Ram Kishore Jaiswal vs B. Kavindra Narain And Ors. on 12 October, 1954

Equivalent citations: AIR1955ALL59, AIR 1955 ALLAHABAD 59

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Bench: V. Bhargava

JUDGMENT

Malik, C.J.

1. These three appeals arise out of three suits filed in the court of the Additional Munsif of Bana-ras for realisation of 'zar-i-chaharum', that is, one-fourth of the sale price.

2. On 16-7-1947, in execution of a simple money decree against Babu Nandan a portion of plot No. 586 was sold at auction and was purchased by the appellant, Ram Kishore Jaiswal. On 25-8-1938, another portion of the same plot was sold by Babu Nandan to the appellant. On 19-9-1938, the rest of plot No. 586 was sold by Babu Nandan to the appellant.

3. Plot No. 586 was situate in Patti Shamlat, Mauza Jaitpura, Banaras. The plaintiffs were the plot proprietors while the defendant Babu Nandan was a parjotdar. The plaintiffs filed three suits and in the plaint they alleged that they were zamindars and under an ancient custom the zamindars were entitled to get one-fourth of the sale price, whether the property was sold by voluntary sale or by auction sale.

4. Suit No. 291 of 1943 was filed to claim 'zar-i-chaharum' as a result of the auction sale and the other two suits, Nos. 625 of 1943 and No. 587 of 1943, were filed to claim 'zar-i-chaharum.' on account of the sales effected on 25-8-1938, and 19-9-1938, respectively.

5. The defendant denied that the plaintiffs were zamindars of Patti Shamlat or that there was any custom for payment of 'zar-i-chaharum' or that the plaintiffs had any right to claim the same.

6. The plaintiffs had filed an incorrect copy of the khewat and the learned Munsif relying on that khewat held that the plaintiffs were zamindars and not plot proprietors and under a custom recorded in the 'wajib-ul-arz' they were entitled to the amount claimed and decreed the plaintiffs' suits.

7. The defendant appellant filed appeals in the court of the learned Civil Judge of Banaras and in that court he filed a correct copy of the khewat. The learned Judge thereupon remitted the following issue to the trial court: Whether the plaintiffs are mere plot proprietors and not entitled as such to claim benefit of the custom of recovery of 'zar-i-chaharum'?"

8. On 12-10-1945, the trial court held that it had been entirely misled by the incorrect copy of the khewat filed by the plaintiffs, that the correct copy of it showed that they were mere plot proprietors and that, as a matter of fact, learned counsel for the plaintiffs had admitted that the plaintiffs were plot proprietors. The learned Munsif further pointed out that the plaintiffs had no concern whatsoever with the Government, that they were not liable to pay land revenue and that they had no right to claim 'zar-i-chaharum'.

9. On return of the finding the lower appellate court held that the plaintiffs were not zamindars but plot proprietors but observed that "even as plot proprietors they were entitled to receive 'zar-i-chaharum' in all instances in which a zamindar would have been able to claim benefit of the recorded custom." The learned Judge also held that the said custom applied also to auction sales. All the three appeals were therefore dismissed.

10. The defendant has filed the Second Appeal No. 1150 of 1946 against the decree in Original Suit No. 291 of 1943, while Second Appeals Nos. 1144 of 1946 and 1170 of 1946 are against the decrees in Original Suits Nos. 625 of 1943 and 587 of 1943 respectively.

11. The cases came up before a Bench and the learned Judges referred two questions of law for decision by a Full Bench of five Judges. The questions are:

> "1. Having regard to the terms of the 'Wajib-ul-arz' of 1853 relating to village Jaitpura, para- gana Dihat Amanat, district Banaras, on the record of Suit No. 291 of 1943 of the Court of City Munsif of Banaras, are the plaintiffs as plot proprietors not entitled to 'zar-i-chaharum', on the sale of houses situated on the land belonging to them?
>
> 2. If the plaintiffs as plot proprietors are entitled to 'zar-i-chaharum', does the right accrue only on voluntary or also on compulsory sales?"

