both respects. Recovery of the ornaments of the deceased at the instance of the appellant incriminated him to the fullest extent and lent the strongest corroboration to the confession of Prem from which it was apparent that no other person than the appellant could have murdered Nirmala Devi.

The appeal is accordingly dismissed.

B.R.T.

APPELLATE CIVIL

Before Falshaw and Dua, JJ.

DATA RAM AND ANOTHER,—*Defendants-Appellants.*

versus

TEJA SINGH AND ANOTHER,—*Plaintiffs-Respondents.*

Regular Second Appeal No. 679 of 1953

1958

Sept., 3rd

Custom—Adoption—Adoptee—Whether must be of the same got as the adopter—Entries in the Riwaj-i-am as to the persons who can be adopted—Whether merely directory or mandatory—Changes in social and community life —Whether warrant a new approach to the provisions of the Customary Law—Appointment of an heir qua and gift of non-ancestral property—Whether can be challenged by collaterals.

Held, that it is not necessary that the adoptee must be of the same *got* as the adopter. The entries in a Riwaj-i-Am as to the persons who can be adopted and the prohibition against adoption outside the *got* or the tribe is not mandatory but only recommendatory or directory and the adoption of a stranger is not invalid merely because he does not belong to the same *got* as that of the adopter.

Held, that once the power to adopt is conferred on a person, the matter of choice, whether it relates to the question of degree of relationship or the adoptee being a kinsman of the adopter or belonging to a particular *got*, caste

or creed, is certainly a matter, the regulation of which should not, generally speaking, be considered to be mandatory. The matter of choice depends on various considerations of detail which the adopter alone can weigh and determine. If the choice is given to the adoptive father to select his adoptee for the purposes of appointing him as an heir, who should be really and effectively helpful to him in his business or other avocation in life, there appears to be no justification based on any sound principle of law or any other compelling reason to confine his choice within the limits of his kinsmen.

Held, that the vital changes which our social and community life has undergone during the last 20 years, and specially during the last ten years or so, do warrant a new approach to the provisions of the Customary, Law, particularly those relating to adoption, marriage, women's right to property and restrictions on power of alienation, etc. The old conservative agnatic theory and the considerations of narrow-minded reactionary tribal society in more or less isolated self-sufficient villages have, in the present set-up, lost much of their sanctity, importance and usefulness. Our present social or community life has out-lived those static ideas and conceptions of the nineteenth or even of the early twentieth century. Sociology is, roughly speaking, synonymous with "social welfare", "social science" or "social justice". Customary law as a branch of sociology, therefore, must reflect the social conditions of the times as they actually exist.

Held, that the customary appointment of an heir has been held, in most essential features, to resemble a gift, the only principle difference being that in the case of a gift the property passes immediately to the donee whereas in the case of appointment of heir, the property does not vest in the appointed heir till the death of the adoptive father. Gift of non-ancestral property cannot be challenged by the collaterals at all because as such they have no interest in the acquired property and, therefore, no right to control its alienation, etc.

Case referred by Hon'ble Mr. Justice A. N. Grover, on 30th April, 1958 to a Division for decision of the legal point involved in the case and later on decided by the Division Bench consisting of Hon'ble Mr. Justice D. Falshaw and Mr. Justice I. D. Dua on 3rd September, 1958.

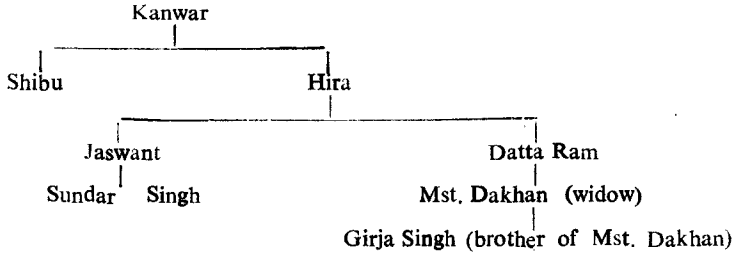
Regular Second Appeal from the decree of the Court of Shri J. N. Kapur, Additional District Judge, Ambala, dated the 25th day of April, 1953, reversing that of Shri G. R. Luthra, Sub-Judge, III Class, Jagadhri, dated the 23rd day of January, 1952 and decreeing the plaintiffs' suit for declaration to the effect that the adoption of Girja by Data Ram (now deceased) is invalid and further ordering that defendant respondent would pay the costs of both the courts to the plaintiffs-appellants.

