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Hasan A.C.J., and Misra, J.

As to costs we think the proper order would be to direct that the parties shall bear their own costs in this Court. As to the costs in the lower court the plaintiffs shall be entitled to their full costs against all the defendants except Parbhu, Hinga, Raghubar and Mathura (defendants Nos. 6 to 9), who will be entitled to their costs from the plaintiffs in proportion to the value of the 33 bighas in respect of which the plaintiffs' suit has been dismissed.

Appeal allowed.

PRIVY COUNCIL.

J.C.* 1929 *November*, 19.

ROSHAN ALI KHAN AND ANOTHER (PLAINTIFFS) *v.* CHAUDHRI ASGHAR ALI AND OTHERS (DEFENDANTS) (AND CONNECTED APPEALS.)

[On Appeal from the Chief Court of Oudh at Lucknow.]

Custom of family—Succession—Supersession of Muhammadan law—Widows—Evidence of custom—Wajib-ul-arz—Custom in other branches of family.

A Muhammadan proprietor died childless in 1865 leaving two widows. The senior widow took possession of his estate, but in 1866 the junior obtained a decree for a half share. The senior died in 1872, the junior on the 16th of May, 1911. On the 15th of May, 1923, the nearest male agnate of the deceased proprietor sued to recover the deceased's share in villages of a pargana from persons in possession through the widows. The plaintiff pleaded that by a custom of his family, in supersession of Muhammadan law, widows in default of children succeeded for their lives with survivorship. *Wajib-ul-arz* relating to custom in the deceased owner's branch of his family were completed in 1870 from statements made by his widows' agent, and stated that in default of children widows took as "maliks", a term which had not then been held to confer an absolute estate; in some cases the agent stated that the widows had a power of disposition. *Wajib-ul-arz* relating to a branch descended in the male line from a common ancestor who lived in the sixteenth century stated specifically that widows succeeded for their lives. In a third

Present:—Lord ATKIN, Sir JOHN WALLIS, Sir GEORGE LOWNDES and Sir BINOD MITTER.

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set of *wajib-ul-arz*, persons who were descended from that ancestor's sister, and who for many generations had lived in the pargana so as to be regarded as forming part of the same community supported the view that the widows took life interests. The Chief Court (reversing the trial judge) held that the custom alleged was not proved and dismissed the suits.

Held, that the fact that the widows had been allowed to succeed in 1865 without any adverse claim, and in accordance with the custom recorded a few years later, sufficiently established that the Muhammadan law of succession was superseded by a family custom, and that the value of the *wajib-ul-arz* (all of which were admissible) in support of the custom alleged was not destroyed by the widows' unfounded claim therein; the documents and the oral evidence established that by custom the widows succeeded for their lives, but not that on the death of one the other succeeded to her moiety. In the result the plaintiff's claim was barred by limitation as to the senior widow's moiety, but succeeded as to the junior widow's moiety.

A statement in a *wajib-ul-arz* is of high evidentiary value of a custom, but is to be disregarded if it appears to have been made from interested motives: *Balgovind* v. *Badri Prasad* (1) and *Uman Prasad* v. *Gandharp Singh* (2), referred to.

Decree of the Chief Court reversed.

CONSOLIDATED APPEALS (No. 83 of 1928) from eight decrees of the Chief Court of Oudh (August 31, 1927) reversing seven decrees and affirming one decree, of the Subordinate Judge of Bara Banki.

The eight suits giving rise to the present consolidated appeal were instituted by the appellants on May 15, 1923, in circumstances which appear from the judgment, and are shortly stated in the above headnote.

The custom in supersession of Muhammadan law upon which the plaintiffs relied was stated in the plaint as follows:—

> "That the custom obtaining in the family of Qazi Mahmud, the ancestor of the Plain-

(1) (1923) I.L.R., 45 All., 413; L.R., 50 I.A., 196.

(2) (1887) I.L.R., 15 Calc., 10; L.R., 14 I.A., 127.

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tiff No. 1 (Appellant No. 1) and of the late Muzaffer Husain Khan, is that if any one has two wives and they are childless, both widows shall, after the death of their husband, remain in possession of their respective half shares for life without the power of alienation and that after the death of both widows, the nearest collateral of their husband becomes the owner of the entire share."

The defendants by their written statements denied the custom alleged, and pleaded that the widows were each absolute owners of a half share of the estate, and that so far as the properties claimed had formed part of the senior widow's share the suits were barred by limitation.

The Subordinate Judge, upon grounds which appear in the present judgment, allowed the plaintiffs' claim so far as it related to the junior widow's share; in seven suits the plaintiffs obtained decrees and one suit was dismissed.

