

APPELLATE CIVIL.

Before Tek Chand and Skemp JJ.

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NOT RAM AND OTHERS (DEFENDANTS) Appellants

March 7.

versus

MST. KISHAN DEVI (PLAINTIFF) Respondent.

Civil Appeal No. 1776 of 1929.

Custom — Succession — Non-ancestral property — Gaur Brahmins of Kharkhauda — District Rohtak — Daughter or Collaterals of 8th degree — Riway-i-Am.

Held. that among *Gaur Brahmins* of Kharkhauda, District Rohtak, a daughter has a preferential right of succession to the non-ancestral property of her sonless father as against his collaterals in the 8th degree.

Second Appeal from the decree of R. S. Lala Shibbu Mal, District Judge, Karnal, dated 22nd April, 1929, affirming that of Mirza Abdul Rab, Subordinate Judge, 1st Class, Rohtak, dated 11th December, 1928, granting the plaintiff, Mussammat Kishan Devi alone, a decree for possession of the property in dispute.

ANANT RAM KHOSLA, for Appellants.

SHAMAIR CHAND and QABUL CHAND, for Respondent.

TEK CHAND J.

TEK CHAND J.—The dispute in this case relates to succession to the property of one Ramji Lal, a *Gaur Brahmin* of Kharkhauda, District Rohtak. Ramji Lal died on the 23rd of February, 1925. He had a son, Harphul, who had pre-deceased him. On Ramji Lal's death, mutation was sanctioned in favour of one Basdeo who claimed to be a son of Harphul. The present defendants, who are collaterals of Ramji Lal in the 8th degree, instituted a suit for a declaration that Basdeo was not the son of Harphul and had no right to succeed to Ramji Lal's property. This suit was decreed on the 25th of May, 1926, whereupon the -

revenue authorities cancelled the previous mutation in favour of Basdeo and entered the land in the names of the present defendants. In May, 1927, *Mussammât* Kishen Devi and certain other persons, with whom we are no longer concerned, instituted the present suit against the defendants for possession of Ramji Lal's land. *Mussammât* Kishen Devi is admittedly the daughter of Ramji Lal. In the plaint she alleged that the land in dispute was not ancestral of Ramji Lal and the defendants and that in any case, as remote collaterals related in the 8th degree, they had no right to succeed in her presence. *Mussammât* Kishen Devi based her claim both on Hindu Law and Custom.

The defendants pleaded that the land was ancestral *qua* them. They denied that the parties were governed by Hindu Law and alleged that according to the custom prevailing in the tribe, a daughter did not exclude collaterals, howsoever remote, in succession to immovable property of a sonless proprietor, whether ancestral or not.

The learned trial Judge found that the land had not been proved to be ancestral, that the parties were governed by custom and not Hindu Law, and that the plaintiff, on whom the *onus* lay, had succeeded in proving that she was a preferential heir to the non-ancestral property of her father. On these findings he decreed the suit. The defendants' appeal has been dismissed by the District Judge. He has, however, granted a certificate under section 41 of the Punjab Courts Act for a second appeal to this Court on the question of custom involved.

The finding that the land is non-ancestral *qua* the plaintiffs was not challenged before us, as indeed it could not be, in view of the documentary evidence on the record.

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 TEK. CHAND J.

Before us counsel for the plaintiff-respondent re-agitated the question that the parties were governed by Hindu Law and not by custom, but after hearing him, I am of opinion that there is no force in his contention. The question was no doubt raised in the plaint and put in issue, but as already observed, it was decided by the trial Judge against the plaintiffs. It does not appear to have been raised before the learned District Judge who decided the case in favour of the plaintiff on the ground that under custom she had a superior right to succeed. I hold that the plaintiff is not entitled to re-open this question on second appeal.

The sole question for determination is whether the decision of the lower Court on the question of custom is correct. In view of the answers to questions Nos. 56 and 57, as recorded in Joseph's Customary Law of the Rohtak District, there is no doubt that the *onus* was rightly placed on the plaintiff to prove that the daughters had a preferential right to succeed to the non-ancestral property of their father as against collaterals of the 8th degree. An examination of the documentary evidence on the record shows, that there are five clear and well-proved instances of exclusion, by daughters, of collaterals of varying degrees. Three of these are supported by mutations, one by a judicial decision, and one by remarks in a settlement pedigreeable. These instances are as follows:—

(1) *Exhibit P.4* is a mutation sanctioned in 1889 in respect of the property of one Trikha, a *Gaur Brahmin* of the neighbouring village Hassangarh in favour of his daughter, *Mussammatt Sundar*, in preference to his collaterals of the fourth degree. No suit appears to have been brought by the collaterals in the Civil Court to contest this mutation.

(2) *Exhibit P.5*—The property of Sham Lal, a *Gaur Brahmin* of Hassangarh, was mutated on the death of his widow in the name of his daughter, *Mussammat* Dharmon, to the exclusion of the collaterals of the 5th degree. This mutation was sanctioned in 1909 after summary inquiry by the Revenue Officer and it does not appear that the matter was taken to the Civil Court.

(3) *Exhibit P.6*—The property of Bul Chand, a *Gaur Brahmin* of *Mauza* Garhi Brahminan, was inherited by his daughters, *Mussammat* Bhagwan Devi and *Mussammat* Bhagwanti, to the exclusion of his brother.

