

(1943) 09 AHC CK 0003
In the Allahabad High Court

Mashkur Ahmad and Another	Vs	APPELLANT
Mt. Zahur-ul-Nissa and Others		RESPONDENT

Date of Decision : 08-09-1943

Acts Referred:

Citation : AIR 1944 All 79 : (1944) 14 AWR 62

Hon'ble Judges : Allsop, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

Allsop, J.—This is an appeal against a preliminary decree in a suit for partition. The plaintiff is the widow of Muhammad Ahmad Khan and claims her share in his property. There is no doubt that she would have a share under the Mahomedan law. The defence was that there was a custom in the family by which women were excluded if there were any sons in existence. The learned Judge found against the custom and passed a decree in favour of the plaintiff.

2. It is argued in appeal that the custom was established. Learned Counsel bases his argument upon the fact that this family migrated from the Nabha State to Saharanpur about the year 1880 and that they were Rajput Mussalmans who, according to him, were governed by the custom prevailing in the Punjab among the agricultural tribes. It seems to us that it is not necessary to go with any detail into the question whether there was a custom, governing the tribe of which this family were members, by which females were excluded. The matter is of no great importance because we are satisfied that the learned Judge was right in holding that the history of the family since it migrated to Saharanpur about sixty years ago shows that the custom, if it existed, had been abandoned. On no occasion where there has been a question of succession in the last sixty years has any member of the family, until this suit was instituted, alleged that the custom pleaded by the defendants was binding upon the family.

3. The ancestor of the family when it migrated from Nabha to Saharanpur was

Wazir Ali Khan. His wife was Mt. Amna and they had four sons, Safdar Ali Khan, Imdad Ali Khan, Aftab Ali Khan and Ruknuddin and daughter, Mt. Neki who was married to a man called Ali Muhammad who remained in the Nabha State in the village where the family had originally lived. In 1887 the first death occurred in this family. Aftab Ali Khan died and the khewat of that year shows that his property passed according to the Mahomedan law. His widow, Mt. Mani, his daughter, Mt. Amtul, and his mother, Mt. Amna received shares in the property. The guardian ad litem of the appellants, Asghar Ali Khan, gave evidence and deposed that Mt. Amtul had given up her share of her own free will. This allegation was supported by the fact that the name of Mt. Amtul's son does not, at a later stage, appear in the khewat. The khewat, however, shows that it was not alleged that the women of the family had no right to have any share. Mt. Amna sold her share in the property to her grandsons and there was no question of her relinquishing it. Thereafter there were other cases of succession and learned Counsel for the appellants has told us that there were six widows and six daughters involved. It does not appear whether Mt. Amna received her share of the property on the death of her husband, Wazir Ali Khan. In the same way when Safdar Ali Khan died we do not know whether his widow, Mt. Qutb-un-nissa, received her share because the khewats have not been produced. Safdar Ali Khan's son was Muhammad Umar. When he died, his widow, Mt. Khair-un-nissa, voluntarily relinquished her right to a share in the property in exchange for maintenance. This fact is of no great value because even under the custom alleged Mt. Khair-un-nissa being childless, would have had a share for her life. It is alleged that widows obtained a life interest if they had no sons. Aftab Ali Khan's widow, Mt. Mani, received a share, as we have already mentioned, and it appears that she never gave it up. One of Aftab Ali Khan's sons was Ramzan Ali. His widow, Mt. Matluban, according to the khewat, obtained a share in his property. She joined other members of the family in making a transfer. There was an exchange to which she was a party and she retained the property which she received in exchange. It appears that Mt. Amtul did not get a share in the property, but her two brothers at the time of the exchange executed a bond to secure the other parties, who were also members of the family against any claim which might be made by Mt. Amtul. It is evident that the members of the family thought that she might be entitled to make a claim. The other two widows involved are Mt. Majidan and Mt. Zainab, the widows of Imdad Ali Khan. The learned Judge has pointed out that Imdad Ali Khan had transferred practically the whole of his property and the question of their getting any share in it did not really arise. It is possible that he still had a very small share by inheritance but the learned Judge has quite rightly pointed out that these two women were being supported by their husband's brother, Safdar Ali Khan and two of Safdar Ali Khan's sons and that it would probably not have been to their advantage to arouse the Antagonism of these people by making a claim as of right to get any very small share belonging to Imdad Ali Khan which might have remained his at his death.

