APPELLATE CIVIL.

Before Dulat and Capoor, JJ.

GURBINDER SINGH AND OTHERS.—*Defendants-Appellants.*

versus

LAL SINGH AND OTHERS.—*Respondents.*

Civil Regular Second Appeal No. 263-P of 1952

1958

May, 21st

Patiala and East Punjab States Union Judicature Ordinance (No. X of 2005 Bk.) Section 49—Second appeal under—Whether lies on facts also—Code of Civil Procedure (Amendment) Act (II of 1951)—Section 20—Extension of the Code of Civil Procedure to Pepsu with effect from 1st April, 1951—Effect of, on section 49 of Ordinance X of 2005 Bk. and on pending actions—The Punjab Courts Laws (Extension) Act (XXXVIII of 1957)—Purpose and effect of—Transfer of Property Act (IV of 1882)—Section 41—Rules for the application of.

Judicature

Held, that section 49 of the Patiala and East Punjab States Union ~~Judicial~~ Ordinance, X of 2005 Bk. indicated the category of cases in which an appeal was competent to the High Court and subsection (2) laid down the grounds on which an appeal could lie. Under this provision an appeal to the High Court from an appellate judgment and decree of a District Judge lay on a question of fact also. From 1st of April, 1951, however, the Code of Civil Procedure was made applicable to Pepsu by section 20 of the Code

of Civil Procedure (Amendment) Act, II of 1951, and thereby subsection (2) of section 49 of the Ordinance, which corresponded to sections 100 and 101 of the Code of Civil Procedure, stood repealed. The result is that as far as the question of second appeal on facts is concerned, a second appeal arising out of a suit instituted on and after the 1st April, 1951, will not be competent on a question of fact, while a second appeal arising out of a suit instituted before the 1st April, 1951, will be governed by the law in force on the date of the suit in each case.

Held, that the Punjab Courts Laws (Extension) Act (XXXVIII of 1957) was meant to extend the Punjab Courts Act along with certain other Acts to the PEPSU territory, and as a good part of section 49 of the PEPSU ordinance corresponded to the provisions contained in the Punjab Courts Act, the Legislature provided that, in spite of such extension, the extended provisions of the Punjab Courts Act would not apply to pending suits and second appeals arising out of them, the reference being to the provisions corresponding to the provisions of the Punjab Courts Act. It is, in the circumstances, impossible to infer from the enactment of Punjab Act 38 of 1957 that the previous Central Act II of 1951, had not in any manner touched section 49 of the PEPSU Ordinance.

Held, that if advantage is to be taken of the rule embodied in section 41 of the Transfer of Property, Act, 1882, it is not enough to show that the transferee was acting in good faith or had paid valuable consideration, but it has further to be proved that the ostensible owner had become such owner with the express or implied consent of the true owner. The two clear rules for the application of section 41 are:

(1) "that in order to deprive a real owner of his rights in immovable property it must be established that he had given his consent, express or implied, to another to represent himself as the owner of the said property;" and

(2) "that mere inactivity on the part of the real owner even with the knowledge of the transfer could not amount to implied consent within section 41 and could not debar

him from acquiring his property from the transferee within the period of limitation unless by some word or conduct on his part he had induced the transferee to believe that his transferor was competent to make the transfer."

Case Law discussed.

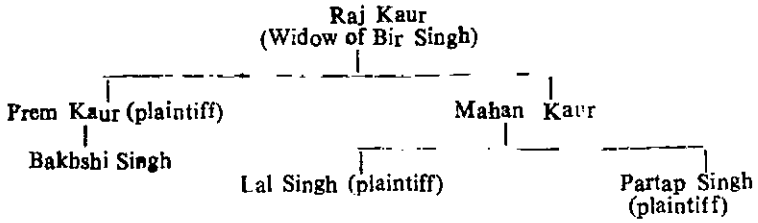
Second appeal from the decree of the Court of Shri Ranjit Singh Sarkaria, Additional District Judge at Faridkot, dated the 22nd day of October, 1952, affirming that of the Sub-Judge, II Class, Faridkot, dated the 17th March, 1951, granting the plaintiffs a decree for possession of one half of the land in suit. The lower appellate Court ordered the parties to bear their own costs throughout.

ATMA RAM, D. S. NEHRA and PURAN CHAND, for Appellants.

