

(1898) 06 CAL CK 0005

In the Calcutta High Court

Case No : Appeal from Appellate Decree No. 2297 of 1896 with Nos. 65, 66 and 67 of 1897

Edward Dalglish and Others

APPELLANT

Vs

Sheikh Gozaffar Hossein and Others

RESPONDENT

Date of Decision : 20-06-1898

Acts Referred:

Citation : (1898) 06 CAL CK 0005

Judgement

1. These are four suits for the possession of occupancy holdings, which the Defendants, second party, have sold to the Defendants, first party, and have ceased to occupy themselves. The Plaintiffs maintain that the holdings are not transferable by custom or local usage. The Defendants contend that, they are so transferable. The Munsif dismissed the suits holding that a custom of transferability had been proved. The Subordinate Judge on appeal on the 29th December 1893, decreed the appeals and allowed the suits.

2. On the 2nd January 1896, second appeals against the Subordinate Judge's decrees were allowed by this Court, and the appeals were remanded to him for fresh hearing See I. L. R. 23 Cal. 427. It was held by this Court that the Subordinate Judge had taken an erroneous view of the law, he being apparently of opinion that occupancy rights were only transferable by custom, which must be ancient. This Court, however, pointed out to the Subordinate Judge that the provisions of the Tenancy Act are subject to usage (sec. 183) and that under sec. 178 (3) (d), occupancy rights - are transferable in accordance with "local usage." The cases were, therefore, sent back to the Subordinate Judge in order that he might "considor the evidence adduced in respect of local usage," and. this Court at the same time pointed out that "the word usage would at any rate include what people are now or recently in the habit of doing in a particular place." He was further instructed that the opinion of persons who would be likely to know of the existence of a right or custom were admissible under sec. 48 of the Evidence Act, and that a judgmet of this Cort; in a case in which the transferability or tenures in an adjoining village in the same Pergunnah was in question should be

taken into consideration by him under sec. 42 of the Evidence Act.

3. The Subordinate Judge has now reheard the appeals and has again allowed them and set aside the Munsifs decrees.

4. The Defendants again prefer second appeals, and it is again argued that the Subordinate Judge has on this, as on the former, occasion mis-stated the law.

5. We regret to say that in our opinion this is the case. Notwithstanding the instructions of this Court that the Subordinate Judge was to consider the evidence adduced in respect of local usage, the Subordinate Judge has again considered the evidence as if custom and usage were synonymous terms, and that the same kind of evidence as would "be required to prove a custom is necessary when the existence of a local usage is in question. He says "For an usage or custom or whatever name we may prefer to give it to grow up and come into vogue in connection with such a thing as. the transferability of a particular class of landed tenure, a long period of time must necessarily elapse. Hence, I think, the idea of antiquity and uniformity in connection with the proof of custom. I do not know the distinction between the words, custom and usage. A mercantile usage may grow up in a short space of time, as in the case of a trade new or old, thousands of transactions may take place in the course of a day. But for the development of a family usage (sic)tions must from the nature of the (sic) (sic) away. The usage to which (sic)183 and 178 of the Tenancy Act refer is an usage existing at the time of the passing of that Act. Time has hardly passed for a new usage to grow up since the passing of that Act, whose definition of a right of occupancy is much wider than that of Act X of 1859."

6. Now, though we quite agree with the Subordinate Judge in the view he has expressed in this passage with regard to mercantile and family usage, we do not think he is right, in his views as to the length of time necessary to establish a usage of the transferability of occupancy holdings. It may be perfectly correct that a long period of time must elapse, before a custom in respect of their transferability can grow up: but it does not appear to us that this is necessarily the case with regard to the growth of a " usage " or " local usage " in" respect of this matter. The framers of the Tenancy Act have not defined the terms " usage " and " local usage" or explained within what period they may be established, but we feel bound to say that in our opinion there is a great difference between a "custom" and a "usage," and that clearly the latter may be established in a much less period of, time than a custom of the transferability of occupancy holdings. We are not prepared to say how long a period must elapse before such a usage can grow up, but we may say that, seeing that more than 12 years have elapsed since the passing of the Tenancy Act, we do not think the Subordinate Judge is right in saying that no new usage can have grown up, since that time.

7. As to his proposition that the usage to which secs. 178 and 183 refer is a usage existing at the time of the passing of the Act, we feel no doubt that this is erroneous. If this were the case no usage could ever spring up or be established

after the passing of the Act. As these mistaken views of the Subordinate Judge of the law on the subject may possibly have affected his appreciation of the evidence and consequently his decision on the merits, we are constrained again to remand the cases to him for a reconsideration of the evidence and for fresh findings on the question at issue.

8. There is one further passage in the Subordinate Judge's judgment to which we think it right to refer. He says :- It would appear from the evidence that the owners of the Kester Indigo Factory are desirous of making occupancy holdings transferable by sale. They have themselves made numerous purchase in villages in which they were or are farmers, and their example has been followed in a few instances generally speaking in those villages. In this state of thing it would manifestly be unjust to treat the purchase made by the. factory as instances to prove the usage as against the proprietors of those villages.". The learned counsel for the Appellant contends that this passage also is incorrect. All that, we need say concerning it is that if the purchases referred to here were purchases made by the Defendants when they were the thikadars, they are clearly not evidence of a usage of the transferability of occupancy holdings against the will of the landlord for the transfers in question would be transfers with the consent of the landlords, the landlords being themselves purchasers, in which case the provisions of sec. 22 of the Tenancy Act might be applicable. What is necessary to establish a local usage such as set up by the Defendants in this case is evidence of purchases or transfers by persons other than the landlords, made with the knowledge but without the consent, of the latter, and to which no objection was made by the latter. We accordingly remand these cases to the Subordinate Judge for a re-hearing of the appeals. Costs to abide the result.