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It is thus clear that any enactment affecting procedure must be given effect to at once, and the learned Additional Subordinate Judge appears to have been in error in holding that the notification only applied to those cases of execution of decrees in which till the 1st of April, 1932, neither an enquiry into the nature of the property was held nor its sale had been ordered.

For the reasons given above I allow this appeal with costs, set aside the order of the lower court, and direct that the execution proceedings pending in the court of the Additional Subordinate Judge of Hardoi be transferred to the court of the Collector of Hardoi.

Nanavutty, J.

Appeal allowed.

APPELLATE CIVIL

Before Mr. Justice E. M. Nanavutty

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March, 6

SURAJ BAKHSH SINGH, RAJA BAHADUR (PLAINTIFF-APPELLANT) *v.* BHUGGA AND ANOTHER (DEFENDANTS-RESPONDENTS)*

Landlord and tenant—Abadi—Wajib-ul-arz *providing that tenants had no right to transfer their houses and compounds —Tenants, whether had transferable rights in their house and compound—Usufructuary mortgage by tenants of their house* and ahata *appurtenant to it, validity of—Easements Act (V of* 1882), *as amended by Act (XII of* 1891), *section* 62—*Licensee—Tenants' position with respect to their houses, whether that of licensees.*

Where the words in a *wajib-ul-arz* were: "*Riaya ko bila ijazat malikan deh makan jadid banane ka ikhtiyar nahin rahta wa ta abad rahne gaon ke makan ba kabze rahta hai. Bar wakht nikal jane unke gaon se makan ba kabze malikan deh ajata hai. Kisi bashinde ko ikhtiar intikal niz utha le jane amla makan ka dusre gaon men hasil nahin rahta, va dena arazi uftada ka waste tamir makan ke riaya ko va banwa dena makan riaya ka munhasir ba razamandi jumla malikan deh rahega,*" *held*, that the tenants of the village had no transferable rights in their houses and the *ahatas* appurtenant to them. They

*Second Civil Appeal No. 13 of 1932 against the decree of Shaikh Muhammad Baqar, Additional Subordinate Judge of Sitapur, dated the 27th of November, 1931, upholding the decree of Babu Gopal Chandra Sinha, Munsif, Sitapur, dated the 31st of July, 1931.

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had therefore no power to execute a usufructuary mortgage of their right to reside in their house and the adjacent compound. They were mere licensees occupying their house as an appurtenant to their holding, and under section 62 of the Easement Act (V of 1882) as amended by Act (XII of 1891), the licence to reside in the house must be deemed to be revoked where the licence was granted for a specific purpose and the purpose is abandoned or has become impracticable. *Raja Ali Mohammad Khan* v. *Chhedan* (1), *Ram Raj Singh* v. *Tej Singh* (2), and *Nawab Mohammad Ali Khan* v. *Badrulnisa* (3), distinguished. *Sri Girdhariji Maharaj* v. *Chhote Lal* (4), *Chajju Singh* v. *Kanhia and others* (5), *Muhammad Rafi* v. *Telhu Singh* (6), *Muhammad Usman* v. *Babu* (7), *Ghirao* v. *Sardar Karam Singh* (8), *Ram Harakh* v. *Bhaiya Ambika Datt Ram* (9), and *Hanwant Singh* v. *Kampta* (10), relied on.

Mr. ***B. N. Shargha***, for the appellant.

Respondents in person.

NANAVUTTY, J.:—This is a plaintiff's appeal against a judgment and decree of the Additional Subordinate Judge of Sitapur, dated the 27th of November, 1931, dismissing the plaintiff's appeal against the judgment and decree of the Munsif of Sitapur, dated the 31st of July, 1931, which had dismissed the plaintiff's suit as against the respondents Bhugga and Durga with costs.

