Dr. Sir Hafiz Mohd. Vs. Shiam Lal

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Court : Allahabad

Decided On : May-11-1944

Reported in : AIR1944All177

Appellant : Dr. Sir Hafiz Mohd.

Respondent : Shiam Lal

Judgement :

Sinha, J.

1. The facts which have given rise to this appeal are briefly these : The village in dispute is Chhatari in the District of Bulandshahr. It has extensive abadi which is divided into houses and shops. They are occupied by ryots who pay rent only for the shops and not for residential houses. The plaintiff is admittedly its sole zamindar. Shiam Lal, defendant 1 and his two sons Shiva Shankar alias Sallo and Baldeo Shankar alias Ballo, defendants 2 and 3, are his sons. Defendant 4 is the son of the brother of Shiam Lal. The first three defendants occupy a house in the abadi of mauza Chhatari. They do not, however, pay any rent or other dues to the plaintiff. The plaintiff came to Court with the following allegations : The defendants lived in the abadi of mauza Chhatari as ryots and were entitled to use and occupy the said house for residential purpose only, he being the owner of the site of the house. The plaintiff went on to say that the defendants, who were members of a joint Hindu family, were occupying the house, the materials of which were supplied by the plaintiff's ancestors to the ancestors of the defendants and so he was also the owner of those materials. He further went on to say that under the terms of the wajib-ul-arz ryots paid no rent for the occupation of residential houses but did pay rent for the use and occupation of the shop and that in the month of January 1939 the defendants wrongly and without his permission, converted their residential house into a shop. The relief claimed, stripped of unnecessary details, was the ejectment of the defendants or for an injunction directing restoration of the house to its, original condition and recovery of damages or for an order fixing the defendants with the liability to pay Rs. 5 per month as rent. The case was based on the wajib-ul-arz, contract and usage. The defence, in the main, of defendants 1 to 3 was that they were entitled to use and occupy the house without any restriction and that-the materials of the house were not supplied by the plaintiffs or his ancestors. It was also pleaded that no ground rent was payable by the ryots for their house and that the entry in the wajib-ul-arz did not apply to shops built by ryots or to those shops which formed part of the residential house. It was further pleaded that the wajib-ul-arz related to the shop in existence at the time of the settlement when it was prepared and not to the shops which had come into existence subsequently. Lastly they refuted the charge that they used any part of the house as a shop; all that they had done was to use it as a godown for the stock in trade; they denied the contractor usage forbidding the use of the house as a stock room or as a godown or forbidding any transaction of business at the residential house of the ryots. The validity of the contract and usage, assuming that they had been proved, was challenged on the ground that they were opposed in public policy and forbidden by law. The applicability of the wajib-ul-arz to Chhatari which had been declared a town area under the Town Area Act, was also impugned. Acquiescence and estoppel were also pleaded. And finally the bar of Section 56, Specific Relief Act, was set up as against the

relief for an injunction.

2. The learned Munsif held that the village Chhatari did not lose its character of an agricultural village; that, under the general law of the province, the plaintiff, as zamindar of Chhatari, was the owner of the site of the house and the defendants were licensees for residential purposes, and under the terms of the wajib-ul-arz, the use of the house by the defendants for any purpose other than residential, amounted to an infringement of the plaintiff's right. He also found that in a part of the house defendants 1 to 3 were storing goods for retail sale and another part was being used as a shop. On these findings the learned Munsif decreed the suit for an injunction restraining the defendants from using the house as a shop. In his opinion rupee one per month was a fair quantum of damages for the use of the part of the house as a shop. Defendant 4 was treated as an unnecessary party. Defendants 1 to 3 went up in appeal. The learned Civil Judge found that mauza Chhatari had ceased to be an agricultural village. He held further that the materials of the disputed house were not supplied by the plaintiff. In his opinion the conversion of the residential house into a shop was not in contemplation of anybody at the time of the Currie Settlement when wajib-ul-arz was prepared. He also found that the defendants were not using the disputed portion of the shop for retail sale but as a godown and, in so doing, they were within their rights. The wajib-ul-arz, to his mind, did not apply to the disputed portion of the house even if converted into a shop, inasmuch as it applied only to those shops which were in existence at the time of the Currie Settlement. His findings on the question of custom and contract were against the plaintiff. He finally came to the conclusion that the Bengal Chaukidari Act and the U.P. Town Area Act had completely altered the position of the village and had the effect of destroying its agricultural character.

3. The plaintiff has come to this Court in second appeal. It might be stated at the very outset that he has not claimed the reliefs with which he had originally come to Court. He only wants the decree of the Court of first instance to be restored. It is desirable to describe the present condition of mauza Chhatari. To quote the learned Munsif 'the population of Chhatari is 5435 - the learned Civil Judge has put it at 5500 - and 75% of this population consists of people of the agriculturists class. Nobody has stated that there is any industry or even a mill or factory in Chhatari. Ofily one person has cafce forward lo say that he makes locks and sells them in Allgarl. The bazar is mostly for agricultural produce or for the supply of other articles of daily necessity. No railway line even is near Chhatari.' No exception to this description has been taken by the learned Additional Civil Judge. The bedrock of the case law in this Court is the well-known case in Sri Girdhari Ji Maharaj v. Chhote Lal ('98) 20 All. 248. Its facts briefly were these : 'The plaintiff Sri Girdhariji Maharaj came into Court alleging that about 26 years previously one Nand Kishore had received from his, the plaintiff's agent, permission to build a house on a piece of land in the village of which the plaintiff was zamindar, on the condition that it should be inhabited by Nand Kishore and his heirs and alleging further that the house which was built could not legally be transferred. The plaintiff also relied upon a, clause in the wajib-ul-arz. The house so built by Nand Kishore was bold in execution of a decree against a son of Nand Kishore and purchased by one Chhote Lal. The plaintiff zamindar asked for a declaration of his right to the land on which the house stood. He also claimed to be put in possession of that land after the removal of the materials of the house by the purchaser.'

The agreement set up failed but their Lordships at p. 250 made the following observations : 'The plaintiff alleged a special agreement under which the house had been originally built. He also relied upon the wajib-ul-arz. He did not specifically set up in his plaint or apparently in his argument before our brother Aikman in this Court, the real point on which this case must be decided and that is that, according to the general and well known custom of these Provinces, a custom so well established that it may be treated as the common law of the Provinces, a person, agriculturist or agricultural tenant, who is allowed by a zamindar to build a house for his occupation in the abadi obtains, if there is no special contract, a mere right to use that house for himself and his family so long as he maintains the house, that is, prevents its falling down and so long as he does not abandon the house by leaving the village. As such occupier of a house in the abadi occupying under the zamindar, as in this case, he has, unless he has obtained by a special grant from the zamindar an interest which he can sell, no interest which, he can sell by private sale or which can be sold in execution of a decree against him, except his interest in the timber, 1 roofing and wood-work of the house.' The zamindar in these

provinces treats the above lines as the charter of his rights. The ryot, on the other hand, replies that they do not amount to anything more than a mere dictum that the zamindar is the owner of the land, a presumption which grows weaker and weaker with the march of time. To the zamindar these lines embody a rule of law, which assures him his rights, unless its binding character is taken away by some express enactment, in express and unmistakable terms. To the tenant they amount to nothing more than a presumtion, the binding force of which has been destroyed either by the process of time or by the Notified Area Act.

4. It must be made clear at the threshold that their Lordships do not use the expression 'presumption' in the judgment. They have, on the other hand, preferred to found the zamindar's right on 'a custom so well established that it may be treated as a common law of the Province.' Even assuming that the observations quoted above only raise a presumption, we must not lose sight of the fact that presumptions vary in their sanction. There are presumptions of fact and presumptions of law. Presumptions of fact or natural presumptions have been defined as 'inferences which are naturally and logically drawn from experience and observation of the course of nature, the constitution of human mind, the springs of human action, the usages and habits o society. These presumptions are generally rebuttable (Best 4th Edn., p. 414).' Presumptions of law or artificial presumptions, are 'inferences or propositions established by law, the inferences, which the law presumptorily requires to be drawn whenever the facts appear which it assumes has the basis of that inference. The presumptions of law are in reality rules of law, and part of the law itself and the Court may draw the inference whenever the requisite facts are developed in pleadings : Best, Edn. 11, Section 304 and Norton, p. 97.' If their Lordships held that the custom which was the foundation of the zamindar's right, was 'so well established' that it may be treated as 'Common law of the Province' even as a presumption, the presumption will be one of law and not of fact. The defendants will, therefore, have to establish that the wajib-ul-arz which records a custom is no longer a living force or to use a juristic expression 'the tooth of time has not eaten away its force.' Whatever the view, the initial presumption, even acceding to their contention, is in favour of the plaintiff and it is for the defendant to displace it.

