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in a position to deal with this contention, as there is nothing on the record to show whether any such expenditure has in fact been made, and, if so, for what purposes and to what extent. No question as to this was raised in the High Court, but their Lordships think that the matter may require further consideration, and that it will be safer to remit the appeal to the High Court for such further directions (if any) upon this point as the learned Judges after hearing the parties may deem necessary. Subject to this reservation, their Lordships think that both these appeals should be dismissed, and they will humbly advise His Majesty accordingly. There will be no order as to costs.

Solicitor for defendants: *H. S. L. Polak.*

Solicitors for plaintiffs: *T. L. Wilson & Co.*

APPELLATE CIVIL.

Before Justice Sir Shah Muhammad Sulaiman and Mr. Justice Niamat-ullah.

1930 *October*, 24.

RAM SARAN DAS (PLAINTIFF) *v.* PEAREY LAL AND OTHERS (DEFENDANTS.)*

Custom—Question of fact or question of law—Civil Procedure Code, section 100—Pre-emption—Sale of house in a town—Custom of pre-emption may exist in certain muhallas but not in others—Proof of custom in the particular muhalla concerned.

In a suit to pre-empt the sale of a house in muhalla Kauwa Tola of Bareilly city, on the basis of a custom of pre-emption alleged to prevail in the entire city and specifically in that muhalla, the evidence tended to show that the custom of pre-emption prevailed in certain muhallas of the city but not in others: *Held* that in such a case a muhalla was to be taken as a unit and the plaintiff had to establish the existence of the custom in the particular muhalla in question. Previous judgments holding that the custom of

*Second Appeal No. 919 of 1928, from a decree of Girish Prasad, Subordinate Judge of Bareilly, dated the 24th of February, 1928, confirming a decree of Suraj Prasad Dube, Additional Munsif of Bareilly, dated the 31st of May, 1927.

pre-emption in the town of Bareilly was established, but not showing that the question whether it applied to the whole town was directly in issue or specifically considered, and judgments holding the custom to exist in muhallas other than the one in question, did not furnish evidence legally sufficient to establish the custom in the muhalla in question.

The question of the existence of a custom is substantially a question of fact and the finding would ordinarily be binding in second appeal. Of course, if the court below has approached the question from a wrong standpoint or has thrown the burden of proof on the wrong party or has wrongly assumed a condition to be necessary which is not required, the finding may be vitiated. Similarly, if it has acted upon illegal evidence or acted upon evidence which is legally insufficient to show that the custom is general and of universal application, the finding may be interfered with. Or if in any other way a proposition of law is mixed up with the finding, the latter may become a mixed question of fact and law. Acts found to have been done in pursuance of the alleged custom would be facts, but the conclusion whether the facts found fulfilled the requirements of the law may be a question of law.

Dr. *K. N. Katju* and Mr. *Damodar Das*, for the appellant.

Mr. *G. S. Pathak*, for the respondents.

SULAIMAN and NIAMAT-ULLAH, JJ. :—This is a second appeal arising out of a suit for pre-emption by a Hindu pre-emptor of a house sold which is situated in muhalla Kauwa Tola in the city of Bareilly. In the plaint the plaintiff alleged that a custom of pre-emption prevailed in the entire city of Bareilly and especially in muhalla Azamnagar, whereof a number of "muhallas" including Kauwa Tola formed part. The existence of the custom of pre-emption was denied by the defendants. The court of first instance framed the issue, "Is there any custom of pre-emption in the muhalla in suit", and found that no such custom was established. In the grounds of appeal before the District Judge the plaintiff urged that the finding of the lower court that the custom of pre-emption did not exist in muhalla Kauwa Tola was erroneous. The learned Judge's judgment also shows that he applied his

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mind principally to the question whether the custom of pre-emption alleged to obtain in the said muhalla (Kauwa Tola) did or did not exist. He agreed with the first court and held that it was not established.

