APPELLATE CIVIL.

Before Dalip Singh and Abdul Qadir JJ.

MUSSAMMAT NARAINI (DEFENDANT) Appellant

versus

BHAG SINGH (PLAINTIFF) AND ANOTHER (DEFENDANT) Respondents.

1934

Jan. 10.

Civil Appeal No. 266 of 1928.

Custom—Succession—Self-acquired property—Kambohs—Tahsil *Nakodar—District Jullundur—Daughters or Collaterals of third degree*—Riwaj-i-am.

Held, that the defendants (the daughters) had failed to prove that by custom among *Kambohs* of Nakodar *Tahsil*, Jullundur district, daughters exclude collaterals of the third degree in regard to the self-acquired property of their father, contrary to the entries in the *Riwaj-i-am* of the Jullundur district.

First appeal from the decree of Lala *Hardyal, Senior Subordinate Judge, Lyallpur, dated the 13th December, 1927, decreeing plaintiff's suit.*

NAND LAL and TUFAIL MOHAMMAD MALIK, for Appellant.

G. R. KHANNA and AJIT RAM, for (Plaintiff) Respondent.

DALIP SINGH J.

DALIP SINGH J.—One Gehna was the *abadkar* of the land in suit. He was succeeded by his son Nihal Singh who acquired the proprietary rights. Nihal Singh died in 1917 sonless and was succeeded by his widow *Mussammat* Attri, defendant No. 1 *Mussammat* Attri made a gift of the land in dispute to defendant No. 2 *Mussammat* Naraini and the mutation was sanctioned by the Collector. The plaintiff Bhag Singh is a collateral of the third degree. The parties are *Kambohs* whose original home was in *tahsil* Nakodar, district Jullundur, and the plaintiff's claim is that he excludes the daughter of the last male holder

1934

MUSSAMMAT NARAINI v. BHAG SINGH.

DALIP SINGH J.

Nihal Singh even to self-acquired property because this is a special custom of the tribe to which he belongs. The *Riwaj-i-am* of the district of Jullundur, the original home of the parties, is clearly in his favour and shows that daughters would be excluded by third degree collaterals even to the self-acquired property of their father. The *onus* therefore rested on the defendant to show that the *Riwaj-i-am* was an incorrect statement of the custom. Now, no doubt in the case of women's rights slight evidence might be sufficient to shift the *onus*; but in this case not even the slightest evidence is really forthcoming. So far as the oral evidence is concerned, thirty-eight witnesses appeared for the defendants who stated that among *Kambohs* of Nakodar daughters excluded collaterals with respect to self-acquired property, but not one of them gives any instance supporting his statement and some of them were compelled to admit instances to the contrary. So far as the oral evidence of the plaintiff was concerned, thirty-two witnesses were produced by him who similarly stated that the collaterals excluded the daughters. Some of them at any rate gave instances some of which are supported by mutations or decisions in their favour. As remarked by the trial Court, this evidence does not really throw any light on the point and where oral instances are unsupported by any documentary evidence, it is difficult to place any reliance on them.

Coming now to the documentary evidence, the following documents have been referred to on behalf of the defendant appellant:—

Exh. D. 6 at page 86 is a case where the right of the daughters was upheld as against collaterals in a judgment of the Chief Court dated the 29th January,

1934

MUSSAMMAT NARAINI v. BHAG SINGH.

DALIP SINGH J.

1907, but the parties were *Arains* of Nakodar *tahsil*, Jullundur district, and the point was not really contested before the Chief Court.

D. W. 17/1 is a mutation which is printed at page 88. It is the case of a gift by a father to his daughter but there is nothing to show that any collaterals were present who could have objected and it is not a case of succession. The parties no doubt are *Kambohs*.

Exh. D. 8 is at page 90. It is a case of *Arains* and is a negative decision. The collaterals were unable to prove that they excluded daughters, the *onus* having been cast on them.

Exh. D. 7 is at page 93 of the paper book. It is a case of *Arains*. The point was conceded in the trial Court and the learned Additional District Judge declined to allow it to be raised for the first time in appeal.

Exh. D. 3 is printed at page 97. It is a case of *Kambohs* but the *onus* was first put upon the collaterals and it was held that the collaterals had failed to discharge the *onus*. A negative decision of this kind is generally of very little value.

Exh. D. 2 is the same case in appeal and the decision again was based on the inability of the collaterals to discharge the *onus* which was put on them.

Exh. D. 4 is the same case in second appeal and the High Court merely dismissed the appeal on the ground that it was a question of custom and there was no certificate.