J. N. SETH and DURGA PERSHAD, for Respondents.

JUDGMENT

Dulat, J. DULAT, J.—The following pedigree-table will help in understanding the facts of this case:—



Raj Kaur was in possession of 851 *kanals* 18 *marlas* of land in village Dhapai which was then in the Faridkot State. Of this area, 481 *kanals* 7 *marlas* was occupancy tenancy, the landlord being the Raja Sahib of Faridkot, while the remaining land was held by Raj Kaur as *adna malik*, again the *ala malik* being the Raja. Sometime about the year 1953 Bk. (corresponding to 1896) Raj Kaur adopted her daughter's son Bakhshi Singh,

and he took possession of the land. Later he transferred some of the land to his cousin Partap Singh son of the second daughter of Raj Kaur. In the meantime, however, and during the lifetime of Raj Kaur, the Raja of Faridkot brought a suit to avoid the adoption and in that suit Raj Kaur and Bakhshi Singh were impleaded as defendants. This suit succeeded and the adoption was declared invalid. Raj Kaur died in Bhadon, 1987 Bk. (corresponding to August, 1930) and about three years after that the Raja of Faridkot brought two suits for possession one regarding the occupancy tenancy and the other concerning the *adna malkiat* and in those suits Bakhshi Singh and Partap Singh were made defendants. Both the suits were decreed and, in execution, the Raja took possession of the entire land in Assauj, 1985, Bk. (corresponding to October, 1928), and some years later the Raja sold the entire land to one Kehar Singh for Rs. 84,357-8-0. Gurbinder Singh and others brought a suit to pre-empt this sale in favour of Kehar Singh and succeeded in getting a decree. Before that, however, Mst. Prem Kaur, daughter of Raj Kaur, brought a suit on the 5th Kartik, 2005 Bk. (corresponding to the 23rd October, 1948), for possession of the entire land against Kehar Singh as well as the Raja of Faridkot, claiming that she was the legal heir of Raj Kaur and entitled to the possession of the land and that the defendants were mere trespassers. About a year later, i.e., on the 6th Phagan, 2006 Bk. (corresponding to the 17th February, 1950) Lal Singh brought a similar suit against Kehar Singh and the Raja of Faridkot, again claiming possession on the ground of title as an heir to his mother Mahan Kaur, who had in the meantime died in Har, 1985, Bk. (corresponding to May, 1938). In this suit Partap Singh was first made a defendant but later joined as a plaintiff. These two suits were consolidated

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and tried together. The Raja of Faridkot was struck off as a defendant as he had no longer any interest in the property while Gurbinder Singh and others, who had succeeded in the pre-emption suit, were joined as contesting defendants. Kehar Singh had filed a written statement and that was adopted by Gurbinder Singh and others.

These two suits—one by Prem Kaur and the other by Lal Singh and Partap Singh—were resisted on a number of grounds. It was denied that Lal Singh and Partap Singh were the sons of Raj Kaur's daughter and also denied that Prem Kaur was Raj Kaur's daughter. It was pleaded that, in any case, neither Prem Kaur nor the sons of Mahan Kaur were legal heirs to the property. It was further pleaded that both the suits were barred by time, having been brought more than twelve years after Raj Kaur's death. It was said that the plaintiffs in both the suits were estopped from suing and that the decision in the previous litigation started by the Raja of Faridkot operated as *res judicata*, and finally that Kehar Singh was a *bona fide* purchaser for valuable consideration and was protected as such. On these pleadings the trial Court framed the following six issues:—

(1) Whether Smt. Prem Kaur plaintiff is the daughter of Smt. Raj Kaur deceased and entitled to succeed to the property left by the latter?

(2) Whether Lal Singh and Partap Singh plaintiffs are the sons of the daughter of Smt. Raj Kaur deceased, and are entitled to succeed to the property left by the latter?

(3) Whether the suits of Smt. Prem Kaur, and Lal Singh and Partap Singh plaintiffs are within time?

(4) Whether the plaintiffs Smt. Prem Kaur, Lal Singh and Partap Singh or either of them are estopped from suing?

(5) Whether Kehar Singh is a *bona fide* purchaser, and if so, what is its effect?

(6) Whether the decision in the suit filed by His Highness of Faridkot against Bakhshi Singh and others for possession of the land in dispute operates as *res judicata* against Partap Singh defendant?

