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male collaterals of a person governed by Customary Law would not enure for the benefit of a female who, though entitled to succeed, is herself not entitled to challenge the alienation. The learned counsel for the appellant has not been able to cite any authority to the contrary.

The conclusion reached by the learned Judge in Chambers is correct. I would, therefore, affirm his decree and dismiss this appeal, but in the peculiar circumstances of the case would leave the parties to bear their own costs throughout.

ABDUL RASHID J.—I agree.

A. N. C.

Appeal dismissed.

APPELLATE CIVIL.

Before Tek Chand and Abdul Rashid JJ.

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June 11.

GURDIAL SINGH (DEFENDANT) Appellant,

versus

MST. TEJ KAUR (PLAINTIFF)
HARBHAJ SINGH AND OTHERS (DEFENDANTS) } Respondents.

Regular Second Appeal No. 1511 of 1936.

Custom — Maintenance of mother — liability of sons and stepson — in proportion in which they succeeded to father's estate — Rajputs of mauza *Shahpur Jajan, Tahsil Batala, District Gurdaspur — no rules of custom or of personal law in existence — Hindu Law* (Mitakshara).

One K., a Hindu Rajput of Gurdaspur district died leaving two sons by a predeceased wife and one son by a surviving wife, *Mst.* T. K. (plaintiff). On his death, the sons succeeded to his estate according to the *Chundawand* rule, the two sons by the predeceased wife getting one-half and the only son of *Mst.* T. K. the other half. Subseqnently, they effected a partition of the estate in these shares. At the partition no

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separate share was allowed to *Mst.* T. K., nor was any provision made for her maintenance. After the partition, *Mst.* T. K. sued her son and the two stepsons for maintenance.

Held, that, in the absence of a definite rule of custom relating to this matter, and also of any clear provision in the personal law of the parties (*i.e.*, the *Mitakshara*) the case must be decided according to principles of equity, justice and good conscience, and that the son of the plaintiff and stepsons were liable for her maintenance in the proportion in which they had divided the paternal estate among themselves.

Bishan Das v. *Mst. Mansa Devi* (1), dissented from.

Hemangini Dasi v. *Kedarnath Kundu Chowdhry* (2), referred to.

Tegh Indar Singh v. *Harnam Singh* (3), and *Subbaravalu Chetti* v. *Kamalavallithayaramma* (4), relied upon.

Second appeal from the decree of Mr. G. D. Khosla, District Judge, Gurdaspur, dated 21st August, 1936, affirming that of Bawa *Jagjit Singh, Subordinate Judge, 1st Class, Batala, dated 26th August, 1935, awarding the plaintiff Rs.20,* per *month maintenance for her life.*

MEHR CHAND MAHAJAN and YASHPAL GANDHI, for Appellant.

JAGAN NATH AGGARWAL, VISHNU DATTA and BALKISHEN MEHRA, for Plaintiff-Respondents.

TEK CHAND J.—The parties to this litigation are Rajputs of *Mauza* Shahpur Jajan, Batala Tahsil, District Gurdaspur, and are related to each other as follows :— TEK CHAND J.

KARAM CHAND.

Mst. Mohan Devi = (W. 1). (W. 2) = *Mst.* Tej Kaur, Plff.

Gurdial Singh, Defdt. No. 1.

Harbhaj Singh, Defdt. No. 2. Shiv Dayal Singh, Defdt. No. 3.

(1) 47 P. R. 1914.
(2) I. L. R. (1889) 16 Cal. 758 (P. C.).
(3) I. L. R. (1925) 6 Lah. 457, 459.
(4) I. L. R. (1912) 35 Mad. 147.

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Mussammat Mohan Devi died many years ago in the life-time of her husband, Karam Chand, leaving a son Gurdial Singh, defendant No.1. He then married *Mussammat* Tej Kaur from whom he had two sons, Harbhaj Singh and Shiv Dayal Singh, defendants Nos.2 and 3. Karam Chand died on the 21st November, 1931, leaving over 650 *ghumaons* of land. On his death, the land was mutated in the names of his three sons jointly. Some years later, it was divided by them according to the *Chundawand* rule; Gurdial Singh getting one-half and Harbhaj Singh and Shiv Dayal Singh one-fourth each. At the time of partition between the sons, no provision was made for the maintenance of *Mussammat* Tej Kaur. Accordingly, she instituted the suit, which has given rise to this appeal, for recovery of Rs. 20 per mensem as maintenance from the three defendants.

