

1932

DAYA,  
SHANKAR  
v.  
MOHAMMAD  
IBRAHIM  
KHAN

We are therefore of the opinion that the court-fee paid on the plaint and on the memorandum of appeals in this Court as well as in the lower appellate court is correct.

---

MISCELLANEOUS CIVIL

---

*Before Mr. Justice Bisheshwar Nath Srivastava and  
Mr. Justice E. M. Nanavutty*

1932  
December, 19

BISHUNATH SARAN SINGH, RAJA BAHADUR (DE-  
FENDANT-APPELLANT) v. MUSAMMAT JUGRAJ KUAR  
(PLAINTIFF-RESPONDENT)\*

*Jurisdiction of civil courts—Deceased not possessing under-proprietary rights but holding only under a hereditary lease—Suit by heir or donee for possession and declaration; if cognizable by civil courts—Civil Procedure Code (Act V of 1908), order XLIII, rule 1(u)—Appeal against an order of remand—Court-fee payable on an appeal against an order of remand.*

Where the Settlement Court decreed a hereditary lease on payment of a fixed rent in favour of a certain person and after his death his heir and donee brought a suit in the civil court for possession of the plots in the exclusive possession of the deceased and for a declaration that he was an under-proprietor of the rest of the plots, if it is found that the deceased did not possess any under-proprietary rights then the civil courts have no right to entertain the suit.

An appeal directed against an order of remand should be filed as a miscellaneous appeal under order XLIII, rule 1, clause (u) of the Code of Civil Procedure on a fixed court-fee of Rs.2 and not as a second appeal on payment of an *ad valorem* court-fee.

Mr. M. Wasim, for the appellant.

Messrs. Radha Krishna and Anand Bali Sawant, for the respondent.

SRIVASTAVA and NANAVUTTY, JJ. :—Two persons Dirgaj Singh and Hanuman Singh in 1868 made a claim for sub-settlement of village Barwa. The

---

\*Miscellaneous Appeal No. 55 of 1932, against the order of Pandit Raghubar Dayal Shukla, District Judge of Rae Bareilly, dated the 21st of September, 1931.

taluqdar denied the claimants' right to sub-settlement but expressed his readiness "to give a perpetual, i.e. hereditary lease on double *parta*." The Assistant Settlement Officer decreed a hereditary lease on payment of a rent of Rs.200 till the next settlement. A moiety of the rights obtained under this decree passed to Sheoratan Singh, father of the plaintiff. Sheoratan Singh on the 5th of January, 1914, executed a deed of gift in respect of the rights possessed by him in favour of the plaintiff. The taluqdar some years later issued a notice of ejectment against the plaintiff which was eventually upheld by the Board of Revenue by their order dated the 23rd of April, 1924. Soon after, on the 22nd of September, 1924, the plaintiff executed a deed of relinquishment of her rights under the gift, in favour of her father. This was followed by two litigations, one a proceeding taken by the taluqdar for correction of the village records and another a suit by Sheoratan Singh and the plaintiff against the taluqdar, under section 108, clause (10) of the Oudh Rent Act. Both these matters went up in appeal to the Board of Revenue. On the 11th of February, 1930, the Board of Revenue dismissed the suit under section 108, clause (10) of the Oudh Rent Act, and allowed the application of the taluqdar for correction of papers. Sheoratan appears to have died some time during the pendency of these litigations.

On the 25th of September, 1930, Jugraj Kuar, daughter of Sheoratan, instituted the suit which has given rise to the present appeal for possession of certain plots of land entered in list A of the plaint which were in the exclusive possession of Sheoratan Singh and for a declaration that she was an under-proprietor of the other plots appertaining to Sheoratan Singh's share which are detailed in lists B and C of the plaint. This suit was based both on her rights as a donee under the deed of gift dated the 5th of January, 1914, and her rights as an heir of Sheoratan Singh. The plaintiff's

1932

BISHUNATH  
SARAN SINGH,  
RAJA  
BAHADUR  
v.  
MUSAMMAT  
JUGRAJ  
KUAR

*Srivastava  
and Nana-  
vally, JJ.*

1932

BISEUNATH  
SARAN SINGH,  
RAJA  
BAHADUR  
v.  
MUSAMMAT  
JUGRAJ  
KUAR

counsel in the course of the trial, on the 2nd of March, 1931, made a statement that the plaintiff did not sue as an heir of Sheoratan Singh and that she claimed only as the donee under the deed of gift.