On the evidence the Court found that Prem Kaur was the daughter of Raj Kaur, and Lal Singh and Partap Singh were the sons of Raj Kaur's second daughter, Mahan Kaur; that Prem Kaur as well as Lal Singh and Partap Singh were entitled to succeed to Raj Kaur's property in preference to the Raja of Faridkot; that the plaintiffs were not estopped from suing; and that the decisions in the previous suits brought by the Raja did not operate as *res judicata*. On the fifth issue the Court held that Kehar Singh was not protected by the rule contained in section 41 of the Transfer of Property Act. On the third issue regarding limitation, the Court found that the suit of Prem Kaur was barred by limitation, while the suit of Lal Singh and Partap Singh was not so barred. and in the result the trial Court dismissed the suit of Prem Kaur but decreed the suit by Lal Singh and Partap Singh and granted them a decree for possession of one-half of the suit land. The parties were left to their own costs. Against this decree, Gurbinder Singh and others appealed and so did Prem Kaur, and cross-objections were filed by Lal Singh and Partap Singh. The learned District Judge considered the matter and affirmed the conclusions of the trial Court on all the issues and thus dismissed both the appeals as well as the

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cross-objections, but left the parties to their own costs throughout. A second appeal to this Court has been filed by Gurbinder Singh and others, the defendants in the suits, while another appeal has been filed by Prem Kaur against the dismissal of her suit, and there are cross-objections by Lal Singh and Partap Singh. All these can be conveniently decided together.

The first matter raised by Mr. Atma Ram on behalf of Gurbinder Singh and others concerns the findings of the Court below that Prem Kaur is Raj Kaur's daughter and Lal Singh and Partap Singh the sons of her other daughter. These are admittedly findings of fact and ordinarily not open to question in second appeal, but Mr. Atma Ram claims that he is entitled to have these findings re-examined, in view of a provision contained in the Patiala and East Punjab States Union Judicature Ordinance (No. X of 2005 Bk.) This question, which is of some importance, had arisen before me in two other second appeals [Regular Second Appeal No. 193 (P) of 1952 and Regular Second Appeal No. 288 (P) of 1952] and I had thought it proper to refer it to a larger Bench, and in another case [Regular Second Appeal No. 4 (P) of 1953] Tek Chand, J., had referred the same question to a larger Bench. All these three cases have been referred to us, and we have apart from Mr. Atma Ram heard Mr. Puran Chand in one case and Mr. D.S. Nehra in the other two cases. All these cases concern territory which, before the 1st November, 1956, was included in the Patiala and East Punjab States Union shortly called "PEPSU" which was a Part 'B' State. The Code of Civil Procedure was for the first time made applicable to Part 'B' States on the 1st April, 1951, by the Code of Civil Procedure (Amendment) Act (No. II of 1951). Prior to that PEPSU had its own law

governing civil procedure and the relevant provision was admittedly contained in the Ordinance relied upon by Mr. Atma Ram as well as other learned counsel. This Ordinance (No. X of 2005 Bk.) purported to consolidate and amend the law relating to the Courts in PEPSU and it came into force there in August, 1948, but even before then there was another procedural law in force with which we are not now directly concerned. The Ordinance in question provided for certain matters relating to appeals to the High Court of PEPSU and section 49 said:—

"(1) Except as otherwise provided by any law for the time being in force in the Union, an appeal shall lie to the High Court from:—

(a) a judgment, decree or order of a District Judge or Additional District Judge passed in exercise of his original civil jurisdiction;

(b) an appellate judgment, decree or order of a District Judge or Additional District Judge, if:

(i) such judgment, decree or order reverses or alters the judgment, decree or order of the Court from whose judgment, decree or order the appeal was preferred to the District Judge or Additional District Judge; or

(ii) the amount or value of the subject-matter in appeal to the High Court is more than Rs. 1,000 in a suit of the nature of small causes or more than Rs. 500 in other suits;

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(c) a judgment, decree or order of a subordinate judge where an appeal does not lie to the District Judge owing to the value of the subject-matter being beyond the appellate jurisdiction of the District Judge, or where there is a good ground to doubt as to which District Judge an appeal lies.

(2) An appeal provided for hereunder shall lie on a question of fact or law or both.

Explanation.—A question as to the existence or validity of a custom or the applicability of a custom to some or all the parties to the appeal shall be deemed to be a question of law."

