APPELLATE CIVIL.

Before Mr. Justice Ashworth and Mr. Justice Muhammad Raza.

1925 November, 20.

RAMPAL SINGH (DEFENDANT-APPELLANT) *v.* BAJRANG SINGH (PLAINTIFF-RESPONDENT).*

Custom, incidents of—Custom, mode of proof of—Family custom, admissibility of, in proof of tribal custom— Stridhan *property, custom regulating succession to—Inference, how far permissible in proof of custom—Evidence Act, section* 13*—Judicial decision, admissibility of, as evidence of an instance in proof of custom.*

Per RAZA, J. :—*Held*, that if a party relies upon the special custom of a family to take the succession out of the ordinary Hindu law, such custom must be proved to be ancient, continuous, certain and reasonable and, being in derogation of the general rule of law, must be construed strictly. A custom must be satisfactorily proved by evidence of particular instances so numerous as to justify the court in finding in favour of the custom.

Held further, that the custom of brothers and nephews of a deceased man succeeding together does not lead to a necessary inference that a custom exists to this effect also that on the death of a childless widow her and her husband's properties are inherited, according to their respective stocks by the persons descending from the same ancestor as her husband but without any regard to the nearness or remoteness of the persons taking the properties. The latter custom is a different custom and is strictly to be proved.

Held also, that a family custom proved to exist among the Bachgoti Thakurs in a certain village cannot be said to govern the Bachgoti Thakurs of another village unless it is shown that the proprietors of the former village are related as members of a family to the proprietors of the latter village.

Per ASHWORTH, J. :—*Held*, that inference is one of the methods of proof and that in the case of a custom there is no

* Second Civil Appeal No. 415 of 1924, from the decree, dated the 12th of July, 1924, of Humayun Mirza, Additional Subordinate Judge of Sultanpur, affirming the decree, dated the 25th of September, 1923, of Ziauddin Ahmad, Munsif of Sultanpur.

reason to reject a clearly logical inference against which no consideration prevails.

Held further, that inasmuch as the *stridhan* of an issueless woman devolves first on her husband and then on his *sapindas* a custom regulating succession by *sapindas* to a male's property must also be held to regulate succession by the *sapindas* of the husband to the *stridhan* property of his widow.

Held also, that the record of a judicial decision is admissible as evidence of an instance under section 13 of the Evidence Act, namely, as a transaction by which the custom in question was claimed and recognized.

Mr. *Zahur Ahmad*, for the appellant.

Mr. *Naimullah*, holding brief of Mr. *Niamatullah*, for the respondent.

RAZA, J. :—This is a defendant's appeal arising out of a suit for possession of certain zamindari shares mahal Utri, pargana Miranpur, district Sultanpur. The relative position of the parties will appear from the pedigree attached.

Harpal Singh, Har Bakhsh Singh and Bhagwani Din Singh were co-sharers of the said mahal. Harpal Singh and Har Bakhsh Singh both died childless. Harpal Singh died about 50 years and Har Bakhsh Singh about 40 years ago. Though Harpal and Har Bakhsh (brothers) lived jointly but mutation was effected in respect of the share of Harpal Singh in favour of his widow Musammat Jasaoo Kunwar. She got possession of Har Bakhsh Singh's share also on his death. On the death of Bhawanidin's widow, Musammat Jitaoo, mutation was made in favour of Musammat Jasaoo in respect of her share also in 1892. Thus Musammat Jasaoo got possession of these three shares and held them till her death. She died on the 18th of November, 1918. A revenue partition was made in 1911 and the said shares were allotted to a

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mahal called after her name. At the time of the death of Musammat Jasaoo three persons, namely Gulab Singh (father of the plaintiff), Raghubir Singh (father of the defendants Nos. 9 and 10) and Udit Narain Singh (father of the defendant No. 7) were the nearest reversioners of Harpal Singh. However, mutation was effected in favour of the plaintiff Bajrang Singh, the defendant No. 1 Rampal Singh, and eight other persons, the defendant No. 1 getting 19 shares and the plaintiff and other, 16 shares. The plaintiff brought the present suit against the defendant No. 1 and others claiming one-third share.

