

Hashmat Ali and another - - - - - *Appellants*

v.

Mussammat Nasib-ul-Nisa - - - - - *Respondent*

FROM

THE HIGH COURT OF JUDICATURE AT LAHORE.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE
PRIVY COUNCIL, DELIVERED THE 22ND DECEMBER, 1924.

Present at the Hearing :

LORD SUMNER.

SIR JOHN EDGE.

SIR LAWRENCE JENKINS.

[*Delivered by* SIR LAWRENCE JENKINS.]

This is an appeal from a decree dated the 23rd of July, 1921, of the High Court of Judicature at Lahore, varying a decree, dated the 28th of May, 1915, of the Court of the Senior Subordinate Judge of Rohtak.

The suit is brought by Mussammat Nasib-ul-Nisa to recover possession of immovable property described in the plaint on the ground that it formed part of the inheritance left by her uncle, Mir Barkhat Ali, and on the death of Mussammat Bismillah Begam, his last surviving widow, devolved on her as his customary heir.

Though the record is voluminous, the points now in issue are narrowed down to two : (a) whether the whole of the property claimed formed part of Barkhat Ali's estate, and (b) whether the plaintiff has established that she is his customary heir. The items claimed include a moiety of the villages of Salakhni and Kanal.

Up to the Mutiny the entirety of these villages belonged to Bisharat Ali. They were then confiscated for his alleged default

Barkhat Ali died in 1872 without issue but survived by the three widows shown in the pedigree. Contrary to the rule of Mohammedan law, they succeeded to the whole of his estate, for an interest terminable with their lives and with a right of survivorship as between themselves.

Mussammat Bismillah Begam was the survivor, and on her death in 1909, three members of the family instituted three separate suits, each claiming as heir of Barkhat Ali to recover possession of the property now in suit. One was brought by Mussammat Nasib-ul-Nisa, one by Mussammat Ahmadi-ul-Nisa, and the third by Mir Afzal Ali. They were consolidated and heard together. The second and third failed, and no appeal has been preferred; in Nasib-ul-Nisa's, a decree was passed in her favour on appeal, and it is against that decree that the present appeal has been preferred.

For Nasib-ul-Nisa it has been argued that, as the heirship of her two rival claimants has been negatived, hers must be taken to be established even as against the defendants. But their Lordships cannot assent to this contention. The defendants, though without title, are in possession and the plaintiff can only recover that possession by establishing her own title as against them, regardless of what has been determined in the other two suits.

Appended to the Subordinate Judge's judgment are nine pedigrees, G I to G IX, showing the family relationship at the dates of the several successions said to support the customary rules of succession on which the plaintiff relies. Their correctness is not questioned and the actual succession in each case is proved, not merely by oral evidence, but by judicial decisions or revenue orders made in mutation proceedings.

The devolutions to which they relate have been accurately investigated by the High Court and it would serve no useful purpose for their Lordships to travel over the same ground.

