tenants and liable to pay him rent. The defendant Uchabal on his side disputed plaintiff's right to receive the rent, on the ground that he held directly from the zamindars and had paid it to them. The Assistant Collector does not appear to have availed himself of the provisions of s. 148, nor were the persons who had received the rent made parties to the proceedings. But it appears to me that the plaintiff should have the benefit of the reservation contained in the proviso to that section, and that he is entitled to bring his present suit.

Holding this view, I would decree the appeal with costs and remand the case under s. 562, Act X of 1877, for trial on the merits.

PEARSON, J.—I concur in the opinion that the present suit is not barred by the Assistant Collector's finding in the suit for arrears of rent, decided by him on the 28th September, 1877, that the plaintiff had failed to prove that the defendants were his under-tenants or that he had let the land to them. The question whether the parties stood in the relation of landlord and tenants was one which it was necessary for him to try incidentally for the purpose of disposing of the suit for arrears of rent, but not one which he had special jurisdiction to determine; and his determination of that question is not that of a competent Court.

The case must be remanded for trial on the merits as proposed by my honourable colleague.

Cause remanded.

Before Mr. Justice Oldfield and Mr. Justice Straight.

1880
June 2

BACHEBI (DEFENDANT) *v.* MAKHAN LAL AND ANOTHER (PLAINTIFFS).*

Jains—Bindala Jains—Inheritance—Alienation by Widow—Hindu law—Mitakshara —Act X of 1865 (*Succession Act*), *s.* 331.

The term "Hindu" in s. 331 of Act X of 1865 means and includes a "Jain," and consequently in matters of succession, Jains are not governed by that Act.

The ordinary Hindu law of inheritance is to be applied to Jains in the absence of proof of custom or usage varying that law. The alienation by gift by the widow

* Second Appeal, No. 19 of 1880, from a decree of F. E. Elliot, Esq., Judge of Mainpuri, dated the 24th September, 1879, affirming a decree of Maulvi Muhammad Said Khan, Munsif of Mainpuri, dated the 17th March, 1879.

1880

BACHEBI v. KHAN LAL.

of a Bindala Jain of her husband's ancestral property is invalid according to the Mitakshara, which is the ordinary law governing Bindala Jains in the absence of custom to the contrary.

THIS was a suit instituted in the Court of the Munsif of Mainpuri in which the plaintiffs claimed, as the reversioners to the ancestral estate of one Hira Lal, to have a transfer by gift, bearing date the 2nd September, 1864, by his widow, the defendant Bachebi, of a portion of such estate, set aside, on the ground that, according to the customs and tenets of the Bindala Jains, a widow of that sect was not competent to alienate her husband's ancestral estate. The defence to the suit was that a widow of the sect of Bindala Jains was competent according to the customs and tenets of that sect to make such an alienation. The Munsif who originally tried the suit dismissed it for reasons which it is not material to state. On appeal the Subordinate Judge of Mainpuri reversed the decree of the Munsif and remanded the suit for re-trial, fixing as an issue for trial, amongst others, the issue: "Has the Bindala widow limited or unlimited power to alienate her ancestral immoveable property, and what are the conditions and circumstances under which such a widow is justified in making such an alienation." The Subordinate Judge, in remanding the suit, directed that a full inquiry should be made as to whether there was any valid custom on the question at issue among the Bindala Jains, or whether that sect was governed by the Hindu law in respect of such question. The Munsif who re-tried the suit held that the burden of proving that there was a valid custom having the force of law among the Bindala Jains under which a widow had an unlimited power to alienate her husband's ancestral estate lay on the defendants, and that they had failed to prove any such custom. The Munsif observed as follows in his decision:—"In sustaining the burden imposed on them by law they (defendants) have produced some documents and some oral evidence. But none of them prove that a widow is invested with such an unlimited power under any circumstances. In the first place the documents are not judicially proved by any kind of evidence in a manner that fulfils the requirements of the law. Secondly, some alienations were made by widows of the sect for the purpose of discharging ancestral debts, and in some instances with the consent of the reversioners, and in others they were in fact

relaxations of the general rule to console the widow and to confer some spiritual benefit on her in the world to come, according to their notion. Such rare departures from the well-rooted and strongly-based principle and usage cannot be permitted to shake it in the least degree. Besides the alienations are of recent dates. The oral evidence produced by the defendants or procured by the Court at their instance consists mostly of persons other than Bindala Jains and therefore cannot be relied on. On the other hand the evidence produced by the plaintiffs is that of persons following the doctrines of the Bindala Jains. These persons unanimously say that a widow is not competent to make any kind of alienation of her ancestral estate under any circumstances. There were some witnesses summoned by the Court. All of them consistently established the doctrine that a widow of the Bindala sect of Jains has no power to alienate her ancestral property. No valid objection has been raised against this evidence by the defendants". The Munsif accordingly gave the plaintiffs a decree setting aside the gift in dispute. On appeal the District Judge affirmed the Munsif's decision, holding that "the defendants had failed to show that the usages of the Bindala Jains permit widows to make permanent alienations of property;" but modified the Munsif's decree, directing that the gift should be deemed valid for the life-time of the widow, and invalid only so far as it purported to be permanent.