12. On the second point there was a Full Bench decision of four learned Judges in --'Kalian Das v. Bhagiratti', 6 All 47 (FB) (A) and it was, therefore, that the learned Judges recommended that a Bench should be constituted of five Judges.

13. As regards the first question, the decisions of this Court relating to Patti Shamlat of Mauza Jaitpura in the city of Banaras have all been one way but by reason of a decision relating to another Mohal oi Banaras known as Bhadaini in the case of -- 'Shukrullah v. Sir Vijaya Ananda', AIR 1949 All 739 (B) where a plot proprietor was given the right to claim 'zar-i-chaharum' the learned Judges referred the question to a Full Bench for decision.

14. On a question of custom a decision in a case as regards the existence or non-existence of a custom is good evidence in other cases and as this case is before a Bench of five Judges we felt reluctant to answer the question as many facts have been assumed in this case, probably for lack of material, which were disputed in other cases and findings were recorded on them. The Judgments of this Court in those cases have been cited in the referring order as authority.

15. To illustrate our meaning we may refer to two decisions mentioned in the referring order which also related to village Jaitpura. The first case is -- 'Gajadhar Shukul v. Bhikhu Nonia', L. P. No. 13 of 1932, D/- 10-4-1934 (All) (C). This Letters Patent Appeal had arisen out of suit No. 269 of 1927 for 'zar-i-chaharum' filed in the court of the Munsif of Banaras by Gajadhar Shukul who was a plot proprietor in Mohal Shamlat village Jaitpura just like the plaintiffs in the present case. In that case the history of the village was carefully gone into and it was found that Jaitpura had previously two Pattis, Patti Mauza Jaitpura, also known as Patti Arhai, & Patti Deo Narain. A large number of plots had been sold and many houses had been constructed on these plots.

In the Settlement of 1866 these plots were put in a separate Patti known as Patti Shamlat and two 'Wajib-ul-arzes' were prepared, one of Mauza Jaitpura also known as Patti Arhai and the other of Patti Deo Narain. It was held in that case that the 'Wajib-ul-arz' of mauza Jaitpura also known as Patti Arhai did not apply to Patti Shamlat. It was also held that the plaintiff who was a mere plot proprietor had no right to claim 'zar-i-chaharum'. A learned single Judge, Dr. S, N. Sen, dismissed the appeal holding that there was no custom in Patti Shamlat as the 'wajib-ul-ara' did not relate to it. He also observed that assuming that a custom did exist the plaintiff as plot proprietor could not claim 'zar-i-chaharum'. The Letters Patent Bench dismissed the appeal on a short point that the plaintiff being merely a plot proprietor he could not rely on the 'wajib-ul-ara' and could not, therefore, claim 'zar-i-chaharum'.

16. The other case is the -- 'Collector of Ghazipur v. Krishna Deo', S. A. Nos. 567 & 568 of 1932, D/- 4-10-1934 (All) (D). In that case also the plaintiff was a plot proprietor in Patti Shamlat, village Jaitpura. There also the custom in Patti Shamlat was denied and it appears from the judgment of the Munsif in Suit No. 97 of 1930, out of which the appeal had arisen, that originally there were two Pattis, Patti Mauza Jaitpura also known as Patti Arhai and Patti Deo Narain, Certain plots which had been sold and had been purchased by others were put in a separate Patti which was known as Patti Shamlat. The proprietors of Patti Shamlat did not pay any land revenue nor was any 'wajib-ul-arz' prepared for that Patti. The 'wajib-ul-arzes' of the other two Pattis were filed in the case and it was held that the 'wajib-ul-arz' of Patti Mauza Jaitpura also known as Patti Arhai did not apply to Patti Shamlat and what is still more important the learned Munsif in his judgment dealing with the contents of the 'wajib-ul-arz' said:

> "It has been clearly recorded in the 'wajib-ul-arzes' that the plot proprietors shall not be entitled to claim any profits arising out of the Malkana rights of the zamindars."

