APPELLATE CIVIL.

Before Tek Chand and Skemp JJ.

MUSSAMMAT ZAINAB BIBI AND ANOTHER (PLAINTIFFS) Appellants

1936

June 5.

versus

JAMAL DIN AND ANOTHER (DEFENDANTS) Respondents.

Civil Appeal No. 1071 of 1933.

Custom — Succession — Arains — Amritsar District — Self-acquired property — Daughters or collaterals in third degree — onus probandi — Riwaj-i-am.

Held, that plaintiffs (daughters), on whom the *onus* lay, had succeeded in proving that according to the custom prevailing among the *Arains* of the Amritsar District, daughters succeed to the self-acquired property of their father in preference to collaterals of the third degree.

Second appeal from the decree of Mr. A. R. Cornelius, District Judge, Lyallpur, dated 21st March 1933, reversing that of Lala *Ram Parshotam, Subordinate Judge, 3rd Class, Sheikhupura, dated 27th October 1932, and dismissing the plaintiffs' suit.*

MUHAMMAD AMIN MALAK, for Appellants.

M. A. MAJID, for Respondents.

The order of the Bench, remanding the case, dated 27th April, 1935, was delivered by—

TEK CHAND J.—The dispute in this case relates to the self-acquired property of Diwan, an *Arain* of *Mauza* Maur, Chak No. 48, Tahsil and District Sheikhupura. On his dying sonless the land was taken by his widow *Mussammat* Malan. On *Mussammat* Malan's death the revenue authorities sanctioned the mutation in favour of Jamal Din and Jalal Din defendants, who are the collaterals of Diwan in the

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third degree. The plaintiffs, *Mussammat* Zainab Bibi and *Mussammat* Karim Bibi, daughters of Diwan, have instituted the present suit for a declaration that they are the rightful owners of the land and that the mutation has been wrongly sanctioned in favour of the defendants.

The plaintiffs based their case on a will alleged to have been made by *Mussammat* Malan, and in the alternative on their right to succeed to the self-acquired property of their father according to the custom prevailing in the tribe. The alleged will has not been proved, and this part of the case is no longer before us.

On the question of custom the learned Subordinate Judge framed an issue in the following terms :—

" Whether the defendants' right of inheritance is superior to that of plaintiffs ? "

The *onus* of this issue was laid on the collaterals. The trial Judge held that the defendants had failed to discharge the *onus* and decreed the suit.

On appeal the learned District Judge came to a contrary conclusion and dismissed the suit. He, however, granted a certificate to the plaintiffs for second appeal under section 41 (3) of the Punjab Courts Act.

It is admitted that this family of *Arains* has migrated from the Amritsar district to the Chenab Colony. In view of the entries in Craik's *Customary Law of the Amritsar District* the *onus* should have been placed on the plaintiffs. Appellants' counsel urges that owing to the wrong allocation of the *onus* his client could not produce all the available evidence bearing on the point and asks for a remand. We consider this prayer to be reasonable and remand the

case under Order XLI, rule 25, to enable the parties to produce such additional evidence on the question of custom as they wish to do. The issue to be tried shall be:—

"Whether according to the custom prevailing in the tribe daughters have a superior right to succeed to the non-ancestral property of their father as against his collaterals of the third degree? *Onus* on the plaintiffs."

It is desirable that the parties should produce documentary evidence, wherever available, in support of the instances on which they rely.

As the Subordinate Judge who had tried the case in the first instance is not in the district, the enquiry on remand shall be made by the Senior Subordinate Judge, Sheikhupura, who will submit his report, through the District Judge, by the 31st August 1935. Both counsel have been directed to cause their respective clients to appear before the Senior Subordinate Judge, Sheikhupura on the 20th May 1935 when he will fix a date for hearing the evidence.