Exh. D. 5 is printed at page 122 and was relied on by the learned counsel who evidently was unaware that the order sanctioning the mutation led to a civil suit, Exh. P. 6 at p. 76, and the mutation was set

aside, the decision being against the daughters. Far from supporting the case of the daughter the instance is really against her.

Exh. D. 9 is printed at page 124. A Division Bench of this Court held that one Pir Bakhsh was not entitled to succeed against the daughters of one Nathu. It is not clear to what tribe the parties belonged and it is stated in the judgment that the Customary Law of the Amritsar district shows that the general trend of opinion was that daughters succeeded to non-ancestral property to the exclusion of agnates. It is not clear what Customary Law was being referred to and the learned counsel was unable to tell us what the learned Judges meant by this reference.

D. W. 19/1 at page 95 is a gift by a *Kamboh* to a daughter. There is nothing to show that any collaterals were in existence and it is a case of gift and not succession. D. W. 19 who produced this document was compelled to admit an instance to the contrary. (*See* page 28 of the printed paper book).

With the exception, therefore, of the case of the *Arains* where the matter may be doubtful, there is not a single instance on this record of *Kambohs* of Nakodar where the daughter has succeeded in the presence of near collaterals even to the self-acquired property of her father.

Against this the plaintiff has produced the following documents :—

Exh. P. 3 at page 48 is a case of succession to one Amar Singh, a *Kamboh*, where in mutation proceedings the daughters were excluded by the collaterals.

Exh. P. 5 at page 72, similarly a gift, was made by one *Mussammat* Dayali. Finally, the mutation

1934

MUSSAMMAT NARAINI v. BHAG SINGH.

DALIP SINGH J.

was rejected by order of the Tahsildar, dated the 18th December, 1926.

Exh. P. 6 is at page 76. It is a case of *Kambohs* of Amritsar decided by the Senior Subordinate Judge of Sheikhupura and therein it was held that the collaterals excluded daughters, various instances being cited in support of the decision. The collaterals in that case were of the fourth degree.

Exh. P. 7 at page 68 is a judgment of the Additional District Judge, Lyallpur, and here again it was held that the collaterals excluded the daughters even to self-acquired property.

Exh. P. 8 at page 67 is the appellate order on the mutation produced as Exh. D. 1 and in it the learned Collector excluded daughters.

Exh. P. 9 at page 63 is a case of ancestral land and need not concern us.

Exh. P. 10 at page 62 is a judgment of the High Court in which it was pointed out that the entries of the *Riwaj-i-am* of Amritsar carried some weight, that the *Riwaj-i-am* was not carelessly or imperfectly compiled and that therefore the collaterals excluded the daughter.

Exh. P. 16 at page 44 is a case of mutation in favour of collaterals in the presence of daughters but there was no dispute.

Exh. P. 17, mutation No. 185, is at page 54. In this the married daughter of one Sundar Singh was excluded by a collateral.

Exh. P. 18, mutation No. 207, is at page 58. In this the unmarried daughter was also excluded by near collaterals.

1934

MUSSAMMAT NARAINI v. BHAG SINGH.

The result is that I would hold in agreement with the trial Court that the defendants on whom the *onus* rested have failed to prove that among *Kambohs* of Nakodar tahsil, Jullundur district, daughters succeed to the self-acquired property of their father in preference to collaterals of the third degree.

I would, therefore, dismiss the appeal with costs.

DALIP SINGH J.

ABDUL QADIR J.—I agree.

ABDUL QADIR J.

A. N. C.

Appeal dismissed.

APPELLATE CIVIL.

Before Jai Lal J.

MUSSAMMAT SHAM DEVI (PLAINTIFF) Appellant

versus

MOHAN LAL AND ANOTHER (DEFENDANTS) Respondents.

1933

Dec. 6.

Civil Appeal No. 1326 of 1932.

Hindu Law—Widow's right to maintenance and residence in family house—Recurring right—Limitation—Residence with husband at time of his death—how far necessary—Previous decree against husband—whether a bar to suit after his death against his heirs.

Held, that a Hindu widow, as such, has a right of residence in the family house and of maintenance out of the family funds and it is a recurring right. The cause of action of the widow in such cases on the death of the husband is distinct from the cause of action she had against her husband during his lifetime, and a previous decree against her husband for maintenance and residence does not operate as a bar to her exercising her right as a widow against his heirs and no question of limitation arises in the case.

Narainrao Ramchandra Pant v. *Rama Bai* (1), followed.

Held also, that it is not the law that in order to entitle a widow to claim a right of residence in the family house, she should have been actually residing with her husband at

(1) (1879) I. L. R. 3 Bom. 415 (P. C.).