

APPELLATE CIVIL

Before Mr. Justice Bisheshwar Nath Srivastava

BINDA PRASAD (DEFENDANT-APPELLANT) v. PANDIT

BIHARI TEWARI (PLAINTIFF-RESPONDENT)*

1933
April, 22

Under-proprietary right—"Qabzadari right", meaning of—Use of the word "qabzadari" in the Settlement Court decree, when to mean occupancy—Holder of such a decree, what is—Proprietor not objecting to some constructions being made, whether can object to construction of pucca building.

The words "qabzadari right" do not necessarily mean occupancy right and it has sometimes been construed even as meaning under-proprietary right, but where circumstances show that a settlement decree was passed not because any proprietary right was possessed, but because the persons concerned had at sometimes been *muqaddams*, the use of the word *qabzadari* in the decree is in the sense of occupancy and not in the sense of under-proprietary right and the holder of such a decree passed on payment of ordinary rent with a deduction of 2 annas per rupee is only an occupancy tenant and as such he is not entitled to construct a *pucca* building without the permission of the proprietor. The fact that the proprietor did not object to the making of some constructions on a portion of the land cannot disentitle him from objecting to the construction of a *pucca* building.

Mr. S. N. Roy, for the appellant.

Mr. M. Wasim, for the respondent.

SRIVASTAVA, J.:—This is a defendant's appeal against the decree, dated the 31st of May, 1934, of the learned Subordinate Judge of Fyzabad reversing the decree dated the 4th of December, 1933, of the learned Munsif of that place.

The plaintiff-respondent, who is admittedly the proprietor of village Paharganj, sued the defendant-appellant on the allegation that he was merely an occupancy tenant of plot No. 241 corresponding to old No. 91 in village Paharganj and that he had wrongfully started

*Second Civil Appeal No. 224 of 1934, against the decree of M. Ziauddin Ahmad, Subordinate Judge of Fyzabad, dated the 31st of May, 1934, reversing the decree of Pandit Hari Krishna Kaul, Munsif of Fyzabad, dated the 4th of December, 1933.

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constructing a *pucca* building on a portion of the said plot. He prayed for demolition of the building and for a permanent injunction restraining the defendant from erecting any building on the said plot. The defendant resisted the suit on the ground that he was an under-proprietor of the plot in suit and was entitled to construct the building without the necessity of asking the plaintiff's permission. He also pleaded acquiescence on the part of the plaintiff. The trial Court held that the defendant was an under-proprietor of the plot in question and accordingly dismissed the suit. On appeal the learned Subordinate Judge disagreed with this finding of the trial Court and held that the plaintiff had only occupancy rights in the plot in dispute. He also in agreement with the trial Court held that the plaintiff was not estopped from maintaining the suit by reason of any acquiescence. As a result of these findings he decreed the suit and ordered the demolition of the building. The defendant was also restrained from constructing any building in future on the plot in dispute without the permission of the plaintiff.

The main contention urged on behalf of the appellant is that he possessed under-proprietary rights in the plot in suit. The determination of this question must be based principally on the interpretation of the decree of the settlement Court, exhibit A-1, dated the 24th of October, 1872. It appears from the judgment of the settlement Court that the defendant's father Saheb Din claimed an area of 14 bighas 11 biswas which admittedly included the plot in suit as *sir* in the right of zamindari. I am prepared to agree with the appellant's contention that this must be construed as a claim for under-proprietary right. But the finding arrived at in this judgment was that Saheb Din or his ancestors had never been in proprietary possession of the village. They had only held management of it at certain times as *muqaddams*. It was further held that Saheb Din

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was entitled to a decree for *qabzadari* right in the land in suit in accordance with the principle laid down in ruling No. 4 of 1868. The ruling referred to is Financial Commissioner's Select Case No. 4 of 1868, (*Thamman Singh and Kesree v. Kindur and Oomrao Singh*). It was held in this ruling, that although plaintiffs can neither get ex-proprietary *sir* nor a right of occupancy under section 4 of the Oudh Rent Bill yet they can prosecute their suit to a cultivating right of occupancy and the Settlement Officer will try and dispose of such a case on its merits. The operative part of exhibit A-1 also shows that the decree for *qabzadari* right in this case was passed on payment of the ordinary rent with a deduction of 2 annas per rupee. I have examined the judgment of the settlement Court in the light of the Financial Commissioner's Select Decision No. 4 of 1868. I feel satisfied that the right granted to Saheb Din was not an under-proprietary right. It is true that the words *qabzadari* right do not necessarily mean occupancy right and it has sometimes been construed even as meaning under-proprietary right but the circumstances of the present case showing that the defendant's ancestors had never possessed any proprietary right in the village and that the decree was passed in their favour only because the defendant's ancestors had at sometimes been *muqaddams* of the village in my opinion clearly indicate that the word *qabzadari* was used in the decree exhibit A-1 only in the sense of occupancy and not in the sense of under-proprietary right. The fixation of rent at 2 annas in the rupee less than that of ordinary tenants also seems to point to the same conclusion. I therefore agree with the lower Court that the defendant possessed only occupancy right and not under-proprietary right in the plot in suit.

It was also argued that the defendant had in the past constructed a godown and established a brick kiln on a portion of the plot in suit without the permission

of the plaintiff. The argument was that these acts of the defendant which were not questioned by the plaintiff show that the parties construed the decree of the settlement Court as giving the defendant a right to make constructions of a permanent character without the plaintiff's permission. I do not think that any such inference is possible in the present case when the terms of the decree clearly show that the rights decreed to him were only that of a tenant and not that of an under-proprietor. Ordinarily a tenant can make improvements on his holding but has no authority to use it for any purpose inconsistent with the purpose for which the land has been given to him. In the present case exhibit A-1 shows that the decree was passed in favour of the defendant's father, as *qabzadari* for agricultural purposes on payment of a somewhat favourable rent. The fact that the plaintiff did not object to the defendant making some constructions on a portion of the land cannot disentitle him from objecting to the construction of the present building. It has been found by both the lower courts that when the construction was started a notice was served on the defendant by the plaintiff and that the present suit was instituted when the defendant continued to build in spite of receiving the notice. In the circumstances I find that the decision of the lower Court is correct and ought to be upheld.

I therefore dismiss the appeal with costs.

Appeal dismissed.

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