Privy Council Appeal No. 84 *of* 1927.

Musammat Vaishno Ditti - - - - - - - *Appellant*

v.

Musammat Rameshri and others - - - - - - *Respondents*

FROM

THE COURT OF THE JUDICIAL COMMISSIONER OF THE NORTH-WEST FRONTIER PROVINCE.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 20TH JULY, 1928.

Present at the Hearing:

LORD SHAW.
LORD SALVESEN.
SIR JOHN WALLIS.

[*Delivered by* SIR JOHN WALLIS.]

Lala Balmokand, an Arora Sikh who carried on a money-lending business in the town of Peshawar, died in December, 1906, leaving a widow, Musammat Kauran, and four daughters, Nikko, Ramo, Rameshri, Lalo, and Ravelo who was a posthumous child. His widow, Kauran, took possession of and managed his estate. At her death, which occurred on the 28th October, 1909, she left a will dated the 27th January and a codicil dated the 23rd May of that year, by which, after founding certain charities, she divided the estate among her daughters in equal shares, and directed that if any of her daughters should die, leaving children before the partition of the property, her surviving children should be competent to receive their mother's share.

On the 12th April, 1910, Rameshri, one of the minor daughters, instituted a suit by her next friend against the executors of her mother's will and her sisters in which she denied that her mother had any power to make a will, and alleged that her eldest sister Nikko, the 3rd defendant, who had been married during her father's lifetime, had no right to succeed to his estate either by law or by the dharmashastra.

In paragraph 7 of the plaint she stated that Surjan Singh, the husband of her minor sister Ramo, the 4th defendant, had been made her guardian *ad litem* and that their grandmother Musammat Hukki had been made the guardian *ad litem* of her minor sisters Lalo and Ravelo, the 5th and 6th defendants.

As regards the written statements of the 1st and 2nd defendants who were sued as executors of Kauran's will, it is only necessary to say that the 2nd defendant Tara Chand, who was the brother of Lala Balmokand and his nearest male agnate, disclaimed any interest in the suit and prayed that his name should be struck out.

The written statement of Ramo, the 4th defendant, denied that her mother Kauran had any power to make a will and prayed that she should be joined as a co-plaintiff with her sister Rameshri.

Nikko, the 3rd and contesting defendant, alleged in her written statement that her mother Kauran was the sole heir of her deceased father according to the dharmashastra, and that according to the same law the rights of the daughters arose only on her death. She alleged that her mother had full powers of disposition over the moveable and self-acquired immoveable property she had inherited, and, further, that the plaintiff had no right of inheritance superior to those of herself and her sisters "both under the law and local custom which binds the parties," and that she herself did not lose her share under the dharmashastra merely because she had been married in the lifetime of her father. She also alleged that the plaintiff herself was married at the date of their mother's death when the succession opened.

In paragraph 7 she alleged that the appointment of Musammat Hukki, the grandmother of the 5th and 6th defendants, as their guardian *ad litem* was defective as she was an old lady and unable to protect their interests, and prayed that she herself should be appointed as their guardian *ad litem*, as they were living with her and under her care as provided in her mother's will.

No written statement was filed by Musammat Hukki on behalf of the minor 5th and 6th defendants who were *ex parte*.

Issues were settled on the 31st May, 1910, and on the 21st June, 1910, the District Judge appointed "guardians *ad litem*" for all the minors, including the plaintiff. In his order he stated that the grandmother Musammat Hukki had refused to act as guardian *ad litem* for the minor fifth and sixth defendants, and had suggested that their sister Nikko, the third defendant, should be appointed as they were living with her. He also stated that Nikko herself had applied to be appointed, but observed that that would only delay the case unnecessarily and that, as she had appointed her husband, Gurmukh Singh, to appear for her and he was willing to appear for defendants 5 and 6, there seemed no objection why he should not be appointed guardian *ad litem* for defendants 5 and 6, and he was accordingly appointed. At the same time, Surjan Singh, the fourth defendant's husband,

was appointed as her guardian *ad litem*, and the plaintiff's father-in-law, Ganga Singh, guardian *ad litem* (it should have been next friend) for the minor plaintiff.

