
(1917) 04 CAL CK 0023
In the Calcutta High Court

Kailas Chandra Dutta and Others

APPELLANT

Vs

Padma Kishore Roy and Others

RESPONDENT

Date of Decision : 23-04-1917

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 100(1)(a), 100(1)(b)

Citation : 41 Ind. Cas. 959

Hon'ble Judges : Beachcroft, J; Asutosh Mookerjee, J

Bench : Division Bench

Judgement

Asutosh Mookerjee, J.—These appeals have been preferred, under Clause 15 of the Letters Patent, against the judgments of Mr. Justice Digambar Chatterjee in two suits for recovery of possession of land. The plaintiffs alleged that the lands in dispute constituted non-transferable occupancy holdings and yet the tenants had transferred them to the defendants. The plaintiffs consequently prayed that the defendants might be ejected as trespassers. The defendants contended that the holdings were transferable by custom and local usage. Thereupon an issue was raised in these terms: "Whether raiyati lands are transferable by usage and custom without the consent of the landlord." The Court of first instance ruled, on the authority of the decision in Peary Mohan Mukerjee v. Jote Kumar Mukerjee 11 C. W. N. 83 that to prove a custom or usage that occupancy holdings are transferable in any locality, it is not sufficient to show simply that such holdings are sold in the village or neighbouring villages, as the essence of usage of transferability is that transfers made to the knowledge of but without the consent of the landlord are valid and must be recognised by him. The Court examined the evidence from this point of view and came to the conclusion that it was quite insufficient to establish the alleged custom or usage. The Court held expressly that the evidence showed that the names of transferees were not recorded in the office of the landlord unless a bonus was paid and that even when bonus was offered by the transferee to the landlord, the latter had the option either to accept or refuse the same. In this view the Court decreed the suits. Upon appeal by the defendants, the Subordinate Judge confirmed the findings of the Trial

Court and held that the evidence did not go to show that occupancy holdings were transferable by custom or usage. With reference to instances of transfer adduced by the defendants, the Subordinate Judge observed that, as ruled in the case of *Rajendra Kishore Adhikari v. Chandra Nath Dutt* 12 C. W. N 878 a growing usage of transferability was of no effect against the landlord and that the usage to be effective must have already grown up *Buzlul Karim v. Satish Chawla* 10 Ind. Cas. 325 : 13 C. L. J. 418 : 15 C. W. N. 752. In this view, the Subordinate Judge dismissed the appeals. On second appeal to this Court, Mr. Justice Digambar Chatterjee has held that the appeals were concluded by the findings of fact arrived at by the lower Appellate Court. On the present appeals, Dr. Jadu Nath Kanjilal has argued that the evidence on the record is sufficient to establish the existence of the alleged custom or usage of transferability, and he has invited us to read the whole of the evidence on the record. In support of the course we have been asked to adopt, reference has been made to the decisions in *Vishnu v. Krishnan* 7 M. 3 : 2 Ind. Doc. (N.S) 588 and *Kakarla Abbayya v. Raja Venkata Papayya Sao* 29 M. 24 : 16 M. L. J. 8.

2. We have the authority of the Judicial Committee for the proposition that a decision that an alleged custom is not established by the evidence on the record is a decision on a question of fact. In the case of *Muhammad Kamil v. Imtiaz Fatima* 4 Ind. Cas. 457 : 31 A. 557 : 10 C. L. J 297 : 11 Bom L. R. 1210 : 14 C. W. N. 59 : 19 M. L. J. 697 : 13 O. C. 183 : 36 I. A. 211 (P. C) the plaintiff contended that the rights of the parties were regulated by the Muhammadan Law of inheritance; the defendants set up a family custom whereby female heirs were excluded. The Trial Court held that the alleged custom was not established by the evidence and this conclusion was confirmed by the Judicial Commissioner on appeal. Sir Arthur Wilson observed that the existence of the custom was a question of fact, and as the Courts in India had concurred in their judgment as to this question, their Lordships saw no reason why they should not follow their usual practice of accepting concurrent findings, of fact. Precisely the same language was used by Lord Collins in another case decided by the Judicial Committee *Anant Singh v. Durga Singh* 6 Ind Cas. 787 : 82 A. 363 : 14 C. W. N. 770 : 7 A. L. J. 704 : 12 C. L. J. 36 : 12 Bom L. R. 504 : 8 M. L. T. 79 : 20 M. L. J. 604 : 13 O. C. 163 (P. C) : 37 I. A. 1911 M. W. N. 324. There the question arose whether succession in a Hindu family was regulated by a special family custom or by the ordinary Mitakshara Law. The Judicial Commissioners, disagreeing with the Trial Court, held that the evidence add need by the plaintiff was not sufficient to establish the special custom. The Judicial Committee held that the question involved was one of fact only and they saw no reason whatever to differ from the opinion of the Judicial Commissioners. The view that the question as to the existence of a custom is a question of fact is supported by numerous decisions of high authority in English Courts. Thus in *Nelson v. Dahl* (1879) 12 Ch. D. 568 on Appeal *Dahl v. Nelson Dankin* (1881) 6 App. Cas. 38 : 50 L. J. Ch. 411 : 44 L. T. 381 : 29 W. R. 543 : 4 Asp M. C. 392 Sir George Jessel, M. R. observed that the question whether there was a specified custom or

