1906
May 28.

Before Mr. Justice Richards.

HASHIM ALI (PLAINTIFF) v. ABDUL RAHMAN (DEFENDANT).*

Pre-emption—Local custom—Finding by lower Court regarding existence of alleged custom—Second Appeal.

Where on a question as to the existence or non-existence of a particular custom the lower appellate Court has acted upon illegal evidence or on evidence which is legally insufficient to establish an alleged custom, the question is one of law; or if it appears that the lower appellate Court has clearly from its judgment disregarded legal evidence the Court can interfere; but the High Court in second appeal is not bound, notwithstanding that the lower appellate Court has heard and weighed the legal evidence offered on both sides, to examine and consider the evidence in all cases when the existence or non-existence of an alleged custom is the sole question at issue. *Kakarla Abbaya* v. *Raja Venkata Papayya Rao* (1) and *Chakauri Devi* v. *Sundari Devi* (2) referred to.

THE material facts appear from the judgment.

Mr. *R. K. Sorabji*, for the appellant.

Munshi *Rahmat-ullah*, for the respondent.

RICHARDS, J.—This was a suit by the plaintiff for the pre-emption of a house in Benares.

This claim is based on a local custom said to exist in Benares and in a particular *mohalla* where the premises are situated. The custom is very clearly and properly stated in paragraph 2 of the plaint.

If this custom as alleged had been proved the plaintiff would clearly be entitled to succeed in the present suit. In paragraph 4 of the plaint the plaintiff alleges that he complied with the formalities as to demand required by Muhammadan law, although the particular custom existing in the *mohalla* did not render such demands necessary. This paragraph is somewhat remarkable and might, perhaps, suggest that the custom was really the Muhammadan custom, but that the plaintiff was not quite sure whether he would be able to show, when the case came for trial, that he had sufficiently complied with the requirements of that law.

The Court of first instance found in favour of the plaintiff; but it does not specifically find what the custom was, or if there was

* Second Appeal No. 994 of 1904, from a decree of F. J. Pert, Esq., District Judge of Benares, dated the 8th of August, 1904, reversing a decree of Babu Hira Lal Singh, Munsif of Benares, dated the 12th of June, 1904.

(1) (1905) I. L. R., 29 Mad., 24. (2) Weekly Notes, 1906, p. 144.

a custom, which prevented one person from selling without first offering the premises to the person or persons having a right to pre-empt.

The lower appellate Court found that a custom of pre-emption was proved, but that there was no sufficient evidence that the custom was anything more than the Muhammadan custom, in which case the formal demands were necessary, and these, he held, had not been complied with.

Whether or not a custom exists is a question of fact and, *primâ facie* at least, the decision of the lower appellate Court on this question is binding on me. Mr. *Sorabji* has referred to the case of *Kakarla Abbaya* v. *Raja Venkata Papayya Rao* (1). In my opinion if the lower appellate Court has acted upon illegal evidence or has come to a decision upon evidence as to the custom which is legally insufficient to establish a custom, the High Court could treat the question as one of law. Again, if it appeared that the lower appellate Court has clearly from its judgment disregarded legal evidence, the Court could interfere; but I do not agree with the contention that, notwithstanding that the lower appellate Court has heard and weighed the legal evidence offered on both sides, in all cases where the existence or non-existence of a custom is the question at issue, it is the duty of the High Court in second appeal to go into and consider the evidence. I do not think the case cited is any authority for such a proposition. I did in the present case look at the evidence, and I find that witness after witness produced by plaintiff simply stated that a custom of *shafa* prevailed. Two out of the three judgments produced are argumentative decisions of the Court rather than findings of fact, and these judgments were quite insufficient to prove the custom the plaintiff alleged. Reading the judgment of the learned District Judge it is perfectly plain that he had it clearly before his mind that he was trying the issue whether or not the custom alleged in paragraph 2 of the plaint existed. He has found that no such custom was proved. I consider that I am bound by this finding. It is not alleged in the grounds of appeal that any legal evidence was rejected by the learned Judge. Mr. *Sorabji* has also referred to the case *Chakauri Devi* v. *Sundari*

(1) (1905) I. L. R., 29 Mad., 24.

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Devi (1), and asked me to refer an issue as to whether or not the demands made by the plaintiff were sufficient within the principle laid down in that case by Knox, J. The lower appellate Court has found that the preliminary demands were not made, and there is no ground of appeal taken as to the finding of the lower appellate Court on this question. The appeal fails and is dismissed with costs.

Appeal dismissed.

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May 30.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Sir George Knox.

JUGAL KISHORE AND OTHERS (DEFENDANTS) *v.* HARBANS CHAUDHRI AND OTHERS (PLAINTIFFS).*

Mortgage—Decree—Sale—Simple money decree—Purchase by decree-holders —Possession—Rights of parties.

The plaintiffs, respondents, obtained a decree for sale and an order absolute under a mortgage executed by one R. H. H. C., a son of R. H., on the sole ground that he had not been impleaded by the mortgagees, obtained a decree, dated the 6th July, 1898, declaring that his share in the family property was not liable to sale. Notwithstanding the latter decree, the plaintiffs sold the entire mortgaged property and themselves purchasing, obtained possession. Next J. K., the holder of a simple money decree against R. H. and H. C., brought to sale a six-pie share together with the equity of redemption of certain land in one of the mortgaged villages and purchased himself. J. K. then sued the plaintiffs for possession, obtained a decree on the 17th December, 1903, subject to any rights which the plaintiffs in the present case might have over the property, and in execution of his decree was given possession of the six-pie share.

Held that although the plaintiffs' purchase in respect of the property covered by J. K.'s decree must be treated as a nullity, their general rights as mortgagees were safe-guarded by the terms of that decree, and section 13 of the Code of Civil Procedure could not bar the plaintiffs' right to bring the present suit.

Held also that the fact that the plaintiffs had purchased a portion of the mortgaged property did not limit them to a right to sue for a proportionate part only of the mortgage debt. *Bisheshur Dial* v. *Ram Sarup* (2), distinguished.

THE facts of the case are as follows:—

On the 20th January, 1886, Ram Harakh, the father of Hanuman Chaudhri, mortgaged to the plaintiffs' father, Lachman

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*Second Appeal No. 248 of 1905, from a decree of W. Tudball, Esq., District Judge, Gorakhpur, dated the 4th of January, 1905, confirming the decree of Munshi Achal Behari, Subordinate Judge, Gorakhpur, dated the 15th of August, 1904.

(1) Weekly Notes, 1906, p. 144. (2) (1900) I. L. R., 22 All., 284.