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been fixed as follows. It is necessary that shops should not be kept open at any other hour." It is noteworthy that the condition does not say that the shop should not, on any account, be closed during these hours.

It seems to me that the object of this condition is to prevent the sale of liquor outside the fixed hours. This condition cannot be interpreted as meaning that at no time between these two limits the shop should be closed, even temporarily. If that be the intention of the authorities, they ought to lay down the condition in more express terms.

In my opinion there was no breach of the condition in the licence. I accordingly accept this reference and setting aside the conviction and sentence, acquit the accused and direct that the fine, if paid, be refunded.

FULL BENCH.

Before Mr. Justice Banerji, Mr. Justice Young and Mr. Justice King.

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June, 5.

MUNICIPAL BOARD, BENARES (PLAINTIFF) *v.* KANHAIYA LAL AND OTHERS (DEFENDANTS).*

Custom—Whether question of fact or of mixed law and fact—Second appeal—Civil Procedure Code, section 100—*Substantial error or defect in procedure—Misreading or ignoring of important documentary evidence*—Haq-i-chaharum—*Custom in Benares city.*

A finding as to the existence or non-existence of a custom, in so far as it is a finding that a certain practice does or does not prevail, is a finding of fact. The question whether a prevailing practice has the essential attributes of a legally binding custom is a question of law.

A finding that it is not proved that owners of houses in a certain locality have usually, upon occasions of the sale of their houses, paid *zar-i-chaharum* to the owner of the site is a finding of fact, binding upon the High Court in second

* Second Appeal No. 1812 of 1926, from a decree of K. A. H. Sams, District Judge of Benares, dated the 8th of May, 1926, confirming a decree of Niraj Nath Mukerji, City Munsif of Benares, dated the 1st of June, 1925.

appeal, unless it is vitiated by some error of law. If it is found that *zar-i-chaharum* has usually been paid on demand, then a further question arises whether the usual practice is sufficiently ancient, uniform, certain, uninterrupted, etc., to constitute a custom having the force of law. This latter question is a question of law. A finding that a "custom" does not exist may, however, involve the determination of both questions.

But a finding of fact may be vitiated by some error of law. Misreading or ignoring of important documentary evidence amounts to a substantial error or defect in the procedure within the meaning of section 100 (1) (*c*) of the Civil Procedure Code and the High Court is justified in reversing the finding if it be of opinion that the reversal of the finding is justified on the merits.

The custom of *haq-i-chaharum* was held established in muhalla Kucha Champa Shahid of Benares city.

Dr. *K. N. Katju* and Mr. *M. L. Chaturvedi*, for the appellant.

Messrs. *Iqbal Ahmad* and *Mukhtar Ahmad*, for the respondents.

BANERJI, YOUNG and KING, JJ. :—The chief point for determination is whether the finding of the lower appellate court, that the existence of an alleged local custom has not been proved, is a finding of fact binding upon this Court in second appeal.

On the 5th of December, 1918, one Nepal sold his house situated in the city of Benares to Kanhaiya Lal, defendant No. 1. The Municipal Board of Benares, as owner of the site of the house, brought the suit out of which this appeal arises, against the buyer (defendant No. 1) and the representatives of the seller (defendants Nos. 2 and 3) claiming one-fourth of the sale price (*zar-i-chaharum*) on the basis of the local custom alleged to prevail throughout the city of Benares.

The principal defence was that the house is situated in the *shahr khas* (city proper) and the alleged custom of *zar-i-chaharum* does not prevail in the *shahr khas*, although it may prevail in certain mauzas which were formerly rural areas but have now been absorbed and included in the Municipal area.

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The trial court found upon the evidence that no custom of realising *zar-i-chaharum* exists in *shahr khas*, and dismissed the suit. The plaintiff appealed to the District Judge who, after remanding the case for findings upon certain issues, agreed with the trial court in finding that the plaintiff had failed to prove the existence of the alleged custom in the muhalla in dispute, namely muhalla Kucha Champa Shahid, which is in the *shahr khas*. The plaintiff now comes to this Court in second appeal and contends that the court below was wrong in finding that the alleged custom did not prevail in the locality in dispute.

For the respondent it is argued that the finding of the court below as to the non-existence of the alleged custom is a finding of fact which is binding upon this Court in second appeal. The appellant maintains that the question of the existence of a custom is a mixed question of law and of fact. So far as the facts are concerned, the findings of the court below, if properly arrived at, must be accepted; but the question whether upon the facts so found the existence of the custom is or is not proved is a question of law. The High Court therefore can and should examine the evidence and decide whether the evidence is not sufficient to prove the alleged custom. Each party cites numerous authorities in support of his contention.

