APPELLATE CIVIL.

Before Tek Chand and Coldstream JJ.

1935

June 21.

RANI SUNDAR DEVI AND ANOTHER (DEFENDANTS)
Appellants
versus
TEGH SINGH AND ANOTHER (PLAINTIFFS)
MST. RADHA DEVI (DEFENDANT)
Respondents.

Civil Appeal No. 2155 of 1934.

Custom — Succession — Non-ancestral property — Chandel Rajputs *of Kishangarh*, Tahsil *Naraingarh*, *District Ambala* — *Daughter* — *whether excludes collaterals* — *Nature of daughter's estate* — *Son of a brother's daughter* — *whether has equal rights with daughter's son* — Riwaj-i-am.

Held, that in the absence of a clear statement to the contrary, the answers in the *Riwaj-i-am* should be taken to refer to ancestral property only.

Sham Das v. *Mst. Moolo Bai* (1), *Rahmat Ali Khan* v. *Mst. Sadiq-ul-Nisa* (2), *Abdul Rahman* v. *Mst. Natho* (3), and *Mohammad Alam* v. *Mst. Hafizan* (4), referred to.

Held also, that among *Chandel Rajputs* of *Mauza* Kishangarh in Naraingarh *Tahsil* of the Ambala District, the daughter is a preferential heir to the collaterals, in succession to the non-ancestral property of her sonless father, but she is entitled to a life estate only.

Riwaj-i-ams, Ambala district, referred to and discussed.

But held further, that there is no special custom among the *Chandel Rajputs* of Ambala whereby the son of a brother's daughter has the same right of succession as a daughter's son.

First Appeal from the decree of Lala *Ram Kanwar, Senior Subordinate Judge, Ambala, dated 20th August, 1934, awarding the plaintiffs a declaratory decree against the defendants, except as regards the non-ancestral land in* Mauza *Madanpore.*

(1) (1926) I. L. R. 7 Lah. 124.
(2) (1932) I. L. R. 13 Lah. 404.
(3) (1932) I. L. R. 13 Lah. 458.
(4) (1934) I. L. R. 15 Lah. 791.

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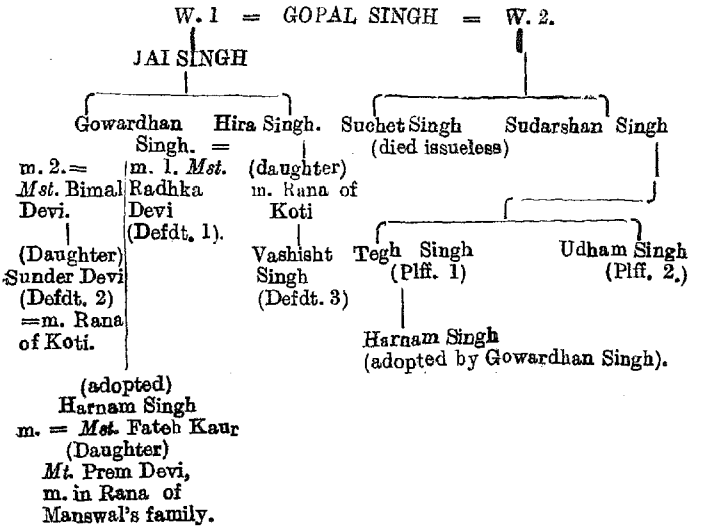
MEHR CHAND MAHAJAN, DUNI CHAND and TEK CHAND, for Appellants.

MAHABIR PARSHAD and QABUL CHAND, for Respondents.

TEK CHAND J.—The property in dispute was at one time owned by *Mian* Gowardhan Singh, a *Chandel Rajput* of *Mauza* Kishangarh in Naraingarh *Tahsil*, Ambala District, to whom the parties are related as follows :—



Gowardhan Singh died in 1912. Some years before his death he had adopted Harnam Singh, son of Tegh Singh, plaintiff No.1, but Harnam Singh predeceased Gowardhan Singh.

In 1901, Gowardhan Singh gifted one-half of 310 *bighas*, 10 *biswas* of land in *Mauza* Banna Madanpore to his wife *Mussammat* Radhka Devi, defendant No.1, and mutation was duly effected in her name. In 1907, he gifted the other half of this land also to her, and since then she has been entered as owner of the whole of this area.

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On Gowardhan Singh's death in 1912, his estate devolved on his sole surviving widow, *Mst.* Radhka Devi, on the usual widow's life-estate.