It will be observed that this section indicated the category of cases in which an appeal was competent to the High Court and sub section (2) then laid down the grounds on which an appeal could lie. It is obvious that, if this particular provision is still in force, an appeal to the High Court from an appeallate judgment and decree of a District Judge would lie on a question of fact. From the 1st April, 1951, however, the Code of Civil Procedure was made applicable to PEPSU and section 20 of Act II of 1951 while extending the Code to PEPSU and other Part 'B' States provided that:—

"If, immediately before the date on which the said Code comes into force in any Part B State, there is in force in that State any law corresponding to the said Code, that law shall on that date stand repealed:

Provided that the repeal shall not affect:—

(a) * * * * * *

(b) any right, privilege, obligation or liability acquired, accrued or incurred under any law so repealed."

Mr. Atma Ram admits, although Mr. Nehra does not, that with the enactment of Act II of 1951 and with effect from the 1st April, 1951, the provision contained in subsection (2) of section 49 of Ordinance X, 2005 Bk., stood repealed, because that was a provision corresponding to a provision contained in section 100 of the Code of Civil Procedure. I shall presently consider Mr. Nehra's contention in this connection, but it is convenient first to deal with Mr. Atma Ram's argument. Mr. Atma Ram's case is that, in spite of the repeal of subsection (2) of section 49 of the PEPSU Ordinance, the right of appeal, as far as his two cases, i.e., the suits brought by Prem Kaur and Lal Singh, are concerned, cannot be affected because the right of appeal had already accrued before the 1st April, 1951, and it was expressly saved by section 20 of Act II of 1951. The argument, in short, is that a right of appeal accrues on the date a suit is lodged and that right remains vested in the parties till the litigation is finally settled. Mr. Atma Ram urges on the authority of several previous decisions that a right of appeal is a substantive right and not a mere matter of procedure and the right cannot be taken away and is ordinarily not deemed to be taken away by any enactment, affecting such right unless that enactment, either expressly or by necessary implication, so demands. In the present case, of course, Act II of 1951, expressly saves every right which may have already accrued, and if Mr. Atma Ram is right that the right of appeal accrues to a party the moment a suit is lodged, it would follow that that right was not affected, by the extension of the Code of Civil Procedure to PEPSU, in the two suits by Prem Kaur and Lal Singh which had

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been filed in the Court of first instance long before the 1st April, 1951. Left to myself I would have been inclined to think that an appeal is a matter of mere procedure, but there are so many authoritative decisions to the contrary starting with the Privy Council decision in *The Colonial Sugar Refining Company, Limited,* v. *Irving* (1), that it is, I feel, too late now to advocate that view. Lord Managhten observed in that case:—

> "The only question is, Was the appeal to His Majesty in Council a right vested in the appellants at the date of the passing of the Act, or was it a mere matter of procedure? It seems to their Lordships that the question does not admit of doubt. To deprive a suitor in a pending action of an appeal to a superior tribunal which belonged to him as of right is a very different thing from regulating procedure."

Following this authority a Bench of the Calcutta High Court in *Sadar Ali and others* v. *Doliluddin Ostagar* (2), decided that:—

> "The date of presentation of the second appeal to the High Court is not the date which determines the applicability of the amended clause 15, requiring permission of the deciding Judge, for further appeal, but the *date of institution of the suit* is, in each case, the determining factor."

Our Supreme Court has followed the same rule in *Messrs Ganpat Rai Hiralal and another* v. *The Aggarwal Chamber of Commerce, Ltd.* (3), applying

(1) 1905 A.C. 369
(2) A.I.R. 1928 Cal. 640
(3) A.I.R. 1952 S.C. 409

the decision in *The Colonial Sugar Refining Company, Limited* v. *Irving* (1). There is then a Full Bench decision of this Court, *Messrs Gordhan Das-Baldev Das* v. *The Governor-General in Council* (2), on the same lines. I am, therefore, compelled to conclude that a right of appeal is substantive right and accrues at the time of the suit. It follows that in the two cases concerning Mr. Atma Ram that right was not affected by the repeal of sub-section (2) of section 49 of the Ordinance, and he is consequently entitled to challenge the lower Court's findings of fact.

