years ago. It was a mortgage by conditional sale. Raghunandan sued to enforce his mortgage and then he and Kandhai came to terms and filed a compromise on the 24th of January, 1930. The claim was decreed in terms of the compromise. Raghunandan got possession of the groves under the compromise on the 5th of April, 1931. He thus became the owner of the property and got possession thereof as such under the terms of the compromise mentioned above.

The plaintiffs brought the present suit on the 27th of July, 1931, alleging that they were entitled to recover Rs.87-8-0 as *zar-i-chaharum* out of the sum of Rs.350 in lieu of which the defendant No. 1 (Raghunandan) had become the owner of the property under the compromise decree for foreclosure, mentioned above.

The claim was resisted by Raghunandan (defendant No. 1). He denied the alleged custom and pleaded that it had no application to the present case.

The learned Munsif dismissed the suit on the ground that the alleged custom had no application to the present case. He was of opinion that the entry in the *fard-irivaj-baghat* (exhibit 1), filed on behalf of the plaintiffs, does not afford any evidence of a custom entitling the zamindars to claim *zar-i-chaharum* on the foreclosure of a riyaya's grove. He held that the custom of a groveholder's liability to pay *zar-i-chaharum* upon a sale of his grove must be taken to be established; but the custom of *haq-i-chaharum* is limited to the case of private sales only and does not extend to a case a foreclosure through court. The custom recorded in exhibit 1 is in the following terms:

"Whenever any one sells or cuts down his grove, then in the case of its sale or cutting down, one-fourth of the price or one-fourth of the wood, as the case may be, shall be taken from him by the zamindars in exercise of zamindari rights."

The learned Subordinate Judge agreed with the finding of the learned Munsif that exhibit 1 is sufficient evidence of the alleged custom; but he disagreed with the finding of the learned Munsif that the custom does not extend to the passing of a title under a foreclosure decree, even if such a decree is based on a compromise. He held that "the mortgagee's entering into possession of the groves in pursuance of the compromise is nothing better than a private purchase of the groves" and that it makes no difference "if instead of taking a registered sale deed, the same result is brought about by a compromise filed in a suit on the mortgage." He, therefore, allowed the plaintiffs' appeal and decreed their claim with costs against both the defendants.

1933

 RAGHU-
NANDAN
v.
KRISHNA
DUTT

Raza, J.

Raghunandan (defendant No. 1) alone has come to this Court in second appeal.

In my opinion there is no substance in this appeal. There is no doubt that the *fard-i-riwaj-baghat* (exhibit 1) is binding upon the parties to the mortgage (i.e. defendants Nos. 1 and 2). I agree with the lower courts on that point. The case of *Sanai Prasad v. Balak Ram* (1) supports the view taken by the lower courts on that point. The custom of *haq-i-chaharum* is thus sufficiently established. The only question to be decided is whether such custom is limited to private sales and does not extend to a case where there has been a foreclosure as the result of a compromise between the parties to the mortgage on the basis of which the mortgagee's claim is decreed by the court against the mortgagor.

In my opinion this question has been rightly decided by the learned Subordinate Judge in favour of the plaintiffs (zamindars).

I have heard the learned Counsel for the parties and have examined carefully the cases that have been laid before me. I do not think it necessary to refer to more than two of these cases. I may refer to the case of *Utri*

(1) (1913) 1 O.L.J., 78.

1933

RAGHU-
NANDAN
v.
KRISHNA
DUTT

Raza, J.

Din v. Munshi Prag Narain (1). This was a suit by the owner of a village for the recovery of *haq-i-chaharum* on a sale of trees in the village. The owners of the trees mortgaged them by way of a conditional sale to the appellant who subsequently obtained a decree for foreclosure. The mortgagors failed to redeem the mortgage and an order absolute for foreclosure was passed in due course. The *wajib-ul-arz* of the village which was held to be binding upon the parties to the mortgage, provided for the payment of *haq-i-chaharum* (one-fourth of the purchase money) to the landlord on a sale of trees being made by persons in the position of the mortgagors. The learned Judicial Commissioners made the following observation in their judgment in that suit:

“It cannot be doubted that when a conditional sale has ripened into an absolute sale there has been a sale within the meaning of the *wajib-ul-arz*.”

I may also refer to the case of *Hira Ram v. Deo Narain* (2). This case also was a case of conditional sale which had become absolute. It was decided by a Full Bench of the High Court. The following observations were made by the Hon'ble Judges in their judgment in that case:

“One question contested in the courts below was, whether the zamindars' right according to the custom extended to such an alienation as that made to Heera Ram. It has been found to do so, and we have before us in special appeal nothing to affect this finding. It must, therefore, be taken that the zamindars' one-fourth on the sale of property of this description is payable not only upon ordinary sales, but also upon conditional sales, which have subsequently become by foreclosure absolute.”

(1) (1907) 11 O.C., 64.

(2) (1867) N.-W.P. H.C., Full Bench Rulings, 63.

In my opinion no case has been made out to disturb the judgment of the learned Subordinate Judge. Nothing has been urged which weakens the force of the judgment or inclines me to sustain this appeal. Hence I dismiss the appeal with costs.

1933

RAGHU-
NANDAN
v.
KRISHNA
DUTT

*Appeal dismissed.**

APPELLATE CIVIL

*Before Sir Syed Wazir Hasan, Knight, Chief Judge and
Mr. Justice Muhammad Raza*

SHEIKH MOHAMMAD ABDUL AHAD (DEFENDANT-APPELLANT) v. PANDIT ARJUN NATH, PLAINTIFF AND OTHERS, DEFENDANTS (RESPONDENTS)*

1933
October, 9

Civil Procedure Code (Act V of 1908), Order XXXIV, rule 6—Mortgage suit—Decree based on an amicable settlement—Plaintiff's right to obtain relief on sale-proceeds proving insufficient not adjudicated upon—Plaintiff, whether can be decreed relief under Order XXXIV, rule 6, in such a case.

The fact that the decree in a mortgage suit is based on an amicable settlement and the sale is held thereunder does not necessarily take the case out of the purview of rule 6 of Order XXXIV of the Code of Civil Procedure. Where neither the parties amicably settle one way or the other as to the plaintiff's right to obtain a decree under Order XXXIV, rule 6, Civil Procedure Code, nor the Court adjudicates upon it, the right is left open to be adjudicated upon when occasion arises in the future for such an adjudication. *Sri Ram v. Suraj Bali* (1), *Jeuna Bahu v. Parmeshwar Narayan Mahtha* (2), and *Ram Nath v. Nageshur Singh* (3), referred to and relied on.

Mr. *Hyder Husain*, for the appellant.

Mr. *Radha Krishna Srivastava*, for the respondents.

HASAN, C. J. and RAZA, J.:—This appeal arises out of an application made by Pandit Arjun Nath respondent No. 1 for obtaining a decree under Order XXXIV,

*Second Civil Appeal No. 81 of 1932, against the decree of Rai Bahadur Thakur Rachhpal Singh, District Judge of Hardoi, dated the 18th of December, 1931, confirming the decree of Pandit Bisunath Hukku, Additional Subordinate Judge of Hardoi, dated the 8th of August, 1931.

(1) (1926) A.I.R., Oudh, 27.

(2) (1918) L.R., 46 I.A., 294.

(3) (1930) I.L.R., 6 Luck., 132.