On the 3rd of March, 1932, *Mussammat* Radhka Devi executed a deed of gift (Ex. P.4) whereby she transferred the following properties to her step-daughter *Shrimati* Sundar Devi (defendant No.2) and *Tikka* Washisht Singh (defendant No.3), who is the daughter's son of Hira Singh, brother of Gowardhan Singh :—

(1) 310 *bighas* and 10 *biswas* of land situate in *Mauza* Banna Madanpore;

(2) 19 *bighas* and 19 *biswas* of land also situate in *Mauza* Banna Madanpore;

(3) 8 *bighas* of land situate in *Mauza* Bharal;

(4) One residential house called 'Qila' situate in *Mauza* Kishengarh;

(5) One residential house outside the 'Qila,' *i.e.* property (4); and

(6) One 'pacca' well with a garden situate in *Mauza* Kishengarh.

It was mentioned in the deed that the donor was the absolute owner of property No. (1) as it had been gifted to her by her husband long before his death, and that the rest of the gifted property had been inherited by her from Gowardhan Singh, that *Mussammat* Sundar Devi was the sole heir of the property of the donor as well as that of Gowardhan Singh, and that the gift was being made to her and Washisht Singh jointly, with *Mussammat* Sundar Devi's consent.

In August, 1933, Tegh Singh and Udham Singh, who are collaterals of Gowardhan Singh in the third

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degree, instituted a suit for a declaration that the aforesaid gift was void as against them and shall not affect their reversionary rights after the death of *Mussammat* Radhka Devi. In the plaint it was alleged that the entire gifted property was ancestral of Gowardhan Singh and the plaintiffs, that on his death it had devolved on *Mussammat* Radhka Devi on the usual widow's life-tenure, that she had no right to gift it, and that the plaintiffs were the next heirs. It was also averred that property No. (4), described as residential *Qila* situate in Banna Madanpore, had been purchased by one Kapuria Mal in execution of a money-decree obtained by him against *Mussammat* Radhka Devi, that subsequently Kapuria Mal had transferred it to Tegh Singh, plaintiff No.1, and that for this reason also defendant No.1 had no right to gift it to defendants Nos.2 and 3.

The learned Subordinate Judge has dismissed the suit in respect of 310 *bighas* and 10 *biswas* of land in *Mauza* Banna Madanpore, holding it to be the absolute property of defendant No.1, but has granted the plaintiffs a decree declaring that the gift in respect of the properties Nos.(2) to (6) shall not affect their reversionary rights after the death of defendant No.1.

From this decree two appeals have been preferred in this Court, (1) C. A. No.2155 of 1934 by the donees, *Mussammat* Sundar Devi and Washisht Singh, urging that the suit should have been dismissed in its entirety, and (2) C. A. No.2297 of 1934 by the plaintiffs praying that the declaration granted by the lower Court should have comprised property No. (1) also.

Two of the points raised at the trial are no longer in dispute. The lower Court has found as a

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fact that the whole of the gifted property was acquired by Jai Singh, father of Gowardhan Singh, and is, therefore, not ancestral *qua* the plaintiffs. This finding is not challenged on behalf of the plaintiffs before us. Similarly, the defendants no longer allege that the parties are governed by Hindu Law. They admit that they are governed by argicultural custom of the *Rajputs* of the Ambala District, though they urge that in one particular matter (to which reference will be made presently) there exists a special custom among *Chandel Rajputs*.

The trial Judge has found that according to the custom prevailing among the *Rajputs* of the Ambala District, the daughter is a preferential heir to the non-ancestral property of her sonless father. The plaintiffs' learned counsel has assailed this finding and has contended that daughters do not succeed to any kind of property, whether ancestral or non-ancestral, and he relies on the entries in the *Riwaj-i-ams* of the district. An extract from the vernacular *Riwaj-i-am* of the Naraingarh *Tahsil* prepared at the settlement of 1887-88 has been placed on the record as Ex. P.5. In the Answer to Question 40 it was stated that "among *Hindu Rajputs* daughters are not considered to be heirs * * * One who meets the deceased even in the 10th degree of relationship shall be considered as heir and owner." In Answer to Question 40 of Kensington's *Customary Law of the Ambala District* published in 1889, different tribes, including *Hindu Rajputs*, are recorded as having stated "that collaterals traced variously for from four to ten generations will exclude the daughter, but the distinctions drawn depend more upon variations in the method of counting generations than on any real difference of custom. The commonly received custom for

