

APPELLATE CIVIL.

Before Mr. Justice Muhammad Raza and
Mr. Justice A. G. P. Pullan.

1929

February, 4.

RAMANAND (PLAINTIFF) v. MURTAZA AND ANOTHER
(DEFENDANTS-RESPONDENTS).*

Appellate Court's power to differ from the trial court on findings based on evidence of witnesses—Evidence of witnesses—Weight to be attached to trial court's opinion on the evidence of witnesses.

It is true that the court of first instance has an advantage over the appellate court in that it can see and hear the witnesses; but there is nothing to prevent an appellate court from differing, and the greater experience usually possessed by the appellate court counteracts, to some extent at least, the advantage which the court of first instance obtains from seeing and hearing the witnesses. *Ram Ratan Shukla v. Nandu* (1), followed.

Mr. Aditya Prasad, for the appellant.

Mr. Ghulam Hasan and Dr. Zafar Husain, for the respondents.

RAZA and PULLAN, JJ.:—This second appeal relates to a case in which a Kasaundhan Bania claims restitution of conjugal rights with a woman who is now said to have married a Muhammadan. In the grounds of appeal great stress is laid on the fact that the lower appellate court recorded a finding that Dharauwa marriages are not recognized amongst Kasaundhan Banias and it is possibly on account of

* Second Civil Appeal No. 354 of 1928, against the decree of S. M. Ahmad Karim, Subordinate Judge of Sultanpur, dated the 16th of July, 1928, setting aside the decree of B. Kali Charan Agarwal, Munsif in addition to strength at Sultanpur, dated the 15th of March, 1928, decreeing the suit.

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this ground of appeal that this appeal has been admitted. We find however that it is unnecessary, and indeed impossible for us, to consider this question at all. The lower appellate court found, after examining the evidence of all the witnesses, at the bottom of page 20 of our book, that no marriage is proved to have taken place between the plaintiff and the defendant No. 2. This was a question of fact and the only evidence adduced in support of it was the evidence of the witnesses which the lower appellate court disbelieved. In appeal we have been asked to hold that the opinion of the Munsif should prevail because he had the opportunity of seeing and hearing the witnesses. It is true that the court of first instance has an advantage over the appellate court in that it can see and hear the witnesses; but there is nothing to prevent an appellate court from differing, and the greater experience usually possessed by the appellate court counteracts, to some extent at least, the advantage which the court of first instance obtains from seeing and hearing the witnesses. The law was laid down by their Lordships of the Judicial Committee in the case of *Ram Ratan Shukla v. Nandu* (1) and no subsequent decisions of their Lordships have diminished one word of that ruling. It was there held that "no court of second appeal can entertain an appeal upon any question as to the soundness of the findings of fact by the court of first appeal; and if there is evidence to be considered, the decision of that court, however unsatisfactory it might be, if examined, must stand final." There is nothing in the judgment of the court below which leads us to the belief that his opinion is perverse or contrary to reason. He appears to have considered the evidence carefully and given a legal

(1) (1891) I. L. R., 19 Cal., 249.

decision upon it. That being so the decision cannot be challenged in second appeal. We, therefore, dismiss this appeal with costs; but we wish to say that we do not record any finding on the controversial matter raised in the appeal, namely, as to whether Kasaundhan Baniyas practise marriage by Dharauwa, we do not wish to go into the question of custom at all as it is not necessary for the decision of the appeal.

Appeal dismissed.

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REVISIONAL CIVIL.

*Before Mr. Justice Muhammad Raza and Mr. Justice
A. G. P. Pullan.*

LACHHMAN PRASAD (PLAINTIFF-APPLICANT) v. RAGHUBAR DAYAL AND OTHERS (DEFENDANTS-OPPOSITE PARTY).*

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Suit for profits for the period in which plaintiff was recorded as co-sharer is cognizable by revenue courts—Jurisdiction of civil and revenue courts—Oudh Rent Act (XXII of 1886), section 124(c)—Appeal to District Judge—District Judge, whether could dispose of the appeal on merits where there was no decision by the Munsif on the merits.

A suit for profits is cognizable by a revenue court where the plaintiffs are recorded co-sharers during the whole period to which the suit relates.

Where the suit for profits was brought in the Munsif's court who held that he had no jurisdiction to try the suit and returned the plaint for presentation to the revenue court and the plaintiff preferred an appeal in the Court of the District Judge who transferred the appeal to the Subordinate Judge, *held*, that if the Subordinate Judge was of opinion that the Munsif was right in holding that the case could be heard only by the revenue court the only course open to him was

*Section 115 Application No. 50 of 1928, against the order of Mohamad Munim Bakhth, Subordinate Judge of Malihabad, Lucknow, dated the 3rd of September, 1928, upholding the decree of Babu Sital Sahae, Munsif (South) Unao, dated the 28th of May, 1927.