

APPELLATE CIVIL

Before Harnam Singh and Kapur, JJ.

KANWAR MOTI SINGH,—Defendant-Appellant.

Versus

MST. CHARJO,—Plaintiff-Respondent.

Regular First Appeal No 173 of 1948

1952

December,
16th

Custom—Rajputs of Kangra District—Whether governed by Custom or Hindu Law—Widow—Whether entitled to the estate of her husband or only to maintenance—Answer to Question No. 102 of the Customary Law of Palampur Tehsil—Evidentiary value of—Punjab Land Revenue Act (XVII of 1887)—Sections 111 and 158—Right to partition land governed by—Ouster of Civil Court's jurisdiction regarding partition of land.

Held,—(1) that Rajputs are one of the predominant agricultural tribes in Kangra District if not in the whole State, and they are governed by Custom and not Hindu Law;

(2) that Question No. 102 of the Customary law of Palampur Tehsil is worded in such a manner that an intelligent answer cannot be expected from simple country folks and so many questions have been put together in one. Besides it is not a reasonable answer that widow with sons can claim partition but not a widow without sons; and then if a widow has received land by way of maintenance she can claim partition in certain circumstances. The answer in Middleton's *Riwaj-i-Am* of Kangra District is differently worded in regard to Palampur Tehsil. In view of the inconsistency it is difficult to rely on the correctness of the answer to Question No. 102 of the Customary law of Palampur Tehsil;

(3) that the rule which applies to succession is contained in Question 44 which states as is indeed the general custom in the Punjab that on a man dying sonless his widow succeeds to his estate—in Kangra if a mother is alive she succeeds equally with the widow. The rule in regard to widows given in Rattigan's *Digest* in Paragraph 11 is the same, where it is stated that in the absence of male lineal descendants the widow of the deceased ordinarily succeeds to life estate. The special family custom which the defendant set out to prove that in their family widows do not succeed to the estate of their husbands but are entitled to maintenance is not established.

Held further, that in regard to the lands partition is a matter which is excluded from the jurisdiction of Civil Courts under section 158 of the Punjab Land Revenue Act and the right to partition is governed by Section 111 of that Act.

Abdul Hussain Khan v. Sona Dero (1), *Dan Singh v. Mst. Sukhan* (2), *Buta v. Mst. Jiwani* (3), *Abdul Qadir v. Mst. Rabia* (4), *Sant Singh v. Basant Kaur* (5), and *Mst. Bhag Bhari v. Wazir Khan* (6), relied on.

First appeal from the decree of Shri H. C. Mital, Senior Subordinate Judge, Kangra at Dharamsala, dated the 1st October, 1948, granting the plaintiff a decree for joint possession of one half share in the lands and houses only in suit against the defendants but dismissing the plaintiffs' suit with regard to the share in the brick-kiln and other properties and leaving the parties to bear their own costs.

TEK CHAND and S. C. MITAL, for Appellant.

S. L. PURI and RAJINDER SACHAR, for Respondent.

JUDGMENT.

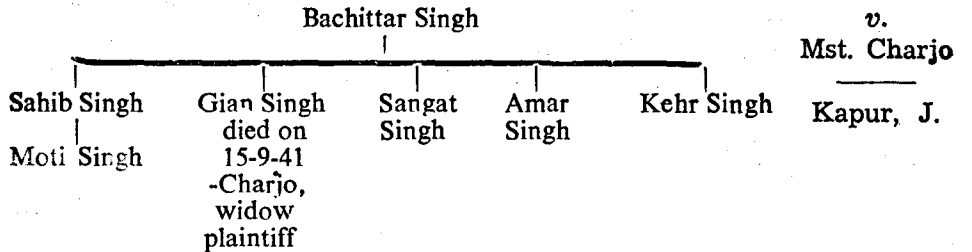
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KAPUR J. This judgment will dispose of two appeals, Regular First Appeal No. 173 of 1948 and Regular First Appeal No. 53 of 1949. Regular First Appeal No. 173 of 1948 is brought by the defendant against the judgment and decree passed by Mr H. C. Mittal, Senior Subordinate Judge, Dharamsala, dated the 1st October 1948, decreeing the plaintiff's suit and Regular First Appeal No. 53 of 1949 is brought by the plaintiff to vary the decree.

