Chet Ram And Ors. vs Manzoor Hasan And Anr. on 12 October, 1953

Equivalent citations: AIR1954ALL441, AIR 1954 ALLAHABAD 441

JUDGMENT

Beg, J.

1. This is a defendants' third appeal. It arises out of a suit brought by the plaintiff for possession of a plot appertaining to Ahata No. 957 situate in Mohalla Kashif Ali Sarai in the town of Unnao. The plaintiff brought the suit on the allegations that he was the owner of the plot in question, that Dhani Ram. defendant No. 3 was his 'riaya', that the house occupied by Dhani Ram fell into ruins about ten years prior to the suit, that the 'arazi' thereafter became 'parti' and the house was abandoned by Dhani Ram. It was further alleged by the plaintiff that subsequently on 29-3-1945, he had given permission to defendant No. 4 Tara Prasad to put up constructions on the said plot, that Tara Prasad started the work of putting up constructions, that he was resisted by defendants Nos. 1 and 2 on 31-3-1945, who alleged that Dhani Ram was their uncle and they were constructing their own house on the said plot. The unlawful resistance by defendants Nos. 1 and 2 gave rise to the plaintiff's suit for possession. Dhani Ram, the previous tenant was impleaded as defendant No. 3 in the suit.

2. A joint written statement was filed on behalf of defendants 1 to 3. In this written statement all the defendants alleged that the house had throughout remained in the possession of Dhani Ram defendant No. 3, that it had fallen down about two years prior to the suit, that all the defendants had started constructing a house on the said site, that the site had never become 'parti' and that for the aforesaid reasons the plaintiff's suit was liable to be dismissed. Defendant No. 4 did not contest the suit.

3. On the basis of the above pleadings, the trial Court framed the following three issues ins the case:

> 1. Did the plot escheat to the landlord because the house of Dhani Ram fell into ruins?
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> 2. Is the plaintiff the landlord of the plot?
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> 3. To what relief is the plaintiff entitled?
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> 4. Defendant No. 3 died during the pendency of the suit in the trial Court and his heirs were brought on the record in his place.

5. The trial Court found all the three issues in favour of the plaintiff and decreed the plaintiff's suit in toto. The contesting defendants filed an appeal against the decree of the trial Court. Their appeal having been dismissed, they filed a second appeal in the High Court. The second appeal of the said defendants having been dismissed, they have now appealed to the Division Bench under Section 12(2), Oudh Courts Act and this appeal has come up for hearing before us.

6. The main argument of the learned counsel for the appellants before us is that the site in dispute is situate in a town and as such the right of escheat cannot accrue in favour of the landlord. In this connection he has placed Strong reliance on the case of -- 'Amba Sahai v. Gopeshwar Babu', AIR 1953 All 607 (A), in which a Bench of this Court has laid down that the general presumption about the prevalence of a custom in agricultural village that no riaya can transfer the site of a house does not apply to the said area when it ceases to be agricultural. If, however, only a portion of the village ceases to be agricultural, the non-applicability of the general presumption mentioned above is confined to the particular area which has ceased to be agricultural and the general presumption would continue to apply to the portion which has remained agricultural.

7. At the very outset it may be mentioned that this plea was not taken by the defendants Nos. 1 to 3 at all in their written statement. It was nowhere alleged that the right of escheat claimed by the plaintiff could not accrue in respect of the site in question, as it lay in an area which was a part of a town or in a portion which had ceased to be agricultural. On the other hand, the nature of pleadings clearly indicates that both the parties assumed that the right of escheat did exist and that the landlord would be entitled to the possession of the site if the house had fallen into ruins as alleged by the plaintiff, and defendant No. 3 had abandoned it. In their joint written statement, the only ground on which defendants Nos. 1 to 3 seem to have contested the right of the landlord to the possession of the suit was that the facts relating to the falling of the house into ruins, as alleged by the plaintiff, were not correct. In other words, the sole ground on which the plaintiff's case of abandonment was resisted by the said defendants in their written statement was that the house had not fallen into ruins about ten years ago, as alleged by the plaintiff, but that it had fallen down only about two years ago and that the possession of the site had throughout remained with defendant No. 3.

