

This view was taken by Scott-Smith J. In *Kishan Lal v. Jai Lal* (1). Also I find that section 37 of the Punjab Courts Act permits delegation of the powers to transfer appeals to one of the Subordinate Judges. This was done by the District Judge, and the Senior Subordinate Judge or the Court of Shri Baweja could exercise these powers by virtue of such delegation and Shri Baweja was as such competent to distribute appeals and transfer them to the Court of the Additional Senior Subordinate Judge.

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I would, therefore, hold that the Court of the Additional Senior Subordinate Judge was competent to entertain these appeals.

The revision petitions will now be placed before a learned Single Judge for disposal on merits.

Bishan Narain J.—I agree.

*Bishan Narain,
J.*

B.R.T.

APPELLATE CIVIL.

Before I. D. Dua, J.

LAL DEVI,—Appellant.

versus

MUNI LAL AND OTHERS,—Respondents.

Regular Second Appeal No. 683 of 1958

*Code of Civil Procedure (V of 1908)—Section 100—
Finding of fact—Mutation proceedings completely ignored—
Rules of Evidence Act with regard to appreciation of evi-
dence not followed—Whether can be interfered with in
second appeal—Evidence of relatives in regard to blood
relationship—Importance of—Mutation proceedings—Nature*

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(1) I.L.R. 1 Lah. 158

of—Inference from the conduct of party in such proceedings—Whether can be drawn.

Held, that where the first appellate court completely ignores the mutation proceedings, particularly when the trial court had, in its judgment, placed considerable reliance thereon and also ignores the principles of the Law of Evidence in regard to the appreciation of evidence on the record, the finding of fact is vitiated and can be interfered with by the High Court in second appeal because of important evidence having been wholly omitted from consideration.

Held, that it is the nearest relative who can best depose about their blood relations and to reject the testimony of a real brother because of his relationship or of his residence in another village, is to ignore the basic principles of the Law of Evidence. Even opinion as to the existence of relationship of one person to another expressed by conduct as to such relationship of any person, who, as a member of the family or otherwise, has special means of knowledge on the subject, is very relevant.

Held, that the mutation proceedings are no doubt, meant only for revenue or fiscal purposes and do not affect questions of title. But the conduct of the parties during mutation proceedings can be considered and necessary inferences drawn therefrom.

Case law considered.

Regular Second Appeal from the decree of the Court of Shri G. S. Bedi, District Judge, Gurdaspur, dated the 18th day of July, 1958, reversing that of Shri M. L. Mirchia, Sub-Judge, 1st Class, Gurdaspur, dated the 28th February, 1958, and granting the plaintiff a decree for possession as prayed for with costs throughout against defendant No. 1 (Mst. Lal Devi).

H. L. SARIN and G. P. JAIN, for Appellant.

D. R. MANCHANDA, for Respondent.

JUDGMENT.

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DUA, J.—One Vir Bhan had three sons, Narain Das, Bhagwan Das and Shankar Das. Narain

Das's son Muni Lal is the plaintiff-respondent in the present litigation which relates to the estate originally left by Shankar Das and was on his death possessed by his widow Mst. Rani. On 25th of November, 1954, Mst. Rani gifted the property in question in favour of Smt. Lal Devi by means of a registered deed, Exhibit P. 6. In this document Smt. Lal Devi was described as the daughter of Mst. Rani, the widow of Pt. Shankar Das, aged 60 years. In this document there is also a reference to one Dina Nath to whom Mst. Rani described as his son who had died earlier. It is stated in this deed that with the exception of her daughter Smt. Lal Devi who had been serving her, there was no other heir and therefore, of her own pleasure and will she was making a gift of this property to her daughter. It was also recited that even after her marriage Smt. Lal Devi had been residing with her mother. Possession was also stated to have been given to the donee on whom full proprietary rights were said to have been conferred. Mst. Rani died on 20th of November, 1956. It appears that during the mutation proceedings in pursuance of the above gift Mst. Rani and Smt. Lal Devi both appeared before the Revenue Officers and admitted the gift. Muni Lal, present plaintiff-respondent, however, objected to the mutation but only on the ground that the property was ancestral and that Mst. Rani, whom he admitted to be his aunt, had no right to make a gift thereof. The Naib-Tehsildar because of this objection by Muni Lal on 21st of February, 1956, adjourned the case so that the parties may adduce evidence. On 30th of May, 1956, Mst. Rani with her counsel and Muni Lal with his counsel and Smt. Lal Devi were all present. The counsel for Mst. Rani stated that the gift deed had been registered and possession had been duly transferred. It was also expressly stated that Smt. Lal Devi was also Mst. Rani's daughter and

