

Gopal and ors. Vs. the Collector of Aligarh and Chunna and anr.

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Court : Allahabad

Decided On : Apr-22-1926

Reported in : 92Ind.Cas.134

Judge : Kanhaiya Lal and ;Ashworth, JJ.

Appellant : Gopal and ors.

Respondent : The Collector of Aligarh and Chunna and anr.

Judgement :

Kanhaiya Lal, J.

1. The dispute in this appeal relates to a piece of muafi land occupied by a grove situated in Qasba Koil, close to the town of Aligarh. The land was originally granted by the predecessors of the plaintiff to Sirh Mal, the predecessor of the contesting defendant, for planting a grove, and the question for considering is whether the descendants of Sirh Mal had a right to sell the grove to Chunn and Ram Lal, and are liable to ejectment in consequence.

2. The allegation of the plaintiff was that there was a custom appertaining to the muafis granted by the zemindars by (sic) of which the muafi holders or their (sic) ants had no right to transfer the muafi by sale. The plaintiff questioned the right Of the son and grandsons of Sirh Mai to transfer the grove, and he sued for the cancellation of the sale and for possession of the grove by the ejectment of the

muafidars and their transferees.

3. The plaintiff relied in support of the custom wajib-ul-arz prepared in 1872 in which under the heading referring to 'muafis granted by the zemindar for specific purposes', it was stated that so long as the muafidar or his descendants remained in possession, there will be no interference with them, and the muafidars shall have every right thereto except that of transfer by sale. A list of the plots and groves then held as muafi was also given and among those plots and groves the grove in dispute was mentioned and described as an old grove (qadim baghicha) held by Sirh Mal. Both in the wajib-ul-arz and in the khasra it was stated that the land had been given for the purpose of planting a grove, and that fact is not disputed.

4. The Coarts below found that the entry in the wajib-ul-arz was sufficient proof of a custom forbidding the alienation and that the plaintiff was entitled to a decree for possession.

5. The entry aforesaid does, not, however, purport to record any custom. There are other Clauses which purport to record customs then in force in the village, and there are some, others which describe the rights of other classes of muafidars and of ex proprietors entitled to malikana rights. The entry relating to the muafidars holding groves in the village merely records the incidents of the tenure, as dictated by the zemindar or his agent at the time, and though, as stated by their Lordships of the Privy Council in *Anant Singh v. Durga Singh* C. Ind. Cas. 787 : 32 A. 363 : 14 C.W.N. 770 : 12 C. L.J. 36 : 7 A.L.J. 704 : 13 O.C. 163 : 37 I.A. 101 : 12 Bom. L.R. 504 : 8 M.L.T. 79 : (1910) M.W.N. 327 : 20 M.L.J. 604 (P.C.), there is no class of evidence more likely to vary in value, according to the circumstances, than the wajib-ul-arz, for entries at times are made therein connoting the views of individuals as to the practice they would wish to see prevailing, rather than the ascertainment of well-established custom, it would not be unreasonable to presume from the entry that the intention of the grantor when he gave the muaji land for planting the grove was that the enjoyment the muafi land (as distinct from the (sic) to the timber or the fruits of the (sic)) was to be restricted to the grantee and his descendants personally. The plaintiff does not, however, rely on any such

incident, or condition of the grant, in the plaint. He does not, even assert that forfeiture or resumption was one of the conditions of the grant or incidents of the custom set up. In fact in *Ala Bux v. Radhay Lal* 30 Ind. Cas. 805 it was held that a statement in the *wajib-ul-arz* by one of the interested parties that he, had power to take away all *muafis*, would not be regarded as sufficient proof of a custom of resumption.

6. Where land is granted for planting a grove the person who plants the grove acquires according to the general Law a transferable interest therein, and in the absence of a custom to the contrary, the trees become his property. As pointed out in *Chokhe Lal v. Behari Lal* 60 Ind. Cas. 115 : 18 A.L.J. 820 : 2 U.P.L.R. (A.) 292 : 42 A. 634, *Lal Baijnath Singh v. Chandrapal Singh* 73 Ind. Cas. 520 : 21 A.L.J. 457 : A.I.R. 1923 All. 553. and *Man Singh v. Madho Singh* 79 Ind. Cas. 599 : 22 A.L.J. 70 : A.I.R. 1924 All. 430 : L.R. 5 A. 34 Rev., the person, who plants such a grove possesses all rights in respect of his grove, which are not excluded by custom, or the incidents of the tenure. No custom is established here and no right of forfeiture or re-entry or resumption is shown to have been reserved.