Upon appeals to the Chief Court all the suits were dismissed.

The learned Chief Judge, with whose judgment MOHAMMAD RAZA, J., agreed, said that it was not sufficient for the plaintiffs to show that there were customs in the family superseding Muhammadan law, they had to prove specifically the custom which they alleged. Much of the evidence produced did not relate to Muzaffer Husain's branch of the family, and in any case it was conflicting. The oral evidence was unreliable. In his opinion the custom alleged was not established, consequently the suits failed.

1929, July 1, 5, 8. *DeGruyther*, K. C. and *Hyam*, for the appellants.

Dunne, K. C. and *Jopling*, for the respondents.

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November 19. The judgment of their Lordships was delivered by Sir JOHN WALLIS :—The main question in these consolidated appeals is whether in the family of the late Muzaffer Husain Khan who died without issue in 1865, leaving two widows, there is a customary rule of succession which supersedes the Muhammadan law and entitles the first plaintiff in this suit, Roshan Ali Khan, to succeed to his estate as his nearest male agnate on the death of the junior widow, Mahmud-un-nisa, who died on the 16th of May, 1911, nearly forty years after the death of the senior widow Mithan-un-nisa.

This suit, which was instituted on the 15th of May, 1923, the day before it would have become barred, was brought for the recovery of the shares owned by Muzaffer Husain Khan, in the village of Dewa and the other villages in the pargana of the same name specified in Schedule B of the plaint, which at the date of suit were in possession of some of the defendants claiming under transfers from the widows themselves or from their heirs. To raise funds for this litigation the first plaintiff has parted with three-fourths of his interest in the suit to Shankar Sahai the second plaintiff.

The family is a very ancient one, claiming descent from the earliest Muhammadan invaders from Afghanistan, but the earlier steps in the pedigree will not bear examination. One Amir Ali in command of an armed force from Baghdad is said to have taken part in one of the numerous invasions by which Mahmud of Ghazni and his family harried northern India at the beginning of the eleventh century. He is said to have returned to Baghdad after marrying his son Zia-ud-din to the daughter of Syed Wesh, one of the Ghazni family who had conquered Dewa where their descendants have since resided. Aladad, the issue of this marriage, who must therefore have been born in the eleventh century is shown in the pedigree

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as the father of Qazi Mahmud from whom this family is descended. This Qazi Mahmud's daughter is said to have been married to an Usmani Sheikh from Persia and her son was Maulana Abdus Salam, who held high office in the reign of the Emperor Shah Jahan which ended in 1658. Obviously Qazi Mahmud cannot have had a father who was born before the Norman conquest and a grandson who was a contemporary of Cromwell.

The descendants of this Abdus Salam who are known as Usmani Sheiks subsequently resided in Dewa and shared the ownership of this village with Qazi Mahmud's descendants in the male line who are known as Hujjaji Sheiks, the two families being so closely connected that for the purpose of this case the Subordinate Judge has treated them as one.

According to the pedigree, which was drawn up in 1870 for the purposes of another suit and has been accepted in the courts below, Qazi Mahmud had eight sons, four of whom were then represented by descendants in the male line. It so happened that in this year the *wajib-ul-arz*, or records of rights of Dewa and the neighbouring villages, were completed; and in them, pursuant to the directions in Oudh Circular No. 20 of 1863, the customary rules of succession observed by the co-sharers in these villages were recorded and attested by or on behalf of the co-sharers. These *wajib-ul-arz* as held by the Board in *Balgobind* v. *Badri Prasad* (1), when properly used, afford most valuable evidence of custom and are much more reliable than oral evidence given after the event. On the other hand, as observed by their Lordships in *Uman Parshad* v. *Gandharp Singh* (2), they at times, as is the case here, contain statements which would appear to have been concocted by the persons making them in their own interest and are therefore to be disregarded, being worse than useless.

(1) (1923) I.L.R., 45 All., 413; L.R., 50 I.A., 196. (2) (1887) I.L.R., 15 Cal. 20; L.R., 14 I.A., 127.

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The Subordinate Judge of Bara Banki in a careful and elaborate judgment found that in this family there existed a customary rule of succession under which in default of male heirs and of daughters, each of the widows took an interest for life in a moiety of her husband's estate with reversion to the male agnates of the husband, and rightly disregarded the statements of the widows' agents, in the *wajib-ul-arz* that they had full powers of disposition over the properties inherited from their husband. He held, however, that there was no right of survivorship between the widows, and consequently that as regards the moiety of the senior widow who died in 1872 the suit was barred. Accordingly he gave the plaintiffs a decree for the properties which fell to the junior widow, with the exception of certain properties in the possession of the Court of Wards, as to which the suit failed for want of the statutory notice.

