1935

NAWAB MIRZA MOHAMMAD SADIQ ALI KHAN v. M. NIAZ AHMAD

appears to have been consistently followed in the late Court of the Judicial Commissioner of Oudh and it may be noted that this view was taken even though the ruling of *Bhawani Prasad* v. *Kutub-un-nissa* (1), was cited. In our opinion we should follow the practice of the Judicial Commissioner's Court which seems to us moreover, if we may say so with respect, to be perfectly sound.

King, C.J. and Ziaul Hasan, J.

We therefore order the appellant to pay a further Court fee on the future interest calculated up till the date of presentation of the appeal.

Let the office report the proper Court fee payable. The appellant is allowed one week's time for paying the Court fee after the amount is notified to him by the office.

APPELLATE CIVIL

Before Mr. Justice Bisheshwar Nath Srivastava

1935 *July* 25

KUNWAR SHYAMA KUMAR SINGH (PLAINTIFF-APPELLANT) *v.* SAT NARAIN AND OTHERS (DEFENDANTS-RESPONDENTS)*

Appeal—Second appeal—Custom, proof of—Quantum of evidence, whether sufficient to establish custom, is a question of fact—Wajib-ul-arz—*Custom prejudicial to* riayas *recorded behind their back in* wajib-ul-arz—*Evidentiary value of such* wajib-ul-arz.

The weight or value to be attached to particular evidence and the question whether the quantum of evidence before the Court is or is not sufficient to establish a custom are matters entirely within the province of a Court of first appeal. This of course is quite different from the question, whether the facts found in any given instance prove the existence of the essential attributes of a custom or usage which is a question of law and can be properly considered in second appeal. *Manna Lal* v. *Thakur Jai Indra Bahadur Singh* (2), referred to.

*Second Civil Appeal No. 59 of 1934, against the decree of Dr. Ch. Mohammad Abdul Azim Siddiqi, Subordinate Judge of Hardoi, dated the 24th of November, 1933, upholding the decree of S. Abul Qasim Zaidi, Munsif North, Hardoi, dated the 7th of March, 1933.

(1) (1905) I.L.R., 27 All., 559. (2) (1928) 26 O.C., 386.

1935

KUNWAR SHYAMA KUMAR SINGH v. SAT NARAIN

Where the residents of a *bazar,* which is a big commercial centre, are not agricultural tenants but reside in it for the purpose of carrying on business and are not parties to the preparation of a *wajib-ul-arz,* the value to be attached to customs prejudicial to their interests and recorded *ex parte* at the instance of zamindars cannot be the same as in other cases in which the zamindars are responsible for dictating customs which concern themselves. *Krishna Kumar* v. *Manzoor Ali* (1), referred to.

Messrs. *P. N. Chaudhri* and *T. N. Kaul,* for the appellant.

Mr. *M. Wasim,* for the respondents.

SRIVASTAVA, J.:—This is a plaintiff's appeal against the decree dated the 24th of November, 1933, of the learned Subordinate Judge of Hardoi affirming the decree dated the 7th of March, 1933, of the learned Munsif North of that place. It arises out of a suit the taluqdar of Hathaura for possession of the site of a ryot's house in bazar Kachhauna.

The plaintiff's case was that he was the owner of village Kachhauna including the bazar and that one Fateh occupied the house in suit situate in the bazar as a ryot. Admittedly Fateh sold the house to defendants 1 and 2 on the 28th of October, 1930, and the said defendants demolished the old house and built a new house on the site of the old one. The plaintiff also pleaded that Fateh had no right to sell the house and that the sale by him constituted an abandonment which gave the plaintiff a right of re-entry. The defendants denied the plaintiff's ownership of the bazar. They also disputed the alleged custom against the transferability of houses occupied by the residents of the bazar. They further pleaded that bazar Kachhauna was a big commercial centre and that every resident of the bazar was the owner of the house. The learned Munsif held that the bazar was owned by the plaintiff. He further found that though bazar Kachhauna was a big commercial centre yet it was governed by the terms of the

(1) (1929) 7 O.W.N., 333.

village *wajib-ul-arz*. He was, however, of opinion that the provisions of the *wajib-ul-arz* applicable to the case were ambiguous, and after an elaborate examination of the evidence afforded by a large number of instances of transfers which had taken place in the bazar, he came to the conclusion that in the bazar of Kachhauna houses were transferable. The learned Subordinate Judge has agreed with all the above findings of the learned Munsif.

Srivastava, J.

