

## APPELLATE CIVIL.

*Before Dalip Singh and Skemp JJ.*

MUSSAMMAT KISSI (DEFENDANT) Appellant,

*versus*

BALWANT SINGH AND ANOTHER

(PLAINTIFFS)

BISHAN SINGH AND OTHERS

(DEFENDANTS)

} Respondents.

**Regular First Appeal No. 327 of 1936.**

*Custom — Succession — childless widow and sons by other wife — Sikh agriculturist of Amritsar District — Widow's right to have the property partitioned — Riwaj-i-am.*

*Held*, that the plaintiffs, the sons, on whom the onus rested, had failed to prove that their childless stepmother was not entitled to a share in the property left by their father and to get the property partitioned.

*Riwaj-i-am*, answers to questions 43 and 123, referred to.

*Beg v. Allah Ditta* (1), and *Labh Singh v. Mst. Mango* (2), relied upon.

Rattigan's Customary Law, para. 16, discussed.

*First appeal from the decree of Lala Mulkh Raj, Assistant Collector, 1st Grade, Amritsar, exercising the powers of a Subordinate Judge, dated 17th May, 1935, granting the plaintiffs the declaration prayed for.*

J. L. KAPUR and KARTAR SINGH, for Appellant.

AMOLAK RAM KAPUR, for Plaintiffs-Respondents.

SKEMP J.

SKEMP J.—The following circumstances have given rise to this first appeal:—

Tehl Singh, a *Zaildar* in the Amritsar district, had two wives *Mussammat Har Kaur* and *Mussammat Kissi*. *Mussammat Kissi* was a widow, when Tehl Singh married her, with a daughter by her previous

husband. She bore Tehl Singh no children, but *Mussammat* Har Kaur and Tehl Singh had two sons, Balwant Singh and Sant Singh.

On the death of Tehl Singh in 1932 mutation of his property was made in favour of Balwant Singh and Sant Singh and *Mussammat* Kissi in equal shares. This mutation was sanctioned on the 6th of April, 1932. *Mussammat* Kissi subsequently applied for partition of her share, but her step-sons objected that she was not entitled to partition, and by order, dated the 13th December, 1934, they were referred to a civil suit. The Revenue Assistant himself tried the suit as a Civil Court. He framed two issues; one as to *Mussammat* Kissi's right of partition, the onus being put on the plaintiffs; the other dealing with the question that she had a pension as widow of her first husband, which the step-sons said was sufficient for her maintenance. The Revenue Assistant found the first issue in favour of the plaintiffs and held that the second issue did not arise. He decreed the plaintiffs' suit with costs on the 17th May, 1935, and *Mussammat* Kissi appealed.

We overruled a preliminary objection that the appeal was barred by time. The suit was valued by the plaintiffs at Rs.199-7-3 for purposes of jurisdiction and the appeal was lodged to the Court of the District Judge on the 13th July, 1935. The proceedings before the District Judge are not with the record but he held that the appeal lay not to his Court but to the High Court and returned the appeal on the 7th of August, 1936. It was presented in the High Court on the 12th of August, 1936.

We are of opinion that the plaintiffs and her legal advisers, misled by the value for purposes of jurisdiction placed on the suit by the plaintiffs, were *bona fide*.

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prosecuting their remedy in another Court and we condoned the delay.

The Revenue Assistant held that the oral and documentary evidence of the plaintiffs re-inforced by paragraph 16 of Rattigan's Customary Law discharged the onus of the issue.

We read through the oral evidence of the plaintiffs and are of opinion that for various reasons it is unreliable and that the case must be decided by the documentary evidence. The Revenue Assistant referred to the *Riwaj-i-am* of district Amritsar; a copy of question and answer 128 were placed on his record. These are reproduced in the Amritsar Code of Tribal Custom. The question and answer are:—

“*Question 128*—If the partition be made, can the widow claim a share? If so, what share, and on whom will it devolve after her death?

*Answer*—All tribes.

A widow having sons will get no share. A sonless widow can get the share separated to which she is entitled. On her death the share thus separated will devolve on the heirs of the deceased husband in accordance with the rules of inheritance.”

He did not follow this because the question does not deal with the case of a man leaving a widow but a son by another widow. In my opinion, this case is covered by the words “A sonless widow can get the share separated to which she is entitled.”

We have also been referred to question and answer 43 which run, as far as relevant, as follows:—

*Q.*—“If a man dies leaving a widow or widows, a son or sons, a daughter or daughters, a brother or other relatives, upon whom will the inheritance devolve?”

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A.—*All tribes*—The son or sons or their male lineal descendants through males inherit in preference to all others. If a man has more than one wife but a son or sons by only one of them, the childless widows are generally each for her life allotted a share equal to that of a son. The other widows and daughters only get maintenance.”

This was not produced before the trial Court but we have allowed it to be referred to in appeal, because after all it is a citation from a work published by authority for the guidance of the Courts in cases of this kind.

Under the well known rulings, *Beg v. Allah Ditta* (1) and *Labh Singh v. Mst. Mango* (2), the effect of these two questions and answers in the *Riwaj-i-am* is to place the onus of proving a custom to the contrary on the plaintiffs. The onus is not light, as an assembly of men was stating the rights of women.

To discharge the onus the plaintiffs have produced besides the inconclusive oral evidence documentary evidence as follows:—

Ex. P.A.—a judgment, dated the 13th August, 1920, by *Mian Muhammad Aslam*, Munsif, First Class, dismissed a suit by a step-mother against her step-son for possession of half the land left by her deceased husband. This proceeded only on paragraph 16 of Rattigan’s Digest.

Ex. P.B.—a compromise in a partition case. A widow had applied for partition, of what share is not clear, but she agreed to take 45 *kanals* of land to be cultivated by the defendants who would pay Rs.120 per annum as rent to be paid through the *Zaildar*. This compromise, it seems to me, favours the defendant.

(1) 45 P. R. 1917 (P. C.). (2) I. L. R. (1927) 8 Lah. 281.

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The defendant produced Ex.D.A., an extract from the *jamabandis* which shows that *Mussammat* Indar Kaur, widow, and two sons of Sundar Singh were owners in equal shares.

Ex.D.B. shows a partition between *Mussammat* Bhagwan Kaur and her step-sons. This had apparently been compromised. As the step-sons got  $\frac{4}{5}$ ths and the step-mother  $\frac{1}{5}$ th of 12 *kanals*, 13 *marlas* and *Mussammat* Bhagwan Kaur got the whole of 2 *kanals*, 13 *marlas*, she got approximately her  $\frac{1}{3}$ rd share.

It seems to me that the instances produced by the plaintiffs are insufficient to discharge the onus cast by the terms of the Code of Tribal custom. Rattigan's Customary Law owes its authority to different considerations, namely, to the wide knowledge and experience of the author. The Revenue Assistant overlooked the explanation to paragraph 16, "But in some cases where the hostility of the sons seems to render such a course advisable, a separate portion of the estate is allotted to the widow in lieu of maintenance."

The dispute before us was limited to the points whether *Mussammat* Kissi had a right to be recorded as owner. It was conceded that if she had such a right she was entitled to partition.

I would accept this appeal and dismiss the plaintiffs' suit. In the circumstances it is best that the parties should bear their own costs.

DALIP SINGH J.

DALIP SINGH J.—I agree.

A. N. C.

*Appeal accepted.*