APPELLATE CIVIL.

Before Mr. Justice Tek Chand and Mr. Justice Bhide.

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Dec. 4.

BHAG SINGH AND OTHERS (DEFENDANTS) Appellants

versus

JAI SINGH AND ANOTHER (PLAINTIFFS) Respondents.

Civil Appeal No. 2532 of 1923.

Custom—Succession—ancestral property—Siddu Barar Jats—*village Gulabewala*, tahsil *Muktsar*, *district Ferozepore*—chundawand *or* pagwand—Riwaj-i-am *in favour of* chundawand—*Admission by plaintiffs in favour of* pagwand—onus probandi.

Held, that an entry in the *Riwaj-i-am*, even in favour of a special custom like *chundawand*, is an important piece of evidence in support of it and is sufficient to shift the *onus* to the party challenging it.

Beg v. *Allah Ditta* (1), and *Labh Singh* v. *Mst. Mango* (2), followed.

But, the burden of proof on the party challenging the entry in the *Riwaj-i-am* would be comparatively light in view of the General custom in the Province being opposed to the *chundawand* custom.

Held also, that certain admissions made by plaintiffs in favour of the *pagwand* custom were sufficient to shift the burden of proof on to them and that they had failed to rebut the strong presumption raised against them by their own admissions and conduct.

Chandra Kunwar v. *Chaudhuri Narpat Singh* (3), referred to.

Held, on the evidence that it had not been established that the parties, who were *Siddu Barar Jats* of village Gulabewala, *tahsil* Muktsar, district Ferozepore, were governed by the *chundawand* and not by the *pagwand* custom.

Second appeal from the decree of Khan Sahib Mir *Ibad Ullah, Additional District Judge, Ferozepore,*

(1) 45 P. R. 1917 (P. C.). (2) (1927) I. L. R. 8 Lah. 281.
(3) (1907) I. L. R. 29 All. 184 (P. C.).

dated the 2nd July 1923, reversing that of Lala *Kundan Lal, Subordinate Judge, 1st class, Ferozepore, dated the 8th December, 1922, and decreeing the plaintiffs' suit.*

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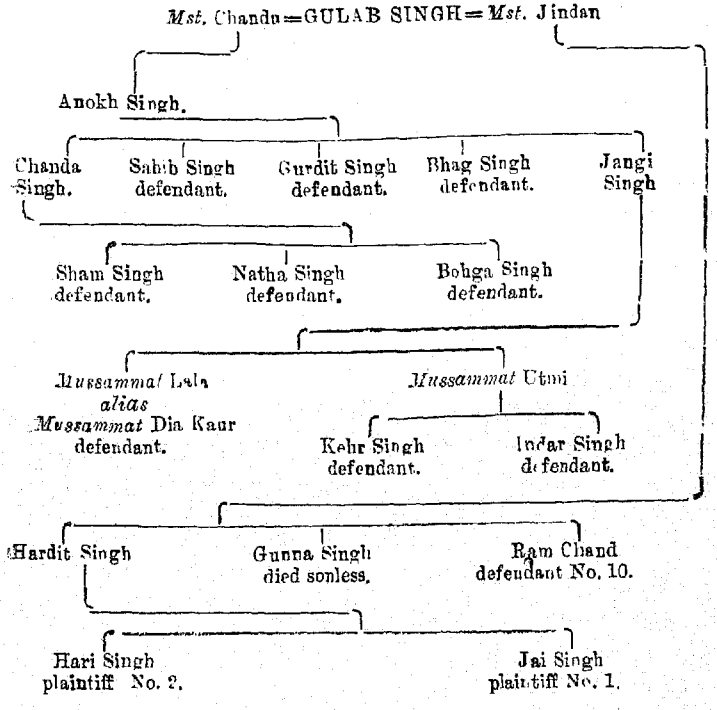
MUHAMMAD SHAFI and ABDUL RASHID, for Appellants.

MOOL CHAND and JAGAN NATH BHANDARI, for Respondents.

JUDGMENT.

BHIDE J.—The pedigree-table of the parties concerned in this case is as follows :— BHIDE J.



