APPELLATE CIVIL.

Before Addison and Abdul Rashid JJ.

MUSSAMMAT JANAT BIBI AND ANOTHER (DEFENDANTS) Appellants

versus

GHULAM HUSSAIN AND ANOTHER (PLAINTIFFS) Respondents.

1934

June 1.

Civil Appeal No. 938 of 1929.

Custom — Alienation — Wills — Muhammadan Gujars *of* Tahsil *Jhelum—Ancestral property bequeathed to daughter —Suit by collaterals—Second Appeal—Certificate under section 41 (3), Punjab Courts Act, IX of 1919, refused by District Judge—whether High Court can hear appeal without certificate or return case to District Judge for re-consideration or with order to grant a certificate—Decision on point of custom—Value of judgment in another case—Indian Evidence Act, I of 1872, section 13.*

The collaterals of one F. D. a *Gujar* of village Langarpur, *Tahsil* Jhelum, sued for possession of certain land on the ground that it was ancestral and F. D. was not competent to bequeath it to his daughter. The District Judge, on appeal, decreed the claim holding that *Gujars* of Jhelum had no power under custom to make wills. An application for grant of certificate under section 41 (3) of the Punjab Courts Act was refused by the District Judge. The defendant lodged a second appeal to the High Court without the certificate under section 41 (3) of the Act and put in a petition for revision, praying that the refusal of the District Judge to grant the certificate should be set aside. Counsel for defendants-appellants relied upon *Pahalwan Khan* v. *Bagga* (1), (published long after the District Judge had decided the appeal before him), as establishing that there was a custom among Muhammadan *Gujars* of *Tahsil* Jhelum, whereby a sonless proprietor had a right to bequeath his ancestral property.

Held, that a decision in a custom case is not a judgment *in rem*. It is only relevant under section 13 of the Evidence Act as a judicial instance of the custom being recognized.

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Held also, that the District Judge, having in the present case recorded a clear order on the application for a certificate that there was absolutely no conflict or uncertainty with respect to the point involved in the case and refused the grant of a certificate accordingly, a second appeal was incompetent without a certificate.

Also, that there was no power in the High Court to send the case back to him in such circumstances for reconsideration or with an order to grant the required certificate.

Lehna Singh v. *Jagat Ram* (1), *Jita* v. *Har Chand* (2), *Mula* v. *Hoshiara* (3), *Mussammat Chinti* v. *Ishar* (4) and *Allah Din* v. *Salam Din* (5), relied upon.

Second Appeal from the decree of R. S. Lala *Jaswant Rai, District Judge, Jhelum, dated the 2nd January, 1929, reversing that of* Sheikh *Mohammad Hussain, Subordinate Judge, 4th Class, Jhelum, dated the 2nd October, 1928, and decreeing the plaintiffs' suit.*

A. N. CHONA, for Appellants.

MOHAMMAD MONIR, for Respondents.

ADDISON J.

ADDISON J.—The collaterals of one Fateh Din sued for possession of certain land on the ground that it was ancestral and Fateh Din was not competent to bequeath it to the defendant. The trial Judge dismissed the suit holding that the will was valid under custom. On appeal the District Judge held that *Gujars* of Jhelum had no power under custom to make wills. He accordingly decreed the claim. Against this decision the defendants have preferred this second appeal without the certificate required under the provisions of section 41 (3) of the Punjab Courts Act. They have also put in a petition on the revision side,

(1) 1923 A. I. R. (Lah.) 377.
(2) 1923 A. I. R. (Lah.) 589.
(3) (1915) 27 I. C. 723.
(4) 100 P. R. 1917.
(5) 96 P. R. 1915.

praying that the refusal of the District Judge to grant this certificate should be set aside.