usage in the Baltic wood trade was a question of fact and like all other customs it must be strictly proved. In *Postlethwaite v. Free-land* (1880) 5 App. Cas. 599 : 49 L. J. Ex. 630 : 42 L. T. 845 : 28 W. R. 833 : 7 A. M. C. 302 Lord Blackburn held that the question whether an alleged custom of the port was established by the evidence was rightly left to the Jury. To the same effect is the decision in *Goodwin v. Roberts* (1875) 10 Ex. 337 on Appeal (1876) 1 A C 476 : 45 L. J. Ex. 748 : 35 L. T. 179 : 24 W. R. 987. Similarly, Channel, J., observed in *Moult v. Halliday* (1898) 1 Q. B. 125 : 67 L. J. Q. B. 451 : 77 L. T. 794 : 46 W. R. 318 : 62 J. P. 8 : 14 T. L. R. 109 that the question as to the existence of a custom is a question of fact, and it is necessary to prove the custom in each case, until eventually it becomes so well understood that the Courts take judicial notice of it. A similar view has prevailed in this Court for at least half a century. Thus in *Hurehur Mookerjee v. Judoonath Ghose* 10 W. R. 153 Jackson, J., held that the question whether the disputed tenure was transferable by custom, was a question of fact on which the lower Court alone could pass a decision, and on which the High Court could not interfere on second appeal. To the same effect is the judgment of Glover, J., in *Joy Kishen Mookerjee v. Doorga Narain Nag* 11 W. R. 348. Again Kemp, J. observed in *Syad Ali v. Gopal Doss* 18 W. R. 420 that a finding upon a question of custom after going into evidence was a finding on a question of fact with which the High Court could not interfere in second appeal. Precisely the same view was taken by Farran, C. J., in *Bai Shirinbai v. Kharshedji* 22 B. 430 : 11 Ind. Dec. (N.S) 869, where he ruled that sitting in second appeal, it was not open to the Court to arrive at an independent finding as to whether the evidence established, as the Courts below concurrently held it did, the existence of a custom amongst Parsis which validated and rendered binding marriages contracted between children of tender age.

3. But, although the question of the existence of an alleged custom is a question of fact, it is conceivable that the decision may involve an error of law so as to justify the interferences of the High Court in second appeal. Thus, the decision is liable to attack in second appeal on the ground that irrelevant evidence has been received, as in *Palakdhari Rai v. Manners* 23 C. 179 : 12 Ind. Dec. (N.S) 119 and *Durga Charan Mahto v. Raghunath Mahto* 20 Ind. Cas. 810 : 18 C. W. N. 55 : 18 C. L. J. 559, or that relevant evidence has been excluded, as in *Dalglish v. Gazuffer Hassain* 23 C. 427 : 12 Ind. Dec. (N.S) 284 and *Sariatullah Sarkar v. Pran Nath Nandi* 26 C. 184 : 13 Ind. Dec. (N.S) 723. The decision may also be successfully attacked on the ground that there is no evidence of the alleged custom, or, as it is sometimes said, that the finding as to the existence of the custom is based on legally insufficient evidence *Peary Mohan Mukerjee v. Jote Kumar Mukerjee* 11 C. W. N. 83; *Hashim Ali v. Abdul Rahman* 28 A. 698 : A. W. N. (1906) 187 : 3 A. L. J. 467; *Ram Bilas v. Lai Bahadur* 30 A. 311 : 4 M. L. T. 169 : 5 A. L. J. 456 : A. W. N. (1908) 112. The decision may again be assailed on the ground that the facts found do not constitute evidence of the alleged custom *Durga Charan Mahto v. Raghunath Mahto* 20 Ind. Cas. 810 : 18 C. W. N. 55 : 18 C. L. J. 559; *Hanumantamma v. Rami Reddi* 4 M. 272 : 1 Ind. Dec. (N.S) 1025;