The suit was resisted by Gurdial Singh, defendant No.1, who pleaded that he, being the step-son of the plaintiff, was not liable for her maintenance, and that the property having been divided according to the *Chundawand* rule she must look to the share allotted to *her* sons for maintenance. The trial Judge repelled this plea, and held that all the defendants were liable for the maintenance of the plaintiff in the proportion in which they had succeeded to the property of their father. He found that having regard to the extent of the property and the station in life of the parties, the proper amount of maintenance for the plaintiff was Rs.20 per mensem. He accordingly passed a decree to the above effect, directing the defendants to pay this amount out of the estate of their father, defendant No.1 to pay Rs.10, and defendants Nos.2 and 3, Rs.10 per mensem. He further ordered that this sum of Rs.20 per mensem shall be a charge upon the

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estate and the defendants shall not alienate or encumber so much of the estate as is sufficient to provide for the above maintenance to the plaintiff. Defendant No.1 unsuccessfully appealed to the District Judge. He has preferred a second appeal in this Court.

As stated already, the parties are Rajputs of Batala Tahsil of Gurdaspur District, and it is common ground between them that in matters of inheritance they are governed by custom and not by Hindu Law. This is clear from the fact that succession to Karam Chand's estate has been according to the *Chundawand* rule, which is not recognised by the *Mitakshara* school of Hindu Law. In the *riwaj-i-ams*, prepared in the last two settlements, it is stated that the rule of *Chundawand* prevails among the Rajputs of Batala Tahsil. The question of maintenance of *Mussammat* Tej Kaur must, therefore, be determined primarily by custom, if one is found to exist. There is, however, no entry in the *riwaj-i-ams* dealing with this matter. Nor have the parties been able to prove by other evidence the existence of any custom bearing on the point. It is settled law that among parties ostensibly governed by Customary Law, if on a particular matter no definite rule of custom is proved to exist, the parties are entitled to fall back on their "personal" law. *Daya Ram* v. *Sohel Singh* (1). If the "personal" law also does not contain any definite rule applicable to the case, it must be decided according to "equity, justice and good conscience." (Section 5 of the Punjab Laws Act). It is conceded by both counsel that the *Mitakshara* (which governs the Hindus residing in the Punjab) does not contain any express provision governing a case of this kind. Under that

(1) 110 P. R. 1906 (F. B.).

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system of law, on the death of a male proprietor, his property devolves on his sons in equal shares, whether born of one or several wives, and they are entitled to hold it jointly until they decide to partition. During this period, the widow or widows of the last male owner are entitled to be maintained out of the estate. If, however, the sons wish to divide the property among themselves, they are entitled to do so without consulting the widows of the father, but on division, each of the widows gets a share equal to that of a son. This share she holds till her death. She is thus independently provided for, and, naturally, the *Mitakshara* contains no provision covering a case like the one before us. The " personal " law, therefore, is of no assistance in the matter. Consequently the question must be decided in accordance with equity, justice and good conscience.

It is common ground between the parties that under custom the widow of a male proprietor is entitled to suitable maintenance out of his estate in the hands of his sons, whether they be the issue of the surviving widow or widows or of a pre-deceased wife. It is also conceded as pointed out in paragraph 17 of Rattigan's *Digest*, that such maintenance is a charge against the whole and every part of the husband's estate and, subject to certain provisos (which are not relevant for the purposes of the case), it is enforceable against the heir or heirs in possession, or those claiming under them. *Mussammat* Tej Kaur accordingly had a right to be maintained by her own sons as well as by her step-son out of the estate which they had inherited from Karam Chand, so long as the estate was joint. These sons have now chosen to divide the estate among themselves without reference to her, nor have they made any suitable arrangement for her maintenance.

Obviously, the partition, which is the act of the sons and to which *Mst.* Tej Kaur is not a party, cannot destroy the charge for her maintenance which, as already stated, she had on the whole and every part of her husband's estate. It follows, therefore, that on such partition, the charge attaches to the portion which has been allotted to each son, and must be realised in the proportion in which they have divided the property among themselves. It is conceded that this is the just and equitable view, and that if there is no rule of Custom or Hindu Law to the contrary, all the defendants must be held liable for the plaintiff's maintenance.