all tribes except *Saiyads* and some *Arains* is to exclude the daughter wherever collaterals can be traced up to the great-great-grandfather." In the *Customary Law of the Ambala District*, compiled by Mr. Whitehead at the conclusion of the last settlement and published in 1921, it is stated that the replies to the questions relating to the daughters' succession "were much the same as at the previous settlement." It is contended by the learned counsel for the plaintiffs that the custom, as recorded in the *Riwaj-i-ams* aforesaid, applies to succession to both ancestral and self-acquired property. None of these *Riwaj-i-ams* shows, however, that the persons, who represented the various tribes, were questioned in respect of non-ancestral property. Neither the Questions nor the Answers contain any reference to non-ancestral or self-acquired property of a sonless proprietor and, therefore, the application of the *Riwaj-i-am* must be restricted to ancestral property only. It has been laid down in a long series of rulings of this Court, that in the absence of a clear statement to the contrary the answers in the *Riwaj-i-am* should be taken to refer to ancestral property only. See *inter alia*, *Sham Das* v. *Mst. Moolo Bai* (1), *Rahmat Ali Khan* v. *Mst. Sadiq-ul-Nisa* (2), *Abdul Rahman* v. *Mst. Natho* (3) and *Mohammad Alam* v. *Mst. Hafizan* (4). I agree with the lower Court that the *Riwaj-i-am* of Ambala District does not support the plaintiffs' contention. There is no other evidence on the record, from which the existence of the alleged custom may be inferred. None of the witnesses has been able to cite any instance of the exclusion of daughters from inheritance to non-ancestral property. Mr. Mahabir Parshad stated that in this family, on

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the death of Suchet Singh, his self-acquired property was taken by his brother Sudarshan Singh and not by his daughter *Mussammat* Mansa Devi. But it is admitted by the plaintiffs' own witness, Ram Singh (P.W.9), that Suchet Singh had made a will in favour of his brother. This was, therefore, not a case of succession, and is not in point. I uphold the finding of the lower Court that on the death of *Mussammat* Radhka Devi the self-acquired property of Gowardhan Singh, deceased, will devolve on his daughter, *Mussammat* Sundar Devi.

On this finding it has been contended on behalf of the defendants that the plaintiffs have no *locus standi* to contest the gift. It is urged that the gift to *Mussammat* Sundar Devi is a gift to the next heir, that according to the custom prevailing among the agricultural tribes of the Ambala District, including *Hindu Rajputs*, a daughter, who succeeds to the property of her father, takes an absolute estate, with full power of disposition, and that as Washisht Singh has been joined as a donee with *Mussammat* Sundar Devi's consent, the plaintiffs have no *locus standi* to maintain the suit. In support of this contention reliance is placed on the Answer to Question 42 as recorded in *Kensington's Customary Law of the Ambala District* relating to the nature of the daughter's estate in the property that she inherits from her father. It is recorded there that " the almost universal reply is that as a daughter can only succeed in the rare cases of absence of all collaterals up to a remote degree there is none to interfere with her and she can alienate without restriction." In Whitehead's *Customary Law* in answer to the same question, it is stated that all tribes agree that in the rare cases of daughter inheritance she has an absolute right of disposal."

This entry, however, admittedly applies to ancestral property and pre-supposes that the daughter succeeds only when no near collaterals are alive. Obviously it has no application to non-ancestral property, and is certainly inapplicable to the present case where the plaintiffs, who are related in the third degree, are in existence. It is conceded that not a single case is known in which the daughter, who has succeeded to the property of her father, has exercised an *absolute* power of disposal over inherited property, uncontrolled by her sons or, in their absence, by the collaterals of the deceased. I hold, therefore, that *Mussammat* Sunder Devi, who is the heir to Gowardhan Singh's property after his widow, *Mussammat* Radhka Devi, is entitled to a life-estate only.

The next contention raised on behalf of the defendants is that there is a special custom among the *Chandel Rajputs* of Ambala and the neighbouring district of Hoshiarpur, whereby the son of a brother's daughter has the same right of succession as a daughter's son, and it is urged that according to this custom Washisht Singh is a nearer heir to Gowardhan Singh than the plaintiffs. It is conceded that a niece's son is not an heir under Hindu Law or under the custom generally prevailing among the agricultural tribes of the Punjab. It is also conceded that no instance has been proved, on the record of the succession of a niece's son among *Chandel Rajputs*. The defendants rely simply on the oral testimony of three witnesses, Phul Singh (D.W.1), Jagdeo Singh (D.W. 3) and Lachhman Singh (D.W.6). This evidence, however, is of the vaguest possible kind and is wholly insufficient to prove the custom, set up by the defendants. It is admitted that in the absence of proof of the alleged custom the plaintiffs are nearer heirs of

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Gowardhan Singh than Washisht Singh. It follows, therefore, that the gift to Washisht Singh is invalid as against the plaintiffs and cannot affect their reversionary rights after the death of *Mussammat* Radhka Devi and the next heir *Mussammat* Sundar Devi and *her* issue, if any.