The difficulty in deciding which of the two conflicting contentions is correct seems to us to arise partly from an ambiguity in the meaning of the word "custom". In one sense it means simply a usual practice. In another sense it means an established practice or usage having the force of law. That the inhabitants of a certain locality have, in certain circumstances, usually acted in a certain manner is, we think, a "fact". It is a state of things, or relation of things, capable of being perceived by the senses. It is impossible to determine whether a given finding is or is not a finding of fact unless we assign to the word "fact" a definite and uniform meaning, and we think that the word "fact" should be understood to have the meaning

assigned to it in section 3 of the Indian Evidence Act. So a finding that it is not proved that owners of houses in muhalla Kucha Champa Shahid have usually, upon occasions of the sale of their houses, paid *zar-i-chaharum* to the owner of the site, is in our opinion a finding of fact. If it is found that *zar-i-chaharum* has usually been paid on demand, then a further question arises whether the usual practice is sufficiently ancient, uniform, certain, uninterrupted and so forth to constitute a binding custom, that is, a custom having the force of law. This latter question must be a question of law. That a practice prevails is perceptible by the senses and therefore a "fact"; that the usual practice is legally binding is not a "fact". So the question whether it is legally binding is a question of law.

These propositions are abundantly supported by the rulings of their Lordships of the Privy Council. In *Mohesh Chunder Dhal* v. *Satrughan Dhal* (1) the question was whether the custom of lineal primogeniture had been proved as the rule of succession to an impartible *raj*. The Privy Council observed that the High Court were right in "considering that the question was merely a question of fact".

In *Muhammad Kamil* v. *Imtiaz Fatima* (2) the question was whether inheritance was governed by a family custom excluding female heirs. Their Lordships remarked "The existence of such a custom is a question of fact . . . "

In *Rup Chand* v. *Jambu Prasad* (3) the question was whether a custom, applicable to the parties, authorising the adoption of a married boy, had been established. Their Lordships laid down that "This is, strictly speaking, a pure question of fact determinable upon the evidence given in the case."

Similarly in *Anant Singh* v. *Durga Singh* (4), where the question was whether a family custom had been

(1) (1901) I.L.R., 29 Cal., 343. (2) (1909) I.L.R., 31 All., 537.
(3) (1910) I.L.R., 32 All., 247. (4) (1910) I.L.R., 32 All., 363.

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established according to which a step-brother was entitled to succeed equally with a full brother, their Lordships observed: "The question involved was one of fact only."

Lastly in *Palaniappa Chetty* v. *Sreemath Devasikamony Pandara Sannadhi* (1), where the question was whether a local custom had been proved, authorising a *shebait* to alienate *debottar* lands at a fixed rent, irrespectively of legal necessity or benefit to the estate, and two successive courts had found the custom to be proved, the Judicial Committee remarked at page 721: "No doubt two findings upon questions of pure fact must be accepted by this Board, but questions of the existence of ancient custom are generally questions of mixed law and fact; the Judge first finding what were the things actually done in alleged pursuance of custom, and then determining whether these facts so found satisfy the requirements of the law. This latter is a question of law, not fact." This exposition of the law by the highest authority is strongly relied upon by the appellant, but we cannot read it as supporting the contention that whenever the question is whether an ancient custom has been proved to exist then the High Court in second appeal can treat the whole question as a question of law and satisfy itself, by examination of the entire evidence, whether the finding of the court below as to the existence or non-existence of the alleged custom is in accordance with the weight of evidence. We take the pronouncement to mean that a finding that an ancient custom exists involves the determination of two questions. The first question is whether the alleged practice prevails or is usually followed. This is a question of fact. If the finding is in the affirmative then a second question arises,—whether the prevailing practice has the essential attributes of a custom having the force of law. This second question is a question of law, not of fact. If

(1) (1917) I.L.R., 40 Mad., 709.

the finding upon the first question is in the negative then no question of law arises for determination. A finding that a "custom" does not exist may, however, involve the determination of both questions. The court of first appeal may hold that the practice does prevail but it is not sufficiently ancient, or uniform, or uninterrupted etc. to constitute a custom modifying the ordinary law. In such a case there would be a question of law for determination in second appeal.

The Privy Council decisions seem to us so clear and consistent on the point in dispute that it might seem unnecessary to discuss the rulings of the High Courts in India, but as many such rulings have been cited before us we will refer to those which are most directly applicable.

