## APPELLATE CIVIL.

*Before Coldstream and Jai Lal JJ.*

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*Jan. 19.*

RUP CHAND (PLAINTIFF) Appellant

*versus*

SARDAR KHAN AND OTHERS (DEFENDANTS) Respondents.

**Civil Appeal No. 394 of 1929.**

Shamilat — *rights in — whether included in sale — when not mentioned in sale deed—Intention.*

*Held*, that although *Shamilat* rights are not a mere accessory to the land separately held and that the *onus* lies on a purchaser of proprietary land to show that a sale to him included a share in the *Shamilat*; where the vendor had severed all connection with the village, and took no further interest in the *Shamilat*, the mere fact that the sale deed did not expressly mention the transfer of *Shamilat* rights will not be conclusive against the vendee.

*And*, that where the surrounding circumstances and subsequent conduct of the parties point to the conclusion that all rights connected with the lands mentioned in the deed, including the right to share in the *Shamilat*, were intended to pass, though each case must depend upon its own circumstances, the Court may be justified in holding that the vendor did not intend to reserve to himself any rights of any kind attaching to the property sold.

*Shahamad* v. *Ibrahim* (1), followed. Other case law discussed.

*First Appeal from the decree of* Lala *Sakhir Chand, Senior Subordinate Judge, Mianwali, dated the 24th November, 1928, dismissing the plaintiff's suit.*

BADRI DAS, NANAK CHAND and UDE BHAN, for Appellant.

J. N. AGGARWAL, J. R. JEREMY, for M. L. BATRA, and S. R. LAUL, for Respondents.

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COLDSTREAM J.—In 1851, Nur Muhammad of village Harnauli in Mianwali district sold a third share of the Samoranawala well and the lands attached thereto, of which he was the original proprietor, to Parsa Ram (Parsa), a resident of Rahdari, twenty miles from Harnauli. At that time the uncultivated waste round the village had not been included within the revenue estate. In 1856-1857, however, the waste land in the vicinity was demarcated, specific areas being allotted to different estates, Harnauli being given a large portion, with the result that, to quote the gazetteer of the Banu district, "a strong feeling of proprietary rights in all the waste land included within the village boundaries soon sprang up in each community." At the first regular settlement of 1878 a liberal area of grazing land was attached to each village as its separate property and the remainder marked off as Government reserves. Thus, it was not until this time that proprietary rights in the *shamilat* were recognised.

On 4th August, 1885, Parsa conveyed by registered deed the property he had purchased to Nota Ram for Rs. 210, specifying the fields sold by their numbers in the revenue records and detailing the boundaries of the area, the southern boundary being described as '*shamilat* land.' The deed did not refer to any rights in the *shamilat*. Nota Ram was a proprietor in the village when he acquired this land. Mutation of records was attempted in 1888, but not finally effected until 15th June, 1894, the delay being apparently due to efforts to obtain a statement from Parsa who had left Harnauli after his sale and was dead.

Twenty-one years later, on 4th October, 1906, Nota Ram and his brother Khota Ram sold the pro-

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perty acquired from Parsa Ram by registered deed to Mehnga Ram, the father of Rup Ram, the present appellant, expressly including in the property conveyed the *shamilat* rights attached to the parcel of land sold. Mutation in the revenue records was duly sanctioned on the 13th March, 1910, it being noted that a share in the *shamilat* had been conveyed with the land.

