

The appeal is partly allowed and the lower Court's decree modified. The decree is set aside so far as it makes the appellants 1 to 3 liable personally to the extent of Rs.13,100 and interest thereon at 6 per cent. per annum. The rest of the decree will stand. We order parties to bear their own costs in this Court.

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UDDIN
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THAKUR
RAM
RAJHAN
SINGH

Appeal partly allowed.

APPELLATE CIVIL

*Before Mr. Justice Bisheshwar Nath Srivastava and
Mr. Justice E. M. Nanavutty*

KAMTA PRASAD AND OTHERS (PLAINTIFFS-APPELLANTS) v.
RAJA PIRTHIPAL SINGH AND OTHERS (DEFENDANTS-
RESPONDENTS)*

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April, 8

Oudh Sub-Settlement Act (XXVI of 1866), rule 10, essentials of—Claim to under-proprietary rights—Claimant's ancestors former proprietors—Village granted to a taluqdar—Some branches declared under-proprietors—Ejectment notice cancelled—Claimant entitled to under-proprietary rights—Under-proprietary rights—Position of several branches of a family in regard to lands held by them not different—Members of some branches recognized as under-proprietors, if member of other branch has same rights.

A person claiming to be an under-proprietor has, under rule 10 of the Oudh Sub-Settlement Act, to establish: (1) that he or his ancestors were former proprietors, (2) that the lands in suit had been held by him or some person from whom he has inherited some time since 13th February, 1944, and (3) that the land had been held by such person as his *sir* or *nankar* when he was in proprietary possession.

Where, therefore, the ancestors of a claimant of under-proprietary rights were admittedly the former proprietors of a village, their claim for sub-settlement having been dismissed owing to the village having already been included in the *sanad* of a *taluqdar*, but they were allowed to make a claim for *sir* in their possession and the members of certain other branches of the same family were declared to be under-proprietors of the *sir* land in their respective cultivation, and the *jamabandi*

*First Civil Appeal No. 37 of 1934, against the decree of Babu Bhagwat Prasad, Subordinate Judge of Bara Banki, dated the 22nd of December, 1933.

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of the first settlement showed that certain plots of land in suit were in possession of the grand-uncle of the claimant at that time and he continued in possession of these plots and a notice of ejectment issued against him in 1880 was cancelled on the ground that he was not a mere tenant, the Court may, in a suit for claim to under-proprietary rights, presume in the above-circumstances that the claimants' ancestors were entitled to under-proprietary rights in the said plots, and the onus shifts on to the *taluqdar* to show the contrary. *Mohammad Mumtaz Ali Khan v. Mohan Singh* (1), *Amrit Lal v. Jang Bahadur Singh* (2), referred to and *Mahmud-ul-Hasan Kirmani v. Baldeo Singh* (3), distinguished.

Where the position of one branch of a family in regard to certain lands in possession of that branch at the time of settlement is not different from the position of other branches of the same family in relation to the lands in possession of those branches, and the members of the latter branches have been recognized to be under-proprietors of their lands, it is reasonably certain that a member of the former branch is entitled to the same rights in such of the lands as were in possession of his grand-uncle at the first regular settlement.

Messrs. *M. Wasim, Khaliq-uz-Zaman and Ali Hasan*, for the appellants.

Mr. *Hyder Husain*, for the respondents.

SRIVASTAVA and NANAVUTTY, JJ.:—This is a plaintiffs' appeal against the decree dated the 22nd of December, 1933, of the learned Subordinate Judge of Bara Banki dismissing the plaintiffs' suit for a declaration that they along with Ram Dulare, defendant No. 9, were under-proprietors of the 18 plots in suit measuring 24 bighas 2 biswas and 18 biswansis situate in village Baghora in the Bara Banki District.

The following pedigree will be helpful in understanding the relationship between Ram Dulare, defendant No. 9, and other members of his family who figure in earlier litigations which have a material bearing on the case.

