evidence to satisfy us that the well which was constructed by Musammat Mendo was constructed for the benefit of the estate or for the good of her tenants and cultivators. We, therefore, think that the court below was right in disallowing this item. The other item, namely, the expenses of a feast on the return of Mendo from pilgrimage, appears also to us not to have been incurred for legal necessity. A feast given on the return of a pilgrim cannot be said to be so intimately connected with the pilgrimage as to justify its allowance as money expended for legal necessity. We know of no authority for allowing such an item as coming within the meaning of legal necessity and none has been cited to us. For these reasons we agree in the view taken by the court below and dismiss the appeal with costs.

Appeal dismissed.

Before Mr. Justice Richards and Mr. Justice Tudball.

SHADI LAL AND OTHERS (DEFENDANTS) *v.* MUHAMMAD ISHAQ KHAN AND OTHERS (PLAINTIFFS). *

1910 *November* 24.

Custom—Evidence—Presumption—Inference of existence of a custom from continued user of land for a particular purpose.

It is open to a court to infer from long enjoyment not exercised by permission, stealth or force, the existence of a custom. If after considering the evidence the court comes to the conclusion that an alleged custom is unreasonable or that the privilege is enjoyed as a result of permission given or that it is exercised by stealth or force the court is entitled to find against the custom. *Kuar Sen* v. *Mamman* (1) referred to.

THE facts of this case were as follows:—

The plaintiffs were the zamindars of the village Jahangirabad and the defendants were cloth printers and sellers. On a particular plot in the village rain water accumulated in the rainy season. The defendants made use of this water for the purposes of their trade, according to the plaintiffs with their permission on payment of rent. The plaintiffs alleged that the defendants prevented them from making other use of the pond and hence they prayed for an injunction to restrain them from interfering with them (the plaintiffs). The defendants denied the permission or payment of rent. They alleged that they

* Second Appeal No. 1018 of 1908, from a decree of H. J. Bell, District Judge of Aligarh, dated the 3rd of June, 1908, reversing a decree of Pitambar Joshi, Additional Subordinate Judge of Aligarh, dated the 4th of March, 1907.

(1) (1895) I. L. R., 17 All., 97.

1910

SHADI LAL v. MUHAMMAD ISHAQ KHAN.

were making use of the pond for hundreds of years and that there was a custom prevalent in the village by which the defendants were entitled to use the water of the pond. The court of first instance (Additional Subordinate Judge of Aligarh) dismissed the claim, but on appeal the lower appellate court (District Judge) reversed the decree. The defendants appealed to the High Court.

Babu *Jogindro Nath Chaudhri* for the appellants.

Mr. *B. E. O'Conor* (with him Mr. *G. P. Boys*, The Hon'ble Pandit *Sundar Lal* and The Hon'ble Pandit *Moti Lal Nehru*), for the respondents.

RICHARDS and TUDBALL, JJ.—After hearing the parties in this appeal we have come to the conclusion that the appeal ought not to be decided without determination of some further matters by the learned District Judge. Notwithstanding that the defendants claimed actual title to the land in dispute, the case was fought out upon the issue whether or not the defendants had a right to soak their cloth and dry it on the property in dispute, which has now been found to be the property of the plaintiffs. It seems to us that the learned District Judge was of opinion that no court under any circumstances could find that a customary right existed where the evidence in support of the custom consisted of user. In this we think the learned Judge was wrong. In our opinion it is open to the court to infer from long enjoyment not exercised by permission, stealth, or force, the existence of a custom. Of course, if the court after considering the evidence came to the conclusion that the alleged custom was unreasonable, or that the privilege was enjoyed as the result of permission given, or that it was exercised by stealth, or force, he would be equally entitled to find against the alleged custom: vide *Kuar Sen* v. *Mamman* (1). We accordingly refer the following issues to the lower appellate court:—

(1) Does any custom exist by reason of which the defendants are entitled to exercise the right of soaking and drying their cloth on the plaintiff's property?

(2) Over what portion of the land in dispute are the defendants entitled to enjoy this right.

