

## APPELLATE CIVIL.

*Before Mr. Justice Harrison and Mr. Justice Dalip Singh.*

MAQTUL SINGH AND OTHERS (DEFENDANTS)

Appellants

*versus*

SADHU RAM (PLAINTIFF).

TULSI (DEFENDANT).

} Respondents.

1926

March 25.

Civil Appeal No. 789 of 1922.

*Appeal—in a case in which all village proprietors were impleaded in the first Court—whether properly presented if only some of them appeal and do not make the other proprietors parties—Custom—Alienation—Non-Proprietors—Banias in Mauza Adhoya Hinduan, Tahsil and District Ambala—Right of alienation of their houses and shops.*

In execution of a decree against T., a *Bania* non-proprietor of Mauza Adhoya Hinduan, the house and shop in dispute were attached. Two Lambardars objected to the attachment and sale of the sites of the premises and their objection was upheld. The decree-holders then brought the present suit against the two Lambardars for a declaration, and on the pleadings of the defendants the rest of the proprietors were made parties. The trial Court decreed the claim. The proprietors appealed to the District Judge who upheld the decision of the trial Court, but granted a certificate on the point of custom. Four of the proprietors then lodged a second appeal in the High Court, and it was objected that the other proprietors not having been impleaded the appeal had not been properly presented.

*Held*, that as any one proprietor could have sued on his own behalf and maintained the present action the other proprietors were not necessary parties to this appeal, though they might have been necessary parties to the suit in the trial Court.

*Udmi v. Hira* (1), referred to.

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*Ambika Prasad v. Jhinak Singh* (1), *Balaram Pal v. Kanysha Majhi* (2), and *Wali Muhammad v. Barkhurdar* (3), distinguished.

*Held also*, that it has been established that by custom the *Bania* non-proprietors of Mauza Adhoya Hinduan have a right to alienate their houses and shops.

*Second appeal from the decree of A. H. Parker, Esq., District Judge, Ambala, dated the 31st January 1922, affirming that of Lala Shibbu Mal, Senior Subordinate Judge, Ambala, dated the 26th April 1921, declaring that the house and shop in dispute are Tulsi's absolute property, etc.*

SHEO NARAIN AND GULLU RAM, for Appellants.

TEK CHAND and ANANT RAM KHOSLA, for Respondents.

The judgment of the Court was delivered by—

DALIP SINGH J.—The plaintiffs-respondents in execution of a decree against one Tulsi, a *Bania* non-proprietor of Mauza Adhoya Hinduan, attached a house and shop belonging to the judgment-debtor situate in the *abadi* of that village. Two *lambardars* on behalf of the proprietors of the village objected to attachment and sale of the site of the house and shop. The objections were upheld by the executing Court and the house and shop were released. The plaintiffs thereupon brought a suit against Tulsi and the two *lambardars* praying for a declaration that the house and shop with their sites were liable to sale in execution. On the pleading of the defendants the rest of the proprietors were made parties. The trial Court decreed the plaintiffs' suit on the ground that a custom had been established in Adhoya Hinduan by which the *bania* non-proprietors were full owners

(1) (1922) I. L. R. 45 All. 286. (2) (1919) 53 I. C. 548.

(3) (1924) I. L. R. 5 Lah. 429.

of the sites of their houses and shops and were entitled to alienate the same. The proprietors appealed to the District Judge and he upheld the decision of the trial Court on the same grounds. A certificate for the purposes of second appeal was, however, granted by the District Judge and four of the proprietors have appealed. They have not impleaded the rest of the proprietors either as respondents or as appellants. *Bakhshi Tek Chand* for the respondents raises a preliminary objection that the other proprietors were necessary parties to the appeal and as they have not been impleaded the appeal has not been properly presented. He has cited *Ambika Prasad v. Jhinak Singh* (1), following a Calcutta decision in *Balaram Pal v. Kanysha Majhi* (2). He has also cited *Wali Muhammad v. Barkhurdar* (3), in which ruling it was held that even where certain persons have been allowed under Order I, rule 8, Civil Procedure Code, to sue in a representative capacity the death of any plaintiff other than the persons appointed as representatives causes the suit to abate. On the other hand Mr. Sheo Narain has cited *Udmi v. Hira* (4) and contends that as no relief is sought against the proprietors it was unnecessary to implead them and as any one proprietor could maintain the suit on his own account the appeal is properly presented. In *Ambika Prasad v. Jhinak Singh* (1), and *Balaram Pal v. Kanysha Majhi* (2), it is no doubt laid down that a person who wishes to have the benefit of Order XLI, rule 4 must implead all the parties to a suit. The facts of those cases were quite different from the present case and without considering whether those rulings are or are not correct it is sufficient for the purposes of this case to hold that as any

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(1) (1922) I. L. R. 45 All. 286.

(2) (1919) 53 I. C. 548.

(3) (1924) I. L. R. 5 Lah. 429.

(4) (1920) I. L. R. 1 Lah. 582.

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one proprietor could sue on his own behalf and maintain the present action the other proprietors were not necessary parties to this appeal, though they may have been necessary parties to the suit in the trial Court. The preliminary objection has, therefore, no force and is overruled.

On the merits the sole question for decision is whether in the circumstances of the present case and on the evidence led the custom claimed on behalf of the *Bania* non-proprietors has been established. According to the judgments of the trial Court and the lower appellate Court there were some 80 alienations of houses and shops and sites by non-proprietors in this village and the adjoining village of Adhoya Mussalmanan. These two villages were originally one at any rate up to 1876 and it seems that they have been separated later for the purposes of revenue assessment, but we are of opinion that the lower appellate Court was correct in holding that for the purposes of deciding the question of the custom prevailing the instances in the one village were valueable as affording a guide to the custom in the other village. It appears that even in *Mauza Adhoya Hinduan* alone there were some 28 alienations, 11 of which were made within 12 years of the present suit and have not yet been challenged. Deducting these 11 there would be 17 unchallenged and unchallengeable alienations by the non-proprietors. There are no judicial decisions in the case of *Mauza Adhoya Hinduan* but there seems to be a decision of the Commissioner that the non-proprietors of *Mauza Adhoya Mussalmanan* have a right to alienate the sites of the houses. An analysis of the alienations shows that at least 4 in *Mauza Adhoya Hinduan* and about 10 in the two villages combined were of sites. It is difficult to see why the

proprietors allowed alienations of such sales to go unchallenged if as a matter of fact they had a right to contest these sales. The other alienations are mostly alienations made by *Banias* to *Banias* and according to the finding of both the Courts the *Bania* non-proprietors of the village appear to have settled in this village from time immemorial, have built *pakka* houses and shops and have transferred sites without objections by the proprietary body. Further, it seems that they are not in the position of ordinary traders in a village, who exist for the purpose of supplying the needs of the village. It seems that the *Bania* non-proprietors of Adhoya Hinduan have an independent existence in the sense that Adhoya is a trading centre for the whole *ilaka*. On the whole, therefore, after considering all the evidence we are of opinion that the custom has been established that the *Bania* non-proprietors have a right to alienate the sites of their houses and shops and we accordingly dismiss the appeal with costs.

C. H. O.

*Appeal dismissed.*

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