APPELLATE CIVIL.

Before Addison and Din Mohammad JJ.

GANGA RAM AND OTHERS (PLAINTIFFS) Appellants

versus

NARANJAN DASS AND OTHERS (DEFENDANTS) Respondents.

1935

Feb. 28.

Civil Appeal No. 1723 of 1929.

Custom — Succession — Ancestral property — Aroras of Dera Ghazi Khan town — Daughters' sons or Collaterals — Riwaj-i-ams.

Held, that by custom among *Aroras* of the town of Dera Ghazi Khan, daughters and their sons are excluded from succession to ancestral property by the collaterals of their father.

Held also, that it is a well-recognised rule that, unless there are clear indications to the contrary, an entry in a record of custom refers only to ancestral property.

Sham Das v. *Mst. Moolo Bai* (1), followed. Case-law and *Riwaj-i-ams*, *discussed*.

Second Appeal from the decree of K. S. Malik *Ahmad Yar Khan, District Judge, Dera Ghazi Khan, dated th March, 1929, affirming that of* Sardar *Gurmukh Singh*, Mongia, *Subordinate Judge, 2nd Class, Dera Ghazi Khan, dated 13th January, 1923, dismissing the plaintiffs' suit.*

BADRI DAS and HARGOPAL, for Appellants.

MEHR CHAND MAHAJAN and N. L. SADANA, for Respondents.

The judgment of the Court was delivered by—

ADDISON J.—Bhola Ram, an *Arora* of Dera Ghazi Khan town, died in 1877 and was succeeded by his widow, *Mussammat* Lachmi Bai, who died in February, 1920. She was succeeded by defendant 1,

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Jhangi Ram, grandson of Wadhawa Ram, brother of Bhola Ram. He thus was a collateral of the deceased Bhola Ram. The plaintiffs, who are the sons of the daughters of Bhola Ram, instituted this suit against Jhangi Ram for possession of the property, basing their claim on a will, dated the 1st of May, 1877, alleged to have been executed by Bhola Ram in favour of his widow, and also on Hindu Law, according to which the daughters of Bhola Ram became owners of their father's property after the death of their mother. The will was held not to be established. It was found that Bhola Ram and Wadhawa Ram were separate and also that the collateral Jhangi Ram excluded daughters and their sons according to custom amongst the *Aroras* of Dera Ghazi Khan. Against this decision this second appeal has been preferred.

Hindus compose about an eighth of the total population of this District and practically all the Hindus are *Aroras*. They have all along acted as *Dharwais* (weigh-men) and money-lenders to the Muhammadan population, and in course of many years have acquired considerable areas of agricultural land from this work which may be said to be subsidiary to agriculture. At the same time, they are cut off from the rest of the Hindu population, and Mr. Diack in the preface to his Customary Law of the District, published in 1898, said that the customs of the Hindus of the district were more akin to the customs of the Punjab than to orthodox Hindu Law, but were opposed to some usages, such as the re-marriage of widows, which were not uncommon in the Punjab. A large area of land in four villages is in dispute in the present case.

At the settlement of 1873-74 a *Riwaj-i-Am* was compiled for the various tribes in the various *tehsils*.

Ext. D. 2 sets out the reply of the Hindu tribes to the question whether a daughter succeeded to her father or his near collaterals did, where there was no male issue. The reply was that a daughter did not succeed when there was no male issue, but the collaterals succeeded. It was lawful for the father to give away some immovable property, but he could not give away the whole of it. An instance was given where a collateral succeeded as against the daughter's sons in the case of a resident of Dera Ghazi Khan town, to which the parties belong, though the land owned by the deceased is in four villages where he and his ancestors must have carried on the work of *Dharwais*. Another instance is given under the reply of the Hindus with respect to a daughter succeeding, but it is stated that she did so because there were no near collaterals. Ext. D.3 shows that this statement of custom of the Hindus was signed by at least 25 *Aroras*.

Shortly after this *Riwaj-i-Am* was prepared, a case came into the Courts which was decided on the 20th of May, 1878 (see Ext. D.5). One of the issues was whether the daughters could succeed and the decision was that the daughters had no concern with their father's property.

The next settlement occurred about 1895 and Ext. D.13 gives the reply of the Hindu tribes to the same question. The reply was that daughters could not get a share of their father's property under any circumstances. D.14 is a list of the Hindus who signed this statement of custom in 1894-95 and they include 34 or 35 *Aroras*, many of them being residents of Dera Ghazi Khan town.

Ext. D.24 is the statement of the custom of Hindus with respect to this question at the settlement of 1920,

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where the same reply is repeated, namely, that daughters cannot get a share of their father's property in any circumstances. Ext. D.25 gives a very long list of Hindus who signed this statement of custom, most of them being *Aroras*.

Since 1874, therefore, these *Aroras* have been recording their statements to the effect that daughters are excluded by collaterals from succeeding to their father's estate. This can be well understood in a tract like Dera Ghazi Khan, Multan and Muzaffargarh, where it would be almost impossible for Hindu females to manage property, on account of the conditions in those districts.

