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others (1), "Nor do their Lordships doubt that where there is, on the part of a father or other guardian, a real and *bona fide* intention to make a gift, the law will be satisfied without change of possession, and will presume the subsequent holding of the property to be on behalf of the minor." This ruling of their Lordships of the Privy Council was followed by their Lordships of the Calcutta High Court in the case of *Fatima Bibee* v. *Ahmad Bakhsh* (2). The case before us is in no way affected by the fact that the guardian obtained possession even for a short time after the execution of the gift. The gift was complete and must be respected. Even if he did not take possession of the property as the guardian of the minors, that circumstance does not affect the rights of the donees as possession remained with their father Maula Bakhsh, who was their legal guardian under the Muhammadan law. He must be held to have been holding the property on behalf of his minor sons. It is neither alleged nor shown that they were in any way separate from him.

Raza and Pullan, JJ.

The result is that we allow this appeal and setting aside the decree of the lower appellate court restore the decree of the first court. The appellants will get their costs from the contesting respondents in all the courts.

Appeal allowed.

APPELLATE CIVIL.

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October, 14.

Before Mr. Justice Wazir Hasan, Chief Judge and Mr. Justice Bisheshwar Nath Srivastava.

TIRATHPATHI, MUSAMMAT AND ANOTHER (DEFENDANTS-APPELLANTS) v. RANJIT SINGH AND ANOTHER (PLAINTIFFS) AND OTHERS, (DEFENDANTS-RESPONDENTS.)*

Rewaj-e-am—*Custom—Entry of a custom in a* rewaj-e-am, *evidentiary value of—Evidence Act (I of* 1872), *section* 108—*Person not heard of for forty years—Death, presumption of—Burden of proof, shifting of.*

Rewaj-e-am is a public record prepared by a public officer in discharge of his duties, and under Government rules; it

*First Civil Appeal No. 136 of 1929, against the decree of Pandit Kishen Lal Kaul, Additional Subordinate Judge of Fyzabad, dated the 4th of October, 1929, decreeing the plaintiffs' suit.

(1) (1875) L.R., 2 I.A., 87 (104). (2) (1903) I.L.R., 31 Cal., 319.

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is clearly admissible in evidence to prove the facts therein entered subject to rebuttal. The statements contained in the *rewaj-e-am* form a strong piece of evidence in support of the custom. *Balgobind v. Badri Prasad* (1), and *Beg* v. *Allah Ditta* (2), relied on. *Muhammad Zafar* v. *Kaniz saiyada* (3), distinguished. *Lekhraj Kuar* v. *Raghubans Kuer* (4), referred to.

Where it is established that a certain person has not been heard of during the last forty years, it should be presumed under section 108 of the Evidence Act that he is dead, and the burden of proving that he is alive is shifted to the other side.

Messrs. *Ali Zaheer* and *Ghulam Imam*, for the appellants.

Mr. *Radha Krishna*, for the respondent.

SRIVASTAVA, J. :—This is a defendants' appeal against the judgment and decree, dated the 4th of October, 1929, passed by the Subordinate Judge of Fyzabad decreeing the plaintiffs' claim. It arises out of a suit for a declaration that the plaintiffs are the next reversioners of one Bhagwat Singh, deceased, and are as such the owners of the properties in suit and that the defendants Nos. 1 and 2 have no right to it.

It is common ground between the parties that Bhagwat Singh who was a Surajbansi Thakur and owned the properties in suit died in September or October, 1928. It is also no longer disputed that Musammat Tirathpathi, defendant No. 1, is Bhagwat Singh's daughter and that Bhup Chand Singh defendant No. 2 is the son of Musammat Tirathpathi. The plaintiffs' case was that according to the general custom obtaining among the Chhatris of pargana Haveli, district Fyzabad and amongst Surajbansi Chhatris in general and also according to the custom obtaining in the family of Bhagwat Singh, deceased, the daughter and her sons are excluded from inheritance, and that the plaintiffs according to a pedigree

(1) (1923) L.R., 50 I. A., 196. (2) (1916) L.R., 44 I.A., 89.
(3) (1927) A.I.R., Oudh, 595. (4) (1879) I.L.R., 5 Calc., 744.

given in the plaint were the nearest reversioners to Bhagwat Singh at the time of his death. They also pleaded that on Bhagwat Singh's death they entered into possession of his property and continued to be in possession at the time of the suit. However as the defendant No. 1 had succeeded in obtaining an order for mutation in her favour, they found it necessary to institute the suit for a declaration as set forth above. The suit was contested by defendants Nos. 1 and 2 who denied the plaintiffs' title as next reversioners and joined issue as regards the customs alleged by the plaintiffs. They also pleaded that the suit for a mere declaration was not maintainable.