The counsel for appellants relied upon *Pahalwan Khan* v. *Bagga* (1), as establishing that there was a custom among Muhammadan *Gujars* of *Tahsil* Jhelum whereby a sonless proprietor had a right to bequeath his ancestral land to an associated collateral to the exclusion of other collaterals of the same degree. This decision was not published till long after the District Judge had decided the appeal before him. Further, a decision in a custom case is not a judgment *in rem*. It is only relevant under section 13 of the Evidence Act as a judicial instance of the custom being recognized. It may be that, owing to faulty prosecution, one decision may be arrived at between certain parties while there may be another decision in a suit arising between other persons.

The principal question before us is, whether this Court has power to compel the District Judge to grant the certificate in question. It is necessary in this connection to set out section 41 (1) and (3) of the Punjab Courts Act :—

" 41. (1) An appeal shall lie to the High Court from every decree passed in appeal by any Court subordinate to the High Court on any of the following grounds, namely :—

" (*a*) the decision being contrary to law or to some custom or usage having the force of law;

" (*b*) the decision having failed to determine some material issue of law or custom or usage having the force of law;

" (*c*) a substantial error or defect in the procedure provided by the Code of Civil Procedure, 1908,

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or by any other law for the time being in force which may possibly have produced error or defect in the decision of the case upon the merits.

" (3) Nothwithstanding anything in sub-section (1) of this section, no appeal shall lie 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."

In *Lehna Singh* v. *Jagat Ram* (1) before Campbell J. the question raised was the existence of a custom and it was held by him that the words " notwithstanding anything in sub-section (1) of this section," with which sub-section (3) of section 41 of the Punjab Courts Act commences, preclude a Court of second appeal in the absence of a certificate from going into the question of whether the first appellate Court had erred in law or procedure." This seems to be the correct view. Under section 41 (1) a second appeal lies if the decision is contrary to law or to some custom or usage having the force of law, but the right of appeal given in sub-section (1) is taken away by the opening words of sub-section (3) which are to the effect that " Notwithstanding anything in sub-section (1) of this section no second appeal shall lie 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 re-

(1) 1923 A. I. R. (Lah.) 377.

garding it is so conflicting or uncertain that there is such substantial doubt regarding its validity or existence as to justify an appeal." The plain meaning of this section is that without the certificate in question no second appeal lies to the High Court.

It is not necessary to refer to all the decisions on this question, but I may allude to *Jita* v. *Har Chand* (1), a decision of a Division Bench. An application for a certificate was made to the Lower Appellate Court but was dismissed on the ground that there was no material on the record on which any decision, as to the custom alleged, could be arrived at. It was held by the High Court that a question of custom was involved, and that even if the decision of the learned District Judge on the merits of the case be erroneous, a second appeal was not competent without a certificate. Similarly it was held by Shah Din J. in *Mula* v. *Hoshiara* (2), that where a certificate to appeal on a question of custom is not granted, no second appeal lies to the High Court and it is immaterial on what ground the same is refused. Again, Shah Din and leRossignol JJ. held, in *Mussammat Chinti* v. *Ishar* (3), that, although the District Judge's view regarding the reversion of the property to the plaintiffs was erroneous, no second appeal was competent without a certificate under section 41 (3) of the Punjab Courts Act. That was a case in which the District Judge had rejected the application for grant of a certificate on the ground that he entertained no doubt that *Mussammat* Chinti was not an heir of the donee. It was also held by Johnstone J. in *Allah Din* v. *Salam Din* (4), that the question of *onus probandi* could not

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be raised without a certificate under section 41 (3) of the Punjab Courts Act.

In the present case the District Judge recorded a clear order on the application for grant of a certificate that there was absolutely no conflict or uncertainty with respect to the point involved in this case. He, therefore, considered the application which was before him and found that the certificate should not be granted. In these circumstances I have not the slightest doubt that the second appeal is incompetent without a certificate, and that there is no power in this Court to send the case back to him for reconsideration or with an order to him to grant the required certificate. It follows that this appeal and revision petition must both be dismissed. Parties will bear their own costs in the revision petition, but the respondents' costs of the appeal will be borne by the appellants.

ABDUL RASHID J.

ABDUL RASHID J.—I agree.

A. N. C.

Appeal and Revision dismissed.