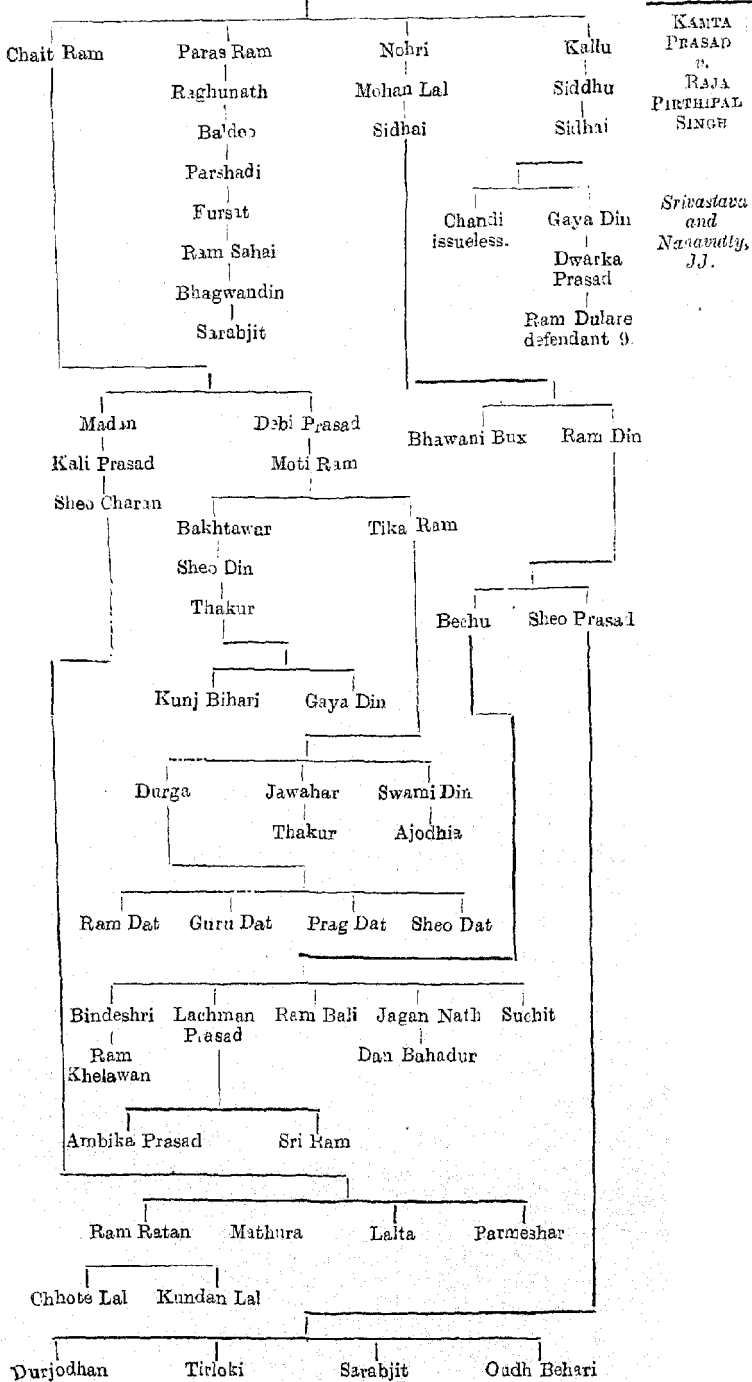
(1) (1923) L.R., 50 I.A., 202.

(2) (1911) 14 O.C., 196.

(3) (1930) 7 O.W.N., 443.

CHHATTAR PABA

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On the 19th of May, 1911, Dwarka Prasad, father of defendant No. 9, executed a deed of mortgage (exhibit 1) in respect of the lands in suit in favour of the plaintiffs and one Jwala Prasad who is now represented by his widow defendant No. 10. On 21st December, 1912, another mortgage deed (exhibit 2) was executed in respect of the same lands in renewal of the previous mortgage exhibit 1 by Dwarka and his son Ram Dulare defendant No. 9 in favour of the same mortgagees. In 1929 the taluqdar sued Ram Dulare for enhancement of rent of the lands in suit treating him as an occupancy tenant. The plaintiffs intervened in their right as usufructuary mortgagees of the lands in dispute. The suit was dismissed by the trial Court but was decreed on appeal by the Commissioner whose order was affirmed by the Board of Revenue. This has led to the institution of the present suit.

The plaintiffs' case is that the ancestors of Ram Dulare defendant No. 9 were old zamindars of village Baghora, that Dwarka Prasad, father of defendant No. 9, and his ancestors had been in possession of the lands in suit as under-proprietors and sir-holders from the Shahi times and that the defendant No. 9 is the under-proprietor and not an occupancy tenant of the land in suit. The plaintiffs claim that accordingly they have the same rights as mortgagees with possession as are possessed by defendant No. 9. The taluqdar of the Surajpur estate of which village Baghora is a part had created a trust of the Surajpur taluqa and defendants 1 to 8 were impleaded as trustees under the said trust.

