

(1944) 11 AHC CK 0009
In the Allahabad High Court

B. Mohd. Fazalur Rahman

APPELLANT

Vs

Nand Kishore Chaube and Others

RESPONDENT

Date of Decision : 23-11-1944

Acts Referred:

Citation : AIR 1945 All 140 : (1945) 15 AWR 1

Hon'ble Judges : Sinha, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

Sinha, J.—This is a plaintiff's appeal arising out of a suit for possession over plots Nos. 25 and 26 of abadi plot No. 372 of Mouza Sidhari and for demolition of certain constructions made by the defendants. The plaintiff also prayed for a perpetual injunction. The case with which the plaintiff came to Court was this : Sidhari was an agricultural village and he was the sole zamindar of the plots in dispute. The defendants, according to him, were mere ryots. Plot No. 25 had a house belonging to one Ramphal and 26. had one belonging to Banshi. Ramphal died issueless and his house in plot No. 25 fell into ruins. The house in plot No. 26 also fell into ruins and Banshi took up his residence elsewhere. He alleged that the defendants were making unlawful constructions on the strength of a sale deed executed by Banshi in respect of both these plots. This sale was made on 4th August 1937. The plaintiff claimed that, as the village in dispute was an agricultural village, the transfer was a bad transfer. The defence was a denial that Sidhari was an agricultural village. It was pleaded that even if it was an agricultural village, there was a custom sanctioning such a transfer. The bars of estoppel and limitation were also pleaded. The learned Munsif decreed the suit, the lower appellate Court has, however, dismissed it. There were three issues raised in the case. The first was whether Sidhari was an agricultural village. The second was whether there was a custom entitling the ryots to transfer their houses along with the sites. Issue 3 was about the bar of limitation.

2. Whatever might have been the character of Sidhari in the part, there can, on

the finding, be no question that it has ceased to be an agricultural village. Part of it was brought within municipal limits in the year 1914. There is a flour mill existing there and a number of bungalows have been raised. There is a further finding by the learned Judge that "this year electricity was introduced in Azamgarh city and there is an electric lamp post in Sidhari..." Sidhari, on the findings has practically all the incidents of a town or a city and it is impossible to hold that it retains its incidents as an agricultural village. To sum up the finding of the learned Judge: "All these facts taken together very strongly indicate that village Sidhari has lost its rural characteristic and has developed urban characteristic and is practically absorbed in Azamgarh city. For all practical purposes, it has become a part and parcel of Azamgarh city. Hence my finding on this point is that Sidhari has lost its rural characteristic and now it is absorbed in Azamgarh city. Therefore, Sidhari is not now an agricultural village." The learned Judge also went into the question of custom and held that, having regard to the large number of instances in which transfers were made by the tenants, the custom alleged by the defendants must be deemed to be established. On these two findings he allowed the appeal and dismissed the plaintiff's suit. On the question of limitation, his finding was adverse to the defendants.

3. In second appeal before us, Dr. Rauf, the learned Counsel for the appellant, contends that this case is governed by Dr. Sir Hafiz Mohd. Vs. Shiam Lal, and we are of opinion that this case is, in all essentials entirely distinguishable from that case. In that case, there was a clear finding that Chhatari retained its character as an agricultural village. Indeed, the finding of the learned Munsif in that case, which was not disturbed by the learned Civil Judge in appeal, was that there were no amenities in Chhatari, which were commonly to be found in towns or cities. Assuming for the sake of argument that Sidhari retains its characteristics as an agricultural village, the instances which the defendants have adduced in support of the custom are quite enough to establish the custom. There have in all been 31 instances. A number of them are sales, a few of them are gifts and a fairly good number are simple mortgages. The learned Counsel for the respondents has invited our attention to Kallu Mal Vs. L. Ganeshi Lal and Another, in support of his contention that even a simple mortgage constitutes good instance of such a custom. This is indeed so, but even if we rule out instances of simple mortgages and confine ourselves only to sales, gifts and usufructuary mortgages, they are about 20 in number and cover a period from 7th September 1885 to 1935. It was held in the Full Bench case mentioned above that the period of 17 years was a sufficiently long period to give rise to a custom. In this case the period is a period of 50 years. It was held in Municipal Board Vs. Kandhaiya Lal and Others that a finding on the question of custom is a finding of fact. The learned Counsel for the appellant has, however, relied upon Nathwa and Another Vs. Raghubans Narain Singh and Another, . It is true that in that case their Lordships held that

where the lower appellate Court finds that certain instances have been proved in which the alleged custom has been followed or recognised, but such instances

are not sufficiently numerous or ancient or uniform to constitute a custom modifying the ordinary law, then in such a case a question of law arises in second appeal and the High Court is entitled to weigh the whole evidence and come to its own conclusion whether the lower appellate Court had rightly decided that the alleged custom had not been proved.

4. But the Full Bench case is authority for the proposition that a period of 17 years is enough in this country to give rise to a custom. In this case the instances are enough and the period of time covered by them is also enough. We, therefore, think that the learned Judge is right and we dismiss this second appeal with costs.