FULL BENCH

Before Mr. Justice Muhammad Raza, Mr. Justice Bisheshwar Nath Srivastava, and Mr. Justice H. G. Smith

1932 November, 16

KARAMAT ALI (DEFENDANT-APPELLANT) *v.* SA'ADAT ALI AND OTHERS (PLAINTIFFS-RESPONDENTS) *

*Muhammadan law—Succession—*Stribant—*Custom of* stribant *—Whole blood, if excludes half blood—Cousin of whole blood, if excludes uncle higher in degree of half blood.*

In the absence of any express custom to that effect, whole blood cannot be held to be preferred to half blood merely because of the custom of *stribant*. Where in a Muhammadan family all that is known of a custom is that division is made according to the rule of *stribant*, in a question of succession arising between a cousin of full blood and an uncle of half blood, the ordinary rule of Muhammadan law applies and the latter, being higher in degree, succeeds to the property.

Brijraj Bux Singh v. *Bhawani Bux Singh* (1), approved. *Nabi Bakhsh* v. *Ahmad Khan* (2), *Gholam Muhammad* v. *Muhammad Bakhsh* (3), *Lachhman Prasad* v. *Durga Prasad* (4), *Baijnath Prasad Singh* v. *Tej Bali Singh* (5), *Tipperah case* (6), and *Hur Pershad* v. *Sheo Dayal* (7), referred to and discussed.

Mr. *Ishri Prasad*, for the appellant.

Messrs. *Ali Zaheer* and *Mohammad Ayub*, for the respondents.

RAZA, SRIVASTAVA, and SMITH, JJ. :—One Pir Ghulam owned a four annas share in mauza Pindri. He had two sons, Umar Hayat and Shujaat Ali, by his first wife, and one son, Kallu, by his second wife. In his lifetime he gave in equal moieties half of his property to his two sons by the first wife, and the other half to his son by the second wife. The one anna share given to

*Second Civil Appeal No. 321 of 1931, against the decree of Rai Bahadur Babu Aprakash Chandra Bose, District Judge of Bara Banki, dated the 6th of August, 1931, upholding the decree of Pandit Brij Kishen Topa, Additional Subordinate Judge of Bara Banki, dated the 13th of March, 1931.

(1) (1924) 11 O. L. J., 586.
(2) (1924) I. L. R., 5 Lah., 278.
(3) (1891) 4 P. R., 6.
(4) (1916) 19 O. C., 165.
(5) (1921) I.L.R., 43 All., 228.
(6) (1869) 12 M. I. A., 523.
(7) (1876) L. R., 3 I. A., 259.

Shujaat Ali was inherited by his son, Altaf Husain, and on the latter's death devolved on his wife, Musammat Zainab. Musammat Zainab died on the 10th of March, 1929, and on her death there was a contest as regards the right to inherit this share between Karamat Ali, son of Umar Hayat, and Kallu. It will be noticed that Karamat Ali is a cousin of Altaf Husain, both being descendants of Pir Ghulam by his first wife, whereas Kallu was Altaf Husain's uncle of half blood. The plaintiffs are the sons and representatives of Kallu.

Both parties are agreed that according to Muhammadan law, Kallu, being higher in degree, was entitled to succeed in preference to Karamat Ali, defendant. The defendant, however, contested the claim on the ground that there was a custom of *stribant* in the family, that Pir Ghulam had distributed his property amongst his sons by the two wives according to this custom, and that therefore the property belonging to the branch of Pir Ghulam's sons by the first wife could not be claimed by the plaintiffs, who represent Kallu, a son of the second wife, until the persons belonging to the first mentioned branch had been completely exhausted.

Both the lower courts rejected the defendant's plea, and decreed the plaintiffs' claim. The defendant came to this Court in second appeal.