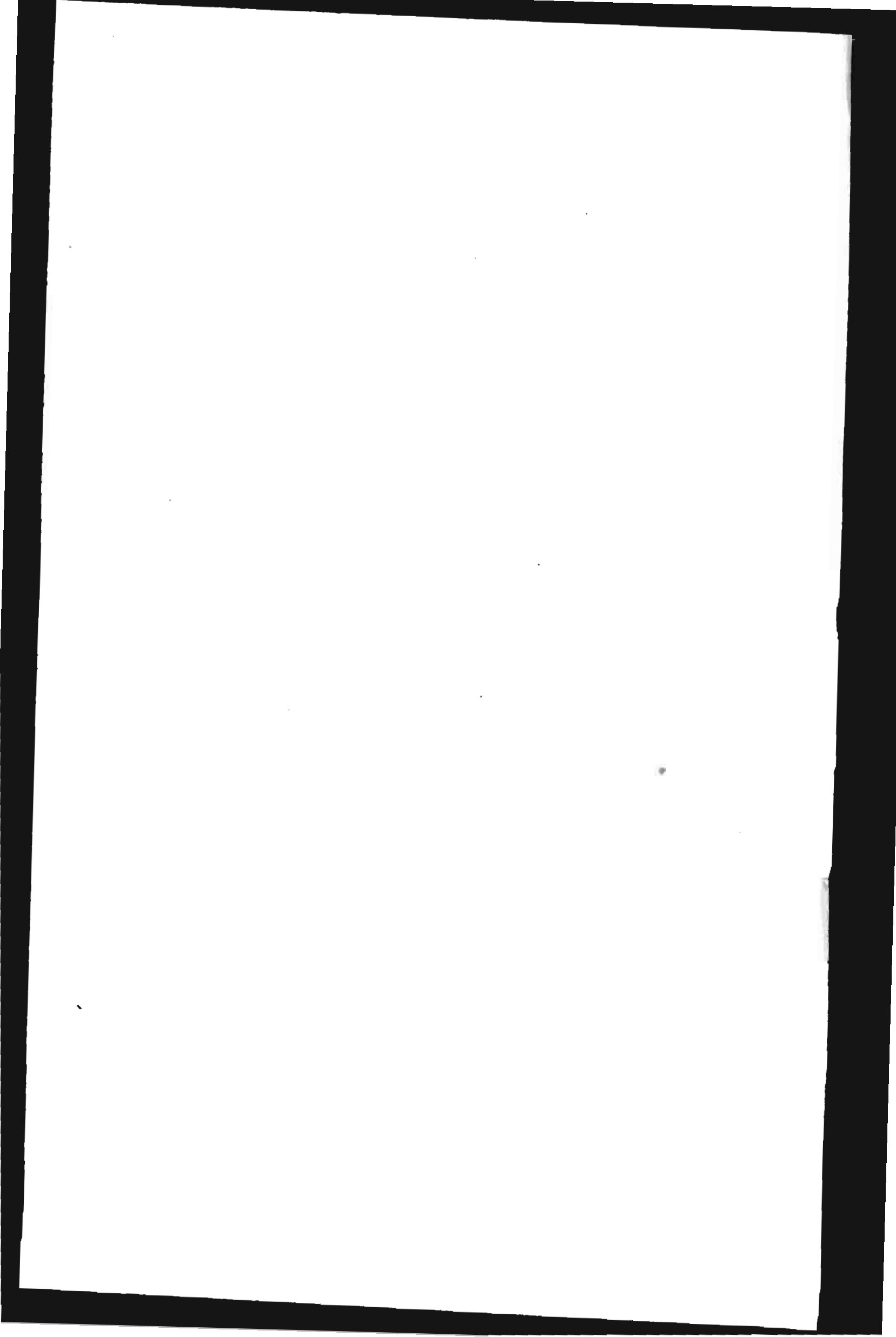
What has to be determined is the inference to be drawn from them as to the rules of succession relevant to the plaintiff's claim in this suit.

They corroborate the oral evidence that in this family custom is followed in matters of inheritance, and this, in their Lordships' opinion, is established beyond controversy. So the present enquiry is not whether in relation to the particular succession now in question the ordinary personal law is superseded by a custom, but what is the customary rule that regulates it.

That there is a customary rule which entitled Barkhat Ali's widows to succeed as heirs to his estate for limited interests is not disputed; it is equally clear that there is a rule of inheritance in this family which entitles brothers to succeed to the exclusion of sisters. Applying these two rules to the succession on the surviving widow's death, if Sarfaraz Ali had survived, he would have inherited Barkhat Ali's property to the exclusion of his sisters. But Sarfaraz Ali was dead, and the plaintiff, his daughter,

alleges that by the code of customary rules regulating succession in this family, the principle of representation is sanctioned, and she claims that by virtue of it she, as Sarfaraz Ali's daughter, in the absence of male issue, represents him and stands in his place. Their Lordships agree that representation is a part of the rules of succession in this family. It is settled by judicial decision that a son in matters of inheritance represents his deceased father, and the record discloses instances of succession in which a widow was recognized as the representative of her husband, and a daughter as the representative of a deceased uncle. It is thus shown that sex is not a bar to representation, but that widows and daughters in the absence of sons can claim the right in their favour.

But then it is said that no instance is proved of an actual succession by a brother's daughter, and therefore, it is argued, the necessary custom that precisely covers this case has not been proved. But if there be a rule that entitles an uncle's daughter to be her father's representative for the purpose of inheritance, it would be anomalous and arbitrary to withhold from a brother's daughter the same right, and their Lordships hold that the High Court rightly decided in Nasib-ul-Nisa's favour. In their opinion, therefore, this appeal should be dismissed, and they will humbly advise His Majesty accordingly. The appellants must pay the costs of this appeal.



In the Privy Council.

HASHMAT ALI AND ANOTHER

vs.

MUSSAMMAT NASIB-UL-NISA.

DELIVERED BY SIR LAWRENCE JENKINS.

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