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Attorney-General that in any case since 1868 in this country the rule of construction of statutes is the one laid down by section 6 of the General Clauses Act, 1868, and that though in express terms that statute may not be applicable to the construction of article 13 (1) of the Constitution, yet that rule is a rule of justice, equity and good conscience and has become a rule of common law in this country and should be applied even to cases where statutes become void by reason of their being repugnant to the Constitution.

For the reasons given above I see no force in this appeal and I would accordingly dismiss it.

Mukherjea J.

MUKHERJEA J.—I am in entire agreement with the view taken by my learned brother Fazl Ali J. in his judgment and I concur both in his reasons and his conclusion.

Appeal dismissed.

Agent for the appellant : *P. G. Gokhale.*

Agent for the respondent : *P. A. Mehta.*

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March 2.

ARJUN SINGH *alias* PURAN

v.

KARTAR SINGH AND OTHERS

[SAIYID FAZL ALI, MUKHERJEA and CHANDRASEKHARA AIYAR JJ.]

Civil Procedure Code, 1908, *O. XLI. r. 27—Additional evidence —Improper admission—Finding based on such evidence—Whether conclusive—Interference—Punjab Custom Act (II of* 1920), *s. 7—Suit to contest alienation of non-ancestral property—Maintainability.*

The discretion to receive and admit additional evidence in appeal is not an arbitrary one but is a judicial one circumscribed by the limitations specified in O. XLI, r. 27, of the Civil Procedure Code, and if additional evidence was allowed to be adduced contrary to the principles governing the reception of such evidence, it would be a case of improper exercise of discretion and the additional evidence so brought on the record will have to be ignored and the case decided as if it was non-existent.

The legitimate occasion for admitting additional evidence in appeal is when on examining the evidence *as it stands* some inherent lacuna or defect becomes apparent, not where a discovery is made outside the court, of fresh evidence, and an application is made to import it. The true test is whether the appellate court is able to pronounce judgment on the materials before it, without taking into consideration the additional evidence sought to be adduced.

Kessowji Issur v. *G. I. P. Railway* (34 I.A. 115) and *Parsotim* v. *Lal Mohan* (58 I.A. 254) referred to.

Though ordinarily a finding of fact, however erroneous, cannot be challenged in second appeal, a finding which is arrived at on the basis of additional evidence which ought not to have been admitted and without any consideration of the intrinsic and palpable defects in the nature of such evidence cannot be accepted as a finding which is conclusive on appeal.

Under s. 7 of the Punjab Act II of 1920 no one can contest an alienation of non-ancestral immoveable property on the ground that such alienation is contrary to custom.

CIVIL APPELLATE JURISDICTION : Appeal (Civil Appeal No. 31 of 1950) against a judgment and decree dated 28th February, 1946, of the High Court of Judicature at Lahore in Regular Second Appeal No. 887 of 1942.

Ram Lal Anand (*Harbans Lal Mittal,* with him) for the appellant.

Bakshi Tek Chand (*P. S. Safeer,* with him) for the respondents.

1951. March 2. The Judgment of the Court was delivered by.

Chandrasekhara Aiyar J.

CHANDRASEKHARA AIYAR J.—The plaintiff, Arjun Singh *alias* Puran, brought a suit in the court of the Subordinate Judge, Jullundur, against Inder Singh, Kartar Singh and five others, for a declaration that a will executed by the first defendant, Inder Singh, in favour of the second defendant, Kartar Singh, about 14 years ago was null and void as against the plaintiff, who was the first defendant's reversionary heir after his death. The plaint comprised a half share of land measuring 395 kanals in the village of Kadduwal,

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another half share of land measuring 837 kanals and 11 marlas in the village of Pattar Kalan, and four houses in the latter village. In the pedigree attached to the plaint showing the relationship of the parties, the plaintiff claims Sehja Singh as his 4th ancestor. Jodha Singh and Jai Singh are shown as Sehja Singh's sons. Defendant No. 1, Inder Singh, is Jodha Singh's grandson. It is alleged that the parties are Jat agriculturists governed by the customary law in matters of alienation of ancestral property and succession, and that as a sonless proprietor under this law is not competent to make a will in respect of his ancestral property, when there are collaterals up to the 5th degree, and as the entire property mentioned in the plaint was ancestral, the will made by the first defendant in favour of the second defendant who claimed to have been adopted by the first defendant was invalid and ineffectual. Plaintiff was born on 22nd July, 1919, and was a minor when the will was made, and so the suit was within time.

The suit was contested mainly by the second defendant, Kartar Singh, who set up his adoption, and pleaded that the properties were not at all ancestral as regards the plaintiff. Defendants 3 to 7 remained *ex parte*.

At the trial, it was admitted that the land situated in Kadduwal was not proved to be ancestral. The Subordinate Judge held that even the land in Pattar Kalan was not shown to be ancestral by the evidence adduced on the side of plaintiff, as it was found that the common ancestor, Sehja Singh, had not only two sons called Jodha Singh and Jai Singh, but a third son named Pohlo, and that from the mere fact that the two sons enjoyed the land in equal shares, no presumption could arise that the property was ancestral and descended by inheritance from the common ancestor, when nothing was known about the share of the third son. He recorded findings in favour of the plaintiff on the issues as to adoption and limitation, but he also held that the plaintiff had no *locus standi* to contest the validity of the adoption as the period of limitation

had expired long before he was born. In the result, the suit was dismissed.