The facts out of which this appeal arises are as follows:

Raja Bahadur Suraj Bakhsh Singh, Taluqdar of Kasmanda, filed a suit against Moinuddin, Bhugga and Durga on the 17th of February, 1931, alleging that he was the sole proprietor of village Wazirnagar, pargana Misrikh, district Sitapur, that Bhugga and Durga were his tenants and *riaya*, that they occupied house No. 89 and *ahata* No. 140 in village Wazirnagar as his *riaya*, that on the 20th of May, 1930, Bhugga and Durga executed a usufructuary mortgage of this

(1) (1912) 15 O. C., 91.
(2) (1926) 3 O. W. N., 964.
(3) (1927) 4 O. W. N., 1106.
(4) (1898) I. L. R., 20 All., 248.
(5) (1881) W. N., 114.
(6) (1902) W. N., 140.
(7) (1910) 8 A. L. J., 61.
(8) (1918) 5 O. L. J., 453.
(9) (1918) 5 O. L. J., 642.
(10) (1911) 11 I. C., 285.

house and compound in favour of Moinuddin of Aurangabad for Rs.350, that the terms and conditions of the mortgage were (*a*) that the period of the mortgage was 20 years, (*b*) that the mortgagee could maintain the present house as long as he liked or demolish it and have a new house constructed thereon, (*c*) that the mortgagee could live in the mortgaged house or let it out on hire, (*d*) that the mortgagors were not allowed to redeem the house within 20 years (the mortgagors are present in Court and according to their own declarations Bhugga is 60 years of age and Durga 50), and (*e*) that it was stipulated that within one year after the expiry of 20 years the mortgagors would be allowed to redeem the mortgaged property on paying in a lump sum the mortgage money together with costs of annual repairs, cost of constructing new building plus interest at one per cent. per mensem on all these items, and that if the mortgage money together with all these items was not paid within one year of the expiry of the period of 20 years, then the mortgage deed would be deemed to be a sale-deed, and the mortgagee would become the sole proprietor of the house and *ahata* which would be deemed to have been sold in lieu of the money due under this mortgage deed (exhibit 2).

It is to be noted that the mortgagee Moinuddin is no tenant or *riaya* of the Raja and that he lives in village Aurangabad which is 14 miles from the house mortgaged. He is a *julaha*, or weaver, by caste, and is the zilledar of Munshi Mushtaq Husain, zamindar of Ant. The consideration of the mortgage entered in the deed is set forth as follows:

(1) Paid before the Sub-Registrar Rs.100 in cash.

(2) Cost of stamps Rs.10.

(3) On account of sums borrowed from time to time from Moinuddin with interest up-to-date Rs.240.

*Total Rs.*350.

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The plaintiff Raja has brought the present suit on the allegation that this mortgage deed executed by Bhugga and Durga is contrary to the terms of the *wajib-ul-arz* of village Wazirnagar, and that the execution of this deed by defendants in favour of Moinuddin amounts to an abandonment of the house and compound, and that the plaintiff should, therefore, be given a decree for possession of the same.

Para. 9 of the *wajib-ul-arz* runs as follows:

> "*Abadi gaon No.* 306 *ba arazi mushtarka deh men wakai hai . . . Riaya ko bila ijazat malikan deh makan jadid banane ka ikhtiyar nahin rahta wa ta abad rahne gaon ke makan ba kabze rahta hai. Bar wakht nikal jane unke gaon se makan ba kabze malikan deh ajata hai. Kisi bashinde ko ikhtiar intikal niz utha le jane amla makan ka dusre gaon men hasil nahin rahta, va dena arazi uftada ka waste tamir makan ke riaya ko va banwa dena makan riaya ka munhasir ba razamandi jumla malikan deh rahega.*"

Defendant No. 1 Moinuddin appeared in the court of the Munsif and admitted the plaintiff's claim and the suit was decreed against him. Defendants 2 and 3, Bhugga and Durga, who are the respondents before me, did not appear in the Munsif's Court and the trial proceeded *ex parte* against them. The plaintiff examined one witness Abdul Karim who deposed that he was the plaintiff's zilledar in Wazirnagar, that Bhugga and Durga used to live there as *riaya*, and that they still lived in the village but after the execution of the deed in favour of Moinuddin they were living in the house of a relation and not in their own house, and that the mortgage deed was in fact a sale-deed because its terms show it to be such, and that he came to know of this fact from Moinuddin as well, and that the custom of the village is that a *riaya* cannot transfer his house. The Munsif, however, dismissed the

plaintiff's suit against defendants 2 and 3 holding that the tenants were competent to mortgage their *riaya* houses to anybody they liked. The learned Additional Subordinate Judge of Sitapur has upheld the judgment of the learned Munsif of Sitapur and has dismissed the appeal of the plaintiff, who has, therefore, filed this second appeal.

Nanavutty, J.

