APPELLATE CIVIL.

1930

June 20, 23.

Before Suhrawardy and Costello JJ.

GIREESHCHANDRA BHATTACHARJYA

v.

RABEENDRANATH DAS.*

Mahomedan Law—Pre-emption—Customary right—Hindus of Sylhet.

A custom under which Hindus in the district of Sylhet have the same right of pre-emption under the Mahomedan law as Mahomedans has long been prevalent in that district, and it has received such judicial recognition as to put that custom into the category of a rule of law.

It is, therefore, no longer necessary for any party to prove the existence of the custom by adducing evidence for that purpose.

Jameelah Khatoon v. *Pagul Ram* (1) distinguished.

Jadu Lal Sahu v. *Janki Koer* (2), *Inder Narain Chowdhry* v. *Mahomed Nazirooddeen* (3) and *Akhoy Ram Shahajee* v. *Ram Kant Roy* (4) referred to.

SECOND APPEAL by the defendants.

The facts of the case and arguments in the appeal are sufficiently stated in the judgment.

Bhagirathchandra Das for the appellant.

Chandrashekhar Sen for the respondent.

Cur. adv. vult.

COSTELLO J. This is an appeal from a decision of the third Additional Subordinate Judge, Sylhet, reversing a decision of the Munsif, First Court,

*Appeal from Appellate Decree, No. 1854 of 1928, against the decree of Rebatiranjan Mukherji, Third Additional Subordinate Judge of Sylhet, dated April 10, 1928, reversing the decree of Binodebihari Ray, First Munsif of Habiganj, dated March 12, 1925.

(1) (1864) 1 W. R. 250.
(2) (1908) I. L. R. 35 Calc. 575; on app. (1912) I. L. R. 39 Calc. 915; L. R. 39 I. A. 101.
(3) (1864) 1 W. R. 234.
(4) (1871) 15 W. R. 223.

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Habiganj. The suit was one for pre-emption and for certain other reliefs. The learned Munsif dismissed the suit on the ground that the necessary formalities had not been complied with and that there had been delay on the part of the plaintiff. The lower appellate court came to the conclusion that all the necessary formalities had been complied with and there had been no unreasonable delay and he agreed with the finding of the learned Munsif that there is a custom of pre-emption among the Hindus in the district of Sylhet.

The only point seriously argued before us was upon the question whether or not the lower appellate court was right in holding that such a custom does exist among the Hindus in that district. The other questions raised are all questions of fact and are concluded by the findings of the lower appellate court. It was argued before us on behalf of the appellants that there was no evidence before the lower appellate court on which the learned Subordinate Judge could properly find that the custom of pre-emption does exist amongst the Hindus of the district of Sylhet and he further argued that the matter is still an open question and must be decided in every case which comes before the court solely upon the evidence given in that particular case. We are not disposed to hold, even upon that view of the matter, that the learned Subordinate Judge was wrong in coming to the conclusion at which he arrived, because he did in fact have before him two documents which were marked as exhibits Nos. 7 and 8—one of which was a judgment of this Court and the other a judgment of a Munsif. Both of them decided that, in fact, the custom of pre-emption must be taken to exist amongst the Hindus of the district of Sylhet. We desire, however, to deal with this matter on a much broader basis. If the contention of the learned advocate for the appellants is correct, it would follow that, even at this time of day, it would be necessary for the

