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who were conjointly committing dacoity, and was present when the act of murder in the dacoity was committed." Further on it was said :—"There is room for such doubt, particularly in the case of Girwar Singh and Raghubar Singh, for there is no evidence which places them within the house of Hira Lal at the time when the murder was committed."

If those two statements to which we have referred are to be taken as of general application, we entirely dissent from their correctness as statements of law. It is probable that in that particular case in which that judgment was delivered Girwar Singh and Raghubar Singh were not proved to have been conjointly with the others committing dacoity. However, on that we need express no opinion. In our opinion it matters not, when in the commission of a dacoity a murder is committed, whether the particular dacoit charged under s. 396 was inside the house or outside the house, or whether the murder was committed inside or outside the house, so long only as the murder was committed in the commission of that dacoity. In our opinion these two men were properly convicted of the offence punishable under s. 396 of the Indian Penal Code. We dismiss their appeals, and, confirming the convictions and sentences, we direct that those sentences be carried into effect.

APPELLATE CIVIL.

1895. *January* 10.

Before Sir John Edge, Kt., Chief Justice and Mr. Justice Banerji.

KUAR SEN (PLAINTIFF) *v.* MAMMAN AND OTHERS (DEFENDANTS).*

Easement—Customary right—Facts necessary to establish the existence of a customary right.

The plaintiff sued for possession of a piece of land which, he alleged, formed part of the court-yard of his *kothi*, and for demolition of a chabutra thereon. The defendants denied the plaintiff's title and alleged that they always used the chabutra as a sitting place, and that during the *Moharram* the *tazias* and *alums* were exhibited upon the chabutra and a *takht* was placed upon it. The Court of first instance found that the defendants had a right to use the land in the manner claimed during the

* Letters Patent Appeal No. 1 of 1894.

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Moharram. The lower appellate Court on the question of the defendants' right to use the said land in the manner claimed by them found as follows:—"That various *mirasis*, whose connexion with each other is not established, have within a period of twenty years or so placed *tazias* upon the land and sung there." *Held* that this finding of fact did not necessarily in law lead to the conclusion that there was a local custom by virtue of which the easement now claimed by the defendants was acquired.

Where a local custom excluding or limiting the general rules of law is set up a Court should not decide that it exists unless such Court is satisfied of its reasonableness and its certainty as to extent and application, and is further satisfied by the evidence that the enjoyment of the right was not by leave granted, or by stealth, or by force, and that it had been openly enjoyed for such a length of time as suggests that originally, by agreement or otherwise the usage had become a customary law of the place in respect of the persons and things which it concerned.

THIS was an appeal under s. 10 of the Letters Patent from the judgment of Aikman, J. in S. A. No. 388 of 1893, reported in the I. L. R., 16 All. 178, *q.v.* The facts of the case are fully stated in the judgment of the Court.

Mr. *D. N. Banerji* and Babu *Jogindro Nath Chaudhri*, for the appellant.

Mr. *Amir-ud-din* for the respondents.

EDGE, C.J. and BANERJI, J.—The plaintiff, who is the appellant in this appeal under s. 10 of the Letters Patent, brought his suit for the possession of a piece of land, which, he alleged, formed part of the court-yard of his *kothi*, and for the demolition of a chabutra thereon, which the defendants claimed the right to maintain and use. The defendants in their written statement denied the plaintiff's title, and alleged that they always used the chabutra as a sitting place, and that during the *Moharram* the *tazias* and *alums* were exhibited upon the chabutra and a *takht* was placed upon it. At the trial in the Court of the Munsif it was orally pleaded on behalf of the defendants that they had obtained a title to the land and chabutra by adverse possession.