8. Turning to the oral pleadings, the plea on which the learned counsel for the defendants-appellants so strongly relies now was not taken at that stage either. For the same reason no issue was framed on it, nor was any evidence led on that point. No such plea was taken by the contesting defendants even at the stage of arguments or at any stage in the trial Court. Further, no such ground was taken by the said defendants in their grounds of appeal to the first appellate Court or in their grounds of second appeal in the High Court. The memorandum of second appeal filed in the High Court on behalf of the appellants show that only one ground of appeal was

taken and it was as follows :

"(1) That on the facts found, no case of abandonment has been made out and the court below erred in decreeing the suit for possession."

This plea has been taken for the first time in the grounds of appeal to the Division Bench and argued before us.

9. The learned counsel for the respondent has taken a strong objection to it and has urged that under the circumstances the plea should not be entertained by us at this late stage. In this connection he has invited our attention to the cases of -- 'Beni Madho v. Harihar Prasad', AIR 1947 Oudh 71 (B) & -- 'Chhatanki v. B. Avadh Narain', AIR 1948 Oudh 262 (C). In the said cases it was laid down by the late Chief Court of Oudh that a point not raised in the courts below or before the Single Judge in second appeal cannot be allowed to be raised in an appeal under Section 12(2), Oudh Courts Act. For the above proposition a number of previous cases referred to therein were relied on in the said cases. On this point we are inclined to agree with the learned counsel for the respondent.

10. In the present case, however, there is every reason for not allowing this point to be raised at this late stage. The point is not a pure question of law but would raise questions which might necessitate fresh evidence on a number of questions of fact. If such a plea had been raised by the contesting defendants, it might have been open to the plaintiff to meet it in a number of ways. For example, the plaintiff might have set up a case that the site in dispute lay in a portion or in an area of the village which had continued to be agricultural or had not become a part of the town. This plea obviously opens up a new avenue of inquiry and investigation not warranted by the pleadings of the parties. Thus the grievance made on behalf of the respondent that he would be taken by surprise and seriously prejudiced if this plea is allowed to be raised at this stage is not without foundation. Under the circumstances, we are clearly of opinion that it would be improper and unfair to entertain it at this stage.

11. In view of the above position, it appears to us that -- 'AIR 1953 All 607 (A)', which is the sheet anchor of the appellants' argument has no application to the facts and circumstances of the present case. In -- 'AIR 1953 All 607 (A)', it was explicitly pleaded by the defendants in their written statement that the portion of the village in which the site lay had ceased to be agricultural and had become a part of the city. This question was the subject-matter of an issue. Evidence was led on it. It was hotly debated by the parties at all stages of the suit. Further, in -- 'AIR 1953 All 607 (A)', there was a concurrent finding of fact of both the lower courts in favour of the defendants to the effect that the particular locality in which the site lay had ceased to be agricultural and had become a part of the city about twenty years prior to the suit.

Moreover, in the case reported in -- 'AIR 1953 All 607 (A)', the site originally lay in an agricultural village when the wajibularz was framed, and it became a part of the city subsequently about twenty years prior to the suit. In the present case the site admittedly lay in town at the time When wajibularz reciting the custom of non-transferability was prepared. Thus the question in -- 'AIR

1953 All 607 (A)' was as to what was the effect of the subsequent change effected by the inclusion of an area within the city on the general presumption of non-transferability that initially applied. to the area when it was a part of the agricultural village. No such question arises in the present case.

It is also to be noticed that in -- 'AIR 1953 All 607 (A)', the person (Rajju Lal) who was alleged to be his riaya by the plaintiff denied the said allegation and was found by the lower courts to be not a riaya at all but a person holding by adverse possession. It was further held that he had acquired proprietary title to the land in dispute after completing his adverse possession for a period of 12 years. This finding was considered by the High Court as by itself quite enough for the dismissal of the plaintiff's suit. On the other hand, in the present case, the riyaya i. e. defendant No. 3 conceded that he had no proprietary title but was only a tenant. For the above reasons, we are clear in our mind that -- 'AIR 1953 All 607 (A)' can provide no parallel to the present case, and is inapplicable to it.