In order to understand the facts of the case it will perhaps be advantageous to give a short

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- (1) I.L.R. 45 Cal 450 (P.C.)
 - (2) 11 P.R. 1895 (Rev.)
 - (3) 82 P.R. 1908 F.B.
 - (4) 4 P.R. 1917 (Rev.)
 - (5) A.I.R. 1923 Lah. 810
 - (6) 70 P.R. 1912.

pedigree-table of the parties—



On the 6th April 1940, there was a partition of the estate of Bachittar Singh and separate possession was taken of their respective shares by Sangat Singh, Amar Singh and Kehr Singh. The property which fell to the share of Moti Singh and Gian Singh was allowed to remain joint. In mutation, Exhibit D.5, page 82 of the printed paper book, it was shown that land with kothi situate at Mahal Palampur would belong exclusively to Moti Singh co-sharer. Land in Tika Thumba, Dakhli Saloh, fell to the share of Moti Singh and Gian Singh in equal shares. Similarly, lands situated in other villages fell to the share of other brothers. On the 14th August 1941, by a registered sale deed, Exhibit P. 12, Gian Singh purported to sell for a sum of Rs. 22,000 the whole of his land, mortgagee rights, tea and rice machines, oil pressing machines, electric power house and other accessories with all rights therein. No money was paid at the time of registration, but Moti Singh undertook to pay the two creditors of Gian Singh—Dilbagh Rai and Manohar Lal. This document was registered at the house of Thakar Gian Singh at 7 p.m. the same day. Mutation of this sale was entered and was sanctioned on the 1st February 1942. It is stated in the mutation proceedings that Mst. Charjo, the widow of Gian Singh, appeared before the Revenue Officer and stated that Moti Singh had agreed to give her maintenance and therefore she raised no objection to the mutation being sanctioned. On the 7th July 1942 Sangat Singh, Amar Singh and Kehr Singh brought a suit against Moti Singh, making Mst. Charjo a party, that the alienation was effected fictitiously without consideration and with

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the intention of defeating the claim of the reversioners and that it would not affect their reversionary rights after the death of the widow, Mst. Charjo. This suit was decreed and on an appeal being taken to the High Court it was held by a Division Bench of the Lahore High Court (Teja Singh and Marten, JJ) that "the sale was a fictitious transaction and not a single pie had been paid" and the appeal was therefore dismissed. This was on the 8th February 1946. It may here be remarked that Mst. Charjo had been made a party (defendant) in that suit, but at her instance her name was struck off on the 11th August 1943.

On the 17th January 1947 a suit was brought by Mst. Charjo for possession of the property alleged to have been sold by Gian Singh to Moti Singh and for rendition of accounts. The defence was that the sale was binding, that the parties were governed by Hindu Law and that Moti Singh and Gian Singh formed a joint Hindu family and Moti Singh was entitled to the whole property by right of survivorship and that even if custom was the rule of inheritance, the widow was according to family custom, entitled only to maintenance. Question of limitation and some other pleas were also taken, but they are not necessary for purposes of this appeal. The issues relevant to the appeal were Nos. 4, 5, 6, 8 and 9 and they are—

4. Was Gian Singh member of a joint family with defendant?
5. Is plaintiff entitled to maintenance and if so, to what amount?
6. Is plaintiff estopped by her conduct from bringing the present suit?
8. Was the sale in favour of defendant a sham and bogus transaction, and, therefore, the plaintiff can obtain immediate possession of the area?
9. Relief.

The learned Judge held that Gian Singh did not form a joint Hindu family with Moti Singh, that the widow was entitled to the estate left by

Gian Singh, that she was not estopped from bringing the suit and that the sale in favour of the defendant was a "sham and bogus transaction" and the plaintiff was entitled to joint possession of one-half share of the lands and houses in suit but "not in the brick-kiln and other properties". Both parties have come up in appeal to this Court.

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Counsel for Moti Singh has first submitted that the parties are governed by Hindu Law and as they were joint Moti Singh should be taken to be entitled to the property by rule of survivorship. The parties to the dispute are Rajputs who are one of the predominant agricultural tribes in Kangra district, if not in the whole State. In the previous suit which was fought between Sangat Singh and others and Moti Singh it was held that the parties are governed by custom and nothing has been shown to support the submission that the parties are not governed by custom. Even if the parties were governed by Hindu Law, there was no joint family between the parties, and the fact that certain specified properties fell to the share of Moti Singh at the time of the partition and the fact that Gian Singh executed a sale of the whole of his property in favour of Moti Singh are in my opinion wholly destructive of any joint Hindu family being there. I would, therefore, uphold the finding of the learned Judge on the question of custom and that even if the parties are governed by Hindu Law there was no joint Hindu family.

