

We accordingly dismiss the application with costs.

*Application dismissed.*

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## APPELLATE CIVIL

*Before Mr. Justice A. H. deB. Hamilton*

RAJA SYED MOHAMMAD SAADAT ALI KHAN (APPELLANT)  
v. KHAN BAHADUR RAJA MOHAMMAD AMIR AHMAD KHAN  
AND ANOTHER (RESPONDENTS)\*

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*Lease of land for planting grove—Lessee not given power of sale or mortgage but no right of re-entry provided—Sale of grove in execution of decree against lessee—Auction purchaser entering into possession by acquiescence of lessee—Landlord, whether can recover possession from auction purchaser.*

Where land was given for planting a grove on condition that the lessee shall have no power of sale or mortgage but no right of re-entry was reserved to the lessor and the grove was sold in execution of a decree against the grove-holder and possession passed to the auction purchaser, *held*, that the lessor was entitled to recover possession from the auction purchaser under the general custom prevailing in Oudh that abandonment entitled the landlord to recover possession of the grove and the lessee's acquiescence in the sale and relinquishing of possession amounted to abandonment.

Mr. *M. H. Qidwai*, for the appellant.

Mr. *Ali Zaheer*, for the respondent no. 1.

HAMILTON, J.:—This is an appeal by a defendant against an appellate decision of the first Civil Judge of Kheri who himself dismissed an appeal against a decision of the Additional Munsif of Kheri.

The facts are that the taluqdar of Mahmudabad gave some land to one Hazari Lal, father of defendant no. 2, for starting a grove and a document was executed on the 20th June, 1877, by Hazari Lal to the effect that on his application the taluqdar on the 1st November, 1876, had given him land to start a grove on certain conditions which included that the ownership of the

\*Second Civil Appeal No. 376, of 1936, against the order of S. Khurshed Husain, 1st Civil Judge of Kheri, dated the 17th July, 1936.

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trees and land would be in the taluqdar and Hazari Lal would have no power of sale or mortgage. There was no condition of re-entry stated. Hazari Lal died and subsequently the appellant obtained a decree against Maiku Lal, the son, and purchased at auction the grove. Maiku Lal raised no objection and possession passed to the auction purchaser. Then the taluqdar of Mahmudabad filed this suit for possession of the grove and succeeded in the trial and first appellate court.

Hamilton,  
J.

The learned counsel for the appellant has urged that Maiku Lal as successor of Hazari Lal did not violate the conditions on which his father was given this land to plant a grove as he executed no voluntary transfer and also as there was no condition of re-entry the plaintiff could not obtain ejectment. The learned counsel quoted the following cases in support of his contention:

*Nil Maqdhah Sikdar v. Narattam Sikdar* (1) was a case where there was a permanent maurasi lease with a stipulation that the lessee would not transfer the land and if he did so the sale was void. There was a sale by a court and it was held that the plaintiffs could not eject as there was no clause giving a right of re-entry or making the lease void in case of a breach of contract against alienation. The condition against transfer could not be said to be for the benefit of the lessor and under section 10, Act IV of 1882, it was void. Further there was no breach entitling the lessor to re-entry as there was no voluntary transfer.

In *Madar Saheb v. Nabawa Gujranshah* (2) it was held that no suit of ejectment lay when there was a qabuliat by which there was an undertaking not to sell or mortgage and a statement that mortgage or sale, if made, would be void, but there was no clause of re-entry.

(1) (1890) I.L.R., 17 Cal., 826.

(2) (1897) I.L.R., 21 Bom., 195.

In *Netrapal Singh v. Kalyan Das* (1) there was a lease under which the lessee and his heirs would not be competent to transfer by sale or mortgage. The property was alienated and the lessor brought a suit for possession which was, however, dismissed.

In *Udipi Seshagiri v. Seshamma Shettati* (2) there was a perpetual lease of agricultural land with the following provision:

"When you do not require this property it should be delivered back to us and you shall have no right to alienate the same to anybody in any way."

The assignment of the lease was held operative.

The decision of the courts below has been supported by learned counsel for the respondents on the strength of various Oudh decisions.

*Azmat-un-nisa v. Ganesh Prasad* (3) was a case of transfer of a house with site and the *wajib-ul-arz* established the custom that the transferor had no right to sell the house with site. It was held that there was a general custom that in the absence of a special contract to the contrary there was in the Province a mere right to use the house as long as the house was maintained and as long as the person in possession did not abandon the house by leaving the village. The occupier, therefore, had no interest which he could sell or which could be sold in execution of a decree except the interest in the timber, roofing and wood-work. This view was held by following *Sri Girdhariji Maharaj v. Chhote Lal* (4). Apart from that, however, the learned Judge held that the plaintiff being admittedly the owner of the land her ownership embraced within it the right to possession. Consequently, the transferor having died and the plaintiff being the owner of the land on which the house stood was entitled to recover possession unless the defendants established a right of occupancy. The transfer having been found to be invalid.

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(1) (1906) I.L.R., 28 All., 400.

(2) (1920) I.L.R., 43 Mad., 503.

(3) (1925) 28 O.C., 119.

(4) (1898) I.L.R., 20 All., 248.

