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Revenue Court, and where a party has had the opportunity of representing his case in the Revenue Court and has not availed himself of it, we should have no hesitation in holding that the jurisdiction of a Civil Court is barred by section 233. In the present case we have no alternative but to allow the appeal. We set aside the decree of the lower Court and remand the case to that Court under the provisions of section 562 of the Code of Civil Procedure, with directions to readmit the appeal under its original number in the register of pending appeals and proceed to dispose of it on the merits. Costs here and hitherto will abide the event.

[*Cf. Muhammad Jan* v. *Sadanand Pande.* (1)—ED.]

Appeal decreed and cause remanded.

1906

February 28.

Before Mr. Justice Banerji.

LAKHRAJ BHARTHI (PLAINTIFF) *v.* ANRUDH TIWARI AND OTHERS (DEFENDANTS).*

Pre-emption—Evidence of Custom—Custom need not be immemorial.

In order that a custom of pre-emption may be held to be established it is not necessary to show that the custom is immemorial, in the sense of the English common law. Hence where in a village which came into existence after 1846 there was found in 1861 evidence of a custom of pre-emption amongst the co-sharers, and further evidence of such a custom in 1885, it was *held* that the custom was sufficiently established for the Courts to give effect to it. *Kuar Sen* v. *Mamman* (2), *Gokul Dichhit* v. *Maheshri Dichhit* (3) and *Mohidin* v. *Shivlingappa* (4) followed.

THE facts of this case sufficiently appear from the judgment of the Court.

Mr. *J. Simeon*, for the appellant.

Hon'ble Pandit *Madan Mohan Malaviya*, for the respondents.

BANERJI, J.—This appeal arises out of a suit for pre-emption based upon a custom alleged to prevail in the village. The defendant denied the existence of the custom and also the right of the plaintiff to claim pre-emption. There was a further dispute

* Second Appeal No. 586 of 1904, from a decree of T. A. H. Way, Esq., officiating District Judge of Gorakhpur, dated the 5th of April 1904, confirming a decree of Pandit Guru Prasad, B.A., Munsif of Deoria, dated the 6th of January, 1904.

(1) Weekly Notes, 1906, p. 30.
(2) (1895) I. L. R., 17 All., 87.
(3) Weekly Notes, 1905, p. 266.
(4) (1899) I. L. R., 23 Bom., 666.

between the parties as to the amount of consideration for the sale in respect of which pre-emption was claimed. The Court of first instance dismissed the suit, holding that the alleged custom had not been proved. In support of his allegation that the alleged custom existed the plaintiff produced a copy of a *rubkar*, dated the 29th of October, 1869, prepared at the time of revision of settlement, in which the custom alleged by him is recorded as a custom prevailing in the village. He also produced the supplementary khewat of 1885, in which there is an entry of the existence of the same custom. The Court of first instance considered that this existence of custom was not sufficient and accordingly dismissed the suit. The lower appellate Court affirmed the decree of the Court of first instance on the following ground. The learned Judge says, in order to establish a custom, it must be proved to be immemorial. The appellant, therefore, must prove by conclusive or presumptive evidence that the custom had existed at least since the annexation of this district by the British Government. But the record shows that at least as late as 1846 the mauza was a jungle grant and no proprietary rights existed. It therefore agreed with the lower Court that it had not been proved that the custom of pre-emption prevailed in the village. It appears that the village came into existence some time after 1846. In 1869 an entry was made in the settlement papers of the existence of pre-emption. This was followed, as I have said above, in 1885. These entries certainly afforded *primâ facie* proof of the existence of a custom. It was not necessary to establish that the custom was immemorial in the sense of the rule of the English Common Law on the subject. This was held by this Court in *Kuar Sen* v. *Mamman* (1) and in the recent case of *Gokul Dichhit* v. *Maheshri Dichhit* (2). The same view was adopted by the Bombay High Court in *Mohidin* v. *Shivlingappa* (3). As the custom relied on in this case could be traced so far back as 1869, it has existed for a sufficiently long period to entitle the Courts to give effect to it as a rule of law binding upon persons to whom the custom applies. The Courts below were therefore wrong in holding that the alleged custom did not exist.

(1) (1895) I. L. R., 17 All., 87. (2) Weekly Notes, 1905, p. 266.
(3) (1899) I. L. R., 23 Bom., 666.

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This, however, was not sufficient for the disposal of the suit. The defendant denied that the plaintiff had any right of pre-emption. The Court of first instance does not appear to have framed any issue on that point, and as that Court and the lower appellate Court decided the case upon a preliminary ground in respect of which their decision was erroneous, the case must be remanded to the Court of first instance under section 562 of the Code of Civil Procedure. I accordingly allow the appeal, discharge the decrees of both the lower Courts, and remand the case to the Court of first instance, with directions to readmit it under its original number in the register and dispose of it according to law. The appellant will have his costs of this appeal. Other costs will follow the event.

Appeal decreed and cause remanded.

1906
March 3.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Sir William Burkitt.

DULMHA KUNWAR (PLAINTIFF) *v.* MAHADEO PRASAD AND OTHERS (DEFENDANTS).*

Act No. II of 1899 *(Indian Stamp Act), Schedule I, Article 1—Stamp—Construction of document—Memorandum of account—Acknowledgment of debt—Admissibility of evidence.*

The plaintiff sued for the recovery of certain sums of money lent by her deceased husband to the defendants, a firm of bankers, and she produced in support of her claim two documents described in the lower courts as *sarkhats*. These were documents in the form of extracts from bankers' books showing a credit and debit side and in one case a balance struck, but they were not signed by the parties or either of them, and they contained no acknowledgment of or promise to pay a debt. They were not stamped. *Held* that these papers were merely memoranda which might be given in evidence for what they were worth, but did not require to be stamped. *Udit Upadhya* v. *Bhawani Din* (1) referred to.

THE plaintiff sued for the recovery of money alleged to have been deposited with the defendant's firm by her deceased husband. In support of her claim she produced two documents, called *sarkhats*, said to have been written by Mahadeo Prasad,

* Second Appeal No. 808 of 1904, from a decree of Mr Muhammad Ishaq Khan, District Judge of Azamgarh, dated the 16th May, 1904, confirming a decree of Pandit Giraj Kishor Dat, Officiating Subordinate Judge of Azamgarh, dated the 20th of February, 1903.

(1) (1904) I. L. R., 27 All., 84.