
(1944) 11 AHC CK 0002
In the Allahabad High Court
Case No : Appeal No. 30 of 1939

Abdul Alim and Others

APPELLANT

Vs

Hayat Mohammad and Others

RESPONDENT

Date of Decision : 25-11-1944

Acts Referred:

Oudh Courts Act, 1925 — Section 12(2)

Citation : (1944) 11 AHC CK 0002

Hon'ble Judges : Thomas, C.J.; Ghulam Hasan, J

Bench : Division Bench

Advocate : Hyder Husein and S.N. Srivastava, for the Appellant; Faiyaz Ali and M. Wasim also joins at a later stage, for the Respondent

Final Decision : Allowed

Judgement

Thomas, C.J. and Ghulam Hasan, J.—This is an appeal u/s 12(2) of the Oudh Courts Act from the judgment and decree dated the 18th September, 1939, passed by a single Judge of this Court. As the appeal raises an important question of law it was declared fit for appeal to a Bench of two Judges. The appeal is filed by the defendant No. 1.

2. The plaintiff is admittedly the owner of mahal Kandhai Prasad, village Sakrawal, in the district of Fyzabad. The suit was one for possession of a house on abadi plot No. 828 which was situate in village Sakrawal. Abdul Razzaq, who was the original occupier of this plot, died on the 7th December, 1932, leaving Mohammad Ibrahim (defendant No. 2) his daughter's son, in whose favour he had made a gift of his house on the 10th May, 1920 (vide Ex. A-1J. Mohammad Ibrahim sold the house on the 1st July 1935, to Hafiz Mohammad Yunus defendant No. 1. Hafiz Mohd Yunus died and is now represented by his heirs in the appeal. The plaintiff alleged in paragraph 1 of the plaint that he was the owner of the agricultural village Sakrawal mahal Kandhai Prasad, pargana and tahsil Tanda, district Fyzabad, and the house in suit was situate in this village. According to custom pleaded by the plaintiff the house had escheated to him

because Abdul Razzaq had transferred it which he had no power to do as riyaya and thus the house must be deemed to have been abandoned and further because Abdul Razzaq died heirless.

3. The defence of Hafiz Mohammad Yunus was that Abdul Razzaq deceased was the owner in possession of the house in suit was situate in muhalla Sakrawal, in the town of Tanda. Muhalla Sakrawal, according to him, was a big muhalla inhabited by persons who carried on different industrial occupations and trades, and this muhalla was within the Municipal limits of Tanda and did not form part of the agricultural village Sakrawal. The custom set up by the plaintiff was denied and it was pleaded that the inhabitants of muhalla Sakrawa had a right to transfer their houses both under law and custom.

4. On the date of the issues the plaintiffs Counsel stated that a portion of the abadi of Sakrawal village only was included in the Tanda Municipality and that the house in suit lay in that portion of the abadi which was not included in the Municipality, The defendant's Counsel stated that the entire abadi of village Sakrawal was included in the Tanda Municipality ever since the Municipality was founded. The plaintiff's Counsel added that even if the house in suit was included in the Tanda Municipality Sakrawal village retained its agricultural character. The trial Court framed the following issue:

Does the house in suit lie in the agricultural village?

5. This is followed by a statement of the plaintiff's Counsel to the effect that if it is found that the house in suit lies in the town the custom will still apply. Accordingly the second issue was framed thus:

Do the customs enumerated in para. 3 of the plaint exist in Sakrawal?

6. The seventh issue was:

Does the house in suit lie within the Tanda Municipality? If so, its effect?

7. It is not necessary to mention other issues because they no longer survive for decision.

8. The trial Court found issue No. 1 in the negative and issue No. 7 in the affirmative. In effect it found that the general custom of the Province forbidding transfer of houses in agricultural villages could not be invoked by the plaintiff. The finding on issue No. 2 was that the Iqrar-i-malikan (Ex. 2) established the custom that the residents could transfer materials of their houses to one another on payment of one-fourth of the consideration to the owner but the house of the riyaya who died heirless or abandoned his residence in the village escheated to the owner. In regard to certain transfers made by the riyayas the trial Court held that the custom was not refuted by them.

9. Hafiz Mohammad Yunus appealed and the lower appellate Court addressed itself to the determination of three questions:

1. Whether the deed of gift was given effect to,

2. Whether the donee acquired the absolute right of transfer by prescription, and

3. Whether the custom set up by the plaintiff had been proved and was applicable to the present case. The first point was conceded on behalf of the plaintiff and it was admitted that Abdul Razzaq did not die heirless and that his daughter's son acquired his rights in the house in suit. The plea of adverse possession was repelled. On the third point it was found that the house in question was situated within the town of Tanda proper and was included within its Municipality, that the custom recorded in Iqrar-i-malikan was intended to apply to that portion of village Sakrawal only which continued to be an agricultural village and did not apply to the abadi which had been included within the Municipal area of the town, and further there had been a deviation from the custom pleaded by the plaintiff as appeared from a number of transfers made by the riyayas. In view of these findings the suit was dismissed.