The parties are *Siddu Barar Jats* of the village Gulabewala, in the Muktsar *Tahsil* of the Ferozepore District.

Gulab Singh, the common ancestor of the parties, had two wives. The plaintiffs are his descendants

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from one of them, while the defendants are his descendants from the other. The dispute relates to the land of Gunna Singh, who died in 1918, without leaving any widow or issue. The land was mutated in favour of the parties, according to the *pagwand* rule of succession in spite of the plaintiffs' contention that the parties were governed by the *chundawand* rule. The plaintiffs then instituted the present suit on the 12th of May, 1921, on the allegation that they are entitled to the whole of the land in dispute according to the latter rule. The trial Court dismissed the suit, holding that the parties were governed by the *pagwand* rule as contended by the defendants. The lower Appellate Court, however, came to a contrary conclusion and decreed the plaintiffs' claim. The defendants have now come up to this Court in second appeal on the basis of a certificate granted by the District Judge under section 41 (3) of the Punjab Courts Act on the question of custom involved in this case, *viz.*, whether the parties to this case follow the *pagwand* or the *chundawand* rule of inheritance.

Before proceeding to discuss the points raised in appeal it will be convenient to state at the outset the manner in which the property left by the common ancestor of the parties, namely Gulab Singh was inherited by his sons. On Gulab Singh's death about the year 1898 there was a dispute between his descendants as regards succession to his property. Anokh Singh, the ancestor of the present defendants, who was the only son of *Mussammat* Chandu, one of the wives of Gulab Singh, then claimed that the parties were governed by the *chundawand* custom, while his descendants from the other wife claimed that the parties were governed by the *pagwand* custom. Eventually

they came to a settlement. Anokh Singh was given one-third share in consideration of the fact that he was a *zaildar* and had to spend money on entertaining guests, etc., while the other descendants were given the remaining two-thirds share. It will thus appear that the original distribution was not in conformity either with the *chundawand* or the *pagwand* rule. The above compromise, which was arrived at in 1899, was apparently not contested by anyone at the time. Four years after the death of Anokh Singh, his sons Gurdit Singh, etc., instituted a suit against Gunna Singh, etc., for possession of 830 *kanals* 15 $\frac{7}{12}$ *marlas* of land claiming that the parties were governed by the *chundawand* custom and that Anokh Singh had no right to accept one-third share instead of the half share to which he would have been entitled according to the *chundawand* custom (*vide* pages 32-33 of the printed paper book containing the evidence, hereafter called Paper Book B). This suit was dismissed on the ground that the compromise effected by Anokh Singh was binding on his descendants. No finding on the question of custom was necessary for this decision but it was incidentally remarked in the course of the judgments of the trial Court as well as the appellate Court that the parties were governed by the *chundawand* custom. In *Ghulam Muhammad* v. *Muhammad Bakhsh* (1), which is the leading case on the subject of *chundawand* and *pagwand* customs and the principles laid down in which were recently approved by their Lordships of the Privy Council in *Nabi Bakhsh* v. *Ahmad Khan* (2), it was held that there is a presumption as to exclusion or non-exclusion of 'half-blood' by 'whole-blood,' according as the pro-

(1) 4 P. R 1891 (F.B.). (2) (1924) I. L. R. 5 Lah. 278 (P. C.).

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perty of the common ancestor was originally distributed according to the *chundawand* or *pagwand* rule. In the present instance, the original distribution was not in conformity with either rule and hence the above presumption does not, strictly speaking, arise. The learned counsel for the respondents urged that even apart from the custom of *chundawand*, a family may become divided into distinct groups constituting separate entities for the purposes of inheritance as held in *Nabi Bakhsh* v. *Ahmad Khan* (1) and that in the present instance this was the result of the distribution of Gulab Singh's property amongst his sons according to the compromise arrived at during the course of the mutation proceedings. But this plea was never raised in the Courts below and involving as it does questions of fact, it cannot be allowed to be raised for the first time in second appeal. The case must, therefore, be decided solely with reference to the question of custom on which a certificate has been granted by the learned District Judge.

