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repel this evidence; and in a case like this, it is important that the trial Court, before which the defence evidence is to be heard, should not mis-direct itself but should be clearly apprised of the principles by which that evidence is to be examined.

For these reasons, I set aside the present conviction and sentence, and remand the case to the lower Court for fresh trial from the stage when charge was framed, after framing a new charge in accordance with the directions contained above. To this extent only the appeal is accepted.

A. N. K.

Appeal accepted.
Case remanded.

APPELLATE CIVIL.

Before Beckett J.

CHUNI LAL AND ANOTHER (PLAINTIFFS) Appellants,

versus

BEANT SINGH AND OTHERS (DEFENDANTS) Respondents.

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May 10.

Regular Second Appeal No. 400 of 1937.

Custom — grant of residential sites in abadi deh — *Non-proprietors of village Bulewal, Tahsil Batala, District Gurdaspur — License — Interpretation of — Presumption — Surrender of proprietary rights by proprietary body —* Onus Probandi.

Held, that the plaintiffs, on whom the *onus* rested, had failed to rebut the presumption that the grant of residential sites to non-proprietors in village Bulewal, Tahsil Batala, District Gurdaspur, had throughout been made in the form of a license which did not permit transfer without the consent of the proprietary body, and they also failed to prove that the members of the proprietary body had surrendered their proprietary rights which entitled the non-proprietors to claim partition of the *abadi*.

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Second appeal from the decree of Lala *Purshotam Lal, Senior Subordinate Judge, Gurdaspur, with enhanced appellate powers, dated 8th January, 1937, affirming that of* Lala *Ishar Das, Subordinate Judge, 1st Class, Gurdaspur, dated 6th August, 1936, dismissing the plaintiff's suit.*

DURGA DAS, for Appellants.

C. L. AGGARWAL, for Respondents.

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BECKETT J.—This is a suit relating to the rights of persons who occupy houses in an ordinary Punjab village, but do not belong to the proprietary body. Two such persons from village Bulewal in the Batala Tahsil of the Gurdaspur District are seeking a declaration to the effect that their village has grown to such an extent that it should more properly be called a town and that the non-proprietors residing therein have accordingly acquired full rights of ownership over both their houses and the sites which they occupy, with complete power to alienate them as they please. The suit has been brought against the proprietors of the village; and as these proprietors are taking steps towards the partition of the *abadi deh*, there is a further prayer that they may be restrained from doing so.

A number of documents were produced to show that the houses of non-proprietors in the village have from time to time been transferred as though their occupiers had the right to alienate. The nature of these documents will be examined later. For the moment, it is sufficient to say that they were not sufficient to convince the trial Court that the non-proprietors had any customary right of alienating their residences in the *abadi deh*. It was further held that the plaintiffs had failed to prove that the present size of Bulewal justifies the name of a town. The

Senior Subordinate Judge, on first appeal, came to the same conclusion. He also examined the general aspect of the question and expressed the opinion that there could hardly be a custom which would entitle one person to alienate property belonging to another. The decree of the trial Court dismissing the suit was accordingly confirmed. Although he was doubtful whether there was any matter involved which could properly be called a custom, the Senior Subordinate Judge granted the plaintiffs the usual certificate to enable them to come up in second appeal.

There are a large number of recorded decisions relating to the rights of non-proprietors in the villages of Northern India, some of which may possibly seem to suggest that the customary rights of villagers are liable to change as the villages grow into towns; and it is evident that these decisions have influenced the way in which the plaintiffs have framed and presented their claim. Since any suggestion of change is contrary to the generally accepted ideas as to the essential nature of " custom," the remarks of the lower appellate Court with regard to the use of this word raise a question which needs some preliminary examination.

In cases of this kind, the word " custom " is generally used with reference to sections 5 and 6 of the Punjab Laws Act, 1872, which run as follows :—

" 5. In questions regarding succession, special property of females, betrothal, marriage, divorce, dower, adoption, guardianship, minority, bastardy, family relations, wills, legacies, gifts, partitions, or any religious usage or institution, the rule of decision shall be—

" (*a*) Any custom applicable to the parties concerned, which is not contrary to justice, equity, or good conscience, and has not

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been by this or any other enactment altered or abolished, and has not been declared to be void by any competent authority.

"(*b*) The Muhammadan Law in cases where the parties are Muhammadans, and the Hindu Law, in cases where the parties are Hindus, except in so far as such law has been altered or abolished by legislative enactment, or is opposed to the provisions of this Act, or has been modified by any such custom as is above referred to."

"6. In cases not otherwise specially provided for, the Judges shall decide according to justice, equity, and good conscience."

When we are dealing with the right of a non-proprietor to sell the house which he occupies without obtaining the consent of the proprietary body, it would be difficult to bring the case under section 5, and it would have to be decided under section 6. Section 6 is, however, subject to section 7, which deals with the application of custom in another way. This section runs thus:—

"7. All local customs and mercantile usages shall be regarded as valid, unless they are contrary to justice, equity or good conscience, or have, before the passing of this Act, been declared to be void by any competent authority."

There are, in fact, two classes of customs which may govern the disposal of property in a Punjab village. In the first place, there are certain rules having the force of law, such as the rules of succession, which cannot ordinarily be changed by the will of the

parties concerned, and most rules of this kind are covered by section 5. In the second place, we have another distinct set of principles, which are not so much rules of the kind which regulate such subjects as succession or marriage, but are more akin to trade usages. These customs or urages are described in Pollock and Mulla's Indian Contract Act at page 63 of the sixth edition, in a passage which may be here quoted.