5. Another distinction must be kept in view. There must be a clear line of distinction between a village losing its incidents by the process of time and as a result of some statute. Time may obliterate all those conditions in which the wajib-ul-arz was prepared or which might attract the applicability of the rule enunciated in the case mentioned above. A legislative enactment may, on the other hand, not make such a clean sweep of those incidents. I shall examine this question a little later. The propositions which I have set forth above will be discussed at their proper place but I have mentioned them here only to clear the ground: The first contention raised on behalf of the appellant is that the wajib-ul-arz governs the rights of the parties. The respondent, on the other hand, argues that, apart from anything else, the zamindar, as will be obvious from a perusal of the terms of the deed, alone was a party to it and it could not be binding upon them. The material portion of the document has been quoted by the learned Civil Judge and is in these terms 'Of the abadi of the village plots Nos. 213, 240, 452 and 494 as mentioned in the Khasra and khatauni are situate in the abadi. I the zamindar live in the village. The ryots also always live in it. So long as He will be in the village there will be no unnecessary interference with him. I shall be entitled to build new houses in the waste land near the abadi for letting in fresh ryots, No interference will be caused to a tenant so long as he chooses to remain in the village. I shall be entitled to let the house abandoned by a ryot to anyone I like. If the same ryot returns and prays for the same house, he will live in it with my consent if it is vacant, otherwise he will have no claim and the land of riyaya will not be saleable on account of any claim against him along with his rights as ryot. I shall be the owner of the materials if the house is built with my materials. The ryots will be entitled to sell the materials of the house already built or to be built in future in ease they are his materials.

6. On the probative value of the wajib-ul-arz there is no room for any controversy now. Their Lordships of the Judicial Committee have in Balgovind v. Badri Prasad ('23) 10 A.I.R. 1923 P.C. 70, held that

Settlement Officers in recording custom in wajib-ul-arzes have to perform duties which the Government orders them to perform. One of these duties was to record custom as the Settlement Officer found them and not as he might think they ought to be. When it is not shown by reliable evidence that the Settlement Officer

neglected to perform his duty or was misled in recording a custom and it does not appear that the statement of the custom is ambiguous, the record in a wajib-ul-arz of a custom is most valuable evidence of the custom much more reliable evidence than subsequent oral evidence given after a dispute as to the custom has arisen.

It has come in evidence that the wajib-ul-arz was prepared at the time of the Currie Settlement in 1870. Allied to this is the minor question whether the wajib-ul-arz is still extant and whether the conditions embodied in it are applicable to the mauza. Section 84(4), U.P. Land Revenue Act, Act 3 of 1901, furnishes a complete answer.

7. A similar question arose so far back as the year 1887 and a Bench of this Court in Shiam Sunder v. Amanat Begam ('87) 9 All. 234 at p. 238 decided that 'despite the partition of the village into separate mohals, the existing wajib-ul-arz at the time of partition must be presumed to subsist and govern the separate mohals until It is shown that a new one has been prepared.' A subsequent case Sadhu Sahu v. Raja Ram ('93) 16 All. 40 (F.B.) went a step further. At p. 46 Sir John Edge, delivering the judgment of the Full Bench, observed : 'In the memorandum of village customs which, at the recent settlement, was prepared there is no reference affirming, negativing or alluding to the custom of pre-emption. The non-existence in that memorandum o village customs of all reference to a custom of pre-emption might be accounted for on the hypothesis that a custom of pre-emption which existed in 1860 bad fallen into desuetude, or on the hypothesis that the proprietors had amongst themselves entered into an agreement excluding any right of preemption in the village, or an agreement that there should be a right of pre-emption different from that which existed under the custom of 1860, or on the hypothesis that they had neglected to demand expressly that the custom should be noted, or that, although they had expressly demanded that the custom should be noted, they had, in the opinion of the Settlement Officer, failed to prove conclusively that the custom existed at the date of the then settlement. It is apparent to my mind, having regard to the specific instructions contained in Rule 38, that from the mere fact that the memorandum of village customs made at the recent settlement is silent on the question of pre-emption. It is impossible to draw an inference that the custom has fallen into desuetude, that the custom is still in existence, or that the Settlement Officer refused to record it, being of opinion that the proprietors had failed to prove conclusively that the custom existed. Although the silence in that memorandum of village customs on the question of pre-emption by itself does not, in my opinion, afford evidence as to whether the custom of pre-emption does or does not exist, still it is a fact to be noted, and one which would have considerable bearing on the inference to be drawn, if there was even some slight evidence independently of the memorandum of village customs that the custom of 1860 had fallen into desuetude and was no longer observed, or that it had been agreed that it should not be followed, or that by agreement some other arrangement as to pre-emption had been come to in the village. The case stands thus in my opinion. The wajib-ul-arz of 1860 although it has determined by effluxion of time, still affords evidence that in this village in 1860 the custom of pre-emption relied upon here did exist. There is the mere fact that the memorandum of village customs of the recent settlement is silent on the question of pre-emption, and there appears to be no further evidence one way or another as to whether the custom of 1860 is still in existence and in force in the village. Under these circumstances, there being evidence that in 1860 this custom of pre-emption did exist, and there being, strictly speaking, no evidence that owing to desuetude or private agreement or otherwise it has ceased to exist. I am of opinion that the Subordinate Judge in appeal was entitled to find that the custom existed at the date of the sale out of which this suit arose.' The principle of this case was affirmed in the well-known case in Dalganjan v. Kalka ('99) 22 All. 1 (F.B.) Banerji J. observed as follows at p. 30:

In my opinion the mere fact that a perfect partition has taken place does not abrogate a custom or contract as to pre-emption which was in force before partition. If after partition a new wajib-ul-arz has been prepared recording a custom or contract different from the custom or contract embodied in the old wajib-ul-arz the presumption will be that the custom which obtained in the village or the mahal at the time of the preparation of the old wajib-ul-arz has fallen into desuetude and a new custom has sprung up or that the cosharers have set aside the old contract and entered into a new one. But where a fresh wajib-ul-arz has not been prepared at partition, it does not follow, as a matter of law or principle, that the custom or contract in force before

partition is no longer to have effect and operation. This was a case of pre-emption but the principle is fully applicable to the case in hand. Nothing has been shown at least in this case how the wajib-ul-arz has lost its force and, in the absence of any evidence to the contrary, it must be deemed to govern the rights of the parties. I shall now address myself to the main question whether Chhatari is still a village, which attracts the applicability of the rule of law laid down in Sri Girdhari Ji Maharaj v. Chhote Lal ('98) 20 All. 248. A large number of authorities have been cited on behalf of both the parties. They will, as indicated above, have to be divided into two sections those which deal with the general law and those which deal with the effect of the Town Area Act. It is necessary at this stage to mention the ratio of such a division. In the case where a village has ceased to be an agricultural village in consequence of the process of time, that is, where the village may have become the centre of some industry or where the bulk of the population has ceased to be agricultural or where the tenant or the ryot has asserted rights, not strictly compatible with his position, for a number of years, with the implied consent of the zamindar, in other words, where the change has been brought about slowly but steadily that is by an evolutionary process, the zamindar shall not be allowed to repudiate what he or his predecessors have encouraged for along series of years. In the case of a legislative enactment no such principle comes into operation. The zamindar has no voice in the matter. The same consequences shall follow where the ryot or the tenant has been acting in defiance of the zamindar for a number of years. This will be a case of adverse possession.

