Gireeshchandra Bhattacharjya Vs Rabeendranath Das

Court: Calcutta High Court

Date of Decision: June 23, 1930

Citation: AIR 1935 Cal 17

Hon'ble Judges: Suhrawardy, J; Costello, J

Bench: Full Bench

Judgement

Costello, J.
This is an appeal from a decision of the third Additional Subordinate Judge, Sylhet, reversing a decision of the Munsif, First

Court, Habiganj. The suit was one for pre-emption and for certain other reliefs. The learned Munsif dismissed the suit on the ground that the

necessary formalities had not been complied with and that there had been delay on the part of the plaintiff. The lower appellate Court came to the

conclusion that all the necessary formalities had been complied with and there had been no unreasonable delay and he agreed with the finding of

the learned Munsif that there is a custom of pre-emption among the Hindus in the District of Sylhet. The only point seriously argued before us was

upon the question whether or not the lower appellate Court was right in holding that such a custom does exist among the Hindus in that district. The

other questions raised are all questions of fact and are concluded by the findings of the lower appellate Court. It was argued before us on behalf of

the appellants that there was no evidence before the lower appellate Court on which the learned Subordinate Judge could properly find that the

custom of pre-emption does exist amongst the Hindus of the District of Sylhet and he further urged that the matter is still an open question and must

be decided in every case which comes before the Court solely upon the evidence given in that particular case.

2. We are not disposed to hold, even upon that view of the matter, that the learned Subordinate Judge was wrong in coming to the conclusion at

which he arrived, because he did in fact have before him two documents which were marked as Exs. 7 and 8-one of which was a judgment of this

Court and the other a judgment of a Munsif. Both of them decided that, in fact, the custom of pre-emption must be taken to exist amongst the

Hindus of the District of Sylhet. We desire however to deal with this matter on a much broader basis. If the contention of the learned advocate for

the appellants is correct, it would follow that, even at this time of day, it would be necessary for the plaintiff, in every case where the customary

right of preemption is asserted, to prove his case upon this point to the satisfaction of the Court before whom the matter is being tried. If that were

so, it is difficult to see at what point the matter would be so concluded that this question would pass out of the region of controversy. As against the

contention put forward on behalf of the appellants, it urged on behalf on the respondent that this question of the existence of the right of pre-

emption amongst the Hindus of Sylhet is no longer one to be decided on the evidence given in the particular case, because the existence of such a

custom has already been judicially recognized in such a way as to put the question outside the region of evidence and to put it into the category of a

rule of law.

3. It is a well known principle that a custom becomes a law when it receives judicial recognition. No doubt, before a custom can have the force of

law it must come up to a certain standard of general reception. A custom of that kind when judicially recognized has the force of law. I may recall

that Professor, Holland in his well known treatise on jurisprudence goes a step further than that even, for he is of opinion that a custom may be law

even before it receives judicial recognition and all that the Court does is to decide the fact that such a custom exists. Without pausing to consider

this view of the matter however it is sufficient for us to say that once the Court has decided, as a fact, that a custom does exist then that custom

obtains the force of law. The actual point we now have to decide was considered by this Court and a judicial decision given with regard to it in the

case of Jadu Lal v. Sahu Janki Koer (1908) 35 Cal 575 where it was held that when existence of the custom, under which Hindus have the same

right of preemption under the Mahomedan law as Mahomedans in any district, is generally known and judicially recognized it is not necessary to

assert or prove it. This case went on appeal to the Judicial Committee of the Privy Council and there Mr. Ameer Ali made some observations

which in effect recognize the principle just enunciated Jadu Lal v. Janki Koer (1912) 39 Cal 915. As long ago as the year 1864 similar

observations were made by Bayley and Macpherson, JJ. in the case of Inder Narain v. Mahomed Nazirooddeen (1864) 1 WR 234. There the

learned Judges in the course of their judgment said:

In the first place we observe as to the question of custom, that the fixed rule of law, as laid down by the High Court, is that where the custom of

the right of pre-emption under Mahomedan law has been adopted by Hindus in any particular district, it shall be there recognized as a legal

custom.

4. That means that once it has been established to the satisfaction of the Court as a matter of fact that the right of pre-emption under Mahomedan

law has been adopted by the Hindus of any particular district the custom shall thenceforth have the force of law and Courts before whom the

matter arises must take judicial notice of its existence. What we really have to determine in this case is whether or not the existence of the right of

pre-emption has been so "judicially noticed" as a custom existing amongst the Hindus in the district of Sylhet that the custom has at any rate by this

time obtained the force of law. The question has already been agitated before this Court on a number of occasions, but conflicting decisions have

been given. As long ago as the year 1864, the matter came before a Bench of this Court consisting of Steer and Jackson, JJ., in the case of

Jameelah Khatoon v. Pagul Ram (1864) 1 WR 250. The head-note of that case runs as follows:

The plaintiff relies upon the custom of preemption prevailing between Mahomedans and Hindus in Sylhet. Held that, unless he can show that the

custom is undoubted and invariable, he is not entitled to a decree.