(1) (1895) I. L. R., 17 All., 87.

In determining these issues the court will have regard to the remarks expressed above. If the court finds that there was a custom extending over some portion, but not over the whole, of the land in dispute, the court, by means of a map or otherwise, will clearly define the area over which the right exists.

The court will also be entitled to take into consideration the reasonableness of the alleged custom. For example, we consider that it might be unreasonable for tenants to claim to prevent a zamindar using a large piece of land for building, agricultural, or other purposes, merely because without interference on the part of the zamindar they had for many years used the land for the purpose of drying cow-dung cakes. In the present case we think that the court might, in conjunction with the evidence of user, consider such matters as the importance of the industry, the length of time it has been established and the possibility or impossibility of carrying on the industry elsewhere if the land is turned into a grove. The court will be entitled to take any additional evidence it finds necessary; on return of the findings 10 days will be allowed to file objections.

On return of the findings the following judgement was delivered :—

The finding on the issues referred by us is against the appellants. Objections have been filed, and the particular objection is that there was a finding by the lower appellate court before the remand that "there had been a user which extended over a period of fifty years," and that the finding of the court upon remand that there was "no evidence that the families of the appellants have constantly and without intermission made use of the tank for a very long time" is inconsistent with the first finding.

In our order of remand we explained to the learned Judge that user under certain circumstances might establish a custom. It appears that when the case went back, very few of the appellants appeared or were represented. A compromise, which the learned Judge says, was most advantageous to the appellants, was agreed upon by their representatives. Shadi Lal, however, refused to abide by the compromise and the case had to proceed. The learned Judge has found against the custom, and we have no

1910

SHADI LAL v. MUHAMMAD ISHAQ KHAN.

reason to think that he did not fully carry out the directions we gave him in the order of remand. We, however, were ready to hear the learned pleader for the appellants and were ready that he should refer us to the evidence which was taken in the court below originally and also on remand, so that we might dispose of the case ourselves without any further delay. The learned pleader admitted that he is not in a position to refer us to this evidence.

We, accordingly, must dismiss the appeal with costs.

Appeal dismissed.

1910

November 25.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Banerji.

MAHARAJA OF BENARES (DEFENDANT), *v.* BALDEO PRASAD (PLAINTIFF).*

Act (Local) No. II of 1901 *(Agra Tenancy Act) section* 177*—Appeal—Question of proprietary title—Jus tertii pleaded by defendant—Third person added as a defendant—Question decided against latter.*

In a suit for assessment of revenue on land in the possession of the defendant, the defendant pleaded that the land belonged, not to the plaintiff, but to a third person. The third person was brought upon the record as a defendant and claimed the land as his, and, on the question of ownership being decided against him, appealed. *Held* that the question raised in the suit was a question of proprietary title which arose directly and substantially in the suit and that an appeal lay to the District Judge.

THIS was an appeal under section 10 of the Letters Patent from a judgement of GRIFFIN, J. The facts of the case are stated in the judgement under appeal which was as follows:—

"This is a plaintiff's appeal arising out of a suit instituted under sections 150 and 158 of the Tenancy Act. The plaintiff's claim was that the defendants should be assessed to revenue in respect of certain land in their possession. According to the plaintiff he was the zamindar of the land in dispute and the defendants had no right to hold it free of revenue. The defendants pleaded that the Maharaja of Benares was the zamindar and that they were entitled to hold the land rent and revenue free. The Assistant Collector decreed the suit. There was an appeal to the Commissioner, who remanded the case with directions that the Maharaja of Benares be made a party. This was done, and the Assistant Collector again decreed the suit. The Maharaja of Benares appealed to the Commissioner, who returned the memorandum of appeal with directions that it should be presented to the District Judge. The latter has now decreed the appeal preferred to him by the Maharaja of Benares. The plaintiff comes here in second appeal. It appears that in the Court of the Assistant Collector certain public records were produced and it was on the strength of the entries in these records

* Appeal No. 149 of 1909 under section 10 of the Letters Patent.