APPELLATE CIVIL.

Before Mr. Justice Tek Chand and Mr. Justice Agha Haidar.

TULSI DAS AND OTHERS (PLAINTIFFS) Appellants

versus

SHIV DAT (DEFENDANT) Respondent.

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June 14.

Civil Appeal No. 1221 of 1923.

Civil Procedure Code, Act V of 1908, Order XXI, Rule 63 —Suit to establish plaintiff's right to the property in dispute —where plaintiff is not in possession—Court-fee—whether auction purchaser can be made a party—and whether decree-holder is a necessary party—Specific Relief Act, I of 1877, section 42 proviso.

Certain land having been attached in execution of a decree against plaintiffs' father and the plaintiffs' objections having been dismissed, the plaintiffs brought a suit under the provisions of Order XXI, rule 63 of the Code of Civil Procedure. It was objected that the Court-fee of the value of Rs. 10 was insufficient, that plaintiffs not being in possession could not sue for a mere declaration, that the decree-holder should have been made a party and that the auction purchaser could not be impleaded.

Held, that in a suit under Order XXI, rule 63, Civil Procedure Code, a Court-fee stamp of Rs. 10 is sufficient, even though there is a prayer for possession.

Dhondo Sakharam Kulkarni v. *Govind Babaji Kulkarni* (1), *Dayaram Jagjivan* v. *Gordhandas Dayaram* (2), and *Phul Kumari* v. *Ghanshyam Misra* (3), followed.

Held also, that the proviso to section 42 of the Specific Relief Act, does not take away from a plaintiff his right to sue for a declaration of his title in so far as it is affected by the order which he seeks to impeach.

Krishtnam Sooraya v. *Pathma Bee* (4), followed.

And, that he can sue any person who in the meantime after the rejection of his objections has come to have any in-

(1) (1884) I.L.R. 9 Bom. 20.
(2) (1906) I.L.R. 31 Bom. 73.
(3) (1907) I.L.R. 35 Cal. 202 (P.C.).
(4) (1906) I.L.R. 29 Mad. 151 (F.B.).

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terest in the disputed property including the auction purchaser.

Dorasawmy Pillai v. *Muthusamy Mooppan* (1), *Sadhu* v. *Ram* (2), and *Subbaraya Mudaliar* v. *Kandaswamy Mudaly* (3), referred to.

Dhondo Sakharam Kulkarni v. *Govind Babaji Kulkarni* (4), and *Dayaram Jagjivan* v. *Gordhandas Dayaram* (5), referred to.

The decree-holder is not a necessary party.

Subbaraya Mudaliar v. *Kandaswamy Mudaly* (3), followed.

First appeal from the decree of Lala *Devi Diyal Dhawan, Subordinate Judge, 1st class, Multan, dated the 6th March 1923, dismissing the claim.*

H. C. KUMAR, for KAHAN CHAND, for Appellants.

MEHR CHAND, MAHAJAN and R. C. SONI, for Respondent.

JUDGMENT.

AGHA HAIDAR J.

AGHA HAIDER J.—This appeal is a continuation of certain claim proceedings. The facts are these :—

One Murli Dhar, the father of plaintiffs Nos. 1 and 2, was the judgment-debtor and the Derajat Sindh Bank, Multan, was the decree-holder. In execution of the decree, the Bank attached the lands in dispute, through the Court of the District Judge, Multan. The present plaintiffs filed objections under Order XXI, rule 58 of the Civil Procedure Code, but those objections were dismissed on the 1st of March, 1921. On the 16th of September, 1921, the lands in dispute were put up for sale in execution of the decree and were purchased at a public auction by Doctor Shiv Datt, defendant No. 2, the sale being confirmed on the 3rd of November, 1921.

(1) (1903) I. L. R. 27 Mad. 94. (3) (1922) 70 I. C. 168.
(2) (1892) I. L. R. 16 Bom. 608. (4) (1884) I. L. R. 9 Bom. 20.
(5) (1906) I. L. R. 31 Bom. 73.

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The plaintiffs prayed that (*a*) the sale of the lands, noted in the heading of the plaint, dated the 16th of September, 1921, in favour of defendant No. 2, may be set aside and declared null and void as against the rights of the plaintiffs, and (*b*) that defendant No. 1 has no claim to Rs. 3,800 deposited in the Government Treasury after payment of the decretal amount to *Lala* Kala Ram, petition-writer. As already mentioned, the Derajat Sindh Bank, Multan, had been impleaded as defendant No. 1 in the present suit; but under an order dated the 26th of July, 1922, its name was struck off the list of the defendants, as, according to the statement of *Pandit* Ganpat Rai, Pleader, for the defendant, the liquidation proceedings had terminated.

A written statement was filed by defendant No. 2 on the 5th of October, 1922; but at present we are concerned only with one plea which had been taken by him in the *jawab-i-dawa* and was also mentioned in the statements of the pleaders for the parties. The plaintiffs' *Mukhtar* stated that "the land in suit is cultivated by tenants who pay rent to defendant. Plaintiffs are not in possession. Defendant is realizing rent since the date of auction. Defendant has given the land to new tenants. The old tenants, who cultivated the land in the time of Murli Dhar, have gone away." This statement of the plaintiffs' own *Mukhtar* was reiterated by Doctor Shiv Dat, the contesting defendant in the suit. He said that [illegible] was in possession of the whole land since the auction and that the plaintiffs [illegible] pointed out [illegible] tention is devoid of [illegible] all that has been [illegible] estate for the benefit of the reversionary body after her death. I am, however, of opinion that this con-

