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BHAGWAN SINGH v. BALBIR SINGH.

RANGI LAL J.

not be challenged in second appeal. I would, therefore, accept the appeal and dismiss the suit with costs throughout.

MONROE J.—I agree.

P. S.

Appeal accepted.

APPELLATE CIVIL.

Before Tek Chand and Skemp JJ.

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Jan. 16.

MAHI AND ANOTHER (PLAINTIFFS) Appellants

versus

MST. BARKATE (DEFENDANT) Respondent.

Civil Appeal No. 1308 of 1932.

Custom — Succession — Self-acquired property — Kahlon *Jats of Sialkot District — Daughters or Collaterals* — Riwaj-i-am.

Held, that the defendant (daughter) on whom the *onus* rested, had succeeded in proving that among *Kahlon* Jats of the Sialkot District, a daughter is entitled to succeed to self-acquired property of her sonless father in preference to his collaterals.

Budha v. *Mst. Fatima Bibi* (1), *Shahamad* v. *Mst. Muhammad Bibi* (2), *Said* v. *Said Bibi* (3) and other cases, relied upon.

First Appeal from the decree of Lala *Kishan Chand, Subordinate Judge, 1st Class, Lyallpur, dated 19th May, 1932, dismissing the plaintiffs' suit.*

GHULAM MOHY-UD-DIN and SHAUKAT RAI, for Appellants.

ZAFRULLAH KHAN and ASADULLAH KHAN, for Respondent.

TEK CHAND J.—One Faujdar, a *Kahlon Jat* of Sialkot District, was the grantee of two squares of

TEK CHAND J.

(1) (1923) I. L. R. 4 Lah. 99. (2) (1929) I. L. R. 10 Lah. 485.
(3) (1929) I. L. R. 10 Lah. 489.

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land in Chak No.146-R. B., *Tahsil* and District Lyallpur. He fulfilled the conditions of the grant and in due course "occupancy rights" in the land were conferred on him. On Faujdar's death in 1899, the tenancy was mutated in the name of his widow *Mussammat* Begam. *Mussammat* Begam died on the 25th December, 1930, and on her death the plaintiffs, who are Faujdar's brother's sons's sons, took possession of the land. On the 28th January, 1931, the *Naib-Tahsildar* sanctioned the mutation of $\frac{3}{4}$ths of the land in favour of the plaintiffs and $\frac{1}{4}$th in favour of his daughter *Mussammat* Barkate in accordance with an alleged settlement between the parties. On appeal the Collector ordered mutation of the entire land in the name of *Mussammat* Barkate. Thereupon the plaintiffs brought a suit in the Civil Court for a declaration that they were in lawful possession as occupancy tenants of $\frac{3}{4}$ths of the land under the aforesaid family settlement. In the alternative, they prayed that in case the alleged family arrangement be not proved, they be declared to be occupancy tenants of the entire land.

In the plaint it was alleged that *Mussammat* Barkate was not the daughter of Faujdar, but that she was *Mussammat* Begam's daughter from a former husband. They further averred that in the course of mutation proceedings the parties had settled their dispute amicably through the intervention of the *bradari*, whereby $\frac{3}{4}$ths of the land had been given to the plaintiffs and $\frac{1}{4}$th to *Mussammat* Barkate. They also pleaded that according to the custom prevailing in the tribe of the parties, collaterals succeeded to the self-acquired property of a sonless male proprietor to the exclusion of his daughter.

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Mussammat Barkate traversed these allegations and stated that she was the legitimate daughter of Faujdar and that according to custom she had a prior right to succeed to Faujdar's self-acquired property. She denied that any settlement, as alleged by the plaintiffs, had been arrived at in the course of the mutation proceedings. The learned Subordinate Judge found against the plaintiffs on all these points and dismissed their suit.

Before us the first contention raised by counsel is that Faujdar was not the last male-holder of the property, but that he left him surviving a four-year old son, Allah Ditta, who died eighteen months later. It was urged, therefore, that even if the plaintiffs fail on all other points, *Mussammat* Barkate had no right to succeed, as she was the sister, and not the daughter of the last male holder. This, however, is an entirely new case set up for the first time in the course of the arguments before us. It was not mentioned in the plaint or in the memorandum of appeal, and is not supported by any tangible evidence on the record. As stated already, on Faujdar's death in 1899, mutation of the land was effected in favour of his widow *Mussammat* Begam, which could not have been the case if he had left a son. The mutation proceedings in 1899 had continued for six months and though the *lambardar* and several members of the brotherhood are stated to have been present, the record does not contain any mention of the existence of a son of Faujdar. The suggestion is clearly a baseless after-thought and I have no hesitation in rejecting it.

