APPELLATE CIVIL.

Before Mr. Justice Broadway and Mr. Justice Abdul Qadir.

ABDUL KARIM AND MUHAMMAD BAKHSH (DEFENDANTS)—*Appellants*

versus

Mst. AMAT-UL-HABIB PLAINTIFF) AND FATEH DIN AND OTHERS (DEFENDANTS)—*Respondents.*

1922

June 10.

Civil Appeal No. 3022 of 1918.

Custom—Succession—Zargars of Batala, district Gurdaspur—non-agriculturists—presumption—Muhammadan Law share of full sister in presence of half sisters.

One M. B., a *Zargar* of Batala, died on the 13th December 1897, leaving him surviving a widow Z. B. and a son K. H. and a daughter by her. This daughter subsequently died. On the 8th February 1898, the widow Z. B. gave birth to another daughter named A-ul-H.—M. B. also left him surviving by his former wife two daughters. The widow Z. B. remarried. The son K. H. sold certain houses left by his father to F. D., A. K. and others. On the 29th November 1917, *Mst.* A-ul-H. instituted a suit claiming one-third share of the houses by partition according to Muhammadan Law. The defendant-vendees contested the suit on the ground that the family followed custom.

Held, that the *Zargars* of Batala, being non-agriculturists, would *primâ facie* follow their personal law and that the defendants on whom the onus lay had failed to prove that these *Zargars* as a whole or the family of the plaintiff in particular were governed by custom in matters of succession.

Held also, that by Muhammadan Law, owing to the death of her full sister, the plaintiff and her brother alone were entitled to her share; and that the plaintiff's share came to 161/864th of the property in dispute.

Second appeal from the decree of W. deM. Malan, Esquire, District Judge, Gurdaspur, dated the 19th July 1918, reversing that of Lala Ganesh Das, Subordinate Judge, 1st Class, Gurdaspur, dated the 11th May 1918, and decreeing the claim in part.

NIAZ MUHAMMAD, for Appellants.

GHULAM RASUL, for ABDUL RASHID, and KAHAN CHAND, for Respondents.

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The judgment of the Court was delivered by—

BROADWAY J.—One Muhammad Bakhsh, a *Zargar* of Batala, died on the 13th December 1897, leaving him surviving a widow *Mussammat* Zainab Bibi and a son and a daughter by her. On the 8th February 1898 she gave birth to another daughter named *Mussammat* Amat-ul-Habib. He also left him surviving by his former wife two daughters. *Mussammat* Zainab Bibi has remarried. The son Khadim Husain sold certain houses left by his father to Fateh Din, Abdul Karim and others.

On the 29th November 1917 *Mussammat* Amat-ul-Habib instituted a suit claiming one-third share of the houses by partition. She alleged that the parties were governed by Muhammadan Law. The defendant-vendees contested the suit on the ground that the family followed custom and not Muhammadan Law and, further, that even if Muhammadan Law was the rule of inheritance the plaintiff had no right to share in the houses as her brother had expended moneys on her marriage to the extent of her share. They also claimed to be entitled to the cost of improvements. The trial Court held that the defendants had proved that this family was governed by custom by which a daughter got no share in the property of her father, and also held that in any event the plaintiff's share under Muhammadan Law was 7/48ths and not 1/3rd. It should be mentioned that one of the daughters of *Mussammat* Zainab Bibi who had survived her father subsequently died. The plaintiff's suit having been dismissed she appealed to the District Judge who, after considering all the evidence on the record, came to the conclusion that the burden of proving that this family was governed by custom and not Muhammadan Law was on the defendants who had not discharged the *onus*. He accordingly held that the plaintiff's family followed Muhammadan Law in matters of succession. In regard to her share, he held that she was entitled to 7/40ths of the said houses, that it had not been proved that her brother had spent moneys on her marriage out of her share in the property in suit and finally that the defendants had failed to prove that they had made any improvements. He

accordingly declared the plaintiff's claim to the extent of 7/40th share in the property in suit. Against this decree the defendant-vendees have preferred two appeals, Abdul Karim and Muhammad Bakhsh being the appellants in No. 3022 of 1918 and Fateh Din and Nathu being the appellants in No. 2743 of 1918. *Mussammat* Amat-ul-Habib has also appealed contending that she was entitled to a one-third share and not only 7/40th. In appeal No. 3022 of 1918 we were addressed by Mr. Niaz Muhammad; Mr. Dev Raj *Sawhney* argued the appeal No. 2743 of 1918, while Mr. Ghulam Rasul addressed us on behalf of *Mussammat* Amat-ul-Habib in all the cases. This judgment will dispose of all the three appeals.

Before proceeding further we may state that the *Zargars* of Batala are non-agriculturists and *primâ facie*, they would follow their personal law and not agricultural custom. It is, therefore, clearly incumbent in this case on the defendant-vendees to prove beyond doubt that this family of *Zargars* is governed by custom. In support of their contention they produced some 15 witnesses who cited something like 33 instances in which daughters belonging to the *Zargar* community had not taken a definite share in their father's estates. We have been taken through these instances, which are summarised at pages 4 and 5 of the printed book. The learned District Judge, however, at page 9 has carefully weighed the evidence of these witnesses and pointed out that most of them are interested in the defendant-vendees. After giving careful consideration to the evidence of these witnesses we see no reason to differ from the estimate placed on them by the learned District Judge In most cases the instances are deposed to by single witnesses alone and we are unable to consider this evidence as satisfactorily proving that *Zargars* of Batala as a whole or this family in particular are governed by custom in matters of succession, and we, therefore, agree with the learned District Judge in holding that the plaintiff's family follows Muhammadan Law in such matters.

Mr. Dev Raj *Sawhney* contended that necessity had been established for the sale to his clients. We are unable to agree with this view. Again, it has been

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definitely found as a fact that the expenses incurred in connection with the plaintiff's marriage were incurred from the moveable property left by Muhammad Bakhsh and not out of the property in suit. This is a finding of fact which we cannot examine in second appeal.

As to the question of improvements, here again the learned District Judge has found as a fact that the vendees have failed to prove that they made any improvements and we are unable to interfere with this finding in second appeal.

Appeals Nos. 3022 and 2743 of 1918 are, therefore, dismissed.

Turning now to appeal No. 3040 of 1918 by the plaintiff, we find that owing to the death of her full sister she and her brother were alone entitled to her share, and the total according to calculation, comes to 161/864ths. We, therefore, accept her appeal to this extent that we vary the decree so as to grant her 161/864ths of the property in dispute. Having regard to all the circumstances of the case we consider it equitable to allow the parties to bear their own costs in this Court in all the appeals.

M. R.

Defendants' appeals dismissed.

Plaintiff's appeal accepted in part.