
(1911) 03 CAL CK 0028
In the Calcutta High Court

Makund Murari Dass and Others

APPELLANT

Vs

Krishna Dhone Ghose

RESPONDENT

Date of Decision : 09-03-1911

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 100

Citation : 9 Ind. Cas. 839

Hon'ble Judges : Coxe, J

Bench : Single Bench

Judgement

Coxe, J.—This, was a suit for recovery of khas possession of a certain holding on the allegation that it was not transferable by custom without the landlord's consent and that the defendants, therefore, who claimed to have purchased it, had no right to it. The suit was dismissed by the Munsif who held that occupancy-holdings were transferable by custom or local usage by which, I presume, he meant to say that they were so transferable without the landlord's consent. The other issues in the case were left undecided by the Munsif. On appeal, the learned District Judge found the evidence to be insufficient to prove the custom. He accordingly remanded the case for decision of the remaining issues.

2. The defendants appeal to this Court. It is argued on their behalf that the District Judge ought to have held that certain admissions made by the landlord were binding upon him and proved conclusively the custom set up by the defendants. But, clearly, these admissions were merely pieces of evidence. It was for the learned District Judge to decide what weight should be attached to them: and if he did not think them conclusive that finding cannot be questioned.

3. The principal point taken on behalf of the appellants is that the decision of the learned District Judge is contrary to a usage having the force of law, and that consequently this Court is bound, in second appeal, u/s 100, Civil Procedure Code, to go into the evidence and to say whether the decision is in accordance with this usage or not. Reliance is placed on the decision in the case of Kakarla Abbayya v. Raja Venkata Papayya Rao 29 M. 24 : 16 M.L.J. 8, which certainly

appears to be in the appellant's favour. On the other hand, the opposite view is taken in the case of Hashim Ali v. Abdul Rahman 28 A. 698 : 3 A.L.J. 467 : (1906) A.W.N. 187. The question, so far as I can gather, does not appear to have been considered in this Court. No doubt, if the evidence is legally insufficient to prove the custom, the finding that the custom existed may be questioned in second appeal. But when the sufficiency or insufficiency of the evidence is not a matter of law but depends on the weighing of that evidence it is not, I believe, the practice of this Court to allow a second appeal in a case of this nature. To hold that in all these numerous cases of the transfers of occupancy holdings a second appeal lies to this Court on the facts would be a very serious thing. And in the present case the appellants have not put it in my power to deal with the facts. In such a case it would obviously be necessary to lay the whole evidence, both documentary and oral, before the Court.

4. I am not at present prepared to say that the finding of the District Judge that the evidence is insufficient to prove the usage pleaded is a decision contrary to a usage having the force of law, and liable to be attacked on the facts in second appeal. The appeal will accordingly be dismissed with costs.