8. The earliest case of this Court is Chhajju Singh v. Kanhaiya ('81) 1881 A.W.N. 114. The facts of this case were briefly these. The plaintiffs who were zamindars alleged that a tenement in the village fell vacant seven years ago, that they then allowed the defendants who had no right of title to the house, to lodge in it rent-free; and that they wanted to eject them as they had misconducted. They also stated that the house had been built by them. The defendants answered that their tenure was not permissive, but had come to them seven years ago by inheritance from the previous occupant, Muwashi, who died then after having occupied it 'for generations'. Through him they set up a title to hold the house, and an occupation of more than 12 years. Inheritance and adverse possession were not made out, nor did the plaintiffs offer any proof of their allegation that the house had been built by them. A Full Bench of this Court consisting of Stuart C.J. and Straight, Tyrrell and Duthoit JJ. recognised the rights of the zamindar in the following judgment : 'It followed, as a natural consequence of the finding, that the house did not come to the defendants by inheritance, and their occupation of it had not been adverse, that their occupancy must have been permissive for they did not profess to be trespassers. The zamindars of a village are, as a rule, and presumably, the owners of all the houses sites in their villages; and a house left unoccupied by a tenant lapses to the landlord in the absence of heirs or other lawful assignees of the last occupant. The plaintiffs could not be deemed to have failed to prove their case as they brought it into Court, because they offered no proof of their superfluous and perhaps incorrect statement that they had built the house.' This case is, therefore, an authority for the proposition that the ownership of the zamindari and house sites in the village is with the zamindar and that it is only a plea of adverse possession, in the absence of anything else, which can avail the ryot or the tenant. I have emphasised this, inasmuch as there is no plea of limitation or adverse possession in the present case. This case was decided in 1881.

9. The next case relied upon by the learned Counsel for the appellants is the case in Sri Girdhari Ji Maharaj v. Chhote Lal ('98) 20 All. 248 already mentioned. It is not surprising that what was a mere presumption in the year 1881 had, by the year 1898, crystallised into 'a custom so well established that it may be treated as the common law of the province.' The period of nearly 17 years is not necessarily a short period for the crystallisation of what was once merely a (practice into a custom 'so well established as to become the common law of the land.' The rule of evidence in this country differs widely from that in England. A distinguished author says : 'In England the rule is that the usage must be so ancient that it must have existed 'from time whereof the memory of man runneth not to the contrary.' This hypothetical period, which is, in jurist's language, known as legal memory in contradiction to living memory, has been fixed, arbitrarily no doubt, anterior to the first day of the reign of Richard I (1199 A.D.).' Grey, C.J. in a case of the Supreme Court of Calcutta said 'I admit that a usage for 20 years may raise a presumption, in the absence of direct evidence of a usage, existing beyond the period of legal memory.' (Roy's Customs and Customary Law-Tagore Law

Lectures pp. 26-28.) The above principle was followed in Kuar Sen v. Mamman ('95) 17 All. 87 and Shadi Lal v. Muhammad Ishaq ('11) 33 All. 257. The learned Counsel for the respondent has sought to distinguish this case on the ground that the real question in that case was about the right of the occupier to transfer his houses. That was no doubt the question, but the determination of that question was impossible without adjudicating upon his right in the village and also in the house as well as the land on which it stood. Another point of distinction which was emphasised, is that this authority could apply only to the case 'of an agriculturist or agricultural tenant.' To my mind there is no substance in this argument. An agriculturist is he who depends for his livelihood upon agriculture. An agricultural tenant may not necessarily be so. He may be only connected with the agriculture, that is to say, who is necessary for the village economy. In Incha Ram v. Bande Ali ('11) 8 A.L.J. 877, the case to which I shall advert at. some length a little later. Banerji J. at p. 844 has put an agricultural tenant on the same level as other people necessary for village economy. Said he 'In the case of an agricultural tenant or handicraftsman or trader whose presence is necessary for the requirements of the village....' This makes it clear that the rule of law laid down in this case, governs the rights not only of an. agriculturist but of other persons who are connected with agriculture or who are necessary for the needs of the village.

10. The next case on which the plaintiff has placed his reliance is the case in Basa Mal v. Ghayasuddin ('04) 27 All. 35. The facts of the case in brief are these : 'The plaintiffs in this case were Hindu zamindars who had become by purchase the owners of a certain portion of the village of Bahpur. According to the findings of the lower appellate Court there was, in this village, in the yard or 'sehn' in front of a house of business (ehaupal) belonging to a tenant of the name of Bahadur Khan 'some sort, of thatched shed which was used by the Mahomedan tenants as a place of worship.' In place of this-thatcbed shed the defendant-respondent, with other Mahomedan tenants of the village, erected or partially erected a 'pucca' mosque using for this purpose bricks taken from a mound of ruins belonging to the zamindars. The zamindara in the present suit sought to have the new building, so. erected, as they alleged, without their permission, demolished, and also asked for compensation in respect of the bricks wrongfully taken by the defendants.'

The wajib-ul-arz contained the following entry : 'No cultivator can build a new house outside the compound of his dwelling house without the zamindar's permission. He is at liberty to do so in his compound. When a cultivator-absconds, the zamindar becomes the owner of his house. If he returns within six months, he gets his house. The zamindar has no right to forcibly eject any one.' The Munsif decreed the claim, but the District Judge dismissed the suit with regard to the demolition. On second appeal: Blair and Banerji JJ. observed : 'The District Judge allowed the appeal and dismissed the suit of the plaintiffs for the demolition of the building upon findings which in our opinion form an insufficient basis for his conclusion. He says that because there was an old shed used for religious observations, the old shed being of a frail and temporary kind, it could be replaced by a permanent mosque in which the same kind of observances should continue. He holds in effect that the defendants had title to erect such a building. It seems to us that he has not fully considered the nature of the tenure of land of a village site. It is held by tenants for dwelling houses and what are understood to be the ordinary appendages of a dwelling house. Indeed it seems to us that it is impossible to contend that a tenant is entitled to erect a permanent mosque as that he is entitled to erect premises for some manufacture. The provisions of the wajib-ul-arz indicate with sufficient clearness that the land of the village site falls within the ordinary provisions relative to the abadi.... Every villager knows perfectly well the nature of his rights in the abadi.'

11. The principle of this case was followed in Jagannath v. Gurdayal Singh ('01) 10 I.C. 284 (All.). The next case on which reliance has been placed by fhe plaintiff is the case in Batu Bhagwan Rai v. Juddu Raj Rai : AIR1926All66 Sulaiman J. observed as follows : 'The tenant as licensee of this plot for the purpose for which he has been using it would have no right to alter its user and utilize it for a different purpose altogether nor would the tenant be entitled to make constructions upon the site that he has in sight for tying cattle or storing heaps of cow-dung cakes.' These cases emphasise the essential character of the rights of a tenant in an agricultural village. They are no more than those of a licensee. Another case which has been relied upon by

the appellant is the case in Rafiullah Khan v. Mt. Mumtaz Begam : AIR1927All609 the facts of which briefly were these : 'The defendants who were tenants sold a house in mauza Ahmadpur in the district of Shahjahanpur which had, at the time of the sale, become a part of the town of Shahjahanpur. The plaintiffs who were the zamindars brought a suit challenging the sale.'

12. Their Lordships, Walsh and Pullan JJ. made the following observations : 'The question to be decided in this appeal is whether the defendants-respondents have or have not a right to sell a house in an area which has been described as Mauza Ahmadpur appertaining to the town of Shabjahanpur. The suit has lasted since the year 1917 and the first decision of the learned Munsif in that year was that the area in which this house is situated is, technically speaking, an agricultural village although it has been included in the municipal area of the town of Shahjahanpur. There is no explicit finding by any Court that this is not the case although it appears that the lower appellate Court has taken the view that because the Municipalities Act has been extended to this mauza, the zamindar is thereby precluded from claiming those rights over the land on which the rights of the raiyats stand, which are admitted to be the universal rights of the zamindars in this province. We are not prepared to agree with this view of the learned lower Court and we are of opinion that this is a case in which the ordinary law of this province must be held to apply unless the respondents are able to prove that they received some title in the house in suit other than that of the raiyats in an agricultural village.... In our opinion the appellant has made good his case. He has all the rights of a zamindar in the mauza in which this property is situated and is entitled to challenge this transaction and obtain a decree.