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that the parties were Brahmans by caste. The counsel for Muni Lal, however, stated that Mst. Rani was in possession of the property as a widow and therefore she had a widow's limited estate only, with the result that she could not gift away the property; neither Customary Law nor strict Hindu Law conferred power of alienation, by means of a gift, on Mst. Rani. The pedigree-table was produced by Muni Lal's counsel in support of his own relationship. It appears that the dispute was referred to the Revenue Officers. The matter then came up for hearing before the Assistant Collector, 1st Grade, who on 24th of December, 1956 sanctioned the mutation. As mentioned above, the donor had in the meantime died on 20th of November, 1956. The donee made a statement that she was the only daughter of the donor and had also been serving her and that the gift had been made in her favour by means of a registered deed dated 25th of November, 1954. Mr. Ram Saran Das, Advocate, on behalf of Muni Lal, objected that the property being ancestral, the donor, as a widow, had no right to make a gift of it and that the gift was incomplete because the land in question was in the possession of the tenants. The Assistant Collector without going into the question of ancestral nature of the property sanctioned the mutation, as it was evidenced by a registered deed and the donor had herself admitted the delivery of possession in favour of the donee. It is noteworthy that in these proceedings Muni Lal did not raise the plea that Smt. Lal Devi was not the daughter of Mst. Rani. It is also stated in the written statement of Smt. Lal Devi in the present suit that she had been granted a succession certificate from a competent Court as an heir of Mst. Rani. On 17th of August, 1957, the present suit was instituted by Muni Lal for possession of the property gifted by Mst. Rani to Smt. Lal Devi, defendant-appellant,

on the ground that Mst. Rani had died issueless and therefore the property devolved on him as the heir of Dina Nath, the last male holder. It appears that Dina Nath who was the son of Shankar Das had perhaps died during the lifetime of Mst. Rani and possibly it is for this reason that Muni Lal plaintiff mentioned Dina Nath to be the last male holder. This aspect of the case, however, was at no stage of the litigation pressed by the plaintiff and thus it has not been gone into or even noticed by the Courts below; nor has it been urged before me; it is thus of no relevance in this appeal and need not detain us at all. It was next alleged in the plaint that Mst. Rani had wrongly described Smt. Lal Devi as the daughter of Shankar Das, the husband of Mst. Rani, with the object of injuring the plaintiff's rights. The suit was resisted by Smt. Lal Devi who controverted the allegations of the plaintiff. The suit was also alleged to be barred by time and pleas of *res judicata* and estoppel were also taken. The following issues were framed in the case:—

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1. Whether the suit is within time?
2. Whether Mst. Rani was the full owner in the property in dispute?
3. Whether Smt. Lal Devi is the daughter of Shankar Das?
4. Whether the gift in dispute is valid?
5. Whether the suit is barred by *res judicata*?
6. Whether the plaintiff is estopped from filing the present suit?
7. Whether the present suit is frivolous and vexatious?

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8. If issue No. 7 is proved, to what special cost is the defendant entitled?
9. Whether the suit is speculative?
10. Relief.