The judgment of the Court after remand—

TEK CHAND J.—This should be read in continuation of our order of remand dated the 27th of April 1935, in which the preliminary facts of the case are given. The property in dispute is situate in *Mauza* Maur, District Sheikhupura, and was acquired by Diwan, an Arain of Amritsar district, who had migrated to the colony. Diwan died sonless and was succeeded by his widow *Mussammat* Malan. On *Mussammat* Malan's death mutation was sanctioned in favour of Jamal Din and Jalal Din defendants-respondents, who are his collaterals of the third degree. The plaintiffs, *Mussammat* Zainab Bibi and *Mussammat*

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Karim Bibi, daughters of Diwan, brought a suit for a declaration that, according to the custom prevailing in the tribe, they had a preferential right to succeed to the self-acquired property of Diwan. The trial Court placed the *onus* on the defendants to prove their superior right of inheritance, and holding that they had failed to discharge it, decreed the suit. The collaterals' appeal to the District Judge was successful. On second appeal we held that in view of the entries in Craik's *Customary Law of the Amritsar district* the *onus* of the issue had been wrongly placed on the defendants. We accordingly re-framed the issue in the following terms and remanded the case for further enquiry :—

" Whether according to the custom prevailing in the tribe, daughters have a superior right to succeed to the non-ancestral property of their father as against his collaterals of the third degree."

Both parties led evidence and the Subordinate Judge has reported that the plaintiffs have discharged the *onus* and have proved that their right to succeed is superior to that of the defendants.

After examining the record and hearing counsel I agree with the conclusion of the learned Subordinate Judge. The plaintiffs have proved five instances of succession of daughters to self-acquired property in preference to collaterals among the Arains of Amritsar district. These instances are as follows :—

(1) *Ex. P. A.* Mutation No. 50 of *mauza* Bhindi Nain, *Tahsil* Ajnala, *District* Amritsar—On the death of Badar-ud-Din, Arain, his self-acquired property was mutated in favour of his daughter *Mussammat* Karam Bibi. An objection was raised by the collaterals of the third degree, but was overruled.

(2) *Ex. P. B.* Mutation No. 139 of the same village—Sadar-ud-Din, brother of Badar-ud-Din, above-mentioned gifted his entire land to his daughter *Mussammat* Mehtab Bibi in 1923. The Patwari put up the mutation, but before it was decided Sadar-ud-Din died. It is in evidence in the present case, that the land of Sadar-ud-Din was both ancestral and self-acquired. Mutation was sanctioned in respect of both kinds of land in favour of the daughter in 1927. Sadar-ud-Din had left a brother Badar-ud-Din and there were other collaterals also. The gift regarding the ancestral property was invalid beyond his lifetime, but the collaterals admitted the daughter's right to succeed with regard to both kinds of property and mutation was sanctioned accordingly.

(3) *Ex. P. C.* Mutation No. 453 of *mauza* Mudh Bhilowal, *Tahsil* Ajnala—*Mussammat* Budhi, widow of Sher Mohammad, Arain, who had succeeded to the property of her husband, gifted it to her daughter *Mussammat* Begum. The brother's sons of Sher Mohammad objected, but their objection was overruled and mutation sanctioned in favour of the daughter on the 28th of March 1923.

(4) *Ex. P. D.* Mutation No. 952—*Mussammat* Hasso, widow of Mehtab Din of *mauza* Tungbala, district Amritsar, was in possession of her husband's self-acquired land. On *Mussammat* Hasso's death, disputes arose between *Mussammat* Chiragh Bibi and *Mussammat* Nawab Bibi, daughters of Mehtab, and Nabi Bakhsh, his cousin. The matter was referred to the *panchayat* who decided in favour of the daughters. Mutation was sanctioned according to the decision of the *panchayat*. Nabi Bakhsh accepted the decision as correct and the Revenue Officer noted in

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his order that all the members of the brotherhood, who were present, supported the daughter's claim.

(5) *Ex. P. 4*—Imam Din, Arain, who had migrated to the Sheikhupura district and had acquired land there, was succeeded by his daughter *Mussammat* Fatima. The nephews of Imam Din objected, but *Khan Bahadur Chaudhri* Mohammad Din, Collector, decided in favour of the daughter on the 2nd of November 1926. A copy of the order of the Collector was placed on the record before remand. After remand Nur Mohammad, husband of *Mussammat* Fatima, gave evidence as P. W. 1, and proved these facts.

