ROOPLAUL v. LAKSHMI DOSS.

I am, therefore, of opinion that the defendant signed exhibit A at the request of his adoptive father without knowing what he was about, that he never intended to give up his property, and that the paternal influence was exercised against his interests.

I would dismiss the appeal and the memorandum of objections but without costs.

The Offg. C J.—I am unable to agree with Mr Read that section 575 of the Code of Civil Procedure governs the present case. The grounds on which *Sabhapathi Chetti* v. *Narayanasami Chetti*(1) proceeds, apply here, and *Lachman Singh* v. *Ram Lagan Singh*(2) is a direct authority in favour of the view that the decision of the Senior Judge prevails in a case such as this.

The decree of Boddam, J., will be modified to the effect stated in my judgment.

SANKARAN NAIR, J.—I agree.

Messrs. *Branson & Branson*—attorneys, for respondent.

APPELLATE CIVIL.

Before Sir. S Subrahmania Ayyar, Offg. Chief Justice, and Mr. Justice Boddam.

1904 August 10, 1905 September 21, 22 and 29.

KAKARLA ABBAYYA (PLAINTIFF), APPELLANT,

v.

RAJA VENKATA PAPAYYA RAO (DEFENDANT) RESPONDENT.*

Ryot right of, to trees—Civil Procedure Code—Act XIV of 1882, *s.* 584—*Power of Court on second appeal to examine evidence of usage—Custom.*

A ryot holding lands in a zamindari on a permanent tenure would, as regards lands on which a money assessment is paid, be *primâ facie* entitled exclusively to the trees thereon. Where the crops are shared between the ryot and zamindar, they will be jointly interested in such trees, but such presumptions may be rebutted by proof of usage or contract to the contrary.

Narayana Ayyangar v. *Orr*, (I.L.R., 26 Mad., 252), followed.

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(1) I.L.R., 25 Mad., 555. (2) I.L.R., 26 All, 10.

*Second Appeal No. 1044 of 1902, presented against the decree of J. H. Munro, Esq., District Judge of Kistna at Masulipatam, in Appeal Suit No. 921 of 1901, presented against the decree of M.R.Ry. T. Krishnaswami Naidu, District Munsif of Bezwada, in Original Suit No. 83 of 1900.

Although the provisions of section 584 of the Code of Civil Procedure disallow a second appeal with reference to findings of fact, yet, the existence or non-existence of a usage having the force of law is unaffected by such disallowance. Consequently, it is the duty of the Court, when it has to pronounce an opinion upon such question to examine the evidence bearing on it, not only as to the sufficiency thereof to establish all the elements (antiquity, uniformity, etc.) required to constitute a valid usage having the force of law, but also the credibility of the evidence relied on and the weight due to it.

Custom in India is transcendent law.

A custom cannot be established by a few instances or by instances of recent date.

Observations on the nature of evidence necessary to support custom.

Eranjoli Vishnu Nambudri v. *Eranjoli Krishnan Nambudri* (I.L.R., 7 Mad., 3), followed.

Hurry Churn Dass v. *Nimai Chand Koyal*, (I. L. R., 10 Calc., 139), not followed.

Bai v. *Shrinbai Kharshedji*, (I. L. R., 22 Bom., 430), not followed.

SUIT to establish the plaintiff's right to trees on his lands. The defendant was a zamindar and the plaintiff was his tenant with rights of occupancy.

Both the lower Courts dismissed the plaintiff's suit.

The plaintiff preferred this second appeal.

V. Krishnaswami Ayyar and *K. Subrahmania Sastri* for appellant.

T. Rangachariar for Sir *V. Bhashyam Ayyangar*, the Hon. Mr. *P. S. Sivaswami Ayyar*, and *P. Nagabhushanam* for respondent.

JUDGMENT.—The principles with reference to the rights of a tenant holding on a permanent tenure lands in zamindaries, have been elaborately considered in *Narayana Ayyangar* v. *Orr*(1) which was decided after this case was disposed of in the lower Court. The previous decisions of this Court in *Appa Rau* v. *Ratnam* (2) and in *Appa Rau* v. *Narasanna* (3) relied on by the Acting District Judge are referred to and explained in the above recent decision. According to it, a ryot holding lands in a zamindari on a permanent tenure would, as regards land on which money assessment is paid, be *primâ facie* entitled to the trees therein exclusively. In regard to lands as to which the sharing of crops between the zamindar and ryot prevails, the zamindar and the ryot would be jointly interested in the trees standing thereon, but presumptions to the above effect are liable to be rebutted by proof of usage or contract to the contrary. In the present case the

(1) I. L. R., 26 Mad., 252. (2) I. L. R., 13 Mad., 249.
(3) I. L. R., 15 Mad., 47 at p. 49.

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zamindar pleaded that he had been customarily enjoying the trees in his zamindari even though standing on lands held by ryots, and evidence as to such enjoyment was offered, but no issue was raised as to the custom of the zamindari, and the judgments of the lower Courts do not discuss the matter with reference to the custom alleged. Considering the importance of this question as bearing upon disputes between the zamindar and his ryots generally, we think there ought to be a direct and distinct finding upon the matter. It should be added that, even in the absence of a custom, it may be shown with reference to the trees on the plaintiff's holding that he has no right to them under contract, if any, between him and the zamindar. We must therefore call upon the District Judge for a finding upon the question whether the defendant—the zamindar—is entitled to the trees in dispute, either by virtue of a custom of the zamindari, or contract between the parties.