The trustee defendants denied that Ram Dulare or his ancestors had any under-proprietary rights in the plots in suit. They pleaded that he was only an occupancy tenant and that the plaintiffs have accordingly acquired no rights under the mortgaged deeds set up by them.

The learned Subordinate Judge held that the ancestors of defendant No. 9 were the old zamindars of vil-

lage Baghora but the plaintiffs had failed to prove satisfactorily the other conditions requisite for establishing a claim for under-proprietary rights under rule 10 of the Oudh Sub-Settlement Act (XXVI of 1866). He therefore dismissed the claim. The plaintiffs appealed, and during the pendency of the appeal in this Court an application was made that the abovementioned trust had been revoked by the taluqdar and by agreement of parties the name of Raja Pirthipal Singh taluqdar has been substituted in place of the defendants-respondents Nos. 1 to 8.

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The only question which has been argued in this Court is as regards the title of Ram Dulare to be an under-proprietor. It is agreed, and there can be no question about it, that a person claiming to be an under-proprietor had under rule 10 of the Oudh Sub-Settlement Act to establish (1) that he or his ancestors were former proprietors, (2) that the lands in suit had been held by him or some person from whom he has inherited sometime since 13th February, 1844, and (3) that the land had been held by such person as his *sir* or *nankar* when he was in proprietary possession. As already stated the lower court has found that the first condition is satisfied in this case, and this finding has been accepted before us by the learned counsel for the defendants-respondents. The controversy therefore is confined as to whether the other two conditions have been satisfied or not.

In order to determine this it is necessary to review in brief the earlier litigations which have taken place between the taluqdar on the one hand and Ram Dulare's ancestors on the other. Exhibit 3 is the copy of a plaint dated the 7th of November, 1863, in a suit brought by Sheo Prasad, Ram Sahai and Bechu in the Settlement Court against Rani Talewand Kuar, taluqdar of Surajpur alleging that they were zamindars of village Baghora for many generations and that they had been wrongfully dispossessed of the village by the Rani during the Mutiny of 1857. They prayed that the village should

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be decreed to them. The suit was dismissed on the ground that the village had been included in the taluqdari "*sanad*" granted to Rani Talewand Kuar, *vide* exhibit 4. On the 21st of October, 1864, a similar suit was instituted again by Ram Sahai, Sheo Dat, Bechu and Dwarka Prasad. It was alleged in the plaint, exhibit 5, in this suit that though they had been dispossessed of the village yet the *sir* was until now in the plaintiff's possession. This suit was also dismissed (exhibit 6), but it was added that the claimants could sue for their *sir* separately. They were also directed to file a list of their *sir* plots. On the 28th of October, 1864, Ram Sahai, Dwarka, Sheo Dat and others made an application (exhibit 8) complaining that the patwari was not giving them the survey numbers of their *sir* plots. A list of *sir* plots was supplied to Ram Sahai on the 9th of February, 1865 (*vide* exhibit 9), and he filed a suit in respect of them. Exhibit 11 is a copy of the proceedings in the suit. On the 5th of July, 1869, the suit was decreed and Ram Sahai was held entitled to retain the 30 bighas 1 biswa *sir* lands claimed by him at an annual rent of Rs.46-14. It is common ground between the parties that under-proprietary rights were decreed to Ram Sahai in respect of this land.

On the 6th of May, 1871, a similar claim was made by Chandi for a decree in respect of his *sir* land measuring 26 bighas 10 biswas (exhibit 17). The plaint in this case was rejected on the ground that the plaintiff had no cause of action. It is difficult to understand this order, but presumably it was made on the ground that he had no cause of action because he continued to be in possession and had not been dispossessed. In 1880 the taluqdar issued a notice of ejectment against Chandi treating him as a tenant at will. Chandi brought a suit to contest the notice of ejectment. It was held that Chandi was a descendant of the old zamindars and not a mere tenant. The notice of ejectment was accordingly cancelled (exhibit 7).