13. When their Lordships say that the ordinary law of this province must be held to apply, they only reiterate the principle embodied in the expression 'a custom so well established that it may be treated as the common law of the province.' It is thus manifest that the principle of law laid down in that case was implicitly followed in this Court even up to the year 1927, even though the conditions might have changed, so much that what was once an agricultural village had become part of the town and was included within the municipal limits. The other case which was cited by the appellant is a case reported in the same volume, Sheo Shanker v. Ram Tahal : AIR1927All605 . Iqbal Ahmad J. as his Lordship then was held 'Occupants of houses in agricultural villages do not, in the absence of a custom of contract to the contrary, by the mere fact of village being included into a municipality, acquire a right to transfer the site of their houses or to transfer the right of residence along with the materials of their houses, and the presumption that the owners of houses in town have transferable interest in the site of their houses has no application to agriculturists residing in an agricultural village, though that village may be within the limits of a municipality.' The precise question in that case might have been different but the foundation of the claim was the right of the zamindar as also the right of the tenant. On the other hand, the learned Counsel for the respondents has relied upon Narain v. Dammar ('88) 1888 A.W.N. 125. There are observations in this case which are inconsistent with those in Chhajju Singh v. Kanhaiya ('81) 1881 A.W.N. 114. But Sir John Edge in Balgovind v. Badri Prasad ('23) 10 A.I.R. 1923 P.C. 70 has expressed his dissent from that case and has observed : 'So far as that decision is based upon an assumption that, apart from special contract, the occupier of a house in the abadi under the zamindar has an interest in the occupancy of that house which can be sold privately or by auction sale, we entirely dissent from it. The occupier's right is a mere personal right of residence.' Strong reliance has been placed on Sri Girdhari Ji Maharaj v. Chhote Lal ('98) 20 All. 248. The facts of that case, very briefly, were these. In execution of a decree against one Parai the decree-holder, Bhaddar, caused to be attached and advertised for sale certain houses situated in Mustafabad, a hamlet of Daraganj, a suburb of Allahabad, together with the sites of these houses. Thereupon the plaintiff, Khairuddin Husain, instituted the present suit as zamindar of the land upon which the houses stood, asking for a declaration that he was the owner and possessor of the houses in question and that they were not liable to be sold in execution of Bhaddar's decree. He further prayed that, in case of the sale of the materials of the houses being allowed, he should be declared entitled to dhik at the rate of 10 per cent, on the sale proceeds. He relied mainly on the following condition entered in the wajib-ul-arz:

'No tenant can build a new house without the permission of the zamindar, and after his abandoningthe village, the zamindar is the owner of the materials of the house. In case of his presence (in the village) the

tenant will be entitled to sell the materials (of the house) provided the house has been built at his own expense, and at the time of sale of the house the tenant shall pay a royalty, called dhik, to the zamindar at the rate of 10 per cent.' The Court of first instance dismissed the plaintiff's suit on the ground that as the minor defendant and his predecessor-in-title did not come in the category of cultivator or riyaya, of the plaintiff, the terms of the wajib-ul-arz could not apply to them. It also held that the defendants had 'proved by very reasonable, oral and documentary evidence that along with the site, the houses in Daraganj had been constantly sold within 35 years before this day, and the zamindar never obtained any right in respect of the site of the old houses.' The learned Judge agreed with the Court of first instance in holding that the custom entered in the wajib-ul-arz could not apply to the houses in question. He, however, came to the conclusion that the plaintiff was entitled to the declaration sought by him as regards the site of the house, and hence he gave him a qualified decree declaring that the site was not saleable. In appeal Stanley C.J. and Rustomjee J., while agreeing with the conclusion, differed in the reasons. Rustomjee J. at p. 136 observes as follows : 'It seems to me that the question regarding the site of the houses Btands on the same footing as that of any other land, which has been continuously in the possession of a man for 12 years or more. If the proprietor of such land sleeps over his rights and allows a stranger to continue in undisturbed possession of it for 12 or more years without exercising any of his rights of a landlord, then that man undoubtedly obtains an indefeasible title to the land. In the case it is admitted before us that defendant 2 and his predecessors-in-title have been in continuous possession of the site of the houses for considerably over 12 years as owners. I am of opinion, then, that this possession must be looked upon as adverse and that it has given the defendant an absolute title to the land. I consider, therefore, that the site of the houses is legally capable of sale under the decree obtained by defendant 1.

14. Stanley C.J. put it on a much narrower ground. To quote him : 'It is admitted that the site of the house in dispute lies within the ambit of the plaintiff's zamindari. It is also admitted that the house was built many years ago and that neither the owner of it nor any of his predecessors-in-title ever paid any rent for it, nor gave any acknowledgment of his title to the zamindar, nor carried on any trade, such as that of carpenter, blacksmith, etc., for the carrying on of which sites in the abadi of a village are usually granted by the zamindar free of rent. It is also admitted that the property lies within the municipal limits of the city of Allahabad. It seems to me that the reasonable inference from the long uninterrupted possession and enjoyment of the property by Bhola and his predecessors-in-title is that they acquired the absolute ownership of the site. If they did not acquire it by a grant from the zamindar, they have acquired it by adverse possession.' We had before us the original paper-book of this second appeal. We find that the case was fought principally on the ground that 'Daraganj is one of the mohallas in Allahabad city. The owners of the houses situated therein are owners of the land as well as of the materials.' There is no such plea in the case before us, nor has any plea of limitation or adverse possession been taken by the defendant. This is enough to distinguish that case from the present case. The learned advocate for the respondent however argues that a plea of title amounts to a plea of adverse possession and relies upon Vasudeva v. Maguni Devan ('97) 24 Mad. 387 (P.C.) and Badam v. Mt. Kasturi : AIR1931All605 . In the first place, a plea of title in a case of an ordinary character, must, necessarily have a different connotation from such a plea in a case of this character where, to use an expression quoted from one of the judgments already referred to, 'the ryot or occupier in these provinces is fully aware of his rights and status.' Besides, even the plea of title has not been raised by the defendants. They have claimed title to the house, but not to the land on which it stands. The right to a house consists of three parts, (1) right in the site, (2) the right in the materials, and (3) the right of residence in the house on the site. This is the principle laid down in Kanhaiya v. Sheva Lal : AIR1936All14 . It was the case of cosharer as against an erstwhile cosharer, but the point has been brought out with great clearness by Sir Shah Sulaiman and Sir Edward Bennet and is of one of general application. If however Rustomjee J. meant to hold that in every case if the zamindar 'sleeps over his rights and allows a stranger to continue in undisturbed possession of it for twelve or more years without exercising any of his rights of a landlord, then that man undoubtedly obtains an indefeasible title to the land,' I beg respectfully to dissent from this proposition. Myview receives support from the following observations of Walsh and Pullan JJ., in Rafiullah Khan v. Mt. Mumtaz Begam : AIR1927All609 Says Pullan J., with which Walsh J. agreed : 'The lower appellate Court has also laid stress on

certain facts from which he argues that the plaintiffs have themselves acquiesced in similar transactions and are estopped by their own admissions from contesting respondents' rights to dispose of this property.... It is by no means certain that those who agreed to other transaction in the past had any intention of admitting the rights of the present respondent....'

15. It may be that the stranger, although he remained in undisturbed possession of the property for more than twelve years, never challenged the right of the proprietor and no occasion, therefore, arose for the exercise of proprietary right or to disturb the possession of the stranger. To draw an inference adverse to the zamindar, the proprietor, from what will at the outside amount to nothing more than an indulgence, is neither fair to him nor consistent with the position of a zamindar or an occupier of the land and will be disruption of the harmony of the village. I may mention that in a later case, Shambhu Nath v. Hari Ram ('17) 4 A.I.R. 1917 All. 233, Sir George Knox, a Judge of unsurpassed experience of the conditions in the rural areas in these provinces, has characterized Bhaddar v. Khairuddin ('07) 29 All. 133 as a peculiar case. To quote a few lines from his judgment : 'The houses in dispute were houses situate in mohalla Daraganj in the city of Allahabad. The judgment does not show to what profession the person who laid claim to the houses as owner belonged. But it is said in the judgment of the learned Chief Justice 'that neither the owner of it nor any of his predecessors-in-title ever paid any rent foe it, nor gave any acknowledgment of his title to the zamindar, nor carried on any trade, such as that of carpenter, blacksmith, etc., for the carrying on of which sites in the abadi of a village are usually granted by the zamindar free of rent.' Mohalla Daraganj cannot by any pretence be said to be a purely agricultural mohalla. It is a portion of the city of Allahabad inhabited mainly by Pragwals and it is doubtful whether a single tenant of an agricultural type resides within the four corners of the mohalla.' The next case cited on behalf of the respondent is the case reported in Incha Ram v. Bande Ali ('11) 8 A.L.J. 877. The facts of that case were briefly these. The plot in question was situate in mauza Kamalganj which was a qasba. Defendants 1 and 2 had acquired it under a sale from defendant 3. The plaintiff who was a zamindar brought a suit for ejectment. The defence was a plea of limitation and adverse possession. It was also pleaded that Kamalganj was not an agricultural village. Richards C. J. made the following observations:

'It is quite clear that Kamalganj is. not an ordinary agricultural village. The first person found in possession was one Chingi. The origin of Chingi's possession has not been ascertained, nor is there any evidence as to who was there before him. Chingi was succeeded by his son Nanhe. After the death of Chingi the site was sold on 12th December 1901.... The main business of Chingi and Nanhe was that of inn-keepers and sellers of tobacco. No rent was paid by Chingi.... In my opinion on the evidence the Court was quite justified in finding that the defendants and their predecessors had been in adverse possession for more than 12 years before the institution of the suit.' Banerji J. preferred to rest his decision on the finding of fact recorded by the lower appellate Court and observes : 'In the case before us the Court below has found on evidence which it was entitled to take into consideration that the possession of the defendants and their predecessors in title was adverse to the plaintiffs. That finding must be accepted in second appeal.' Chamier J. observes as follows : 'But in the present case the circumstances were peculiar. It has been held that the village was an agricultural village, but 2/3rds of the inhabitants are said to have been non-agriculturists.... Assuming, however, that the burden of proof lay on the defendants to prove that their possession was adverse, I think that the lower appellate 'Court was right in inferring from the proved facts that the possession of the defendants and the persons through whom they claim, has been adverse to the zamindars for considerably more than 12 years.' It will thus appear that the real basis of the conclusions of the Court was the finding of fact recorded by the Court below that adverse possession had been made out and the character of the village had changed. This case, therefore, has no bearing upon the present case. Examined carefully the dicta laid down by their Lordships are clearly destructive of the defendant's case. Richards C.J. has made it clear that, 'it would be wrong as a general rule to hold that a zamindar loses his proprietary title in a site within the ambit of a zamindarl by reason merely of the fact that he is unable to prove that the person who last held the land or his predecessors in occupation were agriculturists or carried on some one of the recognized village trades, or the payment of rent in cash or kind. In many cases it might be that a person who was either an agriculturist or village trader and as such, in occupation of the site, has given possession to some relative or friend. If it were

held that the moment any person who was not an agriculturist or village trader began to occupy a village site without the express permission of the zamindar, he began to acquire a title against the zamindar, the position of the latter would be well-nigh intolerable, and he would be driven to perpetually harass the occupiers of the village to the detriment of the whole village community.' Banerji J. is still more explicit : 'In the case of an agricultural tenant or a handicraftsman or trader whose presence is necessary or the requirements of the village, the presumption is that his occupation of the site of house is with the permission of the landlord.' The defendants in this case carry on a business which is necessary 'for the requirements of the village.' This ruling is of no assistance to his case.

16. The next case is Abdul v. Datti ('15) 2 A.I.R. 1915 All. 35. The property in this case was situated in mauza Atarsuiya, a village adjoining the city of Allahabad, and was set apart by arrangement with the proprietors and with the Local Government for the establishment of a colony for the butchers of the city. In course of time this land came to be included within the municipal limits of the city of Allahabad and was designated 'mohalla Atala.' The wajib-ul-arz was the basis of the zamindar's suit. Apart from the fact that the inclusion of the area without the municipal limits which brings it out of the category of the present case, Piggott J. who delivered judgment of the Court distinctly observes that : 'Taking these as the facts of the case, it seems to me idle to enter into a discussion of the principles involved in a series of decided eases of this Court which deal with the respective rights of proprietors of the soil and occupants of houses in purely agricultural villages. I accept, as already remarked, the finding of the Court below that the wajib-ul-arz of 1875 did not intend to include this butcher's quarter within the limits of Allahabad city - the 'abadi shahr' as it then stood. Even so, it seems to me decidedly questionable whether a Court would be justified in applying to an area with such a history, as the above the principles laid down for house sites in purely agricultural villages.'

17. This, if anything, means that in its special circumstances, their Lordships refused to extend to the case the principles governing an agricultural village. The case in Sahu Govind v. Kundan ('24) 11 A.I.R. 1924 All. 112 has nothing in common. with the present case. The following were the special features of that case : (a) Mohalla Zabtaganj - where sites in dispute were situated - belonged to the plaintiffs' predecessor, (b) The so-called ryots are not tenants of the plaintiffs, (c) The ryots paid no rent, (d) They had exercised full proprietary rights over their houses and had transferred them freely as of right, (e) Zabtaganj had for more than 50 years formed part of the town of Najibabad and from 1863 has been under the control of the Municipal Board. It is not surprising if their Lordships rejected the plaintiffs' claim for a declaration that certain transfers made by tenants of sites in the abadi were illegal. The same criticisms will apply to Gokul v. Sheo Natulan : AIR1934All426 and Ram Bharose v. Bishnath Prasad : AIR1934All336 . In fact, at p. 730 their Lordships make it quite clear that 'In the case of ryots 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 licensee sues to eject a transferee of such a ryot, he must also prove the existence or terms of the grant under which the house in suit was built which make the transfer thereof invalid and entitle him to recover possession of the site.' The words italicised appear to be, even after a lapse of thirty-five years, an echo of the dictum in 20 All. 248.1 On the principle which now appears to have received universal acceptance, the case in Amjad Ali v. Ghafoor Mohammad : AIR1935All76 which concerns Qasba Aliganj in the district of Aligarh, does not require much comment. Niamat Ullah J. gave effect to the plea of adverse possession, but made it clear, 'The position is materially different where the land in dispute lies in an urban area which cannot be characterised as an agricultural village.' The last case cited is the case in Misri Lal v. Durga Narain : AIR1940All317 . The case, we are told, went in Letters Patent and Mr. Pathak, the learned Counsel for the respondents before Allsop J. and the appellants before the Letters Patent Bench, has stated before us that the Letters Patent Bench have expressed their disagreement with the view of the learned single Judge, although the judgment has not yet been pronounced. Be that as it may, the case related to the urban area and involved a different question from the one before us and cannot, therefore, afford a proper guide for the decision of the present case. It is, however, significant that at p. 318 the learned Judge observes as follows : 'When we speak of a custom having the force of law we mean that there is some rule of law which has been established as a result of a custom which has crystallized so that it has come to have a legal force.' This is precisely the line of reasoning adopted by Sir John Edge in Sri Girdhari

Ji Maharaj v. Chhote Lal ('98) 20 All. 248. This is a review of the entire case law which has grown round this question since the year 1881. A careful examination will establish that, far from the authority in Sri Girdhari Ji Maharaj v. Chhote Lal ('98) 20 All. 248, being shaken by the efflux of time, it has received accessions of strength at different periods at the hands of different Judges. Whenever there was a departure from it, it was only seeming, determined by the special circumstances of the case. No case has gone to the length of disagreeing with it. On the other hand, every judicial pronouncement was in agreement with it and every Judge tried to follow it and, if he did not, it was only when the special circumstances of the case before him made it imperative for him to arrive at a different conclusion. I now come to the other important question - the effect of the declaration of Chhatari as a town area under Section 3, Town Areas Act (Local Act 2 of 1914). Section 3 provides:

3.(1) The Local Government may, by notification in the Declaration and Gazette - (a) declare any town, definition of town village, suburb, bazar or inhabited areas. place to be a town area for the purposes of this Act, (the italics are mine) and may unite, for the purpose of declaring the area constituted by such union to be a town area, the whole or a portion of any town, village, suburb, bazar or inhabited place with the whole or a portion of any other town, village, suburb, bazar or inhabited place, (b) define the limits of any town area for the like purposes, (c) include or exclude any area in or from any town area so declared or defined, and (d) at any time cancel any notification under this section : provided that an agricultural village shall not be declared, or included within the limits of a town area. (2) The decision of the Local Government that any inhabited area is not an agricultural village within the meaning of the proviso to Sub-section (1) of this section shall be final and conclusive, and the publication in the Gazette of a notification declaring such area to be a town area of within the limits of a town area shall be conclusive proof of such decision.