10. The plaintiff preferred a second appeal. The learned single Judge in appeal held that the custom in Ex. 2 applied to the entire village Sakrawal irrespective of the fact whether any part of it had been included in the Municipal area. On this part of the case the learned Judge also held that the view taken by the lower appellate Court that the custom related to the agricultural part of Sakrawal and not to that part which was included in the town area was foreign to the pleadings of the parties. He relied on a Bench decision of this Court in *Kanhaiya Lal v. Hamid Ali* (1930) 70 WN 271. He further held that certain deeds of transfer filed by the defendant did not show that the transfers were within the knowledge of the owners or that they were not consented to by them. The learned Judge observed that this finding was neither tenable nor correct in law and must be ignored. Upon the question argued before the learned Judge on behalf of the plaintiff that the inclusion or a part of village Sakrawal into the Municipal limits of Tanda did not make it a part of the town and that no part of Sakrawal had ceased to be a part of the agricultural village, the learned Judge refrained from deciding the question, and in view of his finding on the other question decreed the suit.

11. Having heard learned Counsel for parties, we have arrived at the conclusion that the decision of the learned single Judge cannot be sustained and the decision of the lower appellate Court must be restored.

12. We are unable to uphold the view taken by the learned Judge that the finding of the lower appellate Court was opposed to the pleadings of the parties : We have set out at some length the pleadings, both oral and written, of the parties. We are satisfied that both parties were aware of the real nature of the controversy arising in the case and no surprise was sprung upon or prejudice caused to, any of the parties at the trial. Stripped of the unnecessary verbiage, the defendant's case was that the house in question having been removed from village Sakrawal and incorporated within the Municipal limits of Tanda town, the custom recorded in the Iqrar-i-malikan Deh of village Sakrawal no longer applied

to the house in question. The second defence taken by the defendant was that even if the custom was held to apply the present case, the continuity of the custom had been destroyed by a number of transfers which had been made by the tenants in respect of the houses situate in muhalla Sakrawal of Tanda town. That the plaintiff was perfectly aware of this position is clear from the statement of his Counsel who stated that the custom applied notwithstanding the fact that the house in suit had been incorporated in the abadi of Tanda town. The only question, therefore, which arises for determination is whether the view that the custom no longer applied to the present case is legally sound. We shall deal later with the argument whether the custom had or had not been rebutted by the instances of transfers produced by the defendant.

13. Ex. 2, Iqrar-i-malikan Deh was prepared on the 16th June, 1874 (vide Ex. A-23). At the time when Ex. 2 was prepared, a certain portion of the abadi of village Sakrawal had been excluded therefrom and was included in the town of Tanda. The Settlement Report, Fyzabad district (1880) in paragraphs 498 and 499 at page 182, describes how Tanda came into existence. It says that within two miles of village Khaspur was a spot on the banks of the Gogra which was formerly largely visited by Banjaras or travelling dealers, probably because it was the only ferry for miles, and from the fact that the encamping ground of Banjaras, and the gangs of Banjaras themselves also, are both known by the name of Tanda; so this spot permanently came to be known by the name of Tanda. In process of time it expanded into a town by taking up the whole or part of the lands of 12 villages, among which Sakrawal was one. The District Gazetteer of Fyzabad (1905) gives a fuller history of the town. It says that Tanda means a "caravan" and denotes that the place was an encamping ground for Banjaras who carried their goods across the Gogra by the ferry there. It was inhabited largely by Hindu and Mohammedan spinners who carried on a large trade. Besides the tahsil, it had a police station, a post and telegraph office, a cattle pound and a dispensary. There was a Vernacular Middle School and a boarding house. There were about 5000 houses in the town. The market was of considerable importance.

14. The population amounted to 13,543 at the first Oudh Census in 1869 and the total rose to 19,954 in 1881. In 1901 there were 19,853 inhabitants. In point of size it was described as the sixth town in Oudh. It was constituted a Municipality from the 1st April 1870. With this antecedent history in the background we may now refer to Ex. 2 itself to see whether the custom recorded therein could possibly have been intended to apply to abadi lands which had gone out of the agricultural village and now formed an integral part of a town. The opening words show that the custom of the abadi relates to the inhabitants of the village. The transferor at the time of the transfer was not a resident of village Sakrawal. He had ceased to live in the village and had begun to live in the town. The prohibition to transfer the materials in houses was confined to those who lived within the ambit of the agricultural village and could not have been intended to embrace those who had gone out of it. It was argued on behalf of the plaintiff

that the inclusion of the abadi lands within the Municipal area did not- make it a town. This argument was based on the following cases:

1. Janki Pershad v. Sahibunnisa (1904) 7 OC 74; 2. Fasahat Husain v. Mohammad Zamin (1929) 6 OW N 277 and 3. Sohan Lal v, Mohammad Husain (1930) OWN 547. The first two were preemption cases and neither of them applies. In the present case it cannot be doubted that Tanda is an old town which existed from pre-annexation days, that it gradually developed by incorporation therein of lands from several adjoining villages, one of which was Sakrawal. The inhabitants of muhalla Sakrawal are subject in all respect to liabilities which are imposed on other inhabitants of Tanda town. They are as much liable to pay taxed imposed by the Municipal Board as any other inhabitants in the town. The population of the town is non-agricultural, the inhabitants being engaged in avocations pertaining to different crafts and industries. Assuming, but not admitting, for a moment that the custom alleged by the plaintiff exists in respect of Sakrawal village and the agricultural tenants in the village abadi hold the sites subject to the prohibition of transfer as alleged, can it be contended that this prohibition extends to those persons who neither reside in the village nor hold any lands therein, but on the contrary reside in the town it cannot be doubted that Tanda is a town and carry on occupations other than agricultural? We think not. It was argued on behalf of the plaintiff that the prohibition in Ex. 2 is not so much a record of custom as a record of the terms of the grant on which the land was held by the agricultural tenants in the village. This argument was put forward on the strength of the Bench decision in Kanhaiya Lal v. Hamid Ali¹. The wajib-ul-arz in that case related to the town of Pihani and embodied the condition of non-transferability. There it was held that a wajib-ul-arz is as effective in a town as it is in a village and it is not so much a record of custom as a proof of the conditions governing the grant of residential sites in a town. We have no quarrel with this proposition, but we do not think that its application affects the case favourably for the plaintiff. If the Iqrar-i-Malikan Deh prepared in 1874 embodied the condition governing the grant of residential sites to the agricultural tenants, it must be taken that these conditions were accepted for the first time in 1874 by the occupiers of sites. It did not embody any contract entered into prior to that date between the occupiers of the sites and the owner of the village, nor did it embody any conditions restricting the transfer of sites which did not form part of the village. It must be remembered that muhalla Sakrawal was constituted in 1870 long before the Iqra-i-Malikan Deh was prepared. The restrictions on transfer contained therein could not, therefore, have been intended to have retrospective effect. It is true that in the Khewat and the Khasra of the old settlement all the abadi plots of Sakrawal village were included therein notwithstanding the fact that a portion of these had already been included in Tanda town. This, however, in our opinion cannot lead to the inference that the occupiers of the abadi lands who ceased to have any concern since 1870 with village Sakrawal should be held to be governed by the conditions which were imposed for the first time in 1874 by the owners of the village on the

occupiers of the abadi sites in that village.

15. The lower appellate Court found as a fact a part of Sakrawal village was included within Tanda Municipality and, to all intents and purposes, it was converted into a town and was subject to all incidents thereof. In arriving at this finding the lower appellate Court took into consideration all the evidence on the record and the circumstances of the case. This finding was, therefore, a finding of fact which was binding in second appeal vide, *Sohan Lal v. Mohammad Husain* 4.

16. The learned single Judge in second appeal also set aside the finding of the lower appellate Court that the custom was rebutted by the various transfers, proved on behalf of the defendant. A reference to the judgment of the lower appellate Court will show that eight transfers, evidenced by Exs. A-11, to A-18, had been proved to have been made more than 12 years ago without being challenged by the owner. Three of these transfers related to the year 1897 and five were made between 1913 and 1918. According to the lower appellate Court, these constituted a strong evidence of the deviation of custom and the plaintiff adduced no evidence to explain the departure from the custom in so many cases. The learned single Judge says that there is nothing to show that the transfers were within the knowledge of proprietors or were not consented to by them. It is an elementary rule of law that a custom must be proved not only to be ancient and unambiguous but continuous and invariable. The duty of proving this lay upon the plaintiff. The defendant produced "documentary evidence to show the discontinuance or the break in the continuity of the custom. No attempt was made by the plaintiff to rebut it. It was open to him to show that for some reason or other he was not aware of the transfers or that in any particular case he actually consented to the transfer. In the absence of any such evidence knowledge must be imputed to the plaintiff. The transfers were out and out sales and it is obvious that possession must have as a result of the transfers passed from the vendors to the vendees. The lower appellate Court also referred to two documents, Ex. A-6, mortgage deed, and Ex. A-7, sale deed, which show that a ryot had first mortgaged the house to the plaintiff and then sold it to him. The finding which the lower appellate Court reached on a consideration of this evidence was that the custom set up by the plaintiff did not exist any longer or its breach was the rule and observance only an exception. This was a finding of fact which was not liable to challenge in second appeal. In *Kushalpal Singh Vs. Gulzari Lal and Another* it was held, in similar circumstances that where the lower Courts relying on the oral and documentary evidence, in the shape of a number of sale deeds and mortgage deeds executed by the occupiers of houses in course of over 50 years, came to the conclusion that the custom, recorded in the *wajib-ul-arz* that the inhabitants had no right to transfer residential houses, was a dead letter, the finding was one of fact and could not be challenged in second appeal in the absence of any error of law. All that the learned Judge said in respect of this finding was that it was not tenable or correct in law and must be ignored. The reason given by him for saying so was that there was nothing to show that the transfers were within the knowledge of the proprietors or were not

consented to by them. We do not agree with his reasons or the finding. We have already dealt with these reasons and are not prepared to accept them. On the whole, we consider that the finding was one which was not open to reconsideration in second appeal.

17. The result is that we allow the appeal, set aside the decision of the learned single Judge and restore that of the lower appellate Court. The appellants will get their costs throughout from the plaintiffs-respondents.