GANGA PARSHAD, for Appellants.

SHAMAIR CHAND and P. C. JAIN, for Respondents.

JUDGMENT

DUA, J.—Facts relevant for the purposes of these two connected appeals are stated in detail in the referring order of the learned Single Judge dated the 30th of April, 1958. To appreciate the question that arises for decision it will be helpful to refer to the following pedigree-table:— Dua, J.



Data Ram, son of Hira adopted Girja Singh on the 8th of September, 1948. The adoptee is admittedly a brother of Mst. Dakhan, widow of Sundar Singh and is not a kinsman of the adopter. Sundar Singh, as is clear from the pedigree table, is the real nephew of Data Ram. On the 28th of September, 1950, the said Mst. Dakhan and Data Ram both gifted the land, which is the subject-matter of dispute in this litigation, to the said Girja Singh. The plaintiffs who claimed to be the collaterals of Data Ram and Sunder Singh filed a suit on the 4th of October, 1950, for a declaration

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that the adoption dated the 8th of September, 1948, was invalid according to custom and the same should be set aside. A couple of months later on the 11ht December, 1950, the plaintiffs filed another suit for a declaration that the gift made by Data Ram and Mst. Dakhan in favour of Girja Singh was ineffective and not binding on them. These two suits were consolidated and disposed of by one judgment. It was found by the trial Court that the factum of adoption had been proved but the same was invalid. The property was not proved to be ancestral and the gift was held to be an acceleration of succession but both the suits were held to be barred by time with the result that they were dismissed. On appeal the learned Additional District Judge found that part of the property in dispute was ancestral and part non-ancestral. The suit challenging the adoption was held to be within limitation but it was held that Girja Singh being a stranger could not have been validly adopted in the presence of nearer relations. On these findings the plaintiffs were granted a declaration to the effect that the adoption of Girja Singh by Data Ram was invalid.

With respect to the second suit challenging the gift dated the 28th of September, 1950 a decree with respect to the ancestral land was granted to the plaintiffs whereas their suit was dismissed with respect to the non-ancestral property. Against both these decrees aggrieved parties have come up to this Court in second appeal. The learned Single Judge has written a fairly lengthy referring order and has discussed almost all the relevant cases which have been cited at the Bar.

In Regular Second Appeal No.679 of 1953 the only question urged before us is as to the validity of the adoption of Girja Singh. Paragraph

25 of Rattigan's Digest lays down that a sonless proprietor of land in the central and eastern parts of the Punjab may appoint one of his kinsmen to succeed him as his heir. In paragraph 36 it is laid down that there are no restrictions as regards the age or the degree of relationship or the person to be appointed. Paragraph 37 lays down that in certain cases a daughter's or a sister's son is considered to be proper person to be adopted and in paragraph 38 the adoption of the eldest or the only son is considered permissible. The Customary Law of the Ambala District deals with the question of adoption as follows :—

> "Question 59:—Is it necessary that the person adopted should be related to the person adopting? If so, what relatives may be adopted; and what relatives have the preference? Is it necessary that the parties should be of the same tribes, or of the same *got*?"

The answers to this question given both in 1887 and in 1918 are as follows:—

> "1887.—The general sense of the replies is that an adoption must if possible, be from the near collaterals. Failing them, a daughter's son or sister's son may be chosen, but with these exceptions Hindu tribes *rarely adopt* except from their own *got*, and no tribes recognise adoption from an outside tribe. "Muhammadans in general pay less attention to *got* than Hindus. Numerous cases are however quoted by Jats of Rupar where the adopted son belonged to a different family or *got*, and in Naraingarh an instance is given of the adoption of an outsider in preference

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to a collateral being upheld by legal decision. This is a good instance of the difficulties surrounding the whole question of adoption. The general feeling of the country is clear enough, but the customs are not sharply defined, and the intricacies of the law open out a wide field for useless litigation. 1918.—In practice the order of succession is followed and only near collaterals are adopted; failing them a daughter's or sister's son may be chosen. Breaches of this rule are very rare and must be treated as exceptions to custom."

