(1873) 02 CAL CK 0005

Calcutta High Court

Case No: None

Hurronath Mullick and Others		APPELLANT
	Vs	
Nittanund Mullick		RESPONDENT

Date of Decision: Feb. 5, 1873

Judgement

Macpherson, J.

Besides calling some of the plaintiffs and one of their priests to prove that the right to remove the idols has never before been either exercised or claimed, Mr. Kennedy proposed to put in a deed of agreement under seal, executed in June 1871, by (as the plaint says) "a considerable majority" of those entitled to pallahs, including the plaintiffs. That deed recites the custom of the family to be as now alleged in the plaint; and those who signed it covenanted with one another not to remove the idols from Calcutta. The defendant was not a party to this deed, audits reception to evidence was objected to on his behalf by Mr. Jackson. I said, at the trial, that I would receive the recitals, as being a statement in writing made by one of the plaintiffs, Shama Churn Mullick, who might have been examined as a witness had he not died since the suit was instituted. I thought that the recitals were, under s. 13 of the Evidence Act, read together with s. 32, cl. 7, receivable as statements made by Shama Churn, he being now dead, Mr. Kennedy, however, pressed for the admission of the whole deed, together with evidence of the circumstances under which it was executed. He relied on s. 13 of the Evidence Act, and Contended that as the question is as to the existence of a right or custom, the execution of this deed is a "relevant fact," as being either a "transaction by which the right or custom in question was * * * * recognized and asserted" under cl. (a) of s. 18, or as being "a particular instance in which the right or custom was * * * * recognized" under cl. (b). At first, I thought the deed inadmissible, except as a statement made by Shama Churn, the defendant not being a party to it, and being in no way bound by it. And it certainly is rather startling to find that when a set of plaintiffs come into Court claiming a right by custom as against a defendant, a declaration by them among themselves (but behind the back of the defendant) that they have the right, and a covenant to do nothing contrary to it, are

admissible as evidence on their behalf. Such an assertion of right, it at first sight appeared to me, could be placed no higher than an "admission," which (s. 17) is defined to be "a statement, oral or documentary, which suggests any inference as to any fact in issue or relevant fact," made by a party to the proceeding, and which is ordinarily (s. 21) not admissible on behalf of the person who made it. But by cl. 1 of s. 21, "an admission may be proved, by or on behalf of the person making it, when it is of such a nature that, if the person making it were dead, it would be relevant as between third persons under s. 32." And further consideration of the matter has made me come to the conclusion that I must admit this deed, as being in strictness admissible on behalf of the plaintiffs generally: for in admitting the recitals as a statement made by Shama Churn Mullick. I held them to be relevant under s. 32: and it almost necessarily follows that I must admit the deed on behalf of the plaintiffs, though they can themselves be called as witnesses, and though the deed amounts merely to a statement by them of their own view of their case. Practically, however, it makes little difference whether the deed, or any portion of it is admitted or rejected. Whether it is or is not evidence under the new Act, it is manifest that a mere statement by the plaintiffs and others, forming "a considerable majority" of those interested, a few months before action brought, that they have this right and will uphold it is worthless, as against a third party, as evidence that they do in fact have the right which they assert they have. It is none the less worthless because made, as in the present instance, on the occasion of a settlement among themselves of questions and difficulties which, had arisen. In my opinion this deed, when admitted, leaves the plaintiff"s case exactly where it was: for it shows no more than that, whereas the plaintiffs, in October 1872, filed that plaint now, before me, asserting that a certain right exists and praying that, the defendant may be restrained from infringing it they in June 1871, signed a deed in which they, (as amongst themselves) asserted this same right and bound themselves to respect it. Whether, as against the defendant, they have or have not the right claimed remains unaffected by the deed, and must be, proved aliunde.