APPELLATE CIVIL

Before Sir John Thom, Chief Justice, and Mr. Justice Ganga Nath

1940
August, 13

NARAIN SINGH (PLAINTIFF) *v.* NET RAM AND OTHERS (DEFENDANTS)*

Admissibility in evidence—Certified copies of sale deeds to prove a custom of sale of ryots' houses—Evidence Act (I of 1872), section 13—Custom, existence of—Finding of fact.

Certified copies of sale deeds of ryots' houses in a village are admissible in evidence, without formal proof of the sale deeds, to prove instances of sales in support of the existence of a custom of such sales in the village.

The question of the existence of a custom is a question of fact, and a finding that the custom exists is a finding of fact.

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

Messrs. *Panna Lal* and *L. M. Roy*, for the respondents.

THOM, C.J., and GANGA NATH, J.:—This is a plaintiff's appeal arising out of a suit brought by him and the plaintiffs respondents against the defendants respondents to recover possession of two rooms, shown in red colour and marked as A. B. C. D. in the plan attached to the plaint. These rooms are situated in village Pabsara. The plaintiffs' case was that Kallu was allowed to occupy these rooms as a licensee about 50 years ago. On his death, his brother Tej Singh, defendant No. 1, also lived in these rooms as a licensee. In 1924, Tej Singh sold these rooms to Net Ram, defendant No. 2. The sale was invalid and the plaintiffs, who are the zamindars of the site of these rooms, were entitled to possession of these rooms. The defendants *inter alia* contended that there was no license, that there was a custom prevailing in the village under which the ryots were entitled to sell their houses and that the sale made by defendant No. 1 to defendant No. 2 was valid.

The trial court found that the license set up by the plaintiffs had not been established, that the plaintiffs were owners of the site in dispute as zamindars, that

*Second Appeal No. 102 of 1938, from a decree of Bindbasni Prasad, Additional Civil Judge of Bulandshahr, dated the 13th of November, 1937, confirming a decree of Brij Nandan Lal, Munsif of Khurja, dated the 12th of December, 1936.

Kallu was in possession of the house as a ryot and that there was a custom under which the ryots were allowed to sell their houses. These findings have been confirmed by the learned Additional Civil Judge on appeal.

It has been urged by learned counsel for the appellant that the custom set up by the defendants has not been proved. The defendants have produced four original sale deeds and seven certified copies of sale deeds. Some of these copies are more than 30 years old. These documents show that transfers have been made in this village from 1901.

It was contended that the certified copies were not admissible in evidence. This contention is not sound, because these certified copies were not produced to prove the original sale deeds or the genuineness thereof. They were produced simply to prove the instances of the transfers which were made. It was open to the defendants to prove the custom by citing instances before the court showing any transaction in which such a custom was asserted or recognized as well as particular instances in which such a custom was claimed or recognized, as laid down in section 13 of the Evidence Act. It was observed in *Kallu Mal* v. *Ganeshi Lal* (1): "The fact that certain sale deeds or mortgage deeds were executed and were duly registered and each contained assertions of the existence of the right of transfer would in our opinion be in itself admissible, quite independent of the fact whether the genuineness of the signatures on the originals of those documents has been formally proved in this case or not."

These copies were produced simply to prove the existence of such instances. There was no question as to whether any particular individual had executed a particular document. In our opinion the copies were admissible in evidence to prove instances of the sales in support of the existence of the custom.

It was further contended that the evidence produced by the defendants was not sufficient to prove the exis-

(1) A.I.R. 1936 All. 119.

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tence of the custom set up by them. There is no hard and fast rule as to how much evidence would be sufficient to prove the existence of a custom. This question depends entirely on the nature of the evidence as well as on the circumstances of each case. In some cases a large number of instances of transfers may be insufficient, while in others a much smaller number may be quite sufficient. In the present case the evidence produced by the defendants is quite sufficient to prove the existence of the custom. It is a small village of only 200 houses with a population of about 1,500 inhabitants. In such a small village a large number of instances of transfers can hardly be expected. As already stated, transfers have been made by ryots from 1901 without any objection on the part of the zamindars. Some of the sale deeds produced by the defendants were witnessed and attested by some of the plaintiffs themselves. Some of the sales have been made in favour of some of the zamindars of this very mahal and some have been made in favour of some zamindars of other mahals. It is inconceivable that if the custom of transfer of houses by the ryots had not been sanctioned by the zamindars they would have allowed the tenants to transfer these houses in their own favour and in favour of the zamindars of other mahals. The defendants have produced three zamindars, Durga Singh, Jagannath and Tungal Singh, who have deposed to the existence of the custom. This evidence is very important, because the evidence of these zamindars is against their own interests. The testimony of the plaintiffs' own witness Behari Singh is evidence that the custom exists. He is a lambardar and he has himself purchased a house from one Harbans's wife, who was neither a tenant nor a zamindar. All this evidence clearly proves that there is a custom in the village which entitles the ryots to transfer their houses.

It may be observed here that it was not necessary to examine all this evidence, as the question whether a custom exists or not is one of fact, as observed by their Lordships of the Privy Council in several cases, and the

concurrent findings of both the courts were quite clear and sufficient on the point. In *Raja of Ramnad* v. *Mangalam* (1) the question was whether there was a custom by which a tenant was relieved of rent in respect of land allowed to lie fallow. Their Lordships of the Privy Council observed: "The District Judge in the present case has held that there was a custom to relieve the tenant of rent in respect of land allowed to lie fallow. Their Lordships are bound by the finding of fact of the District Judge as regards the existence of the custom."

In *Anant Singh* v. *Durga Singh* (2) the question was as to the right of a step-brother in a Hindu family to share equally with a brother of the whole blood in the succession of a deceased brother. At pages 372-373 their Lordships observed: "The learned Judicial Commissioners, in their Lordships' opinion, gave excellent reasons for refusing to regard the evidence adduced by the plaintiff as sufficient to establish such a special custom in the family as to rebut the ordinary presumption that the Mitakshara law prevailed . . . . The question involved was one of fact only, and their Lordships see no reason whatever to differ from the opinion of the learned Judicial Commissioners."

In *Muhammad Kamil* v. *Imtiaz Fatima* (3) the question was whether the rights of the parties were governed by the Muhammadan law and not by a family custom, as had been alleged. At page 570 their Lordships observed: "The existence of such a custom is a question of fact, and as to this question the courts in India concurred in their judgment. On this point, therefore, their Lordships see no reason why they should not follow their usual practice of accepting concurrent findings of fact."

We agree with the finding of the learned Additional Civil Judge that there is a custom in the village which entitles the ryots to transfer their houses. There is no force in the appeal. In the result the appeal is dismissed with costs.

(1) (1930) I.L.R. 53 Mad. 597(601). (2) (1910) I.L.R. 32 All. 363.
(3) (1909) I.L.R. 31 All. 557.