

APPELLATE CIVIL.

1928

Feb. 5.

Before Mr. Justice Broadway and Mr. Justice Zafar Ali.

. Mst. DIYAN (PLAINTIFF) Appellant,

versus

HIRA NAND, ETC. (DEFENDANTS) Respondents.

Civil Appeal No. 565 of 1919.

Custom—Succession—by stepmother to her stepson—Aroras—Montgomery District—duty of Court in custom cases—Riwaj-i-am.

Held, that in cases where custom is alleged a duty is also imposed upon the Court to endeavour to ascertain the existence and nature of the custom.

Mussammat Fatima Bibi v. Gul (1), *Kartar Singh v. Mathar Singh* (2), *Mussammat Lorendi v. Mussammat Kishen* (3), and *Daya Kam v. Sokel Singh* (4), followed.

Held also, that there is no general custom recognising the succession of a stepmother to a stepson; ordinarily the stepmother has no right except to maintenance.

Mussammat Kirpi v. Ramjas (5), *Kanhaya Singh v. Mussammat Premi* (6), and *Bishan Das v. Mussammat Mansa Deri* (7), referred to, also Ellis' Notes on Punjab Custom, page 88, and Rattigan's Digest of Customary Law, pages 30 and 31.

Held further, that there could be no presumption that because Aroras follow custom in many matters they are also governed by a custom by which a stepmother is entitled to succeed to a stepson. It was for plaintiff, the stepmother, to prove such a custom, and she had entirely failed to do so.

Harbans Lal v. Atra (8), *Taj Muhammad v. Sayad Muhammad* (9), *Nur Muhammad v. Khuda Bakhsh* (10), and *Ram Lal v. Gopi* (11), referred to, also *Mokanda v. Balli Singh* (12), *Pitambar v. Ganesha Ram* (13), *Anant Ram v. Hukman Mal* (14), *Budhu Ram v. Muhammad Din* (15), and the *Riwaj-i-am* of the Montgomery District.

First appeal from the decree of Lala Ghanshyam Das, Senior Subordinate Judge, Montgomery, dated the 3rd March 1919, dismissing the claim.

TEK CHAND and MEHR CHAND, Mahajan, for Appellant.

SHEO NARAIN, for Respondents.

(1) 127 P. R. 1898.

(2) 94 P. R. 1898.

(3) 149 P. R. 1888.

(4) 110 P. R. 1906 (F. B.)

(5) 153 P. R. 1889.

(6) 322 P. L. R. 1913.

(7) 47 P. R. 1914.

(8) (1919) 58 I. C. 858.

(9) 122 P. R. 1916.

(10) 125 P. R. 1916.

(11) 24 F. R. 1914.

(12) 85 P. R. 1884.

(13) 148 P. R. 1890.

(14) 62 P. R. 1902.

(15) 86 P. R. 1915.

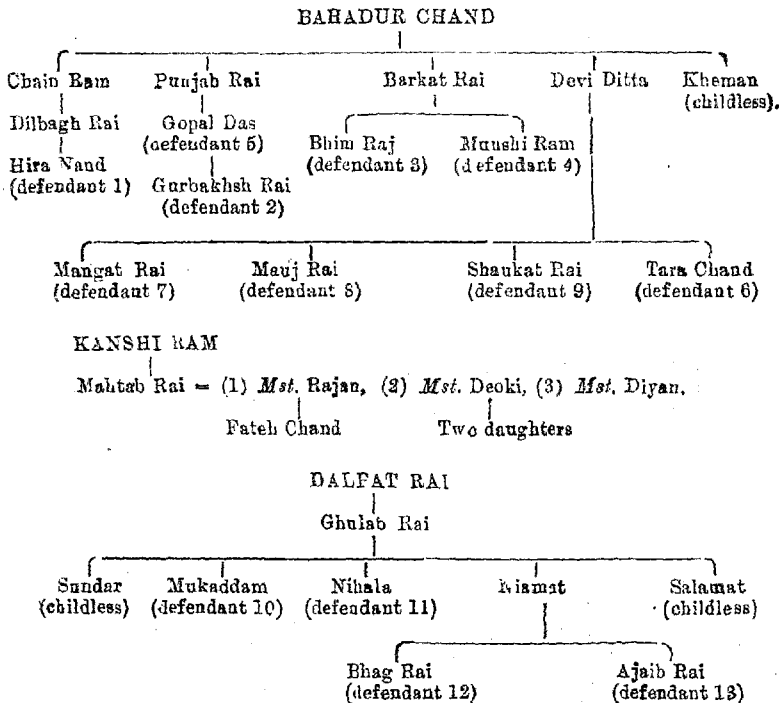
The judgment of the Court was delivered by—