The learned Subordinate Judge has held that the plaintiffs are the next reversioners of Bhagwat Singh, that they are in possession of the property in suit and as such entitled to maintain a suit for a mere declaration and that the daughters and their sons are excluded from inheritance on account of the custom prevailing amongst Surajbansi Chhatris in general and amongst Chhatris of pargana Haveli Oudh and in the family of Bhagwat Singh. He has accordingly decreed the plaintiffs' suit.

The learned counsel for the defendants appellants has urged only two contentions before us. In the first place he has, in connection with the pedigree set up by the plaintiffs, contended that the plaintiffs have failed to prove that Sripat Singh, one of the persons mentioned in the pedigree is dead. In the second place he has challenged the correctness of the lower courts finding that the alleged customs have been established.

In my opinion the contention in regard to Sripat Singh has no substance. It is admitted that Sripat Singh was without issue and that the question of the date of his death is, therefore, immaterial. All that

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has been urged is that the evidence led by the plaintiffs is insufficient to prove that Sripat Singh is dead. Ajudhia Singh, P. W. 3 deposed that "Sripat Singh died of cholera. He had accompanied me to Burma and it was there that he died of cholera before me". The learned Subordinate Judge has believed this statement of Ajudhia Singh and I can see no reason to discredit Ajudhia Singh's testimony on this point. It is further amply established from the evidence of the witnesses examined on either side that Sripat Singh has not been heard of for the last forty years. In exhibit 27 the khewat of village Rampur Halwara also Sripat Singh is described as *mafqud-ul-khabar* (unheard of). As against this concensus of the evidence, reliance has been placed upon an entry in exhibit B8, khewat of village Imalya Jogarai for 1334F. In this khewat there is no mention of the fact of Sripat Singh being unheard of. Reading this entry in the light of other evidence I am not prepared to construe it as proving either that Sripat Singh was alive or that his whereabouts were known. Sripat Singh not having been heard of during the last forty years, it should be presumed under section 108 of the Evidence Act that he is dead, and the burden of proving that he is alive is shifted to the defendants. The defendants have entirely failed to discharge this burden. I therefore agree with the lower court in holding that Sripat Singh is dead.

Next as regards the custom of exclusion of daughters and daughters' sons. In this connection the plaintiffs tried to prove that although the ancestors of Bhagwat Singh had sometime before the regular settlement migrated from the Fyzabad district to the Basti district and although Bhagwat Singh used to live mostly in village Pakri Sangram in the Basti district, he had also a house in Narayawan in the Fyzabad district where he lived sometimes. The learned

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Subordinate Judge has found that the plaintiffs had failed to prove that Bhagwat Singh had a house in Narayawan and this finding has not been disputed before us. Yet it is worth while to remark that according to the settlement report of the Fyzabad district, paragraph 597, Lal Jai Singh, the head of Surajbansi Chattris, had settled in the suburbs of Fyzabad and acquired landed property there and his descendants had later on migrated to other districts. It is also amply proved from exhibit 26 and the khewat forming part of it that a number of persons descended from the same common ancestor as that of Bhagwat Singh were living in the Fyzabad district and that some of their co-sharers had migrated to the other side of the Gaghra river in the Basti district. It is also admitted by the defendants that Bhagwat Singh owned shares in no less than six villages in the Fyzabad district jointly with the other members of the family living in that district.

The learned Subordinate Judge has based his finding in favour of the custom set up by the plaintiffs upon exhibits 24 and 25 the *rewaj-e-am* relating to pargana Haveli, Oudh, district Fyzabad and upon the oral evidence of plaintiffs' witnesses Nos. 1 to 7. The *rewaj-e-am* as usual is in the form of questions and answers. Exhibit 24 is a copy of the questions and exhibit 25 a copy of the answers. The original of these documents is not before us but it appears from the copy exhibit 24, that portions of its original have been mutilated. However it is sufficiently clear that one of the questions put was relating to the rights of a daughter or her children in the presence of male issue or in the case of there being no male issue. The answer given to this question was "that daughters get no share by right of inheritance in any case." The learned counsel for the appellants has strongly contended that the custom as recorded in this *rewaj-e-am* cannot govern Bhagwat Singh as he was not