This judgment was reversed by the Chief Court of Oudh, which held that the plaintiffs had failed to establish the existence of any custom superseding the ordinary rules of Muhammadan law. The learned CHIEF JUDGE, who delivered the judgment of the Court, would appear to have been of opinion that there was a strong presumption against the existence of the custom set up by the plaintiffs. Now the prevalence of customary rules of succession in this part of India has been recognized in the statute law of Oudh, as well as of the Punjab and the North Western Province, which provides that in matters of succession the ordinary rules of Muhammadan and Hindu law are only to be applied in the absence of such customs, though, as held by this Board in *Abdul Hussein Khan* v. *Bibi Sona Dero* (1), the custom set up must be proved by satisfactory evidence, but without insisting, as Lord BUCKMASTER was careful to point out, on the rigorous and technical rules which would be applicable to such a case in England.

(3) (1917) I.L.R., 45 Cal. 450; L.R., 45 I. A., 10,

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In their Lordships' opinion the fact that on the death of Muzaffer Khan in 1865 his widows were allowed to succeed to his estate without any claim by his other heirs, and in accordance with the custom recorded a few years later in the *wajib-ul-arz* of the villages forming part of his estate sufficiently establishes that the ordinary rules of Muhammadan law were superseded in this family by a customary rule of succession; and they are unable to agree with the learned Chief Judge that these *wajib-ul-arz* are of no use to the plaintiffs, merely because they include an unfounded claim on the part of the widows to full powers of disposition over the estate.

On the husband's death the senior widow took possession of the whole estate which she alleged had been constituted an impartible *taluqdari*. In 1866, however, the junior widow obtained a decree for a moiety of the estate, and the decree was affirmed on appeal. After that date the two widows were each in possession of half the estate. In that litigation something was no doubt said about Muhammadan law in the pleadings and the judgments, but their Lordships cannot agree with the learned CHIEF JUDGE that the Oudh Courts before whom the case came laboured under the mistake that under the ordinary Muhammadan law widows succeeded to the whole of their husband's property. In speaking of Muhammadan law they were, in their Lordships' opinion, merely referring to the customary law governing these parties who were Muhammadans.

As regards the *wajib-ul-arz* of the villages inherited by his widows from Muzaffer Husain, who was descended from Qazi Mahmud's son Abdul Wahab, the first to be completed were those of Kundri, Ex. M.27 and Karanjwara, Ex. M. 28, and the other *wajib-ul-arz* mostly refer to these two. In the case of Kundri it was said that the widows succeeded as maliks, a term which had not then been decided to import full ownership. This

wajib-ul-arz was also signed on behalf of Ghulam Ali, the other co-sharer, who was descended from another son of Qazi Mahomed, and in a subsequent litigation was interpreted by a former Judicial Commissioner of Oudh as only giving the widow a life interest, Ex. 44. In the *wajib-ul-arz* of Karanjwara the agents of the widows stated that it was unnecessary to record the custom of succession because the two widows who were in possession were childless and after their deaths he in whose favour they might make a will would be owner. In their Lordships' opinion this interested statement, which is opposed to the other evidence in the case as well as to the accepted ideas on these subjects of Mahomedans and Hindus alike is entitled to no weight whatever.

As regards the other branches of the family, the custom of the descendants of Qazi Mahmud's son Niamat-ullah was recorded in the *wajib-ul-arz* of Kundri on behalf of his descendant Ghulam Ali. This has just been dealt with.

As regards the descendants of Mohi-ud-din, the eldest son, the custom was recorded in the *wajib-ul-arz* of Rampur which was signed by his descendant Fazl Husain. This *wajib-ul-arz* says that the estate descends to sons and failing sons to daughters, but is manifestly incomplete as it fails to give the custom of descent failing issue. In the *wajib-ul-arz* of Dewa the widows of Muzaffer Husain and Fazl Husain had to state the custom in their families which they did by referring respectively, as it would appear, to the *wajib-ul-arz* of Kundri and Rampur; and it may well be that Fazl Husain refrained from stating the custom in full as he did not want to put himself in direct opposition to the widows.

As regards the *wajib-ul-arz* signed by the descendants of Qazi Mahmud's other son, Abdul Nabi, with which the widows' agents had nothing to do, they

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clearly state that the widows took only an interest for life; and in the *wajib-ul-arz* of Chak Kalan Ex. 164, it is stated that when there is no issue both wives remain in possession during their lives; upon their death whoever is nearest in kin in the family succeeds to the share. "Accordingly the wives of Muzaffer Husain are in possession of a half share." The learned CHIEF JUDGE appears to have regarded this entry with some suspicion, but it is not unnatural that the attestors should have given this instance of the custom in their family. It is even possible that knowing of the pretensions of Muzaffer's widows, they may have thought it well to assert that they were governed by the same custom as themselves and took a life interest only.