12. The learned Counsel for the appellants further argued that the effect of the conversion of an agricultural village into a town is to bar a party from adducing any evidence in support of the existence of such a custom. This point is me-rely ancillary to the main argument of the learned counsel mentioned above. It can be disposed of with it on the preliminary ground that it was not raised at any earlier stage of the case and should not, therefore, be allowed to be raised at this stage. We have, however, examined it on merits and we find ourselves unable to subscribe to the view contended for by the learned Counsel. In our opinion, where a village or a certain portion of it has ceased to be agricultural, the effect of such a change is merely to bar the raising of a general presumption in favour of a custom of non-transferability in respect of the village or such portion of the village as has ceased to be agricultural. In spite of the change that has taken place in the area, it is still open to a party to show that the pre-existing custom continued to operate and did not become extinct.

The question of presumption has to be kept distinct from the question of proof. For the purpose of raising the presumption what one has to see is the state of affairs prevailing on the date on which the presumption is sought to be invoked. On the other hand, in order to prove a certain legal relationship between the parties, the court is not only concerned with the state of affairs prevailing at the time when the question arose, but also with the state of affairs prevailing when the alleged legal relationship is said to have arisen. Once the existence of such a legal relationship is proved, it can only come to an end either by operation of law or by a contract between the parties. The mere change in the local condition of the area does not fall under either category and cannot have the effect of altering, extinguishing or abolishing pre-existing rights or liabilities of persons residing within the ambit of such an area. No doubt, the existence of a change in the local conditions might be a relevant factor for the purpose of showing that a custom which previously prevailed in that area fell into disuse as a result of the change brought about in the local conditions.

In other words, it is a relevant factor for the purpose of showing that continuousness which is one of the necessary ingredients of a custom was lacking after a certain stage with the result that what was a custom at one time had ceased to be so at a subsequent time. This, however, is quite different from saying that change in the local conditions or inclusion within municipal area at a stroke of the pen

has the effect of sweeping away or liquidating the pre-existing rights of parties thereby disabling them completely from setting up the custom in question. In other words, in spite of the change brought about by the conversion of an agricultural village into a town, it is still open to a party to show that the preexisting custom continued to exist and remained alive. In such a case the party cannot avail itself of the general presumption of law, but it can adduce any oral or documentary evidence in support of the legal relationship that it seeks to establish in order to prove its case. This would be supported by the observations of the learned Judges in -- 'AIR 1953 All 607 (A)', to the following effect:

> "Even in a non-agricultural area, a custom of non-transferability can be established, if satisfactory evidence be adduced."

13. It is further to be noticed that in -- 'AIR 1953 All 607 (A)', the main question related to the existence of a custom of non-transferability. In that connection, the learned Judges considered the further question as to how far a Wajibularz can be taken to be an evidence of such a custom & any observation made therein in respect of this matter should be construed in that context. There is, however, another aspect of the matter. Apart from Wajibularz being an evidence of custom, it can also be treated as a record of conditions governing the grant of residential sites in an area at the time when it was prepared. This aspect of the matter is exhaustively dealt with in --'Kanhaiya Lal v. Hamid Ali', AIR 1930 Oudh 235 (D), in which a Bench of the late Chief Court of Avadh observed as follows:

> "We agree with the learned Judge of the lower appellate Court that this Wajita-ul-arz will govern the case unless it is controverted and rebutted. Sir Tej Bahadur Sapru, who represented the defendants-appellants before us, has argued that the Wajib-ul-arz has no effect because Pihani is a town. We find against this view. A Wajib-ul-arz is as effective in a town as it is in a village. This particular Wajib-ul-arz is not according to our view so much a record of custom as a proof of the conditions governing the grant of residential ' sites in Pihani, and, as such, is effective to establish that Ichcha had no right of transfer in the land, and that when the land was vacated, the family had not even the right to sell the thatch of which, on the finding of fact, their house was composed..... But apart from that in our opinion it would be impossible to establish a custom against what to us is a grant. It is not a question of evidence as to two conflicting customs. The Wajib-ul-arz lays down the conditions on which these sites were granted." (240).
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> The principle enunciated in the above case was approved by a Bench of the Allahabad High Court in a case reported in -- 'Ratan Ram v. Dhanush-dhariji Bhagwan Birajman Bara Asthan', AIR 1949 All 410 (E). a case which is also referred to and relied upon in -- 'AIR 1953 All 607 (A)'.

