M. Amba Sahai vs Gopeshwar Babu Mehra And Anr. on 10 March, 1953

Equivalent citations: AIR1953ALL607, AIR 1953 ALLAHABAD 607

JUDGMENT

Agarwala, J.

1. This is a plaintiff's appeal arising out of a suit for possession over a house. The plaintiff alleged that he was the zamindar of mohal Basanti Har Prasad in village Nekpur Gauntia Beldaran, that the house in dispute was in the occupation of a 'riyaya', Rajjoo Lal, Who was arrayed in the suit as defendant 2, that in August, 1935, the house was sold by Rajjoo Lal in execution of a simple money decree against him and was purchased by one Chet Ram who sold it to Gopeshwar Babu Mehra defendant 1, that there was a custom in village Nekpur Gauntia Beldaran that no 'riyaya' could transfer the site of the house, that the transfer of the house in execution sale was contrary to the custom and was not binding on the plaintiff-zamindar and that, therefore, he was entitled to take possession of the house.

The plaintiff further pleaded that Rajjoo Lal was a 'chantidar' (licensee), that he had executed an 'Ijazatnama' and had paid rent for the site over which he had constructed the house in dispute and that as such the custom prevalent in the village applied to him. Rajjoo Lal did not contest the suit; only Gopeshwar Babu Mehra defendant 1 contested it. His case was that the plaintiff was not the owner of the site, that village Nekpur Gauntia Beldaran was not an agricultural village, that the custom pleaded by the plaintiff did not prevail in the village and that the execution sale of the house was perfectly valid. The trial Court held that the village was divided into two portions -- one portion was to the north of the railway line and the other was to the south of it -- that the portion to the north of it, in which the house in dispute was situated, had ceased to be agricultural and was a part of the city of Bareilly for, at least, 20 years before the institution of the suit, that Rajjoo Lal and his ancestors, who were 'beldars', were 'riyayas' of the plaintiff who was the owner of the site, that the custom alleged by the plaintiff prevailed in the entire village including the portion which had ceased to be agricultural and in which the house in dispute was situated and that, therefore, the execution sale of the house and its transfer by Chet Ram to Gopeshwar Babu Mehra defendant 1 was void. In the result, it decreed the suit of the plaintiff.

The lower appellate Court differed and held that the portion of village Nekpur Gauntia Beldaran, in which the house in dispute was situated, had ceased to be an agricultural village, that there was no presumption that the custom of non-transferability of the sites by 'riyayas' applied to the portion which had ceased to be agricultural, that the mere fact that Rajjoo Lal was a 'beldar' did not imply that he was a 'riyaya' of the plaintiff, that Rajjoo Lal was not, in fact, an agricultural labourer and that it was not established that the house in suit was given to him or to his ancestors by the plaintiff

under a license. Therefore, it allowed the appeal of the defendant. Against this order of the lower appellate Court, the plaintiff has come to this Court by way of second appeal.

2. There are two main points to be considered in the case :

> " (1) Whether Rajjoo Lal was in occupation of the house in dispute as 'riyaya' or licensee, and (2) If so, whether there was a custom in the locality in which the house was situated prohibiting the 'riyaya' from transferring the right of residence."

3. To determine both these points it is necessary to find whether the locality in which the house is situated is an agricultural village or not. Both the Courts below have found that the village Nekpur Gauntia Beldaran was at one time an agricultural village. This village is divided into two portions by a railway line. The house in dispute is situated in the portion lying to the north of the railway line. It is the concurrent finding of both the Courts below that this portion had become a part of the city of Bareilly and is no longer an agricultural village for at least the last 20 years. In an agricultural village the zamindar is the owner of every inch of the land. If a resident is an agriculturist or is a workman whose services are needed in the interest of the village community, the presumption is that such a person occupies his house with the leave and license of the zamindar and is, therefore, a licensee. But if the occupier of the house is neither an agriculturist nor a person such as described above, his occupation is not presumed to be by leave or license. He will then be deemed to be in occupation by adverse possession. Since the portion of the village in which the house in dispute is situated has ceased to be village, no presumption of his residence therein by leave and license of the zamindar can be raised. In his case evidence will have to be led to show that he came into occupation of his house at a time when the locality was agricultural, in which case the presumption about his residence being by leave and license will be drawn, and once drawn will continue to be drawn, or it will have to be established that in fact the person in question came into occupation of his house by leave and license of the zamindar.

