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the plaintiffs' evidence. In my judgment the decision of the Courts below is erroneous owing to the fact that they have taken a wrong view on the question of the *onus* in this case.

I would, therefore, accept the appeal and grant the plaintiffs a decree for the amount claimed with costs throughout.

ZAFAR ALI J.—I concur

ZAFAR ALI J.

*N. F. E.*

*Appeal accepted.*

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## APPELLATE CIVIL.

*Before Mr. Justice Addison.*

1926

*Nov. 3.*

KHUDA YAR AND OTHERS (PLAINTIFFS). Appellants

*versus*

MUHAMMAD YAR AND OTHERS (DEFENDANTS) Respondents.

**Civil Appeal No. 234 of 1926.**

*Custom—Succession—Awans of* Mauza *Nammal, district Mianwali—whole-blood—whether excludes half-blood*—Riwaj-i-am.

*Held*, that among Awans of *Mauza* Nammal of the Mianwali district a brother of the whole-blood succeeds to his deceased brother's estate to the exclusion of his brother of the half-blood.

*Khuda Yar* v. *Ahmad* (1), *Masta* v. *Pohlo* (2), and *Muhammad* v. *Tara*, Civil Appeal No. 286 of 1898 (unpublished), referred to.

*Sher Khan* v. *Muhammad Khan* (3), and *Ghulam Muhammad Khan* v. *Nur Khan* (4), discussed.

*Second appeal from the decree of* Rai Sahib Lala *Shibbu Mal, District Judge, Mianwali, dated*

(1) 33 P. R. 1919.
(2) 52 P. R. 1896.
(3) (1923) I. L. R. 5 Lah. 117.
(4) 65 P. R. 1917.

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*the 31st August 1925, reversing that of* Lala *Har Sarup, Subordinate Judge, 3rd class, Mianwali, dated the 13th June 1925, and dismissing the claim.*

G. R. KHANNA, for Appellants.

M. L. PURI, for Respondents.

JUDGMENT.

ADDISON J. ADDISON J.—The sole question in this appeal is whether by custom amongst Awans of village Nammal of the Mianwali district a brother of the whole-blood succeeds to his deceased brother's estate to the exclusion of his brother of the half-blood. The trial Court found that he did not, while the lower appellate Court found that he did. The plaintiffs have preferred this second appeal, after obtaining the necessary certificate under section 41 (3) of the Punjab Courts Act.

It is common ground that the *Pagwand* rule (*per capita*) has now superseded the *Chundavand* rule (*per stirpes*) so far as succession to the father's estate is concerned. That being the case, the general rule of custom is stated as follows in paragraph 26 of Rattigan's Digest of Customary Law:—

"In the case of collateral succession, in a contest between the whole-blood and the half-blood, the Court may presume, until the contrary is proved, that when the property of the common ancestor was distributed *per capita* (pagvand), the whole-blood and half-blood succeed together; but where brothers of the whole-blood subsequently form separate groups and so regulate succession among themselves as to alter the original rule of distribution, the presumption will cease to operate. The initial *onus*, therefore, lay on the defendant, but in order to discharge it, it was sufficient for him to establish that he and his full brother, now deceased, formed subsequently a group amongst

themselves distinct from their half-brother, whose sons the plaintiffs are. This plea was taken by the defendant, but the trial Court decided against him on that question. The District Judge on appeal held that in the present case there was evidence that the deceased and his full brother lived together, cultivated their land jointly, and formed a separate group from their half-brother. It was objected that this was not a proper finding and did not conclude the matter as he should have called the evidence on the point " good " or evidence " which proved ". It is clear, however, that he meant it to be a full finding. In all probability he had the report, *Sher Khan* v. *Muhammad Khan* (1), before him when he was writing. It is there stated :—" It may be said at once that there is no evidence of the respective descendants of the two months having formed themselves into separate distinct groups ". The District Judge meant to say that it was different here, though he might have expressed it more clearly. Besides, it is established that, though the holding remained joint, the Revenue papers up to 1921 after 1908 showed the two full brothers cultivating jointly the land, which they held, while the half-brother cultivated his separately. This amounted to a private family partition. This condition of affairs was also supported by oral testimony which should not have been rejected in face of the revenue entries. There is no doubt, therefore, that the two full brothers did constitute themselves into a distinct group, separate from their half-brother. It follows that there is no presumption that the whole and half-blood succeed together. In connection with this question I might also refer to

(1) (1923) I. L. R. 5 Lah. 117, 120.