The question then arises as to whether the sale which was made by Gian Singh in favour of Moti Singh was a sham transaction or was a genuine one. The learned Judge has found that it was a sham transaction. It has not been pleaded that the previous judgment, Ex. P. 5, is *res judicata*. Even if the judgment is not relevant under any other section of the Indian Evidence Act, there is sufficient evidence on this record to show that the previous sale was wholly fictitious. The sale which took place on the 14th August 1941 conveyed the whole of the estate of Gian Singh to Moti Singh. It left nothing for Gian Singh's wife or even for

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himself. The stamp for the sale was purchased at Dharamsala by Moti Singh. It was scribed, executed and registered the same day at Raipur where Gian Singh was living. It recites that the vendor was indebted to Dilbagh Rai and Manohar Lal. Neither of those creditors has been produced in the present case to show that any such debt was as a matter of fact due to them. Beyond the statement of Moti Singh that he had paid off these creditors there is nothing else on the record to prove such payments. No receipts of the creditors have been produced. Although Moti Singh has mentioned that Gian Singh was indebted to Dilbagh Rai and Manohar Lal on the basis of two pronotes for sums of Rs. 12,000 and Rs. 10,000 respectively, he did not state that the pronotes, Exhibit D. 1 and D. 2, were as a matter of fact executed by Gian Singh or bore his signatures. The other circumstances which go to support the finding of the learned Judge are—

- (i) that Gian Singh was not a poor man. P.W.1. Gulab Singh, P.W.2 Mahant Singh, P.W.3 Fateh Chand and P.W.4 Paras Ram have all deposed to his (Gian Singh) being a man of substance;
- (ii) Gian Singh had been suffering from paralysis for about two years before his death. That would be at the time when he executed the alleged pronotes also. There is nothing to show that he needed this money or owed any debts at the time when the so-called pronotes were executed. On the other hand it is stated by witnesses that even at the time of his death he had 1,500 maunds of tea plants stacked in his house which were worth Rs. 22,000 and he received a cheque for about Rs. 14,000 from Calcutta in the year 1938 or 1939. Mahant Singh, P.W.2, was cross-examined in regard to the amount of tea which is alleged to have been in possession of Gian Singh and nothing was brought out

which showed that his statement in regard to the 1,500 maunds of tea was in any way incorrect.

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P.W.5 Rasil Singh is the son of Bachittar Singh's sister and he has stated that Gian Singh was a heavy drunkard and six months before his death his mental condition had begun to become bad and that the sale was fictitious. No reason has been shown why he should have deposed against Moti Singh in this dispute and in favour of Moti Singh's aunt Mst. Charjo who along with her husband is stated to have brought up Moti Singh after the death of the latter's father when Moti Singh was only about a year old.

In these circumstances I am of the opinion that it has been proved that the sale of 1941 was not a genuine transaction but was a fictitious one.

It was next submitted that the plaintiff is only entitled to maintenance even if the parties are governed by custom and reliance was placed on Question No. 102 of the Customary Law of Palampur Tehsil which is printed at page 78 of the paper book and is Exhibit C. 1. The question and answer are as follows—

“Q. 102. Can any of the persons on whom the estate devolves, irrespective of the sex of such person, or of the relationship in which such person stood to the deceased, claim partition as a matter of right?

(i) if she have sons,

(ii) if she have not.

Can a daughter or sister, if remarried, claim partition? If land has been reserved for a widow, daughter or sister by way of maintenance, can they claim

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partition? If so, under what circumstances?

A. by Rajput Tribe.

Any person on whom the property devolves can claim partition. A widow is not competent to have partition effected.

Such (?) a daughter or sister is also not competent to claim partition.

If a widow has sons, she can claim partition.

- I. In the absence of sons (?) she cannot claim partition and is entitled to maintenance only. The custom of the second marriage of a daughter or sister does not exist. They cannot even claim partition. If any land has been reserved for the maintenance of a widow, a daughter or sister, she can claim partition in the event of the maintenance not being paid to her or in case the entire produce of that land is not paid to her.

Oral instances.—None.

Instances of transfers.—None”

The question itself is worded in such a manner that an intelligent answer cannot be expected from simple country folks and so many questions have been put together in one. Besides it is not a reasonable answer that a widow with sons can claim partition but not a widow without sons. And then if a widow has received land by way of maintenance she can claim partition in certain circumstances.

