

## APPELLATE CIVIL.

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

GURDIAL SINGH AND OTHERS (PLAINTIFFS)

Appellants

versus

Mst. BHAGWAN DEVI AND OTHERS (DEFENDANTS)

Respondents.

Civil Appeal No. 2603 of 1922.

*Hindu Law—Succession—Marriage—Chadar Andazi—  
not an approved form of—Mitakshara—Stridhana—devolu-  
tion of—on heirs of husband—“Aurat Madkhula”—meaning  
of—locus standi—of husband's heirs—suit by.*

K. S., a Khatri of the Amritsar District, spent many years in service in Oudh and on retirement brought with him to Amritsar a *Purbia* woman of unknown caste. Shortly before his death he made a will bequeathing to her absolutely two houses, which were his self-acquired property and in the will he described her as his “*Aurat Madkhula*”. On her death without issue, the houses were taken possession of by her relatives, whereupon the plaintiffs, who were the heirs of K. S., instituted a suit, alleging that K. S. had married the deceased woman by *Chadar Andazi*, that on her death the bequeathed houses had devolved on K. S. as her “husband” and on the latter’s death the plaintiffs were entitled to succeed.

*Held*, that the plaintiffs had failed to prove the alleged *Chadar Andazi* marriage between K. S. and the woman and that the expression “*Aurat Madkhula*” used in the will meant a concubine or mistress in contradistinction to “*Aurat Mankuha*”, *i.e.*, a wife married according to strict ritual or by *Chadar Andazi* or by other recognised forms of marriage.

*Held* also, that the houses having been bequeathed to the deceased woman (a *Purbiani* from Oudh) as her absolute property, the succession to her would be regulated by Hindu Law, by which she should be presumed to have been governed and not by the Punjab Custom.

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*Held*, further, that under the Benares School of Hindu Law it is only when the marriage has been performed in one of the approved forms that the *Stridhana* of the married woman devolves, on failure of her own descendants, on her husband and after him on *his* heirs in order of their succession.

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*And*, therefore, even supposing that the alleged *Chadar Andazi* had been proved in the present case, that ceremony not being one of the approved forms of marriage, her *Stridhana* would on her death devolve on *her* heirs and not on her alleged husband and, therefore, the plaintiffs had no *locus standi* to maintain the suit.

*Mitakshara*, Chapter II, Section 11, Bannerji's Hindu Law of Marriage and *Stridhana*, 2nd Edition, page 79 and Mayne's Hindu Law, 9th Edition, page 93, referred to.

*Held* also that the plaintiffs had failed to prove that K. S. or the deceased woman was governed by a special custom different from Hindu Law.

*Held* also that under the general Punjab Custom the special property of a married woman does not devolve on her husband's heirs in preference to her own relations.

Rattigan's Digest of Customary Law, paragraph 271, not followed.

*First appeal from the decree of Lala Prabhu Dial, Senior Subordinate Judge, Amritsar, dated the 15th June 1922, dismissing the plaintiffs' suit.*

NAWAL KISHORE and PARKASH CHAND, for  
 MANOHAR LAL, for Appellants.

MUHAMMAD SHAFI and KHURSHID ZAMAN, for  
 Respondents.

#### JUDGMENT.

TEK CHAND J.—One Kahan Singh, a *Khatri* of *Mauza Mehlanwala* in the Amritsar District, was employed as an Inspector of Police in Oudh. He had by his married wife (who had predeceased him) two sons, whose descendants are the present plaintiffs. On his

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retirement in 1888, Kahan Singh returned to his native village and brought with him a *Purbiani* woman, named *Mussammat Kaushalya*. In 1893 he executed three wills, by the first of which he gave the bulk of his property to his sons and grandsons by his married wife and we are not concerned with that property in this litigation. The second will, Exhibit D. 1, is dated the 5th December 1893, whereby he bequeathed a house at Amritsar to *Mussammat Kaushalya*, who was described in the will as his "*Aurat Madkhula*" and she was given full power of enjoyment and disposition over the house. By the third will, Ex. D. 2, which was executed on the same day, he gave another house to *Mussammat Jai Kuria*, a sister of *Mussammat Kaushalya* aforesaid, for her lifetime and provided that on *Mussammat Jai Kuria's* death this house also would devolve on *Mussammat Kaushalya* in absolute ownership.

On the death of Kahan Singh these three wills were duly acted upon and the legatees took possession of the properties that had been respectively devised to them. A few years later *Mussammat Jai Kuria* died and the house, which had been given to her by the third will was taken possession of by *Mussammat Kaushalya*. *Mussammat Kaushalya* died childless in August 1920 and defendants 1 to 3 who are the descendants of *Mussammat Chhadana*, another sister of *Mussammat Kaushalya*, took possession of all her property, including the two houses.

The present suit was instituted on the 31st of August 1920 by the grandsons of Kahan Singh, alleging that *Mussammat Kaushalya* was the married wife of the *Sardar* and that on her dying childless the property would devolve on the plaintiffs, who are the heirs of her husband. It was also stated in the plaint

that the houses were the ancestral property of the *Sardar*, that they had been given to *Mussammat Kaushalya* for maintenance and residence only and that defendants 1 to 3 were in unlawful possession thereof. The defendants pleaded that *Mussammat Kaushalya* was not the married wife of the late *Sardar*, but was his concubine, that under the wills *Mussammat Kaushalya* was the absolute owner of the houses and that on her death the property being her *Stridhana*, devolved upon her relatives, the defendants. The ancestral nature of the property was denied and it was averred that the *Sardar* had full power of disposition of the houses. It was further alleged that *Mussammat Kaushalya* was a *Purbiani*, and that *Kahan Singh*, a *Khatri*, could not contract a valid marriage with her. These allegations were traversed by the plaintiffs in their replication, where it was also pleaded that the *Sardar* was governed by Customary Law under which a valid marriage between *Kahan Singh* and *Mussammat Kaushalya* should be presumed from their having lived together as man and wife for many years. The lower Court found on all points against the plaintiffs and they have appealed.

