APPELLATE CIVIL.

Before Mr. Justice Scott-Smith and Mr. Justice Fforde.

1923

Feb. 13.

Mussammat SANT KAUR ETC. (DEFENDANTS) Appellants,

versus

SHER SINGH ETC. (PLAINTIFFS) Respondents.

Civil Appeal No. 1639 of 1919.

Custom—Succession—Jats of Amritsar—Sisters or collaterals living in another village—onus probandi—*whether different in respect of self-acquired property from ancestral property*—Riwaj-i-am.

One S. S. a *Jat* whose ancestral home was in the Amritsar District obtained a grant of about 7 squares from Government in Chak No. 60, Jhang Branch, Lyallpur District. He acquired proprietary rights and died on 10th October 1918, leaving a widow, a son U. S. and 4 daughters. U. S. died 15 days later, on 25th October 1918, leaving a widow and a daughter. The land was then mutated in the names of the widows and daughters of S. S. and U. S. The plaintiffs, brothers and brother's sons of S. S., then sued for a declaration that the mutation should not affect their reversionary rights after the death or marriage of the widow of U. S.. They asserted that the widow of S. S. was only entitled to maintenance and that the daughters of S. S., as sisters of U. S., had no rights at all. There was practically no evidence on the record as regards custom.

Held, that the mere fact that the plaintiffs live in the Amritsar District, while the land in dispute is in the Lyallpur District, does not affect their rights of succession.

Daya Ram v. *Sohel Singh* (1), and *Nanda* v. *Hira* (2), followed.

Held also, that the answer to question 70 in Craik's Customary Law of the Amritsar District, though not supported by instances, being not opposed to the general principle as laid down in Rattigan's Digest of Customary Law, Article 24, is a strong piece of evidence in support of the custom mentioned therein.

Beg v. *Allah Ditta* (3), followed.

Held further, that the principle of sisters being usually excluded is not confined to ancestral property only and that consequently the *onus* was upon the sisters to prove that they had a better claim to succeed to the property in dispute than the plaintiffs and that they had failed to discharge this *onus*.

(1) 110 P. R. 1906 (F.B.). (2) 47 P. R. 1917.
(3) 45 P. R. 1917 (P. C.).

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Sohna Singh v. *Kehan Singh* (1), Mussammat *Harnamon* v. *Santa Singh* (2), *Hamira* v. *Ram Singh* (3), and *Gurditta* v. *Jai Singh* (4), referred to, also Rattigan's Customary Law, Article 24.

Mussammat *Hussain Bibi* v. *Nigahia* (5), and *Bholi* v. *Kahna* (6), distinguished.

Held also, that the position of a sister of a male proprietor without issue cannot be assimilated for purposes of inheritance to that of a daughter even as regards self-acquired property.

Hamira v. *Ram Singh* (3), followed.

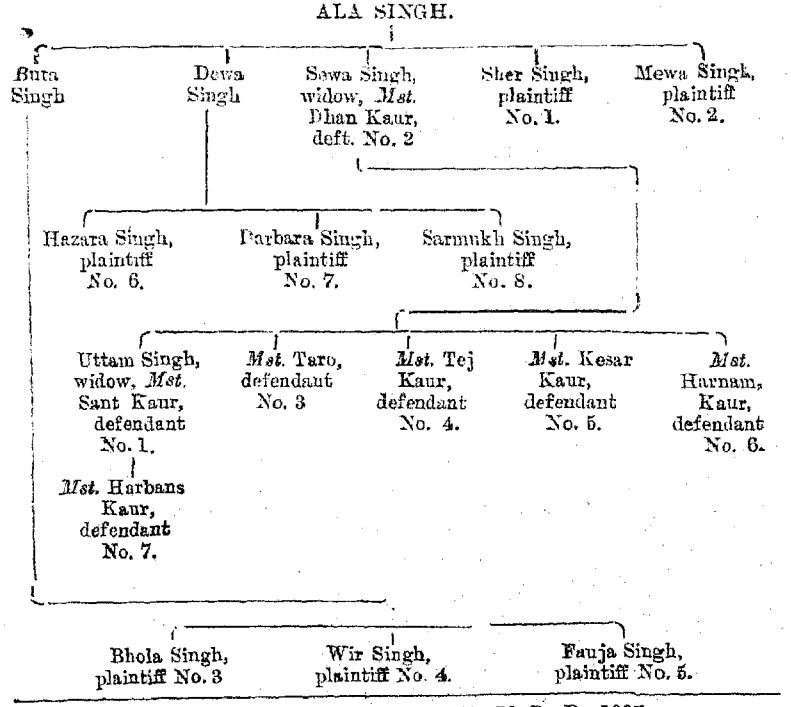
First appeal from the decree of Diwan *Som Nath, Senior Subordinate Judge, Lyallpur, dated the 16th July* 1919, *decreeing the claim.*

N. C. PANDIT, for Appellants.

G. C. NARANG, JIWAN LAL KAPUR AND DEVI DITTA MAL, for Respondents.

The judgment of the Court was delivered by—

SCOTT-SMITH J.—The pedigree table of the parties to the suit out of which the present appeal arises is as follows:—



(1) 113 P. R. 1892.
(2) 98 P. W. R. 1912.
(3) 134 P. R. 1907 (F.B.).
(4) 72 P. R. 1907.
(5) (1919) I. L. R. 1 Lah. 1.
(6) 35 P. R. 1909.