In 1916, Nur Muhammad and others, nephews of Nur Muhammad, sued against Mehnga Ram, Nota Ram and the successors-in-interest of Parsa for a declaration to the effect that, as the sale by Nur Muhammad did not convey any rights in the *shamilat*, they, the plaintiffs, were the owners of these rights in the *shamilat* pertaining to the area sold. Nota Ram did not contest the suit. The successors of Parsa pleaded that they were the owners of the rights in suit by virtue of the sale. The suit was dismissed, the Senior Subordinate Judge holding that Nur Muhammad had no rights in the *shamilat* which he could have sold. In his judgment the Senior Subordinate Judge remarked that Mehnga Ram had no claim to these rights which could not have been acquired by virtue of the purchase from Nur Muhammad, and that Parsa's heirs were not entitled to any rights in the *shamilat* as these had not been reserved to himself by Parsa when he sold the land to Mehnga Ram. An appeal by Nur Muhammad and the other plaintiffs was dismissed by the District Judge and a further appeal by this Court on the 27th January 1922 (Second Appeal No. 1462 of 1917) by Harrison and Raoof JJ. who pointed out that what did not exist in 1851 could not have been sold by Nur Muhammad, remarking at the same time that when the grant of *shamilat* rights was made in 1878, the existing proprietors of

cultivated land acquired thereby a proportionate share in the waste land gifted by Government. "These grantees included the vendee of one-third of Samorana well and his representatives." The Senior Subordinate Judge in giving judgment had stated his opinion that the proprietary body of Harnauli might very well ignore the rights of any of the parties to the *shamilat* land in suit. The learned Judges on appeal pointed out that this expression of opinion was unnecessary and did not affect the decision dismissing the suit against the defendants.

In 1920, the revenue authorities had, in view of the Senior Subordinate Judge's decision, made mutation in the records so as to record Mehnga Ram as merely a *malik kabza*, *i.e.* not a shareholder in the *shamilat*. Efforts made by Rup Chand (Mehnga Ram's son) to revise this mutation were unsuccessful and on the 2nd November, 1923, he instituted the suit from which this appeal arises for a declaration that he was entitled to the share of *shamilat* rights proportionate to the land purchased by his father, alleging that Nota Ram's purchase included these rights, which Nota Ram re-sold to Mehnga Ram. The suit was actively contested by the descendants of Parsa and their alienees (the members of the proprietary body impleaded as such admitting the claim) whose case was that no rights in the *shamilat* were transferred by Parsa to Nota Ram. The learned Senior Subordinate Judge struck a number of issues including one on a plea of limitation and another on the question whether Parsa had severed his connection with the village after his sale. He decided that the suit was within limitation, but dismissed it holding that no rights in the *shamilat* were sold by Parsa, who, he believed, did not know that he had any such

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rights because he was living in another village and the rights had been recognised very recently.

Against this judgment Rup Chand has preferred the present appeal which has been argued before us by Mr. Jagan Nath.

The question for decision is simply whether Parsa Ram's sale of 4th August, 1885, did or did not convey to Nota Ram the *shamilat* rights attaching to the lands specified in the deed. As already made clear, no rights in the waste could have been transferred by Nur Muhammad, for such rights were not in existence before 1878. If Parsa's sale included his rights in the *shamilat*, Rup Chand's suit must be decreed. There can be no doubt that when Parsa Ram sold to Nota Ram in 1885, he had, by virtue of his being a proprietor of village land and thus one of the proprietors of the waste, attached to Harnauli, become a co-sharer in the *shamilat*, and could have transferred the proportionate share attaching to the property specified in his deed.

The learned Subordinate Judge based his decision against the plaintiff-appellant on the grounds (1) that there was no evidence to prove that Parsa was ever in physical possession of any of the *shamilat* area, or that Nota Ram had been in possession of any of it in consequence of his purchase of the Samoranawala well land; (2) that the price paid by Nota Ram was very small (Rs. 210) and out of all proportion to the area of *shamilat* appertaining to the land expressly sold; (3) that as Parsa did not realise he had any rights (which were a recent creation) in the *shamilat* it could not rightly be held that he had intended to sell them, such intention not being expressed in his deed, although the *shamilat* area is mentioned

as one of the boundaries of the parcel sold and (4) that in the pedigree-tables of village proprietors of Harnauli *forming* part of the land revenue settlement record of 1908, there is a remark below Parsa's name to the effect that he had sold all his estate, except the *shamilat* land, to Nota Ram. He has relied strongly upon the judgment of the District Judge in another case, relating to the same village of Harnauli, *Muhammad Hayat* v. *Uttam Chand*, delivered on 23rd December, 1916, in which the District Judge, remarking that no satisfactory or absolutely correct decision was possible in such cases, based his decision solely on the fact that the conveyance deed in that case did not purport to convey *shamilat* rights. An appeal was summarily dismissed by this Court (Second Appeal No. 743 of 1917, decided on 29th March 1917).