Mr. Nawal Kishore for the appellants has conceded that the houses were the self-acquired property of the *Sardar*, that he had bequeathed them to *Mussammat Kaushalya* and that under the terms of the wills they were her absolute property. It is, however, contended with great force that *Mussammat Kaushalya* was the lawfully married wife of the *Sardar* and her *Stridhana* would devolve upon the heirs of her husband both under Hindu Law and Custom, whichever might be found applicable. After a careful examination of the evidence I am, however, of opinion that the findings of the lower Court on both these points

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are correct. The oral evidence as to the alleged *Chadar Andazi* is discrepant in material particulars and cannot be accepted. Moreover, it seems very unlikely that the late *Sardar* would, several years after his return to the village, go through the form of a *Chadar Andazi* marriage with a *Purbiani* woman, who had been living with him for many years before and who is described by the defendants' own witnesses as being over 50 years of age at the time. Mr. Nawal Kishore wanted to refer to a number of documents in which it was alleged *Mussammat Kaushalya* had been described as the widow of the late *Sardar*. But these documents were not exhibited or proved in the Court below and, not being evidence in the case, cannot be referred to in appeal. He also laid much stress on the fact that in the will, Ex. D. 1, *Mussammat Kaushalya* was described by Kahan Singh as his *Aurat Madkhula* and he argued that this meant a wife married by *Chadar Andazi*, as distinguished from *Aurat Mankuha*, which is a wife married with the ordinary ceremonies. This interpretation is, however, clearly erroneous and cannot be accepted. '*Aurat Madkhula*' literally means 'a woman brought into the household' and the expression is used in common parlance to describe a 'concubine' or a 'kept mistress' in contradistinction to a wife, married according to strict religious ritual or by *Chadar Andazi* or other recognised form of marriage. I, therefore, hold that the relationship of husband and wife did not exist between Kahan Singh and *Mussammat Kaushalya*.

Even if I were to accept the contention of the plaintiffs and to hold that *Mussammat Kaushalya* was the lawfully married wife of the *Sardar*, the plain-

tiffs' suit must still fail for want of *locus standi*. Under the Benares School of Hindu Law the *Stridhana* of a married woman devolves, on failure of her own descendants, on her husband and after him on his heirs in order of their succession, only when the marriage had been performed in one of the approved forms. The text of the *Mitakshara* on this point is quite clear and explicit and is as follows:—

“Of a woman dying without issue, as before stated, and who had become a wife by any of the four modes of marriage denominated *Brahma*, *Daiva*, *Arsha* and *Prajapatya*, the property as before described, belongs in the first place to her husband. On failure of him, it goes to his nearest *Spindas*. But in the other forms of marriage, the property of a childless woman goes to her parents, that is to her father and mother. The succession devolves first on the mother \* \* \* \* \* On failure of them, their next of kin take the succession.” (Mitakshara, Chapter II, Section XI).

It is not necessary to enter into an elaborate description of the four approved forms of marriage. They will be found described in detail in Bannerjee's Hindu Law of *Marriage and Stridhana* (2nd Ed.), page 79 *et seq* and Mayne's Hindu Law (9th Ed.) at page 93. It is not pretended that the marriage by *Chadar Andazi* of *Mussammatt Kaushalya* with Kahan Singh (even if it be held proved) would be a marriage in one of the approved forms, and Mr. Nawal Kishore was forced to admit that in this view of the law, the appellants are not *Mussammatt Kaushalya's* heirs and have no *locus standi* to maintain the suit.

As a last resort, the learned Counsel, contended that the succession to the houses would be governed

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by Custom, under which the plaintiffs are heirs to *Mussammatt* Kaushalya's special property. She, however, being a *Purbiani* woman from Oudh could not be governed by the Punjab Custom; and as to Kahan Singh, I cannot find on the record any evidence whatsoever, which might indicate that his tribe or family had ever been governed by Custom in matters relating to marriage. Assuming, however, that he was so governed, I do not know of any rule of Custom, under which the special property of a married woman governed by Customary Law, devolves on her husband's heirs in preference to her own relations. The statement in Rattigan's Digest of Customary Law, paragraph 271, on which Mr. Nawal Kishore relies, is not supported by any authority whatever and I am not prepared to follow it. Custom is a matter of proof and not of conclusions based on *a priori* reasoning or deductions drawn from a comparative study of the laws of distribution prevailing among primitive societies. The learned author of the Digest does not base his remark on any entry in the *riwaj-i-am* of any district in the Punjab or on any decided case, reported or unreported. I must, therefore, respectfully decline to follow it. In the absence of any well-ascertained Custom relating to this matter, we must fall back upon Hindu Law, *Daya Ram v. Sohel Singh* (1), and as already stated, under that law, the plaintiffs are not the heirs.

For the foregoing reasons, the appeal fails and I dismiss it with costs.

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CAMPBELL J.—I agree.

N. F. E.

*Appeal dismissed.*