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a resident of pargana Haveli, Oudh, and as the *rewaj-e-am* was not verified by any person of the branch of Mansa Singh to which Bhagwat Singh belonged. I am not prepared to accede to this contention. As exhibit 25 is the *rewaj-e-am* relating to a big pargana like Haveli Oudh consisting of a very large number of villages it is in the very nature of things that it should be signed by some leading men alone. It was hardly possible that it could be signed by a co-sharer of every branch of the numerous families living or owning shares in the villages of the pargana. However, we find that it bears the signature of Shohrat Singh who was a lambardar and one of the descendants of Dalip Shah a brother of Gandharp Shah, one of the ancestors of Bhagwat Singh. It is also important to note that in exhibit 26 the settlement pedigree relating to village Rampur Halwara which was prepared at the same time as the *rewaj-e-am*, it was stated that in the matter of succession the co-sharers shall remain bound by the *rewaj-e-am*. This pedigree was signed by four persons, Jaskaran Singh, Autar Singh, Sheodin Singh and Shohrat Singh who belonged to various branches of the family descended from the common ancestor Lohang Rai and who were the lambardars of the village. This document also states that there were other share-holders who were unable to present themselves for verification as they were living on the other side of the Gaghra river in the Basti district. It is not denied that Sheoratan Singh, the father of Bhagwat Singh was at that time a co-sharer in this village. Under the circumstances I must hold that Bhawat Singh is governed by the custom recorded in this *rewaj-e-am*. Even if it were not so the custom recorded therein govering the other branches of his family would, in the absence of any evidence to the contrary, afford strong evidence relevant for the determination of the custom applicable to his branch.

Next it was argued that the statement in the *rewaj-e-am* relied upon by the lower court is not a record of any custom but merely a record of an agreement between the persons concerned as to the rule which they wished to regulate succession amongst them. Reliance has been placed upon the use of the words "*iqrar karte hain*" in the preamble to the *rewaj-e-am*, exhibit 25. This preamble runs as follows :—

> "Whereas the settlement of our village in accordance with law has been decided upon by the Government, so we have got recorded in detail all the rights of our community which particularly relate to our proprietary rights in the papers relating to each village. But the rights and customs (*haqooq wa dastur*) in vogue in general in our community (*bataur am hamari qaum main raij hain*) have not been recorded therein. Therefore in respect of them we agree according to the conditions given below (*bamaujib sharait zail iqrar karte hain*)."

I find myself unable to interpret this as showing that what is entered in the document is merely the record of an agreement. It should be observed that this constitutes the preamble to a document the very title of which is *rewaj-e-am* (general customs). The settlement circular No. 20 of 1863 imposed upon settlement officers in Oudh the duty to ascertain and record the general custom of the village in regard to succession, in paragraph 4 of the *wajib-ul-arz*. All that the preamble seems to indicate is that whereas special rights and customs relating to proprietorship had been entered in the papers relating to each specific village, the general rights and customs relating to

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proprietors as a class were recorded in the *rewaj-e-am*. In my opinion the expression, *iqrar karte hain*, in the context in which it has been used is synonymous with the word, declare. In substance it simply means that the persons concerned agreed that the terms and conditions of the general rights and customs prevailing in their community were as stated in the clauses which follow the preamble. In this connection emphasis was laid upon the decision of a Bench of this Court in *Muhammad Zafar* v. *Kaniz Saiyada* (1). In this case the question was as regards the customs obtaining in a Muhammadan family which traced connection with the zamindars in the Mangalsi pargana in the Fyzabad district. The decision of this case rests upon its special facts and circumstances. It is true that the *rewaj-e-am* of pargana Mangalsi was not accepted as a reliable record of custom in this case but this was due to the fact that it was held upon the facts and circumstances of the case that it merely connoted the views of individuals as to the practice which they wished to see prevailing rather than asserting the fact of a well established custom. The settlement khewat which was produced in that case contained many palpable defects pointed out by the learned Judges and showed that there were twenty-six separate families in the village in question and that in the circumstances it was difficult to ascertain a special family custom for each of the separate families. There were also certain inconsistencies in the entries contained in the *rewaj-e-am* itself and between the entries in the *rewaj-e-am* and the khewat. I cannot therefore regard it as an authority for holding that the *rewaj-e-am* of pargana Haveli before us should also be construed as containing a record only of an agreement and not that of a custom.