14. The' learned counsel for the appellants further relied on -- 'Misri Lal v. Durga Narain Singh', AIR 1940 All 317 (F). In this case the learned Judge has approached the same question from the point of view of lost grant and made the following significant observations :

> "It follows therefore that the question whether a particular site is transferable or not does not strictly depend upon the existence of a custom in the sense of a custom having the force of law but upon our knowledge of a custom in the sense of a prevailing practice. What I mean is that no custom is crystallised into a rule of law which compels the owner of a site to make a grant of a particular nature but that the custom in the sense of a prevailing practice has been such that we can assume from our knowledge that lost grants were made in a particular form. It is useful to consider this aspect of the matter because it seems to me to follow that we have to examine the conditions as far as possible existing at the probable time of the grant in order to determine what the nature of the grant is and that no practice which has grown up after the grant has been made and no extraneous circumstances such as the conversion of a rural area into a town area at later period, can affect the terms of a grant already made."

The above observations far from supporting the contention of the learned counsel for the appellants go against him.

15. On behalf of the respondents our attention has been invited to the case of -- 'Mahomed Ali Khan v. Mt. Badrunnissa', AIR 1928 Oudh 438 (G), in which a Bench of the late Chief Court of Oudh observed as follows :

> "As it is a town any presumptions which are in Oudh applicable to the rights of landed proprietors in agricultural villages have no application; but we have a Wajib-ul-arz which, lays down the special rights of the proprietors of the town and of the occupier in houses in Malihabad and specially in Mirzaganj..... Under the terms of the wajib-ul-arz the occupier pays no ground rent and is at liberty to remove the materials of his house. If he were of the inferior riaya he would have to pay to the plaintiff one-quarter of the price of the matters as 'haq chaharum' under the terms of the wajib-ul-arz, but being one of the superior riaya he is permitted to retain the whole of the proceeds of such material himself. So long as the licence exists, the only benefit that the plaintiff could really gain would be if the occupier died without heirs. In these circumstances, the materials would escheat in part to the plaintiff-appellant."

16. Approaching the present case from this aspect, we have in evidence in the present case Ex. 3, the wajib-ul-arz, which already defines the rights of the landlord in this regard and records the conditions governing such grants. According to this wajib-ul-arz if the house of a riaya falls in ruins and there is nothing left of the house, no one can build a house on the site without obtaining the permission of the Zamindar. The learned counsel for the appellants argues that in the said wajib-ul-arz the words 'no one' (koi) were not intended to cover a tenant. We are unable to accept this argument. The wajib-ul-arz clearly contains a general prohibition. The learned counsel for the appellants would like us to add the words 'except the tenant' after the words 'no one' in the above wajib-ul-arz. The importation and addition of words in a document which has the effect of altering its obvious meaning is not warranted by any principle of construction. The document on the face of

it is clear and unambiguous and there is no reason for us to depart from the obvious tenor of its terms. The wajib-ul-arz in question clearly forbids everyone including a riaya from building a house without obtaining the permission of the zamindar, once a house has fallen in ruins.

17. For the above reasons we are of opinion that the proposition contended for by the learned counsel for the appellants is not legally sound. We accordingly overrule it.

18. The next argument of the learned counsel for the appellants was that the finding given by the lower Courts on the question of abandonment and escheat is perverse and should be set aside. In this connection he invited our attention to issue No. 1 which is as follows:

"Did the plot escheat to the landlord because the house of Dhani Ram fell into ruins?"

