

(1948) 11 AHC CK 0005
In the Allahabad High Court

Patan Ram and Others

APPELLANT

Vs

Dhanushdhari Ji Bhagwan Birajman Bara Asthan

RESPONDENT

Date of Decision : 22-11-1948

Acts Referred:

Citation : AIR 1949 All 410

Judgement

1. This is the defendants' appeal against the judgment and decree of Mr. H. K. Ghoshal, Civil Judge, Fyzabad, dated 31st March 1943.

2. The plaintiff sued to recover possession of a thatched khachcha house No. 1207 situated in Mohalla Nahar Bagh within the city of Fyzabad, His case was that he is the proprietor of village Chak Gaura Patti, mohal Mahant Ram Manohar Prasad, and that mohalla Nahar Bagh included within this mohal and village. He stated that defendant 3 lived as a raiyat in the said mohalla and village and had sold contrary to the custom of nontransferability the house in dispute to defendants 1 and 2 in April 1941, that defendants 1 and 2 were in possession, that as a result of the custom the house would be deemed to have been abandoned by defendant 3 and defendants 1 and 2 were mere trespassers. The suit was resisted on the ground that the house being situated within the municipal limits of Fyzabad the custom, if any, did not apply, and that on the contrary residents in the mohalla had the right of transfer and many transfers of houses had taken place without objection from the plaintiff. It was also stated that defendant 3 was a lessee inasmuch as he had paid nazrana for the land and also used to pay annual rent.

3. The learned trial Court held that the house in dispute was situated within the Fyzabad city and that there was every presumption that the resident had the right to transfer his house and its site unless a custom or a contract to the contrary was proved. It found that the custom alleged by the plaintiff was not proved and that, even if there was a custom, there had been so many deviations therefrom as shown by several transfers by the residents that the custom had really ceased to exist. It also held that defendant 3 was a lessee. On these

findings, the plaintiff's suit was dismissed. The plaintiff went up in appeal and the lower appellate Court held that notwithstanding that the house was situated within a mohalla of Fyzabad City "iqrar-i-malikan deh", ex. 1, which was a record of the custom, applied; that according to this custom the plaintiff was entitled to recover possession of the house when it was sold by defendant 3; and that, although several transfers by residents of the mohalla had been proved, it had not been shown that these transfers were within the knowledge of the plaintiff or had not been consented to by him. It also held that defendant 3 was not a lessee. In the result the appeal was allowed and the suit of the plaintiff was decreed.

4. The defendants appealed to the Oudh Chief Court. The matter came up for hearing before a learned Single Judge of that Court and he thought it desirable that the appeal should be disposed of by a Bench. He felt doubtful whether there was in fact any conflict of principle in the two decisions of the Oudh Chief Court : Kan-haiya Lal Babu and Anr. v. Hamid Ali Sijed AIR 1930 Oudh 235 and Abdul Alim and Ors. v. Hayat Mohammad and Ors. AIR 1946 Oudh 188. He was also not certain as to which of these two decisions would be applicable to the facts of the present case.

5. We have heard the learned Counsel for the parties and are satisfied that the appeal must be allowed.

6. There is no dispute that the plaintiff is the proprietor of village Chak Gaura Patti and that mohalla Nahar Bagh is a part of that village and is included within the municipal limits of Fyzabad City. It would appear from the Gazetteer of Fyzabad district that Fyzabad and Ajodhiya were constituted into a municipality in 1869. From the Fyzabad Settlement Report of the year 1880 it would appear that within the municipal limits of Fyzabad were included portions of several villages and one of such villages was Gaura Patti. The custom relied upon by the plaintiff is contained in "iqrar-i-malikan deh", ex. 1, recorded on 31st July 1873 during the first regular settlement. When dealing with the inhabitants or residents of the village "iqrar-i-malikan deh" mentions that the majority of them are Julahas who settled down long ago. With reference to the abadi itself the entry in the "iqrar-i-malikan deh" is as follows:

Yeh maussa ba qism zamindari bil ijmal hai. Bashindagan Deh hafa amla apne mahan ka farohht nahin har sahte wa bahalat tarli sahoonat Mauza ghair he amla apne mahan ka utha nahin le ja sahte hain, bakar hal makan reyayae mafroor wa lawaris mil-hiyat muzhir hoga.

7. The house being situated in a town the law applicable in this case has been correctly laid down in AIR 1930 235 (Oudh) . It is enough for our purposes to quote the head-note:

There is no general rule of law which can be invoked ,against the occupier's title to transfer in a town. [Whether that right of transfer be in respect of site or in respect of the constructions standing on the site, it is for the person who asserts

a superior title to establish it, and unless a title which prohibits the transfer can be established, the transfer will stand good.

The general rule which has been accepted in Oudh, ever since the British Courts have been in existence, to the effect that in absence of a special contract or custom "no raiyat, whether an agriculturist or a non-agriculturist, has any rights in the inhabited area of an agricultural, village except a right of occupation without in right of transfer, does not apply to a site in a town." It has also been held in the same case 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.

This view has been accepted also in another Bench decision of the Oudh Chief Court in Abdul Alim and Ors. v. Hayat Mohd. and Ors. AIR 1946 Oudh 188. So far as the principle applicable in cases of transfers in a town is concerned there is no difference between AIR 1930 235 (Oudh) and Abduf Alim and Ors. v. Hayat Mohammad and Ors. AIR 1946 Oudh 188.

