

(1945) 09 AHC CK 0028
In the Allahabad High Court
Case No : Second Civil Appeal No. 168 of 1910

Mst. Alimunnissa and Others

APPELLANT

Vs

Mukhtar Hausain and Others

RESPONDENT

Date of Decision : 19-09-1945

Acts Referred:

Citation : (1945) 09 AHC CK 0028

Hon'ble Judges : Ghulam Hasan, J

Bench : Single Bench

Advocate : M. Wasim, Mr. Naimullah and Mr. P.N. Bhatt, for the Appellant; Niamatullah, Mohd. Ayub for Respondents 1 to 3 and Mr. Naziruddin, for the Respondent

Final Decision : Allowed

Judgement

Ghulam Hasan, J.—This is the plaintiffs' appeal arising out of the dismissal of their suit concurrently by the two Courts below.

2. The question involved in the appeal is one of, custom and turns upon the construction of the wajib-ul-arz. The construction which has found favour with the Courts below is that the plaintiffs who are the mother and the two sisters of the deceased, Ghaffar Husain, are excluded from inheritance under the custom in favour of the uncles and nephews of the deceased. The following short pedigree will elucidate the controversy :

3. The plaintiffs claimed a specific share under the Mahomedans Law in the property of Fida Husain upon his death on the 28th March, 1938. Their case was that although Alim Husain had predeceased Fida Husain and had become Mahjubulirs (excluded from inheritance) he succeeded to a four annas share in his property under the custom recorded in the wajib-ul-arz of village Ujarion to which the parties belonged, the remaining 3/1ths belonging to the other three brothers of Alim Husain. It was common ground that, in the presence of sons, daughters and widows were excluded from inheritance by the family custom. The

plaintiffs claimed 5/24ths share according to Mohamedan Law in Fida Husain's property.

4. The defence was a denial of the custom under which a Mahjubulirs inherited the property. Alternatively, it was pleaded that if Ghaffar Husain did get a share he having left no issue nor a widow, his property must under the same custom, devolve on his male agnates to the exclusion of his mother and sisters. Mst. Begmi Jan claimed some property in lieu of her dower debt.

5. Both the Courts have found that, although Mahjubulirs, the custom in the wajib-ul-arz conferred a right of inheritance upon Ghaffar Husain. This question is, therefore, no longer in controversy between the parties, the sole question upon which parties are now at variance in the present appeal is whether the construction put upon the wajib-ul-arz by the two Courts below that the mother and the sisters are excluded in favour of the collaterals is justified.

6. Ex. 1 is the Wajtb-ul-arz of village Ujarion. This wajib-ul-arz was a subject-matter of consideration in a case in Mushtaq Ali v. Hurunissal AIR 1929 Oudh 204, in which it was held that among the Mahomedans Inhabitants of village Ujarion, the widow has absolute power of transfer in respect of her husband's property in her hands, and upon her death any portion of the estate left undisputed of goes not to her heirs but to those of her husband. The relevant portion of the wajib-ul-arz is thus translated;

In this village the rule of division of inheritance is this that on the death of a co-sharer his sons become the owners (milks) of heritage in equal shares : daughter shall not get share in presence of son. In case there is no son but there is daughter only then she shall become the owner (milk). In such a case brother and nephew shall not be the owners in (presence of daughter i.e., in presence of male issue, female issue shall not be the owner (milk) but if there be no male issue and there is a female issue, then the female issue shall-get the share. If the deceased co-sharer has got two or several legally wedded wives and there are different numbers of issues from each wife then division of inheritance shall take place in this way that the one son from one wife shall get half share and two sons from the other wife shall get equal share in the other half. In case the deceased co-sharer has left no male issue, then on his death his wife shall come in possession with the power of a proprietor (baikhtiar malikana abizhogi) and on her death her daughter shall come in possession of the heritage left by renter as well as that by tier father. In ca*e (here be not even the female issue then on the death of the widow brother and nephew of the deceased co- sharer shall become the owner (malik) subject to the rules of inheritance [baqaida wirasat). The widow has got power to adopt, any one she likes.

