Privy Council Appeal No. 94 *of* 1915.

Beg - - - - - - - - - *Appellant,*

v.

Allah Ditta and Others - - - - *Respondents,*

FROM

THE CHIEF COURT OF THE PUNJAB.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 18TH DECEMBER, 1916.

Present at the Hearing:

THE LORD CHANCELLOR (LORD BUCKMASTER).
LORD ATKINSON.
LORD WRENBURY.
MR. AMEER ALI.

[*Delivered by* MR. AMEER ALI.]

This is an appeal from a judgment and decree of the Chief Court of the Punjab, dated the 23rd of December, 1908, and arises out of a suit instituted by the plaintiffs, respondents, so long ago as the 4th April, 1900, in the Court of the Additional District Judge of Jhang, for possession of some landed property situated in that district.

The property in suit was owned and possessed by one Shahamad, a Mahommedan Jat, belonging to the sub-community of Dabs, settled in the Jhang district in Southern Punjab. Shahamad died many years ago, leaving a widow, Sahib Bibi, and a daughter named Jindwadi, who was married to a near cousin of the name of Daim. The defendant, appellant, is the son of Daim and Jindwadi. On Shahamad's death, his widow succeeded to his entire inheritance and remained in possession until her death, which is stated to have occurred a year before the litigation commenced. On the widow's death, Jindwadi, acting on behalf of her son, obtained an order from the collector for the registration of his name in the Revenue Registers as proprietor in succession to Shahamad.

The plaintiffs claim to be the collaterals or agnatic relations of Shahamad, and as such entitled by the custom of

their tribe or community to their share of his inheritance on the death of the widow, to the exclusion of his daughter and the daughter's son. The action, however, is confined to a moiety of Shahamad's estate, as it is admitted that Daim was also a collateral and entitled to a half.

The suit was brought against Beg, who was evidently an infant at the time, under the guardianship of his mother. He denied the plaintiffs' title to the inheritance of Shahamad "in the presence of his daughter and grandson." He further alleged that Shahamad had executed a will under which also he was entitled to his grandfather's estate. He also stated that his father, Daim, lived and worked with Shahamad in his lifetime. It is unnecessary to refer to the earlier stages of the suit, which proved infructuous. The first adjudication on proper issues was made by the District Judge on the 20th December, 1902. The real controversy between the parties is clear from the issues framed by him and his judgment thereon. It appears that whilst the plaintiffs based their claim to possession on a general custom of agnatic succession in their community or tribe, the defendant, without, so far as their Lordships can see, admitting the contention, alleged that a daughter married to a collateral who takes up his abode in the father-in-law's house and is known as the *Khânadâmâd*, or "resident son-in-law," succeeds to her father's inheritance to the exclusion of the agnates. And in support of this special custom he produced the *Riwâj-i-âm*, or "official records of custom," in addition to a considerable amount of oral testimony.

Some of the issues were specifically directed to the respective contentions of the parties with regard to the custom. The District Judge in substance held that although there was a custom more or less general among the agriculturist tribes of the Punjab by which daughters were excluded from succession, the existence of another custom, by way of exception, was established by which married daughters residing with their husbands in the paternal house were not subject to the deprivation of the inheritance. He held also that the will set up by the defendant was proved. With regard to the custom alleged by the defendant, his conclusion is expressed in the following words:—

"Then the Khânadâmâdi" (the status of Daim as a resident son-in-law) "is proved; this is a recognised custom, that a daughter or her "descendants get the inheritance in preference to the collaterals. The "same is the result of the local commissioners' report and of the evidence "of the witnesses for the defendant."

He thus found expressly in favour of the existence of the custom on the basis of which the defendant contended the plaintiffs must fail; and he accordingly dismissed the action.

From this judgment the plaintiffs appealed to the Divisional Judge, who affirmed the first Court's decree with a

specific finding based on the *Riwâj-i-âm* in accord with the District Judge. And he added that "nothing had been proved to contradict this custom"—the custom alleged by the defendant.

