

Nathwa and anr. Vs. Raghubans Narain Singh and anr.

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Court : Allahabad

Decided On : Apr-10-1934

Reported in : AIR1934All890; 150Ind.Cas.758

Appellant : Nathwa and anr.

Respondent : Raghubans Narain Singh and anr.

Judgement :

1. This appeal arises out of a suit for recovery of possession of a certain plot; in the village site and for demolition of certain constructions by the defendants the main question that arose in this suit was whether the existence of a custom has been proved in the village of Asaura by which the occupiers of houses in the village could transfer their house together with the sites upon which the houses stand. The trial Court and the lower appellate Court held concurrently that the alleged custom had not been proved. The case came in second appeal before the learned Single Judge of this Court and he considered the evidence relating to the alleged custom and concurred in finding that the existence of the alleged custom had not been proved.

2. It has been argued before us that a sufficient number of instances have been proved to justify a finding that the alleged custom was proved and that it is open to this Court in second appeal to weigh the whole of the evidence and come to a finding whether the custom had been proved.

3. On the question of law as to how far this Court in second appeal is bound by a finding of the lower appellate Court regarding the existence or non-existence of an alleged custom, we think that the learned Single Judge took a perfectly correct view. He referred to the ruling of the Full Bench in the case of *Municipal Board of Banarea v. Kanhaiya Lal* 1931 All. 199. In that case the Bench remarked:

The first question is whether the alleged practice prevails or is usually followed. This is a question of fact. If the finding is in the affirmative, then the second question arises, whether the prevailing practice has the essential attributes of a custom having the force of law. This second question is a question of law, not of fact. If the finding upon the first question is in the negative, then no question of law arises for determination. A finding that a 'custom' does not exist may however involve the determination of both questions. The Court of first appeal may hold that the practice does prevail, but it is not sufficiently ancient, or uniform, or uninterrupted, etc., to constitute a custom modifying the ordinary law. In such a case there would be a question of law for determination in second appeal.

4. We take that the learned Judges meant by this pronouncement that when the lower appellate Court finds that no instances are proved in which the alleged custom has been exercised or recognised, then that is a finding of fact which is ordinarily binding upon this Court in second appeal, if not vitiated by any error of law, and in such a case, no further question of law could arise. In the case which was decided by the Full Bench, the District Judge found that the alleged practice of *zarichaharum* had never been proved to prevail in the mohalla in question and not a single instance of realization of *zarichaharum* in that mohalla had been proved. That finding must no doubt be treated as a finding of fact, namely, that not a single instance of the exercise of the alleged custom had been proved. In the case before us however the lower appellate Court held that certain instances had been proved in which the alleged custom had been followed or recognised but such instances were not sufficiently numerous or ancient or uniform to constitute a custom following the ordinary law. In such a case a question of law arises in second appeal and we think that the learned single Judge was perfectly right in weighing the whole evidence and coming to his own conclusion whether the lower appellate Court had rightly decided that the alleged custom had not been proved.

5. We have also considered the question of proof of custom, but find no good grounds for disturbing the finding of the learned Single Judge. It is true that on three occasions the local Courts have held that the alleged custom in this village was proved. On the other hand, it has been twice held by this High Court on appeal that the custom did not exist. In the present case also we have now three concurrent findings of the trial Court and the lower appellate Court and a learned Single Judge of this Court to the same effect that the alleged custom has not been proved. In our opinion, these findings are correct and we see no reason to take a contrary view. ,>We accordingly dismiss the appeal with costs.

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