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to the contrary. However, that does not assist us to answer this question. We are not aware of any authority in India which enables us to decide that there is a right in the landlord or a right in the tenant by general custom to the fallen wood of self-grown trees. In our opinion a person who brings his suit, claiming that the fallen timber of self-grown trees within an occupancy-holding belongs to him must prove his right by showing a general custom of the district, a particular custom of the village, or a contract which gives him the right. In this case there was a *wájib-ul-arz*. The learned Officiating District Judge did not consider that that *wájib-ul-arz* could be treated as satisfactory evidence. We do not intend to decide whether it can or not, but we merely point out that it was a *wájib-ul-arz* made as long ago as 1867, and that it should be a question possibly for the consideration of the District Judge what effect should be given to the *wájib-ul-arz* if he found that it had been acted upon and the correctness of it had not been disputed until quite recently. We ought to say, as our opinion is invited on the point, that the law in England relating to fallen timber could not, in our opinion, be accepted as evidence of custom or representing what the law is in India on this point.

The papers will be returned to the District Judge of Saháranpur with the answer which we have given.

APPELLATE CIVIL.

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July 15.

Before Sir John Edge, Kt., Chief Justice and Mr. Justice Knox.

RADHA KISHEN AND OTHERS (DEFENDANTS) *v.* RAJ KUAR (PLAINTIFF.)*

Justice and equity and good conscience—Succession to out-casted Brahmin—Brothers of deceased remaining in caste—Sons of deceased by Bania widow.

Khuman, a Brahmin, lived with a Bania widow, for which offence he was out-casted. He left his family and his village and went to live elsewhere, taking the widow with him. He had sons by her, and he and his family lived as cultivators and acquired property. Khuman died in his new home and left the widow and their sons

* Second Appeal No. 84 of 1889, from a decree of W. H. Hudson, Esq., District Judge of Farakhabad, dated the 24th September 1888, reversing a decree of Rai Ishri Prasad, Subordinate Judge of Farakhabad, dated the 22nd August 1888.

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in possession of the property which he had acquired. This being so, the brothers of the deceased Khuman sold the property which had been thus acquired by him to one R. K. R. K. thereupon sued his vendors and the surviving sons of Khuman by the widow, together with their mother and the widow of a deceased son for recovery of the property :—

Held that the sons of Khuman by the Bania widow with whom he had been living and their mother were entitled to remain in possession of the property acquired by Khuman as against the brothers of deceased who had remained in caste.

The facts of this case, are sufficiently stated in the judgment of the Court.

Pandit *Ajudhia Nath*, for the appellants.

The Hon'ble Mr. *Spankie*, for the respondent.

EDGE, C. J., and KNOX, J.—This was a suit to recover possession of certain zamindari property, some houses and bonds and other property from the surviving sons of one Khuman, the mother of those sons and the widow of a deceased son. The other defendants are brothers of Khuman, who sold to the plaintiff. The facts of the case are peculiar. Khuman was a Brahmin, and, having taken a Bania widow to live with him, was outcasted. He left his village, removed to another village, and there lived with the Bania widow. In course of time she bore children to him, the eldest of whom is now thirty-five years old. She and her sons and the widow of one of the sons are the first lot of defendants to whom we have referred. Khuman and his sons, as we infer from the judgment of the lower appellate Court, carried on cultivation together, and Khuman, according to the finding of the lower Court, acquired the property in dispute in this suit. It has been found by the first Court that the plaintiff paid no consideration whatever for the sale to him. That finding is not dissented from in the judgment upon which the decree under appeal was founded. The Judge below gave the plaintiff a decree for possession. Against that decree this appeal has been brought.

We have been referred to texts from Manu, to passages from West and Bühler and to several authorities, and none of them seem to us precisely to govern this case. We have here a case of the illegitimate offspring of parents who belonged to the twice-born classes of Hindus, the father being a Brahmin, the mother a Bania.

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We have also to deal with a case in which the property in dispute, which is in the possession of the offspring of those parents was, according to the finding of the lower appellate Court, which we must accept, the self-acquired property of Khuman, after he had been outcasted, after he had left his family and his village and had started in another village to make a livelihood for himself, the woman who lived with him and their children. If we were trying this case as a Court of first instance, or as a Court of first appeal, we should come to the conclusion that Khuman, having lost his caste, had started a separate family altogether; separate, that is, in the sense of total and absolute separation from the family of his birth and his caste-fellows. We cannot find amongst the authorities and texts cited to us any sure principle to guide us in this case. Under these circumstances we must act on the principles of equity and good conscience, and decline to oust from the possession of the property acquired by Khuman his sons and their mother and the widow of the deceased son for the benefit of the vendee of brothers who were no parties to the acquisition of any portion of this property, and which was not acquired by any ancestor of theirs. This is a very peculiar case and the view we take of it might be absolutely inapplicable in other cases; but, holding the opinion which we do as to what good conscience dictates, in the present case we allow the appeal with costs, and dismiss the suit with costs.

Appeal allowed.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Straight.

1891
July 20.

JWALA PRASAD (PLAINTIFF) *v.* SALIG RAM (DEFENDANT).*

Jurisdiction—Civil and Revenue Courts—Appeal—Erroneous exercise of Jurisdiction by subordinate Court capable of being made a ground of appeal to the High Court.

Where the High Court is the Court of appeal from any particular subordinate Court, and that Court acts without jurisdiction in the trial of a suit or an appeal before it, the High Court has power as an appellate Court to set right the proceedings of such subordinate Court. *Kishna Ram* v. *Hingu Lal* (1) and *Tota Ram* v. *Ishur Das* (2) overruled.

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* Appeal No. 1 of 1891 under Section 10 of the Letters Patent.

(1) I. L. R., 4, All, 237. (2) Weekly Notes, 1887, p. 76.