When the case was heard by a Division Bench, it was contended by the appellant that though the decision of the courts below was in conformity with the decision of a Bench of the late Court of the Judicial Commissioner of Oudh in *Brijraj Bux Singh* v. *Bhawani Bux Singh* (1), it was contrary to the decision of their Lordships of the Judicial Committee in *Nabi Baksh* v. *Ahmad Khan* (2). The Division Bench has therefore referred the following question for decision by a Full Bench :

> Is the present case governed by the decision of their Lordships of the Judicial Committee in *Nabi Baksh* v. *Ahmad Khan* (2)?

(1) (1924) 11 O. L. J., 586. (2) (1924) I. L. R., 5 Lah., 278.

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The argument on behalf of the appellant has been presented before us in two aspects. In the first place reference has been made to exhibit A2, the will of Pir Ghulam, dated the 13th of October, 1884, which contains a recital of the fact that succession in the family is regulated according to the custom of *stribant*, and that he had distributed his property amongst his sons in this way, namely that he had given half of it to his two sons by the first wife and the other half to his one son by the second wife. It has been urged that the distribution made by Pir Ghulam shows that the sons of each wife and their descendants were constituted as separate stocks for the purposes of inheritance. We find ourselves unable to accede to this argument. Beyond a recital of the fact of the custom and distribution of the property as stated above, there is not one word in this document to indicate any intention on the part of Pir Ghulam that the children of each wife were to be treated thenceforward as separate entities for the purpose of succession at any future time.

The next line of argument is that the family being governed by the custom of *stribant*, and Pir Ghulam having distributed his property amongst his sons by the two wives in accordance with this custom, it ought to be held as a matter of law that relations of half blood are excluded by relations of full blood. Strong reliance has been placed on the decision of their Lordships of the Judicial Committee in *Nabi Baksh* v. *Ahmad Khan* (1), and of a Full Bench of the Punjab Chief Court in *Ghulam Muhammad* v. *Muhammad Baksh* (2), which was approved in the first mentioned case. We have carefully examined these decisions. It appears that in the Punjab there obtain two customs of distribution of estates amongst persons entitled to share them, one being known as *pagwand*, and the other *chundawand*. *Pagwand* corresponds to the rule of division "per capita", and *chundawand* corresponds to the rule of *stribant* division. In *Ghulam Muhammad* v. *Muhammad Baksh* (2), it was

(1) (1924) I. L. R., 5 Lah., 278. (2) (1891) 4 P. R., 6.

held by the Full Bench that in cases of collateral succession arising in the Punjab, of which the decision is governed by custom, when it appears

(*a*) that the property of the common ancestor was distributed according to the rule of *chundawand;*

(*b*) that the property of the common ancestor was distributed according to the rule of *pagwand;*

the court may presume, until the contrary is proved, in case (*a*) that the whole blood excludes half blood, and in case (*b*) that the whole blood and half blood succeed together. Their Lordships of the Punjab Chief Court laid down the rule just stated as a result of their investigation into the entire case law bearing on the aforesaid customs. The case of *Nabi Baksh* v. *Ahmad Khan* (1) was a case which went up to the Privy Council on an appeal from a decree of the High Court of the Punjab. Both the courts in India had found that the rule of succession locally applicable was the *pagwand* rule, by which the sons share equally, but the High Court, relying on the principles laid down in *Ghulam Muhammad* v. *Muhammad Baksh* (2) had held that in the case of collateral succession to property given to a child of a first wife, and partitioned off and separated from property given to the children of the second wife, relations of the full blood and half blood must be found within the body of descendants of the first wife. Their Lordships of the Judicial Committee approved of the principles laid down by the Full Bench in *Ghulam Muhammad* v. *Muhammad Baksh* (2) and held that each portion of the property succeeded to by the children of each wife became a separate entity, so that the rules of succession to it were rules of succession to the owner of it, and not to the ancestral owner, and that accordingly the full blood excluded the half blood. We are clearly of opinion that the decision of these cases is based upon the incidents of customs as they obtain in the Punjab. Both these cases being based upon the special Punjab customs, we are

(1) (1924) I. L. R., 5 Lah., 278. (2) (1891) 4 P. R., 6.

