

## APPELLATE CIVIL.

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*Before Justice Sir Henry Scott-Smith and Mr. Justice Fforde.*

1924

Dec. 23.

AMIR HAMZA (DEFENDANT) Appellant,

*versus*

<p>Mst. MURAD BIBI AND ANOTHER (PLAINTIFFS) MUHAMMAD SALIM AND OTHERS (DEFENDANTS)</p>	}	Respondents.
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Civil Appeal No 433 of 1919.

*Custom—Widow's right to have joint holding partitioned—Onus on person denying the right—Pathans of Basti Mithu Sahib, a suburb of Jullundur town—Riwaj-i-am.*

*Held*, that a widow of a deceased co-sharer in a joint holding has a statutory right to demand partition of her share, and the *onus* of proving a custom by which widows are restrained from claiming partition lies heavily on the person denying the right.

*Mussammat Bhag Bhari v. Wazir Khan* (1), followed. *Abdul Qadir v. Mst. Rabia* (2), *Shadi v. Mst. Jeoni* (3), *Ghansham v. Ranji Lal* (4), referred to. *Parshotam v. Mst. Raj Devi* (5), and Rattigan's Digest of Customary Law, article 15, not followed.

*First appeal from the decree of Lala Munna Lal, Senior Subordinate Judge, 1st Class, Jullundur, dated the 30th November 1918, declaring that the plaintiffs are entitled to get the lands in suit partitioned.*

TEK CHAND and GEULAM MOHI-UD-DIN, for Appellant.

BADRI DAS and BALWANT RAI, for Respondents.

The judgment of the Court was delivered by—

Sir HENRY SCOTT-SMITH J.—The facts of the dispute out of which the present appeal arises are

(1) 70 P. R. 1912.

(2) 4 P. R. (Rev.) 1917.

(3) (1922) I. L. R. 3 Lah. 236.

(4) (1923) I. L. R. 4 Lah. 344.

(5) 219 P. L. R. 1913.

given in our judgment of to-day in Civil Appeal No. 386 of 1919. This is an appeal from the lower Court's order giving the plaintiffs *Mussammât Murad Bibi* and her daughter *Mussammât Fatima* a declaratory decree to the effect that they are entitled to partition of their share of the joint property. Mr. Ghulam-Mohi-ud-Din contended, in the first place, that the *onus* was wrongly placed on his client to prove that the widow was not entitled to partition. He referred to article 15 of Rattigan's Digest of Customary Law which states that, where a widow is permitted to succeed to her husband's share in a joint estate, she cannot ordinarily claim partition so as to constitute herself sole owner, though she may at times obtain separation of the share to secure her a full participation of the profits. The earlier rulings of the Chief Court were no doubt to the general effect that a widow is not ordinarily entitled to claim partition, but in *Mussammât Bhag Bhari v. Wazir Khan* (1), a Division Bench held that a widow of a deceased co-sharer in a joint holding has a statutory right to demand partition and, although a suit for a declaration that she is not so entitled is competent in a Civil Court, the plaintiff can only succeed by proving a custom by which widows are restrained from claiming partition, and no consideration of desirability or undesirability should have any weight with the Court. This decision was arrived at after a consideration of the previous decisions of the Chief Court which are quoted at page 268 of the report. In *Abdul Qadir v. Mst Rabia* (2) a different view was taken, but we are not bound by that decision. Subsequent to *Mussammât Bhag Bhari v. Wazir Khan* (1), there is no reported case of the Chief Court or of this Court to the effect that

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the *onus* in such a case is upon the widow to prove that she has a right to a separate partition of her share. In the case of *Parshotam v. Mussammatt Raj Devi* (1), a Division Bench of the Chief Court did take the view that the *onus* was on the widow, but that is not a reported case and therefore not of the same authority as *Mussammatt Bhag Bhari v. Wazir Khan* (2). On the other hand, in *Shadi v. Mst. Jeoni* (3), it was held that as the *Riwaj-i-am* of the Jullundur district to which the parties belong is in favour of a widow's right to claim partition of her husband's share in a joint estate the *onus* of proving the negative was on the plaintiff-collateral who alleged it. This decision was based on the same *Riwaj-i-am* as has been exhibited in the present case, and, therefore, is strongly in favour of the plaintiffs' right to claim partition.

Again, in *Ghansham v. Ramji Lal* (4), it was held that an entry in the *Riwaj-i-am* of the Gurgaon district favouring the widow's right of partition threw the *onus* that such a right did not exist upon the plaintiff who disputed the widow's right to obtain partition. Under these circumstances we see no reason for not following the decision in *Mussammatt Bhag Bhari v. Wazir Khan* (2) which throws the *onus* upon the person denying the widow's right to claim partition. Copies of certain decisions by the Revenue Courts and by the Chief Court prior to *Mussammatt Bhag Bhari v. Wazir Khan* (2) have been cited on behalf of the defendants, but we agree with the lower Court for the reasons given in its judgment at pages 128-129 of paper book A that they do not in any way help the defendant to discharge the *onus* which lay heavily upon him.

(1) 219 P. L. R. 1913.

(2) 70 P. R. 1912.

(3) (1922) I. L. R. 3 Lah. 236.

(4) (1923) I. L. R. 4 Lah. 344.

We, therefore, dismiss the appeal but, for the reasons given in our judgment in Civil Appeal No. 386 of 1919, we leave the parties to bear their own costs in this Court. The plaintiffs' appeal asking for their costs in the lower Court is also hereby dismissed.

*A. R.*

*Appeal dismissed.*

**APPELLATE CRIMINAL.**

*Before Justice Sir Henry Scott-Smith and Mr. Justice Fforde.*

AMIR ZAMAN—Appellant,

*versus*

THE CROWN—Respondent.

Criminal Appeal No. 809 of 1924.

1925

Jan. 21.

*Criminal Procedure Code, Act V of 1898, section 288 (as amended by Act XVIII of 1923)—statement of a retracting witness transferred to the Sessions' record—may be acted upon as if the evidence had been given before the Sessions Judge—The amendment of section 288 explained.*

*Held*, that the statement of a witness made before the Committing Magistrate and transferred to the Sessions' record in accordance with the provisions of section 288, Criminal Procedure Code, is not confined to purposes of corroboration or contradiction of the evidence given before the Sessions Judge, but can be acted upon precisely as if that evidence had been deposed to before the Sessions Judge.

The amending words "for all purposes subject to the provisions of the Indian Evidence Act, 1872", merely mean that the law of evidence enacted in that Act must be complied with, *e.g.*, evidence which has been wrongly admitted by the Committing Magistrate in violation of the provisions of the Evidence Act could not be transferred to the Sessions' record.

*Appeal from the order of Lt-Col. J. Frizelle, Sessions Judge, Rawalpindi, dated the 3rd September 1924, convicting the appellant.*