present case is concerned, the sum of Rs. 15 as *Thakurbari Mamuli* is not, for the reasons already stated, part of the rent. The sum, therefore, cannot be recovered, having regard to the provisions of Regulation V of 1812, and the cases decided on the point. I, accordingly, agree in dismissing the appeal.

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BIJOY SINGHA DUDHURIA v. KRISHNA BEHARI BISWAS.

O. M. *Appeal dismissed.*

LETTERS PATENT APPEAL.

Before Mookerjee and Beachcroft JJ.

KAILASH CHANDRA DATTA

v.

PADMAKISORE ROY.*

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April 23.

Custom or Usage—Facts proving existence of custom or usage whether questions of law—Actual proof thereof question of fact—Second Appeal.

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 ; the question whether such a state of facts has been proved by the evidence is merely a question of fact.

Kakarla Abbayya v. *Raja Venkata Papayya Rao* (1) dissented from.

APPEAL by Kailash Chandra Datta and others, the defendants, from the judgment of D. Chatterjee, J.

The facts necessary for the purposes of this report are shortly these. In the two suits out of which these appeals arose the plaintiffs sued for the recovery of possession of certain disputed lands transferred to the defendants by the tenants.

* Letters Patent Appeals Nos. 100 and 101 of 1914, in Appeals from Appellate Decrees Nos. 4155 and 4156 of 1910.

(1) (1905) I. L. R. 29 Mad. 24.

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They pleaded that the lands in question constituted non-transferable occupancy holdings which could not be so transferred without the consent of the landlord and prayed for the ejectment of the defendant as trespassers. The defendants on the other hand relied upon the existence of a custom or local usage whereby they submitted the holdings were transferable without the landlord's consent. On the 29th June 1909, the Court of first instance decreed the suits holding that "the essence of a custom of transferability is that the transfer made to the knowledge of, but without the consent of, the landlord is valid and must be recognised by the landlord. The evidence on the record is quite insufficient to recognise the test." On appeal, the lower Appellate Court, on the 23rd July 1910, dismissed the appeals and confirmed the findings of the Court of first instance. The defendants, thereupon, preferred second appeals to the High Court. On the 17th July 1914, D. Chatterjee J. dismissed the appeals holding that "the appeals were concluded by the findings of facts arrived at by the lower Appellate Court." The defendants now preferred appeals under clause 15 of the Letters Patent.

Dr. Jadu Nath Kanjilal (with him *Babu Birendra Chandra Das*), for the appellants, relied upon section 100 (*a*) and (*b*) of the Code of Civil Procedure, 1908, where the words "Some usage having the force of law" occurred. The question as to the existence or otherwise of a local custom or usage having the force of law was not a mere question of fact, but a mixed one of law and fact. It was one thing to say that in proving a particular custom certain facts are found, but it was quite a different thing when the question arose whether the facts so found did or did not establish a custom or usage having the force of law. In

the present case, the facts were quite sufficient to establish the custom hence it would be necessary to go into the evidence: *Eranjoli* v. *Eranjoli* (1), *Kakarla Abbayya* v. *Raja Venkata Papayya Rao* (2).

Babu Upendra Kumar Roy, for the respondents, was not called upon.

Cur. adv. vult.

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 rayati 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* (3), 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 or 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

(1) (1883) I. L. R. 7 Mad. 3. (2) (1905) I. L. R. 29 Mad. 24.
(3) (1906) 11 C. W. N. 83.

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that the names of the transferees were not recorded in the office of the landlord unless a bonus was paid, and that even when bonus was offered by the transferees 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* (1), a growing usage of transferability was of no effect against the landlord and that the usage to be effective must have already grown up: *Bazlul Karim* v. *Satis Chandra Giri* (2). 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 *Eranjoli* v. *Eranjoli* (3) and *Kakarla Abbayya* v. *Raja Venkata Papayya Rao* (4).

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

(1) (1907) 12 C. W. N. 878.
(2) (1911) 13 C. L. J. 418; 15 C. W. N. 752.
(3) (1883) I. L. R. 7 Mad. 3.
(4) (1905) I. L. R. 29 Mad. 14.

Muhammad Kamil v. *Imtiaz Fatima* (1), the plaintiff contended that the rights of the parties were regulated by the Mahomedan 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* (2). 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 adduced 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 the English Courts. Thus, in *Nelson* v. *Dahl* (3), Sir George Jessel M.R., observed that the question whether there was a specified custom or usage in the Balticwood trade was a question of fact and like all other customs it must be strictly proved. In *William Postlethwaite* v. *John Freeland* (4), Lord Blackburn

(1) (1909) I. L. R. 31 All. 557.
(2) (1910) I. L. R. 32 All. 363; L. R. 37 I. A. 191.
(3) (1879) 12 Ch. D. 568, 575.
(4) (1880) 5 App. Cas. 599, 616.

