penditure of time and money incurred by plaintiffs who started with a sound cause of action. We hold that it was not necessary for the Courts below to dismiss the suits under appeal in consequence of the notification of the 6th of May 1918, and that they should not have done so In this conclusion we must be taken to differ, with all respect, from the learned Judges who, in *Bishen Singh* v. *Ganda Singh* (1), held in similar circumstances that the trial Court had no alternative to dismissing the suit. We think that the Bench which decided *Kaju Mal* v. *Salig Ram* (2), was correct in thinking that the practical effect of such a decision was to make the notification retro-active in a manner not contemplated by its authors.

We accept both appeals, set aside the order of the lower Appellate Court and remand the appeals under Order XLI, rule 2 for decision of the other points at issue. Stamp on appeal will be refunded and costs will be costs in the cause.

Appeal accepted—Cases remanded.

APPELLATE CIVIL.

Before Mr. Justice Abdul Rauf and Mr. Justice Campbell.

1922

Feb. 22.

NUR HASAN AND OTHERS (PLAINTIFFS) — *Appellants,*

versus

Mst. GHULAM ZOHRA ETC., (DEFENDANTS)— *Respondents.*

Civil Appeal No. 1344 of 1918.

Custom (Succession)—Koreshis of Taragarh, *tahsil and district Gurdaspur*—onus probandi *that Koreshis are governed by custom—application of personal law where custom is not proved—collaterals in the fourth degree and sister—Muhammadan Law.*

Held, that the *onus probandi* that Koreshis of Taragarh are governed by the general agricultural custom of the Punjab was rightly laid upon the plaintiff collaterals and that they had failed to discharge this *onus*.

Jowahir Singh v *Yaqub Shah* (3), followed.

(1) 10 P. R. 1913. (2) 92 P. R. 1919.

(3) 5 P. R. 1906.

Muhammad Bakhsh v. *Ram Singh* (1), *Barkat Ali* v. *Mst. Sultan Bibi* (2), and *Muhammad Ali* v. *Muhammad Ikram* (3), distinguished.

Cases cited on page 23 of Ellis's Notes on Punjab Custom (1917 Edition), referred to.

Second appeal from the decree of W. deM. Malan, Esquire, District Judge, Gurdaspur, dated the 28th January 1918, *modifying that of* Lala *Ganesh Das, Subordinate Judge, 1st Class, Gurdaspur, dated the* 31*st July* 1917, *dismissing the suit.*

BADRI NATH, KAPUR, for Appellants.

NIAZ MUHAMMAD AND SHAMAIR CHAND for SAGAR CHAND, for Respondents.

The judgment of the Court was delivered by—

CAMPBELL J.—The question for decision in this second appeal is whether by custom the plaintiffs, *Koreshis* of Taragarh, tahsil and district Gurdaspur, are entitled to succeed to the ancestral landed estate of Imam Shah, deceased, their collateral in the fourth degree, in preference to *Mussammat* Ghulam Zohra, sister of the said Imam Shah. Both Courts below have held that no such custom has been proved. The trial Court dismissed the plaintiffs' suit for possession, but the lower Appellate Court applied the rules of Muhammadan Law and gave the plaintiffs a decree for half of the land in suit. Both parties have appealed, and the present judgment will dispose of that of the plaintiffs which is accompanied by the requisite certificate under section 41 (3) of the Punjab Courts Act.

The following are the salient facts :—

The plaintiffs as already stated are *Koreshis*, a tribe regarding which it has been said in *Jowahir Singh* v. *Yaqub Shah* (4), that strong proof is required of its members being governed by custom opposed to Muhammadan Law.

The *Koreshis* of this village are not a compact village community or section of a village community. They obtained their land originally by charitable gift. The plaintiffs' family own 60 *ghumaons* only and are not sharers in the *Shamilat.*

(1) 140 P. L. R. 1902.
(2) 19 P. R. 1916.
(3) 63 P. R. 1911.
(4) 5 P. R. 1906.

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NUR HASAN v. *Mst.* GHULAM ZOHRA.

The plaintiffs are not shown to be a family dependent on agriculture. Some members are agriculturists but the majority follow other avocations.

Koreshis are not notified as an agricultural tribe under the Punjab Alienation of Land Act in the Gurdaspur district and do not appear in the *riwaj-i-am*.

Four instances alone of *Koreshis* following the rules of custom in matters relating directly or indirectly to inheritance have been put forward, one of which only, No. 4 below, pertains to the family of the parties. They are as follows :—

(1) In the case reported as *Muhammad Bakhsh* v. *Ram Singh* (1), it seems to have been assumed that *Koreshis* living in Gurdaspur villages follow custom. The question in issue was the validity of a gift by a female. At the most this was an isolated admission by parties belonging to another part of the district.

