MISCELLANEOUS CIVIL.

Before Mr. Justice Mukerji and Mr. Justice Daniels.

1924 December, 15.

TULA RAM SAH AND OTHERS (PLAINTIFFS) *v.* SHYAM LAL SAH AND ANOTHER (DEFENDANTS).*

Hindu law—Effect of migration on the personal law of a Hindu—Custom—Mode of proof of—Compilation made by a Government servant at the instance of the Government—Act No. I of 1872 (Indian Evidence Act), sections 35 and 57—Kumaun.

A court would be justified in assuming *primâ facie* that the law applicable to a Hindu is that prevailing among his caste-fellows in the locality, unless he specifically denies that this is so and sets up the case that he has migrated from another part of India and continues to follow the law which prevailed in his original place of domicile.

An officer of the Indian Civil Service was deputed by the Local Government to inquire into and collect the customs that were prevailing in Kumaun. The officer did so, and wrote a report which was published under the authority of the Government.

Held, that a court administering civil law in Kumaun was justified in accepting this report as *primâ facie* evidence of the customary law applicable to Kumaun and in throwing upon the party who disputed the existence of a custom therein set forth the burden of proving that no such custom existed and that the ordinary Hindu law applied.

THE facts of this case sufficiently appear from the judgement of MUKERJI, J.

Pandit *Kashi Narain Malaviya*, for the applicants.

Dr. *Kailas Nath Katju*, for the opposite parties.

MUKERJI, J. :—This is a reference under rule 17 of the Kumaun Rules by the Local Government for the opinion of this Court.

The facts, which have given rise to this reference, are briefly these. A Hindu resident of Kumaun, by caste a Vaish, namely, Lachi Ram, died and he was

* Miscellaneous Case No. 277 of 1924.

succeeded by his wife Musammat Nimja. He left him surviving, besides the wife, a daughter and two daughter's sons. The daughter's sons were the defendants in this suit out of which this reference has arisen. At the time when Nimja died, three of the brothers of Lachi Ram were living, namely, Tula Ram, the plaintiff, and Parsi and Gangi, the respective fathers of the two other plaintiffs. The plaintiffs claimed that by the custom obtaining in Kumaun they were entitled to the property of Lachi Ram to the exclusion of his daughter's sons. To this claim the defendants filed a written statement and denied the existence of the custom. They pleaded that they were entitled under the Hindu law to succeed to the grandfather. They never stated that they had come from any other part of the country or that they had carried with them any local law or local custom.

The learned District Judge of Almora heard the evidence, discussed it and came to the conclusion that the evidence produced by the plaintiffs was not sufficient to establish the custom which they had pleaded. There was an appeal to the High Court of Kumaun, and the learned Commissioner, who presided over that Court, was of opinion that the plaintiff ought to succeed. It appears that the Local Government deputed Mr. Panna Lal, I.C.S., to inquire into and collect the customs that were prevailing in Kumaun. Mr. Panna Lal has accordingly written a book in which he has stated the different customs which he found prevailing in that area. The learned Commissioner was of opinion that in view of the fact that a record of custom was made by Mr. Panna Lal after an elaborate inquiry, he was entitled to accept the statements in the book as affording good *primâ facie* evidence of the law prevailing in Kumaun, in preference to the law as found in the Hindu text-books.

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He accordingly threw the burden of proof on the defendants to establish that they were entitled to succeed in the teeth of the Kumaun custom, namely, the custom which excluded a daughter or daughter's son from inheritance. The learned Commissioner also examined the evidence on record, and was satisfied that a custom had been established to his satisfaction.

The defendants went up to the Local Government and at their instance the present reference has been made.

The questions sent to us for answer are as follows :—

(1) Was the Commissioner right in refusing to apply the provisions of the *Mitakshara* law to a family of Vaishyas now resident in Kumaun, but who previously migrated from Rajputana? [Cf. *Jawahir Lal* v. *Jarau Lal* (1).]