BROADWAY J.—A preliminary point was disposed of by our order, dated the 23rd January 1923, and a short adjournment granted as we were informed that there was a possibility of a compromise being effected. Negotiations have fallen through, and the appeal has been heard on the merits.

One Nibahu Ram had three sons, Bahadur Chand, Kanshi Ram and Dalpat Rai. The parties to this case are the descendants of these three sons and the following pedigree tables will be of assistance in the case:—

1928

Mst. DIYAN
v.
HIRA NAND.



The plaintiff is *Mussammat* Diyan, one of the widows of Mahtab Rai, on whose death his entire estate, real and personal, descended to his son Fateh Chand. This Fateh Chand was said to have been insane. In any event, he was not capable of managing his own affairs with the result that the Court of Wards took over his estate. Fateh Chand died unmarried in December 1914. On the 14th of August 1915 the suit out of which this appeal has arisen was instituted

1923

Mst. DIYAN
v.
HIBA NANI.

by *Mussammât Diyan* for a declaration that she was entitled to possession of the property left by her deceased stepson *Fateh Chand* during her lifetime as against the said *Fateh Chand's* collaterals. The parties are *Aroras* owning considerable estates in several villages in the Montgomery District, and *Mussammât Diyan* alleged that they were governed by *Zamindara* custom under which she was entitled to succeed to her stepson.

The trial Court found that the property was not ancestral and that the plaintiff had failed to prove any general agricultural custom which would give her the right to succeed to her stepson. It, therefore, dismissed the suit, holding at the same time that the plaintiff might have succeeded if she had alleged a special custom among *Aroras* placing the mother and the stepmother on the same footing as regards succession to a deceased son. This remark was due apparently to the fact that the trial Court had come to the conclusion that among agriculturists as a whole a stepmother was allowed to succeed to her stepson.

Mr. *Tek Chand* for *Mussammât Diyan* has contended that the trial Court has placed too narrow a construction on the plaint, and that on the finding arrived at by it, it should have decreed the suit. He further contended that the evidence on the record amply proved that the parties to this case were governed by agricultural custom under which a stepmother can succeed to her stepson. He urged that by using the expression "*zamindara* custom" in the plaint the plaintiff meant the general custom as followed by the agriculturists in the Montgomery District and that under this custom a stepmother's right was recognised and that therefore there was no need to specifically mention the existence of a special custom as suggested by the learned Senior Sub-Judge. It was also urged that inasmuch as *Fateh Chand* was a lunatic at the time of his father's death, had the parties been governed by Hindu Law, the said *Fateh Chand* would not have succeeded. The fact that he did succeed, it was claimed, pointed to the parties (*Aroras*) being governed by custom. In support of the contention that the learned Senior Subordinate Judge had taken too narrow a view of the pleadings, our attention was drawn to *Prayaga Das Jee Varu v.*

Venkama Naidu (1), *Raja Eup Singh v. Rani Baisni* (2), *Azhimanila v. Kayinari Gopalen* (3), *Arabar Rahman v. Ismail Ebrahim* (4), *Ganpat v. Daulat Ram* (5) and *Khair-ul-Nssa v. Bahadur Ali* (6). We are inclined to accept the contention that the learned Senior Subordinate Judge took too narrow a view of the pleadings and we are in general agreement with *Mussammât Fatima Bibi v. Gul* (7), *Kartar Singh v. Mathar Singh* (8), *Mussammât Lorendi v. Mussammât Kishen* (9) and *Daya Ram v. Sohail Singh* (10) that in cases where custom is alleged, a duty is also imposed on the Court to endeavour to ascertain the existence and nature of that custom.