The question of the existence of a custom is substantially a question of fact, and the finding would ordinarily be binding on us in second appeal. Of course, if the court below has approached the question from a wrong standpoint or has thrown the burden of proof on the wrong party or has wrongly assumed a condition to be necessary which is not required, the finding may be vitiated. Similarly, if it has acted upon illegal evidence or acted upon evidence which is legally insufficient to show that the custom is general and of universal application, the finding may be interfered with. Or if in any other way a proposition of law is mixed up with the finding, the latter may become a mixed question of fact and law. Acts found to have been done in pursuance of the alleged custom would be facts, but the conclusion whether the facts found fulfilled the requirements of the law may be a question of law.

The learned advocate, in this case, urges that the learned Judge has approached the question from a wrong standpoint and has erred in law in throwing the burden on the plaintiff to prove the existence of the custom in the particular locality, viz., muhalla Kauwa Tola, and has ignored the evidence relating to the prevalence of such a custom in the surrounding "muhallas". If such were the case, the finding would naturally be vitiated and it would be our duty to examine the whole evidence afresh.

It is possible to interpret the judgment of the lower appellate court as implying that the evidence of the existence of the custom in the surrounding "muhallas" should be altogether ignored and that the plaintiff is bound to show instances of pre-emption in that very muhalla. At the same time, it is possible

that the learned Judge merely meant to hold that such evidence was not legally sufficient to establish the custom in the "muhalla" in question. In this state of doubt we think it desirable to briefly examine the important pieces of evidence that have been adduced by either party.

In favour of the plaintiff there is a judgment of the Agra High Court of 1866, in which there was a remark that the custom of pre-emption in the town of Bareilly was established. The judgment does not show that the question whether it applied to the whole town of Bareilly or not was directly in issue. There is a similar remark in the judgment of the District Judge of the year 1914; but that remark also is a general observation and there was no specific issue as to whether the custom prevailed in the whole town of Bareilly. There is also a similar remark in the judgment of the first court in a suit which was finally decided by the High Court in 1921, which was partially endorsed by the District Judge, but the actual finding of the High Court did not turn on the existence of such a custom in the whole town of Bareilly. These judgments are, to some extent, in favour of the plaintiff, who also relies on a sale deed of 1855, in which there is a mention that the vendee, who was a resident of muhalla Azamnagar, known as Kauwa Tola, was the pre-emptor. The deed, however, does not show whether the right of pre-emption was based on the existence of any custom or of any private contract between the parties. The deed is therefore not of much importance.

As against these we have a judgment of the Subordinate Judge of Bareilly of the year 1885 in which the existence of the custom of pre-emption in muhalla Kauwa Tola itself was negatived. The judgment is in Urdu and is couched in a somewhat vague language. It is possible that the reasoning of the learned Subordinate Judge was not perfect, but there

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can be no doubt that in that suit the claim of pre-emption brought by a Hindu resident in muhalla Kauwa Tola on the strength of an alleged custom failed. We also find that in a judgment of 1927 the District Judge of Bareilly held that no such custom of pre-emption prevailed in muhalla Kucha Sita Ram situated in the town of Bareilly and adjoining Kauwa Tola. The judgments relied upon by the plaintiff with regard to other muhallas also show that attention was concentrated on the existence or non-existence of such a custom in those particular muhallas.

We must, therefore, accept the finding of both the courts below that there is no universal custom established for the whole town of Bareilly. It appears that the custom has been found to prevail in some muhallas but not in all. This being so, a muhalla is to be taken as a unit. As already pointed out, the frame of the issues, the grounds of appeal before the District Judge and the way in which the question was approached by him, go to show that stress was laid on behalf of the plaintiff on the existence of such a custom in muhalla Kauwa Tola. The evidence on the existence of custom in the surrounding muhallas cannot be of great weight when we find that at least in one of the adjoining muhallas, namely muhalla Kucha Sita Ram, it does not prevail.

If we confine our attention to the evidence which relates to muhalla Kauwa Tola itself, we find that on the one hand there is the vague recital in the sale deed of 1855, and on the other there is a judgment of the Subordinate Judge of 1885. The learned Munsif has also observed that several sale deeds were written in the muhalla but no instance of a claim of pre-emption has been shown.

We, therefore, think that even if the finding of the lower appellate court were not to be binding on us as a finding of fact, we should accept the concurrent conclusions of the two courts. The appeal is accordingly dismissed with costs.