"Fresh evidence may be taken, and the District Judge may call for evidence oral or documentary for the purpose of elucidating the question of custom apart from any evidence which the parties may adduce.

"The findings should be submitted within three months from this date. Seven days will be allowed for filing objections."

[The District Judge, on remand, took further evidence and found that there was no contract regarding the right to the trees, and that the evidence failed to establish a customary right in the trees in the defendant.]

JUDGMENT.—The question for determination is as to the alleged right, stated to be founded on local custom, of the respondent, the zamindar, to trees on land held by persons on the usual permanent ryotwary tenure in his zamindari of Mylavaram in the Kistna district. The finding of the District Judge is that no such custom as that set up has been established.

The preliminary point which has been raised is, whether it is competent for us to examine the evidence with reference to which the finding of the District Judge was given, the matter being before us on second appeal.

Mr. Krishnaswami Ayyar for the appellant contended, that the finding, though one as to an alleged local custom, is still a finding as to a matter of fact, and consequently, it was binding upon us and not liable to be revised by us with reference to the

weight to be given to the evidence adduced. The cases relied on by him, viz., *Hureehur Mookerjee* v. *Judoonath Ghose* (1), *Syud Ali* v. *Gopal Doss* (2), *Hurry Churn Dass* v. *Nimai Chand Keyal* (3), *Bai Shirinbai* v. *Kharshedji*(4), and *Subraya Poi and others* v. *Appu Bhandary and others* (5) decided by this Court, support his contention, but they are not reconcilable with the decisions of this Court in *Hanumantamma* v. *Rami Reddi* (6), *Mirabivi* v. *Vellayanna* (7) and *Eranjoli Vishnu Nambudri* v. *Eranjoli Krishnan Nambudri* (8), the last of which was decided by a Full Bench. In these three cases, the learned Judges who took part in them went into, and discussed the evidence, and arrived, as the result of such examination, at conclusions in regard to the usages then in question, in second appeal. No doubt in doing so, the competency of the Court so to examine the evidence and decide with reference to its weight, was merely assumed. In our opinion that cannot be taken as detracting in the slightest degree from the authority of those decisions in reference to the present point, for it is impossible to believe that the learned Judges who decided them overlooked so obvious an objection, as it must have been, if Mr. Krisnaswami Ayyar's contention were right. It seems to us also that were the question *res integra* we cannot but hold that the contention is untenable. The decisions opposed to our view would have been correct, had the provision of the Civil Procedure Code conferring the right of second appeal not contained the clause "or usage having the force of law;" for then, the words "the decree being contrary to law" by implication would exclude an appeal on the ground that any question or questions of fact raised in the case, and affecting its decision, was or were wrongly determined by the lower Courts, and, in such a state of things, it might have been arguable that a finding by the lower Courts as to the existence or non-existence of a local or special usage, which had to be proved by evidence, was a finding as to a matter of fact, on the analogy of the view held in England that such matters are for the jury and not for the Judge. But the presence in section 584 of the Code of Civil Procedure "or usage having the force of law" makes such an argument irrelevant. This language is so explicit as to

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(1) 10 W.R., 153.
(2) 13 W.R., 441.
(3) I.L.R., 10 Calc., 138.
(4) I.L.R., 22 Bom., 430 at p. 433.
(5) S.A. No. 773 of 1881 (unreported).
(6) I.L.R., 4 Mad., 279.
(7) I.L.R., 8 Mad., 464.
(8) I.L.R., 7 Mad., 3.

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render superfluous the seeking for the reason of the provision though that is not difficult to discover, viz, that a usage of the kind mentioned, being in its nature such as must necessarily affect not only parties to the particular litigation and their privies, but whole bodies of people, stands on a footing similar to a matter of law derived from other sources than usage. The very limited scope which is allowed to usages in England, due to special historical causes (see Pollock and Maitland's 'History of English Law,' 1st Edition, Vol. I, p. 163), accounts for questions as to their existence being treated as falling under the category of questions for the jury. Of course it is otherwise in this country where from the days of Manu it has been laid down that "custom is transcendent law." It is clear, therefore, both upon authority which is binding upon us as the opinion of a Full Bench, and as the right interpretation of the provision in question of section 584 of the Civil Procedure Code, that, though the section disallows a second appeal with reference to findings of fact, yet, the existence or non-existence of a usage having the force of law is unaffected by such disallowance. Consequently, it is the duty of this Court, when it has to pronounce upon that question, to examine the evidence bearing upon it, not only as to the sufficiency thereof to establish all the elements (antiquity, uniformity, etc.) required to constitute a valid usage having the force of law, but also the credibility of the evidence relied on and the weight due to it.

Accordingly we heard Mr. Rangachariar upon the evidence in support of the alleged usage. [And after discussing the evidence their Lordships continued.]

We therefore agree in the conclusion of the District Judge and, accepting his finding, we must allow the appeal and, reversing the decrees of the lower Courts, grant the declaration prayed for with costs throughout.