APPELLATE CIVIL.

Before Mr. Justice Tek Chand and Mr. Justice Johnstone.

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June 22.

MUSSAMMAT JHANDI (PLAINTIFF) Appellant

versus

CHIRAGH DIN AND ANOTHER (DEFENDANTS) Respondents.

Civil Appeal No. 2803 of 1923.

Custom—Succession—Ancestral land—Arains *of* Mauza *Sande Kalan, district Lahore—uncle excluded by sister of childless proprietor.*

Held, that by custom among *Arains* of *Mauza* Sande Kalan, district Lahore, a sister excludes a paternal uncle in succession to the ancestral estate left by her childless brother.

Mussammat Zainab v. *Amir* (1), and *Riwaj-i-am*, Lahore District 1911-14, relied upon.

Chiragh Din v. *Mamman* (2), distinguished.

Mussammat Imam Bibi v. *Mst. Fazal Bibi* (3), *Mussammat Bhagan* v. *Mst. Taban* (4), and *Riwaj-i-am*, Lahore District 1868 and 1891-94, referred to.

First appeal from the decree of Bawa *Kanshi Ram, Subordinate Judge, 1st class, Lahore, dated the 6th November 1923, dismissing the plaintiff's suit.*

GHULAM MOHI-UD-DIN and MUHAMMAD HUSSAIN, for Appellant.

TIRATH RAM and GOPAL CHAND, for Respondents.

JUDGMENT.

TEK CHAND J. TEK CHAND J.—The dispute in this case relates to the property of one Mehraj Din, an *Arain* of the *Nain got*, resident of *Mauza* Sande Kalan, who died childless and wifeless on the 1st of June 1904,

(1) 174 P. R. 1889.
(2) 28 P. R. 1893.
(3) 180 P. R. 1888.
(4) 29 P. L. R. 1902.

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leaving him surviving an infant sister, *Mussammat* Jhandi, aged one year, and an uncle Chiragh Din, defendant No. 1. Before the revenue authorities rival claims to his estate were put forward on behalf of Chiragh Din and *Mussammat* Jhandi, but the mutation was sanctioned in favour of the former and since then he has been in possession. On the 18th of May 1921 *Mussammat* Jhandi (who was still a minor) brought this suit through her maternal grandfather Shahab-ud-Din as next friend for recovery of Mehraj Din's property and other cognate reliefs, alleging that according to the custom prevailing among the parties she was entitled to succeed to the estate of her deceased brother to the exclusion of his uncle Chiragh Din.

Chiragh Din denied that by custom, sisters excluded uncles, and also pleaded that he had planted a garden at a considerable cost and rebuilt a house, and that in the event of the plaintiff's suit being decreed he was entitled to compensation for these improvements. Several issues were framed, the first of which is the only one material for our present purposes. This issue runs as follows:—

"Is plaintiff entitled by custom to succeed to her brother Mehraj Din in preference to her uncle Chiragh Din, defendant? O. P. on plaintiff.

"Or the uncle excludes the sisters? O. P. on defendant."

The Subordinate Judge (*Pandit* Omkar Nath, *Zutshi*) who framed the issues was transferred after he had recorded a part of the evidence and the case was decided by his successor *Lala* Kanshi Ram. He held that the burden of proving the custom set up by the plaintiff was on her and as she had failed

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to discharge it, he dismissed the suit without deciding the other points arising in the suit. She has appealed and we have examined the record carefully and heard both counsel at length.

It may be stated at the very outset that the learned Subordinate Judge, who decided the case was in error in supposing that on the issue as framed the *onus* lay entirely on the plaintiff. The form of the issue leaves no doubt that it was intended to keep the *onus* open and to call upon both parties to prove their respective contentions. Neither party seems to have raised any objection at the time, probably owing to the fact that the entries in the *Riwaj-i-am* of 1891-94 and that of 1911-14 did not agree with regard to the rights of a sister to succeed to the estate of her childless brother. In the *Riwaj-i-am* prepared by Mr. Bolster in the current settlement (1911-14) it is stated in answer to question 71 that the rights of sisters are similar to those of daughters as defined in answer to question No. 61. This answer is supported by two instances, both of *Arains*, in one of which the sister is recorded as having been preferred to her male cousin and in the other she is said to have excluded collaterals in inheritance of ancestral property. In answer to question No. 61 it is stated that among *Arains* in the proximity of Lahore (villages of Harbanspura, Salamatpura, Mahmud Buti, Kotli Abdulrahman, Fateh Garh, Baghbanpura, Begampura, Mian Mir, Ganj, Tajpura, Dogaich, Shadipur, Babu Sabu, Bhadru, Kot Kamboh, Jhugian Nanga, Saidpur and Kot Kanjri) daughters of a sonless proprietor exclude his agnates. In the Appendix to this *Riwaj-i-am* at pages xxviii to xxx, and pages xl to xli numerous instances, supported by references to mutations, are mentioned in which daughters and

sisters had succeeded to the exclusion of collaterals amongst *Arains* in various parts of the Lahore and Sharakpur Tahsils. It will thus be seen that the entries in this *Riwaj-i-am* are very much in favour of the custom set up by the plaintiff.