The plaintiff's case was that at one time the village was agricultural and that at that time Rajjoo Lal's ancestor Ganga Ram was in occupation of the house, and that since he was a 'beldar', i.e., a labourer, he should be presumed to be in possession as a 'riyaya'. The plaintiff's case further was that Rajjoo Lal himself was a licensee having executed a deed of license (chantinama). None of these contentions can be accepted. Ganga Ram seems to have occupied some house in the village but there is no evidence to show that he occupied the house in dispute. Indeed this could not be so because Rajjoo had purchased the materials of the house from certain persons, and had not therefore inherited it from his ancestors. The fact that Ganga Ram or Rajjoo Lal was a 'beldar' does not establish that he was in occupation of his house by leave or license of the zamindar. It is not the caste of the occupier that matters, it is his 'occupation' that enables the presumption of his possession as a licensee to be raised. It has been found by the Courts below that Rajjoo Lal does not work as a labourer. Therefore no presumption can be raised about Rajjoo Lal occupying the house as a licensee. His occupation would, therefore, be deemed to be adverse to the zamindar and he acquired proprietary title thereto after 12 years' possession.

4. As to the contention that Rajjoo Lal was a licensee because he executed a deed of license, it has been found by the Courts below that the 'chantinama' was a suspicious document and that the receipts of the rent were also of the same type. Therefore Rajjoo Lal's occupation as a licensee has not been established. This alone is sufficient for the dismissal of the plaintiff's suit.

5. Even if Rajjoo Lal was a 'riyaya', we have to see whether it was established that the custom of transferability of the right of residence applied to him. In agricultural villages the presumption is in favour of the existence of such a custom. But here again since the locality has ceased to be agricultural no such presumption can be raised. There is a 'wajibularz' of 1899 in which a custom prohibiting transfer of sites by 'riyayas' is recorded. Learned counsel has argued that the custom recorded in the 'wajibularz' should be deemed to apply even to areas of the village which have, after preparation of the wajibularz, ceased to become agricultural. Learned counsel has relied on several cases in support of his contention. In -- 'Sheo Shankar Das v. Bam Tahal Koeri', AIR 1927 All 605 (A), Sir Iqbal Ahmad had a case in which a certain area of an agricultural village was included within the municipal limits. The learned Judge held that the mere fact that a portion of the village was included within municipal limits did not destroy the presumption of the prevalence of the custom. In that case, it was not found that the portion, which had been included within municipal limits, had ceased to be an agricultural area. The same remarks apply to the case of -- 'Rafiullah Khan v. Mt. Mumtaz Begum', AIR 1927 All 609 (B). The case of -- 'Ram Sahai v. Hari Shanker', AIR 1947 All 388 (C), was, no doubt, a case in which an area of part of an agricultural village had become non-agricultural and had been included within the limits of a town. A learned Single Judge of this Court, however, held on the evidence on the record that the custom was established. The learned Judge did not base his decision on any presumption of prevalence of the custom in the area which had become non-agricultural. Even, in a non-agricultural area, a custom of non-transferability can be established if satisfactory evidence be adduced. The learned Single Judge held that, in that case, there was sufficient evidence to prove the custom. In the present case, however, as already stated the Court below has held that the evidence adduced by the plaintiff failed to establish the custom in village Nekpur Gauntia Beldaran. This finding has not been challenged before us. The matter was discussed by a Bench of this Court, of which one of us was a member, in -- 'Patan Ram v. Dhanushdhariji', AIR 1949 All 410 (D), where it was held that where a plaintiff challenges a tenant's right to transfer a house in a town, it is for him to show that the custom upon which he relies is continuous and invariable and to explain away the instances of unobjected transfers. It was observed :

> 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 Den', 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 Faizabad 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 Faizabad 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 Faizabad."
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> The case is, no doubt, distinguishable from the present case on the ground that, in that case, the portion of the village in dispute had ceased to be agricultural before the 'Iqrar-i-malikan Deh' was prepared whereas, in the present case, the same cannot be said so far as the 'wajibularz' of 1899 is concerned. Nevertheless, that case makes a distinction between a portion of the village which has ceased to be agricultural and the portion which still remains to be agricultural.

6. In order that the general presumption may arise, what one has to see is the state of affairs on the date on which the cause of action arose. If, on that date, the disputed property is part of a non-agricultural village or town, the general presumption of custom that applies to an agricultural village and is recorded in the village records like a 'wajibularz' will not be deemed to apply to such portions of the village as have ceased to be agricultural. A 'wajibularz prepared at a time when the village was agricultural and applying by its very terms to an agricultural community cannot apply to a village or a portion thereof which has ceased to be agricultural as the circumstances of the life of the residents of the village or of the portion concerned, have materially altered. In such a case the plaintiff has to prove by positive evidence that even in the portion which has become non-agricultural the custom of non-transferability prevails. As already stated, the plaintiff has failed to establish this.

7. There is no force in this appeal and we dis miss it with costs.