APPELLATE CIVIL.

Before Mr. Justice Scott-Smith and Mr. Justice Harrison.

1924

Feb. 4.

RAM MEHR (PLAINTIFF) Appellant,

versus

PALI RAM (DEFENDANT) Respondent.

Civil Appeal No. 967 of 1919.

Second Appeal—Remand of issues of fact and custom—whether findings of lower Appellate Court are open to challenge in Second Appeal and whether a certificate under section 41 (3), Punjab Courts Act, VI of 1918, is required—Custom—Ancestral property—Mauza *Nahra*, Tahsil *Sonepat*, *District Rohtak—Liability for just debts of predecessor.*

Where at the hearing of a second appeal, findings of fact upon issues, remanded by the High Court under Order XLI, rule 25 of the Civil Procedure Code, are returned such findings are conclusive.

Bal Kishen v. *Jasoda Kaur* (1), *Nehal Singh* v. *Sewa Ram* (2), and *Beni Pershad* v. *Nand Lal* (3), followed.

Held however, that findings upon remanded issues as to custom can be challenged, and no certificate under section 41 (3) of the Punjab Courts Act is required.

Held also, that it had not been proved that by custom in *Mauza* Nahra, *Tahsil* Sonepat, District Rohtak, ancestral immoveable property is liable in the hands of the next holder for the just debts of his predecessor.

Second appeal from the decree of Rai Bahadur Lala *Damodar Das, District Judge, Karnal, dated the 7th January 1919, affirming that of* Lala *Suraj Narain, Senior Subordinate Judge, Rohtak, dated the 28th June 1918, dismissing the plaintiff's suit.*

(1) (1885) I. L. R. 7 All. 765 (F. B.). (2) (1916) 40 I. C. 128.
(3) (1896) I. L. R. 24 Cal. 93.

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SAGAR CHAND and NIAZ MUHAMMAD, for Appellant.

SHAMAIR CHAND, for Respondent.

SCOTT-SMITH J.—A return has now been made by the District Judge to this Court's orders of remand of the 13th January and 11th December 1922. The finding on the first issue is in the affirmative, on the second that the plaintiff's father had not an unfettered right of alienation with regard to these properties, on the third that there is a special custom in the locality in which the parties' village is situate which makes ancestral property in the hands of the next holder liable for the just debts of his predecessor, and on the fourth that the defendant has made improvements valued as follows :—

			Rs.
On property B	...	...	2,500
On property C	...	...	450
On property D	...	...	821

At the hearing Mr. Shamair Chand on behalf of the respondent raised two preliminary points—

(1) that findings of fact by the District Judge upon the issues remanded to him cannot be challenged before us, and

(2) that the findings as regards custom cannot be challenged without a certificate, having regard to section 41 (3) of the Punjab Courts Act.

As regards the first point it was held in *Bal Kishen* v. *Jasoda Kaur* (1) that when the finding and evidence upon issues remanded under Order XLI, rule 25, Civil Procedure Code, are returned to the High Court the finding is conclusive and cannot be challenged on the evidence before the High Court as in

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first appeal. The *ratio decidendi* was that a second appeal is not allowed on questions of fact. This was followed in the case of *Nehal Singh* v. *Sewa Ram* (1), and in *Beni Pershad* v. *Nand Lal* (2) the same view was taken. We agree with the decisions in these cases and we hold that the findings of fact returned to us by the lower Appellate Court cannot now be challenged.

As regards the second point it was contended that under section 41 (3) of the Punjab Courts Act no appeal lies to the High Court from a decree passed in appeal by any Court subordinate to the High Court regarding the validity or the existence of any custom or usage unless the Judge of the lower Appellate Court has certified that the custom or usage is of sufficient importance, and that the evidence regarding it is so conflicting or uncertain that there is such substantial doubt regarding its validity or existence as to justify such appeal. It is urged that the finding on the third issue sent down should be considered as part of the original judgment of the lower Appellate Court, and that therefore it cannot be challenged without a certificate. It was argued on the other side that the appeal was rightly instituted without a certificate because at that time there was no contention regarding the validity or existence of any custom. What was urged at the original hearing was that the lower Appellate Court ought to have framed an issue upon a point of custom which it had not done and we were asked to frame such an issue and remand it for trial. In our opinion the same reasons, which prevent a finding of fact by the lower Appellate Court on an issue remanded to it from being challenged in this Court, do not apply to a decision on a question of custom so remanded. All that is laid down in section 41 is that

(1) (1916) 40 I. C. 128. (2) (1896) I. L. R. 24 Cal. 98.

no *appeal* shall lie to the High Court regarding the validity or existence of any custom without a certificate by the Judge of the lower Appellate Court. There is no provision that when once an appeal has been properly filed, a certificate should be required at any subsequent stage of the hearing. The *proviso* to sub-section (3) lays down that an application under sub-section (3) shall not be received after the expiration of thirty days from the date on which the decree of the lower Appellate Court was passed, and this *proviso*, in our opinion, clearly shows that the provision as to a certificate was only intended to apply as a condition precedent to the filing of an appeal and not as a condition precedent to the challenging of a finding on a question of custom remanded to the lower Appellate Court. Once an appeal has been legally instituted in this Court the appellant can contest at the hearing any findings of the lower Appellate Court (other than findings of fact) which are against him so long as he has taken exception to them in his grounds of appeal. This is his right, and we do not think that it should be taken away from him unless there is a clear provision of the law to this effect. We do not find anything in section 41 (3) which supports the position taken up by the respondent's counsel and we hold that the findings on a question of custom now submitted to us can be challenged in this Court.

