

Shrimati Anguri Devi, *v.* Gurnam Singh, Harnam Singh J. sought on the basis of a partial interest therein. In the noble words of Macklin, J., in *Mani Lal v. Chandu Lal Chhota Lal* (1), cases may arise out of section 7 (v), but the law seems to me as I have said and if the law is harsh, it can always be amended.

For the foregoing reasons I dismiss with costs the petition for the revision of the order passed by the trial Court in civil suit No. 79 of 1949 on the 15th of July, 1949.

Time is given till the 2nd of October 1950, to comply with the order passed by the trial Court on the 15th of July 1949, and parties are ordered to appear in the trial Court on the 14th of August 1950.

APPELLATE CIVIL

Before Harnam Singh, J.

PANJABOO,—Defendant-Appellant,

versus

1950
July 12

MALHA SINGH AND OTHERS (PLAINTIFFS) AND Mst. MAINAN AND OTHERS (PLAINTIFFS *pro forma*),—Respondents.

Regular Second Appeal No. 637 of 1946.

Custom—Rajputs of Nurpur Tahsil, District Kangra—Sister and sister's issue—Whether preferential heirs against collaterals of sixth or seventh degree—Non-ancestral estate of the last male holder.

Held that the defendant, the sister's son of the last male-holder, on whom the onus rested, failed to prove that sisters as well their issue were preferential heirs as compared with the collaterals of sixth or seventh degree in the Kangra District in general and among the Rajputs of the Nurpur Tahsil of the Kangra District in particular as regards the non-ancestral property of the last male-holder.

Regular Second Appeal from the decree of the Court of Shri S. S. Dulat, District Judge, Hoshiarpur/Kangra Districts, dated the 30th day of November 1945, reversing

that of Shri Mani Ram, Senior Sub-Judge, Kangra at Panjaboo,
 Dharamsala, dated the 8th July, 1944 and granting the v.
 plaintiff a decree for declaration that the gift of the land Malha Singh
 as specified in the plaint shall not affect the plaintiffs re- and others
 versionary rights leaving the parties to bear their own
 costs in both Courts.

N. L. WADEHRA, for Appellant.

D. K. MAHAJAN, for Respondents.

JUDGMENT.

HARNAM SINGH J. Hira, Rajput, of Mauza Dhar Kothi wandan, died issueless and on his death the land in suit devolved on Mst. Maina, mother of Hira. On the 18th of October 1942, Mst. Maina gifted the land in suit to Punjaboo, defendant, son of a sister of Hira. Mutation No. 162 with respect to the gift was sanctioned on the 30th of October 1942. Exh. P. 2 is a copy of the proceedings of that mutation.

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On the 26th of October 1943, plaintiffs instituted the suit, out of which this appeal has arisen, for declaration that the oral gift made by Mst. Maina in favour of Punjaboo was not binding on the reversionary rights of the plaintiffs on the death of Mst. Maina.

Defendants resisted the suit pleading, *inter alia*, that the land in suit was not ancestral *qua* the plaintiffs and that the gift in suit was merely an acceleration of succession.

On the pleadings of the parties the trial Court fixed the following issues :

- (1) Are plaintiffs collaterals of Hira, deceased, and of what degree ?
- (2) Is the land in suit ancestral *qua* the plaintiffs ?
- (3) Even if issue No. 2 is not proved, whether according to custom defendant No. 2 could

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not make the gift in suit in favour of defendant No. 1 ?

- (4) Is defendant No. 1 son of Hira's sister ?
- (5) Whether the gift was made in acceleration of succession for services rendered ?
- (6) Are plaintiffs preferential heirs of Hira, deceased, as compared to defendant No. 1 ?
- (7) Is the suit barred since defendant No. 3, a nearer collateral of Hira, deceased, has not joined them ?
- (8) Relief.

Plaintiffs admitted at the trial that defendant No. 1 was the son of Hira's sister. On the evidence recorded at the trial the Court found that the plaintiffs were collaterals of Hira, deceased, having descended from the common ancestor, Sudaman. The trial Court then found that the land in suit was not proved to be ancestral *qua* the plaintiffs. On issue No. 3 the trial Court held that *Mst. Maina* had power to make the gift in suit and that the gift in suit was made for services rendered. On issue No.6, the trial Court found that the property being non-ancestral plaintiffs were not preferential heirs of Hira, deceased, as compared with defendant No. 1. Issue No. 7 was found against the defendants. In the result, the suit failed and was dismissed.

From the decree passed by the trial Court on the 8th of July 1944, plaintiffs appealed in the Court of the District Judge, Hoshiarpur, under section 39 of the Punjab Courts Act, 1918. Finding that there was no evidence to show that sisters succeeded in the presence of collaterals of sixth or seventh degree in the Kangra District in general and among the Rajputs of Nurpur Tahsil in particular the lower appellate Court has allowed the appeal leaving the parties to bear their own costs throughout.

From the decree passed by the lower appellate Court on the 30th of November 1945, Punjaboo, defendant, has come up in appeal under section 41 of the Punjab Courts Act, 1918.