18. The preamble of the Act provides : 'An Act to make better provision for the sanitation, lighting and improvement of town areas in the United Provinces of Agra and Oudh.' Section 4 provides for the appointment of a town magistrate. Section 5 provides for the appointment of a town committee. Section 8 defines the duties of the committee. Section 8(A) Clause (vii) defines the duties of the chairman and they are as below : '(a) to convene and preside at all meetings of the committee, to control the transaction of business thereat, and to maintain a record of such business, (b) to supervise the collection of the tax and any other dues, (c) to supervise the work of the servants of the committee, (d) to conduct all correspondence on behalf of the committee, (e) subject to the control of the committee, to apply the town fund to any or all of the purposes prescribed by Section 23; and (f) to perform such other duties as may be required of or imposed on him by or under this Act.' The learned Civil Judge has held that the Bengal Chaukidari Act, 20 of 1856, was applied to Chhatari. That Act was, on the enforcement of the Town Areas Act, repealed and Chhatari was mentioned in list I of Schedule A, No. 38, Town Areas Act. The earlier Act was also passed for purposes, almost similar to the purposes of the present Act. Sir Tej Bahadur Sapru, the learned Counsel for the appellant, has strenuously argued that on a true interpretation of the ruling of their Lordships of the Judicial Committee, in Fateh Chand v. Kishan Kuar ('12) 34 All. 579 (P.C.), neither of the two Acts commits an inroad upon his right as azamin-dar and that his contention receives support from the expression 'for the purposes of this Act.' The facts in the case before the Judicial Committee were briefly these. The village in question was mauza Rampur in the district of Etah. The Chaukidari Act, Act 20 of 1856, applied to it, Rani Kishan Kunwarwas the zamindar of the mauza, Fateh Chand and others were the purchasers under private sales of certain resumed muafi, dwelling houses and groves situate in a village, from certain tenants. They brought a suit for a declaration that they were entitled to the possession of the property and further entitled to have their names recorded, as absolute owners, in the revenue papers. The Munsif dismissed the suit with costs finding that the plaintiffs were at most occupancy tenants. The Subordinate Judge on appeal decreed the suit. On second appeal the High Court reversed the decision. One of the points in controversy was the effect of the Bengal Chaukidari Act upon the rights of Rani Kishan Kunwar, the zamindar. Their Lordships of the Judicial Committee observed as follows : 'On the hearing of this appeal the learned Counsel, on behalf of the appellants contended that the Judges of the High Court should have accepted the findings of the Subordinate Judge on the question of title as correct and as binding on them in second appeal and were not at liberty to find that the plaintiffs were not

the proprietors of the lands in question. He also contended that the Judges of the High Covtft had misconstrued the wajib-ul-arz and the other documentary evidence and had come to a wrong conclusion. He further contended that the wajib-ul-arz of Mauza Kampur, which was made in the settlement which commenced in 1872 and extracts from which are on the record of this suit, cannot be treated as applying to the abadi of Mauza Rampur, the ' contention being that Rampur, owing to the number of its inhabitants, many of whom, are not agriculturists, and owing to the fact that the Government has applied the Chaukidari Act (Act No. 20 of 1856) to it, Rampur must be regarded as a town and not as a purely agricultural village, to which, according to the learned Counsel's contention, a wajib-ul-arz is alone applicable. The answer to the contention that the wajib-ul-arz does not apply to the abadi of Mauza Ram pur appears to their Lordships to be that the wajib-ul-arz to which reference has been made was prepared by the settlement officer for the whole Mauza Rampur including the abadi, and that all those who were interested were at the time given the opportunity of objecting to the statements contained in it, and further that the Government by applying the Chaukidari Act to Rampur did not alter and could not have altered proprietary rights in Mauza Rampur or in any part of the mauza. The wajib-ul-arz is in their Lordships' opinion cogent evidence of the rights as they existed, when it was made, of those holding proprietary or other rights of property within the mauza, and it has not been shown that the wajib-ul-arz to which reference has been made in this suit differs in any material respect from the wajib-ul-arz which their Lordships have been informed by counsel was made in the more recent settlement.' If there were nothing else, the observations of their Lordships of the Judicial Committee do support the contention of the learned Counsel for the appellant. It has however been contended by the learned Counsel for the respondents that there is no provision in the Bengal Chaukidari Act similar to the one which one finds in Section 3, particularly the proviso and Sub-section (2) of the section. The proviso reads thus : 'Provided that an agricultural village shall not be declared, or included within the limits of a town area.' Sub-section (2) says : 'The decision of the Local Government that any inhabited area is not an agricultural village within the meaning of the proviso to Sub-section (1) of this section shall be final and conclusive....' There is room for considerable argument with regard to the interpretation of the proviso. With that I shall deal presently. It is one of the cardinal principles of the interpretation of statutes that its provisions should be so interpreted as to bring them in conformity with its object and to restrict the operation only to the objects enumerated in the section. In Finchley Electric Light Co. v. Finchley Urban Council (1903) 1 Ch. 437 at page 440, Collins M. Rule observes : 'Their Lordships arrived at that conclusion in accordance with the principle laid down by a line of cases beginning with Coverdale v. Charlton (1879) 4 Q.B.D. 104, that, in construing an Act of Parliament which confers a right upon a public authority for which they do not pay, the Court gives the best effect to the intention of the Legislature by limiting the right to the area which is necessary to enable them to perform the duties imposed upon them in respect o the street as a street.' It is not pretended that the zamindar received any compensation. On the principle laid down, it is argued on behalf of the appellant that this Court will give the best effect to the intention of the Legislature by limiting its operation or effect to the purposes enumerated in the Act itself.

19. If we confine ourselves to the object of the Act, as disclosed by its preamble and also to the purposes as illustrated by the various duties assigned to the committee and also to the chairman, there can be no doubt that the proprietary rights of the zamindar are not affected by it. It may be that to the extent of the duties which have devolved upon the committee and the chairman, the zamindar has been relieved of his responsibility, but that is very far from saying that they amount to an infringement of his proprietary right. Right and duty are correlative terms. The zamindar has a right which he exercises on the land, upon the tillers of the land and upon the ryots in the village. He has also a corresponding duty to look after their welfare. The Legislature was not quite sure that he was fully mindful of his obligations and, as the final responsibility must rest with it, it stepped in with this Act, but only for the purposes enumerated in the Act itself. The learned Counsel for the respondents has, however, endeavoured to argue that although the expression 'for the purposes of this Act,' is to be found in Section 3, Clause (a), it is absent from the proviso as well as Sub-section (2) of Section 3. An interesting question may also arise whether it was competent to the Legislature to declare Chhatari as an agricultural village when, on the findings, it is an agricultural village. The appellant, if necessary, could not have calle4 upon us to determine the larger question as to the right of Legislature to

extend the Act to an agricultural area which Chhatari is, when it itself says that such area will be immune from its mischief, but in the view we take, we have been relieved of the necessity of going into that question in this case. I, however, feel constrained to say that the argument of the learned Counsel for the respondents that the proviso and Sub-section (2) must be read separately from Clause (a) of the section, does not commend itself to me. It is again one of the cardinal principles of the interpretation of statutes that an Act should be so read that the different portions should not come in conflict with one another. On the question of construing provisos in relation to the section itself or the different parts of the same section, the following may be read with advantage. 'The effect of an excepting or qualifying proviso, according to the ordinary rules of construction, is to except out of the preceding portion of the enactment, or to qualify something enacted therein, which, but for the proviso, would be within it; and such a proviso cannot be construed as enlarging the scope of an enactment when it can be fairly and properly construed without attributing to it that effect : Craies on Statute Law, Edn. 4, p. 196.' 'It is a well-known rule, said Bovill C.J. in Horsnail v. Bruce (1873) 8 C.P. 378 , at p. 385, 'in the construction of statutes, that if a substantive enactment is repealed, that which comes by way of proviso upon it is impliedly repealed also:' Craies, ibid, p. 198. This makes it abundantly clear that the fate of the proviso is indissolubly linked up with that of the main section and it must stand or fall with it.