The plaintiff preferred an appeal to the court of the District Judge. He filed an application under Order XLI, rule 27, and section 151, Civil Procedure Code, for leave to adduce additional evidence. The document he wanted to be taken on record and considered, and of which it was alleged that he was not aware at the trial, was a *kami beshi* statement relating to Mauza Pattar Kalam, which contained a note that the third son, Pohlo, gave up his interest in the ancestral property in favour of his brothers. A copy of the statement was filed along with the appeal memorandum. The application was naturally opposed on behalf of the contesting defendants who urged that the plaintiff appellant had ample opportunity to produce all his evidence in the lower court to prove that the property was ancestral and that the entry on which reliance was now sought to be placed appeared on the face of it to be a forged one. The District Judge posted the application to be heard along with the appeal itself. On the 17th March 1942, that is even before he heard the appeal, the District Judge allowed the application. Referring to the two entries found in the *naqsha kami bashi* prepared in 1849-50 and the *muntakhib asami-war* prepared in 1852, which stated that Pohlo had relinquished his ancestral share, he observed : "These two entries taken together, if found genuine, would enable the Court to arrive at a just conclusion. It is, therefore, in the interest of justice that the additional evidence should be let in. I have taken action under Order XLI, rule 27 (1) (b), of the Civil Procedure Code. This additional evidence would supply material to remove the defect pointed out in the judgment of the court below, why two of the sons of Sehja Singh came to own equal shares of land of Pattar Kalan in the presence of their 3rd brother". He permitted the parties to call evidence relating to the two documents. Two witnesses were examined on the side of the appellant. Munshi Pirthi Nath is the clerk in the D. C.'s office, Jullundur City, and he brought the

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record of rights for the village Pattar Kalan prepared at the time of the settlement of 1849-50. Munshi Niaz Ahmad is the office Qanungo in the Jullundur Tahsil and he brought the *muntakhib asami-war* of the record of rights preserved at the Tahsil Office. Both of them gave evidence about the relevant entries found in the registers.

The District Judge reversed the decision of the Subordinate Judge and decreed the plaintiff's suit on the strength of this additional evidence. He held that the entries relied on for the appellant were genuine and not forged and that as Pohlo had relinquished his share, the land in Mauza Pattar Kalan was ancestral qua the plaintiff. He further found that the suit was not barred and was within time under article 120 of the Indian Limitation Act, but that the adoption set up by the second defendant was not true. As the custom of the district did not permit a proprietor to will away any portion of his property, whether ancestral or self-acquired, the plaintiff had, in the opinion of the District Judge, a right to contest the will. On the basis of these findings, he decreed the plaintiff's suit in its entirety, including the lands in the village of Kadduwal which were conceded to be non-ancestral and also an area of 4 bighas and 16 biswas of land in Pattar Kalan which, according to the record of rights, was not in the possession of Jodha Singh and Jai Singh, but with third parties.

Kartar Singh, the second defendant, took the matter on second appeal to the High Court. The learned Judges of the High Court held that there was nothing to show that the land in Pattar Kalan was ancestral and that the District Judge was not justified in admitting additional evidence in the shape of the *naksha kami beshi* and the *muntakhib asami-war* records. They further pointed out that even a superficial observation of the original documents led one irresistibly to the conclusion that the entry regarding Pohlo giving up his share was a subsequent interpolation. They came to the conclusion, therefore, that the entire land situated in Pattar Kalan

was also non-ancestral and that the suit should have been dismissed in toto, inasmuch as under section 7 of Act II of 1920, no person is empowered to contest any alienation of non-ancestral immoveable property on the ground that such alienation is contrary to custom. In view of this finding, no other question arose in the case for decision. Leave was, however, granted to appeal to His Majesty in Council and this is how this appeal is now before us.

It was strenuously argued by the learned counsel for the appellant that it was not open to the High Court to interfere with the discretion exercised by the District Judge in allowing additional evidence to be adduced and that even assuming that there was an erroneous finding of fact, it must stand final as a second appeal can be entertained only on the specific grounds mentioned in section 100 of the Civil Procedure Code. There is, however, a fallacy underlying this argument. The discretion to receive and admit additional evidence is not an arbitrary one, but is a judicial one circumscribed by the limitations specified in Order XLI, rule 27, of the Civil Procedure Code. If the additional evidence was allowed to be adduced contrary to the principles governing the reception of such evidence, it would be a case of improper exercise of descretion, and the additional evidence so brought on the record will have to be ignored and the case decided as if it was non-existent. Under Order XLI, rule 27, it is the appellate court that must require the evidence to enable it to pronounce judgment. As laid down by the Privy Council in the well-known case of *Kessowji Issur* v. *G. I. P. Railway*(1), "the legitimate occasion for the application of the present rule is when on examining the evidence *as it stands,* some inherent lacuna or defect becomes apparent, not where a discovery is made, outside the court, of fresh evidence and the application is made to import it;" and they reiterated this view in stronger terms even in the later case of *Parsotim* v. *Lal Mohan*(2). The true test, therefore, is whether the appellate court is able to pronounce

(1) 34 I. A. 115. (2) 58 I. A. 254.