It is worthy of note that the answer given in 1887 is very elaborate and numerous cases are quoted by Jats of Rupar where the adoptees belonged to different family or *got* and in Naraingarh an instance has been given of the adoption ever of an outsider in preference to a collateral having actually been upheld by a Court of Law. This, answer does not, in my opinion, establish a clear cut, certain and universally recognised rule of custom as is now being relied upon by the respondents. In 1918 it is very briefly stated that in practice the order of succession is followed. It is then noted that breaches of this rule are very rare and must be treated as exceptions to custom. This answer also does not seem to me to materially advance the respondents' case; it certainly does not clearly establish that the custom had in the intervening period since 1887 undergone any substantial change. If there have been instances of adoption of persons who are not related to the adoptor as was stated in 1887 or if breaches of the rule, however, few, have been committed though they may have been considered as exceptions, then it is a question to be considered whether the custom of adopting only near relatives of the adoptor

has been proved to be certain, universal and well-established and whether the suggested rule is mandatory, particularly when the daughter's son and sister's son are also expressly mentioned to be eligible for adoption.

The learned counsel for the appellant has argued that the entries in the *riwaj-i-am* as to the persons who can be adopted are merely directory or recommendatory and not mandatory. He submits that if the power to adopt is conferred on a person then the restrictions imposed on him in the selection of the adoptee should be considered to be merely indicatory and not mandatory. In support of his submission he has referred to a number of decisions. In *Jowala* v. *Dewan Singh*, (1), Tek Chand, J. in dealing with the entry in the answer to question No. 69 of the *riwaj-i-am* of Jullundur District published in 1918 observed as follows:—

> "The question here is not one as to the quantum of evidence necessary to rebut a clear entry in the *riwaj-i-am*, but the real point for decision is the meaning to be given to the entry in the *riwaj-i-am*. If the enty were held to be mandatory, there can be no question that the evidence produced by the defendants must be held to be insufficient to justify a finding that the onus has been discharged. But if the entry is merely indicatory and is to be given the meaning that has been given to similar entries in the *riwaj-i-ams* of the neighbouring districts, I have no doubt that the decision of the lower Courts is incorrect. After giving the matter

(1) A.I.R. 1936 Lah. 237

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careful consideration, I am of opinion that the view taken in the previous rulings of the Chief Court and this Court must be followed and the entry held to be merely indicatory. I hold that the adoption of Jowala by Devi Ditta was valid by custom and that the plaintiffs' suit has been wrongly decreed."

In that case Devi Ditta, a Jat of Jullundur District, had adopted as his son Jowala who was his collateral in the t4h degree. The plaintiffs who were related to Devi Ditta in the 3rd degree instituted a suit for a declaration that the adoption of Jowala was invalid under the custom prevailing in the tribe and reliance was placed on the entry in the *riwaj-i-am* of Jullundur District as stated above. The learned Judge in his judgment relied on earlier decisions of the Punjab dealing with similar entries in the Customary Laws of other districts and observed that the entry in question was indicatory and not mandatory. The counsel next relied on *Basant Singh and others* v. *Brij Raj-Saran Singh* (1), a decision of their Lordships of the Privy Council. In this case an orphan from a different *got* than that of the adoptor was adopted and his adoption was challenged on the ground that the parties were governed by the Customary Law of Delhi district according to which the adoptee, who was both an orphan and not of the same *got* as the adopter, could not be validly adopted. Their Lordships while dealing with this aspect observed as follows:—

"Accordingly, their Lordships are of the opinion that the respondents have established that the Customary Law applied to Khushal Singh when he left