The learned counsel for the appellant, however, relies on *Bishan Das* v. *Mst. Mansa Devi* (1), a case decided by a Division Bench of the Chief Court of the Punjab, among parties governed by the Hindu Law of *Mitakshara* school. In that case, it was held that after partition between two sons, the plaintiff being the real mother of one only, she could not claim maintenance from her step-son, although, as long as the estate remained joint, her maintenance would have been a charge upon the whole estate. The learned Judges in that case followed a decision of their Lordships of the Privy Council in *Hemangini Dasi* v. *Kedarnath Kundu Chowdhry* (2), the parties to which were Bengalee Hindus, governed by the *Dayabhaga* School of Hindu Law. A perusal of their Lordships' judgment leaves no doubt that the decision proceeded on certain texts of the *Dayabhaga* which they quoted at length. (See pages 764-65). One of the texts lays down that on partition between sons of one man by different wives, partition is made "by allotment of shares to the mothers," and while each mother lives

(1) 47 P. R. 1914. (2) I. L. R. (1889) 16 Cal. 758 (P. C.).

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"her sons have no power to make partition among themselves without her consent." Another text of *Jumutavahana* is cited as laying down, that when partition takes place among sons of different mothers with the consent of these mother, "each mother receives from sons *born of her*, an equal share with *them*, and she cannot receive a share from the children of another wife; therefore, she can only receive a share from her own sons (Colebrooke's *Digest* Volume II, Book V, Ch. II, V. 89)." On these texts of the *Dayabhaga* their Lordships ruled that under that system of law, where partition takes place among sons of different mothers, each widow is entitled to maintenance only out of the share or shares allotted to the son or sons, of whom she is the mother. Admittedly, the *Mitakshara* contains no such texts, and, it is clear that on every one of the points dealt with in the Privy Council judgment, the position under that system of law is fundamentally different from the *Dayabhaga*. Under the *Mitakshara*, partition among sons of different wives is *not* made by allotment of shares to the mothers, but each son takes his share independently for himself. Nor is the consent of the mother necessary for a partition among her sons *inter se*. The mode of allotment is also materially different under the two systems. As already stated, in a *Mitakshara* family, on partition among sons of different mothers, each son and surviving mother takes an equal share. This is not so under the *Dayabhaga*. The difference may be illustrated by the following instance. A. dies leaving a widow **B.**, three sons by *her*, named D., E. and F., and a son C. from a predeceased wife. Under the *Mitakshara*, the sons can divide the father's property *inter se* without the consent of **B.**, but on partition the share allotted to

each son (C., D., E. and F.) will be 1/5, and the widow (B.) will take the remaining 1/5. Under the *Dayabhaga* however, the property will first be divided into as many shares as there are sons, *i.e.*, four shares in the illustration; one of these shares (*i.e.*, 1/4) will be allotted to C., and the remaining 3/4 to D., E. and F. jointly. After this partition, the widow B. will be maintained by *her* sons alone. If subsequently D., E. and F. wish to divide the property *inter se*, they must do so with the consent of their mother B., who on this partition, will take an equal share with them, that is to say, the 3/4 share which was allotted in the original partition to this branch of the family, will be sub-divided equally between her and her sons. B.'s share will thus be 1/4 of 3/4 *or* 3/16. (See *Damodardas Maneklal* v. *Uttamram Maneklal* (1) and Rama Krishna's *Hindu Law*, Volume II, p. 959).

None of these matters was considered by the learned Judges of the Chief Court in the case cited. Their attention was directed to one point only, on which the law under both systems is the same, namely, that a step-mother is not an heir to a step-son. From this they concluded that there was no difference between the *Dayabhaga* and the *Mitakshara* as to the position and right of a step-mother in *all* matters, and they applied to a *Mitakshara* family the rule laid down by the Privy Council in *Hemangini Dasi* v. *Kedarnath Kundu Chowdhry* (2) in regard to parties governed by the *Dayabhaga*. With the utmost respect, I feel bound to say that this conclusion of the learned Judges was unjustified and that *Bishan Das* v. *Mst. Mansa Devi* (3) does not lay down the law correctly.

(1) I. L. R. (1893) 17 Bom. 271. (2) I. L. R. (1889) 16 Cal. 758 (P. C.).

(3) 47 P. R. 1914.

APPELLATE CRIMINAL.

Before Tek Chand, A. C. J. and Abdul Rashid J.

1937

July 6.

