

(1925) 06 AHC CK 0034
In the Allahabad High Court

Syed Tajammul Husain

APPELLANT

Vs

Banwari Lal and Others

RESPONDENT

Date of Decision : 19-06-1925

Acts Referred:

Citation : AIR 1926 All 43 : (1926) ILR (All) 77

Final Decision : Dismissed

Judgement

1. This is a plaintiff's appeal arising out of a suit for ejectment on the ground that the plaintiff is a zamindar of the village and the contesting defendant is a person who has without any right purchased a house in the village and is occupying it. The pleas raised in the written statement were that the defendant-vendor was the owner of the house and was entitled to transfer it. There was also a further plea that in this village under a custom the occupiers of houses were entitled to transfer their houses.

2. Both the Courts below came to the conclusion that the evidence produced by the defendant did not establish a custom having the force of law. They accordingly decreed the claim. On appeal a learned Judge of this Court has come to a contrary conclusion. We may note that there was another suit instituted by other zamindars of this village against other transferees which had however been dismissed by the Courts below. A second appeal was preferred in this Court in that case and at the instance of the learned Counsel for the appellant who was also counsel for the appellant in the other case the two appeals were connected together and were ordered to be put up for hearing together. At the time when these two connected appeals came up for disposal the learned Judge of this Court referred to the evidence on the records of both the cases inasmuch as both related to the same custom in the same village and disposed of the two appeals by one judgment. There were altogether 91 sale-deeds produced by the defendant in the connected appeal and 35 sale-deeds were on the record of the present case. He found that the custom was established, but that the defendants had no proprietary right in the site and were mere raiyats without adverse

possession.

3. Although the findings of the lower appellate Court so far as they are findings of fact are binding in second appeal nevertheless it is open to a Court in second appeal to consider whether the evidence which has been found to be proved and instances which have been established do or do not establish a custom having the force of law. In the present case the plaintiff relied on an entry in the wajib-ul-arz of the year 1872 as well as on a judgment of the year 1912 and three compromise decrees besides certain oral evidence, The defendant on the other hand relied on a judgment of the year 1865 as well as a large number of sale-deeds of houses by occupiers in favour of decree zamindars or strangers.

4. Assuming that the interpretation put upon the wajib-ul-arz by the Courts below was correct and that it does not show that the right of residence could be transferred, nevertheless there was a volume of evidence consisting of so many instances of transfer for the last 60 years on which the learned Judge of this Court could hold that there was legally sufficient evidence to establish the custom. The lower appellate Court had brushed aside the sale-deeds by saying that they merely indicated that transfers had taken place, and had thought that unless the defendant established the circumstances under which those sales took place and also showed that the consent of the zamindars had not been obtained they were not of much importance. If the number of sale-deeds had been very small this view might have been sound, but as the number of transfers increased it becomes more and more probable that such a large number of transfers could not take place unless there was a right in the occupiers to make such transfers. When such a large number of instances had been established it did lie on the zamindar to explain how it was that so many transfers were allowed to be made. A very large number of these transfers were made in favour of strangers who were not zamindars. It is impossible to believe that the zamindars would not come to know of the appearance of these strangers in the village and if they took DO step to object the Courts are entitled to draw the inference that there must have been a custom to which they submitted. As to the judgment of the year 1912 we may note that the evidence produced before the Munsif was by no means (Sic) voluminous. The Court had to decide the existence or non-existence of the alleged custom on the evidence before it. The evidence which was produced in that case was not considered sufficient to establish the custom. Although, therefore, the judgment is of some importance it cannot by any means be conclusive. On the other hand we find that at least in the year 1865 when the case mentioned above was decided, it was stated that there had been numerous transfers in the village. We also like to add that although the entry in the wajib-ul-arz is a strong prima facie evidence of custom it is by no means conclusive particularly as the raiyats and other occupiers of houses are not parties thereto.

5. In this case, therefore, we find it impossible to differ from the view taken by the learned Judge of this Court that the evidence adduced by the defendant was legally sufficient to establish the custom. We accordingly dismiss this appeal with

costs, including fees on the higher scale.