

(1943) 11 AHC CK 0003
In the Allahabad High Court

Raja Veni Madho Prasad Singh

APPELLANT

Vs

Mirzapur Electric Supply Co., Ltd. and Another

RESPONDENT

Date of Decision : 15-11-1943

Acts Referred:

Citation : AIR 1944 All 123 : (1944) 14 AWR 93

Hon'ble Judges : Collister, J

Bench : Division Bench

Judgement

Collister, J.—This is a plaintiff's appeal arising out of a suit for recovery of zar-i-chaharum. The plaintiff-appellant is the Raja of Kantit. Defendant 1 is the Mirzapur Electric Supply Co., and defendants second set are Gilbert P. Mackenzie and Robert Ross - who apparently represent a firm of accountants and auditors. On 5th August 1930 the defendants second set, as trustees of the Bengal Stone Co., Ltd., sold certain properties to defendant 1 for Rs. 55,000; and included in the properties so conveyed were a number I of buildings in Mirzapur kalan and in Mirzapur khurd. The value of the various properties was not separately specified in the sale deed, but the plaintiff-appellant estimated the value of the buildings at Mirzapur kalan and Mirzapur khurd at Rupees 30,000 and he claimed Rs. 7500, being one-fourth of the aforesaid amount, as the zar-i-ehaharum due to him in respect thereto on the basis of a custom prevailing in this locality. When the suit went to Court, however, the plaintiff dropped his claim in respect to Mirzapur khurd - where he is apparently a proprietor to the extent of 4 1/2 annas only - and arguments advanced in respect to Mirzapur kalan only, of which mahal the plaintiff-appellant is admittedly the sole proprietor.

2. The suit was contested by defendant 1 alone, and his main pleas were that no custom of zar-i-chaharum existed, that, if it did exist, it had fallen into desuetude, that the value of the buildings did not exceed Rupees 8000, and that, upon a proper interpretation of the wajib-ul-arz, if it be found that there is any liability as regards zar-i-chaharutn, such liability rests upon the vendor alone and not upon the vendee.

3. The learned Judge of the Court below has dismissed the suit on the ground that the custom alleged by the plaintiff-appellant has not been proved.

4. As regards the custom which he alleges, the plaintiff-appellant relied upon the wajib-ul-arz of 1882, on certain kabuliats and a deed of agreement and on a judgment dated 31st March 1931.

5. The contesting defendant relied upon a judgment of the Subordinate Judge of Mirzapur dated 17th December 1935 in connexion with a reference u/s 18, Land Acquisition Act, and he also relied upon two sale deeds dated 12th November 1885 and 20th June 1889, in which there is no mention of any liability to pay zar-i-chaharum in the event of the property being transferred; and the learned Judge also mentions the oral testimony of three witnesses, by name Mul Chand, Jagar Nath and Deo Mangal. The learned Judge has given reasons, which are sound enough, for holding that this evidence does not assist the contesting defendant to any material extent; but he does not mention the evidence of Bechu Lal, who is the patwari of Mirzapur kalan and who says that many sale deeds have been executed in that mahal, but that no zar-i-chaharum has ever been paid, so far as he is aware.

6. It is unnecessary for us to expatiate upon the evidence which the contesting defendant has produced, for we are clearly of opinion, for reasons which will appear hereafter, that the view taken by the Court below is right.

7. We will first consider the wajib-ul-arz of 1882, upon which the plaintiff-appellant mainly - though not exclusively - bases his claim. The onus of proof lay primarily upon the plaintiff-appellant to establish the custom which he set up in his plaint; but as regards the wajib-ul-arz learned Counsel for the appellant contends in the first place that it has been produced from proper custody and that in the second place the entry as regards the alleged custom is prima facie evidence of its existence. There can be no doubt that the wajib-ul-arz was produced from proper custody, and this fact is not disputed. It is also a perfectly good proposition of law that an entry in the wajib-ul-arz as regards a particular custom is good prima facie evidence that such custom exists. If authority is required for this proposition, reference may be made to two decisions of the Judicial Committee, namely *Digambar Singh v. Ahmad Syed Khan* ("14) 1 AIR 1914 P.C. 11 and AIR 1927 113 (Privy Council) . In both those cases a question of pre-emption was in controversy, but the analogy will equally apply in respect to a custom of zar-i-chaharum. In *Digambar Singh v. Ahmad Syed Khan* ("14) 1 AIR 1914 P.C. 11 their Lordships say:

To hold that a wajib-ul-arz is not by itself good prima facie evidence of a custom of pre-emption which is stated in it and that the wajib-ul-arz requires to be corroborated by evidence of instances in which the custom has been enforced would be to increase the costs of litigation in pre-emption cases, and in many cases might practically deprive a sharer of his right. Of course the evidence as to a custom of pre-emption afforded by a wajib-ul-arz may be rebutted by other

evidence.