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Mr. Nathu Lal Wadehra, learned counsel for the appellant, contends that the property in suit being non-ancestral the defendant-appellant was a preferential heir to the estate of Hira, deceased, as compared with the plaintiffs. He then contends that the lower appellate Court was in error in holding that the onus lay on the defendant-appellant to establish that sisters as well as their issue are not excluded in the presence of agnates.

From the resume of facts set out above it appears that the contest in the present proceedings in between a sister's son and collaterals of the sixth degree in respect of property in dispute which is non-ancestral. The learned District Judge has held that sisters are not heirs to self-acquired property as against the sixth degree collaterals. This decision is correct. The *Riwaj-i-am* of Kangra District is silent on the point and we are, therefore, to fall back upon the rule of general custom laid down in paragraph 24 of Rattigan's Digest of Customary Law as *the parties admittedly follow custom*. Authority for this proposition is to be found in the decision in *Farangu v. Mst. Zalmo and others* (1) decided by Mehr Chand Mahajan and Teja Singh, JJ., on the 24th of August, 1948. Paragraph 24 of Rattigan's Digest of Customary Law reads :—

“Sisters are usually excluded as well as their issue.”

Paragraph 24 of the Digest means that sisters and their issue are usually excluded by agnates, however distant, not that a sister is not an heir at all even in the absence of agnates. The general custom prevalent in the province being that sisters and their issue are usually excluded from succession it lay on the defendant-appellant to establish that amongst Rajputs in

(1). R.S.A. No. 1969 of 1946.

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 v. Malha Singh issue excluded collaterals.
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In this view of the case the onus lay upon the defendant-appellant to show that he was a preferential heir to the estate of Hira, deceased, as compared with the plaintiffs.

I now proceed to examine the evidence that has been examined in the case in support of the special custom relied upon by the defendant-appellant. As stated above, the lower appellate Court has found that there is no real evidence to show that sisters do succeed in the presence of collaterals of sixth or seventh degree in Kangra District in general and among the Rajputs of the Nurpur Tahsil in particular. Mr. Nathu Lal Wadehra relies upon Exhs. D. 2 and D. 5 in support of the special custom.

Exh. D. 2 is a copy of the judgment in Civil Appeal No. 85 of 1941. In that case the facts were these : Mohar Singh died childless without leaving any widow on the 6th of October 1939. The land left by Mohar Singh was mutated in the names of the collaterals of Mohar Singh by the Revenue Assistant on the 4th of October 1940. Bidia, the sister's son of Mohar Singh, instituted the suit, which gave rise to the appeal, against Hari Singh, Sohnu and Gangu, sons of Bhana, Gattu, son of Gokal and Mst. Morru, widow of Sundar for declaration that he was in possession of 16 *kanals* of land which formed the subject-matter of the suit and was entitled to continue in possession thereof. Bidia's suit proceeded, *inter alia*, on the ground that he being the sister's son of the deceased and the property being self-acquired had a preferential right to succeed as compared with the collaterals. On these facts the Court found that the property in dispute being self-acquired property of Mohar Singh, Bidia had a preferential right to succeed as against defendants, collaterals of Mohar Singh, in the 4th degree. The judgment proceeded upon the finding that there was a lacuna in the Customary Law of the Kangra District, and, therefore, the case had to be decided under Hindu Law.

Exh. D. 5 is a copy of the judgment in Civil Appeal No. 19 of 1940. In that case the main contest was whether collaterals exclude sisters as regards self-acquired property of the last male-holder. Finding that questions Nos. 54 and 59 of the Kangra District Customary Law applied to ancestral property the Court found that the case was governed by Act II of 1929 and the burden lay on the collaterals to prove that there was a custom to the contrary in their favour.

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As stated above the parties in the present case are admittedly governed by custom, and that being so, it was for the defendant-appellant to establish that he, in the matter of succession, excluded the plaintiffs to the estate of Hira, deceased. That being so, evidence furnished by Exhs. D. 2 and D. 5 has no value. Even under the Mitakshra School of Hindu Law a sister was not in the line of heirs before Act II of 1929 expressly recognised sisters in the line of heirs amongst persons governed by Mitakshra School of Hindu Law. The evidence examined in this case, as shown above, is of no value, and in my opinion, the learned District Judge was right in finding that there was no real evidence in the case to show that amongst Rajputs in the Nurpur Tahsil of the Kangra District sisters as well as their issue exclude collaterals in succession to the estate of the last male-holder.

No other point arises in this appeal, which fails and is dismissed with costs.

MISCELLANEOUS CIVIL

Before Khosla and Kapur, JJ.

K. S. RASHID AHMED AS THE REPRESENTATIVE OF
Mrs. ZAFFAR MOHD.,—*Petitioner.*

versus

INCOME-TAX INVESTIGATION COMMISSION AND
ANOTHER,—*Respondents.*

Civil Miscellaneous No. 259 of 1950.

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Aug. 10

Constitution, Article 226—Writs of Prohibition and Certiorari—Whether can be issued—Taxation on Income (Investigation Commission) Act (XXX of 1947)—Sections