Mr. Nehra had to travel beyond this proposition, because in his cases, we gather, the suits were filed after the 1st April, 1951. He contended, therefore, that the repeal mentioned in section 20 of Act II of 1951 does not at all refer to the provisions contained in section 49 of the PEPSU Ordinance, because the repeal was only of laws '*corresponding*' to the Code of Civil Procedure, while section 49 of the Ordinance did not correspond to the Code at all. This argument involves the substitution of the words "identical with" for the expression "corresponding to" for which there is of course no warrant at all. The argument is otherwise futile, for there is no doubt that when the Code of Civil Procedure was extended to Part 'B' States the intention was that the provisions of the Code alone would govern those matters which were expressly provided for in the Code. Mr. Nehra pointed out in this connection that section 49 provided for several matters, apart from the grounds on which a second appeal could be lodged and that it could not have been intended to repeal the entire provisions merely because of the extention of the Code

(1) 1905 A.C. 369

(2) A.I.R. 1952 Punjab 103

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of Civil Procedure to PEPSU. Learned counsel is, in my opinion, right that Act II of 1951 did not repeal every provision contained in the PEPSU Ordinance but only repealed such laws as corresponded to the provisions of the Civil Procedure Code and in respect of section 49 of the PEPSU Ordinance everything was not repealed. Subsection (1) of that section, for instance, provided for matters which had nothing to do with the Code of Civil Procedure. The only provision in section 49 which corresponded to sections 100 and 101 of the Code of Civil Procedure was contained in subsection (2) and it is that subsection which, in my opinion, stood repealed by Act II of 1951.

In support of his argument Mr. Nehra sought assistance from the fact that after the reorganisation of the States when PEPSU was merged with the Punjab on the 1st November, 1956, the Punjab Legislature enacted Punjab Act, No. 38 of 1957, extending certain Acts including the Punjab Courts Act to the transferred territory, i.e., PEPSU, and while doing so expressly provided in section 4 of Act 38 of 1957 that "all second appeals arising out of suits which were instituted in the Courts of the transferred territories before the appointed date shall continue to be governed by the provisions of section 49 of the Patiala and East Punjab States Union Judicature Ordinance, 2005 (PEPSU Ordinance No. X of 2005 Bk.) Learned counsel sought to conclude from this enactment that it was always understood that section 49 of the PEPSU Ordinance had not been repealed by Act II of 1951and it was, therefore, expressly provided even after the merger of PEPSU with the Punjab that section 49 of the PEPSU Ordinance would continue to govern the matter of second appeals. The confusion in the argument is that it assumes as if section 49 of the PEPSU Ordinance contained one single rule which

either had to stand as one whole or fall. Actually, however, it is clear that section 49 contained several provisions and not all of them corresponded to the provisions of the Code of Civil Procedure and those provisions not so corresponding to the Code were, of course, not touched by Act II of 1951. The provision in subsection (2) of section 49 of the Ordinance was, however, a provision corresponding to the Code of Civil Procedure and consequently stood repealed. Punjab Act 38 of 1957 was meant to extend the Punjab Courts Act along with certain other Acts to the PEPSU territory, and as a good part of section 49 of the PEPSU Ordinance corresponded to the provisions contained in the Punjab Courts Act the Legislature provided that, in spite of such extension, the extended provisions of the Punjab Courts Act would not apply to pending suits and second appeals arising out of them, the reference being to the provisions corresponding to the provisions of the Punjab Courts Act. It is, in the circumstances, impossible to infer from the enactment of Punjab Act 38 of 1957 that the previous Central Act II of 1951 had not in any manner touched section 49 of the PEPSU Ordinance. As I have already said, subsection (2) of section 49 of the PEPSU Ordinance was repealed by Act II of 1951 and the corresponding provision in the Code of Civil Procedure contained in sections 100 and 101 had replaced it with effect from the 1st April, 1951.

To sum up, as far as this question of second appeal on facts is concerned, the conclusion must be that a second appeal arising out of a suit instituted on and after the 1st April, 1951, would not be competent on a question of fact, while a second appeal arising out of a suit instituted before the 1st April, 1951, would be governed by the law in force on the date of the suit in each case. The

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three referred cases (Regular Second Appeals Nos. 193 (P) and 288(P) of 1952 and No. 3(P) of 1953) can now go back to a Single Bench for the decision of the other questions involved.