(1) A.I.R. 1935 P.C. 132

the Delhi District in 1858. But the appellants maintain that the adoption of defendant 1 was invalid in that it did not comply with the Customary Law in two respects, viz., that defendant was an orphan, and that he was not of the same *gotra* as Khushal Singh either of which would invalidate the adoption. The reason that under the Mitakshara law, an orphan cannot be adopted is because a boy can be given in adoption only by his father or his mother, and such giving is an essential part of the ceremonies, but answer 87 in the 1911 manual does not prescribe such giving as a formality necessary to constitute a valid adoption. Answer 83 shows that a brother can be given in adoption, and answer 86 shows that a sister's son or a daughter's son may be adopted; and further, answer 8 shows that a boy may be adopted even after tonsure or investiture with the sacred cord, and that there is no age limit, except that the age of the adoptive son should be less than that of the adoptive father. This makes it clear that the conditions of adoption under the Mitakshara law are completely superseded by the Customary Law, and there is no reason for excluding an orphan under the latter; but, if it were necessary, their Lordships agree with the High Court that the evidence in the present case is sufficient to place the validity of the adoption of an orphan beyond question.

"It is admitted that defendant 1 does not belong to the same *gotra* as Khushal Singh,

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and the appellants found on answer 174 in *riwaj-i-am* of 1880. No such restriction is suggested in the manual of 1911. But answer 174 of 1880 appears to make clear, by the second example in the column of particulars, that it is only a recommendation that they should be of the same *gotra*, and that a person of a different *gotra*, may be adopted; in other words, factum valet. Their Lordships are, therefore, of opinion, on the whole matter, that the adoption of defendant 1 was valid, and that the appellants' appeal fails."

The counsel next referred us to a decision of the Supreme Court, *Hem Singh and another* v. *Harnam Singh and another* (1). Their Lordships in this case while dealing directly with the question of adoption under the Customary Law in the Punjab, very clearly observed that the provision that the right of selection rests with the person adopting, also detracts from the mandatory nature of the limitation imposed upon the degree of relationship. In para 7 of the judgment at page 583 of the report, their Lordships quoted Mulla in his well-known work on Hindu Law which say;

> "It has similarly been held that the texts which prohibit the adoption of an only son, and *those which enjoin the adoption of a relation in preference to a stranger, are only directory*, therefore, the adoption of an only son, or a stranger in preference to a relation, if completed, is not invalid. In cases such as the above, where the texts are merely directory, the principle of factum valet applies and the act is valid and binding."

(1) A.I.R. 1954 S.C. 581

Their Lordships approved of this passage and proceeded—

> "We see no reason why a declaration in a *riwaj-i-am* should be treated differently and the text of the answer should not be taken to be directory."

After making a reference to a number of cases, their Lordships in the end observed as follows:—

> "Whether a particular rule recorded in the *riwaj-i-am* is mandatory or directory must depend on what is the essential characteristic of the custom. Under the Hindu Law adoption is primarily a religious act intended to confer spiritual benefit on the adoptor and some of the rules have, therefore, been held to be mandatory and compliance with them regarded as a condition of the validity of the adoption. On the other hand, under the Customary Law in the Punjab, adoption is secular in character, the object being to appoint an heir and the rules relating to ceremonies and to preferences in selection have to be held to be dirctory and adoption made in disregard of them are not invalid."

The learned counsel then made a reference to sections 4 and 10 of the Hindu Adoption and Maintenance Act (No. 78 of 1956). These two sections are set down below:—

> "4. Save as otherwise expressly provided in this Act;—
>
> (a) any text, rule or interpretation of Hindu Law or any custom or usage as part

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of that law in force immediately before the commencement of this Act shall cease to have effect with respect to any matter for which provision is made in this Act;

(b) any other law in force immediately before the commencement of this Act shall cease to apply to Hindus in so far as it is inconsistent with any of the provisions contained in this Act.

10. No person shall be capable of being taken in adoption unless the following conditions are fulfilled, namely:—

(i) he or she is Hindu;

(ii) he or she has not already been adopted;

(iii) he or she has not been marritd, unless there is a custom or usage applicable to the parties which permits persons who are married being taken in adoption;

(iv) he or she has not completed the age of fifteen years, unless there is a custom or usage applicable to the parties which permits persons who have completed the age of fifteen years being taken in adoption."

The argument is that the Hindu Adoption and Maintenance Act has an overriding effect and lays down the law of universal application as to the persons who are capable of being taken in adoption and even a female can according to the present law be adopted. My attention has also been drawn

to the observations, in some decided cases, that Customary Law is a branch of Sociology and must be in a fluid state and take cognizance of progress of othical and legal notions in the society. In *Daya Ram* v. *Sohel Singh* (1), Chatterji, J., observed as follows:—

> "We must also recognise that Customary Law, like other law, is a branch of sociology and must be in a fluid state and take cognizance of progress of ethical and legal notices in the community in which it is in force."