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plaintiff, in every case where the customary right of pre-emption is asserted, to prove his case upon this point to the satisfaction of the court before whom the matter is being tried. If that were so, it is difficult to see at what point the matter would be so concluded that this question would pass out of the region of controversy. As against the contention put forward on behalf of the appellants, it is urged on behalf of the respondent that this question of the existence of the right of pre-emption amongst the Hindus of Sylhet is no longer one to be decided on the evidence given in the particular case, because the existence of such a custom has already been judicially recognised in such a way as to put the question outside the region of evidence and to put it into the category of a rule of law. It is well known principle that a custom becomes a law when it receives judicial recognition. No doubt, before a custom can have the force of law it must come up to a certain standard of general reception. A custom of that kind when judicially recognised has the force of law. I may recall that Professor Holland in his well known treatise on jurisprudence goes a step further than that even, for he is of opinion that a custom may be law even before it receives judicial recognition and all that the court does is to decide the fact that such a custom exists. Without pausing to consider this view of the matter, however, it is sufficient for us to say that once the court has decided, as a fact, that a custom does exist then that custom obtains the force of law. The actual point we now have to decide was considered by this Court and a judicial decision given with regard to it in the case of *Jadu Lal Sahu* v. *Janki Koer* (1), where it was held that when the existence of the custom, under which Hindus have the same right of pre-emption under the Mahomedan law as Mahomedans in any district, is generally known and judicially recognised it is not necessary to assert or prove it. This case went on

(1) (1908) I. L. R. 35 Calc. 575.

appeal to the Judicial Committee of the Privy Council and there Mr. Ameer Ali made some observations which in effect recognise the principle just enunciated (1). As long ago as the year 1864 similar observations were made by Mr. Justice Bayley and Mr. Justice Macpherson in the case of *Inder Narain Chowdhry* v. *Mahomed Naziroodeen* (2). There the learned Judges in the course of their judgment said—

> In the first place we observe as to the question of *custom*, that the fixed rule of law, as laid down by the High Court, is that where the custom of the right of pre-emption under Mahomedan law has been adopted by Hindus in any particular district, it shall be there recognised as a legal custom.

That means that once it has been established to the satisfaction of the court as a matter of fact that the right of pre-emption under Mahomedan law has been adopted by the Hindus of any particular district the custom shall thenceforth have the force of law and courts before whom the matter arises must take judicial notice of its existence. What we really have to determine in this case is whether or not the existence of the right of pre-emption has been so "judicially noticed" as a custom existing amongst the Hindus in the district of Sylhet that the custom has at any rate by this time obtained the force of law. The question has already been agitated before this Court on a number of occasions, but conflicting decisions have been given. As long ago as the year 1864, the matter came before a Bench of this Court consisting of Mr. Justice Steer and Mr. Justice Jackson in the case of *Jameelah Khatoon* v. *Pagul Ram* (3). The head-note of that case runs as follows :—

> The plaintiff relies upon the custom of pre-emption prevailing between Mahomedans and Hindus in Sylhet. Held that, unless he can show that the custom is undoubted and invariable, he is not entitled to a decree.

The case had been referred back by this Court to the civil court of Sylhet in order that the judge there

(1) (1912) I. L. R. 39 Calc. 915 (922); L. R. 39 I. A. 101 (107).

(2) (1864) 1 W. R. 234, 235.

(3) (1864) 1 W. R. 250.

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might enquire whether as between Mahomedans and Hindus the custom of pre-emption prevailed in that district. The Judge before whom the matter came decided that no such custom prevailed and, accordingly, he dismissed the suit. This Court decided that where the plaintiff relied upon a custom he was not entitled to a decree unless he could show that the custom was undoubted and invariable and that as he did not show such a custom he was not entitled to succeed. It would appear from this decision that the custom of pre-emption amongst the Hindus of Sylhet was not then definitely established in operation and the decision would appear on the face of it definitely to negative the existence of the custom. But, I think we must take it that that decision was founded solely upon the evidence adduced in the course of the case and upon the way in which the plaintiff's case was presented, because, a few years later—in 1871—there was a decision of this Court exactly to the contrary. I refer to the case of *Akshoy Ram Shahajee* v. *Ram Kant Roy* (1), in which Mr. Justice Jackson said—

> I am of opinion that the Subordinate Judge (of Sylhet) has laid down the law correctly. It is admitted that among the residents of the district of Sylhet there is a custom sanctioning a right of pre-emption even among Hindus.