Unfortunately, in making this appointment of Nikko's husband and agent, Gurmukh Singh, as guardian *ad litem* of the 5th and 6th defendants—to which no one raised any objection—the District Judge overlooked the fact that the interest of the minor 5th and 6th defendants was adverse to that of their sister Nikko, the 3rd defendant, as one of the issues in the case was whether Nikko was disentitled to share with her sisters in the inheritance by reason of her marriage during her father's lifetime. To this extent their interests in the *lis* between the minor plaintiff Rameshri and the 3rd defendant Nikko were identical with the plaintiff's, with the result that Gurmukh Singh was in the same position as if he had been representing at the same time the plaintiff and the defendant in the suit, and his interest as husband agent of Nikko, the 3rd defendant, was adverse to the interest of the minor 5th and 6th defendants, whose guardian *ad litem* he was.

These appointments having been made, Ganga Singh, as the plaintiff's next friend, Gurmukh Singh, as agent of his wife, the 3rd defendant, and guardian *ad litem* of defendants 4 and 5, and Surjan Singh, as guardian *ad litem* of his minor wife, the 4th defendant, proceeded on the same day to file a petition of compromise, which had, no doubt, been previously arranged. This compromise declared that Kauran's will was invalid but maintained the charities which she had founded, divided the rest of the estate between the five sisters in equal shares, and provided that in case of the demise of any of the minor girls before marriage her property should be equally divided among her surviving sisters.

In his order sanctioning the compromise the District Judge, after reciting that the compromise which had been entered into by the guardians and next friends of the various parties, who had also been represented by counsel in all cases, had been most carefully considered by him, and with the additional conditions agreed to by the parties as to defendants 5 and 6, appeared to him to be in the best interests of the minors, and to safeguard the family and the family property, which was considerable, from ruinous litigation, he proceeded to ratify the compromise as amended and passed a decree in accordance therewith.

In accordance with the terms of the compromise, Nikko's husband, Gurmukh Singh, and Rameshri's father-in-law, Ganga Singh, were to be appointed joint guardians of the property of the minor defendants 5 and 6, and, together with Ramo's husband, Surjan Singh, they were to be given a succession certificate to enable them to get in Balmokand's estate.

Unfortunately, Nikko's husband, Gurmukh Singh, died within the year, so that Ganga Singh was appointed the sole guardian of

the minor defendants 5 and 6, and also obtained the succession certificate in his name alone, in view of the fact that Ramo had also died and her husband, Surjan Singh, had ceased to have any interest in the estate.

Nikko herself then died late in 1911, leaving a daughter, Vaishno Ditti, the present plaintiff.

Ganga Singh and, after his death in 1916, his sons, Kirpal Singh and Manmohan Singh, who succeeded him as guardians of the minors 5 and 6, and in the management of the estate excluded Nikko's daughter Vaishno Ditti, the plaintiff in this suit, from all share in the estate, and divided the income equally between the three surviving sisters, Rameshri, Lalo, and Ravelo.

In April, 1923, Vaishno Ditti, by her father-in-law, as her next friend, filed a suit for a declaration of her right to her mother Nikko's share in the estate, but it was held that she was not entitled to sue for declaratory relief, and the plaint was returned to her. She then, on the 26th November, 1923, filed the present amended plaint against her mother's three sisters, Rameshri, Lalo and Ravelo, and against Kirpal Singh and Manmohan Singh, the sons of Ganga Singh, who, as already stated, had succeeded their father in the management of the estate, to recover her mother Nikko's one-fourth share in the property left by Lala Balmokand and his widow Kauran. After reciting the previous litigation and the compromise, the plaint alleged that under the deed of compromise the rights of the parties to the suit were completely determined, and also alleged in paragraph 12 that Musammat Nikko, after the death of her sister, Ramo, was, according to the terms of the deed of compromise and riwaj (custom), owner of one-fourth share of the estate of L. Balmokand, and that after Nikko's death the plaintiff, as her daughter, was entitled to a one-fourth share.