This quotation was quoted with approval in division Bench decision in *Mst. Peo* v. *Ujjagar Singh* (2), It is true that in that case the question which came up for consideration was the right of sister to succeed to the non-ancestral property as against collaterals but while dealing with the question of custom, their Lordships approved the observations of Chatterji, J., in *Daya Ram* v. *Sohel Singh* (1), and held in favour of sister's right to succeed in preference to collaterals in view inter alia of the change in the ethical and legal notions in the community. Relying on the observations of Chatterji, J. the counsel in the instant case also submitted that what the persons represented in 1887 or in 1918 before the officers enquiring into the custom should not be the basis for deciding the questions relating to the power of adoption today—about half a century later. It is further submitted that the change in the legal and ethical notions of the community has been recognised even by the Parliament by enacting the provisions of the Hindu Adoption and Maintenance Act mentioned above.

(1) 110 P.R. 1906
(2) 1958 P.L.R. 1

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As against this the learned counsel for the respondents has submitted that although the rule regarding degree of relationship may be directory, the adoptee must nevertheless be a kinsman of the adoptor. Reliance in this connection has been placed on *Kassu and another* v. *Rahim Bakshsh*, (1), and *Pakhar and others* v. *Natha and others* (2), where adoption of wife's kinsman in the one case and wife's brother's son in the other was held invalid. It may however, be mentioned that in *Pakhar and others* v. *Natha and others* (2), the Learned Judges were mainly influenced by the consideration that to allow anyone to be adopted as a matter of course would be inconsistent with the principles on which the tribal society of the Jat villages was constituted. As discussed above and as I would discuss hereafter, these considerations are wholly out of place in the present set-up of our society. Mr. Shamair Chand has also relied on *Joli and another* v. *Khazana and another* (3), in which the adoption of a pichhlag's son was declared invalid on the ground that the adoptee was of a different *got*. The learned counsel has further contended that the entry in the *riwaj-i-am* of Jagadhri is also against the appellant and, therefore, in the absence of any instances to the contrary the adoption in dispute should be held to be invalid.

After giving my most anxious consideration to the matter I am of the opinion that the decision of their Lordships of the Privy Council in *Basant Singh's case* (4), has finally settled the question against the contention of the learned counsel for the respondents that the adoptee must necessarily

(1) 120 P.R. 1884
(2) 156 P.R. 1890
(3) I.L.R. Lah. 48
(4) A.I.R. 1935 P.C. 132

be of the same got as the adopter. It has been expressly held by the judicial committee that such a provision is only recommendatory and the rule of *factum valet* would be properly attracted even when the adoptor's choise has gone outside his own *got*. The observations of their Lordships of the Supreme Court in *Hem Singh's case* (1), also seem to lend support to this view.

Once the power to adopt is conferred on a person, in my opinion the matter of choise, whether it relates to the question of degree of relationship or of the adoptee being a kinsman of the adoptor or belonging to a particular *got, caste* or creed, is certainly a matter, the regulation of which should not, generally speaking, be considered to be mandatory This matter of choice depends on various considerations of detail which the adoptor alone can weigh and determine. Mr. Shamair Chand, learned counsel for the respondents, has in fact conceded that the question relating to degree of relationship is indicatory but he submits that rule of the adoptee being a kinsman is mandatory. I must confess that I have not been able to understand the principle on which this distinction can be sought to be maintained in the present set. up. If the choice is given to the adoptive father to select his adoptee for the purposes of appointing him as an heir, who should be really and effectually helpful to him in his business or other avocation in life, I see no logical justification based on any sound principle of law or any other compelling reason as to why his selection should be confined within the limits of his kinsmen.