(2) Was the Commissioner justified in accepting Mr. Panna Lal's book as a definite authority on customary law, and in throwing the burden of proof not on the parties alleging but on the parties denying a custom which is contrary to the *Mitakshara* law?

With reference to the first question, it will be noticed that it has been contended on behalf of the defendants that they were Vaishyas who originally resided in Rajputana and migrated to Kumaun. I have already indicated that in the written statement no such case was set up. There is no such case, no such pleading, and there was no issue on the point. In the circumstances, the Commissioner was right in accepting the statement of law contained in the report of Mr. Panna Lal and in declining to apply the provisions of the *Mitakshara* law.

It is to be mentioned that under the Hindu law itself, custom stands supreme to the written laws.

(1) (1924) I.L.R., 46 All., 192.

In the case of *Collector of Madura* v. *Mootioo Ramalinga Sathupathy* (1) their Lordships of the Privy Council said:—"Under the Hindu system of law clear proof of usage will outweigh the written text of law." It being the fact that the parties were residents of Kumaun, and it being the fact that Mr. Panna Lal's book purported to contain a statement of law prevailing in Kumaun, the Commissioner was right in applying what should be taken as a good *primâ facie* evidence of the local custom. If anybody wanted to plead that no such custom obtained or for any particular reason the local custom did not apply to him, it was for that party to say so specifically. It is true, as held in the case quoted in the letter of reference, namely, *Jawahir Lal* v. *Jarau Lal* (2), that when a Hindu migrates, he is entitled to carry his own law, that is to say, the personal law, from his home of origin to the new place. He may continue to observe those rules or laws or may abandon them; but where the law to be pleaded is different from the law prevailing in the locality, it must be on the party who pleads that law to say so. Under the circumstances, I am of opinion that the Commissioner was right in the way he acted.

Coming to the question No. 2, we have to say what is the weight to be attached to Mr. Panna Lal's book. I have already stated that Mr. Panna Lal was directed by the Local Government to hold an inquiry as to the customs prevailing in Kumaun. He was, therefore, acting under the orders of the Government and his inquiry was carried on under the provisions of section 35 of the Indian Evidence Act. We have numerous authorities to establish that entries as to customs recorded in the *wajib-ul-arz* are good evidence and admissible under section 35 of the Evidence Act. The reason is this that the record has been

(1) (1868) 12 Moo. I. A., 397 (436). (2) (1924) I.L.R., 46 All., 192.

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made after due inquiry. In the case of *Balgobind* v. *Badri Prasad* (1) their Lordships of the Privy Council found a single entry in a *wajib-ul-arz* enough to establish a custom that had been pleaded before them. If a *wajib-ul-arz* may be admitted into evidence and given the weight that has been attached to it, the record prepared by Mr. Panna Lal is certainly entitled to much more weight. The book written by Mr. Panna Lal will be admissible under section 57 of the Evidence Act without further proof that it is a book written by him. If we attach to Mr. Panna Lal's book the weight to which it is entitled, we must say that it is a definite evidence on customary law as prevailing in Kumaun. My answer to the rest of the question has practically been given in answering the question No. 1. To put it shortly, I would answer this question also in the affirmative and say that, in view of the circumstances, the Commissioner was justified in accepting Mr. Panna Lal's book and in throwing the burden of proof on the defendants.

DANIELS, J. :—I agree and merely desire to add a few words in consideration of the extreme importance of the questions involved in this reference. The first question is—

"Was the Commissioner right in refusing to apply the provisions of the *Mitakshara* law to a family of Vaishyas now resident in Kumaun, but who previously migrated from Rajputana?" [Cf. *Jawahir Lal* v. *Jarau Lal* (2).]

If the question had been put as an abstract proposition of law the answer to it admits of no doubt. The Privy Council in the case of *Balwant Rao* v. *Baji Rao* (3) lay down four propositions :—

First, that *primâ facie* a Hindu residing in any particular province of India is governed by the law of that province.

(1) (1923) I.L.R., 45 All., 413. (2) (1924) I.L.R., 46 All., 192.
(3) (1920) I.L.R., 48 Calc., 80.