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judgment on the materials before it without taking into consideration the additional evidence sought to be adduced.

In the present case, there is nothing to show that there was any lacuna or gap which had to be filled up and that the appellate court felt the need for the omission being supplied so that it could pronounce a judgment; to put it the other way round, it does not appear, and it was not stated, that the District Judge felt himself unable to come to a decision without copies of the settlement register that were sought to be put in before him for the first time. On the other hand, the District Judge made up his mind to admit the certified copies of the *kami beshi* and *muntakhib asami-war* registers even before he heard the appeal. The order allowing the appellant to call the additional evidence is dated 17th March, 1942. The appeal was heard on 24th April, 1942. There was thus no examination of the evidence on the record and a decision reached that the evidence as it stood disclosed a lacuna which the court required to be filled up for pronouncing its judgment. In the circumstances, the learned Judges of the High Court were right in holding that the District Judge was not justified in admitting this evidence under Order XLI, rule 27.

Even conceding that the reception of additional evidence was proper, the District Judge has failed to consider the inherent infirmities of the entries in the settlement registers relied on for the appellant and the several criticisms that could justly be levelled against them for showing that they were spurious. He took the entries to be genuine. The only resason assigned by the learned Judge for treating the entries to be genuine and not forged appears to be that the records had all along remained in proper custody. As against this rather perfunctory remark we must set the following observations of the learned Judges of the High Court :

"Even a superficial observation of the original documents leads one irresistibly to the conclusion that this entry was a subsequent interpolation. In

naqsha kami beshi there was already a remark in that column and the remark relied upon which has very awkwardly been inserted there is with a different pen and in a different ink. It is even impossible to read it clearly. Further, although there are 2 or 3 other places where the names of Jodha and Jai Singh appear, no such remark has been made against them. It may also be observed that though a corresponding remark appears in the column of *sharah lagan* in *muntakhib asami-war* where it is evidently out of place in the copy retained in the Tahsil Office, there is no such remark in the copy which is preserved at the Sadar Office. Even otherwise it does not stand to reason why a remark to this effect should have been made in this column. The way in which these entries were said to have been traced also throws a lot of suspicion on their genuineness."

We find ourselves in entire agreement with these observations of the learned Judges. It is no doubt true that a finding of fact, however erroneous, cannot be challenged in a second appeal, but a finding reached on the basis of additional evidence which ought not to have been admitted and without any consideration whatever of the intrinsic and palpable defects in the nature of the entries themselves which raise serious doubts about their genuineness, cannot be accepted as a finding that is conclusive in second appeal.

If the additional evidence is left out of account, the appellant has practically no legs to stand on. There is nothing to show that the common ancestor Sehja Singh was possessed of the Mauza Pattar Kalan properties which are found subsequently entered in the name of two sons in equal shares with nothing said about the share of the third son Pohlo. As a matter of fact, the pedigree table shows that there was a fourth son called Hamira. If the property had been entered in the registers in the names of all the sons in equal shares, there might be some ground, however, feeble, for presuming that the property was ancestral as alleged by the plaintiff. There is nothing to show

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that the common ancestor owned the land and that his sons got it from him by inheritance in equal shares.

The District Judge was obviously wrong when he decreed the plaintiff's suit even with reference to the lands in Kadduwal conceded to be non-ancestral and the land in Khasra No. 2408 measuring 4 bighas and 16 biswas, which was not in the possession of the two sons Jodha Singh and Jai Singh. He was equally wrong in holding that the customary law which governed the parties did not permit the owner to will away any portion of the property, whether ancestral or self-acquired; this is contrary to section 7 of Punjab Act II of 1920, which is in these terms:

"Notwithstanding anything to the contrary contained in section 5, Punjab Laws Act, 1872, no person shall contest any alienation of non-ancestral immovable property or any appointment of an heir to such property on the ground that such alienation or appointment is contrary to custom."

No other point arises in this appeal which fails and is dismissed with costs in all the courts.

Appeal dismissed.

Agent for the appellant : *Ganpat Rai.*

Agent for the respondents : *S. P. Verma.*

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March 2.

FATMA HAJI ALI MOHAMMAD HAJI AND OTHERS

v.

THE STATE OF BOMBAY.

[SAIYID FAZL ALI, MEHR CHAND MAHAJAN, MUKHERJEA and CHANDRASEKHARA AIYAR JJ.]

Bombay Land Revenue Code, 1879, *s.* 48—*Rules under the Code, r.* 92—*Agricultural land used for other purposes—Collector's duty to alter assessment—Mere confirmation of Collector's order refusing to re-assess—Whether amounts to direction to act otherwise—Right to re-assessment.*