

admissible. The case thus falls outside of all the sections of the Code which treat of the procedure to be observed in remanding a case or in procuring additional evidence in second appeals, and therefore, though I am most unwilling to go beyond the provisions of s. 564, still I am constrained to hold, concurring with my learned brother, that, *ex debito justitiæ*, we are bound to make the order proposed by him.

Cause remanded.

Before Mr. Justice Blair and Mr. Justice Burkitt.

SHANKAR LAL AND OTHERS (PLAINTIFFS) v. DALIP SINGH (DEFENDANT).*

Act XII of 1881, s. 9—Occupancy tenant—Succession to occupancy tenant—Collateral—Sharer in cultivation.

WHERE a collateral relative claims to be entitled to succeed to an occupancy-holding on the death of the occupancy-tenant without direct heirs it is incumbent on him to prove, both that he is the heir according to the law to which he is subject, and also that he shared in the cultivation of the occupancy-holding during the lifetime of the deceased occupancy-tenant. But *non sequitur* that if there is a more remote collateral who was a sharer in the cultivation of the occupancy-holding, he is entitled to succeed in preference to a nearer collateral who did not so share in the cultivation. *Badri Das v. Debi Das* (1), referred to.

This appeal was referred to a Division Bench by an order of Banerji, J., dated the 10th of March 1894. The facts of the case sufficiently appear from the referring order, which is as follows:—

“In this case the property in suit formed the occupancy holding of a person of the name of Lalji. He died leaving the respondent, a collateral relative of his, who has been found by the Court below to have shared with him in the cultivation of his holding. He had also a nearer collateral relative, *viz.*, the father of the respondent, who did not share with him in the cultivation of his holding. The question which arises in this case is—whether the respondent was entitled to inherit the holding, his father, who is a nearer collateral relative of the deceased, being alive. This question is one of im-

* Second Appeal No. 1104 of 1893, from a decree of Pandit Raj Nath, Subordinate Judge of Moradabad, dated the 28th July 1893, confirming a decree of Babu Shiva Prasad, Munsif of Bijnor, dated the 22nd March 1893.

(1) Weekly Notes, 1888, p. 200.

1894

DURGA
DIHAL DAS
v.
ANORAJI.

1894

August 6.

1894

SHANKAR LAL
v.
DALIP SINGH.

portance and is not covered by authorities. I therefore refer the case to a Bench of two Judges.”

Babu *Jogindro Nath Chaudhri* for the appellants.

Mr. *Abdul Majid* for the respondent.

BLAIR, J.—This case has been referred to a Bench of two Judges on account of the importance of the question involved. It is substantially the same question as was raised in the first Bench before the learned Chief Justice and myself in Letters Patent Appeal No. 40 of 1893, dated the 24th July 1894. The judgment does not in terms rule upon the disputed question. The hearing of that case ended in an order of remand directing the Court below to find who, according to general Hindu Law, was the heir of the deceased occupancy-tenant. That remand is only comprehensible upon the supposition that we consider no person was qualified as successor in the occupancy-holding who did not combine with his claim as a sharer in the cultivation the further title as heir; and indeed in the course of the argument the interpretation which we put upon s. 9 of the N.-W. P. Rent Act, XII of 1881, was abundantly manifest. The question raised is this:—“Is a collateral who has shared in the cultivation of land subject to occupancy-tenure entitled on the decease of the tenant whose cultivation he has shared to inherit the occupancy-right in preference to a nearer collateral, who would be heir to the deceased under the ordinary Hindu Law, but who has not shared in the cultivation of the land in question?”