In addition to these instances, P. W. 2 Abdul Ghani and P. W. 4 Ramzan, examined before remand, proved the instance of succession of a sister to the estate of Labha, Arain of *mauza* Hemrajpura, Chak 40, district Sheikhupura. On Labha's death his son Ghulam Mohammad succeeded. Ghulam Mohammad died childless and the property went to his mother *Mussammat* Mahtabo. On *Mussammat* Mahtabo's death the property went to her daughter's sons Mohammad Ismail, Mohammad Ishaq and Ibrahim, sons of P. W. 4 Ramzan, in preference to collaterals. This case of sister's succession indirectly supports the appellants' case. A sister admittedly holds an inferior position to a daughter and the fact that among Arains sisters are allowed to succeed shows that in this tribe females occupy a much more favourable position than in other tribes.

As against all this, the respondents have not been able to produce any instance supported by documentary or credible oral evidence of succession among Arains. After remand they produced copies of two judicial

decisions in which collaterals were preferred to daughters. The parties to none of these decisions, however, were Arains. The first case, *Mussammat Hakim Bibi* v. *Fazal Din*, decided by the District Judge, Lyallpur, on the 28th of March 1935, was among Jats of Amritsar district who had settled in the Chenab Colony. The learned District Judge decided in favour of the collaterals holding that the evidence produced by the daughters was not sufficient to rebut the presumption arising from the entry in the *Riwaj-i-am*. The second case, *Jhanda Singh v. Mussammat Basant Kaur*, which was among the Sikh Jats of Amritsar district residing in the Chenab Colony, was also decided on the *Riwaj-i-am*, it having been found that not a single instance of succession among Jats had been proved on the record of that case by the daughters.

The oral evidence produced by the defendants, both before and after remand, is of the vaguest possible kind. Some of the instances deposed to by the witnesses admittedly related to ancestral property. In others, it was not stated as to whether the property concerned was ancestral or acquired. The defendant Jamal Din, when examined as D. W. 4, admitted that he knew of no instance of succession of collaterals to the self-acquired property of an Arain to the exclusion of daughters. Similarly D. W. 3 Jalal Din also admitted that to his knowledge no such instance existed.

In my opinion, the plaintiffs-appellants have succeeding in discharging the *onus* which lay on them, and it is satisfactorily proved on the record that according to the custom prevailing among the Arains of the Amritsar district, daughters succeed to the self-

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acquired property of their father in preference to the collaterals of the third degree. I would accordingly accept this appeal, set aside the judgment and decree of the learned District Judge and restore that of the Court of first instance decreeing the plaintiffs' suit with costs throughout.

SKEMP J.

SKEMP J.—I agree.

A. N. C.

Appeal accepted.

APPELLATE CIVIL.

Before Tek Chand and Dalip Singh JJ.

CHELA RAM-SANT RAM (CREDITORS) Appellants

versus

OFFICIAL RECEIVER, RAWALPINDI— Respondent.

1936

June 26.

Civil Second Appeal No. 9 of 1936.

Indian Contract Act (IX of 1872) s. 25 (3) — Mention of a time-barred judgment-debt by insolvent in his Schedule of creditors — whether constitutes a fresh cause of action within the section in favour of the creditor.

In November 1924 the firm Chela Ram-Sant Ram got a decree against Nanak Chand. In 1933 Nanak Chand applied to be declared an insolvent and in the Schedule of his creditors he mentioned the judgment-debt of Chela Ram-Sant Ram, execution of which was by then admittedly barred by time. The Official Receiver and the lower Courts rejected the contention of Chela Ram-Sant Ram, that the entry in the Schedule, being an unconditional acknowledgment, implied a promise to pay and brought the case within section 25 (3) of the Indian Contract Act.

Held, that the mere mention of the debt in the Schedule of creditors did not constitute a fresh cause of action under section 25 (3) of the Contract Act. That section requires