From this decision the plaintiffs preferred an appeal to the Chief Court. On this appeal the learned judges held that the will propounded by the defendant was genuine and that Daim was, in fact, a *Khânadâmâd*; but they considered that the finding of the lower Courts was not sufficient for the disposal of the case and they accordingly remanded it for an enquiry as to whether the property left by Shahamad was ancestral or self-acquired, what his powers of disposition were, and so forth—questions, in their Lordships' opinion, wholly immaterial if the custom was established. The order of remand is dated the 16th November, 1905, and the appeal did not come on for further hearing until 1908.

After the remand the matter came before two different officers. The second District Judge, under the orders of the Divisional Judge (not the same Judge who had decided the first appeal), held an elaborate enquiry practically on the same points that had been already decided; his report came before the Divisional Judge, who also went over at considerable length the same ground.

He put aside the statements in the *Riwâj-i-âm*, apparently on the ground that they required to be proved by instances before any value could be attached to them. With regard to the evidence of instances, he thought it referred, with one exception, to other sections of the community, and did not apply to the Dabs. The Divisional Judge further held, in agreement with his predecessor, that the plaintiffs had, on their side, failed to rebut the defendant's allegation as to the existence of a special custom relating to the succession of married daughters among the Dabs.

On the return of the case to the Chief Court the appeal was reheard by two Judges, one of whom was a party to the order for remand. The question was this time confined to the existence of the custom alleged by the defendant; and the learned Judges, being of opinion that the defendant had failed to establish his allegation, reversed the decision of the first Divisional Judge, dated the 3rd February, 1904, and decreed the plaintiffs' claim.

From this decree the defendant Beg has appealed to His Majesty in Council. Their Lordships cannot help thinking that, had it not been overlooked that the main issue in the case at which the Lower Courts had arrived at a distinct finding related to the existence of the custom, twelve years' ruinous litigation might have been avoided. It may be observed here that the Judges who decided in favour of the existence of the custom alleged by the defendant appear to have correctly apprehended the incidence of the *onus*.

In their Lordships' opinion the Chief Court are in

error in supposing that the defendant did not discharge the onus that lay on him of establishing the custom he alleged. Assuming that there is a general custom of agnatic or collateral succession in default of male issue to the exclusion of female heirs among the agricultural tribes of the Punjab, about which the decisions of the Punjab Chief Court are by no means uniform, especially in the case of Mahommedan tribes who are endogamous, it is clear that the rule is admittedly subject to a considerable number of exceptions. Mr. Rattigan, in his valuable work called "A Digest of Civil Law for the Punjab," enumerates the exceptions under paragraph 23. Sir Charles Roe, himself at one time a Judge of the Chief Court, in his "Tribal Law in the Punjab," lays particular stress on the value of the *Riwâj-i-âm* as a record of tribal customs; and, he adds, that "a son-in-law of the house is a regular institution."

In the *Riwâj-i-âm* filed in this case the custom alleged by the defendants is mentioned in express terms as in force among the Syeds, Kureshis, and Syals. With regard to the general body of Jats (in which term the sub-community of Dabs is clearly included) the custom is simply mentioned as "that prevailing among the Syals."

The *Riwâj-i-âm* was produced and exhibited as evidence at the very outset of the case; it is a public record prepared by a public officer in discharge of his duties, and under Government rules; it is clearly admissible in evidence to prove the facts therein entered subject to rebuttal. In their Lordships' opinion, the statements contained in the *Riwâj-i-âm* form a strong piece of evidence in support of the custom, which it lay upon the plaintiffs to rebut, and this, according to the findings of the Divisional Judges, they failed to do.

In their Lordships' opinion, the decree of the Chief Court cannot be sustained, and they will humbly advise His Majesty that it should be set aside, and the plaintiff's suit dismissed with costs in all the Courts in India. The respondents must pay the costs of this appeal.

In the Privy Council.

BEG

v.

ALLAH DITTA AND OTHERS.

DELIVERED BY MR. AMEER ALI.

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