APPELLATE CIVIL.

Before Tek Chand and Monroe JJ.

1932

Nov. 24.

ILAHI BAKHSH (DEFENDANT) Appellant

versus

GHULAM NABI (PLAINTIFF) Respondent.

Civil Appeal No. 1092 of 1927.

Custom — Succession — Waraich Jats of Tahsil and District Gujranwala—Self-acquired property—whether daughter or daughter's son succeeds in preference to collaterals—Riwaj-i-am.

Held, that by custom among the *Jats* of Gujranwala District, collaterals of a sonless proprietor have no right to succeed to his self-acquired property in preference to his daughter or pre-deceased daughter's son.

Entries in the *Riwaj-i-am* considered.

Wazira v. *Mst. Maryan* (1), *Miran Bakhsh* v. *Mst. Mehr Bibi* (2), *Gobinda* v. *Nathu* (3), and *Chambeli* v. *Bishna* (4), referred to.

First appeal from the decree of Sheikh *Abdul Aziz, Senior Subordinate Judge, Lyallpur, dated the 11th April, 1927, decreeing the plaintiff's suit.*

SHAMAIR CHAND, MUHAMMAD AMIN (MALAK), and QABUL CHAND, for Appellant.

J. L. KAPUR and M. C. SUD, for Respondent.

TEK CHAND J.

TEK CHAND J.—One Dad, a *Waraich Jat*, of *Mauza* Butala Jhanda Singh in the *Tahsil* and District of Gujranwala, acquired the land in dispute in the Lyallpur District. He died many years ago leaving him surviving a widow *Mussammat* Thandi, and three daughters, *Mussammat* Talia Bibi, *Mussammat* Karam Bibi and *Mussammat* Rabia Bibi. On

(1) 84 P. R. 1917, pp. 332, 333.
(2) 41 P. L. R. 1916, p. 122.
(3) (1924) I. L. R. 5 Lah. 450.
(4) (1924) 78 I. C. 778.

1932

ILAHI BAKHSH v. GHULAM NABI.

TEK CHAND J.

his death, mutation was effected in the name of *Mussammat* Thandi and she remained in possession till her death on the 8th March 1925. The three daughters pre-deceased their mother: two of them had died childless while the third, *Mussammat* Karam Bibi, left a son, Ghulam Nabi, plaintiff. On *Mussammat* Thandi's death, Ghulam Nabi took possession of the land, but Ilahi Bakhsh, brother of Dad, contested his right to succeed to the property. The Revenue authorities favoured the claim of Ilahi Bakhsh and sanctioned mutation in his favour. Ghulam Nabi has accordingly sued in the Civil Court for a declaration that he, as the daughter's son of Dad, is the rightful heir to his self-acquired property, and was in lawful possession of the land.

The defendant resisted the suit on the ground, that according to the custom prevailing among the *Jats* of Gujranwala District, collaterals of a sonless proprietor had a right to succeed to his self-acquired property in preference to his daughter or pre-deceased daughter's son. The learned Senior Subordinate Judge has held that the alleged custom has not been established, and has decreed the suit.

The defendant has appealed to this Court and on his behalf reliance has been placed upon the answer to question 47 of the *Riwaj-i-Am* of the Gujranwala District, published in 1914. This Question and the Answer were considered at great length by a Division Bench of the Chief Court in *Wazira* v. *Mst. Maryan* (1), where, after a careful consideration of the various entries in the *Riwaj-i-Am* and the manner in which it was prepared, it was clearly demonstrated that it

(1) 84 P. R. 1917, pp. 332, 333.

1932

ILAHI BAKHSH
v.
GHULAM NABI.

TEK CHAND J.

was an imperfectly compiled document and did not correctly record the customs prevailing in the district in several important particulars. Mr. Shamair Chand has confessed his inability to show that this criticism was unjustified, and all that he has urged before us is that some of the general observations in the judgment in that case, relating to the value to be attached to an entry in a *Riwaj-i-Am*, if it is unsupported by instances, are no longer good law in view of the recent decisions of the Privy Council and this Court. This is no doubt true, but these latter decisions do not in any way affect the authority of that decision, so far as it held that the cryptic Answer, supposed to have been given by villagers, most of whom were illiterate, to an ill-expressed question in which no less than ten different problems had been confused, did not correctly represent the custom relating to succession to the self-acquired property of a sonless proprietor in the Gujranwala District.