The Munsif found that the land in question was the plaintiff's and was part of the court-yard of his *kothi* and that the defendants had not acquired any title to it by adverse possession. This is what

the Munsif said on the question of adverse possession in his judgment:—

"I am inclined to think that the defendants and other *mirasis* of the locality have been laying their *tazias* on this land during the *Moharram*. This is the only right which the defendants have acquired by long and uninterrupted usage. I cannot go so far as to hold that such possession amounts to adverse possession." Further on in the judgment the Munsif, after discussing some decisions, found as follows:—"I therefore hold that the defendants, by virtue of an old custom, have acquired right to lay their *tazias* on this spot during the *Moharram* only and perform the ceremonies incidental to it," and he gave the plaintiff a decree for possession of the land and for demolition of the chabutra, but reserved to the defendants a right to erect, two days prior to each *Moharram*, a temporary chabutra on the piece of land and to use such chabutra by laying upon it their *tazias* and performing upon it the incidental ceremonies from the 1st to the 12th days inclusive of the *Moharram* in each year. From that decree the plaintiff appealed, as did also the defendants, to the Court of the District Judge of Bareilly. The learned District Judge found that the land in question was the plaintiff's and that the defendants had acquired no right by prescription to use the land or the chabutra and that no custom to use the land or chabutra had been established. After stating his reasons, with which we agree, for holding that the defendants had acquired no easement by prescription, he thus discussed the question of a custom:—

"Have the defendants and other *mirasis* a customary right to use the land for stationing their *tazias* and *alums* at the time of the *Moharram*? Assuming that such rights might possibly be acquired against proprietors of land by a class only out of the public, I think proof is requisite that the use has been of right and had not a merely permissive origin, and that the right should be distinctly claimed as by custom. Now in the present case, beyond the mere fact that various *mirasis*, whose connexion with each other is not established, have, within a period of twenty years or so, placed *tazias* on the land and sung there, I find no evidence of a right.

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The particular part of Bareilly does not seem to have been long inhabited, and the only clue to the origin of the use is a suggestion by Chaudhri Shib Lal, witness for the defendants, that his ancestor may have permitted it when he was zamindár. But besides this, the defendants do not set up a claim to customary user, but pleaded a proprietary right which they have failed to establish." The District Judge allowed the plaintiff's appeal, and varied the decree of the Munsif by directing that the chabutra be removed without permission to the defendants to re-build temporarily.

From the decree of the District Judge the defendants appealed to this Court. The appeal was heard by our brother Aikman. He was of opinion that the defendants had in their written statement claimed a customary right to use the land and chabutra for the ceremonies of the *Moharram*. Our brother Aikman in his judgment said:—"There was evidence in this case that the *mirasis*, to which caste the defendants-appellants belong, had for a period of twenty years or so placed *tazias* on the disputed plot and sung there. There was a suggestion that this was by leave of the zamindár, but there was no evidence in support of this. In my opinion the facts found by the District Judge are sufficient to establish the custom set up by the appellants," and he restored the decree of the Munsif. From that decree of our brother Aikman this appeal has been brought by the plaintiff.

It is obvious from the findings of the District Judge that no easement by prescription had been proved in this case. There was no dominant tenement. It was not proved that the defendants or any of them had as of right and without interruption and for twenty years enjoyed a right to use the land or the chabutra for any purpose whatsoever. All that was proved, according to the findings of the District Judge, was "that various *mirasis*, whose connexion with each other is not established, have within a period of twenty years or so placed *tazias* on the land and sung there." We are bound by the findings of fact of the lower appellate Court, but we are not bound by the conclusions of law of the lower appellate Court. What we have to consider is, does the fact which the District Judge

found—that various *mirasis* whose connexion with each other was not proved, had "within a period of twenty years or so placed *tazias* on the land and sung there,"—unexplained, necessarily in law lead to the conclusion that there was a local custom by virtue of which the easement now claimed by the defendants was acquired?

If that fact found by the District Judge and unexplained does not necessarily in law lead to that conclusion, the decree of the District Judge was by reason of ss. 584 and 585 of the Code of Civil Procedure final and non-appealable.

Section 18 of the Indian Easements Act, 1882 (Act No. V of 1882) leaves at large the question of law how a local custom may be established. As such a local custom as is now set up on behalf of the defendants excludes or limits the operation of the general rule of law that a proprietor or other person lawfully in the possession of land, and whose rights are not controlled or limited expressly or impliedly by Statute law, by grant, or by contract, has an exclusive right to the use or enjoyment of his land for all purposes not injurious to the rights of his neighbours, it is necessary that those setting up such a custom as that in the present case should be put to strict proof of the custom alleged by them.