4. When we come to consider the daughters of the family we are first faced with the case of Mt. Neki, the daughter of Wazir Ali Khan. It appears that she got no share in any property in the Saharanpur District, but we think in agreement with the learned Judge of the Court below, that no importance can be attached to this point. She remained in Nabha with her husband and appears to have taken no interest in the Saharanpur property. Her son has been examined and has admitted that he is in possession of the whole of the property in the village in the Nabha State from which the family originally came. He said that he was holding it from the rest of the family on a grain rent. However that may be, it is not impossible that Mt. Neki through her husband was allowed some interest in the property in the Nabha State. We have already dealt with the case of Mt. Amtul. The next case is that of Mt. Kulsum, the daughter of Ruknuddin. She was the wife of Asghar Ali Khan, the guardian ad litem of the appellants and it has been suggested to us that she got no interest in the property of her father. The fact, however, is that her two brothers, Yaqub Ali Khan and Mahfuz Ali Khan, made an application to the Tahsildar after the death of their father that Mt. Kulsum had an interest in the property but that she was willing to relinquish it. Mt. Kulsum made a statement to the same effect and the property then passed to the two brothers. This evidence does not show that any custom was set up. In fact it proves that Yaqub Ali Khan and Mahfuz Ali Khan accepted the Mahomedan law as applying to the family. We then come to the case of Mt. Fatima, the sister of Asghar Ali Khan, and the daughter of Safdar Ali Khan. It has been suggested that she also got no share in the property, but the learned Judge has established that this was not so. There was a share of 1106 out of 4000 sehams entered in the khewat as being the property of Safdar Ali Khan. Mt. Fatima's portion of this share was transferred by her under a deed of sale to her brothers. There seems to be no doubt that her right to inherit her father's property was not questioned. There remains the case of the two daughters of Ramzan Ali, one of the sons of Aftab Ali Khan. One of these, Mt. Muhammaddi, was a posthumous daughter. The fact that her name is not entered in the khewat is of no great importance. The other daughter, Mt. Rahmat, was alive when her father died and her name is entered in the khewat. This Mt. Rahmat executed a deed of relinquishment in favour of her brothers. It was suggested by her husband who gave evidence that there was consideration for this relinquishment. It does not appear to us that the matter is of much importance. The document shows that it was accepted in the family that the Mahomedan law applied and that no allegation was made that there was any custom having the force of law by which Mt. Rahmat would be excluded.

5. It is perfectly clear that the family had been acting for 60 years on the assumption that the Mahomedan law was binding upon them and it would be impossible for us to say now that the learned Judge was wrong in his conclusion that the alleged custom was not binding upon them.

6. Learned Counsel who appears for the appellants has argued that the fact that the women of the family have for the most part given up their shares or sold

them to their male relations suggests that the feeling in the family was in favour of the custom which prevailed in the Nabha State from which they had come. It seems to us that we cannot decide the case on the basis of the sentiment prevailing in the family. We must decide it upon the law which applied to the family. We do not see how it can be asserted that there was a custom binding on the family when no member of the family ever asserted it and when every member of the family, as far as the evidence goes, acted on the assumption that it was not the custom but the rule of the Mahomedan law which applied. Learned Counsel has argued strongly that the family brought its custom with it from the Nabha State. Possibly, there might have been a presumption that they did so if the question had arisen immediately or soon after they transferred themselves to Saharanpur, but the presumption if it existed, is of very little importance when we know on the facts which have been established that the family when at Saharanpur never asserted or acted upon the alleged custom. We are satisfied that the learned Judge of the Court below was right in his conclusion to which he came and we dismiss the appeal with costs.