

28th March, 1928, which, in this case, by refusing to confirm the sale, effectively set it aside.

The result is that this appeal must be accepted, the order appealed against set aside and the case remanded to the executing Court for decision upon the respondents' objections to the sale which were to be considered on the 26th October, 1927. The appellant will have his costs in this Court.

TEK CHAND J.—I agree.

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Appeal accepted.

LETTERS PATENT APPEAL.

Before Tek Chand and Coldstream, JJ.

MAULU AND OTHERS (PLAINTIFFS) Appellants

versus

GHANAYA AND OTHERS (DEFENDANTS)

Respondents.

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Feb. 13.

Letters Patent Appeal No. 70 of 1929.

Punjab Courts Act, IX of 1919, Section 41 (3): Certificate—whether necessary—when second appeal is not from a decree but from an order of remand—Civil Procedure Code—Order 1, rule 8—Suit for a declaration in representative capacity against a few of numerous defendants—necessity of strict compliance with provisions of the rule.

The plaintiffs—four in number—brought a suit against four of the proprietors of village Saloh in the Hoshiarpur District for a declaration that they had a right to graze their cattle in the village *shamilat*, stating in the plaint that they were suing in a representative capacity on behalf of all the non-proprietors in the village, and that as the proprietary body consisted of numerous persons, the plaintiffs had selected four defendants to defend the suit on their behalf. A petition was also made, purporting to be under Order 1, rule 8, Civil Procedure Code, asking for permission to the four

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plaintiffs to sue on behalf of all the non-proprietors and to the four defendants to defend the suit on behalf of all the proprietors. The Court, however, did not follow the procedure laid down in Order 1, rule 8, and passed no orders on the petition. The defendants pleaded, *inter alia*, that plaintiffs had no right to graze cattle in the *shamilat*, and challenged their right to sue as representatives of the non-proprietors of the village. In spite of this the plaintiffs took no steps to have service effected personally or by public advertisement on all persons concerned, in accordance with the provisions of Order 1, rule 8. The Court framed four issues, but decided only two and held that the suit was maintainable, and that the plaintiffs had failed to establish their right to graze their cattle in the village *shamilat*, and accordingly dismissed the suit.

On appeal the District Judge held that under the *Wajib-ul-arz* of 1914, the plaintiffs were entitled to graze their cattle in the *shamilat*, and accepting the appeal remanded the case under Order 41, rule 23, to decide the other issues. From the order of remand the defendants lodged an appeal to the High Court under Order 43, rule 1 (*n*), which was heard by a Judge sitting in Single Bench. He dismissed the suit holding that the plaintiffs had no right to graze their cattle in the *shamilat*. On plaintiffs' appeal under the Letters Patent it was contended on their behalf that the Judge sitting in Single Bench had no jurisdiction to entertain the defendants' appeal in the absence of a certificate as the District Judge had decided the case on a question of custom.

Held (overruling the contention), that no certificate was necessary as section 41 (3) of the Punjab Courts Act requiring a certificate for filing a second appeal on a question of custom applies to appeals from appellate *decrees* and has no application to appeals from *orders*.

Mussammat Umri v. Shah Muhammad (1), followed.

Sawan Singh v. Mothu (2), not followed.

Held further, however, that the suit must be dismissed as plaintiffs sued in a representative capacity and permission under Order I, rule 8, had not been obtained, and the pro-

(1) (1922) I. L. R. 3 Lah. 218 (F. B.).

(2) 85 P. R. 1914.

cedure laid down in that rule had not yet been followed—nor could the suit be maintained unless *all* the proprietors were impleaded as parties.

Kumaravelu Chettiar v. Ramaswami Ayyar (1), followed.

Appeal under clause 10 of the Letters Patent from the decree of Zafar Ali J., dated 18th January, 1929, passed in C. A. No. 383 of 1928, reversing that of Sardar Sewaram Singh, District Judge, Hoshiarpur, dated the 14th November, 1927 (which reversed the decree of Lala Ram Rattan, Subordinate Judge, 4th Class, Hoshiarpur, dated the 31st August, 1927) by remanding the case and dismissing the plaintiffs' suit.

DIN DAYAL KHANNA, for HEM RAJ WADHWA, for Appellants.

SUNDAR DAS, for Respondents.

TEK CHAND J.—The plaintiffs, four in number, TEK CHAND J. brought a suit against four of the proprietors of *Mauza Saloh* in the *Una tahsil* of the Hoshiarpur district, for a declaration that they had a right to graze their cattle in the village *shamilat*. In the plaint it was stated that the plaintiffs were suing in a representative capacity on behalf of all the non-proprietors in the village, including the non-occupancy tenants, *kamins* and other residents, whose number was very large and who had a common interest with them. It was also mentioned that the proprietary body consisted of numerous persons and, therefore, the plaintiffs had selected the four defendants to defend the suit on their behalf. Along with the plaint, an application, purporting to be under Order I, rule 8, Civil Procedure Code, was made

(1) (1933) I. L. R. 56 Mad. 657, 667 (P. C.).

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praying that permission be granted to the four plaintiffs to sue on behalf of all the non-proprietors, and to the four defendants to represent the proprietors in this litigation. The Court, however, did not follow the procedure laid down in that rule, nor did it pass any order on the petition.