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The plaintiffs have brought the present suit ostensibly under the provisions of Order XXI, rule 63 of the Civil Procedure Code. In this suit they impleaded the Derajat Sindh Bank, Multan (decree-holder), in liquidation, through the Liquidator, Lahore, as defendant No. 1, and Doctor Sheo Datt, the auction-purchaser, as defendant No. 2, Murli Dhar, the judgment-debtor having died in the meantime. Their main allegations are that Lala Murli Dhar, the father of plaintiffs Nos. 1 and 2, had no concern with the lands in suit which had been settled upon the plaintiffs and in respect of which mutation had been sanctioned in their favour as long ago as the 14th of February, 1920. They further allege that the father of plaintiffs Nos. 1 and 2, *Lala* Murli Dhar, was a man of immoral character who had squandered most of his property in profligacy and extravagance, though the income of the property was sufficiently large for the needs of the family. Their case in short is that the settlement of the property, noted in the heading of the plaint, was an accomplished fact already before the Bank took proceedings in execution against the father of plaintiffs Nos. 1 and 2 and it was these proceedings which subsequently culminated in the auction sale in favour of defendant No. 2. It may also be noted that a sum of Rs. 3,800 was in deposit in the Government treasury to which the plaintiffs claimed to be entitled. Paragraph 8 of the plaint is as follows:—

> value of suit for purposes of court-fee
> for purposes tion is

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estate for the benefit of the reversionary body after her death. I am, however, of opinion that this contention is devoid of all force. As pointed out already, all that has been established is that the plaintiff belongs to the same *got* and is possibly or at best probably descended from a remote common ancestor with Bakha deceased. As such, he has, in my judgment, no right whatever to impugn an alienation by Bakha's widow.

It is now settled law that the mere fact that a person belongs to the same *got* as the last male owner gives him no right to control his widow's dealings with regard to the property that has descended to her from her husband. In *Muhammad Rafi* v. *Khazan Singh* (1), which is regarded as the leading authority on the subject, it was held that a person being unable to prove any specific relationship with the deceased proprietor, cannot be allowed to maintain a suit for declaration to contest an alienation on the ground that he belonged to the same *got* or was descended from the same stock as the alienor. To the same effect are the decisions in *Ram Bhaj* v. *Nand Ram* (2), *Jhindu* v. *Gopala* (3), *Kirpa* v. *Mst. Chinti* (4) and the recent case of *Duni Chand* v. *Lekhu* (5). It must, therefore, be held that the plaintiff has no *locus standi* to maintain the suit.

This finding is sufficient to dispose of the appeal and it is not necessary to deal with the other points that arise on the pleadings. I wish, however, to examine an argument strenuously urged by Mr. Gopal Chand that both according to the custom of the Sials of the Jhang District, as well as under the general agricultural custom of the province the de-

(1) 68 P. R. 1892.
(2) (1909) 4 I. C. 1024.
(3) (1912) 15 I. C. 266.
(4) (1923) 77 I. C. 518.
(5) (1927) 100 I. C. 917, 920.

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fendants being the sons of the daughter of the predeceased son of Bakha are not nearer heirs of Bakha deceased than the plaintiff who is his agnate of a remote degree. The *Riwaj-i-am* of the Jhang District prepared by Mr. Abbott in 1904-09 is, however, opposed to this contention. In answer to question No. 5 given by the members of the Sial tribe it is distinctly stated that if a person dies leaving the descendants of a predeceased son, these descendants succeed to his property in the same way as the predeceased son would have himself succeeded. This indicates that the right of representation is recognized to the fullest extent amongst the members of this tribe. This answer is in accord with the general agricultural custom of the Province which on the whole favours the right of the descendants of a predeceased person to succeed. I must, therefore, hold that the defendants (donees), who are the daughter's sons of Fattu, a predeceased son of Bakha, have under custom a decidedly superior claim to succeed to Bakha's property as against the plaintiff, who is, if at all, an agnate of a very remote degree

It may also be mentioned that according to the general agricultural custom a grand-daughter and her sons are more or less on the same footing as a daughter and her sons as against distant collaterals, and as pointed out by the learned Judge of the Court below, among Sials of this District daughters of a sonless proprietor occupy a very much more favourable position as against collaterals than in many other tribes in the Province. Mr. Gopal Chand has urged that answers to questions Nos. 15 and 19 of the *Riwaj-i-am* indicate that custom favours only such daughters as are married in the same *kuff* as the deceased proprietor. In this case it is proved that the daughter

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of Fattu was married to Sardara, who is, like the plaintiff, a Dinga Sial of the Jhang District. The rule laid down in the answer to these two questions, therefore, applies to the defendants and they are, for this reason also, better heirs than the plaintiff. The gift is, accordingly therefore, an acceleration of succession in favour of defendants Nos. 2 and 3.

However, even if we were to accept the argument of Mr. Gopal Chand that the paragraphs of the *Riwaj-i-am* above referred to do not apply to a case like the present and that no custom, special or general, is proved laying down the rule which is to regulate succession to the property of a deceased proprietor as between remote collaterals and his predeceased son's daughter's sons, in that case the Courts are bound under the authority of the leading case reported as *Daya Ram* v. *Sohel Singh* (1) to fall back upon the personal law of the parties which in this case is Muhammadan Law. It is conceded that under that system of law the defendants being the predeceased son's daughter's sons are entitled to succeed as distant kindred in preference to the plaintiff whose relationship is, as stated above, undefined. In this view of the case also the defendants 2 and 3 have got a right to be maintained in possession of the property of Bakha after the death of his widow, *Mussammat* Bharai.

For the foregoing reasons, I hold that there is no force in this appeal and I would dismiss it with costs.

AGHA HAIDER J.—I agree.

AGHA HAIDAR J.

A. N. C.

Appeal dismissed.

(1) 110 P. R. 1906 (F.B.).