Besides, the vital changes which our social and community life has undergone during the last 20 years, and specially during the last ten years or so, do warrant a new approach to the provisions of the

1) A.I.R. 1954 S.C. 581

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Customary Law, particularly those relating to adoption, marriage, women's right to property and restrictions on power of alienation etc. The old conservative agnatic theory and the considerations of narrow minded reactionary tribal society in more or less isolated self-sufficient villages have, in the present set-up, lost much of their sanctity, importance and usefulness. Our present social or community life has out-lived those static, ideas and conceptions of the nineteenth or even of the early twentieth century. Sociology is, roughly speaking synonymous with "social welfare", "social science" or "social justice." Customary Law as a branch of sociology, therefore, must reflect the social conditions of the times as they actually exist. It is no doubt unfortunate that no enquiry should have been held into the state of the custom in dispute after 1918, to prove its continuous use. Since the commencement of the Constitution of India, however, the omission to enquire into the existence of such customs may well be due to the fact that now the State is expected to endeavour to secure for the citizens a uniform Civil Code throughout the territory of India and in fact we find that in 1956 the new Act dealing with adoption has actually been enforced. But be that as it may, the language of the questions and answers in the *riwaj-i-am*, the decisions of the Privy Council and of the Supreme Court, and the general considerations discussed above clearly show that the adoption of an outsider as such is not necessarily invalid. For all these reasons I am clearly of the opinion that the prohibition against adoption outside the *got* or the tribe is not mandatory but only recommendatory or directory and that the adoption of a stranger is not invalid merely because he does not belong to the same *got* as that of the adoptor.

Before concluding I might also observe that after all, the present suit was merely for a declara-

tion and a declaration, as is well-known, is a discretionary relief. Data Ram died on the 25th of January, 1958 and ever since the adoptor, which took place ten years earlier in 1948, he has been treating the adoptee as his validly adopted son. In 1956 while as yet Data Ram was alive the Hindu Adoption and Maintenance Act came into force. Under this Act it is not disputed that Data Ram could have validly adopted Girja Singh. As is well-known customary appointment of heir does not require performance of any religious ceremonies and it is not without significance that Data Ram actually continued, till his death, to treat Girja Singh as his adopted son. In this view of the matter also I am inclined to hold that the rule of factum valet is fully applicable to the instant case and this Court should not grant the discretionary relief of declaration to the plaintiff. The appeal being a re-hearing it is legitimate for us to take into consideration these aspects while deciding this question.

There is still another way of looking at this dispute with respect to non-ancestral property. The customary appointment of heir has been held, in most essential features, to resemble a gift, the only principal difference being that in the case of a gift the property passes immediately to the donee whereas in the case of appointment of heir, the property does not vest in the appointed heir till the death of the adoptive father. (*See Gainda and another* v. *Mst. Jai Devi and another* (1). Gift of non-ancestral property cannot be challenged by the collaterals at all because as such they have no interest in the acquired property and, therefore, no right to control its alienation etc. With respect to such property of Data Ram, therefore, the collaterals had absolutely no *locus standi* to challenge

(1) I.L.R. 1944 Lah. 519

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the right of Girja Singh to get such property by virtue of being in fact an adoptee of or a donee from the deceased.

Dua, J.

In view of what has been stated above, I am of the opinion that this appeal must succeed and the plaintiffs' suit for a declaration that the adoption is invalid must be dismissed. In the peculiar circumstances of this case, however, there will be no order as to costs.

In the other appeal (Regular Second Appeal No. 891 of 1953) a suit was filed by the same collaterals to have the gift dated the 28th of September, 1948 set aside. In view of the decision in Regular Second Appeal No. 679 of 1953 this appeal must fail. Data Ram and Mst. Dakhan both had gifted the land in suit to Girja Singh. If he is the validly adopted son as held in the connected appeal, then there can hardly be any valid ground on which this gift can be assailed and indeed Mr. Shamair Chand has frankly conceded this proposition. A part of the property has been declared to be non-ancestral and with respect to such property there can certainly be no *locus standi* in the plaintiffs to attack the gift. However, as I have held in the connected appeal that the adoption is good and valid, I think that the gift must be upheld, being to a validly adopted son who is thus also the next heir. The collaterals appeal, therefore, fails and is hereby dismissed. There will be no orders as to costs in this appeal as well. There are also cross-objections filed by Data Ram etc. in this appeal which must, for the reasons given above, be allowed but without any order as to costs.

Falshaw, J.

Falshaw, J.—I agree.

B.R.T.