

Mohammad Hafizullah Khan and ors. Vs. Chithru Khan and ors.

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Court : Allahabad

Decided On : Apr-26-1916

Reported in : 36Ind.Cas.1001

Judge : Lindsay, J.

Appellant : Mohammad Hafizullah Khan and ors.

Respondent : Chithru Khan and ors.

Judgement :

Lindsay, J.

1. This is a plaintiff's second appeal arising out of a suit in ejectment. The case for the plaintiffs was that they were zemindars in Mauza Para Kamal and that the defendants were only tenants (riaya) It was alleged that in January 1912 the defendants had without the plaintiffs' leave erected a new tiled house and chabutra on a waste plot of land No. 1103 included within the abadi area It was alleged that the plaintiffs remonstrated with the defendants and objected to their making these constructions but without success and it was therefore prayed that possession might be awarded to the plaintiffs by demolition of the house and the chabutra.

2. The defence was that the house and chabutra had been put by the defendants in the exercise of their right that the buildings had been constructed much earlier than January 1912 and that the plaintiffs had no right to eject them. The first Court dismissed the suit entirely In appeal the District Judge modified the first Court's decree by directing demolition of the chabutra.

3. The plaintiffs now claim that an order for the demolition of the house should also have been passed The defendants have filed cross-objections complaining of the lower Court's order relating to the demolition of the chabutra and also of the lower Court's order on the question of costs.

4. The facts found by the Court below are 16 A. 328 : A.W.N. (1894) 99 : 8 Ind. Dec. (N.S.) 214. that the plaintiffs' allegation that the house in suit was a new erection on a waste plot of abadi land (No. 1103) was untrue (1880) 15 CL.D. 96 : 43 L.T. 95 : 28 W.R. 911 that the house had been built partly on the old site of an ancestral house belonging to the defendants and partly on the adjacent site of a house which once belonged to Salamat Khan, a former proprietor (3) that Salamat's old house had once been mortgaged to the predecessors-in-interest of the defendants and had eventually been sold to the mother of some of the defendants in the year 1908 (4) that the defendants entertained a bona fide belief of their right to build upon the site of the house acquired from Salamat (5) that they had spent about Rs. 1,000 in building the

house and that it must have taken longer to build than was represented by the plaintiffs and (6) that the plaintiffs by standing by and abstaining from making any assertion of their rights were estopped from now putting forward any title and claiming demolition.

5. The learned Judge found with respect to the chabutra that it was an encroachment extending beyond the limits of the site of the defendant old house and of the house belonging to Salamat Khan that it was a structure of small value and that it was liable to removal.

6. The argument for the plaintiffs-appellants is that the Courts below have misapplied the doctrine of acquiescence and that the facts found would not on a correct interpretation of the law estop the plaintiffs from making a claim for possession by demolition. The law on this subject has been expounded in a decision of this Court reported as *Naunihal Bhagat v. Barneshar Bhagat* 16 A. 328 : A.W.N. (1894) 99 : 8 Ind. Dec. (N.S.) 214 with reference to what was laid down in the case of *Willmott v. Barber* (1880) 15 C.L.D. 96 : 43 L.T. 95 : 28 W.R. 911 The principle upon which the doctrine of acquiescence is based is that a person who acts in such a way as would make it fraudulent for him to set up his legal rights will not be allowed to set up those rights and the elements which go to constitute fraud of this description were enumerated by Fry, J. in the English decision just mentioned. Applying the law so laid down to the facts of the case now under consideration it was for the defendants to show 16 A. 328 : A.W.N. (1894) 99 : 8 Ind. Dec. (N.S.) 214 that they had made a mistake as to their rights (2) that on the fact of their mistaken belief they expended some money or did some act (3) that the plaintiffs were aware of the existence of their own right as zemindars to prevent the defendants from building (4) that the plaintiffs knew of the mistaken belief entertained by the defendants and (5) that the plaintiffs by abstaining from the assertion of their own rights encouraged the defendants to expend the money they laid out in building the house.

7. It is quite true that the judgment of the lower Appellate Court does not contain definite findings upon each of the matters so enumerated, but having regard to all the facts found I have come to the conclusion that the law of acquiescence does apply in this case. As to the mistaken belief of the defendants there is a clear finding which there is plenty of evidence to support. There is also a finding that the defendants expended about Rs. 1,000 on the strength of their belief That the plaintiffs were aware of their own rights goes without saying they have set them up in this suit and there is no plea that they were in ignorance of them before. And we have also a finding that the plaintiffs stood by and thereby encouraged the defendants in the expenditure they incurred. The only question therefore is whether in the circumstances disclosed it can be inferred that the plaintiffs were aware of the mistaken belief entertained by the defendants and allowed them to persist in it. The point arises only in connection with the site of Salamat Khan's old house. Salamat was a former co-sharer in the village and it is proved that he made a mortgage of the house No. 1895 and that he sold his remaining interest in it to the mother of some of the defendants in 1908. The plaintiffs reside in the village and it is a fair inference that they were well aware of this sale and of the consequences which might ensue. A person who purchased such a house might well believe that he had acquired the site his vendor having been at one time a co-sharer and it is impossible to imagine that when the plaintiffs saw these defendants re-building on the site of Salamat's old house they could have been ignorant of the fact that the defendants were acting in the belief that they had a right to build. A substantial house was being put up costing

a considerable sum and it is not to be assumed that persons in the position of the defendants would embark recklessly on such a scheme without believing that they had a right to build.

8. It seems to me that all the conditions of the law of acquiescence were fulfilled in this case and that the plaintiffs' claim was barred in consequence.

9. The appeal fails and is dismissed with costs on the higher scale.

10. The cross-objections may be disposed of in a few words. It is plain from a reference to the plan on the record that the chabutra erected by the defendants extends considerably beyond the sites of the two old houses and the defendants cannot be heard to say that the belief which they might have entertained and did reasonably entertain with respect to their right to build on the old sites extended so far as to lead them to think they could encroach on land not covered by the old sites. There could be no reasonable ground for such a mistaken belief. The District Judge was therefore right in directing demolition of the chabutra.

11. As to costs the lower Court has directed the parties to bear their own in both Courts. The matter was one within the Judge's discretion and his order was an eminently proper one.

12. I dismiss the cross-objections with costs on the higher scale.

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