In the Customary Law of the district by Middleton at page 168 the answer to that question is as follows:—

“All the tribes of Dehra and Hamirpur state that all the recorded owners including widows can claim partition. Sister

and daughters, if remarried, cannot claim partition. The Rajputs of Nurpur and the Jats of Kangra also allow the widow to claim partition. All the rest say that a widow or daughter who has received some land by way of maintenance can claim partition if she has any trouble about the receipt of her maintenance.

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Male owners can always claim partition.”

The defendant never pleaded that the plaintiff was not entitled to get partition and in his written statement relied on family custom in favour of maintenance and not on the custom of the Tehsil or the district and this he could not be allowed to do. See *Abdul Hussain Khan v. Sona Dero* (1).

Besides the answer in Middleton's *Riwaj-i-am* of the district is differently worded in regard to Palampur Tehsil. In view of the inconsistency and what has been said above it is difficult to rely on the correctness of this answer which is printed at page 78 of the paper book.

In any case, the right to partition is governed by the provisions of the Punjab Land Revenue Act which is contained in section 111 of that Act and was recognised by the Financial Commissioner in *Dan Singh v. Mst. Sukhan* (2) and by a Full Bench of the Punjab Chief Court in *Buta v. Mst. Jiwani* (3), which was followed by the Financial Commissioner in *Abdul Qadir v. Mst. Rabia* (4) and this view was upheld in *Sant Singh v. Basant Kaur* (5), following a Bench judgment of the Chief Court in *Mst. Bhag Bhari v. Wazir Khan* (6)

But the rule which applies to succession is contained in Question No. 44 which states as is

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indeed the general custom in the Punjab that on a man dying sonless his widow succeeds to his estate—in Kangra if a mother is alive she succeeds equally with the widow. The rule in regard to widows given in Rattigan's Digest in paragraph 11 is the same. There it is stated that in the absence of male lineal descendants the widow of the deceased ordinarily succeeds to life estate. The special family custom which the defendant set out to prove that in their family widows do not succeed to the estate of their husbands but are entitled to maintenance is not in my opinion established. I would, therefore, hold that the widow is entitled to succeed to the estate of Gian Singh, her deceased husband. I would, therefore, dismiss the appeal brought by the defendant Moti Singh with costs.

In the appeal brought by Mst. Charjo the only point in dispute is whether the decree of the trial Court is to be varied where he has given joint possession of the houses and has not decreed her suit in regard to the other properties which are given in the decree, i.e., the tea factory mentioned at item No. 1 in the decree, covered barracks mentioned at item No. 2 in the decree and the tea manufacturing machine mentioned at item No. 3 in the decree, and in regard to a statement in the judgment that the plaintiff is not at present entitled to separate possession. Her complaint, in my opinion, is justified. In regard to the lands, I have held that she is entitled to the estate left by her husband and partition is a matter which is excluded from the jurisdiction of Civil Courts under section 158 of the Land Revenue Act and the right to partition is governed by section 111 of that Act. It was not for the learned Senior Subordinate Judge to say that she is not entitled to separate possession of lands.

In regard to the other properties mentioned in the decree, she being the owner of those properties would be entitled to get separate possession and if it is necessary that she should get it by partition

she is entitled to do so. I would, therefore, allow the appeal of Mst. Charjo with costs.

In the result the defendant's appeal is dismissed with costs and the plaintiff's appeal is allowed with costs.

HARNAM SINGH, J.—I agree in the order.

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J.

APPELLATE CIVIL

Before Harnam Singh and Kapur, JJ.

1952

LAL SINGH AND OTHERS,—*Plaintiffs-Appellants.*

December
17th

versus

ROOR SINGH AND OTHERS,—*Defendants-Respondents.*

Regular First Appeal No. 5 of 1948.

Custom—Amritsar District—Non-ancestral property—Whether daughters and daughters' sons exclude collaterals—Right of representation amongst females—Whether recognised—Practice—Pleading—Custom not pleaded—Whether can be allowed to be urged in the alternative.

Held, that in Amritsar district daughters and daughters' sons have a preferential claim to the non-ancestral property as against the collaterals. Daughter's son is a preferential heir to the estate of his mother's father if the mother had predeceased the father. The right of representation amongst females under custom is recognised.

Held further, that the plaintiffs came into court alleging that the property in dispute was ancestral property and they never alleged that even if the property was non-ancestral they had a preferential right to succeed to the estate of Sant Singh. On the pleadings therefore they are not entitled to turn round and say that even if the property was non-ancestral they had a preferential right.