The trial court held that the plaintiff had failed to substantiate her claim as an under-proprietor. In view of the statement made by the plaintiff's counsel just referred to he did not decide the question whether or not the plaintiff was excluded from succession by virtue of a family or tribal custom. As a result of his finding about the plaintiff not being an under-proprietor, he dismissed the suit. The plaintiff appealed to the court of the District Judge of Rae Bareilly. The learned District Judge was of opinion that the statement made by the plaintiff's counsel on the 2nd of March, 1931, was not binding on the plaintiff. He therefore passed an order remanding the case under order XLII, rule 23 of the Code of Civil Procedure for decision of the question whether the plaintiff was excluded from succession by virtue of a family or tribal custom. In the course of his judgment he remarked as follows :

*Srivastava  
and Nana-  
vutty, JJ.*

“It is true in the settlement proceedings it was expressly noted that the plaintiffs could not hope for *qabiz darmiyani* rights and that in the settlement khewat also it was entered that the decreeholders' rights were *na qabil intiqal*, i.e. non-transferable. I am therefore prepared to concede that the learned Subordinate Judge was right in holding that the plaintiff could not acquire any valid title to the property under the gift deed executed in her favour by her father; but if the gift was invalid the property would continue to be the donor's till his death.”

The present appeal by the defendant is directed against this order of remand passed by the learned District Judge.

The only contention urged by Mr. *Wasim*, the learned counsel for the defendant-appellant, is that the learned District Judge having in effect held that Sheoratan Singh or the plaintiff had no under-proprietary rights, ought to have held that the suit whether for possession or declaration was not maintainable in the civil court. The argument proceeded that as the civil court had no jurisdiction to entertain the suit, the learned District Judge ought to have dismissed it instead of remanding the case for a finding relating to the issue on custom. He also questioned the correctness of the lower appellate court's view about the statement made by the plaintiff's counsel on the 2nd of March, 1931, not being binding on the plaintiff, but conceded that the determination of this question would be immaterial if the present suit was not cognizable by the civil court.

The learned counsel for the plaintiff-respondent admits that if the plaintiff is unable to establish that Sheoratan Singh possessed heritable as well as transferable rights, the present suit would not be cognizable by the civil court, but contends that the learned District Judge has not arrived at any definite or considered finding on this question. He has also pointed out that the present appeal should not have been filed as a second appeal on payment of an *ad valorem* court-fee, but should have been filed as a miscellaneous appeal against the order of remand on a fixed court-fee of Rs.2.

There can be no doubt that the present appeal is directed against an order of remand and should have been filed as a miscellaneous appeal under order XLIII, rule 1, clause (u) of the Code of Civil Procedure. We would accordingly direct the office to tax only Rs.2 for court-fee in the decree prepared in this Court, and that the appeal will be treated as a miscellaneous appeal.

We are further of opinion that the question as regards the status of Sheoratan Singh has not been fully considered by the learned District Judge. As the present

1932

BISHUNATH  
SARAN SINGH,  
RAJA  
BAHADUR  
v  
MUSAMMAT  
JUGRAJ  
KUAR

*Srivastava  
and Nana-  
vati, JJ.*

1932

BISHUNATH  
SARAN SINGH,  
RAJA  
BAHADUR  
v.  
MUSAMMAT  
JUGRAJ  
KUAR

*Srivastava  
and Nana-  
vally, J.J.*

appeal is only against an order of remand we think it proper that the matter should be properly considered and decided by the lower appellate court. It should be pointed out that if after due consideration of the entire evidence on the record, the learned District Judge arrives at the conclusion that Sheoratan Singh did not possess any under-proprietary rights, then it will follow that the civil courts have no jurisdiction to entertain the suit. If, on the other hand, the learned District Judge comes to the conclusion that the status of Sheoratan Singh was that of an under-proprietor, then the question would arise whether the rights of the plaintiff have to be determined merely on the basis of the deed of gift or also on the basis of her claim as heir of Sheoratan Singh. It is only in the latter case that the determination of the question of custom would be material.

For the above reasons we are of opinion that the order of remand as it stands must be set aside. The learned District Judge must, in the first place, decide the question about the status of Sheoratan Singh and the question of jurisdiction. If after determination of these questions the determination of the question of custom is found to be necessary, the issue relating to it can be remitted to the trial court for a finding. With these remarks we allow the appeal with costs, set aside the order of the lower court and direct the learned District Judge to dispose of the appeal according to law in the light of the remarks made above.

*Appeal allowed.*