Second, that if any such family migrates to another province it carries its own law with it.

Third, that any such family may renounce its original law and adopt the law of the province to which it migrates, but that such renunciation must be proved by evidence.

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Fourth, that the personal law which a migrating Hindu carries with him is the law as it stood at the time of the migration.

The question put by the Local Government is, however, whether *in this case* the Commissioner was right in refusing to apply the provisions of the *Mitakshara* law to a family of Vaishyas now resident in Kumaun, but who previously migrated from Rajputana. We have no hesitation in saying that he was right in so refusing and for the following reasons. First, it was no part of the case of the defendants that the family were governed by any different law from that prevailing among their caste in Kumaun nor was any issue framed on this point. Secondly, the statement that the parties originally migrated from Rajputana is based on the evidence of three witnesses, namely Thakur Das Sah, Bansi Lal Sah and Ram Lal Sah, and all these witnesses, while stating that their family migrated from Rajputana many generations ago, state at the same time that the family is at present governed by the customs prevailing in Kumaun. It may be noted further that these witnesses, though it is true that they belong to the same clan of *Jagati* Sahs as the parties, made no statement as to the family of the parties, but only as to their own family.

On the second question I also agree with my learned brother that the answer must be in the affirmative. It appears to me that the question as put

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involves a certain misunderstanding of what the Commissioner really did. Undoubtedly the burden of proving a custom at variance with Hindu law lies in the first place on the person who sets it up. The burden of proof is, however, liable to be shifted by the evidence adduced by the parties. If the plaintiffs produced *primâ facie* evidence of the existence of the custom the burden was thrown on the defendants to rebut it. In this case the plaintiffs did produce *primâ facie* evidence in the shape of Mr. Panna Lal's report. That report was clearly admissible in evidence under section 35 of the Evidence Act, being a public record made by a public servant in the discharge of his official duty. Where evidence is admissible, the weight to be attached to that evidence is a matter for the court which has to decide on the facts, but we are certainly not prepared to say that the Commissioner was wrong in attaching very great value to that evidence. It appears from the book itself that the record was prepared after an exhaustive inquiry, in the course of which as many as 20,000 witnesses were examined by Mr. Panna Lal and his assistant. The reason which led to Mr. Panna Lal being placed on special duty to prepare this record was that there was a danger of Kumaun customs being disregarded by the courts owing to the inability of parties to produce the necessary evidence in individual cases, and it would be a grave public misfortune if the courts were to be precluded from attaching to that record the value to which the circumstances under which it was prepared naturally entitle it.

The principles on which the record is admissible are precisely those on which an entry in a *wajib-ul-arz* is admitted as evidence of custom. The language

used by the Privy Council in *Ramkishore* v. *Jainarayan* (1) in dealing with a record of tribal custom prepared in the Gurgaon district in the Punjab applies with even greater force to Mr. Panna Lal's report. What the Commissioner did in this case was to treat the report as *primâ facie* evidence of the existence of the custom which it was open to the defendants to rebut, but which was sufficient to establish the plaintiffs' case unless and until it was rebutted. He held and rightly that it had not been rebutted; and further that there was other evidence of very great weight which went to establish the custom in question. He was fully entitled to accept the report as *primâ facie* evidence and, having so accepted, to throw on the other side the burden of rebutting it by other evidence. This is my answer to the reference.

BY THE COURT.—For the reasons given above we answer the first question in the affirmative. The second question as put makes an erroneous assumption and cannot, therefore, be answered by a simple affirmative or negative. Mr. Panna Lal's report was not admitted by the Commissioner as an authoritative statement of the law, but as a *primâ facie* evidence of a fact, namely, the existence of a custom. Our answer to that question, therefore, is that the Commissioner was right in accepting Mr. Panna Lal's report as *primâ facie* evidence of the existence of a custom, applicable to the community to which the parties belong, excluding daughters and daughters' sons from inheritance, and in throwing on the defendants the burden of rebutting it. We think that the costs of this reference should be borne by the applicants.

(1) (1921) I.L.R., 49 Calc., 120.