DES RAJ—Appellant,

versus

THE CROWN—Respondent.

Criminal Appeal No. 126 of 1937.

Indian Penal Code (Act XLV of 1860), SS. 300, Exception 1, and 302 — Murder — Causing death of a woman believed to be a witch — Whether provocation within first exception to S. 300 — Sentence.

The appellant whose right hand was atrophied, deformed and weak, and unfit to handle a knife with it, in the superstitious belief that the deceased, an old lady of about 60 years, was a 'witch' who had been 'shadowing' a child of the family of the appellant and was the cause of his illness, knocked her down, and throwing the whole weight of his body on her plunged a knife with his left hand (which was quite normal) in the temple of the deceased with deadly effect.

Held, that the appellant was guilty of murder. The fact that he plunged the knife in such a vital part of the deceased as the temple indicated that he could have had no other intention than to cause death.

Held also, that the provocation contemplated by the first exception to s. 300 of the Indian Penal Code, must be such as will upset, not merely a hot-tempered or hyper-sensitive person, but one of ordinary sense and calmness and that the exception had no application in the present case.

Sohrab v. *The Crown* (1), *Khadim Hussain* v. *The Crown* (2), *Queen* v. *Ooram Sungra* (3) and *Mato Ho* v. *Emperor* (4), relied upon.

Appeal from the order of Sheikh *Din Mohammad, Sessions Judge, Gujranwala, dated 26th May, 1937, convicting the appellant.*

(1) I. L. R. (1924) 5 Lah. 67.
(2) I. L. R. (1926) 7 Lah. 488.
(3) (1866) 6 W. R. 82.
(4) (1920) 57 I. C. 171.

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M. SLEEM, for Appellant.

MOHAMMAD MONIER, Assistant to Advocate-General, for Respondent.

TEK CHAND A. C. J.—The appellant Des Raj has been convicted under section 302, Indian Penal Code, for having caused the death of *Mussammat* Karam Kaur, a *Brahmin* lady, about 60 years of age, and has been sentenced to death. He has appealed against the conviction and sentence and the record is also before us under section 374 of the Code of Criminal Procedure for confirmation of the capital sentence.

The appellant and the deceased were neighbours. The appellant was living with his brother Sant Ram, a retired policeman, in *kucha* Mistrian, Gujranwala. Sant Ram got a son about a year and a half ago. He had no living issue before. This child fell ill when he was six months old. Sant Ram and the other members of his family believed that this illness was the result of the evil influence of *Mussammat* Karam Kaur, who lived in the neighbouring house with her son and grandsons and the other members of their family, and was reputed to be a "witch." The child recovered on this occasion, but was taken ill again, and the suspicions of the members of Sant Ram's family, that *Mussammat* Karam Kaur was the cause of the illness, were revived.

On the 3rd of March, 1937, the mother and sister of Sant Ram began to abuse *Mussammat* Karam Kaur calling her a "witch," and saying that she was "shadowing" the boy. At that time, the appellant suddenly came out of his house holding a knife in his left hand; and he ran towards *Mussammat* Karam Kaur's house saying that he would "exterminate her family." *Mussammat* Karam Kaur was in the

kitchen with her grand-daughter *Mussammat* Shanti (P. W. 5); while her daughter-in-law, *Mussammat* Maya Devi (P. W. 4), and grand-daughter-in-law, *Mussammat* Gian Devi (P. W. 3), were sitting on the platform in front of the house. On seeing the appellant come towards the house, *Mussammat* Gian Devi ran inside the kitchen and warned *Mussammat* Karam Kaur that Des Raj was coming armed with a knife. Almost immediately after, the appellant entered the kitchen, and throwing the whole weight of his body against *Mussammat* Karam Kaur, plunged the blade of the knife in her right temple. The victim fell down unconscious, and profusely bleeding. The appellant pulled out the knife and was trying to run away, when *Mussammat* Maya Devi caught hold of him and grappled with him. The appellant dragged her to the *deorhi* and managed to escape. Outside the house, he was met by Diwan Chand (P. W. 6), grandson of the deceased, who saw the appellant running towards his own house holding the blood-stained knife in his hand. *Mussammat* Maya Devi, who had followed the appellant, asked Diwan Chand to go and inform his father. He proceeded towards the bazar, but was met by his uncle Durga Das in the way, and both of them proceeded to the police station where the first information report was lodged. The police arrived at the scene very soon afterwards, and arrested the appellant in his house. The investigating officer arranged to send *Mussammat* Karam Kaur to the hospital, but she expired before reaching there.

