

Fateh Vs. Har Bilas

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Court : Allahabad

Decided On : Nov-23-1938

Reported in : AIR1939All392

Appellant : Fateh

Respondent : Har Bilas

Judgement :

Verma, J.

1. The suit which has given rise to this appeal was brought by the respondent for possession over a house by ejectment of the appellant, for a perpetual injunction restraining the appellant from interfering with the plaintiff's possession, over the house, and for future mesne profits. The trial Court dismissed the suit but the lower Appellate Court has reverse that decree and has passed a decree for possession over the house in favour of the plaintiff-respondent. The defendant has come up to this Court in second appeal.

2. The allegations of the plaintiff were that he was the sole zamindar of mahal 7 1/2 biswas situated in village Gopalpura alias patti Saktara, that one Dhumi, who was a Kachhi by caste, had been occupying a house within the abadi of that village as the plaintiff's ryot, that Dhumi died and his widow lived in the house after him, that the widow also has died and as Dhumi left no issue, the house reverted in law to the zamindar, and that the defendant had taken possession of the house

without any title and was liable to ejectment. The defendant-appellant admitted that the plaintiff was the sole zamindar of the village, but pleaded that one Naththay was the adopted son of Dhumi, that Naththay, along with one Palua, a collateral of Dhumi, had made a usufructuary mortgage of the house in favour of the defendant by means of a registered deed dated 6th June 1928, and had put him in possession and that therefore the defendant could not be ejected. In para. 16 of the written statement, the defendant further pleaded that in this village the occupiers of houses were entitled to transfer their houses together with their sites, and that therefore the allegation of the plaintiff that the site of the house in question had reverted to him as zamindar was not correct. The defendant also alleged that the house in question was not situated within the zamindari of the plaintiff.

3. The trial Court held that the house was situated within the zamindari of the plaintiff, that Naththay was the adopted son of Dhumi, that the defendant had failed to prove a custom by virtue of which the occupiers of houses in this village could transfer their houses together with their sites, that as Naththay had executed a usufructuary mortgage in favour of the defendant he could not be said to have abandoned the house and that therefore the zamindar was not entitled to resume possession. Accordingly, it dismissed the suit. The plaintiff appealed to the lower Appellate Court and that Court has agreed with the findings of the trial Court as to Naththay being the adopted son of Dhumi, and as to the non-existence of any custom which could entitle the occupiers of houses in the village to transfer their houses together with their sites. It has also expressed the opinion that as Naththay had put his mortgagee in possession of the house and as the mortgagee could take care of the same Naththay could not be said to have abandoned the house. It has, however, held that as there was no custom prevailing in the village by virtue of which the occupiers of houses could transfer their houses together with the sites, Naththay was not authorized to give a usufructuary mortgage and put the mortgagee in possession and that the plaintiff was therefore entitled to succeed.

4. The learned Counsel for the defendant-appellant has first urged that the village in question is not an agricultural village but is a town and that the law which applies to houses in the abadi of agricultural villages should not be applied to the

house in dispute. It is apparent however that no such plea was raised in the Courts below and no issue was ever framed on this point. The learned Counsel has further urged that there is no finding by the Courts below that Dhumi was an agriculturist. This plea also was never raised in the Courts below. As a matter of fact, the plea raised by the defendant in para. 16 of his written statement mentioned above, and the issues framed in the case, clearly show that the case proceeded in both the Courts below on the footing that the village was an agricultural village and that Dhumi was an agricultural tenant, but that according to the defendant, there was a custom prevailing in the village according to which Naththay was entitled to make the transfer in question. It may also be pointed out that the usual occupation of Kachhis is agriculture. For these reasons we are unable to entertain this argument of the learned Counsel.

5. The next point urged by the learned Counsel is that the fact that Naththay has made a usufructuary mortgage of the house and has put the mortgagee in possession does not show that he has abandoned the house. His contention is that it is absolutely necessary that the ryot must be found to have left the village before it can be held that he has abandoned the house, and that unless such abandonment is established the mere fact of a transfer does not entitle the zamindar to sue for possession. The law on the subject is well-established. We may refer to the case in *Sri Girdhariji Maharaj v. Chote Lal* (1898) 20 All 248, where it has been laid down: 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 to the contrary, a mere right to use that house for himself and his family so long as he maintains the house, that is, prevents it 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 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, roofing and wood-work of the house.

6. The learned Counsel does not deny that this is the law prevailing in these Provinces but he emphasizes the words 'by leaving the village' and the word 'sell' in the above passage. His contention is that the law as laid down here applies only to transfers by wale and to no other forms of transfer, and further that an abandonment can take place only if the occupier of the house has left the village. In our opinion these contentions of the learned Counsel are not correct. In order that the occupier of a house in the abadi of a village may be held to have abandoned the house it is not absolutely necessary to show that he has left the village. The point is in our opinion so obvious that we do not consider it necessary to deal with it at any length. Numerous instances of abandonment of a house are easily conceivable even though the occupier has not actually left the village and gone elsewhere. The argument that the zamindar has a right of suit, only if the transfer in question is a sale, ignores the principle on which the custom, which has been spoken of as the common law of these Provinces in the passage quoted above, rests namely that when a zamindar allows a person to build a house on his land he is entitled to insist that that person and the members of his [family alone should occupy that house and that they should not be entitled to transfer the house and thus force a stranger on the zamindar. In our opinion a usufructuary mortgage also is a transfer of the kind. In which the law does not permit occupiers of houses standing on the zamindar's land to make. In our opinion the decree of the lower Appellate Court is correct and no Interference is called for. For the reasons given above we dismiss this appeal with costs.