It seems clear from that decision that at any rate in the year 1871, the matter had reached the stage where the existence of the custom in question was admitted and recognised. All the reported cases, however, to which we have been referred have apparently omitted to take account of an unreported decision of this Court, which was the judgment put in evidence in the course of the present case as Exhibit No. 7, to which I have already referred. That unreported judgment is one given by Mr. Justice Trevor and Mr. Justice Campbell in *Ramprasad Sarma* v. *Abdul Hakim* (2), on appeal

(1) (1871) 15 W. R. 223, 224.

(2) (1866) S. A. 984 of 1866, decided on 2nd Aug.

from a decision given by the Judge of Sylhet (dated the 23rd January, 1866) affirming a decree of the Munsif of Fenchuganj dated the 20th July, 1865, in which Ramaprashad Sarma and others were appellants and Abdul Hakeem was the respondent. The judgment was as follows:—

In this case the question is whether the custom of pre-emption exists in the district of Sylhet. The judge after a careful analysis of twenty-four cases finds as a fact that it does and the vakil of appellant is wholly unable to state any intelligible ground of Special Appeal. The appeal is dismissed with costs.

We are of opinion that this ancient decision of this Court accorded full judicial recognition to the existence of the right of pre-emption amongst the Hindus in the district of Sylhet; and nothing has been put before us in the course of the argument in this appeal which leads us to any other conclusion than that we ought to hold quite definitely that that custom has by now received such judicial recognition as enables us to say that it has obtained the force of law. The same question came before my learned brother and myself a short time ago and it seems to have been assumed in the course of the argument then put before us that the custom did in fact exist and was not a matter susceptible of argument. We are of opinion that it is desirable that the matter should be finally set at rest and that it should be understood once and for all that the custom in question has been recognised by this Court in such a way as to put the matter beyond controversy and that the stage has been reached where it is no longer necessary for the plaintiff to prove the existence of the custom by adducing evidence for that purpose. The matter has in fact in our opinion reached the stage contemplated by the dictum in the case of *Jadu Lal Sahu* v. *Janki Koer* (1), to which I have already alluded.

We, accordingly, hold as a matter of law that, in the district of Sylhet, Hindus have the same right of

(1) (1908) I. L. R. 35 Calc. 575.

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pre-emption under the provisions of Mahomedan law as Mahomedans themselves have in that district and we express the view that, hereafter, the local courts should take judicial notice of that state of affairs. It follows that the decision of the learned Additional Subordinate Judge of Sylhet is correct and that this appeal must be dismissed. The appellants must pay the respondent the costs incurred by him in this Court.

SUHRAWARDY J. I agree. I wish to say a few words with reference to a decision to which I was a party and in which I may be taken as expressing a view different from what my learned brother has taken in the present case. In *Giridhar Bhattacharjya* v. *Nayanchandra Deb* (1), the Bench of which I was a member held that in a case where pre-emption was pleaded as a customary law in any part of Bengal and Assam it was for the party so pleading to prove that it was a part of the *lex loci* of the particular district. The question then too was raised with reference to some land in Moulvibazar within the district of Sylhet. The case on that occasion was not presented before us in the way in which it has now been done. Besides the question of pre-emption was not of much importance in that case—the fact being that the plaintiff and the contesting defendant were co-sharers with the vendor and had, therefore, equal right to claim pre-emption. The decree in that case would be justified in any view of the matter. In the recent case, *Ramjay Sarma* v. *Gopalkrishna Deb* (2), my learned brother and I took it as undisputed that in the district of Sylhet the law of pre-emption prevails amongst the Hindus also. It is desirable in the interests of all parties concerned that this question should be finally settled. It is

(1) (1929) S. A. 1817 of 1926, decided by Suhrawardy and Jack JJ. on 28th May.

(2) (1930) S. A. 1605 of 1928, decided on 30th May.

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most inconvenient that this question should be raised and decided upon evidence in every particular case which may lead to conflicting decisions in different cases. I, therefore, agree with my learned brother in holding that the authorities are in favour of the view that the Mahomedan law of pre-emption prevails in the district of Sylhet as a customary law even among the Hindus and that it should be so judicially recognised.

Appeal dismissed.

A. A.