Very lengthy and elaborate arguments were addressed to their Lordships on the plaintiffs' contentions that Abdus Shakur, whose descendants attested some of the *wajib-ul-arz* exhibited in the case, and Ewaz Ali, who signed others, were descendants in the male line from Qazi Mahmud and not from Abdus Salam. As regards the descendants of Abdus Shakur their Lordships agree with the learned Chief Judge that the evidence of Mansur Ali, the plaintiff's eighth witness, which the Subordinate Judge accepted, is unworthy of credit. Their Lordships, however, observe that two of these *wajib-ul-arz* Shankurhur Ex. 13 and Sikandarpur Ex. 15, expressly state that the proprietors were Hujjaji Sheikhs, though they mention that they had inherited their shares from their *buzurg* Abdus Shakur. That term does not exclude an ancestor in the female line, but however that may be, it is clear that the attestors regarded themselves as belonging to the family of Qazi Mahmud and not to the family of Abdus Salam who were Usmani Sheiks, and consequently that they must be taken as stating the custom among Hujjajis that is in Qazi Mahmud's family. Similarly as regards Ewaz Ali it is stated in some of the *wajib-ul-arz* which he signed

that the proprietors were Usmani Sheiks, that is to say descended from Abdus Salam and there is other evidence which points the same way. In their Lordships' opinion the *wajib-ul-arz* signed by him must be treated as signed by descendants of Abdus Salam.

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The learned CHIEF JUDGE has rejected the evidence of custom among the descendants of Abdus Salam as irrelevant. Seeing that these two families both descended one in the male and the other in the female line from Qazi Mahmud have lived so long under the same conditions in Dewa and have been so closely connected together as to be treated as one community their Lordships are of opinion that evidence of the custom observed by one family in supersession of the ordinary Muhammadan law is of high evidential value as to the custom in the other. As shown in the judgment of the Subordinate Judge the *wajib-ul-arz* signed by the descendants of Abdus Salam and Abdus Shakur strongly support the plaintiffs' case as to the widows' succeeding to a life interest, and their Lordships consider it unnecessary to refer to them in detail, or to the oral evidence which supports the custom. In their Lordships' opinion it is most clearly established.

In the view taken by the appellate court the question whether the husband's heirs were entitled on the death of the senior widow to succeed forthwith to the properties which had been in her enjoyment did not arise. The Subordinate Judge had held that they were and consequently that as regards these properties the plaintiff's suit was barred. He was of opinion that the *wajib-ul-arz arz* did not establish the right of the surviving widow to succeed to these properties for her life, and that it was more consistent with other recorded incidents of this particular custom to hold that she was not so entitled. Their Lordships are not prepared to differ from this finding.

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In the result their Lordships will humbly advise His Majesty that the appeal be allowed, the decrees of the Chief Court set aside with costs and the decree of the Subordinate Judge restored. The respondents will pay the appellants' costs of the appeal.

Solicitors for appellants: *Barrow, Rogers* and *Nevill.*

Solicitors for respondents: *Watkins* and *Hunter.*

FULL BENCH.

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December, 22.

Before Mr. Justice Wazir Hasan, Acting Chief Judge, Mr. Justice Gokaran Nath Misra and Mr. Justice Muhammad Raza.

THAKUR JAI INDAR BAHADUR SINGH (JUDGMENT-DEBTOR) APPELLANT *v.* MUSAMMAT BRIJ INDAR KUAR (DECREE-HOLDER RESPONDENT).*

Civil Procedure Code (Act V of 1908), order XXI, rules 1 and 2 and section 51—Receiver appointed by court—Payment of money by judgment-debtor of money due under a decree to the receiver—Misappropriation by receiver of money paid by judgment-debtor and of property received by him for sale and payment to decree-holders—Judgment-debtor if absolved from liability for money and property paid to receiver—Loss due to receiver's misappropriation, to be borne by whom—Interpretation of statutes, rules of.

Where the judgment-debtor is proved to have paid money due from him under a decree passed by the court to the receiver appointed by the court for realizing sums of money and making payments to the decree-holder, and the receiver is found subsequently to have misappropriated the money, the judgment-debtor should be absolved from his liability and the loss should not fall upon him. The loss in such a case must fall on the judgment-creditor to whom it would be open to sue the receiver or to take such other remedy as he may be

*Execution of Decree Appeal No. 54 of 1928, against the decree of Babu Jotindra Mohan Basu, District Judge of Lucknow, dated the 4th of July, 1928.