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MUSSAMMAT NAWAB BEGUM v. HUSSAIN ALI KHAN.

The appellants having partially succeeded, we make no order as to costs of this appeal.

P. S.

Decree affirmed with modification.

APPELLATE CIVIL.

Before Addison and Din Mohammad JJ.

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Nov. 3.

FATEH DIN AND OTHERS (PLAINTIFFS) Appellants

versus

MST. HAKIM BIBI AND OTHERS (DEFENDANTS) Respondents.

Civil Appeal No. 132 of 1936.

Custom — Succession — Arains *of village Sodhra, Tahsil Wazirabad, District Gujranwala — Daughter and* Khana damad*—whether succeed in preference to collaterals— written gift — whether necessary —* Riwaj-i-am, *Answer 48.*

Held, that by custom among *Arains* of village Sodhra, Tahsil Wazirabad, District Gujranwala, a daughter and a resident son-in-law, who has been made a *khana damad,* are entitled to succeed on the death of the daughter's sonless father in preference to the collaterals.

Held also, that the provision about a deed of gift or written will in Answer 48 of the Code of Tribal Custom of the Gujranwala District is only recommendatory and not mandatory, and, therefore, though no definite act of donation was proved, it was a fair inference from the established facts that the sonless proprietor settled his daughter and her husband in his house with a view to their succeeding him as his heirs to the exclusion of his collaterals.

Mussammat Baggi v. Mamun (1), relied upon.

Basant Singh v. Brij Raj Saran Singh (2), referred to.

Second appeal from the decree of Mr. M. R. Kayani, District Judge, Gujranwala, dated 4th

(1) 31 P. R. 1895. (2) I. L. R. (1935) 57 All. 494.

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November, 1935, reversing that of Mr. P. N. Joshua, Subordinate Judge, 2nd Class, Wazirabad, dated 31st July, 1934, and dismissing the plaintiffs' suit.

MANOHAR LAL MEHRA, for MOHAMMAD ALAM, for Appellants.

MUKAND LAL PURI and MANOHAR LAL MADHOK, for Respondents.

The judgment of the Court was delivered by—

ADDISON J.—This suit was brought by the reversioners of Sher Mohammad, an *Arain* of village Sodhra in the Wazirabad Tahsil of the Gujranwala District, for a declaration that a gift made by the widows of Sher Mohammad to his daughter *Mussammat* Hakim Bibi should not affect their reversionary rights after the death of the widows. The trial Court held that there was no doubt that the husband of *Mussammat* Hakim Bibi had been established as a *khana damad* and that, therefore, he or she could have succeeded to his property if he had made a gift in his lifetime. As he had not done so, the suit was decreed. *Mussammat* Hakim Bibi appealed against this decision to the District Judge. He held that the gift was valid and, accepting the appeal, dismissed the suit. Against this decision the collaterals have preferred this second appeal.

In answer 48 of the Code of Tribal Custom of the Gujranwala District, compiled in 1914, it is said that if a daughter and her husband live with her father as resident son-in-law (*khana damad*) till his death, she or he is entitled to inherit if there is no son and the father has gifted or bequeathed to either of them his property by a written deed. This answer applies certainly to all tribes in the Wazirabad Tahsil and *Arains* of the Sharakpur Tahsil. As the parties in

this case are *Arains* and live in the Wazirabad Tahsil the statement applies to them.

It has been found in the present case that the husband of *Mussammat* Hakim Bibi was *khana damad* in the true sense of the term. On the marriage of *Mussammat* Hakim Bibi she did not leave her father's house but continued to live with him along with her husband. In fact her husband had been taken into the house before the marriage. The husband belonged to another village and remained with his wife's father for 16 years till his death. It has also been found that Sher Mohammad intended that his daughter and her husband should succeed him but he died before making a formal gift or will. This explains why his widows on his death made such a gift and the only question is whether the daughter is entitled to succeed, there being no deed of gift or written will in her favour.

It seems to us that the essence of the custom is that a daughter and a resident son-in-law, who has been made *khana damad*, are entitled to succeed in this Tahsil on the death of the daughter's father and that the provision about a deed of gift or written will is only recommendatory and not mandatory. When custom first started there were practically no written deeds in the Punjab and this is a refinement obviously added later [see *Basant Singh v. Brij Raj Saran Singh* (1)]. In this view the decision of the District Judge is correct.

We are fortified in this conclusion by a perusal of *Mussammat Baggi v. Mamun* (2). That was a case from Gujrat but the provision in the *wajib-ul-arz* is

(1) I. L. R. (1935) 57 All. 494. (2) 31 P. R. 1895.

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very similar, namely, that there should be a verbal or written gift; and it was found in that case also that there had been no verbal or written gift. Nevertheless it was held that by custom among *Gujars* of the Gujrat District a married daughter was entitled to succeed her father, a sonless proprietor, in a case where, though no definite act of donation was proved, it was a fair inference from the established facts that the sonless proprietor settled his daughter and her husband in his house and on his land with a view to their succeeding him as his heirs to the exclusion of his collaterals. This is on all fours with the present case and for the reasons given we dismiss this appeal but make no order as to costs.

P. S.

Appeal dismissed.

APPELLATE CIVIL.

Before Addison and Din Mohammad JJ.

1936

Nov. 3.

SARAB SUKH (DEFENDANT) Appellant

versus

PREM DATT AND ANOTHER (PLAINTIFF)
SUKHDESH LAL (DEFENDANT) } Respondents.

Civil Appeal No. 462 of 1936.

Civil Procedure Code, Act V of 1908, section 47 and Order XVI, rule 21 : Dispute between a decree holder and his assignee — applicability of the section — Separate suit relating to the validity of assignment — whether competent — Judgment debtor — whether can file a suit for the refund of money realized from him by the assignee of the decree.

Held, that a dispute between an assignee of a decree and the decree holder is not a dispute between the parties within