

## APPELLATE CIVIL.

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*Before Mr. Justice Abdul Raof and Mr. Justice Harrison.*

MILKHI (PLAINTIFF)—*Appellant*,

*versus*

Mussammut PUNNI (DEFENDANT)—

*Respondent.*

Civil Appeal No. 1015 of 1918.

*Second appeal—on onus probandi—where widow of a joint owner claims partition—mixed question of law and custom.*

*Held*, that where the question of burden of proof involves a question of custom, no second appeal is competent without a certificate.

*Second appeal from the decree of F. W. Kennaway, Esquire, District Judge, Hoshiarpur, dated the 10th January 1918, reversing that of Maulvi Barkat Ali Khan, Subordinate Judge, 2nd Class, Hoshiarpur, dated the 3rd November 1917, and dismissing plaintiff's suit.*

B. P. KHOSLA, for *Appellant*.

FAKIR CHAND and AMAR NATH CHONA, for *Respondent*.

The judgment of the Court was delivered by—

ABDUL RAOOF, J.—The facts giving rise to this second appeal may be summarised as below. One Ghania was a joint holder in 675 *kanals* 15 *marlas* of land. He died leaving *Mussammot Punni* as his widow. Her name was mutated in the revenue records. She applied for partition of her half share. Gopala, the plaintiff in this case, objected that she as a widow was not entitled to claim partition. He was referred to the Civil Courts to get the question determined. Accordingly this suit was instituted for a declaration to the effect that 675 *kanals* 15 *marlas* of land being the common ancestral property of the parties, the defendant had no right to have it partitioned.

The Court of first instance at first framed the following issue :—“Is not the widow entitled by custom to

obtain partition of a joint *khata*." It was first inclined to hold that the case was governed by *Mussammat Bhag Bhari v. Wazir Khan* (1) and that the burden of proof lay upon the plaintiff to prove that according to custom *Mussammat Punni* had no right to partition. After, however, recording a part of his judgment the learned Subordinate Judge changed his mind as to the burden of proof and framed an issue in the following words:—"Is the widow entitled by custom to obtain partition of a joint *khata*." The object of framing this issue was to throw the burden of proof upon the defendant *Mussammat Punni*. An opportunity was given to *Mussammat Punni* to adduce evidence to prove that under custom she was entitled to claim partition. The learned Subordinate Judge after going into the evidence given by the parties came to the conclusion that according to custom *Mussammat Punni* as a widow was not entitled to claim partition. The suit was accordingly decreed and a declaration was granted to the plaintiff according to his claim.

An appeal was preferred by *Mussammat Punni* to the Lower Appellate Court. The Lower Appellate Court has come to a different conclusion and has held that the case is clearly governed by the rule as to *onus probandi* laid down in *Mussammat Bhag Bhari v. Wazir Khan* (1). Evidence was given on behalf of the plaintiff to prove the custom according to which a widow would not have the right to claim partition. That evidence has been considered by the Lower Appellate Court and the conclusion at which the Lower Appellate Court has arrived is that the plaintiff has failed to discharge the burden of proof which lay upon him. In *Mussammat Bhag Bhari v. Wazir Khan* (1) the learned Judges who decided the case made the following observation:—

"A widow has a clear, unequivocal, statutory right in virtue of her possession under the Land Revenue Act to demand partition. That Act provides many safeguards against the improper grant of such a request and where the Revenue Authorities see fit to grant it and a suit is brought in a Civil Court to restrain such grant, we are quite clear that no consideration of desirability or undesirability should have any weight at all in this Court; and that the question to be considered is the simple one, whether or not the plaintiff has succeeded in proving the existence of this power of restraint under the Customary Law."

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MUSKRI  
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The effect of that decision we take to be this that according to the statutory law a widow has got a right of partition but that right may be curtailed or limited by a custom which may be proved by a person who objects to her right of partition. Now, in this case it has been held by the Lower Appellate Court that it lay upon the plaintiff to prove that *Mussammat Punni*, though entitled to claim partition, was not entitled to get partition under the custom applicable to her. Under the circumstances above mentioned the plaintiff's suit has been dismissed by the learned Judge of the Court below and the plaintiff has come up to this Court in second appeal. In his memorandum of appeal four pleas have been taken. The second plea raises the question of burden of proof. Pleas Nos. 3 and 4 object to the finding of the Court below as regards the question of custom.

On the appeal coming on for hearing before us a preliminary objection was taken by Mr. Fakir Chand on behalf of *Mussammat Punni*, the respondent, that inasmuch as the appellant has not produced a certificate he is not entitled to question the finding as regards custom. Mr. Khosla, on the other hand, has argued that plea No. 2 raises a pure question of law, inasmuch as it questions the decision of the Lower Appellate Court as to the burden of proof. The question which we have to decide is whether the question of burden of proof in this case is a pure question of law or it involves a question of custom as well. From the statements of the facts of the case as given above it is quite clear that the question of burden of proof can in no way be separated from the question of custom in this case. So in this case the question of burden of proof clearly involves a question of custom.

We must therefore hold that for want of the necessary certificate the appellant is not entitled to argue this appeal. We allow the preliminary objection and dismiss the appeal with costs.

*A.N.C.**Appeal dismissed.*