The principal point for determination in this appeal is whether the tenants in village Wazirnagar have got a right to transfer and execute a possessory mortgage of their right to occupy their tenant houses in the said village. The learned counsel for the plaintiff-appellant has argued that the defendants Bhugga and Durga are mere licensees, and that their licence to live in the house as tenants of the zamindar could not be transferred, and that the transfer in question has the effect of revoking the licence. It is clear from the terms of the *wajib-ul-arz* quoted above that the defendants Bhugga and Durga, who are mere tenants and *riaya* of the Raja, could not mortgage their house and *ahata*. The record of right of village Wazirnagar contains no express words authorizing the tenant of a house in the *abadi* to transfer his house by mortgage to anyone else. The question for decision in the present suit came up for decision in the Allahabad High Court in *Sri Girdhariji Maharaj* v. *Chote Lal* (1), and the learned Judges (Sir John Edge and Mr. Justice Burkitt) made the following observation:

> "He (the plaintiff) did not specifically set up in his plaint, or apparently, in his argument before our brother Aikman in this Court, the real point on which this case must be decided, and that is that, 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

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

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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 wood-work of the house. There is good reason why such a custom should have grown up and have been established. If it were otherwise, agricultural tenants or cultivators who, for the purposes of the cultivation of the agricultural lands of the village, were permitted by the zamindar to build or occupy a house in the *abadi* of the particular village might sell the right to occupy the house to some person unconnected with the cultivation of the agricultural land in the village, and thus in course of time the *abadi* provided and reserved by the zamindar for the use of those cultivating his lands would come to be occupied by persons in no way connected with the cultivation of the agricultural lands in the village. In such a case the zamindar would practically lose his rights in the *abadi* and would be compelled to restrict the area of culturable land in the village so as to provide sites for fresh houses for agriculturists. It might happen that a purely agricultural village, every single site in the *abadi* of which belonged to the zamindar solely, might come to be a village, for example, of weavers, who neither paid rent to the zamindar or promoted the cultivation of the agricultural lands of the village."

Further on their Lordships go on to observe as follows :

> "The occupier's right is a mere personal right of residence."

A full Bench of the Allahabad High Court in *Chajju Singh* v. *Kanhia and others* (1) held that the zamindars of a village are as a rule and presumably, the owners of all the house sites in their villages; and that a house left unoccupied by a tenant lapses to the landlord in the absence of heirs or other lawful assignees of the last occupier. "Other lawful assignees" must not be understood to mean purchasers by private or auction sale from such occupiers.

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The statement of the law set forth in the ruling cited above was accepted in a Letters Patent Appeal reported in *Muhammad Rafi* v. *Telhu Singh* (2). The learned Judges who tried that case made the following observation :

> "The principles therein laid down commend themselves to us and appear to be in harmony with the general law regulating the relation of landholder and the tenant. It must never be forgotten that the landholder in these Provinces is under an obligation to pay revenue nominally for every inch of ground which he holds from the State. His responsibility might be very seriously endangered if it were placed beyond his power to determine what persons should be allowed to occupy the homesteads necessary for the proper cultivation of the village lands. The ground available for homesteads is, in many parts of these Provinces, very small in area and confined. The occupation of such homestead grounds by artisans or by tenants, who were not concerned in the tillage of the land surrounding the homesteads, might prevent labour being forthcoming for the purpose. We agree with

(1) (1881) W. N., 114. (2) (1902) W. N., 140.

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the learned Judges who decided that case (I. L. R. 20 All., 248) and we hold that it is for the plaintiff who by his action if not by his words pleads a special contract in derogation of this general custom, to prove it, and to prove it by express terms, not by inference from words of doubtful import. The right to sell does not necessarily cover the right to mortgage."

Similarly in *Muhammad Usman* v. *Babu* (1) it was held by Sir JOHN STANLEY, C. J. and Sir P. C. BANERJI that the claim of a tenant to transfer a right of residence means that a tenant may by assignment transfer to a stranger a right of residence without the consent of the zamindar, and so force upon the latter a tenant who may be distasteful to him, thus converting a right of tenancy into a right of permanent occupancy. It was held in that case that the zamindar was entitled to recover possession of the site of the house.