8. It is clear that the plaintiff in order to succeed in this case must show that either there is a custom or a contract which prohibits the transfer of a house or a site by a resident in a town. The plaintiff has relied upon Ex. 1 for the custom or contract which prohibits the transfers in the present case. It is for him to show that iqrar-i-malikan deh, Ex. 1, does apply in the present case. It has already been pointed out that at least a portion of village Chak Gaura Patti was included within the municipal limits of Fyzabad City in 1869 four years before the iqrar-i-malikan-deh was prepared. The prohibitions imposed on the right to transfer materials of the house or the contingencies under which a house escheats to the proprietor relate specifically and pointedly to "bashindagan-i-deh," that is, residents of the agricultural portion of the village. This must be so also because clearly a certain portion of Chak Gaura Patti was already included within the city of Fyzabad and was no longer part of the agricultural village. It would thus appear that the restrictions imposed apply only to the residents of the agricultural portion of the village and not to residents of that portion which had already been included within the city of Fyzabad. We treat "iqrar-i-malikan deh" not as a record of a custom but as a record of the conditions on which the grant of residential sites was made. Looked at from this point of view, it is clear that the conditions laid down cannot have any retrospective effect. There is nothing in the language of "iqrar-i-malikan deh" to suggest that the conditions were meant to be retrospective or to apply to residents of that portion of the village which had before the preparation of "iqrar-i-malikan deh" become an integral part of the city of Fyzabad. The plaintiff's father and grandfather were bamboo-sellers and admittedly were not agriculturists, and the plaintiff has been unable to show as to whether the site of the house now in dispute was granted to defendant 3's ancestors before 1873 or after the "iqraar-i-malikan deh" had been recorded. The burden lay on the plaintiff to show that defendant 3's ancestors came into

occupation after the "iqrar-i-malikan deh" had been prepared or, in any case, the "iqrar-i-malikan deh" was applicable to the site now in dispute. The plaintiff has failed to do that. Abdul Alim and Ors. v. Hayat Mohammad and Ors. AIR 1946 Oudh 188, is on all fours with the present case. There, a suit was filed by the proprietor of village Sakrawal for recovery of possession of a house situated in that portion of the village which had become a part of Tanda Municipality in 1870. Iqrar-i-malihan in that case had been prepared in the year 1874. It was there held that iqrar-i-malikan prepared after the inclusion of a portion of the village in Tanda Municipality cannot have application to the inhabitants of that portion which had already become a part of the town. The view that we have taken in this case is thus supported by a Bench decision of the Oudh Chief Court in Abdul Alim and Ors. v. Hayat Mohammad and Ors. AIR 1946 Oudh 188. We are satisfied in these circumstances that the "iqrar-i-malikan deh", Ex. 1, does not apply to the residential sites or houses in mohalla Nahar Bagh and therefore it does not apply to the house now in dispute (and the plaintiff's suit must fail).

9. The decision of the learned lower appellate Court was challenged on another ground also. It was said that the learned lower Court treated "iqrar-i-malikan deh", Ex. 1, as the record of a custom and it committed an error of law when it held that the several transfers by residents of Chak Gauri Patti did not rebut the custom because it had not been shown that the transfers were within the knowledge of the plaintiff or were not consented to by him. In the trial Court were proved as many as 26 sale deeds Exs. A1 to A7, A11 to A14, A16 to A23, D.W. 1/1, D.W. 2/2, D.W. 3/1 to 3/4 and d.w. 4/1 by the riyayas of Chak Gaura Patti from the year 1891 to the year 1941. No objection was ever raised by the owner of the village against any of them except the one now in suit. No doubt Exs. 15 to 22, which relate to a litigation of the year 1887 between the predecessor of the plaintiff and one Sita Ram, show that the site in Chak Gaura Patti was not transferable, but this is not of much help as the sale deeds referred to above relate to a period after 1887, that is, from 1891 to 1941. As held in Abdul Alim and Ors. v. Hayat Mohammad and Ors. AIR 1946 Oudh 188, 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 the custom lay on the plaintiff. The defendants 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 possession must have been delivered to the vendees. The instances of breach of the custom were so numerous that it was impossible to hold that the plaintiff was not aware of the transfers. The documents themselves make no mention that any permission of the proprietor was taken for the sales. It is clear that in the present case the lower appellate Court failed to realise that the burden lay on the plaintiff to prove that the custom was continuous and

invariable and that in view of the several instances of transfer by riyaya it was the duty of the plaintiff to explain how all these transfers had taken place. The lower appellate Court clearly committed an error of law. It is obvious from the documentary evidence of these 26 transfers from 1891 to 1941 that the custom, if any, regarding the non-transferability of houses and sites had ceased to be operative. In this aspect of the matter, it is clear that the plaintiff's suit ought to have been dismissed.

10. We wish to make it clear that when-dealing with the question of custom recorded in the "iqrar-i-malikan deh", Ex. I, we have not decided the question as to whether the sale of the house by defendant 3 does or does not amount to an abandonment of the type contemplated in the terms of "iqrar-i-malikan deh". We have assumed without deciding one way or the other for the purpose of the custom that under Ex. 1 the plaintiff had the right to recover possession of the house on the sale by his riyaya of the house. In the view that we have taken in this appeal it has been unnecessary to decide the question.

11. The result is that we allow the appeal, set aside the judgment and decree of the lower" appellate Court and restore that of the trial Court. The appellants shall get their costs throughout from the plaintiff respondent.

12. The stay order dated 3rd August 1943 passed on civil Miscellaneous Application No. 473 of 1943 is hereby discharged.