I have no doubt upon the wording of the section that one construction, and one only, can be put upon it. The first provision is that on the death of a person entitled to occupancy-tenure that right shall devolve as if it were land. That is precedent to every other condition. It means that the person to inherit must be one who would inherit if the property were immovable property of a totally different kind. Then is added a sentence of disqualification and not of qualification. The section goes on:—“Provided that no collateral relative of the deceased who did not then share in the

cultivation of his holding shall be entitled to inherit under this clause." It seems to me upon the plain and ordinary construction of this section that it first of all specifies a class out of whom the successor must be taken, and then, in the case of some of such persons not having shared in the cultivation, it excludes them from the benefit they would otherwise derive as heirs. By a ruling to which my brother Burkitt has called my attention—*Badri Das v. Dabi Das* (1), my predecessors Straight and Mahmood, JJ., were both of them quite clear as to the interpretation to be put upon this section. I would, therefore, decree the appeal of the plaintiff, and set aside the decrees of both the lower Courts with costs, and give a decree for the plaintiff in the terms of the prayer in his plaint.

BURKITT, J.—I concur fully in the order proposed by my learned brother, and in the reasons given for it. Where a collateral relative claims to be entitled to succeed to an occupancy-holding on the death of the occupancy-tenant without direct heirs, it is, in my opinion, incumbent upon him to prove two things, *viz.*, first, that he is the heir according to the law to which he is subject, and secondly, that he shared in the cultivation of the occupancy-holding during the life-time of the deceased occupancy-tenant. Unless these two requisites be joined in one and the same collateral, such person cannot succeed to an occupancy-holding. The facts here are that the more remote collateral shared in the cultivation, while the nearer collateral (who, it so happens, is the father of the more remote collateral) did not so share, and the contention is that, to use a phrase of Hindu Law, the more remote collateral therefore excludes the nearer, which is a strange proposition. To this proposition I cannot accede. Under the words of s. 9 the right shall devolve as if it were land. I hold, therefore, that the person on whom that right devolves is the person indicated as heir by the law to which he is subject, and not a person more remote in the line of succession who may have shared in the cultivation with the deceased occupancy-tenant. As has been very properly remarked by

(1) Weekly Notes, 1888, p. 200.

1894

SHANKAR LAL

v.
DALIP SINGH.

1894

SHANKAR LAL
v.
DALIP SINGH.

my learned brother, the condition requiring the collateral who claims succession to have shared in the cultivation is a disqualification which disentitles the nearest collateral if he has not fulfilled the condition. But it does not confer any right of succession to the occupancy-tenure on a more remote collateral, even though he may have shared in the cultivation. For these reasons I concur in the order of my learned brother setting aside the judgment of the two lower Courts and giving plaintiff a decree as prayed for in his plaint.

Appeal decreed.

1894
August 7.

FULL BENCH.

Before Mr. Justice Knox, Mr. Justice Blair, and Mr. Justice Burkitt.

QUEEN-EMPRESS v. FAZL AZIM.

Criminal Procedure Code, s. 531—Sessions Court—Jurisdiction—Appeal presented within, but heard outside the local limits of the jurisdiction of a Sessions Court.

A criminal appeal was presented to the Sessions Judge of the Bijnor-Budaun Division at Bijnor within the said Sessions division, but was heard by the said Judge at Moradabad, at which place he was empowered to exercise civil but not criminal jurisdiction. *Held* that the trial of the appeal at Moradabad was an irregularity, but, no failure of justice being shown to have been occasioned thereby, the irregularity was covered by s. 531 of the Code of Criminal Procedure and did not render the trial of the appeal a nullity.

THE facts of this case sufficiently appear from the judgment of the Court.

Mr. D. Banerji for the applicant.

The Public Prosecutor (for whom Mr. W. K. Porter) for the Crown.

KNOX, BLAIR and BURKITT, JJ.—This is an application calling upon us to set aside an order passed by the Sessions Court of Bijnor-Budaun dismissing an appeal presented by one Fazl Azim who was convicted of offences under ss. 265 and 266 of the Indian Penal Code. The main contention urged upon our notice was that the order of the Sessions Judge was a nullity, it having been passed at Moradabad, a place outside the local limits of the Sessions division known