

this decree, and thereupon the defendant shall execute a deed of sale of the property in suit, cause registration and delivery of the same, and put the plaintiff in possession of the property sold, and defendant shall then receive the balance of the purchase-money.

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*Appeal dismissed.*

*Before Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Oldfield.*

LALA AND ANOTHER (DEFENDANTS) v. HIRA SINGH AND OTHERS (PLAINTIFFS).<sup>\*</sup>  
*Cess—Custom—Act XIX of 1873 (N.-W. P. Land Revenue Act), s. 66.*

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A cess leviable in accordance with village-custom which is not recorded under the general or special sanction of the Local Government cannot, under s. 66 of Act XIX of 1873, be enforced in a Civil Court.

A custom to be valid must be ancient, must have been continued and acquiesced in, and must be reasonable and certain.

The fact that a cess leviable in accordance with village-custom has been recorded by a settlement officer is important evidence of the custom, but not conclusive proof of it.

*Held*, on the evidence in this case, that the village-custom set up was not established.

THIS was a second appeal in a suit in which the plaintiffs, zamindars of the village of Nurpur, claimed from the defendants, Rs. 5 as the cess leviable in accordance with the custom of the village on the second marriage of a widow of the Ramaiya caste. The defendants belonged to the Ramaiya caste and resided in Nurpur. The defendant Lala had married the second defendant who was a widow at the time of the marriage. The facts of the case are sufficiently stated for the purposes of this report in the judgment of the High Court.

Mr. *Spankie*, for the appellants, contended that the suit was not maintainable as the cess, although recorded in the administration-paper of the village by the settlement officer, had not been recorded with the sanction of Government—s. 66 of Act XIX of 1873: that the custom was not proved, that it was bad by reason of not being ancient, not having been continued, not having been acquiesced in, and not being reasonable and certain, and further by reason

<sup>\*</sup> Second Appeal, No 475 of 1878, from a decree of W. Lane, Esq. Judge of Moradabad, dated the 27th February, 1878, reversing a decree of Pandit Ratan Lal, Munsif of Bijnor, dated the 22nd September, 1877.

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of its being in restraint of the marriage of a Hindu widow, which the law sanctioned. He referred to *Hurpurshad v. Sheo Dyal* (1); Broom's Commentaries on the Common Law, ed. of 1856, p. 12 and the following pages; s. 26 of Act IX of 1872; and Act XV of 1856.

Babu *Ratan Chand*, for the respondents.

The following judgments were delivered by the Court:

OLDFIELD J.—The plaintiffs sue as zamindars of Nurpur to recover Rs. 5, a sum which they assert they have a right to levy on occasion of a second marriage of a widow of the Ramaiya caste, resident in their village, from the person who marries the widow. Both husband and wife have been made defendants, and plaintiffs rest the claim on ancient custom, and support it by an entry in the administration-paper of the village drawn up in 1872, in course of the current settlement, and by other evidence. The Court of first instance dismissed the suit, holding that the evidence was insufficient to establish the right by custom, and that the administration-paper could not bind those who were no parties to it. The Judge has held that the custom has been established, and he considers that the fact that the cess was entered in the settlement record is a sufficient fulfilment of the provisions of s. 66 of Act XIX of 1873, and he appears further to consider that this Act is not applicable to the case, as the administration-paper was prepared before it came into operation.

The defendant has appealed on several grounds, and without dealing with all, I am of opinion that the decision of the Judge cannot be affirmed, because the cess here claimed is not one which the law permits to be enforced in a Civil Court, and because no right by custom has been established, the Judge having failed to rightly appreciate the nature of the evidence necessary to establish a custom.

The settlement administration-paper drawn up in 1872 contains an entry detailing certain cesses which the zamindars have a right to levy from artizans, and among them is an entry that a sum of Rs. 5 is leviabale as a zamindari due from the caste Ramaiya on occasion of "*karao*" or second marriages by widows. It is necessary for the validity of all such cesses that they be recorded at the time of settlement and sanctioned by Government. In the case before

(1) L. R., 3 Ind. App. 259, see p 285.

us the settlement of the mauza had been commenced, and the record which contains the entry of the cess had been drawn up while Regulation VII of 1822 was in force, but with reference to ss. 2 and 37 of Act XIX of 1873 the settlement then in progress was brought under the operation of Act XIX of 1873, which is now the law in force, and it is essential to see whether those conditions which give validity to a cess under Act XIX of 1873 have been fulfilled in this case. The second paragraph of s. 66 of Act XIX of 1873 applies to the cess in question, and by it a condition for its validity is not only that the cess be recorded by the settlement officer but that it be recorded after special or general sanction by the Local Government. But there is no evidence of any such sanction, nor has the settlement, as we understand, received the final confirmation of Government. Any presumption there might be in favour of the entry of the cess having been made by the settlement officer after sanction had been obtained is weakened in this case by the consideration that the record was drawn up before the new law came into force, which has particularly required that sanction to these cesses be obtained prior to recording them. The claim is therefore not maintainable with reference to s. 66 of Act XIX of 1873.

Amongst the conditions essential for establishing a custom are that the custom is of remote antiquity, that it has been continued and acquiesced in, that it is reasonable, and is certain and not indefinite in its character. To support the custom in this case we have only the evidence of three witnesses. One of them is styled the head of the Ramaiya caste, who is said to be entitled to a part of the cess; another is the plaintiffs' family priest; another the patwari; it is obvious that their evidence should be received with caution, as they appear to have reasons for supporting the plaintiffs, but accepting what they say, it is clear that no custom has been established, and that any payments hitherto made have been exceptional and voluntary.

Bhagwan Das, patwari, says that before the administration-paper was drawn up in 1872, by which the cess was fixed at Rs. 5, every one paid according to his means, and that there have been five marriages of the kind in 1875, and no cess has been paid, but it was disputed in all.

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Nilapat, the priest, can only say, in a general way, that the cess is paid, but he allows none has been paid for the last two years; and Hira, who styles himself the headman of the Ramaiya caste, and claims a cess for himself, admits that he has never realised the cess hitherto. Nor is it clearly shown from what particular person the cess is claimable. No right by custom can be established on the above evidence, and the plaintiffs' case is not assisted by two decrees, which he files to show that the cess has been decreed.

With reference to the entry in the administration-paper, no doubt the proceedings before the settlement officer recording a custom are to be received as important evidence, but they must be weighed against evidence on the other side, and their value has to be properly appreciated. In the case before us, the entry is entitled to little weight, for not only is it not shown that it was recorded as the law requires, but it appears for the first time in the record of the tenth settlement in 1872, and it was made manifestly in the interest of particular parties with a view to establish claims against persons who have not been shown to have been parties to the proceedings, for although the record purports to be attested by Umer, as headman of the Ramaiya caste, he was himself interested in having such a cess recorded, and his authority to represent the caste has not been shown.

It is unnecessary to deal with the other pleas in appeal, as, for the above reasons, I am of opinion that the claim is not maintainable, and I would reverse the decree of the Judge and dismiss the suit with costs.

STUART, C. J.—I entirely concur in and approve the view taken of this case by Mr. Justice Oldfield. I would only wish to add a remark on a point which was strongly insisted on at the hearing by the counsel for the appellant, namely, that the alleged custom, even if proved, was opposed to public policy which favours marriage. But in my opinion that is a consideration derived from the judgments of English Courts which is not applicable to a case like the present. In other respects I agree with Mr. Justice Oldfield. The appeal is allowed, the decree of the Judge reversed, and the suit dismissed with costs in all the Courts.

*Appeal allowed.*