In *Balgobind* v. *Badri Prasad* (2) their Lordships of the Judicial Committee observed that the

(1) (1927) A.I.R., Oudh., 593. (2) (1923) L.R., 50 I.A., 196.

evidence afforded by entries and records of customs prepared by responsible officials whose duty it was to ascertain and record the customs entered, is valuable evidence of the existence of the customs. These observations were, no doubt, made with reference to a *wajib-ul-arz* but they apply with equal force to the case of a *rewaj-e-am*. In *Beg* v. *Allah Ditta* (1) which was a case from the Punjab, the Rt. Hon'ble Mr. AMIR ALI observed as follows:—

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> "The *rewaj-e-am* was produced and exhibited as evidence at the very outset of the case; it is a public record prepared by a public officer in discharge of his duties, and under Government rules; it is clearly admissible in evidence to prove the facts therein entered subject to rebuttal. In their Lordships' opinion the statements contained in the *rewaj-e-am* form a strong piece of evidence in support of the custom, which it lay upon the plaintiffs to rebut, and this, according to the findings of the Divisional Judges they failed to do."

These remarks are fully applicable to the *rewaj-e-am* before us. It is a matter of history that in a portion of the Fyzabad district including pargana Haveli the Punjab system was adopted and instead of the preparation of the *wajib-ul-araiz* according to the N. W. P. system a *missil rewaj-e-am* was prepared according to the Punjab system. I must therefore reject the appellants' contention.

Lastly reference was made to exhibit A11, a copy of the *wajib-ul-arz* of Pakri Sangram in the Basti district in which Bhagwat Singh resided. It is pointed out that there is no mention of the custom of the exclusion of daughters in this *wajib-ul-arz*. The

(1) (1916) L.R., 44 I.A., 89.

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wajib-ul-arz is divided into various headings. I have been unable to discover any heading about customs relating to succession such as we find in *wajib-ul-araiz* prepared in Oudh. The learned counsel for the appellants referred us to the tenth paragraph headed as "Method of sale and transfer of the whole or part of the share-holder's share." This heading in terms relates only to sales and transfers and not to succession or inheritance. Reference was made to *Lekhraj Kuar* v. *Raghubans Kuar* (1) in which their Lordships discussing the provisions of Regulation VII of 1822 observed as follows :—

> "The officers who were to make the inquiries were directed to ascertain and record 'the fullest possible information in regard to landed tenures, the rights, interests and privileges of the various classes of the agricultural community. For this purpose their proceedings shall embrace the formation of as accurate a record as possible, of all local usages connected with landed tenures'. This custom of the Bahrulia clan relating to the mode of inheritance in the clan seems clearly to be a usage of the kind which the regulation requires the officer to ascertain and record."

It may be noted that this was an appeal from Oudh and the observations quoted above were evidently made with reference to *wajib-ul-araiz* prepared in Oudh. Apart from Regulation VII of 1822 the settlement officers were directed by settlement circular No. 20 of 1863, to which reference has already been made, to record general customs relating to succession in the *wajib-ul-arz* and a special column, namely column 4 headed as "Right of transfer and succession" was pres-

(1) (1879) I.L.R., 5 Calc., 744.

cribed for the purpose. However, assuming but not admitting, that it was permissible for the settlement officer to enter the customs relating to succession in paragraph 10 of exhibit A11, I find it difficult to believe that this view of the matter was sufficiently appreciated as far back as 1833 when the *wajib-ul-arz* exhibit A11 was prepared. Under the circumstances I am not prepared to draw any inference adverse to the custom by the mere fact of its not having been recorded in paragraph 10 of exhibit A11. I would also note that the *wajib-ul-arz*, exhibit A11, was dictated not only by Sheoratan Singh, father of Bhagwat Singh, but amongst others also by Ganga Din Singh. Sheopal Singh, Audan Singh, Naurang Singh and Akbar Singh, the representatives of whose branches have signed and verified the pedigree which, as stated before, contains a statment to the effect that they are bound by the *rewaj-e-am*. For these reasons I must overrule this contention also.

Besides the *rewaj-e-am* we have also the evidence of no less than seven witnesses including plaintiff No. 2 who deposed to the existence of the custom of exclusion of daughters and their sons in Mansa Singh's branch, and in the family of Bhagwat Singh. They depose that the custom is ancient and that they came to know of it from their ancestors who are dead. The trial court has believed the evidence of these witnesses and relied upon it in support of its finding. The custom is so notorious amongst Chhatris that I feel no difficulty in accepting the evidence as reliable.