The only other point raised in the defendants' appeal relates to the declaration granted by the lower Court in regard to the so-called *Qila* (property No.4). It was contended that plaintiff No.1 claimed to be the owner of this *Qila* by means of a purchase from Kapuria Mal, but as neither Kapuria Mal, nor plaintiff No.1 ever took possession of the *Qila*, *Mussammat* Radhka Devi's possession must be taken to be adverse to them and, therefore, the claim as laid should have been dismissed. The *onus* of proving adverse possession was clearly on the defendants and they have led no evidence on this point. Indeed, the date of the auction is not apparent from the record and it cannot be said that twelve years have elapsed since then. Moreover, assuming that the auction-purchaser, or plaintiff No.1 as his assignee, had lost their right of ownership by their failure to take possession within the statutory period, *Mussammat* Radhka Devi must be taken to have continued in possession as the heir of Gowardhan Singh. In that capacity she held only a life-estate in the property, possessing a limited power of disposition over it. In this view of the case, the gift of the *Qila* is on the same footing as that of the other properties inherited by the donor from her husband, and the plaintiffs are entitled to the same declaration in respect of it as properties (2), (3), (5) and (6).

In the plaintiffs' appeal the sole point is whether property (No. 1), *i.e.* 310 *bighas* and 10 *biswas* of land

in *Mauza* Banna Madanpore, should have been included in the declaration granted by the lower Court to the plaintiffs. As stated already, this property was not a part of Gowardhan Singh's estate at the time of his death. It had been gifted by him to *Mussammat* Radhka Devi in his life-time and had been entered in the revenue papers as her property for many years. In the deed of gift in dispute (Ex.P.4) this land had been described as the "absolute" property of the donor. The plaintiffs were fully cognizant of this fact, but they did not challenge its correctness in the plaint, and merely stated that, like the other gifted properties, this land also had been 'inherited' by the donor from her husband. In the written statement the defendants explicitly denied the allegation in the plaint and repeated the plea that *Mussammat* Radhka Devi was the absolute owner, but the plaintiffs did not traverse it in their replication. The learned Subordinate Judge accordingly framed an issue (No.4) as to whether the land had been "inherited by defendant No.1 from her husband," and the parties went to trial on it. Finding, at the time of arguments in the lower Court, that the issue must go against them, the plaintiffs' counsel applied for an amendment of the plaint, but the learned Judge rejected the application, as amendment at that stage would have necessitated a re-trial on the merits. I have no doubt that this order was correct. I hold that the plaintiffs' suit was rightly dismissed, so far as this property is concerned.

The result, therefore, is that the gift is valid in respect of property No. (1) and cannot be challenged by the plaintiff, and with regard to the other properties, the gift will hold good for the lives of *Mussammat* Radhka Devi and *Mussammat* Sundar Devi and her issue (if any), after which these properties shall revert to the agnatic heirs of Gowardhan Singh.

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For the foregoing reasons, I would dismiss the plaintiffs' appeal (No.2297 of 1934); and accept the defendants' appeal (No.2155 of 1934) to this extent that in lieu of the decree passed by the lower Court I would grant the plaintiffs a declaration that the gift in dispute, in so far as it relates to the properties other than 310 *bighas* and 10 *biswas* in *Mauza* Banna Madanpore, shall not affect the plaintiffs' reversionary rights after the death of *Mussammat* Radhka Devi and that of *Mussammat* Sundar Devi or her issue (if any). Having regard to all the circumstances, I would leave the parties to bear their own costs in this Court.

COLDSTREAM J.

COLDSTREAM J.—I agree.

P. S.

Appeal accepted.

APPELLATE CIVIL.

Before Jai Lal and Sale JJ.

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July 5.

SHRIMATI SHAKUNTLA DEVI (PLAINTIFF) Appellant

versus

KAUSHALYA DEVI AND OTHERS (DEFENDANTS) Respondents.

Civil Appeal No. 1804 of 1934.

Hindu Law of Inheritance (Amendment) Act, II of 1929, section 2: whether applicable to a claim by a sister to succeed to the estate of her brother — who died before the Act came into force, and whose estate is in possession of a widow — The meaning of the word 'intestate' in the preamble of the Act and 'the estate of a widow' under the law of Mitakshara, *explained.*

Held, that the Hindu Law of Inheritance (Amendment) Act, II of 1929, applies to the estates of those *Hindu* males, governed by the law of Mitakshara, who have died intestate before the Act came into force, if their estate vested in a female holder who was alive on the 21st February, 1929 (the date on which the Act came into force).