It appears that at the second settlement Dwarka, father of defendant No. 9, was recorded as an occupancy tenant of the land in suit, but there are no documents on the record to show the circumstances under which, or the grounds on the basis of which, this entry came to be made. On the 15th of May, 1894, Dwarka made an application (exhibit A-1) for correction of the records and prayed that his name should be entered as an under-proprietor in register No. 3 instead of as an occupancy tenant in register No. 4. Exhibit A-3 is the statement of Dwarka made in these proceedings. The application was ordered to be filed, *vide* exhibit A-2, on the 7th of July, 1894 with the remark that the matter had already been decided.

In 1909 a notice of ejectment was issued by the taluqdar against Oudh Bihari, Sarabjit and Durjodhan, sons of Sheo Prasad. The Revenue Court cancelled the notice holding them to be under-proprietors. The taluqdar thereupon filed a suit in the Civil Court for a declaration that they were not under-proprietors. This suit was finally dismissed by the Court of the Judicial Commissioner of Oudh (exhibit 16) on the 7th of May, 1914. It was held by the Judicial Commissioner that the defendants' ancestors were old zamindars of village Baghora and had been in cultivation of the plots in suit as *sir* and were therefore entitled to under-proprietary rights in the said plots.

Reliance has also been placed on exhibits 19 to 38 which are receipts for rent given by the taluqdar showing that he accepted the rent from the plaintiffs who are described in the receipts as mortgagees.

The position therefore stands thus: The ancestors of Ram Dulare defendant No. 9 were admittedly the former proprietors of village Baghora. Their claim for sub-settlement of the village was dismissed because the village had been already included in the "*sanad*" of the taluqdar, but they were allowed to make a claim for *sir* lands in their possession. Ram Sahai, a cousin of Ram

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Dulare made such a claim and obtained a decree for under-proprietary rights from the Settlement Court in respect of his *sir* lands. The sons of Sheo Prasad were also declared under-proprietors of the *sir* lands in their cultivation by the Judicial Commissioner of Oudh in 1914. Exhibit 12, the *jamabandi* of the first settlement, shows that 11 plots out of the 18 plots in suit were in possession of Chandi, grand-uncle of Ram Dulare at that time. Chandi had also brought a suit in the Settlement Court claiming under-proprietary rights in the lands in his possession, but curiously enough the plaint was rejected on the ground that he had no cause of action. He, however, continued in possession of the said lands and a notice of ejectment issued against him in 1880 was cancelled on the ground that he was not a mere tenant. It may be noted that in those days it was usual for the Revenue Courts in suits in which a notice of ejectment was contested on the ground that the claimant possessed proprietary or under-proprietary rights to decree the suits on a finding that he was not a mere tenant, if the Court was of opinion that a *prima facie* case for proprietary or under-proprietary rights had been made out. It was repeatedly held in the old Judicial Commissioner's Court that such a finding gave the taluqdar a cause of action for a suit in the civil court for a declaration that the claimant did not possess any proprietary or under-proprietary rights (e.g. *Amrit Lal v. Jang Bahadur Singh* (1)). This view held sway till 1923 when it was overruled by their Lordships of the Judicial Committee in *Mohammad Muntaz Ali Khan v. Mohan Singh* (2). But during this long period of 1880 to 1923 no such suit was instituted by the taluqdar against Chandi or after him against Dwarka Prasad or his son Ram Dulare as he should have done if according to the view of law prevailing at the time he had questioned their right as under-proprietors. We have mentioned this only as an evidence of the Taluqdar's conduct and

(1) (1911) 14 O.C., 195.

(2) (1923) L.R., 50 I.A., 202.

not as in any way debarring him from disputing the plaintiff's claim in the present suit.

It is obviously impossible for any one at the present day to adduce direct evidence about the lands which were in possession of his ancestors as *sir* while they were in proprietary possession during the Shahi times or even at some time during the twelve years preceding the annexation. Oral evidence on these points at the present day is altogether out of question. Documentary evidence also is practically impossible because at that time there was no regular system of record of rights like what we have now and because the khasra numbers, which are so helpful for the purpose of identifying the plots, have come into existence only since the first regular settlement. In such circumstances we think it justifiable for the Court to make certain reasonable presumptions. Taking all the circumstances of the case into consideration we are of opinion that it would not be unreasonable to presume that conditions 2 and 3 mentioned above are satisfied in the case of the 11 plots out of the plots in suit which were recorded in the name of Chandi at the time of the first regular settlement. At any rate we think that the facts which have been established in the present case are sufficient to shift the onus on to the defendant taluqdar to show the contrary.

