APPELLATE CIVIL.

Before Mr. Justice Abdul Raoof and Mr. Justice Martineau.

1921

Dec. 5

PIRBHU, ETC. (PLAINTIFFS)—*Appellants,*

versus

TOTA, ETC. (DEFENDANTS)—*Respondents.*

Civil Appeal No. 2685 of 1918.

Custom—Pre-emption—Town of Fatehabad, District Hissar—Proof of custom—previous judgments.

Held, that the plaintiff had failed to prove the existence of the custom of pre-emption in the town of Fatehabad.

A judgment based upon a compromise or confession, though of some probative force, cannot be placed upon the same footing as one in which after contest a custom was held to be proved or negatived.

Imperial Oil Soap and General Mills Company, v. *Misbah-ud-Din* (1), followed—

Bhagwanti v. *Sohan Lal* (2), referred to.

Second appeal from the decree of Rai Sahib Lala Sri Ram, Poplai, District Judge, Hissar, dated 12th June 1918, affirming that of Lala Khan Chand, Subordinate Judge, 2nd Class, Hissar, dated 5th November 1917, dismissing the claim.

NANAK CHAND, Pandit, for Appellants.

JAGAN NATH, for Respondents.

The judgment of the Court was delivered by—

MARTINEAU, J.—The plaintiffs have sued for pre-emption of a house in the town of Fatehabad in the Hissar District. The Lower Courts have concurred in dismissing the suit on the ground that the existence of the custom of pre-emption in that town has not been proved. The views of the trial Court was that the custom had originally existed, but had been abrogated, and that it was dying out in the seventies and eighties, since when there have been no instances of the exercise of the right.

(1) (1921) I. L. R. 2 Lah. 83. (2) 111 P. R. 1908.

The Lower Appellate Court has not expressed an opinion on this point, but has only decided that the plaintiffs have not succeeded in proving that any custom of pre-emption prevailed in the town of Fatehabad when the Pre-emption Act of 1913 was passed, and the point for determination in this second appeal is whether that decision is correct.

It is pointed out that Fatehabad is a town of Muhammadan origin, but this fact does not materially help the plaintiffs, as it does not relieve them from the burden of proving the existence of the custom.

A judgment in a contested suit of 1885 is relied upon, but as observed by the learned District Judge that suit was decided with reference to a decision in another suit, a copy of the judgment in which has not been filed, and it appears that the claim was based on a condition in the Wajib-ul-arz, which is not the case here. The judgment of 1885 is therefore of no value in the present case as evidence of the existence of the custom.

There are three cases of the years 1874, 1882 and 1890, in which decrees for pre-emption of houses at Fatehabad were passed on compromises, but as has been held in *Imperial Oil Soap and General Mills Company* v. *Misbah-ud-Din* (1) a judgment based upon a compromise or confession, though of some probative force, cannot be placed on the same footing as one in which after contest a custom was held to be proved or negatived.

The oral evidence as to the existence of the custom is scanty, and the statements of witnesses as to instances of the exercise of the right are not supported by documents, except the statement of Dulla, who says he acquired a house from one Sultan by right of pre-emption and produces the sale-deed, dated the 18th December 1895, in support of his statement. That also was a case of the vendee admitting the right of pre-emption, and it is possible that the reason why Sultan resold the house to Dulla was that he got a higher price than the price he had himself given. He sold the house to Dulla for Rs. 200, and although the same price was entered

(1) (1921) I. L. R. 2 Lah. 88.

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in the deed by which he purchased the house in November 1895, only Rs. 150 were paid at the time of the registration of the deed, the remaining Rs. 50 being entered as having been received before.

Counsel for the appellants has referred to *Bhagwanti* v. *Sohan Lal* (1) in which the custom of pre-emption was held to be proved only on the strength of a few judgments in cases in which the question of custom was not fought out. But that case related to the sale of a house in Delhi City, and it was pointed out that there was ample authority for the proposition that the custom prevails very generally throughout the City of Delhi. The ruling referred to is quite inapplicable to present case.

The plaintiffs have in our opinion not succeeded in proving the existence of the custom of pre-emption in the town of Fatehabad, and we accordingly dismiss the appeal with costs.

A. N. C.

Appeal dismissed.

(1) 116 P. R. 1908.