The learned District Judge in decreeing the plaintiffs' suit has relied chiefly on the *Riwaj-i-am* of the district and certain instances supported by judicial decisions. Sir Muhammad Shafi, who appeared for the defendants-appellants, pointed out at the outset that the general custom in this province is *pagwand* and that even in places where the *chundawand* custom prevailed that custom is rapidly giving way to the *pagwand* custom. In particular, he has drawn attention to the fact that, while at the time of the Settlement of 1871-72, the *chundawand* custom was followed in 23 villages of the Muktsar *Tahsil*; that number was reduced to only four (*viz.*, Udekaran,

(1) (1924) I. L. R. 5 Lah. 278 (P. C.).

Bhalla, Miana and Gulabewala) by the time of the Settlement of 1914. In view of these facts and the absence of any instances in the *Riwaj-i-am* from the village Gulabewala, the learned counsel has urged that the entry in the *Riwaj-i-am* in support of the existence of the *chundawand* custom in that village is of little or no value. It has been, however, held by their Lordships of the Privy Council in *Beg* v. *Allah Ditta* (1), that an entry in the *Riwaj-i-am*, even though it may be unsupported by instances, is a strong piece of evidence in support of the custom recited therein and shifts the burden of proof to the party challenging its correctness. There were certain decisions of the Punjab Chief Court and this Court in which the above rule was construed as limited to cases where the particular custom recited in the *Riwaj-i-am* entry was in conformity with the general custom of the Province. But as has been recently pointed out by a Division Bench in *Labh Singh* v. *Mst. Mango* (2), the Privy Council decision does not really warrant the above restriction placed on the rule enunciated therein. The correct view appears to be that an entry in the *Riwaj-i-am*, even in favour of a special custom, is an important piece of evidence in support of it and is sufficient to shift the *onus* to the party challenging it. The utmost that can be reasonably said in such a case would be that the burden of proof on the party challenging the entry in the *Riwaj-i-am* would be comparatively light in view of the general custom in the Province. It may be further pointed out in this connection that in the present instance it appears from the answer to

(1) 45 P. R. 1917 (P. C.). (2) (1927) I. L. R. 8 Lah. 281.

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Question 36 in the *Riwaj-i-am* of the Ferozepore District prepared in 1914 that *Siddu Barars* from the villages Udekaran, Bhalliana, Thandewala and Gulabewala actually appeared and made a statement in support of the *chundawand* custom. This statement seems remarkable in view of the fact that a large number of other villages, which previously followed the *chundawand* custom had abandoned it in favour of *pagwand* and the entry in the *Riwaj-i-am* must, therefore, I think, be considered to be an important piece of evidence in support of the custom.

We must, therefore, start with the position that in 1914 at any rate the *chundawand* custom prevailed in the village Gulabewala. This raises an initial presumption in favour of the plaintiffs. The main point for decision in the case is whether there is evidence on the record to rebut this presumption and to prove that this custom has since undergone a change. The learned counsel for the appellants has rightly urged that the instances of *chundawand* custom prior to 1914 or from villages which were found to have abandoned the *chundawand* custom by that year are of no assistance in deciding the above question. In view of the fact that *chundawand* custom has been abandoned in many villages, old instances are also of not much value as pointed out in *Ahmad* v. *Haji Mahmud* (1). Lastly, instances in which the decision is based (as in *Nabi Bakhsh* v. *Ahmad Khan* (2), not on the existence of the *chundawand* or *pagwand* custom, but on other grounds such as the separation of the family into distinct groups by other causes such as partition of the family property by the father during his lifetime, etc., must also be excluded.

(1) 50 P. R. 1909, p. 168. (2) (1924) I. L. R. 5 Lah. 278.

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Of the judicial decisions relied upon by the learned District Judge none appears to be of much assistance. Two of these decisions relate to the family of the present parties but they were prior to the Settlement of 1914. The third case *Ladhu* v. *Rulia* is of no value, as it related to a village which had given up the *chundawand* custom by the year 1914 and the case was decided long before that Settlement. Two other decisions to which the learned counsels for the respondents has drawn our attention are of the year 1916 and 1919 and are printed at pages 47-50 and pages 57-59 of Paper Book B. These decisions, however, relate to other villages and proceed on the basis of the division of the family into distinct groups by partition of the family property. There appears to be thus no judicial decision on the record subsequent to the year 1914, which could be considered to be of any importance for the decision of the question now under consideration.