5. The case had been referred back by this Court to the civil Court of Sylhet in order that the Judge there might inquire whether as between

Mahomedans and Hindus the custom of pre-emption prevailed in that district. The Judge before whom the matter came decided that no such

custom prevailed, and, accordingly, he dismissed the suit. This Court decided that where the plaintiff relied upon a custom he was not entitled to a

decree unless he could show that the custom was undoubted and invariable and that as he did not show such a custom he was not entitled to

succeed. It would appear from this decision that the custom of pre-emption amongst the Hindus of Sylhet was not then definitely established in

operation and the decision would appear on the face of it definitely to negative the existence of the custom. But I think we must take it that decision

was founded solely upon the evidence adduced in the course of the case and upon the way in which the plaintiff"s case was presented, because a

few years later-in 1871-there was a decision of this Court exactly to the contrary. I refer to the case of Akshoy Ram Shahajee v. Ram Kant Roy

(1871) 15 WR 223 in which Jackson, J., said:

I am of opinion that the Subordinate Judge (of Sylhet) has laid down the law correctly. It is admitted that among the residents of the district of

Sylhet there is a custom sanctioning a right of pre-emption even among Hindus.

6. It seems clear from that decision that at any rate in the year 1871, the matter had reached the stage where the existence of the custom in

question was admitted and recognized. All the reported cases however to which we have been referred have apparently omitted to take account of

an unreported decision of this Court, which was the judgment put in evidence in the course of the present case as Ex. 7, to which I have already

referred. That unreported judgment is one given by Trevor and Campbell, JJ. in Ramprasad Sarma v. Abdul Hakim, Second Appeal No. 984 of

1866, on appeal from a decision given by the Judge of Sylhet (dated 23rd January 1866) affirming a decree of the Munsif of Fenchuganj, dated

20th July 1865, in which Ramaprashad Sarma and others were appellants and Abdul Hakeem was the respondent. The judgment was as follows:

In this case the question is whether the custom of pre-emption exists in the district of Sylhet. The Judge after a careful analysis of twenty-four cases

finds as a fact that it does and the vakil of appellant is wholly unable to state any intelligible ground of special appeal. The appeal is dismissed with

costs.

7. We are of opinion that this ancient decision of this Court accorded full judicial recognition to the existence of the right of pre-emption amongst

the Hindus in the district of Sylhet; and nothing has been put before us in the course of the argument in this appeal which leads us to any other

conclusion than that we ought to hold quite definitely that custom has by now received such judicial recognition as enables us to say that it has

obtained the force of law. The same question came before my learned brother and myself a short time ago and it seems to have been assumed in

the course of the argument then put before us that the custom did in fact exist and was not a matter susceptible of argument. We are of opinion that

it is desirable that the matter should be finally set at rest and that it should be understood once and for all that the custom in question has been

recognized by this Court in such a way as to put the matter beyond controversy and that the stage has been reached where it is no longer

necessary for the plaintiff to prove the existence of the custom by adducing evidence for that purpose. That matter has in fact in our opinion

reached the stage contemplated by the dictum in the case of Jadu Lal v. Sahu Janki Koer (1908) 35 Cal 575 to which I have already alluded.

8. We, accordingly, hold as a matter of law that, in the district of Sylhet, Hindus have the same right of preemption under the provisions of

Mahomedan law as Mahomedans themselves have in that district, and we express the view that hereafter the local Courts should take judicial

notice of that state of affairs. It ""follows that the decision of the learned Additional Subordinate Judge of Sylhet is correct and that this appeal must

be dismissed. The appellants must pay the respondent the costs incurred by him in this Court.

Suhrawardy, J.

9. I agree. I wish to say a few words with reference to a decision to which I was a party and in which I may be taken as expressing a view

different from what my learned brother has taken in the present case. In Giridhar Bhattacharjya v. Nayanchandra Deb, Second Appeal No. 1817

of 1926, the Bench of which I was a member held that in a case where pre-emption was pleaded as a customary law in any part of Bengal and

Assam it was for the party so pleading to prove that it was a part of the lex loci of the particular district. The question then too was raised with

reference to some land in Moulvibazar within the district of Sylhet. The case on that occasion was not presented before us in the way in which it

has now been done. Besides, the question of pre-emption was not of much importance in that case-the fact being that the plaintiff and the

contesting defendant were cosharers with the vendor and had therefore equal right to claim preemption.

10. The decree in that case would be justified in any view of the matter. In the recent case, Ramjay Sarma v. Gopalkrishna Deb, Second Appeal

No. 1605 of 1928, my learned brother and I took it as undisputed that in the district of Sylhet the law of pre-emption prevails amongst the Hindus

also. It is desirable in the interests of all parties concerned that this question should be finally settled. It is most inconvenient that this question should

be raised and decided upon evidence in every particular case which may lead to conflicting decisions in different cases. I therefore agree with my

learned brother in holding that the authorities are in favour of the view that the Mahomedan law of pre-emption prevails in the district of Sylhet as a

customary law even among the Hindus and that it should be so judicially recognized.