7. The *muafidar* built some structures over the land, besides a pucca well and boundary walls when he planted the grove. The, grove was in existence from before 1872, and if one of the incidents of the tenure, was that the *muafidar* shall have no right to alienate his *muafi* land, but no right of, re-entry was reserved to the plaintiff, the *muafi* cannot be resumed and the *muafidar* or his descendants cannot be ejected, though the sale of the *muafi* rights can be set aside. In fact the *toajib-ul-arz* states that a *zemindar* shall not interfere so long as the *muafidar* and his descendants remain in possession. There is no proof of any abandonment by them of their *muafi*, rights, in favour of the *zemindar*. The vendees had taken security from the vendors for the refund of the purchase-money in case their rights were interfered with. They have accepted the decree passed by the Trial Court against them and have not further interested themselves in the case. The vendors alone have appealed and, in the absence of an express covenant for re-entry, no right of forfeiture can be enforced.

8. In *Parameshri v. Vittapa Shanbaga* 26 M. 157 : 12 M.L.J. 189, where a permanent lease was granted by a certain person to another without any right to the latter to alienate the property, it was held that an alienation subsequently made by the lessee did not entitle the plaintiff to terminate the permanent lease and re-enter upon the land. In *Madar Saheb v. Sannabawa Gujranshah* 21 B. 395 : 11 Ind. Dec (N.S.) 132 a Clause in a lease, whereby the lessee covenanted not to 'alienate, unaccompanied by any Clause for reentry upon a breach of the covenant, was held to be merely a covenant and not a condition, and a suit brought by the lessor for ejectment was dismissed. In *Netrapal Singh v. Kalyan Das* 28 A. 400 : A.W.N. (1906) 60 : 3 A.L.J. 196 where perpetual lease of a village was granted to a lessee and his heirs, containing, a covenant against an alienation, by the lessee but no covenant giving to the lessor a right of re-entry upon breach of the former covenant, it was similarly held that the successors-in-title of the lessor could not recover the property, the subject of the lease, from the alienees of the successors-in-title of the lessee. In *Dharani Kanta Lahiri v. Siba Sundari Debi* 35 C. 1069 : 8 C.L.J. 188 where a grant was made to certain persons in succession without any power of alienation, it was held that though the alienation by one of the grantees, who was given a life-interest, was against the provisions of the grant and was bad in law, yet inasmuch as the breach of the provisions did not operate as a forfeiture, the plaintiff was not entitled to a decree for khas possession. In *Basarat Ali Khan v. Manirulla* 2 Ind. Cas. 416 : 36 C. 745 : 10 C.L.J. 49 where a lease was granted containing a covenant prohibiting the digging of pits and tanks, or the transfer of the land in any way without a letter from the lessor and no right of reentry was reserved, it was held that an assignment subsequently made by the lessee was operative, notwithstanding the covenant.

9. What applies to a lease, where no right of re-entry is reserved, applies with greater force to the grant of a wuafi tenure, where the grantee of the muajidar has planted a grove, constructed a well, and built other structures of a permanent character on the faith of the grant without any covenant for re-entry or for feature. The muafidars still reside in the town in which the muafi is situated; and there is no finding that they have abandoned possession. The Aendees alone seem to have abandoned their rights under the sale-deed.

10. The appeal ought, therefore, to be allowed and the decrees of the Courts below modified so far as they award possession as against the defendants-appellants. The parties to the appeal ought in the circumstances to bear their own costs here and in the lower Appellate Court.

Ashworth, J.

11. This second appeal arises out of a suit brought by the respondent as zemindar against the appellants-defendants, transferees, and other defendants, transferors of a certain grove, for cancellation of the sale deed executed by the former in favour of the latter. The suit was based on the allegation that according to 'rivaj' (usage or custom) recorded, in the wajib-ul-arz of 1872, the defendants first party held, the grove on a tenure which did not entitle them to transfer it to a third party (defendants party No 2) and that the sale entitled the plaintiff to resume the grove. The defence was that there was no such custom, or usage, and that, in any case, the defendants were entitled to compensation, in the event of the suit being decreed, for a well, buildings and improvements. Both the lower Courts decreed the suit but allowed the defendants to remove the materials of constructions from the grove. The first; Court held that the wajib-ul-arz was decisive as evidence of the tenure of the defendants first party, and that this tenure did not allow sale. The lower Appellate Court held that the general law prevailing in these Provinces was that a grove holder could not transfer, and that this general law was given effect to in the wajib-ul-arz. It held that the defendants had failed to rebut the presumption arising from the general law.