Counsel attacked in a half-hearted manner the lower Court's finding as to *Mussammat* Barkate being the legitimate daughter of Faujdar. We have read the evidence bearing on the point and find that it fully

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supports the conclusion of the learned Subordinate Judge. *Mussammat* Barkate was married to one Jalal on the 26th August, 1911, and in the marriage register she was described as the daughter of Faujdar. There is no reason to suppose that a false statement was made, about 20 years before the present dispute arose. It is significant that in the mutation proceedings, which followed on the death of *Mussammat* Begam, the defendant's status as the daughter of Faujdar was not challenged by the plaintiffs or any one else. Similarly in the document, Exhibit D.W.3/1, which according to the plaintiffs was executed on the 6th of January, 1931, and in which the alleged family settlement is stated to have been recorded, the plaintiffs themselves described her as the daughter of Faujdar. It is further important to note that the plaintiffs have not been able to give the name of *Mussammat* Begam's alleged first husband from whom *Mussammat* Barkate is alleged to have been born.

In the lower Court the plaintiffs, in support of their claim to succeed to the self-acquired property of Faujdar in preference to the defendant, relied on the answer to question No.47 of the *Riwaj-i-am* of Sialkot District compiled by Mr. Boyd in 1916. It is well-settled that the initial presumption must be made in favour of the correctness of this entry, but the lower Court after a careful examination of the evidence on the record and the previous judicial decisions held that the defendant had succeeded in displacing the presumption. Before us Mr. Ghulam Mohy-ud-Din frankly admitted that he was unable to assail this finding. He conceded that there were several instances of daughters excluding collaterals in succession to non-ancestral property of their sonless fathers, while there was not even one instance in support of the Answer as

recorded. This entry in the *Riwaj-i-am* has been examined in several cases by this Court and in every one of them it has been found that it was not in accord with the actually prevailing custom. *Budha* v. *Mussammat Fatima Bibi* (1), *Shahamed* v. *Mohd. Bibi* (2), *Said* v. *Said Bibi* (3), *Khudadad* v. *Rabi Bibi* (4) and *Fateh Din* v. *Mohamad Bibi* (5). The finding on this point in favour of the defendant, therefore, must be maintained.

The last point urged was that after the death of *Mussammat* Begam when mutation proceedings were going on before the *Naib-Tahsildar* the parties came to a settlement whereby the land in dispute was divided between the parties. *Mussammat* Barkate being given $\frac{1}{2}$ square and the plaintiffs $1\frac{1}{2}$ squares. In support of this contention reliance was placed mainly on an unregistered document (Exhibit D.W.3/1) which purports to have been executed by Mahi and Ilahi, plaintiffs, on the 6th of January, 1931. This document, however, is not signed by *Mussammat* Barkate. The oral evidence produced by the plaintiffs is vague and discrepant and was rightly rejected by the lower Court. Some of the witnesses, who claimed to have brought about the settlement, have stated that two agreements were executed, one of which was given by the plaintiffs to *Mussammat* Barkate and the other was given by *Mussammat* Barkate to the plaintiffs. This later document, if it was executed at all, must have been in possession of the plaintiffs, but it was not produced at the trial. Indeed, Mahi, plaintiff, when examined as his own witness, denied that *Mussammat* Barkate had executed any agreement in favour of himself or his brother.

(1) (1923) I. L. R. 4 Lah. 99.
(2) (1929) I. L. R. 10 Lah. 485.
(3) (1929) I. L. R. 10 Lah. 489.
(4) (1930) A. I. R. (Lah.) 724.
(5) (1930) I. L. R. 11 Lah. 415.

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I agree with the lower Court that the plaintiffs have failed to prove the alleged settlement.

The appeal is without force and I would dismiss it with costs.

SKEMP J.—I agree.

A. N. C.

Appeal dismissed.

LETTERS PATENT APPEAL.

Before Addison and Din Mohammad JJ.

1935

Jan. 16.

BISHEN DAS AND ANOTHER (DECREE-HOLDERS) Appellants

versus

TULSI SHAH AND SONS (DECREE-HOLDER), TAFAZAL HUSSAIN SHAH AND OTHERS (JUDGMENT-DEBTORS) } Respondents.

Letters Patent Appeal No. 87 of 1934.

Civil Procedure Code, Act V of 1908, sections 47 (1), 73 : Order passed ostensibly under section 73, but deciding also a matter covered by section 47 (1)—whether appealable—Issue of warrant against one decree-holder to enforce payment of amount due to other decree-holders — whether legal — Practice of Subordinate Courts — consigning execution proceedings to record room and ordering attachment to continue — deprecated.

B. D. in execution of his decree attached certain houses belonging to his judgment-debtors. T. S. obtained a decree against the same judgment-debtors and in execution attached the same properties. Both execution proceedings were consigned to the record room and in both of them orders were passed that the attachment would continue. B. D. applied for sale of the attached property and with the Court's permission purchased the property himself for Rs.11,000. T. S. then applied for rateable distribution of the proceeds of the sale. The Subordinate Judge allowed this request and ordered that B. D. would not get a sale certificate unless and until he paid to T. S. his rateable share, and in a summary