The learned Subordinate Judge held the suit to be within limitation; he further held that Mst. Rani was not the full owner of the property in question as she had gifted away the property before the coming into force of the Hindu Succession Act. Under issue No. 3 Smt. Lal Devi was found to be the daughter of Shankar Das. Under issue No. 4 the trial Court held that the gift in dispute was in favour of the next heir as Smt. Lal Devi being the daughter of Shankar Das was entitled to succeed on Mst. Rani's death. Issues Nos. 5, 6, 7, and 8 were not pressed before the Court below and on issue No. 9 the plaintiff was held to possess no right to challenge the gift. On these findings Muni Lal's suit was dismissed.

Against the judgment and decree of the trial Court the plaintiff preferred an appeal to the Court of the learned District Judge who by his judgment and decree dated 18th of July, 1858, allowed the appeal and decreed the plaintiff's claim. The learned District Judge found that the alleged paternity of Smt. Lal Devi had not been proved; the validity of the gift deed was upheld by the learned District Judge but he observed that the gift being of a life tenure it finished with the death of Mst. Rani with the result that the property had to go to the next heir of Shankar Das who happened to be the plaintiff in the present case.

Aggrieved by the judgment and decree of the learned District Judge, Smt. Lal Devi has preferred the present appeal and I have heard the counsel

for the parties at great length. The learned Advocate for the appellant has submitted that the lower appellate Court has completely ignored the effect of the mutation proceedings and of the statements made by the parties in those proceedings; he further submits that letters which passed between the relations and in which Smt. Lal Devi has been mentioned or referred to in very endearing terms, as a child in the family, have also been completely ignored by the lower appellate Court. It has further been emphasized that the learned District Judge has approached the consideration of the case from a wholly erroneous point of view and has not applied the test laid down by the Law of Evidence in considering the question of relationship.

It is admitted that Shankar Das had died nearly about 43 years ago. Mst. Rani had actually described Smt. Lal Devi as her daughter in the registered deed of gift and had also admitted this fact during the mutation proceedings before the Revenue Officers. This assertion was not denied in the mutation proceedings by Muni Lal, who would obviously have been the immediate next heir, had Smt. Lal Devi not been Shanker Das's and Mst. Rani's daughter. No explanation has been offered, in the Courts below or even at the Bar before me, by the counsel for Muni Lal, as to why did the plaintiff not raise this important plea of fact during the mutation proceedings. All that his counsel could suggest to me was that it was perhaps not considered necessary. I must confess my inability to consider this explanation to be either plausible or natural. If Muni Lal was the next heir then, if an attempt was made to put forward an impostor or any other person who laid claim to a superior or preferential right to succeed to Shankar Das's estate, then one would have naturally expected Muni Lal to vehemently protest

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against it, and to expose the falsity of the claim. The fact, that he only chose to confine his opposition, to the deed of gift, to the ancestral nature of the property, clearly shows, to my mind, that he believed and thought at that time that Smt. Lal Devi was truly and in reality the daughter of Shankar Das and Mst. Rani. It is surprising that the learned District Judge should have completely ignored the mutation proceedings, particularly when the trial Court had in its judgment placed considerable reliance on Exhibit P. 5, the copy of the mutation, and the District Judge reversed that judgment. In my opinion, this circumstance by itself, is sufficient in law, to vitiate his finding. As observed by Tek Chand, J., in *Ghanya Lal Benarsi Das v. Gian Chand* (1), a finding, which is based on part only of the evidence which is legally on the record, is not a legal finding and is not binding on parties in appeal. In *Firm Mansa Ram Gordhan Das v. Firm Mangal Sain Duni Chand* (2), a Division Bench of the Lahore High Court observed as follows :—

“Now, we are quite prepared to concede that, ordinarily, grounds which impugn findings of fact cannot be entertained in second appeal, but where an appellate Court bases a finding of fact upon one piece of evidence alone without considering the whole of the evidence bearing upon the point the finding is not, in our opinion, binding on a Court of second appeal. A finding of fact to be binding on a Court of second appeal must be a judicial decision reached on a consideration of the whole of the evidence, and where it appears that all the available evidence has not been considered, the

(1) A.I.R. 1929 Lah. 145

(2) A.I.R. 1922 Lah. 149

High Court will interfere and should interfere in second appeal.”

