

raised before us either in the court which decided the suit or the executing court.

In this view of the case, it is not necessary for us to decide the other points which have been raised by the learned counsel on behalf of Kunwar Deo Singh.

We accordingly reject the application but make no order as to costs.

Application rejected.

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RAJA DEO
SINGH

APPELLATE CIVIL

Before Mr. Justice Ziaul Hasan

BANKEY LAL AND ANOTHER (DEFENDANTS-APPELLANTS) v.
VIDYA SAGAR ABKAR (PLAINTIFF-RESPONDENT)*

1938

September,
29

Right of transfer of house by Riyaya—Riyaya occupying houses in cities and towns, right of transfer of—Landlord suing transferee of house of riyaya—Burden of proof—Zemindar building house subsequently losing proprietary rights in village—Right of transfer of house, if lost.

In the case of *riyayas* occupying houses in cities and towns it is to be presumed that they have a right of transfer, unlike those who inhabit agricultural areas. Where, therefore, a landlord sues the transferee of a house of a *riyaya* in a town, he must prove that the site of the house belongs to him and that the transferor was incompetent to transfer the house. *Kanhaiya Lal v. Hamid Ali* (1), *Muhammad Ali Khan v. Badrunnissa* (2), and *Muhammad Sher Khan v. Amjad Husain* (3), referred to.

A house built or bought by a zamindar is a transferable house and such rights of transfer do not cease on an auction sale of his undivided zamindari share in the village. *Zahur Hasan v. Shaker Banoo* (4), followed. *Kanhaiya Lal v. Sheva Lal* (5), dissented from.

Mr. *Nasir Ullah Beg*, for the appellants.

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

*Second Civil Appeal No. 168 of 1936, against the decree of Mr. Kishan Lal Kaul, Civil Judge of Fyzabad, dated the 26th of February, 1936, reversing the decree of Mr. Shiam Manohar Tewari, Munsif of Fyzabad, dated the 14th of September, 1935.

(1) (1930) 7 O.W.N., 2271.

(2) (1928) A.I.R., Oudh, 438.

(3) (1929) 13 R.D., 615.

(4) (1925) A.I.R., All., 29.

(5) (1935) A.L.J.R., 1118.

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ZIAUL HASAN, J.:—This is a defendants' second appeal against a decree of the learned Civil Judge of Fyzabad in a suit brought by the plaintiff-respondent for possession of a house and in the alternative for demolition of the constructions made by the defendants and for a perpetual injunction restraining the defendants from making any constructions on the site in question in future.

The plaintiff's case was that the house in suit belonged to him but that the defendants had lately begun making encroachments on the plaintiff's land lying to the west of the house. The defendants denied that the plaintiff was owner of the house in suit and alleged that the house belonged to them and that the constructions made by them have been made on old foundations.

It appears that in the village of Janaura in which the house in suit is situated, two brothers Ram Charan and Sarju were co-sharers. On Ram Charan's death the share devolved on Sarju and it is not disputed that the house in suit was occupied by Sarju and his wife Musammata Bhagwanta. Sarju's share in the village was sold and the sale was pre-empted by the plaintiff respondent's ancestors but Sarju and Bhagwanta continued in possession of their house. After Bhagwanta's death Mata Prasad, son of Ram Charan and Chittu, son of Mata Prasad, came into possession of the house as reversioners of Sarju and sold it to the present defendants-appellants.

The learned Munsif in whose court the suit was filed dismissed it. The plaintiff appealed and in the court of appeal the parties' counsel made the following statement:

"On a careful consideration of the points in controversy and the trial of the case, we abandon some of our pleas and confine our pleadings in which the following four issues alone arise on which the trial court be directed to give its findings and decide the case. The parties shall be entitled to lead evidence only on issue 1 and shall content themselves with the evidence on record on issues 2 to 4. The issues are—

1. Whether the site of the house in suit is part of an agriculturist village or of a town?

2. Whether Mata Prasad had a right of transfer under law of the said house to enable the defendants to occupy it in their own right?