12. In this appeal it is contended that the prevailing law in these Provinces is (sic) grove-holder may transfer his rights; (sic) reliance is placed in Lal Baijnalh Singh v. Chandrapal Singh 73 Ind. Cas. 520 : 21 A.L.J. 457 : A.I.R. 1923 All. 553 and other decisions of this Court. It is also maintained that the passage in the wajib-ul-arz relied upon by the plaintiff does not prove any custom, usage or tenure binding on the defendants. It may be conceded that there is authority for holding that a grove-holder can sell under the provisions of the Tenancy Act unless he is precluded by custom, usage or contract. The plaintiff relies upon para. 10 of the wajib-ul-arz of 1872 which is headed by the title 'statement of muafi granted by the zemindar for

special purposes.' In this paragraph this particular grove is specified as granted without a right of transfer by the grantee. It has been clearly established by respondent's Counsel that it was the duty of the Settlement Officer in 1872 to 'ascertain and record the fullest possible information in regard to landed tenures, rights, interests and privileges of the various classes of the agricultural community' and it was provided that 'for this purpose the proceedings should embrace the formation of as accurate a record as possible of all local usages connected with landed tenures'. This was provided in Regulation VII of 1822 which was not abrogated in this respect by Regulation IX of 1833, the last Regulation preceding the Settlement of 1872. I construe this to mean that it was a duty of the Settlement Officer to (a) record local customs and (b) local usage. The paragraph is not a record of custom, because it does not purport to be this, but it may be construed as a record of local usage applicable, at any rate, to the holdings mentioned specifically. Now a local custom supersedes the Statute or general law. A local usage does not supersede it, but is to be read into the contracts, or implied contracts of persons living in the locality to which the usage applies. While a custom depends for its validity on its antiquity, a usage depends for its validity on its notoriety. The Settlement Officers were enjoined not only to record customs but usages. Regarding para. 16 as a record of local usage, it would be good evidence and, if accepted as sufficient evidence, would be binding not only on the zemindars who signed the wajib-ul-arz but on the grantees. The plaint cannot be construed as excluding reliance on 'usage' as distinguished from custom. I, therefore, hold that the lower Courts were right in finding that the defendants first party were not entitled to sell the grove.

13. The next question is what is the result of their having done so. It has been argued that the wajib-ul-arz does not specify forfeiture as a result of a sale, and that, therefore, there is no proof of liability upon defendants to forfeiture. But the provision against transfer would be meaningless unless we read into it also a provision that it will involve forfeiture. A liability implies a right and a right a remedy. There being no rent on the plot the zemindar would have no remedy. If there is a rent his remedy would have been, to ignore the transferee and hold the transferor still liable. Apart from this it is clear that the transferor has given up possession. He has also given up his claim to title by the very fact of executing the

sale-deed. In the case of abandonment the grove would revert to the zemindar, and the conduct of the transferor must amount to abandonment. He cannot claim to continue possession through his transferee because he can take no benefit from his unlawful alienation. Reference may also be made to Section 154(c) of the Agra Tenancy Act (U.P. Act II of 1901) which enacts that a rent-free grant is forfeited on breach of a condition. What is enacted as a rule of law in the case of agricultural land granted rent-free is also equitable in the case of non agricultural land so granted.

14. The provisions of law applying in the case of leases, which forbid an unlawful transfer operating as forfeiture, except where there is a contract or custom or usage providing for this, are not applicable to rent-free grants. The terms of a grant forbidding transfer must entail that the right of reversion operates, from the date when possession is given to a third party under such unlawful transfer.

15. It is further urged that this being a suit for resumption of muafi, should have been brought in the Revenue Court under the provisions of Section 150 read with Section 167 of the Tenancy Act. It is sufficient to say that those sections only exclude the jurisdiction of Civil Courts in cases for the resumption of land which means land let or held for agricultural purposes, and that a grove of the description in suit is not such land.

16. It has been urged that the plaintiff was bound to pay compensation for the well, buildings and other improvements. No rule of law or equity has been shown justifying such a claim.

17. For the above reasons, I would dismiss this appeal with costs including costs - on the higher scale.

18. As we disagree, the appeal will stand dismissed with costs including costs on the higher scale in this Court.