The finding on the first issue and on the fourth issue as to the value of the improvements cannot be challenged before us ; that on the second issue is not challenged. The finding on the third issue, however, is challenged by counsel for the appellant who urges that it has not been proved that there is any special custom in this locality which renders ancestral property liable in the hands of an heir for payment of the debts of his predecessor. In our opinion the learned

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District Judge has arrived at his finding on this issue on insufficient materials. He says that 13 instances have been cited by the witnesses from the locality in question in which a decree has been obtained and either executed against the immoveable property of the judgment-debtor after the death of the latter without objection by his heirs or in which the heirs had compromised. The Commissioner who made a local inquiry and recorded the evidence in which these instances were referred to has pointed out that the evidence in support of them is defective. The learned District Judge says that some of them are supported by documents, but counsel has not been able to point out to us which of them are so supported and in our opinion they have not been properly proved. The learned District Judge also admits that many of the instances are not indeed instances of execution of a decree against ancestral landed property after the death of the original judgment-debtor. Under the circumstances we are quite unable to regard this evidence as sufficient to prove that in the locality where the parties reside ancestral immoveable property is liable in the hands of the next holder for the just debts of his predecessor.

[*The remainder of the Judgment is not required for the purpose of this report*—Ed.]

HARRISON J.

HARRISON J.—I agree with the conclusions, and am of opinion that in this case the finding on the third issue can be impugned at this stage without a certificate. The remand is under Order XLI, rule 25, and whether objections be presented or not, it is our duty as an appellate Court seized with the original appeal to proceed to determine that appeal after examining the correctness of the findings on the additional issues. To this rule there is the important exception that it is not within our province to examine such findings when they deal with facts. The contention of the respon-

dents is that in virtue of section 41 (3) of the Punjab Courts Act questions of custom, if unsupported by a certificate, are or must be treated as questions of fact. In a sense this is true, and for practical purposes in second appeals findings on custom unsupported by a certificate are treated as findings of fact. The wording of the section, however, makes it more correct to say that such questions are treated as questions of law subject to the *proviso* regarding the certificate, and therefore may be said to be penalised questions of law rather than privileged questions of fact. The difference is all important. Doubtless questions of custom may be and often are questions of fact ; oftener they are questions of law, sometimes mixed questions of law and fact. Whatever may be their nature they are all classified under section 41 of the Courts Act with questions of law and usage, which may be agitated as a matter of right on second appeal. A penal condition is then added making the presentation of a certificate an indispensable preliminary. Had the contrary procedure been adopted and had such questions been classified with questions of fact subject to privileged treatment being accorded on the production of a certificate the position would have been very different. The finding would then have been a finding of fact unassailable until certain conditions had been observed ; now it is more akin to a question of law which can be agitated as a matter of right subject always to the disabling provisions of section 41 (3), so far as they may be applicable. This sub-section penalises an appeal from a decree. Here we have no appeal and no decree except the original decree from which the appeal was presented and which dealt with no question of custom. No certificate is therefore required. The penal condition does not in terms apply, and the question can be agitated in exactly the same manner as an ordinary

question of law. This result may be due to a defect in the Act with which we are not concerned for the words are clear and in applying a penal provision the greatest strictness must be observed.

C. H. O.

Appeals accepted.

APPELLATE CIVIL.

Before Mr. Justice Abdul Raoof and Mr. Justice Moti Sagar.

MAULA BAKHSH (PLAINTIFF) Appellant,

versus

Mst. TILLO (DEFENDANT) Respondent.

1924

Feb. 19.

Civil Appeal No. 1954 of 1920.

Custom—Succession—Gujars *of Jhelum District—whether a stepmother is entitled to succeed equally with a son*—Riwaj-i-am—onus probandi.

Held, that the entry in the *Riwaj-i-am* being in favour of a stepmother succeeding equally with a son among *Gujars* of the Jhelum District, the *onus probandi* that this was not the custom was on the son, the plaintiff, and that he had failed to discharge the *onus*.

Beg v. *Allah Ditta* (1), followed.

Second appeal from the decree of W. deM. Malan, Esquire, District Judge, Jhelum, dated the 9th August 1920, reversing that of Lala *Prabhu Dial, Senior Subordinate Judge, Jhelum, dated the 6th May 1920, and dismissing the plaintiff's suit.*

NAND LAL, for Appellant.

GHULAM RASUL, for Respondent.

The judgment of the Court was delivered by—

ABDUL RAOOF J.—Only one simple issue arises for decision in this appeal, *viz.*, whether among the *Gujars*

(1) 45 P. R. 1917 (P. C.).