

## APPELLATE CIVIL.

*Before Mr. Justice Broadway and Mr. Justice Harrison.*

PHULLO (PLAINTIFF), Appellant

*versus*

MST. DAKHAN AND OTHERS (DEFENDANTS),

Respondents.

1921

June 27

Civil Appeal No. 3149 of 1917.

*Custom—Alienation—by a widow—mortgagee rights—whether moveable or immoveable property.*

*Held*, that mortgagee rights in land fall within the definition of immoveable property and, so long as a mortgage subsists, in the hands of a widow it forms part of her husband's real estate and is subject to the same limitations and restrictions as any other portion of that estate.

*Mussamat Lacho Bai v. Asa Nand* (1), *Sant Singh v. Jowala Singh* (2), *Sewa Ram v. Dheru Shah* (3), and *Sundar Singh v. Mst. Har Kaur* (4), followed.

*Sri Ram v. Ramji Das* (5), dissented from.

*Second appeal from the decree of Rai Sahib Lala Diwan Chand, District Judge, Karnal, dated the 15th August 1917, reversing that of Rai Suraj Narain, Junior Subordinate Judge, Rohtak, dated the 16th January 1917, decreeing plaintiff's claim.*

IQBAL CHAND, for Appellant.

TAJ-UD-DIN, for Respondents.

The judgment of the Court was delivered by—

BROADWAY J.—The only point for determination in this case is whether under Customary Law an alienation by a widow of mortgagee rights succeeded to by her from her husband can be impugned by the reversioner in the same way as an alienation of ordinary ancestral land.

(1) 144 P. R. 1882.

(3) 79 P. W. R. 1913.

(2) 58 P. R. 1899.

(4) 77 P. L. R. 1912.

(5) 59 P. R. 1909.

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In order to arrive at a decision of this question we have to see whether mortgagee rights are moveable or immoveable property.

It is clear that such rights come within the definition of immoveable property given in the General Clauses Act, X of 1897.

In *Sri Ram v. Ramji Das* (1), however, Rattigan and Robertson J.J. recorded an expression of their opinion that for the purposes of the Customary Law of this province a mortgagee's rights could not be regarded as land.

An opinion of such eminent judges no doubt must carry weight. At the same time it was an *obiter dictum* and the case was decided on other points.

*Sant Singh v. Jowala Singh* (2) and *Mussammat Lacho Bai v. Asa Nand* (3) were not brought to the notice of the said judges and these decisions take a totally different view.

In *Sant Singh v. Jowala Singh* (2) Chatterji J. held that a mortgagee's rights in land fell within the definition of immoveable property. In *Mussammat Lacho Bai v. Asa Nand* (3) Smyth and Barkley J.J. held that the mortgagee's interest while unredeemed was undoubtedly an interest in immoveable property which a widow was incapable of alienating to any one not entitled to redeem. The learned judges considered the main arguments that could be adduced against this view and explained that whatever might be the widow's position in the event of the mortgage being redeemed during her lifetime so long as the mortgage subsisted it formed part of her husband's real estate and was subject to the same limitations and restric-

(1) 59 P. R. 1909.

(2) 58 P. R. 1899.

(3) 144 P. R. 1882.

tions as any other portion of that estate. We are entirely in agreement with the view taken in these decisions and counsel for the respondent has been unable to convince us to the contrary.

We may add that Kensington J. followed *Sant Singh v. Jowala Singh* (1) in *Sewa Ram v. Dheru Shah* (2) and Chevis J. held that such rights were immoveable property in matters of succession under the Customary Law in *Sunder Singh v. Mussammatt Har Kaur* (3).

We accordingly accept this appeal with costs and setting aside the decision of the learned District Judge, restore the decree passed by the trial Court.

C. H. O.

*Appeal accepted.*

### APPELLATE CIVIL.

*Before Mr. Justice Harrison and Mr. Justice Zifar Ali.*

MAHANT BASANT DAS (DEFENDANT), Appellant  
*versus*

HEM SINGH, ETC. (PLAINTIFFS) } Respondents.  
DAYAL DAS (DEFENDANT)

Civil Appeal No. 559 of 1923.

*Civil Procedure Code, Act V of 1908, section 92—Suit by Sikhs for removal of Mahant of a Hindu shrine—"interest in the trust"—Sikhs—"Singhs"—Udasis—creeds and observances contrasted and discussed—Locus standi to sue—Control of place of worship—by majority or minority adhering to original practices—Custom—Court not to usurp functions of religious body.*

The eight plaintiffs, belonging to the "Singh" denomination of the Sikh religion obtained sanction to sue for the

(1) 58 P. R. 1899.

(2) 79 P. W. R. 1913.

(3) 77 P. L. R. 1912.