In the *Riwaj-i-am* of 1891-94 it is stated (page 10) that among *Rajputs*, *Dogars* and *Arains* a daughter or sister succeeds to the property "if there is no male collateral nearer related than in the fifth generation." No instances are given in support of this entry. In the preface it is stated by the compiler, Mr. G. C. Walker, that the information on which the *Riwaj-i-am* was based was "meagre and inadequate."

The *Riwaj-i-am* prepared in 1868 is silent as to the rights of a sister, but it is that among *Arains* a "daughter succeeds to the estate of her sonless father in the presence of collaterals."

It was contended on behalf of the plaintiff-appellant that in view of the entry in the latest and more carefully prepared *Riwaj-i-am* (1911-14) the initial presumption is in favour of the custom set up by her and that the *onus* ought to have been placed upon the defendant-respondent to prove the contrary. On the other hand, the respondent's learned counsel urged that as succession to Mehraj-Din opened out in 1904 the *onus* ought to be regulated according to the entries in the *Riwaj-i-am* of 1891-94, and it lay on the plaintiff to affirmatively establish that by custom she had a right to succeed. After fully considering the arguments of the learned counsel, I am of opinion that in view of the conflict in the *Riwaj-i-ams* the learned Subordinate Judge (*Pandit* Omkar Nath *Zutshi*) followed the proper course in keeping the *onus* open and calling upon both parties to prove

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their respective contentions. I shall, therefore, proceed to examine the evidence led by each party and then to see how the balance turns.

The plaintiff claims that the weight of judicial instances is decidedly in her favour. She relies, first on *Mussammat Zainab* v. *Amir* (1), which was a case among *Ghelan Arains* of the neighbouring village of Babu Sabu, in which the learned Judges of the Chief Court in their first order referred to two cases decided by subordinate Courts in 1856 and 1869 respectively, in both of which sisters had succeeded their brothers in preference to uncles, but with a view to have the matter investigated further, they remanded the case. On remand a very full enquiry into the custom of the *Arains* of the Lahore District appears to have been made by Mr. W. A. Harris, District Judge, whose report, dated the 20th December 1889 (Ex. P. 24) is printed at page 1 of the supplementary paper book. He recorded his finding in favour of the sisters and this finding was accepted by the Chief Court, it being held that by the custom prevailing among the *Arains* of Lahore District "a sister excluded collaterals wholly from inheritance to her childless brother."

The plaintiff has further produced copies of judgments of two cases decided by *Lala* Udai Ram, *Munsif*, in 1910 (Exs. P. 25 and 22), the parties to which were *Arains of Mauzas* Faizpur Khurd and Faizpur Kalan, respectively. In both these cases sisters succeeded to the exclusion of near collaterals. The decision in the second of these cases was affirmed on appeal by the Divisional Judge and a revision to the Chief Court was unsuccessful (Ex. P. 21).

(1) 174 P. R. 1889.

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In another case (Ex. P. 20) the parties to which were *Arains* of *Mauza* Salamatpur, the Chief Court refused to interfere on revision with the decision of the lower appellate Court affirming the trial Court's decree in favour of the sister. All these instances support the plaintiff's case and there are also observations in favour of the sister's right to succeed in *Mussammat Imam Bibi* v. *Mst. Fazal Bibi* (1), and *Mussammat Bhagan* v. *Mst. Taban* (2), though the questions actually decided in those cases were different.

The plaintiff further relies on Ex. P. 23, which is a judgment by Mr. Tapp, *Munsif*, 1st class, Lahore, dated the 5th of April 1904, and in which there are remarks in favour of the sister's right to succeed. But as the property in dispute in that case was non-ancestral, it is not of much value as an instance. As against these not a single judicial instance has been brought to our notice on behalf of the defendant-respondent.