Further our attention has been drawn by the learned counsel for the respondents to exhibit 45 which is a copy of a judgment passed by the Subordinate Judge of Basti in a case of Surajbansi Chhatris. One of the issues in this case was as regards the custom of exclusion of daughters. Amongst other evidence the *rewaj-e-am* of pargana Haveli was also relied upon as

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evidence in proof of the custom. The learned Subordinate Judge held the custom established and that it was valid and enforceable. This is a judicial decision and affords important evidence in support of the custom.

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The defendants have failed to produce any documentary evidence in rebuttal. The defendants' learned counsel referred only to two witnesses, namely, D. W. 4, Karia and D. W. 9, Bhikau Singh. This evidence has not been accepted by the learned Subordinate Judge and, I think quite rightly. Thus there is hardly any rebutting evidence worth the name on the defendants' side. The cumulative effect of the entire evidence in the case is, in my opinion, overwhelming in support of the custom. I have, therefore, no hesitation in accepting the lower court's finding as correct.

I would, therefore, dismiss this appeal with costs.

HASAN, C. J. :—I agree in the order proposed by my learned brother that the appeal should be dismissed with costs. I am persuaded to accept the finding in favour of the custom arrived at by the trial court mainly on the ground that there is no evidence of the succession of a daughter to the estate of her father. We have before us a long pedigree and it is impossible to conceive that there were no daughters in any generation from the time of Lohang Rai up to Bhagwat Singh's death. If daughters had inherited it is but reasonable to presume that their names as owners of their father's estate though for their life time only would have found place in this pedigree. The contrary supposition that there had been no daughter born in any of these generations is equally in my opinion a circumstance in favour of the existence of the usage of exclusion of daughters for the simple reason that no case ever arose against that usage. I cannot help observing that had this not been the case

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I would have agreed with the view taken as to the evidential value of the *rewaj-e-am* generally in the case of *Muhammad Zafar* v. *Kaniz Saiyada* (1).

BY THE COURT:—The appeal is dismissed with costs.

Appeal dismissed.

APPELLATE CIVIL.

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October, 15.

Before Mr. Justice Muhammad Raza and Mr. Justice A. G. P. Pullan.

CHANDRA BALI AND ANOTHER (PLAINTIFFS-APPELLANTS) v. DRIGPAL SINGH AND ANOTHER (DEFENDANTS-RESPONDENTS)*

United Provinces Land Revenue Act (III of 1901), section 233(k)—Suit for declaration that plaintiffs were entitled to be recorded as co-sharers in a mahal and not the defendants—Parties allotted one mahal jointly by revenue court in a previous partition suit—Civil suit, if barred by section 233(k), Land Revenue Act—Res Judicata—*Constructive* res judicata.

Where the plaintiffs brought a suit for a declaration that they are the co-sharers in a certain mahal and are entitled to be recorded as such and not the defendants and in a previous partition suit in the revenue court both of them were arrayed on the same side and had one mahal allotted to them jointly, but in the civil suit no attempt was made to interfere with the decision of that court, *held*, that the suit was not barred by the provisions of section 233(*k*) of the Land Revenue Act, and no question of constructive *res judicata* can be said to arise. *Lal Bihari* v. *Parkali Kunwar* (2), *Data Din* v. *Nohra* (3), and *Musammat Phuljhari* v. *Har Prasad* (4), relied on. *Baij Nath Singh* v. *Bahadur Singh* (5), distinguished. *Ajodhia Prasad* v. *Lakhpat*, (6) *referred* to.

Mr. *Ghulam Imam*, for the appellants.

Mr. *Haider Husain*, for the respondents.

*Second Civil Appeal No. 30 of 1930, against the decree of M. Ziauddin Ahmad, Subordinate Judge of Sultanpur, dated the 30th of November, 1929, reversing the decree of Saiyed Hasan Irshad, Munsif of Amethi at Sultanpur, dated the 15th of December, 1928.

(1) (1927) A.I.R., Oudh., 598.
(2) (1920) I.L.R., 42 All., 309.
(3) (1930) A.L.J., 1046.
(4) (1926) I.L.R., 1 Luck., 318.
(5) (1925) 2 O.W.N., 872.
(6) (1928) I.L.R., 4 Luck., 291.