It has been contended on behalf of the plaintiff-appellant that many of the instances of transfers relied on by the defendants were cases of mortgages or sales of structures of houses. It was argued that if these instances are excluded from consideration the residue of instances is quite insufficient to establish the custom of transferability. In my opinion the Courts below were not oblivious of the nature of the transactions which the appellant would seek to exclude from consideration. The learned Munsif has carefully anlysed the documents produced in evidence and classified the mortgage deeds separately from the sale deeds. The learned counsel for the appellant admits that even after excluding the documents in question there are no less than sixteen sale deeds evidencing out and out transfers of houses in the bazar. I am therefore of opinion that there is quite ample evidence to support the finding. I am further of opinion that the question of the sufficiency or insufficiency of evidence is not a question which can be gone into by a Court in second appeal. I think that the weight or value to be attached to particular evidence and the question whether the quantum of evidence before the Court is or is not sufficient to establish a custom are matters entirely within the province of a Court of first appeal. This of course is quite different from the question, whether the facts found in any given instance prove the existence of the essential attributes of a custom or usage which is a question of law and can be properly considered in

1935

KUNWAR SHYAM KUMAR SINGH v. SAT NARAIN

Srivastava, J.

second appeal, *Manna Lal* v. *Thakur Jai Indra Bahadur Singh* (1).

It was also argued that the learned Subordinate Judge was wrong in holding that the provisions of the *wajib-ul-arz* were ambiguous. The argument proceeded that on a proper interpretation of the *wajib-ul-arz* it should be held to clearly prohibit the riyaya from making any transfers of the house and that in this view of the matter the alleged instances of transfers in breach of the clear provisions of the *wajib-ul-arz* should not be allowed to derogate the custom. I regret I find myself unable to accede to this argument. The relevant portion of the *wajib-ul-arz* provides that persons who built their houses with their own money are the owners of the materials (*amla*), but have no concern with the land. It is absolutely silent as regards the power of transfer. I am not therefore prepared to disagree with the view of the two Courts below that the *wajib-ul-arz* is not altogether free from ambiguity.

I should also note that the residents of the bazar which is a big commericial centre are not agricultural tenants but reside in it for the purpose of carrying on business. They are also not parties to the preparation of the *wajib-ul-arz*. In *Krishna Kumar* v. *Manzoor Ali* (2) I expressed the opinion that in a case in which the tenants are not parties to the preparation of a *wajib-ul-arz*, the value to be attached to customs prejudicial to their interests and recorded *ex parte* at the instance of zamindars cannot be the same as in other cases in which the zamindars are responsible for dictating customs which concern themselves. These remarks apply with greater force to a case like the present in which the riyayas are not agricultural tenants.

For the above reasons I am of opinion that no sufficient grounds have been made out for my interfering with the concurrent findings of the two lower Courts

(1) (1923) 26 O.C., 386. (2) (1929) 7 O.W.N., 333.

as regards the alleged custom. The result therefore is that the appeal fails and is dismissed with costs.

Appeal dismissed.

APPELLATE CRIMINAL

Before Mr. Justice Bisheshwar Nath Srivastava

SOBHA AND ANOTHER (APPELLANT) *v.* KING-EMPEROR (COMPLAINANT-RESPONDENT)*

1935 *July* 26

Indian Penal Code (Act XLV of 1860), section 299, Explanation 2 and section 304—Simple hurt—Death due to septic meningitis due to neglect in treatment and wrong remedies—Explanation 2 of section 299, I. P. C., applicability of.

Where a person causes simple injury to another but the latter subsequently dies of septic meningitis which developed on account of the use of wrong remedies and neglect in treatment, the death cannot be said to have been caused by the bodily injury within the terms of Explanation 2 to section 299 of the Indian Penal Code and the person causing the injury cannot be convicted of culpable homicide not amounting to murder under section 304 of the Indian Penal Code.

Dr. *J. N. Misra*, for the appellant.

The Government Advocate (Mr. *H. S. Gupta*), for the Crown.

SRIVASTAVA, J.:—This is an appeal by two brothers Sobha and Tilak who were charged under section 304 of the Indian Penal Code for the offence of culpable homicide not amounting to murder of their uncle Badri. The learned Additional Seesions Judge of Bahraich has convicted Sobha under section 304 of the Indian Penal Code and sentenced him to 8 years' rigorous imprisonment but has found Tilak guilty only under section 323 of the Indian Penal Code and sentenced him to six months' rigorous imprisonment.

The case for the prosecution is briefly as follows: On the 31st of July, 1934, about one or two *gharis* before

*Criminal Appeal No. 173 of 1935, against the order of Pandit Damodar Rao Kelkar, Additional Sessions Judge of Bahraich, dated the 5th of March, 1935.