There are copies of orders on two mutations subsequent to the year 1914 on the record, both of which favour the *chundawand* custom (*vide* pages 51 and 75-76 of the Paper Book B). The first relates to the village Udekaran and is of the year 1916. It simply follows the *Riwaj-i-am* of the village. In the second case some evidence was recorded and mutation was sanctioned according to the *chundawand* rule, but here again the order was based chiefly on the *Riwaj-i-am*. This mutation is of the year 1922 and may yet be challenged in Courts

The oral evidence produced by the parties is meagre. Plaintiffs produced nine witnesses, while defendants produced only four. Of the latter only two have stated that the parties are governed by the

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pagwand custom, while the plaintiffs' witnesses who are also all *Siddu Jats* depose that they are governed by the *chundawand* custom. The witnesses have, however, not referred to any fresh instances of custom of any importance subsequent to the preparation of the *Riwaj-i-am* of 1914.

The position, therefore, is that there is no definite evidence of any importance, *e.g.*, in the shape of instances regarding the course of custom in the village Gulabewala since the preparation of the *Riwaj-i-am* of 1914. That *Riwaj-i-am* of course, raises a presumption in favour of the plaintiffs, but the fact that the custom has been in a fluid state in the neighbourhood has to be borne in mind. The learned counsel for the appellants has strongly relied upon the evidence on the record regarding certain admissions made by the plaintiffs in connection with the present dispute, and has urged that those prove beyond doubt plaintiffs' own recognition of a change in the custom. This evidence is undoubtedly very important. The admissions relied upon are as follows:—Gunna Singh died in October 1918. The mutation with respect to his land was decided in December 1918 (*vide* Ex. D/10 at pages 104-111 of Paper Book B). At that time plaintiffs apparently asserted their claim to this land according to the *chundawand* custom but the defendants relied upon the *pagwand* custom. It was stated by Bhag Singh *Lambardar* at the time that the cattle and other effects of Gunna Singh had been divided according to the *pagwand* rule. This fact was admitted by Hari Singh, plaintiff, as well as Ram Chand, defendant, and the mutation was then effected according to the *pagwand* rule. Subsequently, the parties appear

to have made a reference to arbitration in connection with the *Rabi* crop of 1919 on the land of Gunna Singh, deceased, as well as other property of the deceased. The *Rabi* crop was partitioned by the arbitrators according to *pagwand* rule and the decision was apparently accepted by the plaintiffs without any protest at the time or further contest (*vide* agreement at page 122 of the Paper Book B, and evidence of Bhup Singh at page 15 of the same Paper Book). The reference to arbitration in connection with the other property apparently fell through; but when Bhag Singh instituted a suit in February 1919 for 1/15th share in certain moveable property of Gunna Singh valued at Rs. 7,500, the plaintiffs plainly admitted in paragraph 3 of their *Jawab-dawa* that Bhag Singh was entitled to 1/15th share in the entire property left by Gunna Singh (*vide* page 120, Paper Book B). This admission cannot be explained except on the assumption that the plaintiffs admitted the *pagwand* custom. It appears that Ram Chand disputed Bhag Singh's claim at first, but he too subsequently admitted it (*vide* Ex. D.-3 at page 123, Paper Book B). On 1st July, 1920, Jai Singh, plaintiff, made an application for the partition of land, admitting defendants to be co-sharers therein, and on the 8th July 1920, he also appeared before the Tahsildar, Muktsar, and made a statement in support of his application. The application, however, appears to have been subsequently dropped when the present suit was instituted on the 5th May 1921.