Coming now to mutations, we find that many instances are given in pages xxvii to xli of the Appendix to the *Riwaj-i-am* of 1911-14 showing that daughters and sisters exclude collaterals. The parties to a large number of these mutations were *Arains* ; and of them those from *Mauzas* Nainsukh, Jia Moosa, Muzang, Nawan Kot, Kot Khoja Sâid, Khairpur Khurd, Pukki Thatti, Khairpur Kalan, Nawan Kot, Sande Kalan and Babu Sabu are of particular value. In some of them it is not stated whether any collateral was alive, but in most of them it is specifically recorded that the female heirs succeeded in preference to male collaterals. The respondent's counsel argued that in the list of villages mentioned in answer to question 61 of the *Riwaj-i-am* of 1911-14 the villages

(1) 180 P. R. 1888. (2) 29 P. L. R. 1902.

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Sande Kalan and Nawan Kot are not mentioned, and, therefore, it should be concluded that the custom of these villages is different from that of the village named. But this contention is sufficiently disposed of by the entries in the Appendix, where we find instances of other villages in which the custom is exactly the same. It follows, therefore, that this list is not exhaustive but is merely illustrative of the villages situate in the proximity of Lahore in all of which the custom among *Arains* is more or less similar. This evidence is supplemented by further instances supported by mutation entries in which the sister was successful. See Ex. P. 27 (Sande Kalan), Ex. P. 29 (Bhogiwal), Ex. P. 30 (Sande Kalan), Ex. P. 35 (Kot Khwaja) and Ex. P. 36 (Nawan Kot).

The respondent has produced a number of mutation entries, some of which no doubt show that the estate of a childless *Arain* was taken by the collaterals as against the sisters. But in most of them (*e.g.*, Exs. D. 3, D. 4 and D. 8) the sisters did not appear before the mutating officer and orders were passed *ex-parte*. Some of them like D. 13, are too recent and may yet be contested, while others are irrelevant, as in them the deceased person had left both a brother and a sister and the former excluded the latter.

The oral evidence cited by both parties was not of much value, except in so far as it was supported by the mutations already referred to, and I do not think it necessary to discuss it.

In deciding this issue, it must be borne in mind that among *Arains* generally and particularly among those of the Lahore District, female relations occupy a much more favourable position than among the other agricultural tribes of the central districts of the

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Punjab. In most of the Lahore villages a daughter succeeds in preference to a brother or an uncle to the ancestral property of her sonless father; and the entry in the latest *Riwaj-i-am* is to the effect that in the villages in the proximity of Lahore the rights of the sister and the daughter are the same.

Mr. Tirath Ram for the respondent urges, however, that the custom of the *Arains* of the villages situate in the neighbourhood of the town of Lahore is irrelevant as the parties to this litigation originally belonged to *Mauza* Nainsukh, which is situate across the river Ravi in the Sharakpur Tahsil and where the custom is different. In support of his contention he relies upon certain observations of Plowden J. in *Chiragh Din* v. *Mamman* (1), and on the fact that a part of the property in dispute in this case is situate in *Mauza* Nainsukh. There is, however, no evidence that the ancestors of this family ever lived at *Mauza* Nainsukh and if so, at what time they migrated to Sande Kalan. Further we have not been referred to any instances or other evidence, to the effect that the custom of the *Arains* of *Mauza* Nainsukh is different from that of *Arains* resident in the other *Arain* villages on both sides of the river. On the other hand we find at page xxviii of Mr. Bolster's *Riwaj-i-am* that in *Mauza* Nainsukh itself an *Arain* daughter succeeded in 1898 in preference to a nephew. In my opinion this contention is devoid of force and should be over-ruled.

Mr. Tirath Ram next referred to a remark in the statement of Jamal Din (P. W. 8) *Lambardar* of *Mauza* Sande Kalan, but this remark obviously relates to a case where the deceased had left a brother and a sister and the brother had succeeded to the exclusion

(1) 2 P. R. 1893.

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of the sister. There is no dispute as to the right of a brother to succeed in such circumstances, and this matter has no bearing on the question to be decided in this case.

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After fully considering the evidence on the record I am of opinion that the custom is as recorded in the *Riwaj-i-am* of 1911-14 and it must be held that among *Arains* of *Mauza* Sande Kalan a sister excludes the paternal uncle in succession to the ancestral estate left by her childless brother. The finding of the lower Court to the contrary cannot, therefore, be sustained.

I would accordingly accept the appeal, set aside the decree of the lower Court and remand the case under order XLI, rule 23 for decision of the remaining points. Court-fee on appeal shall be refunded; other costs shall be costs in the cause.

JOHNSTONE J.

JOHNSTONE J.—I concur.

N. F. E.

Appeal accepted.
Case remanded.