Mirabivi v. Vellayanna 8 M. 464 : 9 Ind. Jur. 267 : 3 Ind. Dec. (N.S) 317 and Subhadra v. Tribhuan Dat 15 Ind. Cas. 247. The decision may, further, be liable to attack on the ground that in the determination of the question in controversy, legal principles or tests have been erroneously applied, for instance that the Court has not correctly appreciated the essential attributes of a custom [Mahamaya Debi v. Haridas Haldar 27 Ind. Cas. 400 : 42 C. 455 : 20 C. L. J. 183 : 19 C. W. N. 208; Desai Ranchhoddas v. Rawal Nathubhai 21 B. 110 : 11 Ind. Dec. (N.S) 75; Prodyote Kumar Tagore v. Rakhal Chandra 5 Ind. Cas. 243 : 11 C. L. J. 209 : 14 C. W. N. 487 : 37 C. 322 or of a usage Dalglish v. Gazuffer Hassain 23 C. 427 : 12 Ind. Dec. (N.S) 284 and Palakdhari Rai v. Manners 23 C. 179 : 12 Ind. Dec. (N.S) 119 or has overlooked the distinction between a custom and a usage Nelson v. Dahl (1879) 12 Ch. D. 568. Consequently, the question, whether the facts found in any given instance prove the existence of the essential attributes of a custom or usage, is a question of law which may be discussed in second appeal Durga Charan Mahto v. Raghunath Mahto 20 Ind. Cas. 810 : 18 C. W. N. 55 : 18 C. L. J. 559; Lalman v. Nund Lal 20 Ind. Cas. 894 : 17 O. C. 1. Obviously, the question whether a custom is reasonable or valid, is a question of the law Hurry Churn Dass v. Nimai Chand 10 C. 138 : 13 C. L. R. 207 : 5 Ind. Dec. (N.S) 94; Gurai Kar v. Kuarmoni Singha 29 Ind. Cas. 312 : 19 C. W. N. 1188. Subject to these qualifications it is plain that the mere question of sufficiency of the evidence adduced to establish a custom is not a ground of second appeal [Sreemutty Kurani Dassi v. Sajoni Kant Singh 12 C. W. N. 539; Hashim Ali v. Abdul Rahman 28 A. 698 : A. W. N. (1906) 187 : 3 A. L. J. 467; Rao Girraj Singh v. Lala Haragobind Sahai 4 Ind. Cas. 304 : 32 A. 125 : 7 A. L. J. 36; Makund Murari Dass v. Krishna Dhone Ghose 9 Ind. Cas. 839; Ganesh Dat Singh v. Sukhraj Singh 14 Ind. Cas. 12; Lalman v. Nandalal 20 Ind. Cas. 894 : 17 O. C. 1 and Mahadeo Prasad v. Nabi Bukhsh 25 Ind. Cas. 104 We are not unmindful that a contrary view was adopted in the case of Kakarla Abhayya v. Raja Venkata Papayya Rao 29 M. 24 : 16 M. L. J. 8. in which it was ruled that it is the duty of the Court in second appeal, when a question of custom is raised, to examine the evidence not merely with a view to ascertain whether all the essential elements have been proved to exist but also whether the evidence is credible. We respectfully dissent from this view, which, in our opinion, finds no support from Section 100 (1)(a), (b) of the Civil Procedure Code, 1908. No doubt, a second appeal lies to the High Court on the ground that the decision is contrary to, or has failed to determine some material issue of, usage having the force of law." But this does not entitle the High Court in second appeal to determine whether the evidence of the existence of the alleged usage is or is not credible, though the High Court is competent to determine, whether the usage, proved by evidence to exist, does or does not possess the force of law. In so far as the contrary view was taken in the cases of Ram Harakh Tewari v. Ishardat Tewari 3 Ind. Cas. 558; Shahbaz Khan v. Rahiman 11 Ind. Cas. 536; Kakarla Abhayya v. Raja Venkata Papayya Rao 29 M. 24 : 16 M. L. J. 8. and possibly also to some extent in Vishnu v. Krishnan 7 M. 3 : 2 Ind. Doc. (N.S) 588 we are not prepared to accept them as correct expositions of the law. The

substance of the matter is that while the question whether a given state of facts establishes a binding custom or usage is a question of law, the question whether such a state of facts has been proved by the evidence is a question of fact.

4. In the case before us no question of law obviously arises upon the facts found by the lower Appellate Court in concurrence with the Court of first instance, and we are clearly of opinion that Mr. Justice Digambar Chatterjee properly declined to examine the oral and documentary evidence, with a view to determine whether the Subordinate Judge was correct in his conclusion as to its insufficiency to establish the alleged custom or usage. The appeals fail and must be dismissed with costs.

Beachcroft, J.

5. I agree.

6. Appeals dismissed.