Mr. Justice Kisch in his judgment said: "Village Jaitpura originally consisted of two Pattis; Patti Arhai and Patti Deo Narain. A 'wajib-ul-arz' was drawn up in respect of each of these Pattis in the settlements of 1853 and 1866. In those documents the custom of the zamindars having a right to

one-fourth of the sale-prdceeds of houses sold by parjotdars is recorded. It is also recorded that plot proprietors shall not have such right. The house in suit is situated in Patti Shamlat." In the case before us, however, only a mutilated copy of the 'wajib-ul-arz' of Mohal Mauza Jaitpura also known as Patti Arhai was filed, and the portion mentioned in the judgments of the learned Munsif and Mr. Justice Kisch are not to be found in it as it is said that that portion of the paper has been destroyed.

17. The learned Judges referring the case assumed that the 'wajib-ul-arz' of Patti Arhai, Mauza Jaitpura related to Patti Shamlat and on that assumption they referred the first question.

18. Before we deal with this question, we must point out that in our view the custom relied on is a most unreasonable custom under which the zamindar can claim not only a one-fourth share of the price of the prajauti land but also a one-fourth share of the price of the building that may have been put up on the land by the parjotdar and this he is entitled to get every time the house is sold. What was the origin of this custom we do not know. It may have something to do with the levy of 'chauth' by the Mahrattas on the fall of Moghul Empire. Though this custom was claimed to prevail in two Mohals, Bhadaini and Jaitpura, which are now parts of Banaras city, persons owing land had started giving land on parjaut and parjautdars had started creating darpajauts reserving to themselves the right to claim a one-fourth share of the sale price on the sale of houses on such land. An attempt was made at one time to reduce the rigour of this unjust demand by selling the land separately from the building but that too did not succeed as it was held that it was a ruse to defeat the claim. Ultimately the Legislature had to step in in the year 1951 and pass an Act, the U. P. Abolition of Zar-e-Chaharum Act, 1951 (U. P. Act 30 of 1951), that such demands are illegal, whether based on custom or contract. This Act is not retrospective and does not, therefore, apply to this case.

19. Coming now to the question formulated by the Bench, the portion of the 'wajib-ul-arz' of Patti Arhai, mauza Jaitpura, on which reliance is placed is as follows:

> "Jis wact koi makan malik apna makan zamin parjawat farokht kare tab chaharum qimat mubaiyya ka ham zamindar ko milta hai so badastur lete rahenge (i.e., whenever the owner of a house situate on parjot land sells it then one-fourth of the sale price is payable to us, the zamindars, and we shall continue to receive the same as before)."

The question for decision is whether the plaintiffs, who are mere plot proprietors, can claim to be 'zamindars'. Learned counsel for the plaintiffs-respondents has urged that the word 'zamindar' has not been defined in the 'wajib-ul-arz' and it must mean 'owner of land' and that the plaintiffs being owners of a plot of land they can, therefore, claim to be zamindars. The 'wajib-ul-arz' was prepared by revenue officers during the course of the settlement and the words, therefore, used in the 'wajib-ul-arz' must be given the ordinary meaning given to them in revenue proceedings. The word 'zamindar' has a well established connotation. It means "a person who is the owner or a co-sharer of a mohal and as such has an interest in the common land of the mohal and the management of the mohal, has the right to realise rent from tenants and in the absence of a contract to the contrary is liable to pay land revenue to Government".

The plaintiffs cannot claim to come in that category at all. No attempt has been made on behalf of the plaintiffs to prove how they came to acquire the plot No. 586. It is admitted that they are not co-sharers in the two main mohals, mohal mauza Jaitpura also known as Patti Arhai & Patti Deo Narain. It is also admitted that they have no liability to pay land revenue to Government by reason of their ownership of the plot. In these circumstances we see no reason to differ from the conclusion that was arrived at by Sulaiman, C. J., and King, J., in 'Gajadhar Shukul's case (C)' and Kisch, J. in the 'Collector of Ghazipur's case (D)'.

