

APPELLATE CIVIL.

Before Mr. Justice Moti Sagar.

LEKH RAJ AND RAMJI DAS (PLAINTIFFS)

Appellants

versus

INDER MAL AND SAIN (DEFENDANTS)—Respondents.

Civil Appeal No. 1478 of 1922.

Custom—Pre-emption—Mohalla Bagarian in the town of Kaithal, district Karnal—necessity of proving existence of the custom in the particular sub-division of the town.

Held, that it had not been proved that the custom of pre-emption prevails in Mohalla Bagarian in the town of Kaithal.

Held also, that where a town is divided into sub-divisions, the pre-emptor must prove affirmatively the existence of the custom of pre-emption in the particular sub-division in which the property is situate, and that the *onus* is not discharged by proof of the existence of the custom in neighbouring sub-divisions.

Melaram v. Mussamat Bando (1), and *Prabh Dial v. Bhikkho Mal* (2), followed.

Jai Devi v. Naubat Rai (3), *Muhammad Husain v. Ghulam Muhammad* (4), and *Bul Chand v. Lekhu* (5), referred to.

Held further, that a judgment based upon a compromise or confession, though of some probative value, cannot be put upon the same footing as one in which after contest a custom has been held to be proved or negatived.

Imperial Oil Soap and General Mills Company v. M. Misbah-ud-Din (6), followed.

Second appeal from the decree of F. W. Skemp, Esq., District Judge, Karnal, dated the 11th March 1922, reversing that of Chaudhri Kanwar Singh, Munsif, 1st Class, Kaithal, dated the 13th June 1921, and dismissing the plaintiffs' suit.

SHAMAIR CHAND, for Appellants.

JAGAN NATH, for Respondents.

(1) 59 P. R. 1911

(2) (1921) 61 Indian Cases 822.

(3) 71 P. R. 1905.

(4) 78 P. R. 1911.

(5) 139 P. W. R. 1911.

(6) (1921) I. L. R. 2 Lsh. 83.

MOTI SAGAR J.—This is a second appeal against a decision of the District Judge of Karnal, dated the 11th March 1922, dismissing the plaintiffs' suit for possession by pre-emption of a house situate in *Mohalla Bagarian* of the town of Kaithal, in the Karnal District. The contentions raised by the defendant were that the house was not situate in *Mohalla Bagarian*, that the custom of pre-emption did not prevail in the *Mohalla* in question and that the price of Rs. 900 mentioned in the sale-deed was neither paid nor fixed in good faith. The trial Court found against the defendant on all these points and decreed the plaintiffs' claim. On appeal the District Judge, however, was of opinion that the plaintiffs had failed to establish that the custom of pre-emption prevailed in *Mohalla Bagarian*, and he accordingly dismissed the suit. The plaintiffs have now come up in second appeal to this Court through Mr. Shamair Chand after obtaining a certificate from the District Judge, while Mr. Jagan Nath has appeared on behalf of the respondents.

The sole question for determination is whether the custom of pre-emption prevails in the *Mohalla* of Kaithal where the house sold is situate. In support of the contention that the custom of pre-emption prevails in the *Mohalla* in question, the learned counsel for the appellants relies upon two things. Firstly, he cites certain published judgments of the Chief Court from which it appears that the custom of pre-emption exists in some of the neighbouring sub-divisions. In one of the judgments there is an expression of opinion to the effect that pre-emption prevails very generally throughout the town of Kaithal. It is argued that in these circumstances the *onus* of proving the non-existence of the custom of pre-emption in this *Mohalla* is upon the defendant and that he has failed to discharge that *onus*. I am unable to accept this contention. As held in *Melaram v. Mussammat Bando* (1), a case which has been cited with approval in another recent case reported as *Prabh Dial v. Bhikhoo Mal* (2), it may now be taken as settled that where a town is divided into sub-divisions, the pre-emptor must prove affirmatively the existence of the

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custom of pre-emption in the particular sub-divisions in which the property is situate and that the *onus* is not discharged by proof of the custom in the neighbouring sub-divisions. The two authorities, *Jai Devi v. Naulai Rai* (1), and *Muhammad Husain v. Ghulam Muhammad* (2), relating to *Mohalla Tayyab* and *Mohalla Pansarian* in the town of *Kaithal*, and the sale-deed of 1883 relating to *Mohalla Boran* to which reference has been made in the course of arguments, are consequently not of any great help to the plaintiffs. As to the prevalence of the custom of pre-emption in the town generally, reference may be made to *Bul Chand v. Lekhu* (3), in which it was found that the custom of pre-emption did not exist in *Mohalla Marhat Khan*, another sub-division of the same town. The observations made by the learned Judge in *Jai Devi v. Naulai Rai* (1), that pre-emption prevails very generally in the town are, therefore, not strictly in accordance with the facts.

Next, reliance has been placed on a decision by *Lala Amrit Lal*, Munsif, dated the 16th December 1913, in the case of *Durga Parshad v. Sita Ram* by which the claim of the plaintiff for possession of a house by pre-emption in this very *Mohalla* was decreed. It is argued that this is a very strong piece of evidence in favour of the plaintiffs and that it completely shifts the *onus* of proof on the defendant. A reference to the written statement filed by the defendants in that case, however, makes it quite clear that there was no contest between the parties as to the right of pre-emption, the vendee having admitted that the pre-emptor in that case was entitled to claim the house, and it is clear, as laid down in *Imperial Oil Soap and General Mills Company v. M. Misbah-ud-Din* (4), that 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 is held to be proved or negatived.

The next piece of evidence upon which reliance has been placed is a judgment of *Lala Achhru Ram*, dated the 9th October 1920, in the case of *Joti Ram v. Hisari*. This case also relates to *Mohalla Bagarian*,

(1) 71 P. R. 1905.

(3) 189 P. W. R. 1911.

(2) 78 P. R. 1911.

(4) (1921) 1 L. R. 2 Lah. 83.

but it will be observed that the judgment in that case practically proceeds on the basis of the earlier judgment of 1913 in which the right of pre-emption was admitted.

The defendant, on the other hand, has produced some evidence to show that many sales have taken place in this *Mohalla* without the exercise of the right of pre-emption. In these circumstances I do not think that one or two solitary instances of the admission of the custom supported by a few instances in the neighbouring sub-divisions are sufficient to discharge the *onus* of proving the existence of the custom in *Mohalla* Bagarian which lay heavily upon the plaintiffs. In my opinion the District Judge was right in holding that the plaintiffs had failed to establish the prevalence of the custom in this *Mohalla*, and I dismiss the appeal with costs.

A. B.

Appeal dismissed.

REVISIONAL CRIMINAL.

Before Mr. Justice Scott-Smith.

NIZAM DIN—Petitioner,

versus

THE CROWN—Respondent.

Criminal Revision No. 1761 of 1922.

Indian Penal Code, section 283—Extortion—Nikah Khawan refusing to perform the marriage ceremony unless he was first paid a fee.

Held, that a *Nikah Khawan* is not bound to read a *Nikah* for a person unless he chooses to do so, and it is no offence for him to demand any fee he likes for doing so.

Case reported by D. Johnstone, Esquire, Sessions Judge, Multan, with his No. 216-J. of 1922.

The report of the Sessions Judge runs as follows:—

The accused on conviction by *Khon Sahib Maulvi Ghaus Bakhsh*, exercising the powers of a Magistrate, 1st class, in the Muzaffargarh District, was sentenced by

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Feb. 16.