

APPELLATE CIVIL

Before Kapur, J.

BHAGI RAM, AND ANOTHER,—*Defendants-Appellants.*

versus

1. BIRBAL, AND ANOTHER,—*Plaintiffs and Lakhu AND ANOTHER,—Defendants-Respondents.*

Regular Second Appeal No. 576 of 1949.

1954

28th April

Custom (Punjab)—Succession—Mother—Whether better heir than the brothers—Position under the personal law—Middleton's Customary Law of the Kangra District, Questions and Answers—44, 49, 50 to 52 and 54—Position of mother if any way different.

Held, that according to Hindu Law a mother is better heir than the brothers and according to the Customary law of the Punjab as given in Rattigan's Digest of Customary Law, which is a book of undoubted authority, a mother of the deceased succeeds to a life estate in default of male lineal descendants or a widow. After the mother come daughters or the collaterals in the case of self-acquired and ancestral property, respectively. Thus both under the personal law of the parties and the general custom of the Punjab a mother is a better heir to a deceased male proprietor than the brothers.

Held further, that on a correct reading of Questions Nos. 44 to 55 of the *Riwaj-i-am* of the Kangra District the widow and the mother are equal heirs to male proprietors who die without leaving male lineal descendants and that the rights of other persons are subordinate to the rights of the widow and the mother and therefore the mother would be a preferable heir to the brothers.

Second appeal' from the decree of Shri Sham Lal, Senior Sub-Judge, with enhanced appellate powers, Kangra at Dharamsala, dated the 7th May 1949, reversing that of Shri Gurbachan Singh, Sub-Judge, 1st Class, Kangra, dated the 19th April, 1948, and granting the plaintiffs a decree for possession of the land in suit by pre-emption and ordering the plaintiffs to deposit Rs. 632 in the lower court on or before 8th June 1949, failing which their suit shall stand dismissed with costs and leaving the parties to bear their own costs throughout.

D. K. MAHAJAN, for Appellant.

NEMO, for Respondents.

JUDGMENT

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KAPUR, J. In this second appeal which is brought by the defendants against an appellate decree of the Senior Subordinate-Judge, Dharamsala, reversing the decree of the trial Court whereby suit of the plaintiffs was dismissed, arises a question of custom as to what is the position of the mother in regard to succession to her son.

Lakhu and Mst. Brijji, widow of Bholu, sold the land in dispute on the 13th July, 1941 to Bhagi Ram, Hari Singh and Jagat Ram for a sum of Rs. 632. On the 26th April, 1942 mutation was entered. Birbal and Sohnu who, were collaterals of the alienors brought a suit for pre-emption. The suit was dismissed by the Subordinate Judge as Jagat Ram, one of the vendees, had died and his mother who was his legal representative was not brought on the record, but on appeal being taken, the case was remanded to the trial Court for deciding the other issues, holding at the same time that the estate of Jagat Ram was sufficiently represented by the two brothers Bhagi Ram and Hari Ram and the suit had not abated, but it left open for decision the question as to when Jagat Ram died and whether he had died before the institution of the suit and what the effect of that was.

The trial Court held that Jagat Ram had died before the institution of the suit and therefore the question to be decided was as to who the original heir of Jagat Ram was, and if he was not impleaded, the suit was not properly constituted and could not proceed and it was therefore dismissed.

On appeal being taken to the Senior Subordinate Judge, it was held that under custom the brothers were better heirs than the mother and therefore the suit could proceed as the brothers were parties and the plaintiffs were entitled to possession by pre-emption having a better right of pre-emption. The defendants have come up in appeal to this Court, and the question, as I have

said before, to be decided is who would succeed to the estate on the death of Jagat Ram—his mother or his brothers. According to Hindu Law a mother is a better heir than the brothers and according to the Customary Law of the Punjab as given in Rattigan's Digest of Customary Law, which is a book of undoubted authority, as was held in *Subhani's case* (1), a mother of the deceased succeeds to a life estate in default of male lineal descendants or a widow : see paragraph 22. After the mother come daughters or the collaterals in the case of self-acquired and ancestral property respectively. Thus both under the personal law of the parties and the general custom of the Punjab a mother is a better heir to a deceased male proprietor than the brothers. We have then to see whether any departure from this rule has been made by the *Riwaj-i-am* of the District which applies to the parties who are Rajputs. I would therefore refer to Middleton's *Riwaj-i-am* of Kangra District. Question No. 44 deals with cases where a male proprietor leaves no male descendants. The question and answer may well be quoted—

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“Question 44...If a man dies leaving no male descendants but a widow and a mother, what rights, if any, has the mother to succeed?”

Answer—All the tribes except the Jats of Kangra Tehsil reply that the widow and mother succeed equally to a limited life-estate in the property of the deceased.

Apparently in such cases on the death of one of the females her rights lapse to the survivor and the collaterals cannot succeed as long as one of them is alive and does not marry and thereby lose her rights.”

(1) I.L.R. 1941 Lah. 154 (P.C.).

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Thus the *Riwaj-i-am* shows that on the death of a male proprietor, his estate is inherited by his widow and mother equally. Then follow questions and answers dealing with estate which are taken by such female heirs. Question No. 49 deals then with daughters' right of inheritance and it is stated that sons and widows exclude daughters and to this there is no exception. Questions Nos. 50 to 52 deal with inheritance of daughters when they are entitled to maintenance and what is the nature of the estate taken by them. Question No. 53 relates to the right of daughters' sons to succeed to the daughters (their mothers). Then come question No. 54 and the answer thereto which are as follows—

Question 54—If a man dies without male lineal descendants and leaving no widow, a daughter or descendants through a daughter, who is entitled to succeed?