So too in Oudh Mr. Justice LINDSAY held in *Ghirao* v. *Sardar Karam Singh* (2) that if a person has been ejected from his agricultural holding in a village he has no right to occupy a house in the village against the will of the zamindar. And again in *Ram Harakh* v. *Bhaiya Ambika Datt Ram* (3) it was held by a Bench of the late Court of the Judicial Commissioner of Oudh, that where a tenant is found in occupation of a house in the *abadi* of an agricultural village, the village site being the landlord's property, there is a presumption that he holds the site as appurtenant to his tenancy and has no right to retain it against the wish of the landlord on ceasing to be a tenant in the village.

In *Hanwant Singh* v. *Kampta* (4) Mr. Justice PIGGOTT of the Allahabad High Court held that the residential tenant of a house situated in a village in the United Provinces has, in the absence of any evidence as to a contract to the contrary, no right to sell the site on

(1) (1910) 8 A. L. J., 61.
(2) (1918) 5 O. L. J., 453.
(3) (1918) 5 O. L. J., 642.
(4) (1911) 11 I. C., 285.

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Nanavutty, J.

which the house stands, and that he cannot even sell the right of residence upon the site in question.

The cases cited by the learned Additional Subordinate Judge and by the Munsif, namely, *Raja Ali Mohammad Khan* v. *Chhedan* (1) and *Ram Raj Singh* v. *Tej Singh* (2) are cases of grove-holders and a mortgage by a grove-holder stands on a very different footing from a mortgage of a *riaya's* house by a tenant residing in a village. These rulings have, in my opinion, no relevancy to the question for determination in the present suit.

The ruling reported in *Nawab Mohammad Ali Khan* v. *Badrulnisa* (3) is also not applicable to the present case, because the house which was transferred in that case was a house situated in a town and not a house situated in a village of these Provinces, and it was held in that case by the late Mr. Justice MISRA, that in the case of the towns, unless a custom to the contrary is established, the occupiers of houses should be considered to have a power of transfer of the right to occupy the sites on which their houses stand. This ruling can be easily distinguished from the facts of the present case. Wazirnagar is not a town but a purely agricultural village in the heart of the district of Sitapur, and I am of opinion, therefore, that the ruling above cited has also no applicability to the facts of the present case.

Following the authorities cited above, I hold that the tenants Bhugga and Durga had no power to execute a usufructuary mortgage of their right to reside in the house No. 89 and the adjacent compound No. 140 in village Wazirnagar to Moinuddin, defendant No. 1, as the defendants-respondents have no transferable rights in the house and *ahata* in question. They were mere licensees occupying the house in question as an appurtenant to the holding, and under section 62 of the Easement Act (V of 1882) as amended by Act XII of

(1) (1912) 15 O. C., 91. (2) (1926) 3 O. W. N., 964.
(3) (1927) 4 O. W. N., 1106.

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1891, the licence to reside in the house must be deemed to be revoked where the licence was granted for a specific purpose and the purpose is abandoned or has become impracticable.

In this view of the matter it is unnecessary for me to discuss the further question involved in this suit whether the usufructuary mortgage deed executed by Bhugga and Durga really amounts to a sale-deed.

Nanavutty, J.

For the reasons given above, I allow this appeal, set aside the judgments and decrees of the two lower courts, so far as they affect defendants 2 and 3, and decree the plaintiff's suit against them also. The plaintiff's suit has already been decreed by the trial court against defendant No. 1. The plaintiff will get his costs in all courts.

Appeal allowed.

APPELLATE CRIMINAL

Before Mr. Justice E. M. Nanavutty and Mr. Justice H. G. Smith

1933 *March*, 6

DAULAT RAM (ACCUSED-APPELLANT) *v.* KING-EMPEROR (COMPLAINANT-RESPONDENT)*

Criminal Procedure Code (Act V of 1898), sections 164, 167(3), 533, 236 and 237—Non-compliance with the provisions of section 164 of the Code of Criminal Procedure, effect of—Section 533, if cures the defect—Defects which are cured by section 533 of the Code of Criminal Procedure—Confession—Retracted confession not proved to be duly made and voluntary, whether admissible in evidence—Magistrate remanding accused to police custody after recording his confession without giving reasons, effect of—Indian Penal Code (Act XLV of 1860), section 302—Accused charged with murder under section 302 of the Indian Penal Code—Conviction, if can be altered into one under section 411 of the Indian Penal Code.

Held, that it is an essential condition laid down in section 533 of the Code of Criminal Procedure that non-compliance

*Criminal Appeal No. 88 of 1933, against the order of H. J. Collister, Sessions Judge of Lucknow, dated the 4th of February, 1933.