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The ancestral home of the parties is in the Amritsar District, but the property in dispute amounting to some 7 squares in area was acquired by Sewa Singh in the Lyallpur District. He died on the 10th October 1918 and was succeeded by his son Uttam Singh, who died 15 days later on the 25th October 1918. After the death of Uttam Singh mutation of the property in dispute was effected, with the consent of *Mussammat* Sant Kaur and *Mussammat* Dhan Kaur in their names as well as in the name of *Mussammat* Harbans Kaur, the daughter of Uttam Singh, and in the names of defendants Nos. 3 to 6, the sisters of Uttam Singh and the daughters of Sewa Singh, in equal shares. The plaintiffs, who are brothers and nephews of Sewa Singh, brought the present suit for a declaration that the alienation by way of mutation in favour of defendants, with the exception of *Mussammat* Sant Kaur, should not affect their rights after the death or remarriage of *Mussammat* Sant Kaur. The Lower Court, having regard to the answer to question No. 70 in Mr. Craik's Customary Law of the Amritsar District, Article 24 of Rattigan's Digest of Customary Law, and to the case of *Hamira* v. *Ram Singh* (1) was of opinion that the *onus* lay upon the defendants, and holding that they had not discharged it, gave the plaintiffs a decree that the alienation of $\frac{4}{7}$ths of the land in dispute in favour of the defendants Nos. 3 to 6 should not affect the plaintiffs' rights of reversion on the death or remarriage of *Mussammat* Sant Kaur.

The defendants have appealed to this Court, and as there is practically no evidence on the record, the argument has mainly been as to which party the *onus probandi* lay on. Mr. N. C. Pandit, on behalf of the appellants, laid some stress on the fact that the plaintiffs lived in the Amritsar District whereas the land which was acquired by Sewa Singh, was in the Lyallpur District, where the plaintiffs themselves owned no land. In our opinion this fact in no way affects the plaintiffs' right of succession as agnates of Sewa Singh. It was held in *Daya Ram* v. *Sohel Singh* (2) by a Full Bench that—

"It has not been laid down by *Lokhar* v. *Hari* (3) and other rulings on the point that mere community of descent does not

(1) 134 P. R. 1907 (F. B.). (2) 110 P. R. 1906 (F. B.).
(3) 64 P. R. 1893.

give agnates of a deceased land owner a right of succession to acquired land left by him in a village in which they do not own any land."

This was followed in *Nanda and others* v. *Hira and others* (1) wherein it was held that—

"*Primâ facie* agnates of a deceased person are entitled to a share in his estate even though they live in another village and own no land in the village in which the land in dispute is situate."

We, therefore, hold that the mere fact that the plaintiffs live in the Amritsar District while the land in dispute is in the Lyallpur District does not affect their rights of succession.

The next point urged by Mr. Pandit was in regard to the answer to question No. 70 in Mr. Craik's Customary Law of the Amritsar District. He points out that no instances are given in the answer and that the author in page vi of the preface states that "in the case of questions in regard to which no particular case in point was cited by the people and no judicial decisions or mutations could be traced, the answers represent nothing more than the personal opinion of the persons consulted and cannot carry the same weight as answers supported by cases." It is, therefore, urged that as there are no instances cited in support of the answer to question No. 70 the answer is valueless. In our opinion it cannot be said that no value attaches to this answer, but we agree that the same value does not attach to it as would have attached had there been instances cited in support of it. It certainly does not appear to be opposed to the general principle as laid down in Article 24 of Rattigan's Digest of Customary Law, and therefore, the decision of their Lordships of the Privy Council reported in *Beg* v. *Allah Ditta* (2) is in point wherein it was held that an entry in the *Riwaj-i-am* is a strong piece of evidence in support of the custom mentioned therein.

Counsel next referred to Article 24 of Rattigan's Digest and argued that that Article really applied to cases where the property was ancestral. Some of the authorities, however, referred to under that Article deal with cases of acquired property. We have referred to

(1) 47 P. R. 1917. (2) 45 P. R. 1917 (P. C.).