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the remarks in paragraph 3 of page 89 of the report, *Khuda Yar* v. *Ahmad* (1).

I next come to the Customary Law of Mianwali district. In the *Riwaj-i-am* prepared in the Settlement of 1878, it is said that after the death of a sonless brother his full brother excludes his half-brother whether the land is ancestral or not, but it is added that in families where the half-brothers are stronger than the full brothers and the property is still joint, then all succeed equally, though if the property is divided, then in no case does the half-brother take a share. An instance from Chakrala village is given in that *Riwaj-i-am*, according to which the full brother excluded his half-brothers. In the *Riwaj-i-am* of 1908 it is recorded that though sons of all wives inherit equally from their father yet on the death of a son the custom as to succession by brothers is different. Among Pathans, with three exceptions and among Sayyads, the full brother succeeds in preference to the half-brother. Among the three exceptions to the Pathan Rule and among Hindus, the full and half-blood succeed equally. The Jats also said that they followed the rule of equal succession but several instances were quoted amongst them in which full brothers excluded half-brothers. The Bilochis were equally divided as to which of the two customs they follow. *The Awans were also divided on this question, succession having taken place both ways.* Four instances are given in this *Riwaj-i-am* where Awans of Nammal, the village in question in this case, followed the rule of succession by the full blood, while five instances are given where Awans of the Chakrala-Thammenwali tract followed

(1) 33 P. R. 1919.

the rule of equal succession. This means that ten instances are given in the two *Riwaj-i-ams*, namely, one instance from Chakrala given in the first document of 1878 where the full blood succeeded, while five instances are given in the 1908 document from the Chakrala tract where there was equal succession and four instances are given from Nammal where the whole blood excluded the half-blood. All these instances are admitted and are not in dispute. The later instances, which will be discussed hereafter, are also not in dispute.

It follows that the old *Riwaj-i-am*, which remains a valuable piece of evidence (see *Masta* v. *Pohlo* (1), was in favour of the full-blood excluding the half-blood, but that in the interval between 1878 and 1908 opinion became divided and some Awans on the later occasion, stated that they followed one rule and some that they followed the other. The instances in favour of equal succession were all from the Chakrala tract and instances the opposite way from Nammal. The new *Riwaj-i-am* shows further that some tribes still adhere completely to the old rule of the full blood while other tribes, including the Awans, are about equally divided in opinion between the two rules. While there was thus a general rule in 1878, the rule of the full blood had come into some disfavour by 1908, but it still preponderated on the whole, though Awans were divided as to the custom.

There are two distinct tracts in Mianwali district where Awans reside. One is the high-lying tract of Chakrala-Thammenwali which is at a long distance, and separated from the lowlying tract of Nammal-Dhibba. There is nothing to show that the

(1) 52 P. R. 1896.

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Awans in these two tracts belong to different sub-divisions, but the instances already quoted go to prove that in the Chakrala tract the Awans changed from the full blood to equal succession between 1878 and 1908, while in the Nammal tract the instances are all of full blood succession. This seems to have furnished the *ratio decidendi* in *Ghulam Muhammad Khan* v. *Nur Khan* (1), where it was held that in Chakrala amongst Awans all brothers succeeded equally. It was pointed out there that the rule of succession as between brothers varied according to the Customary Law of the district, and that none of the instances relating to the exclusion of the half-blood came from Chakrala itself. The old *Riwaj-i-am* does not seem to have been quoted and there was no question in that case of separation into two groups. By analogous reasoning it seems to follow that the Awans of the Nammal tract have adhered to the old custom which still prevails in full force amongst them. Even though the Awans of the two tracts cannot be said to constitute two different sub-divisions it does not follow that these Awans must necessarily follow the same custom in matters of succession like the present. Custom does vary from locality to locality. The Awans of the Nammal tract are obviously more conservative than members of their tribe living in the other tract and have continued to follow the old customary rule, which is also the rule of succession according to their personal law (Muhammadan).