3. Whether the site of the *pucca kothris* in suit is part of the *chabuttra* appurtenant to the house of Mata Prasad?

4. Whether the defendants had a right to build *pucca kothris* on the site of their *chabuttra*?"

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The case was on this statement of parties' counsel remanded by the lower appellate court to the trial court for trial of the above issues. The learned Munsif accordingly held a new trial of these issues and deciding all of them in favour of the defendants again dismissed the suit. The plaintiff again appealed and the learned Civil Judge though agreeing with the finding of the trial court that the site of the house was not part of Janaura village but was part of the site of Fyzabad town held that Mata Prasad had no right of transfer in the house, and relying on the *wajib-ul-arz* of village Janaura held that Mata Prasad could only transfer the materials of the house. On these findings he reversed the decree of the trial court and decreed the plaintiff's suit giving the defendants three months' time to remove the materials of the house. Against this decision the defendants have brought this appeal.

I have heard the learned counsel for the parties at length and am of opinion that the appeal must prevail. As found by both the lower courts the house in dispute is situate within the limits of the Fyzabad Municipality. In *Kanhaiya Lal v. Hamid Ali* (1) it was held that the general rule which has been accepted in Oudh, ever since the British Courts have been in existence, to the effect that in the absence of a special contract or custom no raiyat, whether an agriculturist or a non-agriculturist, has any rights in the inhabited areas of an agricultural village except a right of occupation without a right of transfer, does not apply to a site in a town. Similarly in *Muhammad Ali Khan v. Musammat Badrunnissa* (2) it

(1) (1930) 7 O.W.N., 271.

(2) (1928) A.I.R., Oudh, 438.

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was held that any presumptions which are in Oudh applicable to the rights of landed proprietors in agricultural villages have no application to the rights of landed proprietors in towns. In the Allahabad case of *Mohammad Sher Khan v. Amjad Husain* (1) it was held that in case of *riyayas* occupying houses in cities and towns it is to be presumed that they have a right of transfer, unlike those who inhabit agricultural areas, and so if a licensor sues to eject a transferee of a *riyaya* he has to prove not only his ownership but must also prove the existence of custom or terms of the grant under which the house in dispute was built which make the transfer thereof invalid, entitling him to recover possession of the site. It was therefore for the plaintiff to prove that the site of the house in suit belongs to him and that Mata Pershad was incompetent to transfer the house. The plaintiff places reliance solely on the *wajib-ul-arz* of the village but the clause relied on by him applies to *riyayas* whereas in the present case it is not disputed that Mata Prasad's father and uncle who built the house in suit were co-sharers in the village, so that the provisions of the *wajib-ul-arz* do not obviously apply to the present case. In the case of *Kanhaiya Lal v. Sheva Lal* (2) SULAIMAN, C.J. and BENNET, J. held that a distinction should be drawn between the position of persons who have been zamindars and who in their capacity as zamindars own houses and the position of persons who are mere *ryots* and that in the case of a mere *ryot* the zamindar grants a licence to the *ryot* to make a residence, such a licence remaining a licence the *ryot* having no right of transfer of the house which he makes in pursuance of such licence but that a house built or bought by a zamindar is a transferable house and such rights of transfer do not cease on an auction sale of his undivided zamindari share in the village. A contrary view was no doubt taken by a Judge of the Allahabad High Court sitting singly in the case of *Syed Zahur Hasan v. Shaker Banoo* (3) but that view was dissented from, and rightly, if I may say so with respect. in the case of *Kanhaiya Lal v. Sheva Lal* (2).

(1) (1929) 13 R.D., 615.

(2) (1935) A.L.J.R., 1118.

(3) (1925) A.I.R., All., 29.

Apart from this aspect of the case, the plaintiff's suit is clearly barred by time. If, according to the plaintiff's case, Mata Prasad had no right of transfer in the house in suit, but was only owner of the materials, the defendants came into possession of the house when they purchased it from Mata Prasad and his son on the 13th of July, 1921, adversely to the plaintiff and since they have been in possession since their purchase, they have acquired title even by adverse possession and the plaintiff's right, if any, in the house has been lost for his being out of possession for more than twelve years.

As regards the constructions made by the defendants to the west of the house in suit on the site of an old *chabuttra*, the learned Civil Judge himself remarks :

"I believe the plaintiffs witnesses when they say that only a *chabuttra* existed there. Since the *chabuttra* was contiguous to the house which Mata Prasad sold to the defendants, I believe that it was in Mata Prasad's possession up to the time of the sale and went into the defendant's possession from the time of sale."

On the learned Civil Judge's own finding therefore the plaintiff is not entitled even to recover possession of the land covered by the *chabuttra*.

I therefore allow the appeal and dismiss the plaintiff's suit with costs in all the courts.

Appeal allowed.

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