Mr. Tek Chand then took us through the evidence, oral and documentary, on the record. This evidence shows that in matters relating to succession *Aroras* follow agricultural custom. It was argued from this that it should be presumed that the said *Aroras* were also governed by a custom by which a stepmother was entitled to succeed to a stepson. In this respect our attention was drawn to *Harbans Lal v. Atra* (11), *Taj Muhammad v. Sayad Muhammad* (12), *Nur Muhammad v. Khuda Bakhsh* (13) and *Ram Lal v. Gopi* (14). We are unable, however, to agree to this proposition. The fact that the tribe to which the parties belong have in many matters adopted agricultural custom is no doubt a fact to be considered in deciding whether or not the said tribe have adopted the particular custom set up by the plaintiff. That *Aroras* do follow custom in many matters cannot be denied, *vide Mokanda v. Balli Singh*, (15), *Pitamber v. Ganesha Ram* (16), *Anant Ram v. Hukman Mal* (i) and *Budhu Ram v. Muhammad Din* (18), but in none of these cases was this particular custom with which we are now concerned under consideration.

So far as this Province is concerned, we have been unable to find any general custom recognising the succession of a stepmother to a stepson. Indeed at page

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| (1) (1917) 44 I. C. 641. | (7) 127 P. R. 1898. | (13) 125 P. R. 1916. |
| (2) (1884) I. L. R. 7 All. 1. | (8) 94 P. R. 1398. | (14) 24 P. R. 1914. |
| (3) (1914) 23 I. C. 337. | (9) 149 P. R. 1338. | (15) 85 P. R. 1884. |
| (4) (1914) 27 I. C. 373. | (10) 110 P. R. 1906 (F. B.) | (16) 148 P. R. 1890. |
| (5) 63 P. R. 1904. | (11) (1919) 53 I. C. 855. | (17) 62 P. R. 1902. |
| (6) 27 P. R. 1906. | (12) 122 P. R. 1916. | (18) 86 P. R. 1915. |

1928

—
Ms. DEYAN
 v.
HIRA NANDI

123

Mst. DIYAN
v.
HIRA NAND.

88 of Notes on Punjab Custom by Ellis it is said that the stepmother has no right ordinarily except to maintenance, and this proposition is also laid down in Rattigan's Digest of the Customary Law, pages 30 and 31. This proposition is also supported by *Mussammatt Kirpi v. Ramjas* (1), *Kanhya Singh v. Mst. Premji* (2) and *Bishan Das v. Mst. Mansa Devi* (3). It seems to us therefore that, if anything, a stepmother's right to succeed to her stepson according to the general custom has been negatived, and it is for the plaintiff in the present case to clearly satisfy us, by the production of instances where stepmothers have succeeded, that such a custom exists.

The fact that Fateh Chand succeeded to his father cannot by itself be regarded as sufficient proof of the family being governed by custom. It is true that in the plaint it was alleged that Fateh Chand was a lunatic at the time of his father's death, but this fact was denied in the pleadings and there is no real evidence to support the assertion. A man may be incapable of looking after his affairs without necessarily being a lunatic within the meaning of that term for the purposes of preventing his succession under the Hindu Law. It was held in *Surti v. Narain Das* (4), that the assumption of control by the Court of Wards of the property of a person did not imply lunacy such as would cause a disability to succeed. A reference to the *Riwaj-i-am* of this district shows that the question of a stepmother's right to succeed to her stepson was never considered although various other matters were brought forward, namely, questions relating to adoption, *khanda-madi* and widow remarriage. On general rules we are therefore unable to hold that the custom set up can be deduced. It was, however, contended that the said custom had been proved by the instances on the record and this view has undoubtedly been taken by the learned Senior Subordinate Judge in deciding issue No. 4. An examination of those instances, however, does not seem to us to warrant the conclusion arrived at by the Court below.

