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IN THE MATTER OF THE PETITION OF KHALIL AHMAD.

1908 *April* 3.

BY THE COURT.—We allow the application so far that we direct that the words, "and therefore invalid" be expunged from the judgment. Having regard to the circumstances of the case we make no order as to costs.

FULL BENCH.

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

RAM BILAS AND ANOTHER (PLAINTIFFS) *v.* LAL BAHADUR AND OTHERS (DEFENDANTS). *

Custom—Finding in favour of existence of custom based upon insufficient evidence—Second appeal—Practice.

Held that where a question arises as to the existence or non-existence of a particular custom, and the lower appellate Court has acted upon illegal evidence or on evidence legally insufficient to establish an alleged custom, the question is one of law, and the High Court is entitled in second appeal to consider whether the finding is based upon sufficient evidence. *Hashim Ali* v. *Abdul Rahman* (1) approved. *Raj Narain Mittar* v. *Budh Sen* (2) referred to.

IN this case the defendants respondents Nos. 2 and 3 sold to the defendant No. 1 their house in mauza Bilsanda, together with its site. The plaintiffs, zamindars of Bilsanda, sued for recovery of possession of the site and for the ejectment of the defendant vendee. The vendee pleaded that Bilsanda was not an ordinary agricultural village, but a town, that the custom of sales and other transfers without the consent of the zamindars prevails in the abadi and therefore the plaintiffs had no title to eject him. The Court of first instance decreed the plaintiffs' claim, finding that the custom alleged was not established, and that the defendants vendors held the house in question as ordinary agricultural tenants and were not entitled to sell more than the materials of it. The vendee appealed. The lower appellate court (additional Judge of Bareilly) reversed the decree of the first Court and dismissed the plaintiffs' suit upon the main ground that Bilsanda was not a village, but a town, to which the ordinary law as to tenants' houses in the abadi was inapplicable. The plaintiffs

* Appeal No. 83 of 1907 under section 10 of the Letters Patent from a judgment of Griffin, J, dated the 19th June, 1907.

(1) (1906) I. L. R., 28 All., 698. (2) (1904) I. L. R., 27 All. 338.

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appealed to the High Court, and their appeal, coming before a Single Judge of the Court, was dismissed. The plaintiffs thereupon appealed under section 10 of the Letters Patent, which appeal was referred to a Bench of three Judges, by order of the Chief Justice dated the 28th March 1908.

Messrs. *R. Malcomson* and *J. Simeon* and Babu *Sital Prasad Ghosh*, for the appellants.

The Hon'ble Pandit *Sundar Lal*, for the respondents.

STANLEY, C.J.—The defendants respondents 2 and 3 were agricultural tenants of the plaintiffs, residing in the village of Bilsanda, and as such tenants occupied the house in the village which is the subject-matter of this litigation. This I take to be the finding of the lower appellate Court. The argument before that Court appears to me to have proceeded on the assumption that the vendors were such tenants of the zamindar, and the question was whether or not a custom which was set up, and to which I shall presently refer, was a binding custom. The defendants respondents 2 and 3 sold the house in question to the defendant No. 1 *together with the site*. The zamindars took exception to the sale of the site and instituted the suit out of which this appeal has arisen for possession of the site of the house. The defence set up was that according to custom the tenants of the village were entitled to appropriate and sell not merely the materials of their houses in the abadi of the village, but also the sites upon which their houses stood, that is, that they could sell the landlord's property. This contention is not supported by the wajib-ul-arz of 1866. In that document provision was made whereby the tenants were permitted to sell or remove the materials of their houses, but nothing whatever is stated in it upon which could be based the suggestion that they could also sell the sites. The wajib-ul-arz is silent as to the sites, and from this silence I draw the inference that a tenant could not under the wajib-ul-arz sell the sites, on the principle *expressio unius exclusio alterius*. The later settlement is silent upon the question of the sale of tenant's houses, and it was the contention in the Courts below that a custom has sprung up whereby tenants in the abadi on leaving their houses can sell and dispose of, not merely the materials of their houses, but also the sites. Instances

of sales were given in evidence, and there is no doubt that a number of documents have been produced in which apparently not merely the fabrics of the houses but the ground also upon which they stood was the subject of sale. We are not aware, however, of the circumstances under which these sales took place. It may be that the landlord had by express agreement with the tenants in the particular cases transferred to them the sites of their dwellings. It may be that the sales were made with the consent of the zamindars. It may be that the sales were made under some special agreement with the tenants made at the time when the occupancy of the houses began. However this may be, it seems to me that the evidence is not such as would justify the Court in holding that so extraordinary a custom as is set up should have been recognized and legalized in this village. In the case of *Raj Narain Mitter* v. *Budh Sen* (1), my brother Knox observed in regard to evidence of this class, namely, sale deeds and mortgages of house property in a village, that "they are at the best only evidence of so many specific instances of transfer and nothing more." Attaching as much importance to such evidence as I find myself able to do, I have come to the conclusion that, even assuming that the custom which was here set up could be upheld by a Court as a valid and legal custom, the evidence in this case is wholly insufficient to establish that custom. I do not express any opinion as to whether such a custom can be regarded as a valid custom. That is a matter upon which it is unnecessary for me to express an opinion. I agree in the view expressed by my brother Richards in the case of *Hashim Ali* v. *Abdul Rahman* (2) that where a question arises as to the existence or non-existence of a particular custom, where the lower appellate Court has acted upon illegal evidence, or on evidence which was legally insufficient to establish an alleged custom, the question is one of law. I regard the question before the Court as one of law and not as one of fact, and therefore hold that we are entitled to consider whether the decision arrived at by the learned Judge of this Court upholding the decision of the lower appellate Court was based upon sufficient evidence. I am pleased to be able to hold that the evidence was

