

APPELLATE CIVIL.

Before Mr. Justice Abdul Raof and Mr. Justice Martineau.

SHER JANG (DEFENDANT) — *Appellant*,

versus

MUNSHI RAM (PLAINTIFF) — *Respondent*.

Civil Appeal No. 1329 of 1917.

Custom—Succession—non-proprietors—village Simli, Hoshiarpur district—collaterals in fourth degree—onus probandi.

Held, that the *onus probandi* that he was entitled by custom to succeed to the shop in suit, the property of a deceased non-proprietor, was upon the plaintiff, a collateral in the fourth degree, and that he had failed to discharge the *onus*.

Attra v. Moda (1). and Ruttigan's Digest of Customary Law, paragraph 238-A, followed.

Second appeal from the decree of F. W. Kennaway, Esq., District Judge, Hoshiarpur, dated the 9th February 1917, affirming that of Lala Dwarika Pershad, Munsif, 1st Class, Garhshankar, District Hoshiarpur, dated the 22nd May 1916, decreeing plaintiff's claim.

TEK CHAND, for Appellant.

FAQIR CHAND, for Respondent.

The judgment of the Court was delivered by—

MARTINEAU, J.—The plaintiff sued for possession of a shop, situate at the village of Simli in the Hoshiarpur District, which was left by one Mela, who died about 10 years before suit and was as has been found by the Lower Appellate Court, a non-proprietor in the village. The shop adjoins the house of the defendant, who is a proprietor. The plaintiff contends that he is entitled to the shop as the heir of Mela, who was his second cousin, and the Courts below have found in his favour. The defendant has preferred a second appeal, having obtained a certificate from the District Judge under section 41 (3) of the Punjab Courts Act.

1921

SHER JANG
v.
MUNSHI RAM.

In paragraph 238-A of Rattigan's Digest of Customary Law it is laid down that a remote collateral is not entitled to succeed to a non-proprietor, and it is not disputed that this is a correct statement of the custom, the question being only whether or not a second cousin, that is, a collateral of the fourth degree, is to be regarded as a remote collateral. We are unable to agree with the learned District Judge in applying by analogy in the present case the rule under which, where the question is one of succession to proprietary rights in land, the descendants of a common great-grandfather are regarded as near collaterals.

In the case of succession to a proprietor any collateral, however remote, would be entitled to succeed in default of a nearer heir, but where the question is one of succession to a non-proprietor remote collaterals are excluded, and what has to be determined in the present case is whether the plaintiff has proved the existence of a custom by which a collateral in the fourth degree can succeed to a non-proprietor.

There is no instance on the record of the succession of a collateral in that degree, and the cases mentioned in Rattigan's Digest of Customary Law do not show that collaterals more distantly related than first cousins have ever succeeded. *Attra v. Moda* (1) is a case in point. It related to a village in the Hoshiarpur District, and the plaintiff was, as in the present case, a collateral of the deceased non-proprietor in the fourth degree. It was held that it lay on him to prove that collaterals more distantly related than a nephew were by custom entitled to succeed, and that he had failed to discharge the *onus*.

We find therefore in the present case that the plaintiff, on whom the *onus* lay, has failed to prove that he is by custom entitled to succeed to the shop left by his second cousin, a non-proprietor of the village.

We accept the appeal, reverse the decrees of the Courts below, and dismiss the suit with costs throughout.

Appeal accepted.

(1) 37 P. R. 1387.