A Customary Law of the Dera Ghazi Khan district was prepared in English by Mr. Diack, Settlement Officer, in 1898, and the answers which are relevant to the present inquiry are those to questions 40 and 43, namely that the Hindus of the Dera *Tehsil* say that daughters cannot succeed under any circumstances, but they qualify this by adding that in rare instances, where there are no collaterals, the rule would be that daughters' sons would succeed *per stirpes*. The same reply is given in Mr. Wilson's Customary Law prepared in 1920. Three instances are given by him of collaterals excluding daughters, while other three instances are given where daughters succeeded, but as regards the three last-mentioned instances, it is not said whether collaterals were in existence. Exts. D.16 and D.11 are judicial instances in the town of Dera Ghazi Khan where collaterals excluded daughters, while D.26, D.28 and D.54 are instances of mutations regarding succession in favour of collaterals to the exclusion of daughters. D.52 and D.49-A are similar instances in the case of residents of Dera Ghazi Khan town, and many witnesses have

also given other instances where collaterals excluded daughters; though such oral testimony is not of the same effect as documentary. On the other hand, most of the plaintiffs' witnesses cited instances where daughters succeeded either by reason of a gift or a will. There are, however, a few instances where the Courts held that Hindu Law was followed by the *Aroras* of this district, though there are decisions the other way. The principal reason given in the judgments which favoured the application of the Hindu Law, was that these *Aroras* lived for the most part in towns (though none of the towns in this district are very big), and their primary occupation was not agriculture and, therefore, the burden was heavily upon them to establish that they followed custom. It is true that the burden is always upon the person who states that he follows custom to prove that he does so and also to prove what the custom is. In the present case, however, there are three *Riwaj-i-Ams* attested by numerous Hindus, including a large number of *Aroras*, to the effect that since 1874 the Hindus in this district have been following custom and excluding daughters from succeeding in the presence of collaterals. There are numerous instances of this custom having been followed and the reason for its establishment is obvious. As early as 1890, a Division Bench of the Punjab Chief Court held in *Pitambar* v. *Ganesha Ram* (1) that in a suit between town *Aroras* of Dera Ismail Khan and Bhakkar, nephews succeeded equally with brothers by custom, and by custom nephews succeeded in preference to daughters to the ancestral and acquired immovable property of a sonless owner. The inquiry in the present case, as regards the custom in Dera Ghazi

(1) 148 P. R. 1890.

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Khan, corroborates this valuable judicial instance in a neighbouring district where conditions are similar. It was held by a Division Bench in *Budhu Ram* v. *Muhammad Din* (1) that it had been proved that the *Aroras* of a particular village in District Dera Ghazi Khan, had so far departed from the tenets of Hindu Law as to adopt the customary rule that a father, in his lifetime, was the owner of the property with such limits to his rights of ownership as custom prescribed. *Sham Das* v. *Mst. Moolo Bai* (2) deals with a case of *Aroras* in the neighbouring district of Muzaffargarh. It was held that by custom amongst those *Aroras*, daughters of a sonless proprietor were excluded by collaterals from succeeding to ancestral property, that being the custom recorded in the *Riwaj-i-Am* of that district as well. It was said that this custom was dictated by local circumstances, the district being a rough, wild tract in which it was difficult for females to retain and manage immovable property, and one in which the compact village community, associated with the central parts of the Punjab, was practically non-existent. These remarks apply also to Dera Ghazi Khan. There can be no question, therefore, that amongst *Aroras* in Dera Ghazi Khan *Tehsil* and town it has been established in the present case that daughters and their sons are excluded from succession by the collaterals of their father.

The District Judge has found that a small area of 2 *kanals* 6 *marlas* is not the ancestral property of the deceased, but he dismissed the appeal *in toto* as that area was negligible. Following *Sham Das* v. *Mst. Moolo Bai* (2) we must hold that it is a well-recognised rule that, unless there are clear indications to the contrary, an entry in a record of custom refers only to

(1) 86 P. R. 1915. (2) (1926) I. L. R. 7 Lah. 124.

succession to ancestral property. The learned counsel for the appellants, however, stated that he did not press for a decree for this small area, provided he was excused from paying the costs of this litigation. Acting on his suggestion, we dismiss the appeal, but direct that the parties bear their own costs throughout.

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A. N. C.

Appeal dismissed.

APPELLATE CIVIL.

Before Addison and Din Mohammad JJ.

GURMUKH SINGH (DECREE-HOLDER) Appellant

versus

HARI CHAND AND OTHERS (JUDGMENT-DEBTORS) Respondents.

1935

Feb. 28.

Civil Appeal No. 324 of 1932.

Civil Procedure Code, Act V of 1908, Order XXXIV, rules 5, 6 : Application by puisne mortgagee for sale of mortgaged property — which has already been sold under decree of a prior mortgagee — Whether application for a personal decree is barred by rule 6.

Held, that where a puisne mortgagee applies to have the mortgaged property sold under Order XXXIV, rule 5 of the Civil Procedure Code, and it appears that the property has already been sold in execution of a decree of the prior mortgagee and there does not exist any part of the mortgaged property which can be sold, an application for a personal decree against the mortgagee should be granted, Order XXXIV, rule 6, being no bar to the grant of a personal decree.

Shyam Behari v. *Mst. Mohandei* (1), not followed.

Other case-law, discussed.

First Appeal from the order of Chaudhri *Kanwar Singh, Senior Subordinate Judge, Gujranwala, dated 26th November, 1931, holding that the application of*

(1) 1930 A. I. R. (Oudh) 377 (F. B.).