20. The argument of the learned Counsel for the respondents that the proviso is not governed by the expression 'for the purposes of this Act' must, therefore, be rejected. The authorities cited on behalf of both the parties on the effect of this Act upon the right of the zamindar will have to be examined in the light of the principle of law enunciated above. Reliance has been placed by the appellant in support of the above proposition on the case in Mathura Prasad v. Bhola Nath : AIR1938All144 Niamat Ullah J., emphasised this point : 'The Act provides for the appointment of a Town Magistrate, constitution of a town panchayat, taxation, town fund, sanitation and 90 on. Any area included in a town area, declared by the Local Government to be such, must be presumed to be no part of an agricultural village and the decision of the Local Government may be final and conclusive; but this is only for the purposes of the Act.' The learned Counsel for the respondents has attempted to distinguish this case on the ground that in that case the declaration had been withdrawn and the observations were in the nature of an obiter. It is so, but we agree with the line of reasoning adopted by the learned Judge. On behalf of the respondents, on the other hand, very strong reliance has been placed on Behari Lal v. Sukhbir Singh : AIR1936All442 . This authority is, as far as it goes, certainly in favour of the respondents, but it fails to consider the effect of the expression 'for the purposes of the Act.' Besides, any finding on the question of the effect of Section 3, U.P. Town Areas Act, was in the nature of an obiter dictum, inasmuch as the second appeal was concluded by findings of fact. Their Lordships themselves observe at p. 209 : 'In the first place, we consider that the finding of fact of the lower appellate Court is conclusive.' The case which has gone to the extreme length in favour of the appellant is the case in Panguwa v. Batan Singh : AIR1938All129 Ganga Nath J. observes as follows:

'According to this section a notification is to be made by the Government in respect of any local area other than an agricultural village. The decision of the Local Government that the local area is not an agricultural village shall be final and conclusive. After the notification, it cannot be said that the area in respect of which a notification has been made is an agricultural village. Consequently the patti which is included in the notified area and in which the house in dispute is situated cannot be regarded as an agricultural village and the plaintiff as its zamindar cannot claim any right in the soil.' This case is also open to the criticism that the material passage which is the sheet-anchor of the plaintiff, did not receive any consideration. Besides, the dictum that the zamindar loses alj rights even in the soil is not sound. The zamindar loses his rights in the surface or it may be in things above the surface, but never in the soil. This principle has always been followed in England. In Municipal Council, Sydney v. Young (1898) 1898 A.C. 457 at p. 459 Lord Morris observed as follows : 'Now it has been settled by repeated authorities...that the vesting of a street or public way vests no property in the municipal authority beyond the surface of the street, and such portion as may, be absolutely necessarily incidental to the repairing and proper management of the street, but that it does not vest the soil or the land in them as the owners. If that be so, the only claim that they could make would be for the surface of the street as being merely property vested in them qua street, and not as general property.' This principle

was followed by their Lordships of the Judicial Committee in a case which went from this country and is reported in Man Singh v. Arjun Lal . I am, therefore, of opinion that the Town Areas Act affected the right of the zamindar only to the extent it was necessary 'for the purposes of the Act;' his proprietary rights have remained untouched. In the view which I have taken,-it is not necessary to deal with the larger question whether the Town Areas Act was ultra vires, but out of deference to the able arguments of Sir Tej Bahadur Sapru I shall deal with it, though only very briefly. The Town Areas Act, in so far as it takes away some or all the rights of the zamindar without making adequate compensation, must be deemed exproprietary and is ultra vires. The zamindars were assured of their rights by the Sovereign in 1858 : 'We know, and respect, the feelings of attachment with which the Natives of India regard the lands inherited by them from their ancestors ; and We desire to proteot them in all rights connected therewith, subject to the equitable demands of the State; and we will that generally, in framing and administering the law, due regard be paid to the Ancient Rights, Usages and Customs of India.' (Mukerji's Indian Constitution, Vol. I, page 433). And if the Town Areas Act makes an inroad upon the rights of the zamindar without compensation, it must be condemned on the ground that it is ultra vires. This argument is sought to be supported by a reference to a quotation from a well-known authority : 'In every Government there is inherent authority to appropriate the property of the citizen for the necessities of the State, and constitutional provisions do not confer the power, though they generally surround it with safeguards to prevent abuse. The restraints are that when a specific property is taken, a pecuniary compensation, agreed upon or determined by judicial inquiry, must be paid.' (Cooley's Constitutional Limitations, Edn. 8, Vol. II, page 743.) The principle enshrined in the above lines has been accepted by their Lordships of the Privy Council in the well-known case in Secy. of State v. Moment ('13) 40 Cal. 391 (P.C.). The facts of this case were briefly these. The Lower Burma Town and Village Lands Act (Burma Act 4 of 1898), by its Section 41 provided : 'No civil Court shall have jurisdiction to determine any claims to any right over land as against the Government.' The respondent, Moment, was the owner of a house, stabling, etc., standing on land known as 36A Sandwith Road, in the Cantonment of Rangoon. The Secretary of State instituted a suit in the Chief Court for possession of the land on payment of compensation for the buildings erected thereon, in which suit, on 30th May 1905, the Court made a decree for possession, and directed the appellant to pay Rs. 1590 as compensation. In execution of the decree the Secretary of State took possession of the land and buildings on 18th September 1905, and through the Executive Engineer, Rangoon Division, issued orders in October 1905, for the sale of the buildings on the land by public auction. Moment preferred an appeal against the order, and the Chief Court in its appellate jurisdiction reversed the decree.

21. The Secretary of State preferred an appeal against this order and one of the points taken before their Lordships of the Judicial Committee was whether, on a correct interpretation of Section 41 (b) of the Act, he was entitled to move the civil Court. Lord Haldane, delivering the judgment of the Board, repelled the contention that Section 41(b) could take away the right given to every citizen to move the Court : 'The Act of 1838 declared that India was to be governed directly and in the name of the Crown, acting through a Secretary of State aided by a council, and to him were transferred the powers formerly exercised by the Court of Directors and the Board of Control. The property of the old East India Company was vested in the Crown. The Secretary of State was given a quasi-corporate character to enable him to assert the rights and discharge the liabilities devolving on him as successor to the East India Company. The material words of Section 65 enact that 'the Secretary of State in Council shall and may sue and be sued as well in India as in England by the name of the Secretary of State in Council as a body corporate; and all persons and bodies politic shall and may have and take the same suits, remedies and proceedings, legal and equitable against the Secretary of State in Council of India as they could have done against the said Company.' Section 66 is a transitory provision making the Secretary of State in Council come in place of the company in all proceedings pending at the commencement of the Act, without the necessity of a change of name. Section 67 is also a transitory provision making engagements of the Company entered into before the commencement of the Act binding on the Crown and enforceable against the Secretary of State in Council in the same manner and in the same Courts as they would have been in the case of the Company had the Act not been passed. By Section 22, Councils Act, 1861, the Governor-General in Council is given power to make laws in the manner provided, including power to repeal or amend existing laws, and including the making of laws for all Courts of justice.