The defendant Bachebi appealed to the High Court, contending, *inter alia*, that the Hindu law of inheritance was not applicable to Jains, but the Indian Succession Act of 1865, and she was competent to make the alienation impugned by the plaintiffs.

Pandit *Ajudhia Nath* and Babu *Ratan Chand*, for the appellant.

Pandit *Bishambhar Nath*, for the respondents.

The judgment of the Court (OLDFIELD, J., and STRAIGHT, J.,) was delivered by

OLDFIELD, J.—This is a suit to set aside a gift of certain ancestral property inherited from her husband made by Bachebi, a widow of the Bindala sect of Jains, on the ground that her act was illegal under Hindu law.

1880

CHHEDI v. HAN LAL.

The Courts below have decreed the claim. It has been contended in appeal before us that the Hindu law of inheritance does not govern the Jain community, and it was argued that in the matter of succession they would be governed by the Indian Succession Act. The contention cannot be allowed. The case before us is not one relating to intestate or testamentary succession, and no argument can be founded on the Act, since its application to Jains is in our opinion excluded by the terms of s. 331 of the Act, by which the provisions of the Act do not apply to intestate and testamentary succession to the property of Hindus, the word Hindu being used in its generic sense to include Jains. Moreover, it is now settled law that the ordinary Hindu law of inheritance is to be applied to Jains in the absence of proof of custom and usage varying that law. This was affirmed by the Privy Council in *Chotay Lall* v. *Chunno Lall* (1). Their Lordships say: "The customs of the Jains, where they are relied upon, must be proved by evidence, as other special customs and usages varying the general law should be proved, and in the absence of proof the ordinary law must prevail."

The ordinary law which will govern this case in the absence of custom to the contrary is the Mitakshara, and by that law the widow had no power to make the gift in question. Some evidence was produced with the object of showing that by custom prevalent among Bindala Jains a widow has absolute power over property inherited from her husband; but the lower Courts have held that the evidence does not establish any custom which can override the ordinary law, and in this respect we see no ground for interference.

In *Sheo Singh Rai* v. *Dakho* (2) it was observed that, among Jains of the Saraogi Agarwala sect, the sonless widow takes a very much larger dominion over the estate of her husband than is conceded by Hindu law; but that decision did not affirm any absolute right in the widow over ancestral property inherited from the husband, which is what we are concerned with in this case: and a custom established among one sect of Jains may not necessarily prevail among another, since the Jains are divided into numerous sects (*gachasor-gotras*), most of which do not eat together. We under-

(1) L. R., 6 Ind. Ap., 15. (2) I. L. R., 1 All., 688.

1880

BACHE v. MAKHAN.

stand that the Bindala sect with which this suit deals is small in numbers and confined to the districts of Mainpuri, Etah, and Farukhabad; and we may assume that the defendant has produced all the evidence of usage which is procurable, and that is clearly inadequate to establish the right claimed for the widow over ancestral property inherited from her husband.

Some of the cases of alienations by widows cited were with consent of relations or such as the Hindu law permits, and the oral evidence adduced is not evidence on which a Court could rely: some of the witnesses for the defendant are not of the same sect, whereas those of that sect produced by plaintiffs deny the existence of the customary right claimed. We dismiss the appeal with costs.

Appeal dismissed.

Before Mr. Justice Pearson and Mr. Justice Straight.

1880
June 25

MATA PRASAD (DEFENDANT) *v.* GAURI (PLAINTIFF)*

Suit of the nature cognizable in a Small Cause Court—Second appeal—Sale-proceeds—Act X of 1877 *(Civil Procedure Code), s.* 586.

A suit by one decree-holder against another for the money received by the latter on a division between them of the proceeds of an execution-sale as his share of such proceeds, under the order of the Court executing the decrees, is a suit of the nature cognizable in a Court of Small Causes, and consequently, where the amount of such money does not exceed five hundred rupees, no second appeal lies in such suit.

THE plaint in this suit stated that one Nandan hypothecated a house to the plaintiff on the 6th February, 1875, subsequently hypothecating the same house to the defendant; that on the 3rd October, 1877, the plaintiff obtained a decree against Nandan enforcing his lien on the house, in the execution of which the house was attached and proclaimed for sale; that the defendant had also caused the house to be attached in the execution of the decree held by him against Nandan; that the property was sold on the 21st January, 1878, for Rs. 115, in the execution of the plaintiff's decree; that the plaintiff was entitled to be paid the whole of the sale-proceeds,

* Second Appeal, No. 1238 of 1879, from a decree of R. G Currie, Esq., Judge of Gorakhpur, dated the 24th June, 1879, affirming a decree of Shah Ahmad-ul-lah, Munsif of Gorakhpur, dated the 26th February, 1879.