8. This decision was followed by their Lordships in the later case. Learned Counsel for the appellant also relies on Section 91, Land Revenue (N.W.P.) Act of 1873, which was in force at the material time. That section provides:

All entries in the record so made and attested shall be presumed to be true until the contrary is proved.

9. By "record" the Legislature meant the record of rights, as is clear from the heading under which this section occurs. Thus, there can be no doubt that ordinarily the record of a custom, whether it be of pre-emption or of zar-i-chaharum, appearing in a wajib-ul-arz, is perfectly good prima facie evidence that such custom prevails in the locality to which the wajib-ul-arz relates; but the presumption is rebuttable and in the case which is before us there are circumstances attaching to the entry in the wajib-ul-arz which call for careful examination in order to arrive at a decision as to whether the entry can be regarded as a reliable piece of evidence in favour of the custom alleged. It appears that settlement operations in this area began in 1882, and learned Counsel for both sides agree that these operations continued up to 1885 - vide the Gazetteer of the Mirzapur District, p. 170 - and the Settlement Officer was an official named B. Jai Gopal Banerji. The wajib-ul-arz itself was drawn up in 1882, but at a later date we find a marginal entry in red ink against the paragraphs under Chap. 4, which is headed "Rights of Tenants in General" and this is the entry which purports to contain a record of the custom of zar-i-chaharum. This entry, as translated at p. 29 of our paper-book, reads as follows:

Under an order dated 30th March 1885 of the Court of B. Jai Gopal Sahab, Settlement Officer, this condition was laid down in respect of the paras - that when a person wants to sell...houses in respect of which ground rent is paid one-fourth of the price is paid to Kaja Sahab as his dues.

10. In the copy which has been produced in this case the entry purports to be dated 24th January 1885, but this is almost certainly an error and we think that the correct date is 24th July 1885, for we find that this is the date which was given by the Munsif of Mirzapur in his judgment in suit No. 393 of 1933, in which the present appellant was the plaintiff and which was the subject of a reported decision by a learned Judge of this Court to which we shall have occasion to refer. Anyway, the order authorising the entry and the entry itself both purport to have been made in 1885 and possibly the settlement operations in respect to Mirzapur kalan may still have been in progress at that time - though there is no absolute certainty as regards this fact. The entry purports to be signed in Urdu "in running hand." In the certified copy which has been produced in this case the signature was illegible to the translator, but Behari Lal, the record-keeper of the Collectorate, brought to the trial Court the original wajib-ul-arz of 1882 and he says that the signature is of a moharir named Habib Ullah. As we have already seen, this entry was made no less than three years after the completion of the

wajib-ul-arz and it bears no signature of the Settlement Officer; the official who purports to have signed it held no higher post than that of moharir. There is nothing to show when or how or in what circumstances this entry came to be made and we do not know whether anyone, except the moharir, was present at that time. Nor do we know whether the order of the Settlement Officer was verbal or in writing. If it was a written order, no copy of it has been produced. The learned Judge of the Court below has referred to certain rules which were made u/s 90 of Act 19 of 1873, which was then in force. We have not been able to secure these rules, but learned Counsel for the appellant accepts as correct the quotations from them which appear in the judgment. The learned Judge states that K. 49 provides as follows:

The khewat and wajib-ul-arz shall be attested by the Settlement or Assistant Settlement Officer in the presence of all the lambardars of each mahal or their authorised agents and shall be signed by the Settlement Officer or Assistant Settlement Officer and by all the lambardars and the patwari.

11. Rule 58 reads:

No alteration shall be made in the record of rights or the settlement misil after the latter has been sent to the Collector's office, except under the signature of the Settlement Officer.

12. As regards the entry which is under our consideration, there was no attestation or signature as required by these rules and any presumption which might otherwise attach to an entry of a custom in the wajib-ul-arz is thus weakened almost to the point of extinction in this particular case. We have been referred to a judgment of Harries J. in Kalicharan Chowdhari and Others Vs. Raja Beni Madho Prasad Singh and Others , where the facts were in some respects very similar and the plaintiff was the same as in the suit out of which the present appeal has arisen. In that case the marginal entry in red ink was accepted by the learned Judge as prima facie evidence of the custom alleged; but there were features in that case which definitely distinguish it from the case which is before us. In the case before Harries J., there is nothing in the judgment to show whether the entry purported to bear the signature of the Settlement Officer; but in our case we know that the entry was signed by a person of no higher status than that of a moharir. The learned Judge was impressed by two facts; one was that the wajib-ul-arz was produced from proper custody - as in our case - and the other was that the entry was not impugned. Therefore at page 169 the learned Judge says:

...it is useless to speculate as to how this entry came to be made in the margin, but having regard to the fact that it is not suggested that it is a forgery and to the fact that the document is produced from the proper custody, I am bound to regard this entry as part of the wajib-ul-arz.