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unable to deduce from them any general principle of law which could be made applicable to the present case.

Reliance has also been placed upon the reasoning contained in the decision of a single Judge of the late Court of the Judicial Commissioner of Oudh in *Lachhman Prasad* v. *Durga Prasad* (1). It was held in this case that, as a logical result of the custom of *stribant*, persons who are descended from a different mother, though senior in degree, are not entitled to preference. The case was overruled by a Bench of the late Court of the Judicial Commissioner of Oudh in *Brijraj Bux Singh* v. *Bhawani Bux Singh* (2), and it was held that the custom of *stribant* has no application to a case where the choice of heirs lies between persons of different degrees. We are in complete agreement with this decision. In *Baijnath Prasad Singh* v. *Tej Bali Singh* (3) Lord DUNEDIN quoted with approval the following observation made in the Tipperah case :

> "When a custom is found to exist, it supersedes the general law, which, however, still regulates all beyond the custom."

Lord DUNEDIN described this as a general proposition which furnished the keynote of the position. In the present case, all that we know of the custom is that division is made according to the rule of *stribant*. No question of such division arises in the case of Altaf Husain, the last male owner, as he had only one wife and was also sonless. The present case, therefore, is clearly outside the custom. The succession at issue is not touched by the custom of *stribant*. It follows that it must be regulated by the general law. Further, as laid down in *Hur Pershad* v. *Sheo Dayal* (4), a custom must be construed strictly. We cannot, therefore, in the absence of any express custom to that effect, hold that whole blood must be preferred to half blood merely because of the custom of *stribant*.

(1) (1916) 19 O. C., 165.
(2) (1924) 11 O. L. J., 586.
(3) (1921) I. L. R., 43 All., 228.
(4) (1876) L. R., 3 I. A., 259.

In *Lachhman Prasad* v. *Durga Prasad* (1) it was said that the preference of full blood to half blood followed as a logical result of the custom of *stribant*. Lord HALSBURY is reported to have said once that law was not a logical science. This is equally, if not more, true of a custom. No doubt there have been cases in which effect has been given to necessary implications of a particular custom. It seems to us impossible to say that the contention put forward by the appellant is by any means a necessary implication of the custom of *stribant*.

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For the above reasons, we are of opinion that the present case is not governed by the decision of their Lordships of the Judicial Committee in *Nabi Baksh* v. *Ahmad Khan* (2), and the question referred to the Full Bench should be answered in the negative.

APPELLATE CIVIL

Before Mr. Justice Bisheshwar Nath Srivastava and Mr. Justice E. M. Nanavutty

RAM LAL MISRA, PANDIT, (PLAINTIFF-APPELLANT) *v.* RAJENDRA NATH SANYAL, BABU (DEFENDANT-RESPONDENT)*

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Contract Act (IX of 1872), section 23—Auction sale—Agreement between two persons not to bid at an auction sale, whether against public policy—Execution of decree—Several decree-holders applying for rateable distribution—Secret agreement between a decree-holder and the purchaser not to bid against him with a view to defraud other decree-holders—Agreement, whether fraudulent and void—Maxim, in pari delicto potior est conditio possidentis, *applicability of.*

Held, that an agreement between two persons not to bid against each other at an auction sale is perfectly lawful and cannot be considered to be opposed to public policy.

*Second Civil Appeal No. 339 of 1931, against the decree of Pandit Tika Ram Misra, Subordinate Judge, Malihabad at Lucknow, dated the 31st of July, 1931, upholding the decree of Babu Mahabir Prasad Varma, Munsif, (South) Lucknow, dated the 28th of November, 1930.

(1) (1916) 19 O. C., 165. (2) (1924) I. L. R., 5 Lah., 278.