20. Reference has also been made to a third decision by a Bench of this Court in -- 'Bishwa-nath Barai v. Ram Nandan', L. P. A. Nos. 6; 7, 8 and 30 of 1946, D/- 3-11-1951) (All) (E). The question that arose in that case was whether a per-son who by adverse possession acquired title to a plot of land could rely on the custom of 'zar-i-chaharum'. The learned Judges held:

> "It is true that the plaintiff has acquired proprietary title over the plots by adverse possession against the zamindar. That, however, does not mean that the plaintiff by adverse possession becomes zamindar. No doubt he becomes proprietor of the plots but that makes him a plot proprietor only. In order to become a zamindar or a 'co-sharer' in the Mohal the plaintiff has to show that he partakes in the management of the Mohal or exercises other rights that usually appertain to a 'co-sharer' in a Mohal. The word 'zamindari' is used in this sense as denoting a co-sharer in a Mohal. It is not used with reference to a proprietor or the owner of a 'Haqiat mutfarqa' unless such person partakes in the management of the Mohal."

21. In the case of -- 'Ramjimal v. Riaz-ud-din', AIR 1935 PC 169 (F) it was held that if a person was proprietor of a specific plot of land and as such was not entitled to any interest in the joint-lands of the Mohal nor was he entitled to take part in the administration of its affairs he was only a petty proprietor and not a co-sharer. That case no doubt depended on the language of the Agra Pre-emption Act but that Act merely reproduced what was well recognised as the meaning of a plot proprietor as against a zamindar or a co-sharer.

22. The decision of Harish Chandra and P. L. Bhargava, JJ. in 'Shukrullah v. Sir Vijaya Ananda (B)' cited above is not relevant as it related to mauza Bhadaini and the learned Judges have pointed out at page 740 of the report that the plaintiff in that case was not a plot proprietor but was a pattidar or a co-sharer and was liable to pay land revenue to the Lambardar.

23. Our answer to the first question, therefore, is that the plaintiffs as plot proprietors were not entitled to claim 'zar-i-chaharum' on sale of the houses situate on the land belonging to them in Patti Shamlat.

24. As regards the second question, it was seventy years back in the year 1884 that the learned Judges pointed out that a custom of 'Zar-i-chaharum' applicable to private sales would not necessarily apply to auction sale and that the plaintiff would have to prove that there was a custom applicable to auction sales also. This case has been followed for the last seventy years. No doubt Collister, J. in the case of -- 'Radhey Shiam v. Nazir Husain', AIR 1941 All 173 (G) said that no

distinction existed between an auction sale and a private sale but within a few months sitting with Iqbal Ahmad, Chief Justice, the learned Judge overruled himself in -- 'Basdeo Singh v. Sheo Shankar', AIR 1941 All 396 (H).

The language of the 'wajib-ul-arz' does not sup-port such a custom. The words have already been quoted and they are to the effect that 'whenever the owner of a house sells the same'. This cannot apply to an involuntary sale by a Court.

25. Three documents, Exhibits 6, 7 and 5 of 1870, 1871 and 1901 were filed. They are three judgments of the court of the Munsif in which 'chaharum' was claimed and was allowed. In none of these cases was the question of custom when property was sold by auction raised or decided.

In our view, the 'wajib-ul-arz' does not support the plaintiffs and these three judgments are wholly insufficient to prove a custom in favour of the plaintiffs. Learned counsel has conceded that he cannot ask us to overrule the decision in '6 All 47 (FB) (A)'. What he contends is that a custom has grown up since. That decision is of 1884 and there is no sufficient material on the record to justify a finding that a well established custom has grown up for payment of 'zar-i-

chaharum' on compulsory sales of houses on parjauti land. Our answer to the second question, therefore, is that there is no custom entitling plot proprietors to claim 'zar-i-chaharum' on voluntary sales and even if there was such a custom it will not apply to compulsory sales and no custom applicable to such sales has been established on behalf of the plaintiffs.