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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. *Robarts* (1). Similarly, Channell J. observed in *Moull* v. *Halliday* (2), 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 *Hureehur Mookarjee* v. *Jadunath Ghose* (3). 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 *Joykishen Mookerjee* v. *Doorga Narain Nag* (4). Again Kemp J. observed in *Syed Ali* v. *Gopal Dass* (5), 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* (6), 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.

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 interference of the High Court in second

(1) (1875) L. R. 10 Ex. 337.
(2) [1898] 1 Q. B. 125, 129.
(3) (1868) 10 W. R. 153.
(4) (1869) 11 W. R 348.
(5) (1870) 13 W. R. 420.
(6) (1896) I. L. R. 22 Bom. 430, 437.

appeal. Thus, the decision is liable to attack in second appeal on the ground that irrelevent evidence has been received, as in *Palakdhari Rai* v. *Manners* (1) and *Durga Charan* v. *Raghunath* (2) or, that relevant evidence has been excluded, as in *Dalglish* v. *Guzuffer Hussain* (3) and *Sariatullah* v. *Pran Nath* (4). 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* v. *Jote Kumar*(5), *Hashim* v. *Abdul* (6) *Ram Bilash* v. *Lal Bahadur* (7). The decision may, again, be assailed on the ground that the facts found do not constitute evidence of the alleged custom: *Durga Charan* v. *Raghunath* (2), *Hanumantamma* v. *Rami Reddi* (8), *Mirabivi* v. *Vellayanna* (9), *Subhadra* v. *Tribhuban* (10). 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* v. *Haridas* (11), *Desai* v. *Rawal* (12), *Prodyot* v. *Gopi*(13)] or of a usage [*Dalglish* v. *Guzuffer* (3), *Palakdhari* v. *Manners* (1)] or, has overlooked the distinction between a custom and a usage [*Nelson* v. *Dahl* (14)]. 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

(1) (1895) I. L. R. 23 Calc. 179.
(2) (1913) 18 C. W. N. 55.
(3) (1896) I. L. R. 23 Calc. 427.
(4) (1898) I. L. R. 26 Calc. 184
(5) (1906) 11 C. W. N. 83.
(6) (1906) I. L. R. 28 All. 698.
(7) (1908) I. L. R. 30 All. 311.
(8) (1881) I. L. R. 4 Mad. 272.
(9) (1885) I. L. R. 8 Mad. 464.
(10) (1912) 15 I. C. 247.
(11) (1914) I. L. R. 42 Calc. 455, 471.
(12) (1895) I. L. R. 21 Bom. 110.
(13) (1909) 11 C. L. J. 209.
(14) (1879) 12 Ch. D. 568, 575.

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question of law, which may be discussed in second appeal. [*Durga Charan* v. *Raghunath* (1), *Lalman* v. *Nandalal* (2)]. Obviously, the question whether a custom is reasonable or valid, is a question of law: *Hurry Churn* v. *Nimai Chand* (3), *Gurai* v. *Kuarmoni* (4). 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: *Kurani* v. *Sajoni Kant* (5), *Hashim* v. *Abdul* (6), *Girraj* v. *Hargobind* (7), *Makund* v. *Krishna* (8), *Ganesh* v. *Sukraj* (9), *Lalman* v. *Nandalal* (10), *Mahadeo* v. *Nabi Baksh* (11). We are not unmindful that a contrary view was adopted in the case of *Kakarla* v. *Raja Venkata* (12), 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 of 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

(1) (1913) 18 C. W. N. 55
(2) (1913) 17 Oudh Cas. 1.
(3) (1883) I. L. R. 10 Calc. 138.
(4) (1915) 19 C. W. N. 1188.
(5) (1908) 12 C. W. N. 539.
(6) (1906) I. L. R. 28 All. 698.
(7) (1909) I. L. R. 32 All 125.
(8) (1911) 9 I. C. 839.
(9) (1911) 14 I. C. 12.
(10) (1913) 20 I. C. 894.
(11) (1914) 25 I. C. 104.
(12) (1905) I. L. R 29 Mad. 24.

exist, does or does not possess the force of law. In so far as the contrary view was taken in the cases of *Ram Harak* v. *Issur* (1), *Shahbaz* v. *Rahiman* (2), *Kakarla* v. *Raja Venkata* (3), and possibly also to some extent in *Eranjoli* v. *Eranjoli* (4), 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.

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. I agree.

L. R. *Appeals dismissed.*

(1) (1909) 3 I. C. 558.
(2) (1911) 11 I. C. 536.
(3) (1905) I. L. R 29 Mad. 24.
(4) (1883) I. L. R. 7 Mad. 3.