The first, Exhibit P. 14, relates to the succession to one Budhu, a minor, who was succeeded by his

(1) 153 P. R. 1839.

(3) 47 P. R. 1914.

(2) 322 P. L. R. 1913.

(4) (1890) I. L. R. 12 All. 530.

father's two widows. This was a case amongst *Brahmans* and there was nothing whatever to show the existence of any other possible heirs. The mutations show that the two widows were living in the same house and clearly they were both entitled to maintenance at least.

Exhibit P. 24 refers to the same property as also does P. 25, which mutation shows that on the death of Budhu's mother his stepmother took the property. We cannot regard this instance as of any value.

Exhibit P. 17 relates to the succession to an occupancy tenancy, the last occupancy tenant being Dharm Chand, an *Arora*. He died without issue and without leaving a widow. His mother and stepmother were treated as heirs and the mutation was attested by Dharm Chand's paternal uncle. The area was not large. We cannot regard this instance as of any great value to prove the custom set up. In Exhibit P. 29 Tara Singh and his stepmother succeeded jointly to the property of Tara Singh's father, Rattan Singh, an *Arora*. This is not a case of a succession by a stepmother to a stepson and cannot establish the custom set up.

Exhibit P. 26 is on the same footing as P. 29 and affords no assistance.

Exhibit P. 27 relates to *khatris* and was not a succession to a stepson.

After a careful consideration of this evidence we are unable to hold that the custom set up by the plaintiff in this case has been proved. The fact that the tribe to which the parties belong are in many respects governed by custom cannot by itself afford a basis for the deduction that in the said tribe a custom exists by which a stepmother succeeds to her stepson.

Arguments were addressed by the learned counsel as to whether the defendant-respondents with the plaintiff formed a compact village community. It is not necessary for us to discuss this question and we would only note that the history of the villages in which this family holds property appears to show that the said villages are owned almost entirely by this family.

It is clear that under Hindu Law *Mussammat* Diyan would not succeed to her stepson Fateh Chand.

1923

—
Mst. DEYANr.
HIRA NAND.

The *Rwaj-i-Am* affords her no assistance, inasmuch as it is silent as to this question and the evidence on the record does not, in our opinion, prove the custom set up. We accordingly dismiss this appeal with costs.

A. R.

Appeal dismissed.

APPELLATE CIVIL.

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

RODHA RAM (DEFENDANT) Appellant,

versus

AMAR CHAND (PLAINTIFF) } Respondents.
MAYA MAL (DEFENDANT) }

Civil Appeal No. 180 of 1920.

Joint Hindu Family—Alienation by Manager—Necessity—what enquiries alienee should make—Onus probandi.

Held, that in the case of an alienation by the Manager of a joint Hindu family the alienee is bound to enquire into the necessities for the loan and to satisfy himself as well as he can that the Manager is acting in the particular instance for the benefit of the estate. If he does so inquire and acts honestly, the real existence of an alleged sufficient and reasonably-credited necessity is not a condition precedent to the validity of his charge and under such circumstances he is not bound to see to the application of the money.

Hanooman Persaud Panday v. Mst. Babooee Munraj Koonweree (1), followed.

Held also, that the burden of proving that he acted *bona fide* and without knowledge that the necessity was fictitious lies upon the alienee.

Charanjit Singh v. Telu Mal (2), followed.

Second appeal from the decree of Lt.-Col. B. O. Roe, District Judge, Jullundur, dated the 28th October 1919, affirming that of Lala Devi Das, Munsif, 1st Class, Jullundur, dated the 2nd April 1919, decreeing the plaintiff's claim.

DIWAN MEHR CHAND, for Appellant.

H. D. BHALLA and FAQIR CHAND, for Respondents.

The judgment of the Court was delivered by—

FFORDE J.—The suit out of which this appeal arises was brought for a declaration that a certain sale deed,

(1) (1856) 6 Moo. I. A. 393.

(2) 152 P. R. 1888.