For this observation four reported cases were relied upon. This decision was later relied upon by Skemp, J., in *Gobind Ram v. Kaju Ram* (1). The statements contained in the deed of adoption and made before the mutation officer by Mst. Rani are very strong pieces of evidence on the question of relationship by blood between her and Smt. Lal Devi. The counsel for the respondent has strenuously contended that merely because Smt. Lal Devi has been described as the daughter of Mst. Rani, it does not necessarily mean that she was also Shankar Das's daughter. Indeed, this submission has been the chief plank on which he has based his case. This argument has only to be stated to be rejected. There has been no suggestion that Smt. Rani remarried after Shankar Das's death, which admittedly occurred about 43 years ago; nor has there been any suggestion that she ever became unchaste or indulged in any immoral conduct. Had this been so, I have not the least doubt in my mind, that Muni Lal plaintiff, who is now so strenuously contesting Smt. Lal Devi's claim would have tried to claim the property in dispute even from Mst. Rani in her lifetime; at any rate, on Mst. Rani's death, during the mutation proceedings, he would certainly have laid claim to the property in dispute on the additional ground that Smt. Lal Devi being an utter stranger and not being the daughter of Shankar Das, the plaintiff, was in any case, entitled to succeed, irrespective of the character of the property. In this connection, it would not be out of place to mention, that Smt. Lal Devi was nearly 45 years old when she gave her statement in the present case. She must therefore have been born when Shankar Das was alive. If Smt. Lal Devi was the

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daughter of Mst. Rani at the time when Mst. Rani's husband was alive then under section 112 of the Indian Evidence Act it is conclusive proof that she is the legitimate daughter of Shankar Das. The lower appellate Court has, surprisingly enough, completely ignored even this important aspect of the case. Regarding oral evidence also, in my opinion, the learned District Judge has not applied the test which, in such cases, the Law of Evidence has laid down. In the present case Jhanda Ram, the real brother of Mst. Rani, has appeared in the witness-box as D.W. 7. He is aged 65 years and he has expressly stated that Mst. Rani was married to Shankar Das, and Smt. Lal Devi is her daughter. He has also stated that Shankar Das had two sons from Mst. Rani and they have both died. In cross-examination this witness's veracity has not at all been shaken. The learned District Judge has, in a very perfunctory manner, disposed of this witness's testimony. It is interesting to reproduce the language of the lower appellate Court: "Jhanda Ram (D.W. 7) supported Mst. Lal Devi about her parentage and there is nothing worth mentioning in his cross-examination except that he belonged to a different village and was a brother of Mst. Rani." This, in my opinion, is a most unsatisfactory way of dealing with the testimony of an important witness like the real brother of Mst. Rani; and I fail to understand the logic of the learned District Judge in rejecting the testimony of Jhanda Ram about Smt. Lal Devi being the daughter of his real sister, Mst. Rani. The reason given by him is not only superficial but is in law no reason. It is the nearest relative, who can best depose about their blood relations and to reject the testimony of a real brother because of his relationship or of his residence in another village, is to ignore the basic principles of the Law of Evidence. Mst. Guro aged 75 years has also appeared as D.W. 8 and has deposed that she was