The written statement admitted that a compromise of the previous suit had been effected, and a decree passed in accordance therewith, and did not contain any allegation that the compromise was not binding because some of the minor parties had not been properly represented. Paragraphs (5) and (9) were as follows :—

> (5) The allegations in para. 7 of the plaint, as made, are not admitted to be correct. The legal effect of the compromise is only this : that the wills of Musammat Kauran were cancelled and the daughters of L. Balmokand came into possession of property as daughters with life-interest, according to the *dharmashastra*. No partition was effected amongst them. However, in the deed of compromise, some feasible arrangements were suggested for the sake of convenience and good management of the property. It is wrong to say that on its basis any definite decision was arrived at regarding the rights of the parties, or that the daughters of L. Balmokand or their children became bound to reserve property of the value of Rs. 42,000 permanently for charities. It is correct that according to *dharmashastra*, the share of a daughter who dies unmarried devolves on other daughters, and this is what the deed of compromise implies.
>
> (9)–(8 ?) It is correct that the life-interest of Musammat Ramo ended with her death and her sisters became entitled to the possession of the

property left by Balmokand. It is, however, denied that on the death of Musammat Nikko her share devolved upon her daughter, or that Musammat Nikko had any particular share. According to *dharmashastra* and the law, the rights of life-interest which were proposed to be given to Musammat Nikko ceased with her death, and the entire property devolved upon her three sisters with life-interest. The term in the compromise deed in this respect is null and void and unacceptable, and the other daughters of L. Balmokand or their children are not bound by any such term. The last portion of para. 12 of the plaint is, therefore, denied.

The plaintiff put in a replication denying that the interpretation placed upon the contract was correct, or that the daughters were given only life-interest, or that no partition had been effected between them. Under the compromise each of the daughters was held to be the owner of a one-fifth share as her absolute property, and the compromise was binding on the defendants, who were parties to the suit. It was wrong to say that Nikko got no particular share ; she got a one-fifth share and on Ramo's death a one-fourth share. It was further alleged that the rights which according to the compromise were given to Nikko devolved on her daughter on her death according to riwaj, and not on her other surviving sisters, as alleged in the written statement. Under the circumstances the dharmashastra did not apply to the rights of Nikko, or to the other daughters, nor were the parties governed by the dharmashastra.

What is described in the English translation of the written statement and the replication as a particular share clearly means a share not passing by survivorship to the other sisters, and it was further alleged that if the effect of the compromise was to give Nikko any more than such a share, it was null and void and unacceptable.

There was no express provision in the compromise decree as to what was to happen on Nikko's death leaving a daughter, and the written statements appear to mean that if under the compromise Nikko took a full estate descendible to her children, the compromise so far was null, void and unacceptable. Supposing the ordinary Hindu law to apply, it might well be contended that the sisters had no power by means of the compromise to enlarge their estates, so as to prejudice the rights of the next male reversioners to succeed to the whole of the father's estate on the death of the last surviving daughter, though, even so, it might be argued that they could provide for the enjoyment of the estate until the death of the last survivor.

The only question properly arising on these pleadings was whether under the compromise the sisters took more than a life estate, and, if so, whether such provision was binding, and, if not, was the plaintiff entitled to succeed by custom to her mother's share ? If it had been intended to challenge the whole compromise on the ground that two of the minor defendants in the suit had not been properly represented, as was done on the

appeal to the Judicial Commissioner, this defence should have been specifically pleaded, so that the plaintiff might have notice of the possibility that the compromise might fail her and that she might have to rely entirely on the proof of custom. On the pleadings, as they stand, it is difficult to see how the first issue, " Are not parties bound by the (compromise) decree of 23rd June, 1910 ? " can be said to arise.

At the trial the plaintiff gave certain evidence, which will be considered later, that by general custom among the community a daughter's daughter succeeded to the inheritance in the absence of the daughter's son, and the defendants called no rebutting evidence at all.