13. What view the learned Judge would have taken if the authenticity of the entry had been challenged we do not know. Moreover, his attention was not

drawn to the rules which are mentioned by the Court below in our case. In our case the contesting defendant pleaded in his written statement that the entry in the wajib-ul-arz was a "unilateral and ex parte" order, which did not bind the inhabitants and could not be enforced as a custom; but in Court he went further and contended that the entry was suspect. It is suggested before us that the plaintiff-appellant was taken by surprise by this sudden leap from an allegation that the entry was not binding to an allegation that it was suspect; but we cannot accept this contention. The plaint was filed on 4th August 1936, without any copy of the wajib-ul-arz. The written statement was put in on 2nd November 1936, and the copy of the wajib-ul-arz was not filed by the plaintiff-appellant until 21st January 1937. Thus, if anyone was taken by surprise, it was the contesting defendant rather than the plaintiff-appellant.

14. Having regard to the circumstances which we have mentioned, we are of opinion that no presumption in favour of the plaintiff-appellant can be drawn from this belated entry in the margin of the wajib-ul-arz written by a low-paid clerk in unknown circumstances; in fact we would go further and would say that the entry is open to the criticism of being of dubious authenticity.

15. The plaintiff-appellant having thus failed in respect to the wajib-ul-arz - which is the main basis of his suit - it remains for us to decide whether there is other evidence on the record from which a reasonable inference can be deduced that the alleged custom exists in Mirzapur kalan.

16. The other documents upon which the plaintiff-appellant relies consists in a qabuliat dated 3rd September 1882, another qabuliat dated 6th November 1905, a deed of agreement dated 9th January 1919, a qabuliat dated 13th October 1919, and the judgment of the Munsif of Mirzapur dated 31st March 1931, in Suit No. 496 of 1928. In the qabuliat of 3rd September 1882, the executant agreed to pay Rs. 41 a year as rent for a plot of land which he had taken for the purpose of building a house and keeping stones, and it was covenanted that in case of sale the lessee should pay zar-i-chaharum out of the sale consideration to the zamindar. In the other three documents it was agreed that in consideration for receiving a plot of land on which a house was to be built the lessee would pay ground rent at a certain rate and would pay zar-i-chaharum to the zemindar in the event of sale. In our opinion, the covenant expressed in these four documents to pay zar-i-chaharum upon sale of the materials of the buildings falls far short of proving that a custom of zar-i-chaharum prevails in Mirzapur kalan. If a large number of such leases had been proved, it might perhaps be inferable from such a covenant that it was inserted because there was a custom to this effect in the mohal, but these four documents in which the lessee agreed to pay zar-i-chaharum are certainly inadequate to prove the existence of the custom which is alleged.

17. We are left with the judgment of the Munsif of Mirzapur in Suit No. 496 of 1928 in which it was held that the custom prevails. The learned Munsif remarks in his judgment that the custom is mentioned in the wajib-ul-arz and he then

says that on behalf of the defendants it was objected that the entry was in the form of a contract and did not amount to a record of custom, that it did not bear the signatures of the tenants and that the entry relating to this matter was added one year after the preparation of the wajib-ul-arz. The learned Munsif rightly held that the entry was not a record of contract and it did not require signatures of the tenants; and as regards the contention that the entry was not made until a year later, the learned Munsif says : "This entry was left over when the wajib-ul-arz was prepared, and the later entry is nothing but a correction." The learned Munsif did not, however, consider the various circumstances attending this entry which we have mentioned in this judgment - perhaps because no argument was addressed to him in respect thereto. The judgment is certainly a piece of evidence upon which the plaintiff-appellant is entitled to rely, but we are clearly of opinion that, standing virtually alone - apart from the three qabuliats and the deed of agreement which we have already mentioned - it is totally inadequate to support the plaintiff-appellant's claim.

18. For the reasons given, we are of opinion that the suit has been rightly dismissed by the Court below. We accordingly dismiss this appeal with costs as against defendant-respondent 1. It is argued before us by learned Counsel for the defendants second set that they should be allowed their costs of this appeal; but it was necessary to implead them in this appeal and we do not think that they are entitled to any costs.