For the appellant Mr. Badri Das contends that in the present case the circumstances, the conduct of the parties, and the entries in the revenue records clearly indicate that, as a matter of fact, the *shamilat* rights were sold and did pass to Nota Ram with the land purchased from Parsa. Mr. Jagan Nath who opposes the appeal on behalf of the descendants of Parsa Ram and their alienees supports the decision of the lower Court on the grounds given by it and on the strength of remarks made in several judgments of the Punjab Chief Court in analogous cases.

To the pedigree table on which the learned Subordinate Judge has relied no importance can be attached. No doubt there is a presumption of correctness attaching to the remarks recorded in such documents, but in this case this part of the record has been shown to be incorrect, for it wrongly described one Jawaya Ram as joint vendor with Parsa Ram.

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Jawaya Ram was not a party to the sale and an order for the correction of this entry had been obtained from the revenue authorities 23 years previously by Parsa Ram, in order to clear his title before he sold the property to Nota Ram (See Exhibit P. 105, at pages 75 to 77 of the paper book). The entry was also inconsistent with the existing record which did not at that time show Parsa as a proprietor of proprietary rights in any village land but described Nota Ram and his brother as full proprietors of their lands on the Samoranawala well, and not merely as *malik kabza*. Nota Ram's successor Mehnga Ram was described as owner with a share in the *shamilat* in the Jamabandi of 1910-11 (mutation in his favour having been sanctioned, as stated above, on 13th March 1910).

Nor, in this case, does the smallness of the price paid for the land raise any presumption, or indeed afford reliable evidence, regarding the intention of the parties with respect to the disposal of rights in the appurtenant *shamilat*. As remarked by the Chief Court in *Shahamad* v. *Ibrahim* (1), land was not in those days (1862) regarded as a valuable property. The learned Judges " failed " in that case " to understand what possible object there could have been in separating the *shamilat* from the proprietary holding and reserving the former for the original owners." The applicability of these remarks to the present case is not affected by the distinction drawn by the learned Subordinate Judge between the facts of that case and the facts of this one.

It is not shown that the *shamilat* rights conferred upon the proprietors in 1878 had any monetary value apart from the cultivated area. The waste was

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extensive and the proprietors in all probability used it in common for grazing without regard to their individual undivided shares. The fields sold were in 1878 all unirrigated, the well having fallen into disuse. A very small area (seven *kanals*) out of that expressly sold (217 *kanals*) was under cultivation in 1888 and the land revenue and cesses imposed at the settlement amounted to only 14 annas, 11 pies.

It is true that Mehnga Ram was the first proprietor of the suit property, clearly proved to have been expressly described in the land revenue record as owner of rights in the connected *shamilat*. I do not think that this fact justifies the view that these rights had not been acquired by Nota Ram and reconveyed to him. I have already noted that the records do not mention Parsa as owner of any *shamilat*. Nor was Nota Ram described as *malik qabza*, as he ought to have been had he not been a sharer in the *shamilat* attached to the holding. Nor was Mehnga Ram ever so described until 1920, by which time he was dead. On the other hand, the revenue records of the settlement of 1888, and the subsequent *jamabandis* go to show that Nota Ram (whose father was alive in 1888 and shown as in possession of *shamilat* land) was holding some *shamilat* in his own name, being recorded as a tenant of this separate portion in 1888 and as proprietor in 1892-93, after mutation in his favour in respect of the lands purchased from Parsa had been proposed. It is probable enough that this share of *shamilat* was that which passed to him (irrespective of his father's share as proprietor of other land in the village) by virtue of his acquisition of the Samoranawala fields.

