

APPELLATE CIVIL

Before Kapur, J.

MST. ORKU AND OTHERS—Appellants.

versus

MST. BHODI,—Respondent.

Regular Second Appeal No. 396 of 1953.

Custom (Punjab)—Tarkhans of Dehra Tehsil in Kangra District—Whether governed by Custom. Hindu Law—Mother—Remarriage—Whether dis-entitles the mother to succeed to the estate of her son.

1954

July, 2nd

Held, that the Tarkhans of Dehra Tehsil in the Kangra District are governed by Hindu Law and not by Custom, and under the Hindu Law a mother though remarried would be entitled to succeed to the estate of her son.

Regular Second Appeal from the decree of Shri Gulal Chand Jain, Senior Sub-Judge, Kangra at Dharamsala, dated the 18th June, 1953, affirming that of Shri Pritam Singh, Sub-Judge, 1st Class, Kangra, dated the 30th January, 1953, granting the plaintiff a decree for possession of the land in suit against the defendants with costs.

M. C. SUD, for Appellants.

D. K. MAHAJAN, for Respondent.

JUDGMENT.

KAPUR, J., This is a defendants' appeal against an appellate decree of the Senior Subordinate Judge, Dharamsala, dated the 18th June, 1953, confirming the decree of the trial Court and holding that the parties are governed by Hindu Law. The trial Court had decreed the plaintiff's suit.

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One Chuhru died issueless and without a widow. The Revenue authorities on his death mutated his estate in the name of his grandmother, Mst. Orku, on the ground that his mother had remarried and had thus lost her right to succeed. The mother then brought a suit for possession of the estate alleging that she was governed by Hindu Law. I am of the opinion that it has been satisfactorily proved that she has remarried. The question is what is the law applicable in such cases.

The Courts below have held that the parties are governed by Hindu Law and not by custom. They are Tarkhans who own about 23 *bighas* of land and it has not been proved that they form a compact village community. They do not own a great deal of land and the record shows that they were brought into the village and land was given to them for their maintenance. Of course, there is no proof that the Tarkhans provide Lambardars in this village.

The instances which have been produced by the parties go to show that the parties are governed by Hindu Law. In the first place, they are non-agriculturists and according to the trend of authorities of this Court and of the later cases in the Lahore High Court they would be governed by Hindu Law. Besides, it is for a person who claims to be governed by custom to prove that fact and to prove what the custom is : see *Abdul Hussein Khan v. Sona Dero* (1), a Sind case.

The instances of decided cases produced by the mother show that Tarkhans of Dehra are governed by Hindu Law and not by custom. Exhibits P. 3 and P. 4 are cases where a gift was made to a daughter and an attack on that gift by the collaterals failed. Exhibit P. 5 was a case of a gift to a daughter which was upheld because the parties were governed by Hindu Law. Exhibits P. 7

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and P. 8 are also cases of a gift to a daughter which could not be successfully challenged by collaterals. Exhibit P. 11 is an instance which is not of much assistance. Exhibit P. 12 is a case by a mother who was found to have become unchaste and it was held that the parties being Tarkhans were governed by Hindu Law and, therefore, she was entitled to retain the estate that she had inherited and also to succeed to her mother-in-law. Exhibit P. 13 is another case of Tarkhans where they were held to be governed by Hindu Law.

The plaintiff has also relied on certain instances of Lohars. The first is Exhibit P. 6. where a remarried mother was allowed to succeed to the estate of her son under Hindu Law. Exhibit P. 14 is also a case of Lohars and they were held to be governed by Hindu Law. P. 10 is a judgment of Rashid, J., in which Tarkhans of Palampur Tehsil were held to be governed by Hindu Law and not custom. It is a good instance in favour of the respondent and it lays down principles on which the matter is to be decided.

The weight of evidence of judicial instances, in my opinion, is in favour of Tarkhans of Dehra being governed by Hindu Law.

Tarkhans, as I have said before, are not an agricultural tribe in the Kangra District. The area that they own is a very small one and they might have been consulted at the time of the preparation of the *Riwaj-i-am* in the year 1853 but they were not consulted at the time of the preparation of the *Riwaj-i-am* of 1914. Of course, a mere consultation is not presumptive proof of their being governed by custom but it is significant that they were not even consulted in 1914, and in all cases that have been brought to my notice wherever there was a dispute amongst Tarkhans between daughters and collaterals in regard to succession or a gift the daughters were successful.

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In these circumstances I am of the opinion that the Courts below have rightly held that the parties are governed by Hindu Law and not by custom.

It was admitted before the Senior Subordinate Judge that if the parties are governed by Hindu Law the mother, even though she has remarried, would be entitled to succeed to the estate of her son, and in paragraph 43 of Mulla's Hindu Law also it is stated that a remarried mother is entitled to succeed to the estate of her son. I would, therefore, dismiss this appeal with costs.