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SADHU RAM
v.
DHANPAT RAI-
TELU RAM.
COLDSTREAM J.

argued before him was the question of law whether a decree against a firm and a decree against a partner in his individual capacity are necessarily decrees against the same judgment-debtor within the meaning of section 73. The plea now taken sets up a new case upon which we are not now prepared to adjudicate.

For the reasons I have given I would accept the appeal with costs and restore the judgment and decree of the Additional District Judge.

JAI LAL J.—I agree.

A. N. C.

Appeal accepted.

LETTERS PATENT APPEAL.

Before Addison and Din Mohammad JJ.

MUNSHI RAM (DEFENDANT) Appellant,

versus

MEHR DAS AND ANOTHER

(PLAINTIFFS)

SARWAN DAS AND OTHERS

(DEFENDANTS)

} Respondents.

Letters Patent Appeal No. 97 of 1936.

Punjab Land Revenue Act (XVII of 1887) s. 44: Entry in Revenue papers -- presumption of correctness — Onus probandi — Punjab Courts Act (IX of 1919), s. 41 (3): Custom — Second appeal — without Certificate — whether competent.

The property in dispute was ancestral property in the hands of one M.R. Upon his death his *Chela* K. succeeded him, the parties being *Udasi Fakirs*, but not in charge of any institution. M.R., the real nephew of M.R., disputed the

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right of K. to succeed, but being a *Chela* of M.R. he succeeded as his son. On the death of K. the land was mutated in favour of M.R. the contesting defendant. The plaintiffs, brother and mother of K., brought the present suit for a declaration that the land belonged to them as heirs of K. The trial Court dismissed the suit. On appeal the District Judge held that the parties followed custom and that M.R. was entitled to succeed on the death of K. The plaintiffs applied for a certificate under s. 41 (3) of the Punjab Courts Act but their application was dismissed as time-barred. On second appeal to the High Court, a Single Bench held that the plaintiffs-appellants were in possession of the land and that M.R. could therefore succeed only by proving clearly a better title to succeed, also that a certificate was not necessary as the lower Appellate Court had decided the matter, not on the basis of any evidence, but merely on the analogy of succession to the estate of an appointed heir. M.R. appealed under the Letters Patent.

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Held, that the land having been mutated in favour of M.R. and his own name having been incorporated in the revenue papers as owner, there was a statutory presumption in his favour under s. 44 of the Punjab Land Revenue Act which had not been given effect to.

Held further, that the appeal before the Single Bench was incompetent for want of a certificate under s. 41 (3) of the Punjab Courts Act, as the question involved was clearly a question regarding the validity or existence of a custom within the meaning of that section.

Sohna Mal v. Nanak Chand (1), followed.

Letters Patent Appeal from the decree of Jai Lal J., dated 8th April, 1936, modifying that of K. S. Sheikh Abdul Aziz, District Judge, Ludhiana, dated 14th August, 1935, who affirmed that of Sheikh Bashir Ahmad, Subordinate Judge, 2nd Class, Samrala, dated 30th October, 1934, by decreeing the plaintiffs' suit.

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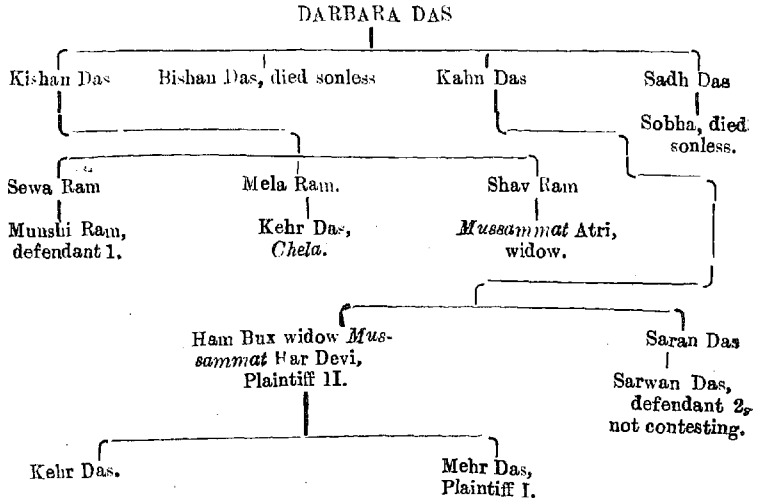
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QABUL CHAND, for M. L. PURI, for Appellant.

D. N. AGGARWAL, for (Plaintiffs) Respondents.

The judgment of the Court was delivered by—

ADDISON J.—This is an appeal under the Letters Patent from the decision of Jai Lal J. The following pedigree-table is necessary to understand it:—



The property in suit was ancestral property in the hands of Mela Ram. Upon his death, his *Chela* Kehr Das succeeded him. The parties are *Udasi Fakirs* but it would seem that they are not in charge of any institution, that is, they are merely land owners. Munshi Ram, the real nephew of Mela Ram, disputed the right of Kehr Das to succeed, but it was held that, being a *Chela* of Mela Ram, he succeeded as his son. Kehr Das himself has now died. The land has been mutated in favour of Munshi Ram who is defendant No. 1 in the present case. The widow of Ram Bakhsh, *Mussammat* Har Devi, and Mehr Das, who was the real brother of Kehr Das, have brought this present suit for a declaration that the agricultural land, which had been mutated in the name of Munshi Ram, belonged to them as they were the heirs of Kehr Das.