With regard to this evidence, the District Judge observed that he did not think the plaintiff's witnesses in any way improved the status of the plaintiff as they were unable to quote any case. On the other hand, he declared, as well he might, that he was unable to understand why the compromise should not be declared binding on the parties, and it is therefore obvious that the point that the guardian *ad litem* of defendants 5 and 6 had an adverse interest, was not raised before him, any more than it was in the written statement. He accordingly held that the compromise was by way of a *bona fide* settlement of a family dispute, and that its validity could not be questioned.

On issue (2) he held that under the compromise Nikko became entitled on her sister Ramo's death to a one-fourth share which descended to her daughter. As regards issue (3), as to plaintiff's right of inheritance, if the compromise was not binding, he considered it unnecessary to discuss it at any length, and merely observed, "Anyhow, in equity she (the plaintiff) would be entitled to the share of her mother, and I don't think that the other daughters of Balmokand would in any way bar those children of inheritance."

The grounds of objection to the compromise were, for the first time, adumbrated in the grounds of appeal, in which it was alleged that it was not binding on the minor parties to the suit because it was wholly against their interests, which were not represented and considered, and because the rules of procedure regarding compromise were not complied with. It was only at the hearing of the appeal that the specific objection was taken that the 5th and 6th defendants were not properly represented because the Court had appointed a guardian *ad litem* whose interest was adverse to those minors contrary to the provisions of O. 32 R. 4 of the Code of Civil Procedure for the reasons which have been already set out.

On appeal the Judicial Commissioner held that in consequence of this objection the compromise could not be binding on the minor 5th and 6th defendants, and held further that the compromise was opposed to Hindu Law if its effect was to make the daughters hold as tenants in common instead of jointly

with rights of survivorship. In the result he held the compromise not binding on any of the defendants, allowed the appeal, and dismissed the plaintiff's suit.

In their Lordships' opinion there were clearly no merits in the objection to the compromise taken at a late stage of the case that the minor 5th and 6th defendants had not been properly represented. The terms of the compromise were approved by the next friend of the minor plaintiff and the guardian *ad litem* of the minor 4th defendant, who were in the same interests as the 5th and 6th defendants, and were further carefully considered and approved by the District Judge. Even so the question remains whether the failure to observe this important provision of the Code would not, when properly raised, have the effect of invalidating the compromise so far, at any rate, as regards the shares of the 5th and 6th defendants.

This is a question with which their Lordships consider it unnecessary to deal, because, in their opinion, the plaintiff is entitled to succeed on another ground. As already stated, the District Judge found on the 3rd issue that the plaintiff was entitled to succeed to her mother's share independently of the compromise, but based this decision on grounds of alleged equity rather than custom, because in his opinion the plaintiff's evidence as to custom did not help her case as the witnesses were unable to quote any instances in support of their deposition, while the Judicial Commissioner reversed this finding on the ground that the plaintiff had no right to succeed to her mother's share as under Hindu Law it passed to her sisters by survivorship.

Having regard to the conditions existing in this part of India, both the lower Courts erred, in their Lordships' opinion, in disregarding the unrebutted evidence of custom which was given by the plaintiff as to her right to succeed to her mother's share because it was unsupported by instances. Section 27 of North-West Province Regulation VII of 1901, which corresponds with Section 5 of the Punjab Laws Act, 1872, is as follows :—

> In questions regarding inheritance, special property of females, betrothal, marriage, dower, adoption, guardianship, minority, bastardy, family relations, wills, legacies, gifts, partition, or any religious usage or institution, the rule of decision shall be :—
>
> (*a*) Any custom of any body or class of persons which is not contrary to justice, equity and good conscience, and has not been declared to be void by any competent authority.
>
> (*b*) The Mohammedan law, in cases where the parties are Mohammedans, and the Hindu law, in cases where the parties are Hindus, except in so far as such law has been altered or abolished by legislative enactment, or is opposed to the provisions of this Act, or has been modfiied by any such custom as is referred to in the preceding clause of this section.