personally present at the time of Smt. Lal Devi's birth and that at that time Mst. Rukmani, another near relation of Smt. Lal Devi, was also present. It is again surprising that the learned District Judge should have expected Mst. Guro to give the name of the *Dai* who was present at the time of the birth. Shankar Das having, according to the learned District Judge's own observation, died more than 43 years ago, it is most unreasonable, to say the least, to expect a woman of 75 years of age, to remember the name of the *dai*, who attended on Mst. Rani nearly 45 years ago; Smt. Lal Devi has as noticed above, given her age as 45 years when she appeared as D.W. 14. In my opinion, the learned District Judge has required a standard of proof much higher than that required by law. He has also rejected the testimony of Sohan Lal, the husband of Smt. Lal Devi, on equally illegal and unsubstantial grounds. The Court below expected direct knowledge of relationship from Sohan Lal, forgetting that even opinion as to existence of relationship of one person to another expressed by conduct as to such relationship, of any person, who as a member of the family, or otherwise, has special means of knowledge on the subject, is very relevant. In my opinion such conduct is more relevant than the oral statements of stranger. We have also on the record, certain letters written by Thakur Das to Jhanda Ram, in which Smt. Lal Devi has been endearingly described and to whom loving regards have been sent. These letters date back to the period from the year 1922 to the year 1932. These letters appear to be most natural and, in my opinion, considerable weight has to be attached to their contents, as showing that Smt. Lal Devi was a child in the family and was not an utter stranger as is suggested by the plaintiff for the first time in the present case.

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The learned Advocate for the respondent has very forcibly argued that the finding, on the question of Smt. Lal Devi not being the daughter of Shankar Das, and Mst. Rani, is a finding of fact and is binding on this Court in second appeal. In support of his contention he has relied on the following five decisions : (1) *Durga Chowdrani v. Jewahir Singh Chowdhri* (1), where the Judicial Committee of the Privy Council observed that there is no jurisdiction to entertain a second appeal on the ground of an erroneous finding of fact however gross or inexcusable the error may seem to be, and where there is no error or defect in the procedure, the finding of the first appellate Court on a question of fact is final, if that Court had before it evidence proper for its consideration in support of the finding (2) *Basiram Saha Roy and others v. Ram Ratan Roy and others* (2), where the Judicial Committee again observed that findings of the first appellate Court are conclusive and the High Court and the Privy Council are bound to accept them without further enquiry. (3) *Midnapur Zamindari Co., Ltd. v. Secretary of State* (3), where Sir Binod Mitter while delivering the judgment of the Judicial Committee observed that "if he (the District Judge) had evidence proper for his findings notwithstanding the statutory presumptions then, it seems to their Lordships that his findings of fact were final and conclusive". (4) *Arjan Singh v. Kartar Singh and others* (4), head note (d) of which reads thus:—

"It is no doubt true that a finding of fact, however erroneous, cannot be challenged in a second appeal, but a finding

(1) I.L.R. 18 Cal. 23
(2) A.I.R. 1927 P.C. 117
(3) A.I.R. 1929 P.C. 286
(4) A.I.R. 1951 S.C. 193

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 admitted as additional evidence which raise serious doubts about their genuineness, cannot be accepted as a finding that is conclusive in second appeal."

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Relying on this decision Mr. Manchanda submitted that there is no question of additional evidence having been admitted in the present case and therefore the first part of this head note governs the present case before me. The last decision relied upon by the counsel is (1) *Ranjit Singh and others v. Chaudhri Nawab Khan and others* (1). Reliance is placed on head note (c) which says that "the mere fact that the lower Court omits to mention certain pieces of evidence does not go to show that he did not consider them. In any case where the finding is based on evidence, it is not liable to be set aside in second appeal, even if the High Court is inclined to come to contrary conclusion". There can hardly be any dispute with the proposition of law enunciated in the authorities relied upon by Mr. Manchanda, and indeed *Durga Chowdhvani v. Jewahir Singh Chowdhri* (2), has recently been approved by the Supreme Court, but, as I have observed in the earlier part of this judgment, the learned District Judge has completely ignored the mutation proceedings which show the conduct of the plaintiff, at the earliest stage of the dispute and that conduct is hardly consistent with the plea of fact which he has now advanced in the present suit. In those mutation proceedings as

