

APPELLATE CIVIL.

Before Mr. Justice Harrison and Mr. Justice Dalip Singh.

UMRA AND OTHERS (DEFENDANTS) Appellants

1927

versus

Feb. 18.

MST. DURGA DEVI AND OTHERS } Respondents.

(PLAINTIFFS)

MST. THAKRI (DEFENDANT) }

Civil Appeal No. 2257 of 1922.

*Custom—Succession—Daughters or collaterals—Chopra
Khatris—Jullundur District.*

Held, that the defendant-appellants, on whom the *onus* lay, had failed to prove the alleged special custom among the Chopra Khatris of the Jullundur District, by which daughters are excluded from inheriting the property of their father by collaterals, even though the father was separate from such collaterals.

First appeal from the decree of Rai Sahib Lala Ganga Ram, Wadhwa, Senior Subordinate Judge, Jullundur, dated the 16th May 1922, awarding the plaintiffs possession of the house and shops in dispute, etc.

BADRI DAS and DEV RAJ SAWHNEY, for Appellants.

FAKIR CHAND and VASDEV, for Respondents.

The judgment of the Court was delivered by—

DALIP SINGH J.—The pedigree table of the parties is printed at page 74 of the paper book. The plaintiffs are the daughters of Megh Raj, deceased, and they sued his brother Ganesh Das and the widow of one Nandu, son of another brother of Megh Raj, namely, Chint Ram, and Umra, grandson of Chint Ram, for possession of their father's property. They also claimed Rs. 400 from Ganesh Das alleging that the said sum had been deposited with Ganesh Das by their

1927

UMRA

v.

MST. DURGA
DEVI.

mother *Mussammatt Ralli*. Ganesh Das died during the pendency of the suit and his sons were brought on the record as his legal representatives. Various pleas were raised by the defendants, but the trial Court decreed the plaintiffs' suit except as to a half share in the property shown as No. (d) in the plaint, namely, a shop situate in Lal Bazar, Jullundur City, and as to the Rs. 400 alleged to have been deposited with Ganesh Das. Both sides have appealed.

So far as the appeal of Umra and others is concerned the sole point urged before us has been that by the custom of the Chopra Khattris of Jullundur District daughters are excluded from inheriting the property of their father by collaterals even though the father was separate from the collaterals. The parties are high caste Hindus, and the *onus* admittedly lies heavily on the appellants to prove the special custom alleged. The evidence given in the case is oral. Various instances are given by the witnesses in which daughters were excluded by the collaterals. It is also urged that a custom of this kind can be proved by the statements of persons of the brotherhood who are in a position to know the facts and who have deposed to the existence of this custom. It is also contended that there is no rebuttal of the evidence given on behalf of the appellants, and that not a single instance has been proved by the other side in which a daughter succeeded to the exclusion of the collaterals. We have been through the instances adduced in support of the custom and we are satisfied that they are not sufficient to prove the alleged custom. In many of the cases it is not clear that the deceased father was separate from the collaterals who excluded the daughters. In others it seems that the daughters had no issue and were maintained by the collaterals. In such cases it is quite pos-

sible that the daughter was unwilling to assert her right to a life interest in her father's property, and it does not follow that she could not have inherited the property of her separated father if she had chosen to assert that right instead of contenting herself with being maintained. We have been pressed by the argument that the respondents have been unable to produce a single instance of a daughter succeeding in the presence of collaterals. It must, however, be borne in mind that these Chopra families in Jullundur District are not very numerous, and it is possible that no case has arisen in which a separated Chopra Khatri died leaving no sons and leaving daughters who were in a position to assert their right of succession. We are therefore of opinion that the defendants-appellants have failed to establish the special custom which they pleaded and the appeal therefore fails and is dismissed with costs.

As regards the cross-appeal of the plaintiffs the important document mentioned in the judgment (Ex. P. 19) has not been printed and by the rules of this Court cannot therefore be referred to. There is no excuse for the non-printing of this document which is distinctly referred to in the judgment. The cross-appeal therefore as to the half share of the shop which is disallowed must also fail as the plaintiffs-appellants cannot establish that Kishen Chand was a tenant of the shop. The only other point urged by counsel for the appellants was that the costs should have been given in proportion to the success of the parties. It seems to us, however, that the defendants-appellants had some ground for raising the plea of custom and the plaintiffs failed as to that part of the case on which they produced evidence. The only question therefore could be of Pleader's fee. In the circumstances we are

1927

UMRA

v.

MST. DURGA
DEVI.

not prepared to interfere with the discretion of the trial Court in the matter, and we therefore dismiss the cross-appeal with costs also.

A. N. C.

Appeals dismissed.

APPELLATE CIVIL.

Before Mr. Justice Campbell and Mr. Justice Tek Chand.

MOHAMMAD ISHAQ AND OTHERS (DEFENDANTS)

Appellants

versus

MOHAMMAD YUSAF AND ANOTHER

(PLAINTIFFS)

MOHAMMAD IBRAHIM (DEFENDANT)

} Respondents.

1927
Feb. 22.

Civil Appeal No. 2142 of 1922

Transfer of Property Act, IV of 1882, section 53—principles of—applicable in Punjab—Voluntary alienation—intention to defeat or delay creditors—Presumption—elements necessary to raise—Burden of proof—debts due at the time of gift—debts subsequently incurred—distinction.

The plaintiff claimed to have been granted a decree upon a pro-note which was alleged by her to have been made in her favour prior to a gift by the judgment-debtor of his land in favour of his minor sons and sued for a declaration that the gift was a nullity, fraudulently defeating her as a creditor; but neither the decree nor the judgment nor the pro-note in suit was produced.

Held, that by virtue of section 53 of the Transfer of Property Act (the *principles* of which are applicable to the Punjab) it was upon the plaintiff to prove, not only that the alienation was gratuitous and that her claim against the donor had been defeated or delayed by that gift, but also, that she was a creditor of the donor at the time the gift was made; failing which, the presumption that the gift had been made with the intention of defeating or delaying her as a creditor did not arise.

Held (per Tek Chand, J.) that, although creditors whose debts were actually due at the time of the voluntary transfer