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these cases. The first one is *Sohna Singh* v. *Kahan Singh* (1), where it was found in a suit the parties to which were Dhariwal *Jats* of the Fazilka *Tahsil* of the Ferozepore District that no custom was established by which a sister and her son were entitled to inherit acquired landed property in preference to collaterals descended from the grandfather of the deceased owner. In that case the *Riwaj-i-am* was against the sisters and it was held that they had not proved their claim. Then there is the case of Mussammat *Harnamon* v. *Santa Singh* (2). There the conflicting claims to non-ancestral property of a sister and of a collateral in the 10th degree were considered, and the Judges were of opinion that *Hamira* v. *Ram Singh* (3) re-inforced by *Gurditta* v. *Jai Singh* (4) showed that the *onus* lay on the sister.

The next case to which we were referred was that of Mussammat *Hussain Bibi and others* v. *Nigahia and others* (5) in which it was held that in questions of succession to self-acquired property between collaterals of the 8th degree and sisters, the *onus* of proving that they have a preferential right is in the first instance on the latter. When that case first came up for hearing the Judge in Chambers discussed Article 24 of Rattigan's Digest and also the case of *Bholi* v. *Kahna* (6) and said that the question of *onus* was a somewhat difficult one. In *Bholi* v. *Kahna* the parties were Muhammadans and the contest was between sisters and collaterals in the 6th degree and Clark C. J., was of opinion that under the circumstances the *onus* was upon the collaterals who lived in another village.

In the case of Mussammat *Hussain Bibi and others* v. *Nigahia and others* (5) also the parties were Muhammadans and the collaterals were related in the 8th degree, and therefore the case of *Bholi* v. *Kahna* (6) supported the contention that the *onus* was upon the collaterals. In the present case, however, the personal law of the parties is the Hindu Law and under it the sisters are not heirs, or in any case they come in after collaterals related so nearly to the deceased as the plaintiffs in the present case. In *Bholi* v. *Kahna* (6) and in Mussammat *Hussain*

(1) 113 P. R. 1892.
(2) 98 P. W. R. 1912.
(3) 134 P. R. 1907 (F. B.).
(4) 72 P. R. 1907.
(5) (1919) I. L. R. 1 Lah. 1.
(6) 35 P. R. 1909.

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Bibi and others v. *Nigahia and others* (1) the parties were Muhammadans, and under their personal law sisters are preferred to collaterals and therefore those cases do not help the defendants in the present case. Moreover in Mussammat *Harnamon* v. *Santa Singh* (2) which followed *Hamira* v. *Ram Singh* (3) it was pointed out that the *onus* in such a case lies generally on the sisters.

Bearing these authorities in mind and also taking into consideration the answer to question No. 70 in Craik's Customary Law of the Amritsar District, which certainly is evidence in favour of the plaintiffs, we are constrained to hold that the *onus* lay on the defendants, sisters, to prove that they have a better claim to succeed to the property in dispute than the plaintiffs.

It was held in *Hamira* v. *Ram Singh* (3) that among parties following Customary law the position of a sister of a male proprietor without issue cannot be assimilated for purposes of inheritance to that of a daughter, and she must, therefore, in such matters be regarded as a sister of that proprietor and not as a daughter of his father. That case was one where the property was not ancestral and it is, therefore, entirely on all fours with the present case. At page 646 of that volume the Judges said: "We are unable to see that any case is made out for departing from the ordinary order of succession of sisters."

In other words they were of opinion that the *onus* was upon sisters. Mr. N. C. Pandit wished to argue that the decision of the Full Bench was unsound but we declined to allow him to do so.

Defendants-appellants have produced no evidence with the exception of a copy of a judgment of Mr. Rose, Additional Judge of Amritsar, dated the 6th March 1917, which is obviously quite insufficient to shift the *onus*.

It was finally pointed out by counsel for the appellants that after the death or remarriage of *Mussammat* Sant Kaur, *Mussammat* Dhan Kaur, as the mother of the last male owner Uttam Singh, would succeed to a life

(1) (1919) I. L. R. 1 Lah. 1. (2) 98 P. W. R. 1912.
(3) 134 P. R. 1907 (F. B.).

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estate. There is no doubt that under Customary Law the mother is entitled to a life interest and the only point urged against this by counsel for the respondents is that *Mussammat* Dhan Kaur having consented to the mutation in favour of defendants Nos. 3 to 6 has lost any rights which she might otherwise have had. We are unable to agree with this; no doubt she was willing to allow mutation to be made in favour of her daughters, but if this mutation is held not to confer any rights upon them she may assert her own rights to a life interest after the death or remarriage of her daughter-in-law *Mussammat* Sant Kaur. We, therefore, think that there should be an amendment of the decree by adding the name of *Mussummat* Dhan Kaur after that of *Mussammat* Sant Kaur.

We dismiss the appeal but we direct that the decree be amended to this extent that the alienation of $\frac{4}{7}$ths of the land in suit in favour of defendants Nos. 3 to 6 shall have no effect on plaintiffs' right of reversion after the death or remarriage of *Mussammat* Sant Kaur and *Mussammat* Dhan Kaur. As the case is a very hard one for the defendants we direct that the parties should bear their own costs in this Court.

A. N. C.

Appeal dismissed—decree amended.