7. A plain and reasonable construction of his wajib ul-arz appears to show that daughter is excluded by son, but if there is no son she becomes the owner and the brother and nephew of the deceased co-sharer have no right to succeed to any share. Another custom is that if the co- sharer leaves several wedded wives

tnvina different issue from them, then the division takes place per stirpes. The third custom is that if the co-sharer leaves no male issue but he leaves female issue, then the widow succeeds with full lights of transfer and the female issue, come in only after her death. This custom seems to run counter to the first custom where the daughters succeed in the absence of sons, unless it be supposed that the case contemplated under the first custom is one of co-sharer leaving no widow. The last custom is that if the co-sharer leaves no issue, whether male or female, and leaves a widow, the "latter succeeds presumably as an absolute owner and if she leaves any property undisputed of at her death, it is inherited by the bhai bhatija of the deceased co-sharer according to the rules of inheritance. We are concerned with the last custom, but in order to properly comprehend and appreciate the intention of the framers of the wajib-ul-arz it is necessary to consider the "entire custom in one setting.

8. A great deal of controversy has raged round the meaning of the phrase "biqaida wirasat": the plaintiffs contend that it means "rules of inheritance under the Mahomedans Law" and the defendants urge that it means according to the order of propinquity. While the plaintiffs' learned Counsel in this Court has adhered to the construction which was put upon the custom on behalf of his clients in the Courts below, learned Counsel for the defendants has repudiated both. According to him, these words mean no more less than the rules laid down in paragraph 4 of the wajib-ul-arz relating to custom will be followed e.g., that an uncle will not exclude the nephew but they will succeed together, that there will be division per stirpes and so on. That the custom embodied in the wajib-ul-arz has been borrowed from the Hindu law, with certain modifications, by the Mahomedans is agreed between the parties. It is unnecessary to refer in detail to the variations introduced by the custom into the Hindu law, as they appear clearly on the face of the wajib-ul-arz. "A significant feature of this wajib-ul-arz is that in the preceding paragraph the daughter appears to have been excluded by the "Sons only and by no others, and in the latter portion of the wajib-ul-arz she seems to have been postponed to the widow subject, however, to the widow leaving any property undisputed of to be inherited by her. There is an unambiguous statement in the preceding paragraph that "bhai bhatija" have no place in the scheme of inheritance as long as a daughter exists. It follows, therefore that the exclusion of the daughter is only where she co-exists with the son but not where the co-sharer leaves daughter only. That the intention of the wajib-ul-arz is to exclude the brother and nephew in the presence of a daughter does not admit of the slightest doubt. The question, therefore, resolves into this : Could this plain and unambiguous intention have been overridden by the framers of the wajib-ul-arz in a latter portion of paragraph 4 by providing that where the deceased co-sharer leaves no sons but a daughter and a widow, the widow succeeds in preference to the daughter and upon her (widow's) death the daughter should be completely cut out from the scheme of inheritance and the property should devolve upon the bhai bhatija of the deceased co-sharer to the exclusion of the daughter ? Whether the construction put upon the words "

baqaida wirasat" by the plaintiff or by the defendant is correct, I am not prepared to so co is true these words as to exclude the daughter in favour of the collaterals in face of the declared intention of the wajib-ul-arz to the contrary. Accepting for a moment the construction of the words " baqaida wirasat " as contended for by the defendants, it does not follow that the daughter is excluded in favour of the collaterals, if these words are to be interpreted according to the scheme of inheritance laid down in paragraph 4, .then there can be no doubt it the daughter has been expressly made an heir in the opening words of paragraph 4 to the property of her father in the absence of the son. This construction would, therefore, be quite in harmony with the intention expressed in the preceding opinion of the custom. On the other hand, it would be wholly unreasonable to infer it while the daughter has been made an heir in the absence of the sons and there is an express provision excluding the collaterals if they co-exist wit I the daughter, (the \ words " baqaida wirasat" must indicate her disinheritance in favour of the same collaterals. One of the essential requisites of a custom is that it should be reasonable before it can be enforced by the Courts. The wajib-ul-arz cannot* be regarded as approbating a particular rule of inheritance in one portion and reprobating the same in another. The argument that the females were generally to be excluded in favour of the males according to the conception of the society in pre-Islamic Arabia is hardly justified in view of the fact that the wajib-ul-arz itself recognizes the right of the daughter and the widow to succeed although the collaterals are alive. Admittedly there are no express words in the wajib-ul-arz to indicate exclusion of mother and sister in favour of uncles and nephews and it would be hardly logical to extend the rule of analogy so as to infer the exclusion of the sister by a mile cousin, however distant. In *Tewari Balbliaddar Prasad v. Har Narain Das* 1933 OWN 424 a Bench of the old Judicial Commissioner's Court re- marked.

