

(1923) 07 AHC CK 0025
In the Allahabad High Court

Sheo Prasad Dube and Others

APPELLANT

Vs

Sarju Mahto and Another

RESPONDENT

Date of Decision : 06-07-1923

Acts Referred:

Citation : 78 Ind. Cas. 519

Hon'ble Judges : Sulaiman, J;Lindsay, J

Bench : Division Bench

Judgement

1. The question in this case is whether the lower Appellate Court was right in holding that the plaintiffs-respondents were entitled to succeed in their suit for pre-emption.
2. The suit as framed was based on an alleged custom of pre-emption. The Court of first instance dismissed the suit on the ground that the custom was not proved. The Subordinate Judge was also of opinion that the plaintiffs could not rely on any contract for pre-emption inasmuch as no such case had been set up in the plaint.
3. The plaintiffs went in appeal and the learned Additional Judge, while agreeing with the first Court that there was no proof of custom, nevertheless, held that the plaintiffs were entitled to succeed on the ground of contract.
4. It is now argued before us on behalf, of the defendants vendees that the Judge of the Court below ought not to have decreed the claim on the basis of contract no such case having been set up in the plaint.
5. On the other hand, the learned Counsel who has argued the case on behalf of the plaintiffs-respondents maintains that the decision of the Court below should be upheld on the ground that the evidence which was produced in the case conclusively proves the existence of custom.
6. We will deal with the second matter first. The learned Counsel has laid great stress upon the Full Bench case reported in *Ali Nasir Khan v. Manik Chand* 25 A.

90 : A.W.N. (1902) 207. There it was pointed out with reference to certain entries in the Record of Rights which were prepared in the Basti and Gorakhpur Settlement in the year 1885 that a peculiar weight must be assigned to entries of custom made in the Settlement Records of that time because special instructions had been issued by the Board of Revenue to Settlement Officers. Among other directions given was one regarding the Record of a Right of pre-emption. Such a regard was to be made when the proprietors expressly demanded that it should be noticed and proved conclusively that a custom exists.

7. There can be no doubt, therefore, that when we find an entry of this kind, as we do find in the present case, we start with a very strong presumption in favour of the existence of custom.

8. But we do not understand the Full Bench decision to lay down that such an entry is conclusive proof and is binding on the Civil Courts. It will be noted that in the case which was before the Full Bench the only evidence to be considered was a wajib-ul-arz of 1866 and an extract from the Record of Rights of the Settlements 1886-87.

9. In the present case there is other evidence to be considered and it is principally on this other evidence that the Courts below have decided against the plaintiffs. Documents were produced before the lower Court to show that there was no record of custom in the wajib-ul-arzes of 1833 and 1860 and it was further proved to the satisfaction of the Court below that in both those years the village was in the possession of a single proprietor.

10. We have further evidence in the shape of the statement of the patwari which says that there[^]was no transfer of property in this village up till the year 1894 when a sale was effected in favour of Ram Subhag who was the father of the first plaintiff Sarju Mahto. The next transfer which took place was in or about the year 1901 when a second transfer was made in favour of the same Ram Sub hag.

11. In these circumstances, was think it was competent for the Court below to say that there was evidence on the record which overturned the presumption founded upon the entry in the Record of Rights for the year 1885. We cannot, therefore, interfere with the finding of the Court below on this point.

12. There remains the question of contract. It has been laid down that where plaintiffs rely upon a contract in order to succeed in a suit for pre-emption the contract ought to be pleaded, for in such a case it would be necessary for the plaintiff to show that the person through whom he claimed was one of the contracting parties.

13. We think this objection although a technical objection is one which ought to prevail. However we do not find it necessary to decide this question on any mere technicality. We have already adverted to the fact that the first plaintiff got a footing in the village for the first time in the year 1894, that is, some 7 or 8 years after the settlement had been made.

14. If it be the fact, and it does appear to be the fact, that these plaintiffs first got a footing in the village by purchase some 7 or 8 years after the Settlement was made we do not think that they are entitled to enforce a contract which was entered into at the time of the Settlement assuming that" the record in the wajib-ul-ars is a record of contract. These people were no parties to the contract and we do not think they ought to be allowed to enforce it.

15. We have come to the conclusion, therefore, what this appeal ought to be allowed and we allow it accordingly. We set aside the decree of the Court below and restore the decree of the Court of first instance. The defendants-appellants are entitled to their costs both here and in the lower Appellate Court. The costs in this Court will include fees on the higher scale.