

**(1895) 09 CAL CK 0004**  
**In the Calcutta High Court**

Palakdhari Rai

APPELLANT

Vs

Manners and Others

RESPONDENT

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**Date of Decision :** 03-09-1895

**Acts Referred:**

Bengal Tenancy Act, 1885 — Section 183  
Evidence Act, 1872 — Section 13

**Citation :** (1896) ILR (Cal) 179

**Hon'ble Judges :** Prinsep, J; Ghose, J

**Bench :** Division Bench

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## Judgement

Prinsep and Ghose, JJ.—These appeals relate to fourteen suits brought by the zemindar of mouzah Bishenpore Saresa for the ejectment of the defendants, first party, from certain holdings which they have bought from the defendants, second party, having rights of occupancy, on the ground that as such holdings are not transferable they are trespassers without valid title. Plaintiff also asks for mesne profits during the occupation of these defendants, who are associated together in an indigo factory. So far as the appeals before us are concerned, we need only mention the main ground of the defences set out in the written statement that the holdings in question are transferable by the "law and custom prevailing in Behar," and that a claim for mesne profits cannot be made.

2. The Munsif found that the custom or usage set up was not established and he decreed the suits.

3. On appeal, the Subordinate Judge has set aside these decrees, holding that "the usage exists in different parts of the district in full force, and that in other parts of it the usage is still in a state of growth," and that the instances mentioned by the witnesses for the defendants are enough to make out the usage pleaded."

4. It is contended by the plaintiff in appeal that the lower Court has erroneously held that in order to prove that holdings of tenants with rights of occupancy are transferable, it is sufficient to give some instances of sale; whereas it should be

proved that the custom set up is ancient, well established, invariable and acquiesced in; and that the evidence does not establish such a custom. It has been further contended that there is no legal evidence of any usage in the locality, and that the judgment of the Subordinate Judge cannot be supported because it has proceeded upon statements which are not relevant within the terms of the Evidence Act.

5. Before dealing with the matter raised in these appeals, it is useful that we should state shortly the law relating to the transfer of rights of occupancy, These rights were first expressly declared by Act X of 1859, for, although up to that time tenant right had no doubt been recognized by the Courts, still it was not clearly defined or indeed held to exist in the terms expressed by Act X of 1859. The only person concerned in the transfer of a tenant's holding was naturally the landlord-zemindar, and if his consent had been obtained, or if he acquiesced in the transfer, the transaction came into effect. But his consent was often withheld or not even asked for, and the Courts were soon called upon to determine the validity of such transfers. As a rule, the consent of the landlord was necessary. It was even doubted, see per Peacock, C.J., in *Ajoodhia Persad v. Emambandi Begum* B.L.R. Sup. Vol. 725 : 7 W.R. 528, whether a holding with rights of occupancy was heritable. But it was afterwards held that the consent of the landlord was not necessary to render a transfer valid if it was in accordance with a custom of the country or the locality.

6. It will be observed, however, that in none of the cases on this subject was any reference made to a transfer in accordance with usage. The Courts held that the custom of the country or the locality alone conferred the right of transfer of such holdings without the consent of the landlord. Sales of such holdings in execution of decrees against such tenants used occasionally to be held. When they were held at the instance of the landlord as decree-holder, the transfer so effected would be with his consent; but when the sales were in execution of decrees by third parties the right of transfer without such consent was generally disputed.

7. Bengal Act VIII of 1869, which repealed Act X of 1859 wherever it was brought into operation, did not alter the law in this respect, except in so far that Section 6 seemed to recognize a transfer by inheritance of a holding with right of occupancy, and so the law remained until the passing of the Bengal Tenancy Act in 1885. Section 26 of that Act provided for the devolution of a holding with right of occupancy on the death of a tenant by declaring that if he died intestate in respect of such rights "it shall, subject to any custom to the contrary, descend in the same manner as other Immovable property." Section 183 has an important bearing on the right of transfer. It declares that nothing in the Act" shall affect any custom, usage or customary right not inconsistent with, or not expressly or by necessary implication modified or abolished by, its provisions." The law laid down by the Courts in the cases has already been explained, and, as has been pointed out, it was held that the right of transfer without the consent of the landlord depended upon the custom of the country or the locality. The law thus

expressed was so far modified by the Bengal Tenancy Act that the right of transfer of a holding with occupancy right could be established by proof of the existence of usage under which such transfers were made without such consent. For, although no reference was expressly made in Section 183 itself in regard to the validity of a transfer in accordance with usage, which may be established by evidence of a less substantial character than that required to prove a custom, illustration (1) to Section 183 seems to shew that this was contemplated by the Legislature. That explanation is as follows: "A usage under which a raiyat is entitled to sell his holding without the consent of his landlord is not inconsistent with, and is not expressly or by necessary implication modified or abolished by, the provisions of this Act. That usage accordingly wherever it may exist will not be affected by this Act." However, therefore, the law may have been previously declared, as it is now expressed in the Bengal Tenancy Act, a transfer in accordance with usage is valid even without the consent of the landlord. The only case in which this subject is incidentally noticed and to which we would refer is that of *Juggomohun Ghose v. Manick Chand* 7 Moo. I.A. 263, in which their Lordships of the Privy Council (see p. 282 of the report) state: "It remains now to consider the other ground upon which the plaintiff relied—the evidence of mercantile usage. To support such a ground there needs not either the antiquity, the uniformity, or the notoriety of custom, which in respect of all these becomes local law. The usage may be still in the course of growth; it may require evidence for its support in each case; but in the result it is enough if it appears to be so well known and acquiesced in that it may be reasonably presumed to have been an ingredient tacitly imported by the parties into their contract." In applying this case, it must be borne in mind that it relates to a usage in dealing in a particular class of mercantile transactions and contracts made in the course of such business. Consequently in introducing these principles in the present case, which does not relate to contracts entered into between the parties to the litigation but affects a third party, the landlord, it would be necessary either to prove the existence of the usage on his estate or that it is so prevalent in the neighbourhood that it can reasonably be presumed to exist on that estate. It may be that the usage may have gradually sprung up all round an estate and yet never have been introduced on it or been recognized on it, and therefore in considering the evidence it is of much importance that this should be taken into consideration in connection with the conduct of the landlord in regard to any such transfers as may have taken place without his consent. It is on such considerations that the cases before us should be decided, but they have been overlooked by the Subordinate Judge.