Now it has been laid down by Robertson, J., in *Daya Ram* v. *Sohel Singh*, 1906, P.R. 390, in a passage approved by this Board in *Abdul Hussein Khan* v. *Bibi Sona Dero*, 45 I.A. 10, under the corresponding section 5 of the Punjab Laws Act, 1872, that that

section raises no presumption that parties are to be governed by custom rather than by their personal law, and that the personal law of the parties must be applied unless the custom is proved. It may seem at first sight that this view of the section gives no effects to clause (*a*) which requires the succession to be governed by any custom applicable to the parties concerned, and that the law would be the same if this clause had been omitted. In a sense, this may be so, but their Lordships are of opinion that in putting custom in the forefront, as the rule of succession, whilst leaving the particular custom to be established as it necessarily must be, the legislature intended to recognise the fact that in this part of India inheritance and the other matters mentioned in the section are largely regulated by a variety of customs which depart from the ordinary rules of Hindu and Mohammedan law.

In these circumstances it has been rightly held in the Lahore Court in the case above mentioned that, where a custom is alleged, a duty is imposed on the Courts to endeavour to ascertain the existence and nature of that custom; and the Local Government has come to their assistance by establishing a *riwaj-i-am* or record of custom in the different parts of the Punjab, including the North-West Frontier Province which was formerly included in it. It has been held by this Board that the *riwaj-i-am* is a public record prepared by a public officer in discharge of his duties and under Government rules; that it is clearly admissible in evidence to prove the facts entered thereon subject to rebuttal; and that the statements therein may be accepted even if unsupported by instances (44 I.A. 89, 97; 52 I.A. 379, 383).

Further, manuals of customary law in accordance with *riwaj-i-am* have been issued by authority for each district, and in their Lordships' opinion stand on much the same footing as the *riwaj-i-am* itself as evidence of custom.

In these circumstances their Lordships are of opinion that, even though there be no evidence of instances, still, if the custom spoken to by the party's witnesses is in accordance with the custom applicable to his community according to the manual of the customary law of the district, there is sufficient prima facie evidence of the existence of the custom, subject, of course, to rebuttal, and that it ought not to be held insufficient merely for want of instances.

Their Lordships will now proceed to deal with the facts of the present case in the light of these observations. There is no repetition in the written statement in this case of the allegation that the eldest sister took no share in her father's estate by reason of her having been married during his lifetime; and it was admitted that on the death of the minor sister Ramo without issue her share devolved on her sisters, including Nikko. What was denied was that on Nikko's death her share devolved on her daughter or that the compromise could make it so devolve.

As regards the custom, there was the evidence of the two witnesses for the plaintiff, that in the community of the Arora Sikhs, to which the parties belong, a daughter's daughter succeeds

to the inheritance in the absence of a daughter's son, and there was no evidence the other way. Though the witnesses were unable to speak to any instances in which the custom had been observed, their evidence is entirely in accordance with what is laid down in the Customary Law of the Peshawar District, at page 32, that in the event of a daughter entitled to inherit having predeceased her father her share may be taken by her issue. If, as here stated, in the event of a daughter dying *vitâ patris*, her daughter is entitled to succeed by representation, it appears to their Lordships to follow *a fortiori*, that a daughter's daughter must be entitled to the share which had devolved upon her mother; and it may be observed in conclusion that this is what was expressly provided in the mother's will which would appear to have been intended rather to safeguard the property than to make any alteration in her daughters' rights of succession to their father's property.

For these reasons their Lordships are of opinion that the custom relied on for the plaintiff is sufficiently established in the absence of any evidence to the contrary, and that this appeal should be allowed and the decree of the District Court restored subject to the following modifications, (*a*) that the appellant be granted a decree for a one-fourth share of the movable and immovable property, and (*b*) a decree for rendition of accounts as from the 23rd June, 1910, with respect to her share, with rents profits and interest, with costs here and in the Lower Appellate Court, and they will humbly advise His Majesty accordingly.

In the Privy Council.

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DELIVERED BY SIR JOHN WALLIS.

Printed by
Harrison & Sons, Ltd., St. Martin's Lane, W.C.2.

1928.