Answer—The order of succession is generally stated to be—

- (1) donees by will;
- (2) collaterals according to their relationship;
- (3) persons from whom the deceased had received the land in gifts;
- (4) *ala maliks*;
- (5) descendants of the founders of the Tika.

The widows of brothers and others as well as mothers have been left out owing to the limited nature of their right. They do succeed as shown elsewhere, but to a life-estate only

Brothers and their descendants would naturally come first. Those that are dead will be represented by their widows, and after others, etc., would

come the mother. Donees by Will will succeed only if the reversionary heirs do not assert their right to challenge the alienation of ancestral property." Bhagi Ram and others
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In this question nothing has been said about the mother. It only deals with where a man dies without male lineal descendants and leaves no widow, daughter or descendants through a daughter. It is significant that this question does not make even a reference to the case of a mother which question No. 44 does. The other heirs who are covered by questions Nos. 44 to 53 are mentioned, but the mother is left out. The answer gives the cases from Nos. 1 to 5 and what is stated with regard to the mother seems to be a gloss of the compiler and not the answers of tribesmen and a statement that brothers and their descendants come first and that after the brothers would come the mother is also, in my opinion, merely an opinion of the compiler which seems to have no basis and which goes counter to both the personal law of the parties and the general custom of the State.

Reference has been made to *Sohnu and others v. Bahga and another* (1), a case of Ghirths of Kangra District. In that case one Gulabi made a gift of some land in favour of Bahga whom she described as her husband and on her death the remainder of the property was mutated in his favour. A claim was put forward by the plaintiffs who were *atma bandhus* of the father of Gulabi and it was held that under the Customary Law which applied to the parties the plaintiffs were excluded. Question 54 of the *Riwaj-i-am* by Middleton was relied upon and Broadway, J., dealing with this at page 434 held that the answers to the question were exhaustive and excluded cognates, i.e., the plaintiffs in that case. The attention of the learned Judges was never drawn to

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the fact that the rights of the mother were not dealt with in Question No. 54 as that question did not arise.

Mr. Daya Krishan Mahajan has relied on an unreported judgment, Letters Patent Appeal No. 117 of 1943. In that case on the death of a male proprietor the property was mutated half in the name of his widow and the other half in favour of his mother Mst. Renku. On the death of the widow her share was mutated in favour of her two unmarried daughters and on their marriage the whole of the estate was mutated in favour of the mother. The mother made gift of the whole of the estate on two different occasions in favour of Shibba who was not member of the family and one of the daughters of the deceased male proprietors contested the validity of the gift claiming that as a daughter she was a preferential heir and was, therefore, entitled to the whole of the property which had been gifted by the mother to the outsider Shibba and in the alternative to the portion which was inherited by her mother.

Dealing with Question No. 44 of the *Riwaj-i-am* the Bench held that in Kangra District, the mother had equal rights with the widow. The learned Judges then dealt with Question 49 and pointed out that in framing that question the existence of the mother had been overlooked and that the mother was placed on an equal footing with the widow and took equally with the widow in the absence of male lineal descendants.

Question No. 54 is then dealt with where it is again pointed out that the existence of the mother was not present in the mind of the person who framed the question and dealing with the rights of the mother Harries, C. J., who delivered the judgment of the Bench, said—

“The compiler of the *Riwaj-i-am* seems to have realised that the question as framed did not take into account the mother’s

position and the widows of brothers and such like, and therefore, it is stated that they have been left out owing to the limited nature of their right. It is, however, said that they do succeed as shown elsewhere, but to a life estate. The mother is shown elsewhere, that is, in answer to question 44, as succeeding along with the widow. It is true that later the compiler makes an observation in the answer to question 54 that a mother would follow brothers and their descendants, or if they are dead, their widows, but even so, that would according to the answer to question 49 place the widow well ahead of a married daughter who is postponed to collaterals of the 5th or 7th degree.

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It appears to me upon a consideration of these various questions and answers that as the position of the mother had been defined earlier in the answer to question 44, the compiler of the *Riwaj-i-am* did not think it necessary to introduce her into the order of succession in the answers to questions which had been framed omitting the mother altogether. In my judgment, it is clear from these answers that the mother being an equal heir with the widow was a preferential heir to the married daughters and, therefore, on the death of Mt. Projan, she would take the whole of the property for her life. As there are in this case no collaterals, the married daughter could only take on the death of her grand-mother."

Ultimately, it was held that the mother was entitled to the whole of the estate on the death of the widow of the last holder and thus taking the questions, Questions Nos. 44 to 54, into consideration the

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Bench was of the opinion that the law of inheritance according to the Customary Law of the Kangra District was that the position of the mother was equal to that of the widow.

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I am in respectful agreement with the view taken by the Letters Patent Bench that on a correct reading of the various questions, Questions Nos. 44 to 54, of the *Riwaj-i-am* of the Kangra District the widow and the mother are equal heirs to male proprietors, who die without leaving male lineal descendants and that the rights of other persons are subordinate to the rights of the widow and the mother and, therefore, the mother would be a preferable heir to the brothers. In that view of the matter the suit which was filed by the pre-emptors without bringing the mother on the record was not properly constituted and must, therefore, be dismissed as all the necessary parties were not brought on the record.

I would therefore, allow this appeal, set aside the judgment and decree of the appellate Court and restore that of the trial Court. The appellants will have their costs in this Court and in the Courts below.