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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.

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In this connection reference may be made to *Tegh Indar Singh* v. *Harnam Singh* (1) where the broad proposition, enunciated in *Bishan Das* v. *Mst. Mansa Devi* (2), was expressly dissented from by a Division Bench of this Court (Shadi Lal C. J. and Addison J.). See also *Subbarayalu Chetti* v. *Kamalavallithayaramma* (3), where the learned Judges of the Madras High Court, after referring to the Privy Council decision in *Hemangini Dasi* v. *Kedarnath Kundu Chowdhry* (4), pointed out that " the provisions of the *Dayabhaga* under which that case was decided, were different from those of the *Mitakshara* and that the rule laid down therein could not be made applicable in provinces governed by the *Mitakshara* School of Hindu Law."

I hold, therefore, that the Courts below came to a correct conclusion in holding that on partition of Karam Chand's estate between the defendants, they are liable for the maintenance of the plaintiff in the proportion in which they have divided the estate among themselves.

No objection was taken to the amount fixed, which does not seem to be unreasonable in the circumstances.

For the foregoing reasons, I would dismiss this appeal but, having regard to all the circumstances, would leave the parties to bear their own costs in this Court.

ABDUL RASHID J.

ABDUL RASHID J.—I agree.

A. N. C.

Appeal dismissed.

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