The defendants filed a lengthy written statement in which they pleaded, *inter alia*, that the plaintiffs had no right to graze cattle in the *shamilat*. They averred that the plaintiffs were neither tenants nor *kamins* nor did they possess any other status in the estate but had migrated recently from other villages, and that they had no right to sue in a representative capacity on behalf of the non-proprietors. These allegations were not traversed by the plaintiffs, nor did they, in spite of the fact that the defendants had challenged their claim to sue as representative of the entire body of "non-proprietors" in the village, take any steps to have service effected personally or by public advertisement on the persons concerned, in accordance with the provisions of Order I, rule 8. The Court proceeded to try the suit, framing four issues, one of which was: "whether the suit as framed was maintainable." In a brief order it found this issue in favour of the plaintiffs but on the second issue it held that the plaintiffs had failed to establish any right to graze their cattle in the village *shamilat* and, therefore, it dismissed the suit, without deciding the remaining issues.

On appeal the learned District Judge held that under the village *wajib-ul-arz*, prepared in the Settlement of 1914, the plaintiffs were entitled to graze their cattle in the *shamilat*. He accordingly accepted

the appeal, and remanded the case to the trial Court under Order 41, rule 23, Civil Procedure Code, for decision of the issues which had been left undecided in its previous order.

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From the order of remand, the defendants lodged an appeal in the High Court under Order 43, rule 1 (*u*). This appeal was heard by Zafar Ali J. sitting in Single Bench. He disagreed with the learned District Judge's interpretation of the entry in the *wajib-ul-arz*, and holding that the plaintiffs had no right to graze their cattle in the *shamilat*, dismissed the suit. The plaintiffs have appealed under clause 10 of the Letters Patent, and the first contention raised on their behalf is that the learned Judge in Chambers had no jurisdiction to entertain the defendants' appeal, as the District Judge had decided the case on a question of custom and no certificate for instituting an appeal in the High Court had been obtained from him. This objection does not appear to have been taken before the learned Judge but has been urged for the first time in the Letters Patent Appeal. The objection is, however, without substance and is based on a misapprehension of the scope of section 41 (3) of the Punjab Courts Act. That section is the only provision of the law which requires a certificate for filing an appeal on a question of custom in the High Court, but its operation is restricted to second appeals against appellate *decrees*. It has no application to appeals against *orders*. In the case before us no *decree* had been passed by the District Judge: as stated already, he had passed an *order* remanding the case under Order 41, rule 23. Section 41 (3) of the Punjab Courts Act was, therefore, inapplicable, and a certificate was not necessary.

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The learned counsel for the appellants referred us to the proviso to clause (u) of rule 1 of Order 43, Civil Procedure Code, and the judgment of a Division Bench of the Chief Court in *Sawan Singh v. Mothu & others* (1). But that case was expressly dissented from by the Full Bench in *Mst. Umri v. Shah Muhammad* (2), and cannot be regarded as laying down good law. Following the decision of the Full Bench in the case cited, I hold that the defendants' appeal against the order of remand, passed by the District Judge, had been properly instituted, and I would accordingly overrule the objection.

The next question is whether the plaintiffs are entitled to a declaration that they had a right to graze their cattle in the village *shamilat*. As has been stated above, they claimed to sue in a representative capacity on behalf of all the "non-proprietors" in the village, including the non-occupancy tenants and the *kamins*, and they sued the four defendants as representatives of the proprietary body. They fully realized that such a suit could proceed only if permission under Order I, rule 8, was given, and they actually made an application under that rule. But the procedure laid down therein was not followed, nor was the permission of the Court obtained. In *Kumaravelu Chettiar v. Ramaswami Ayyar* (3), their Lordships of the Privy Council have laid down that the provisions of Order I, rule 8, must be strictly complied with, otherwise the judgment in the action will bind only those persons whose names are actually on the record. It was observed that "the obtaining of

(1) 85 P. R. 1914.

(2) (1922) I. L. R. 3 Lah. 218 (F. B.).

(3) (1933) I. L. R. 56 Mad. 657, 667 (P. C.).

the judicial permission and compliance with the succeeding orders as to notice are * * * quite clearly the conditions on which the further proceedings in the suit become binding on persons other than those actually parties thereto and their privies." These essential conditions not having been fulfilled in the present case, it was by no means a representative action, but was merely a suit between the four named plaintiffs and the four individual proprietors who had been impleaded as defendants.

This being the real nature of the suit, it is obvious that it is impossible for the Court to grant to the plaintiffs the relief claimed by them. A suit to obtain a declaration that the plaintiffs possess certain rights in the *shamilat* can be maintained only if all the proprietors have been impleaded as parties. This not having been done, the defect is fatal to the suit, which should have been dismissed on this short ground alone.

In this view of the case, it is not necessary to examine in detail the terms of the entry in the *wajib-ul-arz*. It may be stated, however, that two of the plaintiffs are *Telis*, the third is a *Gujar* and the fourth is a *Bahiti*, who have migrated recently to *Mauza Saloh* from other villages. They are neither *tenants* nor *kamins*, and their counsel has not been able to tell us, what their real status in the estate is.

In my opinion this appeal is without force, and I would dismiss it with costs.

COLDSTREAM J.—I agree.

A. N. C.

COLDSTREAM J.

Appeal dismissed.

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