That Parsa did not know that he had rights in the *shamilat* by virtue of being owner of the Samorana-

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wala land is a pure surmise. On the other hand it is perfectly clear that he did not intend to reserve to himself any rights of any kind attaching to the property sold. The deed purported to convey all rights of entry and dispossession and stated that the vendor would have no further concern or connection with the land sold. Two thatched cottages were sold with the land, and Parsa left the village where he had no other land, and took no further interest in the holding. His sons who apparently had notice of the mutation made no representation when their father's name was removed from the records (Exhibit P. 9). Nor did any person raise objection when Nota Ram's sale to Mehnga Ram was given effect in the records in 1910 when it was noted that a share of the *shamilat* went with the land (Exhibit P. 10). When Mehnga Ram's rights in the *shamilat* were first questioned in 1916, it was not Parsa's successors but the successors of Nur Muhammad, the first vendor, who went to law. Meanwhile there had been two settlements and revisions of records at which Parsa's heirs and successors had shown no interest in the rights now claimed for them.

As pointed out by a Division Bench of the Chief Court in *Shahamad and others* v. *Ibrahim and others* (1), each case of this kind must depend on its own particular facts and circumstances and it is impossible to lay down a hard and fast rule which would be applicable to all cases. In that case, as here, the sale-deed did not mention *shamilat* rights but, as here, the vendor had severed all connection with the village and took no further interest in the *shamilat*. The learned Judges held it clearly established that at the

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time of the sale the parties intended that all the rights of the vendor, whether in the *shamilat* or in the proprietary holding, should pass to the vendees. The judgment in *Ahmad* v. *Ahmad* (1), on which respondents' counsel relies was cited in the Chief Court's judgment and not followed. See also *Gullu* v. *Khuda Bakhsh Khan* (2), a case in which there were many circumstances similar to those of the case before us. It is true that more recently, noticeably after the judgment in *Ram Das* v. *Amir Shah* (3), this Court has, in several rulings, laid it down emphatically that *shamilat* rights are not a mere accessory to the land separately held and that the *onus* lies on a purchaser of proprietary land to show that a sale to him included a share in the *shamilat* [see *Gobind Ram* v. *Ali Muhammad* (4), and *Zaida* v. *Raja* (5)].

But the mere fact that the sale-deed did not expressly mention the transfer of *shamilat* rights will not be conclusive against the vendee [*Gullu* v. *Khuda Bakhsh Khan* (2)]. We have to look also at the surrounding circumstances including the subsequent conduct of the parties. In the present case these all point, in my opinion, very decidedly to the conclusion (of the correctness of which I am in no doubt) that Parsa sold to Nota Ram all rights connected with the lands mentioned in the deed, including the right to share in the *shamilat*. His successors took no interest in the *shamilat*—Parsa's name disappeared from the records—two settlements took place. The vendees and their successors were recorded as full proprietors of their land at Samoranawala well. Partition proceedings had been in progress from 1923, but

(1) (1910) 6 I. C. 1003.
(2) (1917) 38 I. C. 120.
(3) 113 P. R. 1901.
(4) (1923) 79 I. C. 84.
(5) (1924) 84 I. C. 113.

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no objection on behalf of Parsa's descendants was put forward in these proceedings until 1924. None of them had ever been in possession of any land in the village.

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I may before ending this judgment note that reference was made by Mr. Jagan Nath to a statement made on 22nd November, 1928 by Nota Ram, as a witness in a case in which Mehnga Ram was plaintiff, to the effect that he had not bought the *shamilat* rights from Parsa. The statement was made after Nota Ram had parted with his rights, and it is not apparent how it can affect Mehnga Ram here. The value of his statement may be judged from the fact that he denied that he had sold *shamilat* rights to Mehnga Ram although his deed expressly transferred them.

For the reasons given I would accept the appeal and setting aside the judgment of the lower Court grant plaintiff the decree sought with costs against the contesting defendants.

JAI LAL J.

JAI LAL J.—I agree.

*N. F. E.*

*Appeal accepted.*