(2) A judgment by the District Judge of Gurdaspur, dated 10th November 1915, held that *Koreshis* of Kalanaur town, 8 or 10 *kos* distant from the village of the parties, were governed by custom. This judgment is not on the present record and we cannot say whether the finding was on admission or otherwise. The learned District Judge whose decision is now under appeal has seen it and notes that his predecessor in that case, by an obvious error, referred throughout the judgment to the parties as *Sayyads*—a fact which indicates the possibility of misunderstanding and would detract from the value of the judgment as an authority. In any case, where the presumption against the adoption of custom by *Koreshis* is so strong, as it has been ruled to be, an instance from so far a distance is not of much practical assistance to the plaintiffs.

(3) Ramzan (P. W. 5) of Kadianwali, a village 15 *kos* from Taragarh, has stated, he being a *Koreshi*, that on the death of his uncle Imam-ud-Din the latter's daughter, who was married to a man of a village 8 or 9 *kos* distant was entirely excluded from inheritance by Imam-ud-Din's brothers. The witness calls Imam-ud-Din "his uncle" but does not say that he

(1) 140 P. L. R. 1902.

himself was one of the heirs. He is not supported by any document and it cannot be said that the best evidence available of this instance has been given. *Secondly*, the remarks made above under (2) apply here with greater force. *Thirdly*, Ramzan states that *Koreshis* are proprietors of Kadianwali. *Fourthly* Shah Nawaz (P. W. 6), *Koreshi* of the same place, called to support the story about Imam-ud-Din's daughter admitted that he knew of no instance in which "a sister got no share."

(4) *Mussammat* Shehr Bano, widow of Mir Hussain, brother and uncle of 6 of the present plaintiffs, is said to have succeeded to the whole of his estate. There is no evidence of when Mir Hussain died, and thus it is impossible to be certain that this instance about which too, there is no documentary evidence was not manufactured for purposes of the present litigation. The plaintiffs have made *Mussammat* Shehr Bano a defendant.

Practically the only reported decision on which counsel for the plaintiffs is able to rely is *Barkat Ali* v. *Mussammat Sultan Bibi* (1), where it was held on facts which do not apply in the present case that *Koreshis* of the Jullundur district follow custom. He has cited also *Jowahir Singh* v. *Yaqub Shah* (2), and *Muhammad Ali* v. *Muhammad Ikram* (3), but these are more against him than in his favour.

For the respondents a number of other rulings have been quoted to show that *Koreshis* in various other parts of the Province have been held not to follow custom. It is unnecessary to detail them. They are set out on page 23 of Ellis's Notes on Punjab Custom (1917 Edition) with the rest of the case law which makes it clear that nothing can be presumed in favour of the plaintiffs' contention.

In our opinion the *onus* was rightly laid upon the plaintiffs to prove that they were governed in matters of inheritance by the general custom of Punjab agriculturists, and the decision of the Courts below that they have failed to discharge that *onus* was perfectly correct. The best proof of a custom is evidence of its having been followed and the plaintiffs here have been able to produce merely three doubtful instances from

(1) 19 P. R. 1916. (2) 6 P. R. 1906.
(3) 63 P. R. 1911.

distant villages and nothing at all of any reliability from near home.

We consider that the appeal must fail and it is dismissed with costs.

A. R. *Appeal dismissed.*

APPELLATE CIVIL.

Before Mr. Justice Abdul Raoof and Mr. Justice Campbell.

1922

Feb. 22.

Mussammat GHULAM ZOHRA (DEFENDANT)—*Appellant*

versus

NUR HASAN, ETC. (PLAINTIFFS)
GHULAM FARUK, ETC. (DEFENDANTS) } *Respondents.*

Civil Appeal No. 1556 of 1918.

Custom (Succession)—Koreshis *of Taragarh, tahsil and district Gurdaspur—suit for possession by collaterals in fourth degree against sister—where neither party proves a custom affirmatively—Muhammadan Law.*

Held, that neither party having proved a custom affirmatively the case must be decided by Muhammadan Law, notwithstanding that plaintiffs based their claim on custom only.

Mussammat *Bakht Bano* v. *Chiragh Shah* (1), followed.

Held also, that by Muhammadan Law, there being no child or son's child or brother of the deceased, the appellant as a sister was a sharer and entitled to one-half share and the respondents as the descendants in the male line of the deceased's great grandfather were entitled to the residue.

Wilson's Digest of Anglo-Muhammadan Law, Fifth Edition, paras. 219, 224, 231 and 233, referred to.

Second appeal from the decree of W. de M. Malan, Esquire, District Judge, Gurdaspur, dated the 28th January 1918, *varying that of* Lala *Ganesh Das, Subordinate Judge, 1st Class, Gurdaspur, dated the* 31*st July* 1917, *dismissing the claim.*

NIAZ MUHAMMAD, for Appellant.

BADRI NATH, KAPUR, for Respondents.

(1) 45 P. R. 1908.