It is against all principles to uphold a custom by means of possible inferences or even by probable I implications.

9. This remark was quoted with approval by a Bench of this Court in *Mahabir Singh v. Radha* (1922) 9 OLJ 618 and the learned Judges expressed their dissent from the observation made in *Dildar Husait v. Fateh Bahadur* (1921) 8 OLJ 554. to the effect;

Where it is proved that by custom daughters and their sons are excluded from inheritance, it may be safely assumed that sisters and their sons are also excluded.

10. In a later case of this Court *Rabinath Bux Singh v. Ram Jiawan* 1936 OWN 50 the Bench re- marked :

Having however given our careful consideration to the terms of these two wajib-ul-araez we are not satisfied that they are sufficient to make out the alleged custom. Admittedly they do not contain any words expressly excluding daughters from inheritance. It is not enough merely to show that on certain possible

implications such an exclusion could be inferred. In the absence of express words of exclusion the language must be sufficiently definite to show that the daughters must be excluded by necessary implication.

11. It was remarked by Mr. Justice Broadway in *Paras Ram v. Hukman Singh* (1923) 73 I.C. 239 and:

It is dangerous to seek to extend custom by such logical processes as analogy." In AIR 1936 991 (Lahore) , the learned Judges remarked that "Custom cannot be deduced by mere inference.

12. No instances were given by the defendants in proof of the custom set up by them. On the other hand, the plaintiffs cited the instance of one Umda Khanam who succeeded to her son Chhajju (Vide Ex. 1, wajib-ul-arz item No. 23). This woman executed a sale deed (Ex. 19) on the 13th January, 1880, in favour of Shaikhehdi Husain, a collateral of her husband. Mehdi Husain was the son of Ahmad Ali and the grandson of Ghani Ahmad. Umda Khanam was the widow of Qadrat Ali, who was a brother of Ghani Ahmad (vide pedigree Ex. 12). Upon the death of Qadrat Ali his son Chhajju succeeded and when he died Umda Khanam succeeded to his share. If the custom, as alleged by the defendants, existed. Mst. Umda Khanam was excluded in favour of the collaterals including Mehdi Husain. Mehdi Husain's son Bashir Husain, as P. W. 2, gave evidence that his father took a sale deed of the property from Mst. Umda Khanam. Indeed the defendants' own witness, Nasir Ali D. W. 1, himself admitted that on the death of Qadrat Ali his son Ghajju succeeded and on his death his mother Umda Khanam inherited the property, though he immediately added after this-

If a man dies his mother will not get a share among us Shaikh Siddiqis.

13. He was, however, unable to say how Chhajju's mother got a share. It is true that one instance is not sufficient to destroy a custom according to the observation of their Lordships of the Privy Council in *Ekradesh Mar Singh v. Janeshwari Bahnasin* (1914) 411. A. 275 but that remark was made in a case where the family custom was well established. It was said that Mst. Umda Khanam was entitled only- to a share in the property of her son but not to the whole and the remainder should have gone to the collaterals. That is true but if the collaterals did not take any steps to enforce their share, it does not disprove the fact that Mst. Umda Khanam asserted her rights to the property presumably under the Mahomedans Law and succeeded in enforcing the right.

14. It was urged on behalf of the defendants that the note appended at the foot of the wajib-ul-arz by the Settlement Officer shows that although there was a difference of opinion in regard to the custom relating to the succession of Mahjubulirs, there was complete unanimity in regard to the other custom. It is true that the custom in question was verified indisputably by all the persons, but it does not affect the meaning or the construction to be placed upon the custom.

15. I hold, therefore, that the view taken by the lower Courts in regard to the

interpretation to be I placed upon the wajib-ul-arz is not correct I and that it has not been shown that the plaintiffs I are excluded by custom in favour of the collaterals.

16. Accordingly I allow the appeal, set aside the judgment and decree of the lower appellate Court and remand this case to the lower appellate Court for decision of the questions left undecided. The appellants will be, entitled to their" costs throughout.