To proceed now with the appeals requiring our decision, Mr. Atma Ram admitted that there was good evidence to show that Prem Kaur was the daughter of Raj Kaur. It is enough to mention in this connection that in the very suit brought by the Raja of Faridkot Prem Kaur was admitted to be Raj Kaur's daughter. Prem Kaur has herself given direct evidence about this matter. Mr. Atma Ram's main contention was that Lal Singh and Partap Singh were not shown to be the sons of Raj Kaur's daughter, but having gone through the evidence I find little force in this contention. Lal Singh has given evidence and it is supported by Prem Kaur. Four other witnesses have similarly deposed to their relationship showing that Lal Singh and Partap Singh are the sons of Mahan Kaur, who was the daughter of Raj Kaur. Mahan Kaur was married to Pala Singh and the evidence shows that Lal Singh and Partap Singh are the sons of Pala Singh. It was urged before us that the oral evidence of witnesses concerning such relationship is not good evidence, but, considering that the evidence is given by persons who knew the parties and saw them living in certain relationship, the evidence is really about conduct. In the present case, however, there is also good documentary evidence. The previous litigation leaves no doubt that Mahan Kaur was admitted to be the daughter of Raj Kaur and Lal Singh and Partap Singh are certainly Mahan Kaur's sons. There is no rebuttal of this evidence, and Mr. Atma Ram had to admit that no attempt was made by the defendants in the present suits to show that Lal Singh and Partap Singh were

not in fact the sons of Mahan Kaur, or that Mahan Kaur was not the daughter of Raj Kaur. As the record stands, therefore, it is impossible to disturb the concurrent finding of the Courts below that the relationship alleged by the plaintiff is established.

The next question concerns the right of succession to Raj Kaur's property. This matter is admittedly governed by the *dastur-ul-amal* of 1893 in force in the Faridkot State which mentions clearly that if a person dies his estate devolves on his son or sons, his widow, his mother, his grandmother and so on including his collaterals, and failing such heirs on his daughter and daughter's son and so on. So that a daughter and a daughter's son are heirs within the meaning of the *dastur-ul-amal*. Mr. Atma Ram conceded that as far as the *adna malkiat* or proprietorship rights in the land were concerned, Raj Kaur's daughers and after them her daughter's sons were entitled to succeed. His submission, however, was that in respect of the occupancy tenancy the matter was governed not by the *dastur-ul-amal* but by the rule mentioned in section 59 of the Punjab Tenancy Act. This section undoubtedly excludes a daughter and a daughter's son from succession, and if the rule were applicable in the present case the Raja of Faridkot as landlord was entitled to step in on the death of Raj Kaur. The Courts below have, however, found that even in respect of occupancy tenancy the rule of succession was the same as contained in the *dastur-ul-amal*. The language of the *dastur-ul-amal* is comprehensive enough and does not purport to distinguish an occupancy tenancy from the other estate of a deceased person. The matter, however, does not rest there, for there is on the record the copy of a *robkar* issued by the Council of Administration in the Faridkot State

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which leaves no doubt that succession to an occupancy tenancy was also governed by the same rule as other property. The order of the Council expressly stated:—

> "Since some time it has been brought to the notice of the Council of Faridkot State that certain persons are being deprived of their legitimate rights in view of section 58, subsection (4) of the (Punjab) Tenancy Act of 1887. It has been urged that, if ordinary heirs can succeed to the other property of a deceased. there is no reason why they should not succeed to occupancy rights, and, in consideration of the rights and the well-being of the people of the State. and Council considers it proper that it should be ordered that till such time as any order to the contrary is made, occupancy tenancy should be governed by the same rule of succession as ordinary property and the provisions of section 59 of the Tenancy Act should have no force."

It appears to me that the Council were not making any new rule but were merely enforcing what they believed to be the proper rule of succession, but, even if it be that a new rule was being created, it is not suggested that the Council of Administration was not competent to do so. No order to the contrary was ever made. I am in the circumstances. satisfied that section 59 of the Punjab Tenancy Act did not govern succession to the occupancy tenancy left by Raj Kaur, and that under the ordinary rule a daughter and a daughter's son were entitled to succeed and the Raja of Faridkot as landlord had no right in the presence

of such heirs. I would, thus, affirm the conclusions of the lower Courts in this respect that to the property in dispute Prem Kaur was entitled to succeed to the extent of one-half and Lal Singh and Partap Singh the other half.

Mr. Atma Ram then contended that the decision of the suit for possession brought by the Raja against Bakhshi Singh and Partap Singh should operate as a bar to the present claim of Partap Singh. The argument is that in that litigation Partap Singh could and ought to have raised the plea that he was entitled to retain possession of the property as the heir of Raj Kaur in preference to the plaintiff, i.e., the Raja, and such a plea should be deemed to have been raised in that suit and decided against him. Reliance in this connection was placed on section 11 of the Code of Civil Procedure, Explanation IV, which says:—

> "Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit".