The appellant relies strongly upon *Kumarappa Reddi* v. *Manavala Goundan* (1) decided by a Full Bench of the Madras High Court. The existence of a local custom was in dispute and two successive courts answered the question in the negative. The Full Bench held that they were precluded in second appeal from interfering with the findings of actual facts from which the existence of the custom might be inferred; but the inference as to the existence and the decision as to the validity of the custom are matters of law revisable by the High Court in second appeal. They expressly overruled *Kakarla Abbayya* v. *Raja Venkata Papayya Rao* (2) which laid down that where a question of custom is concerned the High Court in second appeal should examine the evidence bearing upon it and should consider the credibility of the evidence relied on and the weight due to it. WALLIS, C. J., expressly held that the High Court has no larger powers of interference with findings as to custom, in so far as they are findings of fact, than with any other findings of fact. The learned Judges held that, on the facts found by the District Judge, the existence

(1) (1917) I.L.R., 41 Mad., 374. (2) (1905) I.L.R., 29 Mad., 24.

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of the custom in the estate was proved. It seems that they were of opinion that the District Judge's findings of fact were, to some extent, vitiated by errors of law and therefore liable to interference in second appeal. It must be observed that the District Judge held that the custom used to prevail but it had been discontinued in all but a small portion of the lands in suit. We think this ruling is no clear authority for the view that a finding that an alleged practice does not prevail and never has prevailed in a given area is a finding of law and not a finding of fact.

The appellant also cites the Full Bench ruling of this High Court in *Ram Bilas* v. *Lal Bahadur* (1), but we do not think that it supports his contention. It was held that where a question arises as to the existence or non-existence of a custom and the lower appellate court has acted upon illegal evidence or on evidence legally insufficient to establish the custom, then 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. In that case the court below found the custom proved. In such cases the question of law necessarily arises as to whether the prevailing practice has the essential attributes of a legally binding custom. When their Lordships speak of evidence "legally insufficient" to establish a custom, we think they mean insufficient to establish a custom having the force of law, that is, insufficient to establish the legal requirements of such a custom.

In *Hazari Dulaiya* v. *Janki* (2) and *Rafiq* v. *Shankar Lal* (3) it was held that the question of the existence or non-existence of a custom was a question of law, or a mixed question of law and fact, and the High Court in second appeal can consider whether the finding is based upon sufficient evidence. In these cases, however, the point was not argued.

(1) (1908) I.L.R., 30 All., 311. (2) (1909) 3 Indian cases, 6.
(3) A.I.R., 1925 All., 718.

In *Ali Husain* v. *Syed Mazahir Husain* (1) the point was argued and it was held by a single Judge that it is always open to the High Court in second appeal to consider whether a finding on custom was based on sufficient evidence. This ruling purports to follow *Ram Bilas* v. *Lal Bahadur* (2), but seems to go further and we cannot reconcile it with the Privy Council decisions.

On the other hand we have numerous High Court decisions to the effect that a finding as to the existence or non-existence of a custom is essentially a finding of fact.

The question is very fully discussed in *Kailash Chandra Datta* v. *Padma Kisore Roy* (3), in which it was held that the question whether the facts found in any given instance prove the existence of the essential attributes of a custom is a question of law; the question whether such a state of facts has been proved by the evidence is merely a question of fact. This appears to us to lay down the law correctly, in the light of Privy Council rulings.

Similar opinions are expressed by learned Judges of this Court in *Hashim Ali* v. *Abdul Rahman* (4), *Baru Mal* v. *Tansukh Rai* (5), *Shakira Bibi* v. *Nandan Roy* (6), *Munshi* v. *Sahu Kedar Nath* (7), and *Ram Saran Das* v. *Pearey Lal* (8).

We think the preponderance of judicial opinion establishes the propositions that a finding as to the existence or non-existence of a custom, in so far as it is a finding that a certain practice does or does not prevail, is a finding of fact. The question whether a prevailing practice has the essential attributes of a legally binding custom is a question of law.

(1) A.I.R., 1924 All., 477.
(2) (1908) I.L.R., 30 All., 311.
(3) (1917) I.L.R., 45 Cal., 284.
(4) (1906) I.L.R., 28 All., 698.
(5) (1915) I.L.R., 37 All., 524.
(6) A.I.R., 1922 All., 241.
(7) S.A. No. 1356 of 1927. decided on 28th October, 1927, and confirmed in L.P.A. No. 2 of 1928.
(8) (1930) I.L.R., 53 All., 308.