(1) A.I.R. 1939 Lah. 548

(2) I.L.R. 18 Cal. 23

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noticed above, we have also the statement of Mst. Rani who expressly stated that Smt. Lal Devi was her daughter. This statement is clearly admissible under section 32(5) of the Indian Evidence Act because at that time the relationship of Smt. Lal Devi with Mst. Rani was not being disputed by the plaintiff. See *Jan Mohammad and others v. R. B. Karm Chand and others* (1). The finding of the Court below is thus assailable because of important evidence having been wholly omitted from consideration; but apart from this aspect of the matter, the Supreme Court has recently in *Oriental Investment Co., Ltd. v. Commissioner of Income-tax, Bombay* (2), considered this question and laid down the test for determining questions of law and fact. The present case is governed by the principle laid down in clause (v) of the head note which says that "a finding on a question of fact is open to attack as erroneous in law if there is no evidence to support it or if it is perverse". For this principle reference was made in the body of the judgment to an earlier case of the Supreme Court in *Meenakshi Mills, Ltd. v. Commissioner of Income-Tax, Madras* (3). It is true that these cases relate to section 66 of the Income-Tax Act but the discussion and reasoning of their Lordships of the Supreme Court would be equally applicable to the interpretation to be placed on section 100 of the Code of Civil Procedure. Mr. Manchanda has also submitted that the mutation proceedings are meant only for revenue or fiscal purposes and therefore those proceedings do not affect questions of title. The counsel is certainly right in his submission, but here we are not determining the question of title by relying on the entries sanctioned during mutation proceedings. It is only the

(1) A.I.R. 1947 P.C. 99
 (2) A.I.R. 1957 S.C. 852
 (3) 1956 S.C.R. 691

conduct of the plaintiff-respondent during mutation proceedings, which is being considered, and from which necessary inferences are being drawn. This inference can legally be drawn in spite of the fact that mutation proceedings are concerned only with fiscal purposes. In this view of the matter I need hardly discuss *Hariharsingh Sukhram Channahu v. Deonarayan Bodhram Channahu and others* (1), and *Nand Kishwar Bux Roy v. Gopal Bux Rai and others* (2), cited by the learned Advocate.

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Before concluding I may also note the last point raised by the counsel for the appellant. He has submitted that as soon as the new Hindu Succession Act came into force, Mst. Rani became absolute owner and therefore the plaintiff has no right to challenge the impugned gift. Reliance in support of this contention has been placed on section 14 of the Act which is in the following terms :—

“14. (1) Any property possessed by a female Hindu, whether acquired before or after the commencement of this Act, shall be held by her as full owner thereof and not as a “limited owner.

Explanation.—In this sub-section, “property” includes both movable and immovable property acquired by a female Hindu by inheritance or device, or at a partition, or in lieu of maintenance or arrears of maintenance, or by gift from any person, whether a relative or not, before, at or after her marriage, or by her own skill or exertion, or by purchase or by prescription, or in any other manner whatsoever, and also any

(1) A.I.R. 1954 Nag. 319

(2) A.I.R. 1940 P.C. 93

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such property held by her as *stri-dhana* immediately before the commencement of this Act.

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- (2) Nothing contained in sub-section (1) shall apply to any property acquired by way of gift or under a will or any other instrument or under a decree or order of a Civil Court or under an award where the terms of the gift, will or other instrument or the decree, order or award prescribe a restricted estate in such property."

As against this, Mr. Manchanda has contended that Mst. Rani was not possessed of the property in suit on the date when this Act came into force as she had already parted with the possession in favour of Smt. Lal Devi. The fact, however, remains that Smt. Lal Devi would also, being a female Hindu be considered to have possessed the property in question at the relevant time, and it is open to the appellant to argue that she as such, is entitled to take advantage of this section. The language of the deed of gift does not prescribe a restricted estate in the property in question, but, as this point has not been fully debated at the Bar, and was half-heartedly raised by the counsel for the appellant, I do not think it is either necessary or proper to go into this somewhat difficult and debatable question of law, particularly in view of my decision on the points discussed earlier in this judgment.

For the reasons given above, I would allow this appeal but in the peculiar circumstances of this case, I would leave the parties to bear their own costs throughout.

B.R.T.