The question, therefore, is whether it was open to Partap Singh in the previous suit to raise this particular plea that he was entitled to the property, being a better heir than the plaintiffs. It has to be remembered in this connection that the suit for possession followed the Raja's suit for avoiding the adoption of Bakhshi Singh by Raj Kaur, and Partap Singh was joined in the suit as he happened to be in possession of a part of the property as transferee from Bakhshi Singh. At the

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time of the suit Partap Singh's mother Mahan Kaur, was living and during her lifetime Partap Singh could not possibly claim to be Raj Kaur's heir, nor claim to retain possession as such heir. It seems to me, therefore, that this particular plea was not open to Partap Singh at the time of the previous suit, and it follows, therefore, that the plea cannot be deemed to have been raised and decided against him. I hold, therefore, in agreement with the lower Court, that the ground of *res judicata* cannot be allowed to non-suit Partap Singh.

The next contention is that Kehar Singh was a *bona fide* transferee having bought the property from the Raja for valuable consideration and must be protected by section 41 of the Transfer of Property Act. This section is expressed thus:—

> "*Section 41.* Where, with the consent; express or implied, of the persons interested in immovable property, a person is the ostensible owner of such property and transfers the same for consideration, the transfer shall not be voidable on the ground that the transferor was not authorized to make it: provided that the transferee after taking reasonable care to ascertain that the transferor had power to make the transfer, has acted in good faith.

It is clear that if advantage is to be taken of this rule, it is not enough to show that the transferee was acting in good faith or had paid valuable consideration, but it has further to be proved that the ostensible owner had become such owner with the express or implied consent of the true owner. Can

it then be said in the present case that the Raja of Faridkot was made to appear the ostensible owner of the property by an implied consent on the part of the true owners? It is said that since the true owners did nothing to interfere with the Raja's possession or with the transfer made by the Raja in favour of Kehar Singh, it should be inferred that the true owners had impliedly consented to it. I find it impossible to reach this conclusion. Certain decisions of the Lahore High Court, to which it is unnecessary to refer now, did indicate that some latitude should be shown to a *bona fide* transferee, but the danger of this latitude was soon realised, and later decisions have repeatedly stressed the need of protecting the interest of the true owner even against a *bona fide* transferee unless it is clear that the true owner himself induced the belief that the ostensible owner could deal with the property. I need only refer to a decision of a Full Bench of the Lahore High Court *in Shamsher Chand* v. *Bakhshi Mehar Chand and others* (1), which laid down two clear rules:—

(1) that "in order to deprive a real owner of his rights in immovable property it must be established that he had given his consent, express or implied, to another to represent himself as the owner of the said property;" and

(2) "that mere inactivity on the part of the real owner even with the knowledge of the transfer could not amount to implied consent within section 41 and could not debar him from acquiring his property from the transferee within the period of limitation unless by some word or conduct on

(1) A.I.R. 1947 Lah. 147

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his part he had induced the transferee to believe that his transferor was competent to make the transfer."

These are wise rules and I find myself in respectful agreement with them. Looking at the facts of the present case it is clear that if the transferee, i.e., Kehar Singh, had taken the trouble of enquiring into the title of his transferor, i.e., the Raja he (Kehar Singh) could not have failed to discover that the Raja had acquired possession in the course of litigation and that the property had originally belonged to Raj Kaur and Raj Kaur's daughter and daughter's sons were in existence, and further that the Raja's possession was in no manner with the consent of the true owners. It is of no consequence that the true owners did not immediately go to Court to claim their rights and, in my opinion, therefore, no advantage can in the present case be taken of the rule in section 41 of the Transfer of Property Act.

There remains now the question of limitation. The Court below has held the suit of Prem Kaur barred by limitation on the view that Article 141 of the Limitation Act applies to the suit and it was filed more than twelve years after the death of Raj Kaur. Mr. Kaushal on behalf of Prem Kaur contends that Article 141 is not really applicable, because this was not a suit by a Hindu as such for the possession of property left by a Hindu female, the argument being that such suit must be founded on some rule of Hindu Law. There is nothing in the language of Article 141, Limitation Act, to support this suggestion. The Article runs:—

"Like suit by a Hindu or a Muhammadan entitled to the possession of immovable property on the death of a Hindu or Muhammadan female."