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In accordance with these propositions we have to consider how far we are entitled in second appeal to interfere with the findings of the court below. The District Judge finds that it is not proved that the practice of *zar-i-chaharum* ever prevailed in muhalla Kucha Champa Shahid. Not a single instance of the realisation of *zar-i-chaharum* in that muhalla was proved. We think this must be held to be a finding of fact binding upon this Court in second appeal unless it can be shown that the finding is vitiated by some error of law.

Dr. *Katju* has forcefully argued for the appellant that the finding of the court below should be reversed as being vitiated by errors of law. One important branch of evidence consisted of a number of qabuliats executed in favour of the Collector or Municipal Board. The appellant relied on these as containing admissions of liability to pay *zar-i-chaharum*. The court below remarked that they are contracts and "do not refer to a custom whereby the dues are realised". We find that the learned Judge must have completely misread or ignored certain qabuliats which contain clear references to the custom. Ordinarily we should have sent certain issues to the court below for recording its findings, but as the whole of the evidence has been laid before us by the advocates for the parties, we proceed to examine it.

Serial No. 21 (of the appellant's list of documents) is a qabuliat of the year 1873 relating to the lease of a plot in muhalla Gyan Bapi (*shahr khas*) for building purposes. The lessee states: "When I or my successors sell the materials of the house, then out of the sale price we shall deposit to the Municipality one-fourth share on account of the right (*haq*) of the Municipality." This is a clear recognition of the customary *right* of the Municipality to *zar-i-chaharum*. The same language is to be found in serial Nos. 22 and 23 and other qabuliats also.

Serial Nos. 103 to 110 (of the respondent's list of documents) are qabuliats of the years 1859 to 1864 in favour of the Collector. In these the lessee recites: "If we sell the materials of the house we shall deposit in the Treasury one-fourth as *haq-i-zamindari* in pursuance of the custom prevailing in the city." The custom could not have been recognized in clearer terms. Two of these leases relate to Bengali Tola, which is a muhalla of *shahr khas*. The learned Judge was therefore clearly under a misapprehension when he said that the qabuliats do not refer to the custom. We think the misreading or ignoring of important documentary evidence amounts to a substantial error or defect in the procedure within the meaning of section 100(1)(*c*) of the Code of Civil Procedure and justifies this Court in reversing the finding if we hold such reversal justified on the merits.

Another substantial error in procedure was to place reliance upon an opinion expressed by the Law Committee of the Municipality in their resolution of the 4th of July, 1908. We do not know the names of the members of the Committee. None of them were called as witnesses. We think their opinion is inadmissible in evidence for the purpose of proving that the custom does not prevail.

As to the absence of proof of realisations we think the Judge was wrong in supposing that the Collector would exercise supervision over the collection of dues in respect of *Nazul* land made over to the Municipality for administration and control. The suggestion that realisations were made but were embezzled by servants of the Municipality seems probable enough.

The plaintiff produced eight decrees for *zar-i-chaharum* relating to muhallas of *shahr khas* but not to muhalla Kucha Champa Shahid. These show that the prevalence and validity of the custom have been judicially recognized in certain muhallas of *shahr khas*.

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This goes far to disprove the defendant's contention that the custom does not prevail in any part of *shahr khas*. He himself produced sale deeds relating to other muhallas in *shahr khas* for proving that no *zar-i-chaharum* had been paid, so it was common ground that the custom prevailing in other muhallas of *shahr khas* had an important bearing on the prevalence of the custom in the muhalla in dispute.

One of the strongest pieces of evidence in the plaintiff's favour is to be found in the admissions in the sale deeds of the house in suit. The sale deed of 1918 by which the house was transferred by Nepal to defendant No. 1 contains the words: "And be it known that the buyer is responsible for payment of the *zar-i-chaharum* due to the zamindar. I the seller shall have no concern with it." The earlier sale deed of 1903, whereby the house was sold to Nepal, also contains a clause stating that the buyer would be responsible for the "*haq-i-chaharum* zamindar". The language of the deeds contains no suggestion that the zamindar's right to *haq-i-chaharum* was in any way doubtful. We think that they amount to admissions of the zamindar's right, and the language does not support the theory that the covenants "were inserted by way of precaution" in case the zamindar really had such a customary right.

Upon consideration of the whole of the evidence we think the plaintiff has proved the prevalence of the practice in the locality in question. The validity of the practice as a custom having the force of law has received judicial recognition in so many cases that we must regard it as a legally binding custom. In the result we allow the appeal and decree the plaintiff's suit with costs throughout.