8. We have considered the evidence on which the Subordinate Judge's conclusion as to the existence of this custom or usage has been established. We find that there is evidence on which the conclusion of the Subordinate Judge that usage is established maybe arrived at, but at the same time we find that much that is not relevant under the Evidence Act has been admitted on the record, and that from his judgment it would seem that the Subordinate Judge has to a

considerable extent relied on these irrelevant matters. The Subordinate Judge first of all states that "there is a large body of oral evidence to show that there is such an usage, and the kobalas filed and proved in the cases amply support the oral evidence adduced. Mr. Manners has deposed to the usage, and his witnesses have supported him." He therefore takes Mr. Manners as the principal and most important witness in the case.

9. We have examined the evidence of Mr. Manners, and we cannot find that it is relevant on the question of the usage setup. Mr. Manners was employed as an assistant in the indigo factory in 1871-72, and he states that he has known of this custom "for the last 20 years about," but he admits in cross-examination that his "knowledge was derived from what he heard then of such transaction," and he gives no instance of any transfer of this description. It certainly does not appear that Mr. Manners is a person who had such knowledge of the affairs relating to zemindari matters as to make him a competent person to speak generally of the existence of usage in this locality, for he admits that after being employed for about a year in this place he left it and was employed at places fifty or hundred miles distance until the last six years. Since that time he states that he has been purchasing lands from occupancy raiyats having taken over 200 kobalas of such lands. The kobalas relating to the villages in these suits which are on the record and have been challenged are all of very recent date, and by themselves would certainly establish neither a custom nor usage in regard to such transactions.

10. We would here refer to Section 13 of the Evidence Act as showing the character of evidence by which a right or custom may be proved. Mr. Manners' evidence is not of that description.

11. The Subordinate Judge next states that "one of the purchases was made so long ago as the year 1277." There is no doubt a kobala of that date, but that is an isolated instance, and it relates to land in a different mouzah. The other kobalas adduced in evidence also relate to lands in other mouzahs.

12. The Subordinate Judge next refers to the fact that some of the landlords (maliks) have purchased without the consent of their other sharers, and from this he finds a "usage well known in the locality and acquiesced in by the other maliks." But this is not a legitimate conclusion. Such a purchase stands on an entirely different footing from a purchase by a stranger; for it is made at least with the consent of the purchasing landlord, and it could not be properly regarded as a recognition of a usage to purchase without the consent of the landlord. We may here point out that in the case of a purchase by one of the maliks the other maliks cannot maintain a suit for ejectment. Their only remedy would be by a partition of the property within which the land purchased is situate, though perhaps they might also sue for a declaration of the invalidity of the sale.

13. The Subordinate Judge then proceeds to say "that the evidence on the side

of the defendants makes out a strong case against the plaintiff that such usage does exist and is well established." It may be that a Court competent to find on the facts which on second appeal we are unable to do, may, on a proper consideration of the evidence, find that a usage has been established, but we have no doubt that the conclusion arrived at by the Subordinate Judge is based mainly on what is either irrelevant, or does not directly bear upon the custom or usage in the particular mouzahs in which the lands in suit are situated. He has nevertheless not taken this distinction into consideration, and has dealt with the evidence as if it were evidence regarding transfers of land in these mouzahs. It is impossible for us to be satisfied that if he discarded what is irrelevant from his consideration he would have come to the same conclusion. In dealing with this case we find ourselves in the position described by GARTH, C.J., in delivering judgment in *Worries Chunder Chatterjee v. Chundee Churn Roy Chowdhry* ILR Cal. 293, except that we cannot find that the finding of the lower Appellate Court as was found in that case is "upon evidence quite independently of that improperly admitted." In the cases before us, rather the findings of the Subordinate Judge are mainly based on what is irrelevant, and though he has also referred to what is evidence, it is impossible to say that his conclusions proceed upon a proper consideration of that evidence alone.

14. We may also observe that in considering the documentary evidence the Subordinate Judge does not seem to have addressed himself to the question how far the kobalas that have been produced, which all relate to other villages, bear upon the question of the existence of the usage in the two villages in which the holdings have been purchased by Manners and which are the subject matters of these suits. Nor has the Subordinate Judge noticed that several of the witnesses for the defendant, while speaking to transfers without the consent of the landlord, admit that such consent is generally obtained or is usual, and that one of these witnesses distinctly says that the custom exists only since Manners' purchase.

15. For these reasons we are of opinion that the appeal has not been properly tried, and that the case must be remanded for a retrial, and we direct that the trial be held by the District Judge.

16. We would observe that if it should so be that the District Judge finds that the usage is not established, the ejectment of the defendants does not necessarily follow. It will be his duty in such a case to consider the terms of the Bengal Tenancy Act relating to this subject, and we may point out that if any of the tenants whose lands have been purchased are still in possession of any portion of their holdings, the landlord would not be entitled to such ejectment. This has been held by us in several unreported cases. Costs to abide the result.