But even if the Answer is to be taken as including in its purview the custom on this particular point, I am of opinion that the initial presumption arising in favour of its correctness has been amply rebutted by the evidence on the record. In addition to the case reported as *Wazira* v. *Mst. Maryan* (1), which is a valuable instance in point, we have the judgment of *Khan Bahadur Shaikh* Amir Ali, District Judge, Gujranwala, dated the 23rd April 1919 (Exhibit P. 4), where it was held that according to the custom prevailing among the *Jats* of Gujranwala *Tahsil*, daughters succeeded to the self-acquired property of their father in preference to his near collaterals. Further, the plaintiff has proved the following four

(1) 84 P. R. 1917.

instances of such succession by the oral testimony of the persons concerned :—

(1) Fazal Din, father of Ghulam Nabi (P. W. 3), succeeded to the self-acquired property of his maternal grand-father to the exclusion of near collaterals of the deceased.

(2) *Mussammat* Resham Bibi, wife of Ahmad Khan (P. W. 6), got the property of her father in preference to his collaterals of the third degree.

(3) Dasondhi, father of Rehmat Khan (P. W. 8), inherited the self-acquired land of his maternal grand-father in the presence of his near collaterals.

(4) The sons of Mehar Dad (P. W. 11), succeeded to the land of their maternal grand-father Gehna-Chima and excluded his brother Shah Muhammad.

In addition, we find that a number of *Jat* witnesses have deposed that custom permits succession of daughters or their sons to self-acquired property in preference to near male agnates. Of these, special mention may be made of Rehmat Khan, son of Jalal-ud-Din (P. W. 7), *Lambardar*, who has stated that he will not succeed to the self-acquired property of his sonless brother as the latter has got a daughter alive.

As against this, not a single well-ascertained instance of daughter's exclusion from succession to their father's self-acquisitions has been proved by the defendant-appellant. I hold, therefore, that the appellant has failed to prove this part of his case.

Mr. Shamair Chand, however, urges that, even if daughters succeed to such property, a predeceased daughter's son is not an heir, and he has referred us

1932

ILAHI BAKHSH
v.
GHULAM NABI.

TEK CHAND J.

to Question 50 of the *Riwaj-i-Am* which runs as follows.—

"If there be no daughters, do daughter's sons succeed? If so, is the property equally divided amongst all the sons of several daughters or are the shares proportioned to the number of daughters who leave sons?

Answer 50—"When the daughter has been allowed to succeed, her sons inherit. All the sons of several daughters receive shares according to the number of daughters who leave sons."

Mr. Shamair Chand contends that this Answer means that the daughter's son inherits, only in those cases in which his mother had *actually succeeded* to her father's property. In my opinion this interpretation is not warranted by the language used. It seems to me clear, that what the Answer, as recorded, was intended to convey is that a daughter's son succeeds only in tribes among whom, and to property to which, the right of the daughter to succeed to her father's property is recognised by custom. It does not, and cannot, mean that the right of a daughter's son to succeed to the property of his maternal grand-father is contingent upon his mother having survived her father, and actually inherited his property. It is significant that on this point also not a single instance, oral or documentary, has been cited in which a predeceased daughter's son had been excluded by collaterals in succession to self-acquired property. In this connection, it might be of interest to refer to *Miran Bakhsh* v. *Mst. Mehr Bibi* (1), *Gobinda* v. *Nathu* (2) and *Chambeli* v. *Bishna* (3), where the same question

(1) 41 P. L. R. 1916, p. 122. (2) (1924) I. L. R. 5 Lah. 450.
(3) (1924) 78 I. C. 778.

1932

ILAHI BAKHSH
v.
GHULAM NABI.

was raised in cases relating to other districts but was answered in favour of the pre-deceased daughter's son.

In my opinion the plaintiff's suit has been rightly decreed and I would dismiss the appeal with costs.

TEK CHAND J.

MONROE J.—I agree.

MONROE J.

A. N. C.

Appeal dismissed.

APPELLATE CIVIL.

Before Bhide J.

1932

Dec. 5.

BIBI VAID KAUR (DECREE-HOLDER) Appellant

versus

BALKISHAN DAS MEHRA (JUDGMENT-DEBTOR) Respondent.

Civil Appeal No. 545 of 1932.

Execution of Decree—maintenance in favour of wife—Decree in declaratory form—executed previously without objection—whether objection that decree is not executable can be entertained in subsequent proceedings—res judicata.

The wife obtained a declaratory decree for maintenance of Rs. 45 *per mensem* against her husband in May 1915. The decree was executed by the wife several times through the Court without objection, but when in 1929 she again claimed arrears for about 2½ years, the husband for the first time raised the objection that the decree, being declaratory, was not executable.

Held, that the decree having been allowed to be executed in previous proceedings without any objection, the objection that the decree was incapable of execution could not be raised in subsequent proceedings.

Banu Mal v. *Pars Ram* (1), *Ram Kirpal Shukul* v. *Mst. Rup Kuari* (2), *Raja of Ramnad* v. *Velusami Tevar* (3), *Dip*

(1) (1926) 92 I. C. 254. (2) (1883) 11 I. A. 37 (P. C.).
(3) (1921) 33 Cal. L. J. 218 (P. C.).

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