They also sued for possession of a house, but they have given up this part of their claim, and we are only concerned with the agricultural land.

Munshi Ram pleaded that, the land being ancestral and Kehr Das having succeeded as a son, he, as nephew of Mela Ram and cousin of Kehr Das in his adoptive family, was the heir according to custom which the parties followed. The trial Judge held that there was no family custom proved, but that the parties followed the Customary Law of the district. He further held that Kehr Das, as *Chela* of Mela Ram took the place of a fully adopted son of Mela Ram and in that capacity succeeded him, and that the plaintiffs were not entitled to succeed according to custom as natural heirs of Kehr Das, as Kehr Das had been adopted completely out of his own branch of the family. He, therefore, dismissed the suit. On appeal, the learned District Judge held that the parties followed custom and that by that custom Munshi Ram was entitled to succeed on the death of Kehr Das. He consequently dismissed the appeal.

The plaintiffs then applied to the District Judge for a certificate under the provisions of section 41 (3) of the Punjab Courts Act. The application was barred by time under the proviso to that sub-section, and as there was no sufficient cause for not presenting it within the proper period the application was dismissed and the certificate was not granted. The plaintiffs then instituted a second appeal in this Court without a certificate. Jai Lal J. accepted the appeal and decreed the plaintiffs' suit as regards the agricultural land. Against this decision, the defendant Munshi Ram has preferred this appeal under the Letters Patent.

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The learned Single Judge, though he accepted the appeal, stated that the question involved in it was not free from difficulty. He also said that the appellants were in possession of the property and that Munshi Ram could therefore only succeed by proving clearly a better title to succeed. He seems to have overlooked the fact that the land has been mutated in favour of Munshi Ram, whose name has been incorporated in the revenue papers as owner. There is a statutory presumption in favour of Munshi Ram under section 44 of the Land Revenue Act, and this has not been given effect to.

Apart from that, there is the question of want of certificate required by section 41 (3) of the Punjab Courts Act. The learned Single Judge said that the Lower Appellate Court had decided the matter not on the basis of any evidence but merely on the analogy of succession to the estate of an appointed heir. He went on to say that in these circumstances a certificate was not necessary and referred to *Indar Singh v. Jai Singh* (1).

That authority, however, was only to the effect that where the conclusion of the District Judge was based not upon a consideration of evidence, that is to say, on a decision as to the weight of evidence, but was based on the interpretation of a clause in the *Wajib-ul-arz*, a second appeal lay to the High Court without a certificate, and the learned Judges relied upon two judgments of Jai Lal J. to the same effect, which are reported in *Ghafur v. Shahabuddin* (2) and *Gul Mohammad v. Attar Singh* (3). The present case is not one which depends upon the interpretation of any clause of a *Wajib-ul-Arz* (statement of custom) but,

(1) (1935) 157 I. C. 341.

(2) 1932 A. I. R. (Lah.) 397.

(3) 1932 A. I. R. (Lah.) 463.

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even if it did, we are of opinion that the interpretation of a clause in the village statement of custom would involve a decision regarding the validity or existence of a custom and that a certificate would, therefore, be necessary under section 41 (3) of the Punjab Courts Act. By section 41 (1) an appeal is allowed to the High Court from a decree on any of the following grounds, namely:—

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

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

(c) a substantial error or defect in the procedure provided by the Code of Civil Procedure or by any other law for the time being in force.

Section 41 (3), however, then goes on to enact that, notwithstanding anything in sub-section (1), 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 unless the Judge of the Lower Appellate Court has certified that the custom 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. The appellants themselves admitted that a question of custom was involved in their appeal when they applied for a certificate, and there is no doubt that the question in dispute is whether by custom Munshi Ram succeeds or the plaintiffs. No appeal, therefore, was competent without this certificate, which the appellants should have obtained, had they

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put in an application within time. It was laid down by a Division Bench of the Punjab Chief Court in *Sohna Mal v. Nanak Chand* (1), that the natural meaning of section 41 (1) and (3) of the Punjab Courts Act appears to be, that

(a) even though the decision on custom by the Lower Appellate Court is wrong;

(b) Even though the Lower Appellate Court has failed to determine a material point of custom;

(c) Even though the Lower Appellate Court's procedure is marred by grave irregularities, still this Court shall not interfere unless the certificate has issued. With this decision we are in full agreement and hold that the appeal to this Court was incompetent for want of the necessary certificate.

We accept the appeal with costs before us, before the Single Judge, and in the District Court, and restore the decree of the Lower Appellate Court, dismissing the suit.

A. N. C.

Appeal accepted.

(1) 22 P. R. 1913.