(1) (1904) I. L. R., 27 All., 338. (2) (1906) I. L. R., 28 All., 698.

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legally insufficient, as it appears to me that a grave injustice would be done if the proposition which has been advanced by the learned advocate for the respondents in this case could be held to be good law. I therefore would allow the appeal. I would set aside the decision of the learned Judge of this Court and also the decision of the lower appellate Court and restore the decree of the Court of first instance.

BURKITT, J.—I am of the same opinion. I agree with the learned Chief Justice in the interpretation which he has put on the judgment of the lower appellate Court, and I further fully concur with him in everything he has said as to the very peculiar custom set up by the defendants respondents in this case. I also would restore the judgment of the Court of first instance setting aside the judgments of the learned Judge of this Court and of the lower appellate Court.

AIKMAN, J.—The property in dispute in this case is situated, as is found by the learned Additional Judge, not in an ordinary agricultural village but in a town. I wish to guard myself against saying anything which might be taken as affecting the title of the residents of towns to the houses in which they live. I should have been glad to have had a clearer finding by the lower Court as to the title by which the vendors of the respondent Lal Bahadur acquired the property they sold to him. But assuming that the finding of the learned Additional Judge is, as the learned Chief Justice and my brother Burkitt hold it to be, that the vendors held the property in their capacity of agricultural tenants, I agree in thinking that the evidence relied on by the Courts below as proving a custom whereby such tenants could sell their houses was legally insufficient to establish such a custom. I wish to add that in my opinion it does not follow that, because a resident of a town cultivates land belonging to the zamindar within whose zamindari the site of the town is shown as situated, it necessarily follows that he has no heritable or transferable interest in the house in the town in which he resides. But if it is shown, as I assume to be the case here, that the tenant occupies the house in consequence of and as appertaining to his agricultural tenancy, the onus would lie on him to prove that he had a right to transfer the house. In my opinion in

the present case this onus has not been discharged by the respondent. I therefore concur in the order proposed.

BY THE COURT.—The order of the Court is that the appeal be allowed, the decree of the learned Judge of this Court and also of the lower appellate Court be set aside and the decree of the learned Munsif restored, with costs of this appeal, and also costs in the lower appellate Courts. We extend the time for the removal by the defendant respondent No. 1 of all the materials of the house up to the 15th of May next.

Appeal decreed.

APPELLATE CIVIL.

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

ABDUL KARIM KHAN (DEFENDANT) *v.* MAQBUL-UN-NISSA BEGAM (PLAINTIFF) AND MUHAMMAD RAZA KHAN AND ANOTHER (DEFENDANTS).*

Act No. VII of 1889 *(Succession Certificate Act), section* 4—*"Debt"*—*Deferred dower.*

Held that the dower of a Muhammadan wife, whether prompt or deferred, is a "debt" within the meaning of section 2 of the Succession Certificate Act, 1889, and that in a suit for its recovery brought by the heirs of the deceased wife against the husband no decree can be passed in favour of the plaintiff in the absence of the certificate required by the Act. *Nemdari Roy* v. *Mussummat Bissessari Kumari* (1) dissented from. *Mahamed Ishaq* v. *Sheikh Akramul-Huq* (2) distinguished. *Webb* v. *Stanton* (3) referred to.

THE plaintiff in this case sued as one of the heirs of Musammat Qadri Begam, the deceased wife of Muhammad Abdul Karim Khan, to recover from the latter her share of the dower debt of Qadri Begam, fixing the amount at a lakh of rupees. The principal defendant resisted the suit upon various grounds; *inter alia* that the defendant had obtained no certificate of succession in respect of the estate of Qadri Begam and that the suit was barred by limitation. The Court of first instance (Subordinate Judge of Moradabad) decreed the plaintiff's claim. The defendant Abdul Karim Khan appealed to the High Court, again urging the two grounds mentioned above.

*First Appeal No. 154 of 1906, from a decree of Maula Bakhsh, Subordinate Judge of Moradabad, dated the 30th of March 1906.

(1) (1898) 2 C. W. N., 591. (2) (1907) 12 C. W. N., 84.
(3) (1883) L. R., 11 Q. B. D., 518, at p. 524.