(4) *Exhibit P.1* is a copy of the judgment in a civil suit *In re Shib Dyal v. Mst. Shib Devi*, decided by the Munsif of Rohtak on the 7th November, 1905. The dispute related to the property of one Badri, a *Gaur Brahmin* of *Mauza* Bhatgaon in the Sonapat *Tahsil* of Rohtak District, the claimants being the daughter of Badri and his collaterals in the 8th degree. The case appears to have been hotly contested by the parties who produced considerable oral and documentary evidence. The Munsif in an exhaustive judgment found in favour of the daughter, and in support of his conclusion relied on a previously decided case from the same village, the parties to which were *Gaur Brahmins*, and where the daughter was held to have a preferential right to succeed to the property of her sonless father as against collaterals in the 3rd degree. The Munsif also referred to a number of other instances, where daughters have succeeded. It appears that an appeal was filed by the collaterals against the decree of the Munsif, but was dismissed by the Divisional Judge.

(5) *Exhibit D.2*—This is an extract from the pedigree-table of the proprietors of *Mauza* Khar-

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khanda, which shows that one Bindra, a *Gaur Brahmin*, being sonless, got his entire estate mutated in favour of his son-in-law, Ram Chand, whose descendants were in possession. This document is of importance as Bindra was a member of the family of Ramji Lal, whose property is in dispute in the case before us.

In addition to this, the witnesses produced by the plaintiff-respondents have deposed to six other instances in which daughters excluded collaterals in succession to non-ancestral property. There is no documentary evidence in support of these instances, but the witnesses were not cross-examined at all in regard to their statements relating to this matter, and in at least two cases evidence was given by persons whose mothers had taken the property to the exclusion of their maternal grandfathers' collaterals.

The learned District Judge has also relied upon Exhibit P.7, a judgment of *Sheikh Abdul Haq*, Subordinate Judge, Delhi, in *Badlu v. Umrao Kaur*, the parties to which were *Gaur Brahmins* of *Manza Haroli* in the Delhi Province, and the contest was between daughters and collaterals of the 9th and 10th degree. In that case the Subordinate Judge had decided in favour of the collaterals and his judgment was relied upon by the present plaintiffs as an instance in support of their case. This judgment, however, has since been reversed on appeal by a Division Bench of this Court, published as *Badlu v. Mst. Umrao Kaur* (1). Mr. Anant Ram Khosla for the defendant-appellants has strongly relied upon this case as an instance in his favour, but it is important to note that the land in that case was ancestral *qua* the collaterals

of the deceased. This case, therefore, helps neither party and must be left out of consideration.

As against this, all that the collaterals relied upon in the Court below, was the judgment of *Bhai Umrao Singh*, Subordinate Judge, dated the 31st of October, 1907, in *Brahman Datta v. Lachhmi* (Exhibit D.8). The degree in which the collaterals were related to the last male owner in that case is not stated in the judgment, but it is clear that the land was ancestral. I do not think, therefore, that this instance is in point.

Counsel referred us to a decision of Rattigan J. in *Mukhandi v. Bakhtawar Singh* (1) the parties to which were *Gaur Brahmins* of Kharkhauda. The dispute there was between the daughters and collaterals of the 3rd degree and the property in dispute was ancestral. The main question argued before the learned Judge was whether the *Gaur Brahmins* of Kharkhauda were governed by custom or by Hindu Law and it was found that they were governed by custom. He consequently decided the case in favour of the collaterals who, according to the general custom, had a preferential right to succeed to ancestral property as against the daughter of the last male holder. It will thus be seen that there is not a single proved instance of exclusion of a daughter from non-ancestral property of her sonless father.

It may be mentioned that the oral evidence of witnesses produced by both parties showed that Ramji Lal followed priestly functions and that he did not cultivate land with his own hands. It is also admitted that none of the plaintiffs lives in Kharkhauda. Some of them belong to Halalpur and others to Nahra. Both these villages are situate in *Tahsil* Sonapat, while Kharkhauda is in *Tahsil* Rohtak. It is clear, there-

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fore, that the plaintiffs and the deceased were not members of a compact village community, nor are they cultivators by profession.

In my opinion, the Judges of the Courts below have correctly found that the plaintiff-respondent had succeeded in discharging the *onus* which lay on her to prove that a daughter was a preferential heir to the non-ancestral property of her father as against collaterals of the 8th degree. I would accordingly dismiss this appeal with costs.

SKEMP J.

SKEMP J.—I agree.

A. N. C.

Appeal dismissed.

APPELLATE CIVIL.

Before Addison and Din Mohammad JJ.

1935
 March 8.

BAHADUR SHAH AND ANOTHER (PLAINTIFFS)

Appellants

versus

ZULFIQAR SHAH AND OTHERS (DEFENDANTS)

Respondents.

Civil Appeal No. 1967 of 1930.

Custom — Succession — Pagwand or Chundawand — Sayads of Kotla Sayyadan, District Shahpur — Riway-i-Am.

Held, that according to custom among *Sayads* of village Kotla Sayyadan, District Shahpur, the rule of succession is *pagwand* and not *chundawand*.

Riway-i-Am of the Shahpur District, referred to.

Rattigan's Digest of Customary Law, Exception 2 to paragraph 7, not followed.

Second Appeal from the decree of Lala Devi Dayal, Dhawan, District Judge, Shahpur, at Sargodha, dated 11th August, 1930, reversing that of Mirza Zahur-ud-Din, Junior Subordinate Judge, Sargodha, dated 30th August, 1929, and dismissing the plaintiffs' suit.

GHULAM-MOHI-UD-DIN; for Appellants.