The suit was contested by the defendants Nos. 1 to 6 principally. Their defence was that they were entitled to the property by virtue of a custom the particulars of which will be set out hereafter. The court of first instance decreed the plaintiff's claim holding that the custom set up by the contesting defendants was not satisfactorily proved and was not applicable to the present case. Rampal Singh defendant No. 1 alone appealed but his appeal was dismissed by the Subordinate Judge of Sultanpur on the 12th of July, 1924. He has now appealed to this Court. The question of custom is the only question to be decided in this case. The plaintiff's father being one of the nearest reversioners, the defendant-appellant cannot come in except on the ground of the custom set up by him.

Musammat Jasaoo Kunwar had no right to the property which she was holding in her life-time. She had no right to succeed Har Bakhsh Singh and Musammat Jitaoo Kunwar. However, she acquired title to the property by adverse possession and it is not disputed that it became her *stridhan* property. The *stridhan* property of an issueless woman goes to

her husband and after him to his heirs in order of their succession to him. Under the Mitakshara law the right to inherit arises from propinquity, that is, proximity of relationship. The appellant is the relation of a remoter degree of descent than the plaintiff's father and cannot succeed until and unless the alleged custom is made out.

The custom set up by the defendant-appellant is as follows :—

> "In the community (tribe) and family of Harpal Singh and the parties the custom which prevails relating to inheritance is that on the death of a childless widow her, as well as her husband's estate, is inherited by the collaterals of her husband, having regard to their descent without any consideration of their nearness, the descendants of the eldest son receiving 19 shares and those of the remaining sons 16 shares."

The defendant-appellant alleges that his ancestor Girdhar Shah was the eldest son of Faqir Shah. No mention of the alleged custom was made in the wajib-ul-arz, that is, the wajib-ul-arz of Utri (exhibit A6).

The oral evidence which has been produced by the defendant-appellant to prove that brothers and nephews succeed together by custom is unreliable and insufficient. The learned Munsif has subjected that evidence to a careful analysis. No instance was given in which succession by collaterals also was regulated by custom. The oral evidence has been properly rejected by the lower courts.

The appellant's learned Counsel relies on documentary evidence principally. He has referred to exhibits A1 to A5 and A23. Exhibits A1 to A5 show

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that the plaintiff's father Gulab Singh had brought a suit against his uncle Ram Newaz Singh in 1866 in respect of the property of his another uncle Phulman Singh who had died childless. He was not entitled to any share in the property of Phulman Singh, under the Hindu law, in the presence of his uncle Ram Newaz Singh, but he had claimed a one-third share in that property. He had made no mention of any custom in his plaint but his plaint and his statement show that he had taken the law and the custom both to be the same. Ram Newaz had admitted the custom in his statement and had contested the suit simply on the ground that a *panchayat* had already decided that Gulab Singh could not take the property unless he accepted his liability to pay his share of the debt of the deceased. The liability for the debt along with the property was the only question to be decided in that suit. The claim was eventually decreed without any liability for the debt. The principal custom which has been set up in this case was not set up or recognized in that case. Ram Newaz Singh had stated the custom as follows :—

> " If a co-sharer either a brother or other *near relative* dies without any issue, then his share is divided among the remaining living co-sharers according to their respective shares."

In my opinion the statement of Ram Newaz Singh alone does not establish the custom in question. It should be borne in mind that if a party relies upon the special custom of a family to take the succession out of the ordinary Hindu law, such custom must be proved to be ancient, continuous, certain and reasonable, and, being in derogation of the general rule of law, must be construed strictly. A custom must be

satisfactorily proved by evidence of particular instances so numerous as to justify the court in finding in favour of the custom. One instance or even four modern instances are not sufficient to prove a custom—see *Durga Charan Mahto* v. *Raghunath Mahto* (1). When the custom is proved to exist it supersedes the general law, which however still regulates all outside the custom—see *Ram Nandan* v. *Janki Kuer* (2) and *Mata Din Sah* v. *Shaikh Ahmad Ali* (3). In the first place the statement of Ram Newaz alone, mentioned above, does not establish the custom of brothers and nephews succeeding together and in the second place that statement does not establish the particular custom under consideration. I think the custom of brothers and nephews of a deceased man succeeding together does not lead to a necessary inference that a custom exists to this effect also that on the death of a childless widow, her and her husband's properties are inherited, according to their respective stocks by the persons descending from the same ancestor as her husband but without any regard to the nearness and remoteness of the persons taking the properties. I think the latter custom is a different custom and is strictly to be proved. In my opinion exhibits A1 to A5 do not help the defendant-appellant in this case.