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the defendants' occupation of the plaintiff's land was rank trespass and without any further ado they must vacate.

*Mahabir Prasad v. Uma Shankar* (1) being about a grove is more in point. It was held there that the sale of one half of a grove by a tenant who is not the owner amounted to an abandonment of the grove to that extent and the landlord is entitled to eject the purchasers in pursuance of the usual custom prevailing in Oudh that the grove reverts to the landlord when it is abandoned by the tenant.

*Hamilton,*  
*J.*

In *Iqbal Husain v. Kesho Dayal* (2) it was held that where on the basis of a *wajib-ul-arz* the only right which the grove-holders had was to enjoy the fruits and every other incident of property in the trees belonged to the *taluqdar*, the grove-holders had no right to sell the trees. If they sold the trees the sale amounts to abandonment as the purchaser gets nothing by an invalid purchase, the *taluqdar* was entitled to get possession of the grove so sold.

In *Ganesh v. Raja Suraj Bakhsh Singh* (3) it was held that according to the usual custom prevailing in Oudh a tenant is debarred from selling a grove held by him and if he does so, the landlord can treat it as abandonment and sue for recovery of possession from the transferee. It was urged that there could be no custom in that case inasmuch as the grove in suit was planted after the annexation and that therefore there had not been time for a custom to grow up. The learned Judge stated that the terms under which the tenant held the grove must be a matter of contract between him and his landlord. Where however, a general custom exists with regard to groves it is obvious that every person who plants a grove must, in the absence of any agreement to the contrary, be held to have acted in accordance with the custom. The court below held

(1) (1925) 28 O.C., 133.

(2) (1938) O.W.N., 176.

(3) (1925) 2 O.W.N., 944.

in this case that there was no general custom prevailing in the village because the *wajib-ul-arz* which gave in details the right of grove-holders dealt only with such groves as existed in 1863. The conditions, however, were similar to those contained in Ex. 1, the document in the present case.

These Oudh Cases which have been quoted were all cases of transfers by the grove-holder and not sales by a court, but I do not think that that materially alters the position once it is held that there was abandonment whether the abandonment be by an immediate voluntary act, namely, by transferring the grove and handing over possession or by acquiescence in the sale and relinquishing possession subsequent to that auction sale. Maiku Lal has acquiesced in the sale to the defendant appellant who is now in possession. It is true that there was no custom as to groves in this village in the sense that the *wajib-ul-arz* dealt only with the groves there specified, and similarly this document Ex. 1 has no mention of a general custom but it appears to me that it contains the terms on which groves are held in Oudh under custom when such custom exists and it was implied, therefore, that the taluqdar would have the same right as he has where the custom exists. It has been held both in *Mahabir Prasad v. Uma Shankar* (1) and in *Ganesh v. Raja Suraj Bakhsh Singh* (2) that there is a general custom in Oudh that when a grove holder abandons the grove the village proprietor is entitled to possession.

The decisions quoted by the learned counsel for the appellant do not refer to Oudh and do not refer to groves and, therefore, can be distinguished from those Oudh decisions. It should be remembered that Ex. 1, dated the 20th June, 1877, was not drawn up till some seven months after the land was given for the planting of grove and so I consider it reasonable to infer that when this land was given it was given on

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conditions which included the recognition of the general custom in Oudh that abandonment entitled the landlord to recover possession of the groves.

I think, therefore, that the decisions of the courts below are correct and I, therefore, dismiss the appeal with costs.

*Appeal dismissed.*

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### APPELLATE CIVIL

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March,  
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*Before Mr. Justice Ziaul Hasan and Mr. Justice R. L. Yorke*

BABU SARSUTI PRASAD (APPELLANT) v. LALA BAIJNATH SINGH (RESPONDENT)\*

*Usurious Loans Act (X of 1918), as amended by U. P. Act (XXIII of 1934), section 3(2)(b), provisos 3 and 5—Interest, reduction of—Finding as to transaction being unfair, if necessary to reduce interest—Stipulated rate of interest on unsecured debt, ranging between 9 and 24 per cent.—Court's discretion to hold interest to be excessive.*

Under the United Provinces Usurious Loans Act the Court can relieve the debtor against a portion of the stipulated rate of interest without having to consider whether or not the transaction was substantially unfair.

According to the 3rd and 5th proviso to section 3(2)(b) of the Usurious Loans Act (XXIII of 1934) if the stipulated rate of interest ranges between 9 per cent. and 24 per cent. the court has discretion, regard being had to all the circumstances, to hold that it is excessive.

Messrs. *Radha Krishna Srivastava and Chandra Prakash Lal*, for the appellant.

Messrs. *L. S. Misra, Kashi Prasad Srivastava and Tribhawan Nath*, for the respondent.

ZIAUL HASAN and YORKE, JJ.:—This appeal arises out of a claim put forward in proceedings under the United Provinces Encumbered Estates Act.

The respondent Lal Baij Nath Singh and some trustees appointed by him for the management of his estate applied under section 4 of the Encumbered

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\*First Civil Appeal No. 19 of 1937, against the order of Pandit Percy Lal Bhargava, Special Judge, 1st Grade, Partabgarh, dated the 13th October, 1936.