
(1906) 08 AHC CK 0003
In the Allahabad High Court

Khair-Ud-Din Husain

APPELLANT

Vs

Bhaddar
Khair-Ud-Din Husain Vs Bhola

RESPONDENT

Date of Decision : 15-08-1906

Acts Referred:

Citation : (1907) ILR (All) 133

Hon'ble Judges : John Stanley, C.J.;Rustomjee, J

Bench : Division Bench

Final Decision : Disposed Of

Judgement

Rustomjee, J.—The facts in this case arose as follows. Defendant No. 1 had obtained a decree against the father of defendant No. 2, a minor. Under this decree certain houses, situated in mohalla Daraganj of the city of Allahabad, were attached and advertised for sale, with their site, for the 17th September, 1904. Upon this the plaintiff, who is entered in the Government papers as zamindar of the land on which the houses were built, brought a suit for a declaratory decree that he was the owner and possessor of the houses in question, and that they were not liable to be sold in execution of that decree. He further prayed that, in case of the sale of the materials of the houses being allowed, he should be declared entitled to dhik at the rate of Rs. 10 per cent, on the sale proceeds. He relied mainly on a condition which was entered in his wajib-ul-arz (record of rights); this is set out in extenso in paragraph 6 of the plaint and runs as follows: "No tenant can build a new house without the permission of the zamindar, and after his abandoning the village, the zamindar is the owner of the materials of the house. In case of his presence (in the village) the tenant will be entitled to sell the materials (of the house) provided the house has been built at his own expense, and at the time of sale of the house the tenant shall pay a royalty, called dhik, to the zamindar at the rate of Rs. 10 per cent."

2. In the result the Court of first instance dismissed the plaintiff's suit on the ground that as the minor defendant and his predecessor in title did not come in the category of cultivators, or riyaya, of the plaintiff, the terms of the wajib-ul-

arz could not apply to them. It also held that the defendants had "proved by very reasonable oral and documentary evidence that along with the site the houses in Daraganj had been constantly sold within 35 years before this day, and the zamindar never obtained any right in respect of the site of the old houses." Upon this the plaintiff preferred an appeal to the Court of the District Judge. That officer agreed with the Court of first instance in holding that the custom entered in the wajib-ul-arz could not apply to the houses in question. He however, came to the conclusion that the plaintiff "was entitled to the declaration sought by him as regards the site: of the house's, and hence he gave him a qualified decree declaring that the site was not saleable. This has led to the present second appeal of defendant No. 1, who was decree holder in the original case. The portion of the District Judge's judgment which deals with this question of the site runs as follows: "With regard to the site other considerations come in. There is no proof how the houses came to be built. The site is admittedly in the zamindari of the plaintiff. In the absence of evidence I must assume that the houses were built with the expressed, or implied, consent of the plaintiff or without his knowledge. Had he objected, and the defendant's predecessors persevered in spite of his objection, a question of adverse possession might arise. But the burden of the proof of such objection: would be with the defendant. Proceeding under this assumption I cannot find how the plaintiff has lost or the defendant acquired proprietary rights in the site." I am unable to agree with the proposition set down here. It seems to me that the question regarding the site of the houses stands on the same footing as that of any other land, which has been continuously in the possession of a man for twelve years or more. If the proprietor of such land sleeps over his rights and allows a stranger to continue in undisturbed possession of it for twelve or more years without exercising any of his rights of a landlord, then that man undoubtedly obtains an indefeasible title to the land. In the present case it is admitted before us that defendant No. 2 and his predecessors in title have been in continuous possession of the site of the houses for considerably over twelve years as owners. I am of opinion then, that this possession must be looked upon as adverse and that it has given the defendant an absolute title to the land. I consider, therefore, that the site of the house is legally capable of sale under the decree obtained by defendant No. 1. This appeal might accordingly be allowed and the decree of the appellate Court might be set aside, that of the Court of first instance being restored.

Stanley, C.J.

3. I agree in the conclusion at which my brother Rustomjee has arrived. The question before us, it appears to me, must be determined upon the proper inferences to be drawn from the fact, which are not in dispute. It is admitted that the site of the house in dispute lies within the ambit of the, plaintiffs zamindari. It is also admitted that the house was built many years ago and that neither the owner of it nor any of his predecessors in title ever paid any rent for it, nor gave any acknowledgment of his title to the zamindar, nor carried on any trade, such as that of carpenter, blacksmith, etc., for the carrying on of which sites in the

abadi of a village are usually granted by the zamindar free of rent. It is also admitted that the property lies within the Municipal limits of the city of Allahabad. It seems to me that the reasonable inference from the long uninterrupted possession and enjoyment of the property by Bhola and his predecessors in title is that they acquired the absolute ownership of the site. If they did not acquire it by a grant from the zamindar, they have acquired it by adverse possession. I would further point out that if we may presume that a license merely was granted by the zamindar" to the predecessors is title of Bhola to build the house in question and they acting upon that license built the house, which is admittedly one of a permanent character, the zamindar, in view of Section 60 of the Indian Easements Act could not revoke the license so granted. He could not revoke the license and require that the house be removed. I would, therefore, allow the appeal, set aside the decree of the District Judge and restore the decree of the Court of first instance.

4. The order of the Court is that the decree of the lower appellate Court be reversed and the decree of the Court of first instance restored with cost in all Courts.