(1936) 11 AHC CK 0017

Allahabad High Court

Case No: None

Kalicharan Chowdhari and Others		APPELLANT
	Vs	
Raja Beni Madho Prasad Singh and Others		RESPONDENT

Date of Decision: Nov. 26, 1936

Hon'ble Judges: Harries, J

Bench: Single Bench

Final Decision: Allowed

Judgement

Harries, J.

This is a defendants'' appeal against a decree of the lower appellate Court confirming a decision of the Court of first instance decreeing the plain, tiff''s claim. The plaintiff was the zamindar of a village and claimed to recover Rs. 1,125 as zarichaharum due to him on the sale of a grove made by one of the defendants in favour of other defendants on 28th March 1927. He further claimed a sum of Rs. 405 as interest upon the amount due making a total claim of Rs. 1,530. The defendants denied that there was a custom in this village under which zarichaharum could be claimed and further pleaded that in any event no interest should be granted upon the sum of Rs. 1,125 which had been claimed as the principal sum due. Both the lower Courts held that the custom had been established and that the plaintiff was entitled to the amount claimed by way of principal and interest. Against the decision of the lower appellate Court the defendants have preferred this second appeal. It is common ground that if such a custom exists the plaintiff would be entitled upon the facts of this case to a sum of Rs. 1,125, but it is contended that there was no evidence before the Court by which the zamindar was entitled to any sum by way of zarichaharum upon the sale of a grove situate within the village. To establish the custom the plaintiff produced the wajibularz for the year 1289 P. and there is an entry in this wajibularz in these words:

This has also been agreed that if anybody sells a grove or trees or tenancy or houses at that time the Raja Sihib is entitled to one-fourth of the price.

2. It is to be noted that this entry is not in the body of the document but is an entry which was made later in the margin in red ink. There is no evidence as to when this entry was made, but it is not contended that the entry is not a perfectly genuine one. The wajibularz for 1289 F. undoubtedly contains this entry which I must assume in the absence of any evidence to the contrary to be a genuine entry. The wajibularz was produced from the proper custody and no suggestion has been made that anything has been added to it which should not have been added. Obviously the marginal1 entry was made later than the entries in the body of the document, but that may be due to the fact that the information was not before the officers concerned when the material in the body of the document was written. On the other hand it may be that somehow or other this entry was omitted and had to be written in the margin. However, it is useless to speculate, as to how this entry came to be made in the margin, but having regard to the fact-that it is not suggested that it is a forgery, and to the fact that the document is produced from the proper custody, I am bound to regard this entry as part of the wajib-ul-arz. As the entry is part of the wajib-ul-arz it is in my view prima facie evidence of the custom alleged. This case is very similar to the case in Chunni Vs. Mt. Bibi Rafiunnisha Begam, In that case the wajib-ul-arz of a village recorded a custom that certain ryots settled in the village had to pay a fixed sum to the zamindar as bau (the fee of a landlord when a daughter of one of his tenants is married) on the occasion of each marriage. It was held that the wajib-ul-arz was prima facie a record of custom and it was not necessary to corroborate the entry by evidence of specific instances. It was further held that where a custom is proved to exist, that custom must be held, to continue and the onus of proving discontinuance lay upon the defendant and as the defendant had not pleaded that the custom had fallen into desuetude the wajib-ul-arz was good evidence of the custom.

3. It is contended in the first place by the appellants that in the circumstances of this case the wajib-ul-arz of 1289 F. is not evidence of a legal custom which this Court can recognize and enforce. It is pointed out that the wajib-ul-arz for 1247 F. was tendered in evidence and that in that wajib-ul-arz no reference whatsoever is made to this custom. Consequently it is argued that this alleged custom must have arisen between the years 1247 F. and 1289 F. and that being so, it cannot possibly be said to be immemorial. It is contended that this is obviously something quite recent and of such a nature that the Court could take no judicial notice of it and enforce it. In my view the fact that this custom is not recorded in the wajib-ul-arz of 1247 F. is not evidence that such a custom did not exist. The absence of any reference to the custom in that wajib-ul-arz certainly shows that the matter was not brought to the notice of the officers concerned in drawing up the wajib-ul-arz, but I cannot infer that because a custom was not recorded in that particular wajib-ul-arz no such custom existed at that time. If the appellants argument were sound then before a

wajib-ul-arz could be used as evidence of custom it would have to be shown that every wajib-ul-arz from the time that such documents first came to be prepared contained entries relating to such custom. Failure to record a custom in a particular wajib-ul-arz may be due to a number of reasons and I cannot draw the inference that because this custom was not recorded in the wajib-ul-arz of 1247 F. that it did not exist at that time. It is recorded in the wajib-ul-arz of 1289 F. and that entry is prima facie evidence of the existence of the custom. I cannot infer that because the custom is first recorded in 1289 F. that it came into existence some time between 1247 F. and 1289 F. It is recorded in 1289 F. as a custom which obtains in this particular village and that being so it is in my view prima facie evidence of that custom. It has further been argued that the actual words used in the entry suggest an agreement or contract rather than custom. The opening words of the entry are "This has also been agreed." In my view these words " This has also been agreed " mean that the persons appearing before the settlement officer were all agreed that: such a custom existed. The words do not: suggest that the parties have entered into a contract about the matter. In Returaji Dubain v. Pahlwan Bhagat (1911) 33 All. 196 this Court held that:

An entry in a wajib-ul-arz is a prima facie; record of a custom rather than a contract and that the fact that such a word as iqranama is used at the beginning or end of it is not enough to make the entry one of contract and not of custom.

4. In my view there is nothing in the wording in the wajib-ul-arz to suggest that it does not purport to be a record of a custom existing in the village. The defendants failed to rebut this prima facie evidence of custom, and that being so the lower Court rightly held that the custom of zar-i-chaharum had been established. In those circumstances the defendants who were the vendors and vendees of the grove in question were bound to pay one-fourth of the price, viz. Rs. 1,125. The learned Civil Judge also gave the plaintiff interest upon this sum from the date of the sale, but in my view this decision cannot stand. There is no evidence that, any demand was made by the plaintiff before the suit was instituted and in the absence of such evidence of demand the plaintiff cannot, in my view, be given interest before this suit was instituted. The granting of interest from the date of; sale of the grove cannot be justified under either the Contract Act or the Interest Act, but it is conceded that interest would run from the date of the suit. The granting of interest from the date of sale cannot possibly be supported and the sum of Rs. 405, decreed as interest, cannot be sustained. In my judgment the plaintiff was entitled to recover in this suit a sum of Rs. 1,125 and simple interest at the rate of 6 per cent, per annum from the date of the suit until the date of the decree and thereafter until payment. The appeal therefore is allowed to this extent and to this extent only: that the plaintiff is only to have interest on the sum of Rs. 1,125 from the date of the suit until the date of payment. The parties will pay and receive costs in this Court and in the Courts below according to their success or failure.