

Bechai Vs. Badri Narain and anr. and

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Court : Allahabad

Decided On : May-23-1921

Reported in : AIR1921All68; 63Ind.Cas.292

Judge : Lindsay and ;Kanhaiya Lal, JJ.

Appellant : Bechai

Respondent : Badri Narain and anr. And; Chekhuri

Judgement :

1. Both these appeals have arisen out of suits brought by the plaintiffs-respondents for the recovery of what is described as zar chaharum. In each case the claim was based upon the sale of a house situated in a patti salled Deo Narain Singh, of which the plaintiffs are admittedly Zemindars, It is not disputed that in this patti of Deo Narain Singh are included a number of houses which fall within the Municipal boundary of the City of Benares and in that particular portion of the City which is known as Mohalla Jaitpura.

2. The plaintiffs based their case upon a custom which was recorded in the wajib-ul-arz prepared in the year 1866 The defendants on the other hand denied that they were liable to be sued for these sums. They denied that there was any custom of the kind alleged by the plaintiffs and they further relied upon a later statement of custom, which it was said was prepared at the time of the last Settlement of Benares. This later statement of custom has been described in the

evidence and in judgments as the halat dehi.

3. Both the Courts below found in favour of the plaintiffs. The Court of first instance based its judgment upon what was recorded in the wajib-ul-arz of 1806 and also upon certain other evidence, showing that there had been cases brought to the notice of the Courts in which the existence of this custom had been recognised and enforced. Those instances for the most part relate to the years prior to the year 1883, but there are instances also which relate to years subsequent to that date.

4. In the second appeal now before us the defendants come forward and assert that no sash custom was proved and that, as a matter of fact, the present custom is that all persons who occupy houses in this patti are the owners of both the houses and the house sites and are entitled to dispose of them as if they are their full owners.

5. A preliminary objection was taken to the hearing of these appeals based upon the provisions of Section 102 of the Code of Civil Procedure. It was argued that the suits were of the nature of Small Cause Court suits and that as the amounts in dispute were under Rs. 500, no second appeal lay. After hearing Counsel on this point we decided that the preliminary objection could not be sustained and that the hearing of the appeals must proceed.

6. In this connection we need only refer to Clause 13 of the Second Schedule of the Provincial Small Cause Courts Act (IX of 1887). That clause exempts from the jurisdiction of Small Cause Courts all suits to enforce payment of the allowance or fees respectively called 'malikana' and 'haq.' The concluding portion of the clause relates to claims for cesses and other dues with which we are not concerned here. It is perfectly obvious that what the plaintiffs are claiming in these suits are what is described as 'haq' in the clause just referred to. There was cited before us a decision of a single Judge of this Court reported as *Bohra Bhoi Raj v. Ram Chandra* 5 Ind. Cas. 950 : 42 A. 448 : 18 A.L.J. 561. All we need say is that, if the learned Judge in that decision meant to lay down that a suit of this kind, that is to say, a suit for a haq, was cognisable by a Small Cause Court, we are unable to agree with him.

7. To come to the merits of the case, we have already mentioned that in support of the custom under which they were claiming, the plaintiffs relied upon the wajib-ul-arz of 1866, That document, which professes to be a record of custom, lays down that in the case of persons, who are described as parjotdars, selling the materials of their houses, the Zemindars are entitled by way of haq chaharum to a one-fourth share of the sale-proceeds. That the declaration contained in this document was intended to be a declaration of custom appears to us to be clear from the concluding words, in which the Zemindars said that they would realise all their Zemindari haqs 'in accordance with the custom.'

8. We have also been preferred to the evidence which was produced before the first Court, showing instances in which the custom had been observed and enforced.

9. To turn now to the main argument which was put forward on behalf of the defendants, namely, the argument based upon the document known as the halat dehi. We were referred in this connection to paragraphs 46 and 47 of the Official Report on the Survey and Revision of Records of the Benares District. This report, which was compiled at the last Settlement of Benares, was printed in the year 1887.

10. In dealing with the record prepared at this revision of Settlement, the Settlement Officer at page 46 of the report states that the principal papers in the record are the map, the khasra, the jamabandi, the khewat and the halat dehi. In paragraph 47 referring to the halat dehi, he describes it as being of the least importance. He mentions how this document was directed to be prepared by way of a substitute for the old wajib-ul-arz, and shows how the first intention was that the wajib-ul-arz was to be done away with entirely. He then goes on to describe the nature of the entries contained in the halot dehi, showing that it mentions the method by which the instalments of the Government revenue are to be paid and the rents collected how cesses are taken, and other matters of local interest, such as the rights of irrigation, la short the paper is described an being a memorandum of the existing customs as ascertained by the Settlement Officials during the progress of the Settlement arrangements.

11. According to what is stated in the halat dehi in these cases (Exhibit 24), we find from Clause 10 of the document that in the area of patti Deo Narain Singh, in respect of which the document was prepared, the general rule observed was that the Zemindars were entered as the owners and the house owners were entered as tenants of the Zemindars. These entries profess to have been made in accordance with certain instructions given by the Settlement Officer prior to the year 1885. We have, unfortunately, no copy of these instructions before us and are unable to say for what purpose or in what circumstances they were issued.