Exhibit A23 is a copy of a judgement in a suit between some Bajgoti Thakurs of Dahyawan, district Sultanpur. It is true that the following custom was held to be proved in that case :—

> " If a man dies without leaving a male issue his relatives, namely, brothers or cousins or nephews (son of brother or cousin) and grandson (grandson of a brother or a

(1) 20 I.C., 810. (2) 29 Calc., 828.
(3) 11 O.C., 1.

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cousin) get share in the property of the deceased without regard to nearness or remoteness."

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However that custom was held to be proved in that case as a family custom and not as a tribal custom. This is clear from the judgement of the Munsif who decided that case. The judgement shows clearly that no attempt was made to prove the custom as a tribal custom in that case. It appears that the parties to the present suit are also Bajgoti Thakurs, but it is not shown that they are related as members of a family to the proprietors of village Dahyawan. It was held in *Lalman* v. *Nand Lal* (1) that wajib-ul-araiz of villages belonging to the same clan are inadmissible in proof of a family custom unless it is shown that the proprietors of those villages were related as members of a family to the plaintiffs. There is no objection to a party pleading that a custom obtains both in a family and in the tribe to which that family belongs but he must of course prove that the custom is binding on the family, whether he confines his evidence and plea to the family or not—*Musammat Parbati Kunwar* v. *Rani Chandarpal Kunwar* (2). In the present case no attempt has been made to prove the custom in question as a tribal custom. The defendant-appellant attempted to prove the custom as a family custom but failed in his attempt. I do not find a single instance in which the particular custom set up in this case was claimed, recognized or exercised. Under these circumstances I think the lower courts were perfectly right in holding that the alleged custom was not proved and the plaintiff's claim must, therefore, be rejected. In my opinion there is no force in this appeal.

(1) 17 O.C., 1. (2) 8 O.C., 94 at 100.

I would, therefore, dismiss this appeal with costs.

ASHWORTH, J. :—This is a defendant's second appeal. The plaintiff's claim was resisted by the appellant on the ground of the existence of a certain custom, but both the lower courts have held that he failed to prove this custom. The only question arising in this appeal is whether the lower courts were right in holding that the custom did not exist. The custom set up may be phrased as follows :—

> "A right of representation exists whereby collateral descendants in different degrees from a common ancestor succeed to the share to which their immediate ancestor, if alive, would succeed."

There were two alternative claims in respect of this custom. One was that the custom prevailed in the family. The other was that the custom prevailed in the community of Bajgoti Thakurs settled in the Sultanpur district to which this family belong.

As regards the family custom a preliminary objection has been taken that the decision of the lower courts was one of fact which cannot be upset in second appeal, the evidence relied upon to prove this custom was the record of a certain case in which Gulab Singh, father of the plaintiff Bajrang Singh, sued his uncle Ram Newaz Singh for a share of the property left by another uncle and was successful. The plaintiff in that case, it was urged by the present appellant, had based his claim on the custom now set up. The defendant in that case did not deny the custom but defended his suit on another ground. The suit was decreed. These proceedings embodied in exhibits A1 to A5 were pleaded as a transaction in which to use the words of section 13 of the Evidence Act, the custom was "claimed and recognized.". The court of first

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instance stated that " There was no evidence to prove that the father of Gulab Singh had predeceased Phulman Singh," i.e. the uncle whose property was in question in the suit. Accordingly it held that the case was not necessarily evidence of the custom set up. In other words, the court held that it was possible that Gulab Singh was suing for property which had vested in his father before that father's death and as representative of his father, in which case there was no invocation of the custom now set up. The lower appellate court also held that the claim was based on the ordinary law of succession and not on any custom. Now it may be that the courts were wrong in holding that in that case no custom was set up either expressly or by implication. It may be that the plaint showed that Gulab Singh's father had died before the succession in question in that case opened out, and that for this reason custom was alleged by implication. But no question of law arises in second appeal. In determining what the plaint in that case meant and in deciding, even wrongly, that there were no circumstances which would give a particular meaning to that plaint, the courts were deciding questions of fact. We allow the preliminary objection that so far as the alleged family custom was held not to be proved the decision of the lower appellate court is not open to appeal.