The lower court as well as the learned counsel for the defendant-respondent has placed strong reliance on the decision of a Bench of this Court in *Mahmud-ul-Hasan Kirmani v. Baldeo Singh* (1). Emphasis has been laid on the following observations made in that case:

"It may be that it is very difficult for the defendants to prove at the present time that the lands in suit had been held by them or their ancestors as *sir*, but the Court cannot help them. It cannot be presumed that the lands which were held by them or their ancestors in 1869 had been held by them as *sir* also when they were:

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in proprietary possession at a very remote period. Hard cases must not be allowed to make bad law."

We are in entire agreement with these remarks, but each case must be judged on its own merits. In that case even the fact of the defendants' ancestors having formerly been proprietors of the village was not free from doubt. Beyond the fact of certain lands being recorded in the possession of their ancestors in 1869 there was no other evidence to indicate that the lands had been held by them as *sir*. We are therefore of opinion that that case does not afford any parallel to the present one and is distinguishable. There is nothing in the present case to suggest that the position of the branch of Ram Dulare in regard to the lands in possession of that branch at the time of settlement was different from the position of the branch of Ram Sahai or from that of the branch of Sheo Prasad in relation to the lands in possession of those branches. As Ram Sahai and the sons of Sheo Prasad have been recognized to be under-proprietors of their lands, it seems to us reasonably certain that Ram Dulare is entitled to the same rights in such of the lands as were in possession of his grand-uncle Chandi at the first regular settlement.

We accordingly allow the appeal, set aside the decree of the lower court and decree the plaintiffs' claim for a declaration that they and defendant No. 9 are under-proprietors and not *qabzadars* of the following eleven plots in suit, noted at the foot of the judgment. The claim in respect of the remaining plots is dismissed. The parties will receive and pay costs in proportion to their success and failure:

<i>First Regular Settlement</i>			<i>Present</i>
	Survey number		Survey number
1.	201 corresponding to	..	204
2.	229 ditto	..	232
3.	475/3 ditto	..	530
4.	718 ditto	..	767

<i>First Regular Settlement</i>		<i>Present</i>	1936
Survey number		Survey number	
5.	787 corresponding to	835	KAMTA PRASAD
6.	805 ditto	853	v. RAJA
7.	1073 ditto	5 biswas and 5 biswansis land of 1156	PITHIPAL SINGH
8.	1074 ditto	1158	Srivastava and
9.	1094/1, 1094/2 corresponding to	1183	Nanavutty, J.
10.	1096 corresponding to	1185	
11.	1100/1, 1100/2 corresponding to	1192	

Appeal allowed.

REVISIONAL CRIMINAL

*Before Mr. Justice Bisheshwar Nath Srivastava and
Mr. Justice E. M. Nanavutty*

GANGA PRASAD (APPLICANT) *v.* THE MUNICIPAL BOARD,
FYZABAD (OPPOSITE-PARTY)*

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United Provinces Municipalities Act (II of 1916), section 298 H, clause (e)—Byelaw no. 1, proviso and no. 2 of Fyzabad Municipality—Provision vitiating byelaw no. 1 whether ultra vires—Breach of byelaw no. 1, if an offence—General prohibition, applicability of—Breach of byelaw no. 2, whether an offence.

While the byelaw no. 1 framed by the Fyzabad Municipality under section 298 H (e), Municipalities Act, prohibits the residing of public prostitutes in the specified area, the proviso appended thereto allows such public prostitutes who own houses in the prohibited area to live therein for their life-time. The proviso thus vitiates the prohibition contained in byelaw no. 1 and is *ultra vires*. Hence a conviction for breach of byelaw no. 1 cannot stand. *Emperor v. Naziran* (1), *Chanchal v. King-Emperor* (2), and *Emperor v. Bal Kishan* (3), relied on. *Emperor v. Mannu* (4), referred to. *Municipal Board of Fyzabad v. Vidyadhari* (5), distinguished.

*Criminal Revision No. 127 of 1935, against the order of R. B. Pandit Manmatha Nath Upadhyay, Sessions Judge of Fyzabad, dated the 8th of August, 1935.

(1) (1932) I.L.R., 54 All., 611. (2) (1932) A.L.J., 28.
(3) (1902) I.L.R., 24 All., 439. (4) (1920) I.L.R., 42 All., 294.
(5) (1921) 24 O.C., 157.