12. After this reference to the manner in which the entries were made, the document goes on to say that persons who are in occupation of houses are the owners both of sites and of the houses and that they have powers of transfer just as the Zemindars have, and that the Zemindars have no connection with the houses.

13. We are asked to hold on the basis of this document that any custom which found a place in the record prepared in 1866 has been abrogated. It would be very difficult, in our opinion, to come to any such conclusion on evidence of this kind. There is not a word in this halat dehi about the existence or non-existence of the custom of haq chaharum. All that can be said is that the provision by which the occupants of houses are declared to be the owners is inconsistent with the existence of any such custom as was recognised in the wazib-ul-arz of 1866.

14. The Courts below found in these cases that the defendants are pargotdars, in other words, that they are persons who occupy house sites on land which belongs to the Zemindars. We have been referred to the jamabonoi which was prepared at the recent Settlement, and from this it is evident that at that time the plots with which we are now concerned were recorded as bila began, that is to say, not assessed to rent. In the column of remarks we find two entries showing items of Rs. 2 8-0 and Rs. 2-4-0 respectively. We are unable to say what these figures are intended to represent. Beyond the bare figures there is nothing else in the column of remarks. It is a fair inference from the document as it stands that these lands with which we are now concerned were recorded at the time of the last Settlement as not liable for payment of any rent. The lower Courts, however, have agreed in

holding that these lands are nevertheless parjauti lands, and it has been urged that this is a finding of fact with which we are not entitled to interfere in second appeal. We do not propose to interfere with it and we must proceed on the assumption that the lands are in fact parjauti lands.

15. In this connection we might usefully refer to paragraph 86 of the Settlement Report. In this it is stated that over and above the various kinds of cultivatory holdings described in the preceding portion of the report there is an area of 322 acres recorded in the jamabandi as parjauti holdings. The Settlement Officer said that all this land is in the immediate vicinity of the City of Benares and consists of small plots cultivated and assessed to rent at the last Settlement and on which, subsequent to the preparation of the 1840 record, houses and buildings had been erected. The report goes on to say that ground rent amounting to Rs. 5,278 is still collected on some of these plots, aggregating in all 184 acres. In these cases rent had been assessed by the consent of the landlord and tenant and had been entered in the column of remarks in the jamabandi and in the halat dehi in compliance with the provisions of Section 66 of Act XIX of 1873. It is further stated that the 134 acres entered as rent free include all parjauti plots on which rent was entered in the former jamabandi but on which rent is now either admittedly not collected or its realisation disputed.

16. All we are entitled to infer from this is that at the time the Settlement was being revised, a portion of the land which had previously been recorded as parjauti land was recorded as rent free, either because of an admission that no rent was paid or because there was some dispute as to whether the rent was payable.

17. This plea does not appear to us to touch the Question which is raised in this case, namely, the existence of a custom. It is obvious from what has been stated in paragraph 86 that the land may be parjauti land although it is not recorded as paying any rent. We have no doubt, therefore, that the Courts below were, on the evidence before them, entitled to say that the land in dispute was parjauti land. On this point we need only further observe that in the jamabandi these lands are shown as being held by persons described as parjotdars, and we might further add that at least in the sale-deeds with which we are concerned the lands were

described as parjauti lands.

18. That being so, we are not disposed to interfere with the decision of the Court below on the question of custom. It would, in our opinion, not be reasonable to say that the record of custom which was made in the year 1866, has been abrogated by the preparation of a condensed wajib-ul-arz which now goes by the name of halat dehi and regarding which we have very little information. We do not see how the Settlement Officer conducting the Settlement operations could, by the preparation of a document of this kind, abrogate an existing custom which he found recorded in documents prepared at an earlier Settlement.

19. We are asked to say that this Court had decided in one case, namely, Second Appeal No. 7 of 1914 decided on the 17th of May 1915, that the halat dehi had wiped out the wajib-ul-arz which had been prepared in earlier times and that it was, therefore, to be considered as the only reliable record of existing custom. In his connection it is to be observed that the case which was before the Court on that occasion was not a case in which haq chaharum. was being claimed on the basis of custom. That was a case in which the suit had been brought to recover rent from persons on the ground that they were parjotdars. Any observation to be found in the halat dehi which is relevant to a case in which ground rent is being claimed must not necessarily be treated as relevant when we are dealing with the question of custom by which Zemindar claim to realise haq chaharum. We cannot, therefore, treat this case as an authority for the proposition which has been advanced on behalf of the appellants. On the evidence we are satisfied that the Courts below were right in holding that so far as the plots in dispute are concerned, the Zemindars have by custom good right to claim haq chaharum. Before concluding the judgment we think that it may fairly be observed that the document described as halat dehi prepared for the patti Deo Narain Singh must necessarily refer to lands other than parjauti lands, because we find that there is a provision made for the instalments in which land revenue is to be paid, in other words, it is clear that in this patti there are revenue paying lands which must be distinguished from parjauti lands. Consequently it cannot, we think, be contended that the provision of the document which lays down that the occupants of the houses are the owners of the houses and the sites and have full power of transfer,

necessarily relates exclusively to parjauti lands. The result of all this is that both appeals fail and are dismissed with costs.

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