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ing it, the conduct of the Mukhtar was certainly reprehensible; but the question was one of law, and was not free from some difficulty, and the Mukhtar concerned was an inexperienced junior practitioner. When specifically ordered by the court that he should produce the document, he did produce it, though under protest. We would, therefore, direct that no action be taken on account of his failure to produce the document at the first opportunity. We, however, decline to quash the order directing him to produce the document. Let the case be returned.

APPELLATE CIVIL

Before Sir Shah Muhammad Sulaiman, Chief Justice and Mr. Justice Bennet

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NIHAL CHAND AND ANOTHER (DEFENDANTS) *v.* BHAGWAN DEI (PLAINTIFF)*

Privacy, right of—Customary right—General custom of province—Judicial notice—Not necessary to allege and prove existence of such custom in the locality—Evidence Act (I of 1872), section 57.

It is well established and recognized that a customary right of privacy exists generally in these provinces, and it is open to a court to take judicial notice under section 57 of the Evidence Act of the general prevalence of such a custom having the force of law. It is, therefore, not necessary that such custom should be alleged and proved by evidence produced in each case to establish it.

Bhagwan Das v. *Zamurrad Husain* (1), disapproved.

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

Mr. *Shiva Prasad Sinha*, for the respondent.

SULAIMAN, C.J., and BENNET, J.:—This is a defendants' appeal arising out of a suit brought by the plaintiff for the closing up of a large window in the upper storey opened recently by the defendants, on the ground that her right of privacy was infringed inasmuch as her

*Appeal No. 27 of 1934, under section 10 of the Letters Patent.

(1) (1929) I.L.R., 51 All., 986.

courtyard and house were overlooked. The first court dismissed the suit, relying mainly on certain observations made in the case of *Bhagwan Das* v. *Zamurrad Husain* (1); but the lower appellate court has reversed that decree, holding that the right of privacy based on social custom and parda system is quite different from the right of privacy based on natural modesty and human morality, and that the latter is not confined to any class, creed, colour or race, and it is the birthright of a human being and is sacred and should be observed, though the right should not be exercised in an oppressive way. That decree has been affirmed by a learned Judge of this Court.

In appeal the learned counsel for the defendants has first urged before us that there being no finding that the plaintiff is the owner of the house occupied by her she has no *locus standi* to maintain the suit. It has been found by the courts below that the plaintiff has been occupying this house for the last quarter of a century, that her possession has never been challenged during this period and that she is not in wrongful possession of this house at all. Even if she were not the owner, she would have a right as occupier to maintain the suit under section 4 of the Indian Easements Act.

The next contention urged in appeal is that in view of the observations made in the case referred to above, the right of privacy cannot be allowed unless it is affirmatively urged and proved in each case that there is a custom of privacy prevailing in the particular locality. The case of *Bhagwan Das* (1) was not one in which the whole of the plaintiff's house or a courtyard or even the whole of a room was overlooked by the new windows and doors. But it was possible to see from the defendant's window into the plaintiff's window. No doubt the learned Judges made some observations suggesting that the right of privacy may not now be in full force after the lapse of nearly half a century since the case of *Gokal Prasad* v. *Radho* (2) was decided, but in the special

(1) (1929) I.L.R., 51 All., 986. (2) (1888) I.L.R., 10 All., 358.

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circumstances of that case they did not feel called upon to consider that point. Apparently the attention of the learned Judges was not drawn to the fact that there have been numerous cases in this Court even subsequent to *Gokal Prasad's* case in which such a right of privacy has been recognized even without strict proof of the existence of a custom in the particular locality.

In *Abdul Rahman* v. *Emile* (1) EDGE, C.J., and KNOX, J., held that the customary right of privacy which prevailed in various parts of the North-Western Provinces was a right which attached to property and was not dependent on the religion of the owner thereof. In that case the right of privacy was recognized in Landour. The learned Judges pointed out that on the question of privacy the defendant's plea that the law recognized no such right of privacy as was claimed was not sound and that the law does recognize the right of privacy in these provinces when established by custom, and followed *Gokal Prasad* v. *Radho* (2).

In the case of *Abdul Rahman* v. *Bhagwan Das* (3) KNOX, J., upheld the right of privacy, even though some other portion of the plaintiff's house was actually overlooked from the defendant's roof. The learned Judge observed: "The primary question will be, does the privacy in fact and substantially exist, and has it been and is it in fact enjoyed? If it is found that it did substantially exist and was enjoyed, the next question would be, was that privacy substantially or materially interfered with by acts done by the defendant, without the consent or acquiescence of the person seeking reliefs against those acts?" In that case, however, it was admitted that in the town of Meerut there was a local custom in favour of privacy.

In the case of *Jamil-uddin* v. *Abdul Majeed* (4) RAFIQ, J., held that even apart from the evidence as to the existence of a right of privacy, it had been laid down in *Gokal Prasad's* case (2) that at any rate in these provinces

(1) (1893) I.L.R., 16 All., 69.
(2) (1888) I.L.R., 10 All., 358.
(3) (1907) I.L.R., 29 All., 582.
(4) (1915) 13 A.L.J., 361.

the custom of parda has for centuries been strictly observed by all Hindus except those of the lowest classes and by all Muhammadans except the poorest.

In *Fazal Haq* v. *Fazal Haq* (1) IQBAL AHMAD and SEN, JJ., held that a customary right of privacy within certain limitations exists in the North-Western Provinces and a material interference with such a right is an actionable wrong and affords a good cause of action to the person or persons affected thereby, and that in view of the social conditions of this country and as the direct result of the custom which has descended from olden times, the right of privacy has taken too deep a root to be dislodged by any *à priori* reasoning.

In *Chhedi Ram* v. *Gokul Chand* (2) another Bench of this Court, of which one of us was a member, held that even the existence of a public lane in between the houses of the parties would not destroy such a right of privacy.

Unfortunately these earlier cases were not brought to the notice of the Bench which decided *Bhagwan Das's* case (3). In the case of *Tika Ram Joshi* v. *Ram Lal Sah* (4) it was conceded that by local custom a right of privacy does exist in the cities and plains of these provinces, and it was only argued that no such custom exists in towns and villages situated in the hills.

When a particular custom is of general prevalence and is commonly recognized, it is open to a court to take judicial notice of such custom having the force of law under section 57 of the Indian Evidence Act, and it is therefore not necessary that there should be evidence produced in each case to establish such a custom. Indeed in many villages where the custom has been so well recognized that no one has dared to infringe it, there might be no instance to prove that the custom was denied and upheld on a previous occasion. We, therefore, think that the view taken by the learned Judge of this Court that the suit was rightly decreed was correct.

The appeal is accordingly dismissed with costs.

(1) (1927) 26 A.L.J., 49.
(2) (1928) I.L.R., 50 All., 706.
(3) (1929) I.L.R., 51 All., 986.
(4) [1935] A.L.J., 432.