It remains to examine the other instances proved. In favour of the full blood I have already noted the instance from Chakrala given in the 1878 *Riwaj-i-am*, and the four instances from Nammal (one of them is

(1) 65 P. R. 1917.

in fact an instance from the neighbouring village of Dhibba) given in the 1908 document. The sixth instance is a judicial one—*Muhammad* v. *Tara and others* (Civil Appeal No. 286 of 1898). It was held by the Chief Court in that case, which came from Nammal, that half-brothers had not succeeded in proving that they succeeded along with full brothers and that the *Riwaj-i-am* was against their contention. The fact that this case went to the Chief Court was not apparently brought to the notice of the learned Judges who decided *Sher Khan* v. *Muhammad Khan* (1).

The seventh instance of full blood succession comes after 1908 and is a case from Dhibba (adjoining Nammal). In 1910 on the marriage of the widow of Sultan his four full brothers, Rahman, Khan Zaman, Jehan and Muhammad Zaman, excluded three half-brothers Bega, Fajra and Noor Nai.

Again (8th instance) in Nammal, in 1920, on the death of the widow of Muzaffar his full brother, Allah Yar, excluded the half-brother, Sher.

Lastly (9th instance), in 1923, in Nammal, on the death of Ghulam Muhammad, his full brother, Muhammad Khan, excluded two half-brothers, Ahmad and Khera.

The last two instances are not without value, though there may yet be time to dispute them, as they clearly show that in Nammal up to the present day the old rule persists. Of these 9 instances of full blood succession, six come from Nammal, two from the neighbouring village of Dhibba, and one from Chakrala, the solitary instance in the latter place being prior to 1878.

(1) (1923) I. L. R. 5 Lah. 117.

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On the other hand, there are four instances of equal succession in the Chakrala-Thammenwala tract given in the *Riwaj-i-am* of 1908. The fifth instance of equal succession comes from Dhor Yaru Wala village near Mianwali town, removed from the two main Awan tracts. (See Survey map attached to the judgment of the District Judge). This is also given in the 1908 *Riwaj-i-am*. The only other case is that reported as *Sher Khan* v. *Muhammad Khan* (1), and it comes from Nammal. The plaintiff in it set up a special family custom and failed to prove it, that fact being emphasised frequently in the judgment. It is impossible to say what the decision in that suit would have been, had the case set up been that the Awans of Nammal had continued to follow the old custom given in the first *Riwaj-i-am*, as that document was not before the Court in that suit. Further, it was held that there was no evidence of separation in that case. It cannot, therefore, be taken as an authority, binding upon me in this case, though even in it the difference as regards this custom between the two tracts was apparent. I have already discussed *Ghulam Muhammad Khan* v. *Nur Khan* (2).

In Nammal, therefore, it has been established beyond doubt [there being no exception to the rule there except the case *Sher Khan* v. *Muhammad Khan* (1) where the plaintiff set up a special family custom and failed to prove it] that the rule of succession amongst Awan brothers is that the full blood excludes the half-blood. This is in accordance with the old *Riwaj-i-am* and with the personal law of the parties. Though, therefore, the Awans of the two tracts were divided in opinion when the *Riwaj-i-am* of 1908 was drawn up, it is clear from the instances quoted that the

(1) (1923) I. L. R. 5 Lah. 117. (2) 65 P. R. 1917.

Nammal villagers adhered to the old customary rule and that the villages of the Chakrala tract favoured the newer rule of equal succession. The fact that these latter villages have changed an old custom cannot affect the villagers of Nammal, who have adhered to it. In my judgment, therefore, the decision of the learned District Judge was correct.

A decision strictly in point is *Khuda Yar* v. *Ahmad* (1), though it was about Jats of the Mianwali tahsil and district. The Jats according to the later *Riwaj-i-am* asserted the rule of equal succession though there were instances of the full blood excluding the half-blood, whereas the Awans did not assert either rule universally but were divided as to what the custom was. Yet in a case similar to the present, it was held that the burden was upon the half-brothers to establish that they succeeded with the full brothers and that they had failed to discharge it. The evidence in the present case goes further and proves that in Nammal amongst Awans the full brother excludes the half-brother, this being the invariable rule, followed from ancient times, though amongst the Awans of the separated Chakrala tract a new custom appears to have arisen, as held in *Ghulam Muhammad Khan* v. *Nur Khan* (2).

For these reasons I dismiss this appeal with costs.

*A. N. C.*

*Appeal dismissed*

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(1) 33 P. R. 1919. (2) 65 P. R 1917.