But a proviso to this section enacts that there is to be no power to repeal or in any way affect, among other matters, any provision of the Government of India Act, 1858. Their Lordships are of opinion that the effect of Section 65 of the Act of 1858 was to debar the Government of India from passing any Act which could prevent a subject from suing the Secretary of State in Council in a civil Court in any case in which he could have similarly sued the East India Company. They think that the words cannot be construed in any different sense without reading into them a qualification which is not there, and which may well have been deliberately omitted. The section is not, like the two which follow it, a merely transitory section. It appears, judging from the language employed to have been inserted for the purpose of making it clear that the subject was to have the right of so suing and was to retain that right in the future, or at least until the British Parliament should take it away. It may well be that the Indian Government can legislate validly about the formality of procedure so long as they preserve the substantial right of the subject to sue the Government in the civil Courts like any other defendant, and do not violate the fundamental principle that the Secretary of State, even as representing the Crown, is to be in no position different from that of the old East India Company. But the question before their Lordships is not one of procedure. It is whether the Government of India can, by legislation take away the right to proceed against it in a civil Court in a case involving a right over land. Their Lordships have come to the clear conclusion that the language of Section 65 of the Act of 1858 renders such legislation ultra vires.' The above principle has now received statutory recognition by Section 299, Government of India Act, which provides that: '(1) No person shall be deprived of his property in British India save by authority of law. (2) Neither the Federal nor a provincial Legislature shall have power to make any law authorising the compulsory acquisition for public purposes of any land, or any commercial or industrial undertaking, or any interest in, or in any company owning, and commercial or industrial undertaking, unless the law provides for the payment of compensation for the property acquired and either fixes the amount of the compensation, or specifies the principles on which, and the manner in which it is to be determined. (3) .... (4) .... (5) In this section 'land' includes immovable property of every kind and any rights in or over such property, and 'undertaking' includes part of an undertaking.' The respondents seek to meet this argument on two grounds. In the first place, say they, there was no provision corresponding to Section 299 on the statute when the Town Areas Act came into force in 1914. Moment's case Secy. of State v. Moment ('13) 40 Cal. 391 (P.C.) they seek to distinguish on the ground that Section 41(b), Burma Act, came into direct conflict with Section 65, Government of India Act, 1858. Here, according to them, Section 3 or the other provisions of the Town Areas Act do not come in conflict with any other provisions of the law. The question is one of great constitutional importance, but it is not necessary, in this case, to arrive at any final decision on it. I think that the plaintiff is on surer ground when he takes his stand on the expression 'for the purposes of the Act.'

22. A few other points have been raised on behalf of the respondents in support of the decree. It is argued that the precise right conferred by the zamindar upon the ryots is shrouded in obscurity and, in the absence of positive evidence, the grant must be construed in favour of the grantee, and reliance has been placed upon a passage in a well-known authority which is to the following effect : 'It is a general principle that a grantor may not derogate from his own grant and that such grant is always construed strictly against him. This principle, which is one not of equity but of law, in no way depends upon an implication of a covenant on the part of a grantor; and it applies to a person depriving title from a grantor in the same way as it applies to a grantor himself. It follows that a lessor retains, as a rule, no rights over premises demised by him, although actually exercised at the time of severance and not merely in contemplation, except such as are reserved to him by the lease in clear and express terms.' (The Law of Landlord and Tenant by Foa.) and 'There may be an exception out of an exception, relating consequently to a thing which will pass by the demise to the lessee; but for this it must be capable of being ascertained at the time of the demise, and must not depend upon a mere future contingency.' (The Law of Landlord and Tenant by Foa.) In my opinion, this argument has no force. We are not left in the dark as regards the rights of the zamindar and the tenant in the abadi. The zamindar has, unless the contrary is established, all the rights whereas a tenant has only the right of use and occupation. In the words of Blair and Banerji JJ. in Basa Mal v. Ghayasuddin ('04) 27 All. 356. 'Every villager knows perfectly well the nature of his rights in the abadi.' Besides this argument is in the teeth of the observations of Richards C. J. in Incha Ram v. Bande Ali ('11) 8 A.L.J. 877, to the following effect : 'I think it

would be wrong as a general rule to hold that a zamindar loses his proprietary title in a site within the ambit of a zamindari by reason merely of the fact that he is unable to prove that the person who has held the land or his predecessors in occupation were agriculturists or carried on some one of the recognized village trades, or the payment of rent in cash or kind. In many eases it might be that a person who was either an agriculturist or village trader and as such, in occupation of a site, has 'given possession to some relative or friend. If it were held that the moment any person who was not an agriculturist or village trader began to occupy a village site without the express permission of the zamindar, he began to acquire a title against the zamindar, the position of the latter would be well-nigh intolerable.'

23. It has also been argued that if the absolute possession of the property was to remain with the tenant, he must be deemed to have acquired all the rights in the property including the right to the land and for this reliance has been placed on the following observations in. Halsbury's Laws of England, Vol. 20, Hailsham Edition. 'If the effect of the instrument is to give the holder an exclusive right of occupation of the land, though subject to certain reservations or to a restriction of the purposes for which it may be used, it is in law a demise of the land itself.' and also on Glenwood Lumber Co. v. Phillips (1904) 1904 A.C. 405 which says : 'It is not, however, a question of words, but of substance. If the effect of the instrument is to give the holder an exclusive right of occupation of the land, though subject to certain reservations or to a restriction of the purposes for which it may be used, it is in law a demise of the land itself.' and further on Behari Lal v. Chote : AIR1933All911 , where the judgment was based upon the dictum laid down in the English case. This will not be so if the grantor and the grantee knew their rights. The observations of Blair and Banerji JJ., and of Sir Henry Richards in the cases noticed above, furnish a complete answer also to this argument. It is also argued that the house in dispute is not one of the houses which were in existence at the time of the wajib-ul-arz and does not, therefore, fall within its mischief. The wajib-ul-arz determines the rights of the parties as they were not only on the date that it has drawn up, but for all time to come. Its terms must, therefore, be held to govern not only the parties then living or the property then in existence, but all their descendants and also the property of an alleged nature which subsequently came into existence. The clause in the wajib-ul-arz is only illustrative - illustrative of the rights of the parties with reference to the property. This argument must, therefore, be rejected. Lastly it is argued that on the finding of the learned civil Judge that, 'a shop to my mind is a place where retail sales are held. A godown would not come under the definition...' the plaintiff has no cause of action. Evidently this finding is treated as a finding of fact. I do not agree. A godown is much nearer a shop than a residential house and it is hypercriticism to say that a godown continues to be a residential house. The learned Judge has himself found that delivery of goods is made from the godown in dispute. He sums up his conclusion in this way. 'Considering the evidence I find that the defendants are not using the disputed portion as a shop for retail sale but as a godown.'

24. In Stroud's Dictionary we find the following definition of the word 'shop' : 'It must be something more than a mere place for sale; it imports a place for storing also, where the commodities admit of storing.' (Stroud's Judicial Dictionary, 2nd Edn., p. 1873). I have, on a review of the above authorities, come to the conclusion that the plaintiff has fully established his case. He is entitled to have the injunction granted by the learned Munsif. I would therefore, allow the appeal, set aside the decree of the lower appellate Court and restore that of the Court of first instance with costs in all the Courts.

Plowden, J.

25. I concur with the judgment of my learned brother. When the appeal was first argued before us, I thought that the Town Areas Act modified the rights of the zamindar but after hearing learned Counsel for the appellant on the first day, I was convinced that the rights of the zamindar as against the ryots were not in the least affected although some duties of a public nature were taken from his hands and placed with a committee. Otherwise whatever rights the zamindar has in an agricultural village he keeps in a town area. The difficulty in this case, as I understood it, lay in the fact that the terms of the wajib-ul-arz had not been altered since 1870 although Chhatari came under the operation of the Bengal Chaukidari Act in 1873 and of the Town Areas Act in 1914. It seemed to me therefore indisputable that the settlement officer had allowed the wajib-ul-

arz to remain as it was in 1870 because he thought, either by mistake or after consulting the parties concerned, that some of the terms laid down in 1870 when Chhatari was an agricultural village were not intended to apply to it after it became a town area. Some of the details, for instance that in 1870 there were so many shops and some of them were vacant, could not possibly apply to the conditions of the last settlement. After listening to arguments on the first day before the Full Bench was constituted I had no doubt that the plaintiff had the right to develop this area either as a residential or a trading area, but it was not clear from the plaint in what way he would in future develop it. This ambiguity should, in my opinion, be clarified in this case so that other residents would know what were the plaintiff's intentions and would make their arrangements accordingly. Learned Counsel for the plaintiff gave an assurance that this area would be developed as a residential area and unless any of the residents attempted to turn their houses into shops or godowns, they would remain in undisputed possession. Learned Counsel admitted that if he had been drawing up the plaint, he would not have sued either for the ejectment of the defendants or for the fixation of rent if the Court came to the conclusion that the defendants were entitled to turn their houses into shops or go-downs but only for the injunction which the Munsif granted the plaintiffs. This assurance and admission give the ryots a guarantee that this particular area is to be maintained for residential purposes. In my opinion this guarantee fulfils the1 legitimate demands of the defendants.

Verma, J.

26. I also agree that this second appeal should be allowed, the decree of the lower appellate Court should be set aside and the decree of the trial Court should be restored.

27. The appeal is allowed, the decree of the lower appellate Court is set aside and the decree of the trial Court is restored, with costs in all Courts.