It would thus appear that for over $2\frac{1}{2}$ years since the death of Gunna Singh, plaintiffs made no attempt whatever to dispute the *pagwand* custom beyond a faint-hearted assertion of a claim to the whole of

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Gunna Singh's land at the time of mutation, and they have quietly accepted the division of Gunna Singh's moveable property in accordance with *pagwand* custom. Plaintiffs have made no attempt whatever to explain their admissions and conduct till the institution of the present suit. It has been pointed out by their Lordships of the Privy Council in *Chandra Kunwar* v. *Chaudhuri Narpat Singh* (1) that the effect of an admission is to shift the burden of proof to the party making the admission. What a party himself admits to be true may reasonably be presumed to be so and until the presumption is rebutted the fact admitted must be taken to be established. In the present instance, the admission and conduct of the plaintiffs seem to be inexplicable except on the hypothesis that they considered *pagwand* to be the true rule of custom governing the parties at present. It is noteworthy in this connection that the compromise which was arrived at in the year 1898, amongst the descendants of the common ancestor Gulab Singh seems to indicate a swinging of the pendulum towards the *pagwand* custom even at that time; for Anokh Singh was given an extra share only in consideration of the fact that as a *zaildar*, he had to incur expenses in connection with entertainment of guests, etc. The entries in the *Riwaj-i-ams* referred to already show beyond any doubt that custom has undergone a rapid change in the neighbourhood. It seems, therefore, very likely that it did so in the village of the parties also, and plaintiffs being conscious of this fact did not think it worth while at first to dispute the *pagwand* custom.

It was for the plaintiffs to rebut the strong presumption raised against them by their own admissions

(1) (1907) I. L. R. 29 All. 184 (P. C.).

and conduct, but they have made no attempt to do so. It was urged on their behalf that the admissions may have been made under a misapprehension and that they do not operate as estoppel. But, as already pointed out, the admissions are sufficient to shift the *onus* to them, and they have not explained why they made the various admissions, why they did not sue for 2½ years and why they have been content to accept the division of the moveable property according to the *pagwand* rule. They have not only not adduced any evidence on these points but have not even ventured to go into the witness-box for the purpose. This omission is very significant and tells very strongly against them (*vide Gurbakhsh Singh* v. *Gurdial Singh*) (1).

It was further urged on behalf of the plaintiffs that the defendants or their ancestors had also admitted *chundawand* custom on certain occasions. But these admissions were made long ago, prior to the *Riwaj-i-am* of 1914. At that time, *chundawand* was apparently the prevailing rule. These admissions cannot therefore help the plaintiffs in this case.

Finally, the fact that Ram Chand, one of the brothers of Gunna Singh, has not joined the plaintiffs in this suit is also significant. It has been stated by one of the plaintiffs' witnesses that Ram Chand has a second wife and he is siding with the defendants in order to favour the children of that wife. But this explanation seems hardly convincing.

In view of the admissions and conduct of the plaintiffs in this case, I would hold that the plaintiffs have failed to establish that they are governed by the *chundawand* custom on which they rely.

(1) (1927) 105 I. C. 220 (P. C.).

I would accordingly accept the appeal and dismiss the plaintiffs' suit with costs.

TEK CHAND J. TEK CHAND J.—I agree.

A. N. C.

Appeal accepted.

APPELLATE CIVIL.

Before Sir Shadi Lal, Chief Justice and Mr. Justice Bhide.

MUSSAMMAT TARA DEVI (PLAINTIFF) Appellant

versus

SARUP NARAIN DECREE-HOLDER } (DEFENDANTS)
KARAM CHAND JUDGMENT-DEBTOR } Respondents.

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Dec. 5.

Civil Appeal No. 1398 of 1925.

Hindu Law—Mother's claim for maintenance or residence—whether a charge on family property—as against a creditor who has lent money for family necessities—Mother and other women—distinction between—if any.

Held, that it is well settled that a Hindu widow's claim for maintenance or residence is *not* a charge on the family property unless it is fixed thereon by a decree, etc., and that it cannot be enforced against a creditor who has lent money for family necessities. There is no distinction between the position of a mother and that of other women under Hindu Law in this respect.

Mulla's Hindu Law, paras. 475, 478-A, Mayne's Hindu Law, paras. 464, 465, and Gour's Hindu Code, sections 83, 89 and 92, referred to.

First appeal from the decree of Sardar *Sewa Singh, Subordinate Judge, 1st class, Amritsar, dated the 4th March 1925, dismissing the plaintiff's suit.*

HUKAM CHAND and L. C. MEHRA, for Appellant.

DURGA DAS and BHAGWAN DAS, for Respondents.