
(1896) 01 CAL CK 0009
In the Calcutta High Court

Guzuffer Hassain and Others

APPELLANT

Vs

E. Dalglish and Others

RESPONDENT

Date of Decision : 02-01-1896

Acts Referred:

Bengal Tenancy Act, 1885 — Section 178(3)(d), 183
Evidence Act, 1872 — Section 42, 48

Citation : (1896) ILR (Cal) 427

Hon'ble Judges : Trevelyan, J;Beverley, J

Bench : Division Bench

Judgement

Trevelyan and Beverley, JJ.—In this case we think that the learned Subordinate Judge has taken an erroneous view of the law. The question was whether according to custom or usage those tenures were transferable. Section 183 of the Bengal Tenancy Act runs thus : Nothing in this Act shall affect any custom or usage or customary right not inconsistent with or not expressly or by necessary implication modified or abolished by its provisions." We find in Section 178 of the same Act, Sub-section 3, Clause (d) that "nothing in any contract made between a landlord and a tenant, after the passing of this Act, shall take away the right of a raiyat to transfer or bequeath his holding in accordance with local usage." That shows that "local usage" will give a right to a raiyat to transfer his. tenure, even if Section 183 did not expressly confer that right upon him. The learned Subordinate Judge says in his judgment: "Then, one most important fact is that the witnesses do not seem to say that the custom has been existing to their knowledge ever since they came in mind of it, but that it has come into existence since so many years. This seems to me to be a very serious defect in the evidence; in fact, it seems to make the evidence entirely valueless, for a custom must be ancient," and we have been referred to Mr. Rampini's Edition of the Bengal Tenancy Act in connection with the question of custom. It is true that the notes suggest that custom referred to in Section 183 must be ancient custom; such custom as is in England required to be proved to have dated from time immemorial. It is not, however, necessary for us here to consider what the

meaning of the word "custom" is in this section, as in the cases of tenures, which have come into existence since the year 1859, the words of the section admittedly do not necessitate the proof of anything that took place so long ago. The word "usage," at any rate, would include what the people are now or recently in the habit of doing in a particular place. It may be that this particular habit is only of a very recent origin, or it may be one which has existed for a long time. If it be one regularly and ordinarily practiced by the inhabitants of the place where the tenure exists, there would be usage" within the meaning of the section. The evidence which the learned Subordinate Judge has excluded on the ground that it does not refer to ancient custom is, we think, evidence which requires consideration, inasmuch as it may establish local usage. The case, therefore, will go back in order that the learned Subordinate Judge may consider the evidence adduced in respect of local usage.

2. Moreover, we find in the judgment this statement: "The evidence of some of the witnesses is worth absolutely nothing; most derive their knowledge from hearsay." As the case is to be considered by the learned Subordinate Judge, he must reconsider that portion of the judgment just quoted, with reference to the following observations : Where any question of right or custom is to be decided opinions of persons who would be likely to know of its existence are, u/s 48* of the Evidence Act, admissible in evidence. We have not had the evidence in this case before us, and we cannot say whether the hearsay evidence is within the ordinary meaning of the word, that is, whether the witnesses heard statements of facts from other persons, or whether the evidence is such as comes properly within the meaning of Section 48 of the Evidence Act. The learned Subordinate Judge, however, should consider that evidence together with the other evidence.

3. Reference has been made by the learned Subordinate Judge to the judgment of this Court in a case where the transferability of tenures in an adjoining village of the same pergunnah was in question. There is no doubt that this is evidence u/s 42t of the Evidence Act. The learned pleader for the respondent contends that the judgment should not be used in evidence, as it does not refer to the village in question here. We are not prepared to agree with that contention. If the tenures in other villages in the same pergunnah were held under the same conditions, and were in other respects like the village in question, there is no reason why the usage of transferability in such other villages should not be some evidence (the weight of it is another question); at any rate, in support of the evidence which has been given in this case, as to the custom of this particular village. It may be evidence which affirms the evidence given in this case.

4. We therefore set aside the decree of the Lower Appellate Court, and direct that the learned Subordinate Judge do re-hear the appeal with regard to the observations contained in our judgment.