The facts, as stated above, are proved conclusively by the evidence of P. W. 3, *Mussammat* Gian Devi, P. W. 4, Maya Devi, P. W. 5, Shanti Devi, and P. W. 6, Diwan Chand, against whose veracity nothing whatever has been urged by Mr. Sleem, who has argued the appellant's case before us.

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The learned counsel has contended, however, that the appellant could not be said to have intended to cause death and, therefore, the offence falls under section 304-II. He has also urged, in the alternative that the appellant acted under "grave and sudden provocation" and thus lost self-control, and, consequently Exception 1 to section 300 applies. I have no doubt, that both these contentions are devoid of force. It is true, as deposed to by the medical witness, that the appellant's right hand is atrophied, deformed and weak, and he cannot handle a knife with it. But this does not affect the case at all. According to the prosecution, he was holding the knife in his left hand, and it was with it that he inflicted the fatal blow. This hand is quite normal; and the fact that the appellant plunged the knife in such a vital part of the deceased as the temple, with deadly effect, indicates that he could have had no other intention than that of causing death. Further, it is in evidence that when he emerged from his own house and proceeded towards the deceased he stated that he had come "to exterminate the family." He again stated that "he was going to put an end to this daily cause of mischief." After the assault, when he returned to his house and his own mother and sister reprimanded him for his act, he did not repent but replied that he had "finished their life-long trouble." There is also the important fact that before inflicting the fatal blow, he had knocked *Mussammat* Karam Kaur down and pressed her with his knee throwing the whole weight of his body on her. All these facts clearly establish that his intention was none other than that to cause death.

The plea that the appellant acted under grave and sudden provocation and thus lost self-control, is without any foundation whatsoever. It may be that the

appellant and the other members of his family were under the superstitious belief that *Mussammat* Karam Kaur was a "witch" and that she had been "shadowing" the child and this had resulted in his repeated illness, but by no stretch of imagination can this be described as "grave and sudden provocation" caused by *Mussammat* Karam Kaur to the appellant. Indeed, it appears from the evidence that *Mussammat* Karam Kaur was the wronged party, as the members of the appellant's family used to abuse her frequently. On the occasion in question also, it was the appellant's mother and sister who had abused *Mussammat* Karam Kaur. Mr. Sleem suggests that the deceased and her daughter-in-law and other female relations must have returned the abuse and this must have provoked the appellant, but there is no warrant for this assumption on the record. In his statement, the appellant did not state that this was so, nor was any such suggestion made in the cross-examination of the eye-witnesses.

Mr. Sleem argued that in determining whether a person acted under grave and sudden provocation, due regard must be had to the superstitious beliefs of the persons concerned, and their mental attitude at the time of the occurrence. But as pointed out in *Sohrab* v. *The Crown* (1) and *Khadim Hussain* v. *The Crown* (2) the "law requires that the provocation contemplated by Exception 1 of section 300 must be such as will upset, not merely a hot-tempered or hypersensitive person, but one of ordinary sense and calmness." Judged by this standard, there can be no doubt that the plea is without any force whatever. In this connection, reference may be made to *Queen* v. *Ooram Sungra* (3) and *Mato Ho* v. *Emperor* (4), the facts of

(1) I. L. R. (1924) 5 Lah. 67.
(2) I. L. R. (1926) 7 Lah. 488.
(3) (1866) 6 W. R. 82.
(4) (1920) 57 I. C. 171.

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which were very similar to those of the case before us. In the latter case the accused, a member of an aboriginal tribe, had killed a woman under the impression that she was a witch and was responsible for the illness of his wife and daughter. The facts showed that he was not labouring under any hallucination, but knew that he was killing a human being and also that he was aware of the nature of his act. It was held that he was guilty of murder. In the present case also, there is no proof of any such hallucination, nor is it suggested that the appellant was mentally deficient. I accordingly hold that the appellant has been rightly convicted of murder.

The learned counsel for the Crown conceded that this is not a fit case in which the capital sentence should have been imposed. Having regard to all the circumstances I agree with him.

For the foregoing reasons I would uphold the conviction, but commute the sentence of death to one of transportation for life. To this extent the appeal is accepted.

ABDUL RASHID J.—I agree.

A. N. K. *Appeal accepted in part.*