"But there is a class of cases, of considerable importance in England, where the parties are presumed to have contracted with tacit reference to some usage well known in the district or in the trade, and whatever is prescribed by that usage becomes an additional term of the contract, if not contrary to the general law or excluded by express agreement. Such terms are certainly implied, as resulting not from the words used, but from a general interpretation of the transaction with reference to the usual understanding of persons entering on like transactions in like circumstances. . . . The ground on which usages of this kind are enforced is not that they have any intrinsic authority, but that the parties are deemed to have contracted with reference to them. They need not, accordingly, be ancient or universal. It is enough that they are in fact generally observed by persons in the circumstances and condition of the parties."

It seems to be this class of local customs to which reference is made in section 7 of the Punjab Laws Act, in which it is to be observed that such customs are coupled with mercantile usage. In the Punjab villages, it is a matter of presumption that the *abadi deh* is a common property of the proprietary body until partition has taken place; and when an outsider is

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allowed to settle permanently in the village and build a house in the *abadi deh*, it is further to be presumed that he does so by license from the proprietors. It is improbable that the terms of this license are ever put into words, but they are known to the parties concerned and are to be implied from local usage much in the same way as certain terms will be read into any other transfer of property, unless there is evidence to the contrary. When a non-proprietor is granted a site for building in a village, one of these implied terms is that he may not transfer it, though it will be allowed to descend to his own family. The addition of such a term to the grant may be called a local custom; but it would probably be better to refer such customs as "usages" in order to distinguish them from customs which are governed by section 5 of the Punjab Laws Act.

It is a question of fact whether such a restriction on transfer is to be taken as an implied term when a site is granted to a non-proprietor in any particular village. Generally, it will be presumed that the proprietary body intends the grant to be subject to a restriction on transfer and that this condition has been accepted by any non-proprietor accepting the grant. The presumption may be rebutted in a variety of ways. It may be shown that the course of dealings between proprietors and non-proprietors over a long term of years has been such as to indicate that no restriction on transfer is implied when a grant is made. It is quite possible that the growth of a village or its absorption into a large town may lead the proprietary body to acquiesce in a system which allows the free transfer of residential sites. As observed in the passage quoted above, usages of this kind are not immutable. I agree, however, with the learned Subordinate Judge that very

strong evidence will be needed to show that the proprietors of a village have surrendered their privileges. It is a presumption of law that each man must be expected to act in a manner most favourable to his own interests, and instances intended to show the surrender of these privileges must exclude the possibility of any other construction.

When instances in the present case are examined, I do not think that they bear out the proposition that grants to non-proprietors in village Bulewal must be taken as having been made without the usual reservation against transfer. The only instances which occurred before the present century are those relating to Court sales. There are seven such instances, of which four belong to the present century, and in most of these instances the property was bought in by one of the village proprietors. With regard to Court sales it is to be observed that these are enforced transfers, so they do not necessarily throw any light on the terms of the original grant, and it is only the subsequent conduct of the proprietors which is relevant. If the house of a non-proprietor is put to sale and is bought in by one of the proprietors, no question arises of allowing a stranger to come into the village. In these circumstances, it would hardly be worth while for the proprietary body to bring a suit for a declaration that the site is not liable to transfer. There is only one instance of purchase by a non-proprietor at a Court sale before 1933; and since it is evident that efforts have been made to find every possible instance of transfer, the fact which emerges most prominently is that no non-proprietor appears to have thought of transferring his residence of his own accord until recent years.

The next series of instances are those relating to mortgages, none of which are earlier than 1910. The

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effect of the mortgage of 1910 was to let a proprietor in possession. There are two mortgages of 1914 and one of 1915, which purport to be mortgages with possession, but which were apparently intended to leave the original occupier in possession as a lessee. The other mortgages are of 1926 and later. Here again there are no earlier instances of any transfers which would let a stranger into the village; there is only one instance before 1926 which would result in an ostensible change of possession, and even this would only pass the possession to a proprietor.

The instances of a voluntary transfer of possession otherwise than by mortgage are extremely few. There are two instances of gift in 1907 and 1914. Both of these are gifts to near relatives, one of whom had previously been a proprietor of the house himself. Since it is the practice for these houses to descend to collaterals, there is nothing in such gifts which would necessarily call for action on the part of the proprietors. There are three instances of outright sale, but these occurred in 1934 and 1935.

From examination of these instances, which appear at first sight to be numerous, it will be found that there is only one instance of transfer of possession other than transfer to a proprietor or near relative until quite recent years; and of the transfers to proprietors, all except one were the result of Court sales. There does not appear to have been any attempt on the part of the non-proprietors to assert an unrestricted right of disposal until 1934. Since there are over 200 resident non-proprietors in the village, the paucity of true instances tends to strengthen the presumption against an unrestricted power of disposal rather than the reverse.

There is one other matter which requires consideration. Evidence has been given to show that a number of *pucca* houses have been built by non-proprietors in the village and it is argued that they would not have done so unless they had full rights of ownership in the sites below. Although I am aware that there are conflicting views on this point, I do not myself think that this argument has a very great weight. It is well known that the partition of an *abadi* is of rare occurrence, and the possession of a non-proprietor is not likely to be disturbed so long as the family lasts. Unless he has any intention of transferring his business elsewhere, it does not seem likely that the remote possibility of a partition would deter him from making the best possible provision within his means for the accommodation of himself and his family.

For these reasons, I am of opinion that the plaintiffs have failed to rebut the presumption that the grant of residential sites to non-proprietors in village Bulewal has throughout been made in the form of a license which does not permit transfer without the consent of the proprietary body, and that they have also failed to prove that the members of the proprietary body have surrendered the proprietary right which would enable them to claim partition of the *abadi*. The decree of the trial Court is accordingly confirmed and the appeal dismissed with costs.

Counsel for the plaintiffs has asked for the grant of a certificate to enable him to present a Letters Patent Appeal. This prayer is granted.

A. N. K.

Appeal dismissed.