It is not denied that Prem Kaur is a Hindu, nor that Raj Kaur was a Hindu female, and it is, therefore, difficult to see why Article 141, Limitation Act, does not apply to the suit, the ground on which possession is claimed being of no significance. Mr. Kaushal then urged that, in any case, this Article applies only where a Hindu female dies and she is immediately before her death not in possession of the property, and the suit is brought by the next heir for possession. This may be so, but in the present case it is perfectly clear that Raj Kaur was not at the time of her death in possession of the property. She had already parted with possession and even on Mr. Kaushal's argument the suit by Prem Kaur would be governed by Article 141. It is admitted that time for such a suit begins to run from the date the female dies, which in this case was Raj Kaur, and since the suit was filed long after twelve years had expired since Raj Kaur's death the suit was clearly barred by time.

Regarding the suit of Lal Singh and Partap Singh, the position is different. The Court below has held that to that suit Article 141, Limitation Act, would not be applicable. Mr. Atma Ram for the defendants contended that Article 141 would apply even to that claim because it was a suit by a Hindu for the possession of immovable property previously belonging to a Hindu female. Assuming this to be so, it is clear that the suit could be brought within twelve years of the death of the Hindu female and that Hindu female in the case of Lal Singh and Partap Singh's suit was their mother, Mahan Kaur; who admittedly died well within twelve years of the suit. Mr. Atma Ram contended that time should be taken to run from the date of Raj Kaur's death because the property

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originally belonged to her. This, however, does not appear to me to be the intention of Article 141, Limitation Act. An identical matter was actually considered by a Full Bench of the Allahabad High Court in *Bankey Lal and others* v. *Raghunath Sahai and others* (1), and Sulaiman, Acg., C. J., clearly laid down that a reversioner's suit was competent within twelve years of the death of the female on whose death alone the reversioner could claim the property. The facts in that case were very similar to the facts of the present case. The property had belonged to one Bansidhar, who was succeeded by his widow Mst. Gumane who died in 1894. The property then devolved on Mst. Gumane's daughter, Mst. Saraswati, who died in 1920 without ever entering into possession of the property and without ever suing to recover it. The suit was brought after Mst. Saraswati's death by her sons and it was argued that time had begun from the death of Mst. Gumane—which argument was repelled and it was held that time against the sons of Mst. Saraswati began to run from the date of Mst. Saraswati's death, and Article 141, Limitation Act, was applicable. It is clear that on this view the claim of Lal Singh and Partap Singh cannot be denied on the ground of limitation. The Court below took the view that Article 141 was not applicable but Article 144, and since the suit was brought within twelve years of the date the Raja took possession, it was within time. It is admitted that one trespasser cannot tag on another trespasser's possession to his own possession to defeat the owner, so that even on the view that Article 144 would apply the present claim of Lal Singh and Partap Singh cannot be defeated on the score of limitation.

(1) A.I.R. 1928 All. 561

At one stage of the arguments reference was made to section 22 of the Limitation Act and it was suggested that since Partap Singh was not originally a plaintiff in the suit instituted by Lal Singh, the suit in respect of Partap Singh's claim should be deemed to have been instituted only when Partap Singh was made a plaintiff by which date twelve years' period had expired. It is, however, clear that section 22 of the Limitation Act has no application to the present case, because here Partap Singh was a defendant in the suit of Lal Singh at the very time the suit was instituted and subsection (2) of section 22 makes it quite clear that where a defendant is made a plaintiff or a plaintiff made a defendant the rule mentioned in subsection (1) has no application. Learned counsel, therefore, did not press this particular suggestion any further. No other question has been raised in the two appeals.

In the cross-objections the only matter raised concerned costs, for, although at one stage Mr. Seth did suggest that if Prem Kaur's claim is to fail her share of the property should devolve on Lal Singh and Partap Singh, he did not press this suggestion for obvious reasons. As far as costs are concerned, the lower appellate Court has in my opinion, taken a reasonable view in leaving the parties to their own costs throughout, and I would not care to interfere with it.

The result is that the two appeals as well as the cross-objections fail and I would dismiss them all, but in view of all the circumstances again leave the parties to their own costs in this Court.

CAPOOR, J.—I agree.

Capoor, J.

B.R.T.