A local custom to have the effect of excluding or limiting the operation of the general rules of law must be reasonable and certain. A local custom as a general rule is proved by good evidence of a usage which has obtained the force of law within the particular district, city, mohalla or village, or at the particular place, in respect of the persons and things which it concerns. Where it is sought to establish a local custom by which the residents or any section of them of a particular district, city, village or place are entitled to commit on land not belonging to or occupied by them, acts which, if there was no such custom, would be acts of trespass, the custom must be proved by reliable evidence of such repeated acts openly done, which have been assented and submitted to, as leads to the conclusion that the usage has by agreement or otherwise become the local law of the place in respect of the person or things which it concerns. In order to establish a customary right to do acts which would other-

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wise be acts of trespass on the property of another the enjoyment must have been as of right, and neither by violence nor by stealth, nor by leave asked from time to time. We cannot in these Provinces apply the principle of the English Common Law that a custom is not proved if it is shown not to have been immemorial. To apply such a principle as we have been urged by the counsel for the appellant to do would be to destroy many customary rights of modern growth in villages and other places. The Statute law of India does not prescribe any period of enjoyment during which, in order to establish a local custom, it must be proved that a right claimed to have been enjoyed as by local custom was enjoyed. And in our opinion it would be inexpedient and fraught with the risk of disturbing perfectly reasonable and advantageous local usages regarded and observed by all concerned as customs to attempt to prescribe any such period.

In our opinion a Court should not decide that a local custom, such as that set up in this case, exists, unless the Court is satisfied of its reasonableness and its certainty as to extent and application, and is further satisfied by the evidence that the enjoyment of the right was not by leave granted or by stealth or by force, and that it had been openly enjoyed for such a length of time as suggests that originally, by agreement or otherwise, the usage had become a customary law of the place in respect of the persons and things which it concerned.

As we understand the judgment of the District Judge, all which he found to have been proved by the evidence was that different *mirasis* had within a period of about twenty years before suit placed, during the *Moharram*, *tazias* upon the land and had sung there, but that it was not proved, at any rate to his satisfaction, that there was any connexion between such different *mirasis*, or that they represented the body of *mirasis* of Bareilly, or even of the particular mohalla or part of Bareilly in which the plaintiff's land is situate. We cannot say that in law the District Judge was bound, on the evidence before him in first appeal, to hold that a local custom under which the defendants could lawfully and adversely to the plaintiff

go upon his land or maintain or erect a chabutra there was established. Under such circumstances we allow this appeal with costs, and, setting aside the decree of this Court, we restore and affirm the decree of the District Judge.

Appeal decreed.

Before Sir John Edge, Kt, Chief Justice and Mr. Justice Banerji.

MUHAMMAD KARIM-ULLAH KHAN (PLAINTIFF*) *v.* AMANI BEGAM AND OTHERS (DEFENDANTS).

Muhammadan law—Dower—Widow's lien for dower—Suit by heir claiming possession without payment of proportionate share of dower—Burden of proof as to nature of widow's possession.

When a Muhammadan widow is in possession, and has been for some time in undisturbed possession of property which had been of her husband in his life-time, and dower is admitted or proved to be due to her, it lies upon the heir who claims partition without payment of his proportion of dower to prove that the Muhammadan widow was not let into possession by her husband in lieu of dower or did not obtain possession in lieu of dower after her husband's death with the consent or by the acquiescence of the heirs.

THIS was an appeal under s. 10 of the Letters Patent from the judgment of Burkitt, J., in S. A. No. 940 of 1893, reported in I. L. R., 16 All. at p. 225. The facts of the case were as follows :—

The plaintiff sued as heir to one Mahmud Khan for partition of certain immovable property alleged to have been of Mahmud Khan in his life-time. He impleaded as defendants Musammat Amani Begam and Musammat Moti Begam the two widows of Mahmud Khan, Musammat Mahbub Begam the widow of one Umar Khan deceased, brother to Mahmud Khan, and certain other persons who, he stated, with himself comprised the entire list of the heirs of Mahmud Khan. He claimed possession by partition of 21 sihams out of 128 sihams in two houses specified in the plaint, of which the widows were apparently in possession, but he did not offer to pay any portion of any dower-debt which might be due to the widows or any of them, nor did he mention that any such dower-debt was due.

* Letters Patent Appeal No. 23 of 1894.