

APPELLATE CIVIL.

1888
June 30.*Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Tyrrell.*

GURDAYAL MAL (DEPENDANT) v. JHANDU MAL (PLAINTIFF). *

Pre-emption—Town—Custom—Evidence—Decrees enforcing right.

In a suit for pre-emption based on custom, evidence of decrees passed in favour of such a custom, in suits in which it was alleged and denied is admissible evidence to prove its existence. The most satisfactory evidence of an enforcement of a custom is a final decree based on the custom.

Gajju Lal v. Fateh Lal (1) distinguished, *Koodoottoollah v. Mohines Mohan Shaha* (2), *Sheo Churn v. Goodur* (3), and *Lachman Rai v. Akbar Khan* (4), referred to.

THIS was a suit to enforce the right of pre-emption in respect of the sale of a plot of land situated in muhalla Saraogian, or of the Saraogis, in qasba Kandhla, zila Muzaffarnagar. The plaintiff based his claim on the custom of the town. Both the lower Courts gave the plaintiff a decree. The defendant vendee appealed to the High Court.

The Hon. Pandit *Ajudhia Nath* and Munshi *Ram Prasad*, for the appellants.

The Hon. T. Conlan and Munshi *Kashi Prasad*, for the respondent.

EDGE, C. J., and TYRRELL, J.—This was a suit for pre-emption. The plaintiff alleges generally in the plaint that by reason of his co-sharership he was entitled to a pre-emptive right with regard to the property, and that he had made the necessary demand. By the written statement the defendant denied that there was any custom. The custom has been found on the evidence, some of which was oral, namely, that of the inhabitants of the town. Other evidence which was put in consisted of sale-deeds relating to sales in which the right was enforced, but without the assistance of the Courts of law. Another class of evidence consisted of decrees in suits relating to property in the town, by which the right of pre-emption was recognised and enforced. For the defendants, witnesses were called who

* Second Appeal No. 126 of 1887 from a decree of T. Benson, Esq., District Judge of Saharanpur, dated the 1st December, 1886, modifying a decree of Maulvi Muhammad Maksud Ali Khan, Subordinate Judge of Saharanpur, dated the 2nd September, 1886.

(1) I. L. B., 8 Cal., 171.

(3) N.-W. P., H. C. Rep., 1888, p. 198.

(2) 5 Rev. Civ. and Cr. Rep., 290.

(4) I. L. B., 1 All., 440.

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gave a general denial of the existence of the custom. Those witnesses could not mention any instance in which a claim of pre-emption had been successfully resisted.

It is said that the decrees to which I referred were not admissible in evidence. It appears to me that they were the best evidence of instances in which the right was recognised. They are to my mind the most satisfactory evidence, because they are the result of decisions in cases in which one party alleged the custom and the other denied it. The Courts having heard the evidence decided in favour of the custom. As those decrees were not in suits between these parties, they were not conclusive, but they were excellent evidence to show that the right was asserted in the town by other persons and was recognised by the lawfully constituted legal tribunals. We have been referred to the Full Bench judgment of the Calcutta High Court in the case of *Gujju Lall v. Fateh Lall* (1). That case does not bear on the question here. There the question between the parties was as to the right to recover possession of particular property, and the judgment that was sought to be made use of was a judgment in a suit to which the plaintiff was not a party. That the judgments such as we have here are admissible in evidence of the local custom was established by the case of *Koodootoolah v. Mohinee Mohun Shaha* (2). That was a pre-emption suit, and the custom there sought to be established was a custom of pre-emption. In the case of *Sheo Churn v. Goodur* (3) the learned Judges of this Court considered that instances of an enforcement of a custom were good evidence. The most satisfactory evidence of an enforcement of a custom is a final decree based on the custom. If we want further authority, it is to be found in the case of *Lachman Rai v. Akbar Khan* (4), in which case the learned Judges considered that proof afforded by judicial record was amongst the most cogent evidence of an existing custom and that it had been enforced. Judicial records in England not between the same parties have been admitted as evidence of the existence of local customs.

It appears to us that the learned District Judge was fully authorised in finding that the custom of pre-emption existed in

(1) I. L. R., 6 Cal., 171.

(2) 5. Rev. Cir. & Cr. Rep., 290.

(3) N.-W. P. H. C. Rep., 1868, p. 138.

(4) I. L. R., 1 All., 440.

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the town. It is said that there was no evidence of the custom having existed or of its having been enforced in this particular part of the town or *muhalla*. That in our judgment is immaterial. The custom applied to the whole town and the greater included the less. There was no evidence that the custom did not apply to this particular ward.

The remaining question is as to the price. The sale-deed stated the price at Rs. 2,500. The Judge found that the true price was Rs. 1,500. It was proved that Rs. 2,500 had been paid in the presence of the Registrar, but there was evidence that immediately afterwards Rs. 1,000 of that sum was returned to the vendee, and there was evidence that the vendor and vendee had said that Rs. 1,500 was the price. That was a question for the Judge, and we cannot interfere with his finding.

There is one point which we have omitted to mention, that is, it is contended that the plaint is bad because it does not specifically set out what the custom was. No doubt it would have been more regular if the custom had been specifically defined in the plaint, but the parties were put to no inconvenience. Each side called evidence, one to the custom and the other to rebut it.

We are of opinion that there is no sufficient reason to warrant us in disturbing the judgment of the Court below. The appeal is dismissed with costs.

Appeal dismissed.

Before Mr. Justice Straight and Mr. Justice Mahmood

BAMJIWAN MAL AND OTHERS (PLAINTIFFS) v. CHAND MAL AND OTHERS
(DEFENDANTS). * *

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May 8, 9.

Act XV of 1877 (Limitation Act), ss. 5, 14—Appeal preferred to wrong Court through mistake of law—Exclusion of time—Civil Procedure Code, ss. 111, 216, 561—Suit for dissolution of partnership—Set-off—Objections under s. 561—Dismissal of appeal as barred by limitation—Objections not entertainable.

A suit for dissolution of partnership in which the claim was valued at Rs. 2,000, with a prayer that such balance as might be found due to the plaintiff upon taking the partnership accounts, might be paid to him, is a suit for money within the meaning of s. 111 of the Code of Civil Procedure, and a plea of set-off may be raised in such a suit, and if in consequence of such plea the Court of first instance decrees in favour of the defendant a sum above Rs. 5,000, then by reason of the provision in

* First Appeal No. 213 of 1886, from a decree of Maulvi Muhammad Said Khan, Subordinate Judge of Azamgarh, dated the 31st March, 1886.