It is next urged that a tribal custom was set up and proved. It was alleged alternatively to a family custom in the plaint, but no attempt seems to have been made to prove it. Exhibit A23 is invoked in arguments in this appeal. That is a judgement where the custom set up was held applicable to " the descendants of one Chitra Sen ". As the court of first hearing has remarked, there is no evidence to show that the present family are such descendants. The

wajib-ul-arz of the village says that all the Bachgoti Thakurs of the Sultanpur district are descended from a common ancestor Barial Singh, but it is not suggested that Barial Singh was a descendant of Chitra Sen.

I have seen the judgement of my learned colleague. I concur with it so far as the finding is that the appeal should be dismissed. I think it, however, desirable to express dissent in respect of these matters. My learned colleague quotes the case *Durga Charan Mahto* v. *Raghunath Mahto* (1) as an authority for holding that a family custom should not be held proved merely by four modern instances. Reference to that decision shows that the Calcutta High Court were dealing with a custom set up as a family custom and referred to the Privy Council case *Chandika Bakhsh* v. *Munna Kunwar* (2) as showing that their Lordships of the Privy Council had declined to find in favour of the alleged custom upon evidence which consisted of four modern instances. A reference, however, to the decision of their Lordships of the Privy Council will show that they were considering in that case not a family custom but a class of tribal custom. It is true that the headnote speaks of a family custom being set up but the custom that was being set up in that case was one said to obtain in the tribe known in Oudh as Ahban Thakurs. The evidence in the case had shown only four instances in favour of the tribal custom whereas there were altogether 18 instances discussed. I consider that this ruling of the Privy Council has no application to a custom set up as a family custom. *Ashworth, J.*

Again I cannot agree with the finding that the existence (if proved) of a custom of brothers and nephews of a deceased man succeeding together would

(1) 20 I.C., 810. (2) 29 I.A., 7.

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not lead to a necessary inference that a custom existed to this effect also on the death of a childless widow. There is a rule of Hindu law which is set out as follows in section 196 (1) of Dr. Gour's Hindu Code, second edition :—

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> " The *stridhan* of an issueless woman devolves on her husband if she was married to him in the Brahm form which will be presumed, and failing him to his nearest *sapindas* in the order of their succession to him."

It is correct that a custom must be unequivocally stated and proved but it does not follow that it cannot be proved by inference. It is urged, that the evidence only justifies it being held that the property of a propositus will go to collaterals in different degrees without any preference being given to nearness, but what is proved does not justify us in holding that this will apply in respect of the property of a childless widow.

Reliance has been placed on the case *Bijai Bahadur Singh* v. *Mathura Singh* (1). This is a judgement of a single Judge of the Judicial Commissioner's Court of Oudh but it follows the Privy Council decision of *Brij Indar Bahadur Singh etc.* v. *Lal Seetla Bux* (2). In these cases it was held that from a custom excluding daughters and their issue from inheriting the property of their father it could not be inferred that they were excluded from inheriting the *stridhan* property of their mother. There was an obvious reason for this. Hindu law generally favours the claims of daughters in respect of their mother's property. Here there is no such principle involved. I consider that inference is one of the methods of proof and that in the case of a custom there is no reason to reject a clearly logical inference against

(1) 9 O.L.J., 327. (2) L.R., 5; I.A., 1.

which no consideration prevails. It appears to me that inasmuch as the *stridhan* of an issueless woman devolves first on her husband and then on his *sapindas* a custom regulating succession by *sapindas* to a male's property must also be held to regulate succession by the *sapindas* of the husband to the *stridhan* property of his widow.

Lastly I do not agree that exhibits A1 to A5 were not admissible as evidence of an instance under section 13 of the Evidence Act, namely, as a transaction by which the custom in question was claimed and recognized. It makes no difference that the defendant contested the claim of the plaintiff in that case on another ground, namely, that he could not get the property in question without paying up the previous debt. The claim was only sustainable if inheritance was governed by the custom now set up. It was an easy answer to the defendant in that case that the custom did not exist. The fact that he did not resist the suit by denying the plaintiff's right, in my opinion, makes this case an instance. No doubt it was only one instance and it was unnecessary for this Court in appeal to consider it, inasmuch, as the finding in respect of the family custom was one of fact and no question of law arose.

ASHWORTH and RAZA, JJ. :—We direct that the appeal shall be dismissed with costs to the respondent.

Appeal dismissed.