He further argued that the issue itself was wrongly framed, as it implied that the mere fact that the house had fallen into ruins was according to the trial Court enough to prove that the site had been abandoned by the tenant. He accordingly, prayed for a remand of the case after framing proper issues. The frame of issues in a case depends upon the pleadings of the parties. An examination of the pleadings of the parties in the present case shows that the landlord had brought the suit on the ground that the land had reverted to him as the house had fallen into ruins and was abandoned by the tenant. The only ground on which the defendants contested the suit was that the house had not fallen into ruins. Thus both the parties impliedly accepted the position that if the house had fallen into ruins, as the plaintiff alleged, the plaintiff would be entitled to the relief claimed by him. Under these circumstances we do not see anything wrong in the frame of the said issue.

In this connection it may also be mentioned that no such grievance was made on behalf of the appellants at any stage prior to the appeal before the Division Bench. Even in the grounds of appeal before the Division Bench no such ground has been taken. The prayer of the learned counsel for remand was made for the first time at the close of his oral arguments before us. It comes at a very late stage and cannot be allowed by us.

19. It may, however, be noted that in spite of the fact that in view of the position taken up by the parties, the issue was framed in the above form by the trial court, it had adverted to a number of circumstances which conclusively proved that the defendants had abandoned the house. These circumstances have come out from the documentary as well as oral evidence of the defendants themselves. Thus it has been admitted that Dhani Ram left the Mohalla and was living with his brothers, sons and grandsons in a different mohalla called Budhwari. It has further been admitted by defendant No. 1 as D. W. 7 that Dhani Ram let out a Kothri on a modest rental of -/12/-, that this kothri fell down and that only a sum of Rs. 4/- or Rs. 5/- was needed to reconstruct it. Even this paltry sum was not spent to put up the fallen kothri. Further in an application given by Ram Prasad defendant No. 2 to the Municipality he clearly stated that the house in question was his property "Mujh sail ba ek makan hai". Dhani Ram died during the pendency of the suit.

D. W. 5 Rameshwar. his grand-son, admitted in evidence that Dhani Ram was unfit to do pairavi in his lifetime. This witness namely Rameshwar is said to be financing the constructions, yet he

admitted that he did not do any pairavi in the case. He also admitted that Dhani Ram's brother Durga was alive and he also did nothing in regard to the house. It is also in evidence that defendants Nos. 1 and 2 live closeby. There is one more factor which is of importance and that has also come out in defendants' own evidence. It appears that after the suit was started, defen-posthaste probably with a view to present the court with a 'fait accompli'. In their feverish haste to put up the constructions, they did not even wait for Municipal sanction. They were, accordingly, prosecuted by the Municipality. Even when faced with a criminal prosecution, they did not plead that the constructions did not belong to them and really belonged to defendant "No. 3 Dhani Ram. They did not even plead that they were putting them up merely as agents of Dhani Ram or that they were in any way acting on his behalf. On the other hand, they took the whole burden on themselves and paid the fine without demur. This strongly points to the conclusion that the persons who are really responsible for the constructions and who are its real owners are defendants Nos. 1 and 2.

It is evident that in this case the lapsed interest of defendant No. 3 was used by them as a smoke screen for the attack launched on the right and title of the plaintiff and the defence set up by them is merely a barricade put up as a part of their strategy. Relying on the above circumstances the lower Courts rightly came to the conclusion that Dhani Ram defendant No. 3, the original tenant, had lost all interest in the house and in any case defendants Nos. 1 and 2 were mere strangers who had no right to put up any constructions thereon. The lower Courts further believed the plaintiff's case that the house had fallen into ruins as long as ten years ago and disbelieved the defendants' case that the house had fallen down only two years ago. The two Courts below also believed the plaintiff's oral evidence and disbelieved the defendants' oral evidence on the various points relating to the case. In view of the above facts we are of opinion that the findings given by the lower Courts on the issue of abandonment and escheat cannot be characterized as perverse or improper. On the other hand, they are quite reasonable and fair and immune from any error of law or procedure. We have no jurisdiction to interfere with them at this stage. They are final between the parties and binding on us.

20. For the aforesaid reasons we are of opinion that there is no force in any of the contentions advanced by the learned counsel for the appellants. This appeal must accordingly fail and is hereby dismissed with costs.