

Equivalent Citation: AIR 1923 Lah 368, 76Ind. Cas.770

IN THE HIGH COURT OF LAHORE

S.A. No. 1773 of 1919

Decided On: 16.12.1922

Appellants: **Zenab-un-nisa and Ors.**
Vs.
Respondent: **Duni Chand and Ors.**

Hon'ble

Abdul Raof and Moti Sagar, JJ.

Judges/Coram:

Counsels:

For Appellant/Petitioner/Plaintiff: Muhammad Iqbae

For Respondents/Defendant: Madan Gopal for Tirath Ram

JUDGMENT

1. This second appeal arises out of a suit for a declaration that certain houses attached by defendant No. 1 in execution of his decree against defendants No. 2 and 3 and certain other Judgment debtors now represented by defendants Nos. 4 to 7 are not liable to attachment and sale. The plaintiffs are the widow and the daughters of one Khuda Bakhsh mistre, who died very many years ago, and the property in suit consists of two houses in the city of Lahore which admittedly belonged to Khuda Bakhsh deceased at one time. The widow mussammat Fahiman claims exclusive rights of ownership in one of the houses in consequence of a gift alleged to have been made in her favour by her deceased husband in lieu of her dower and in the other a 42/64th share only is claimed by the daughters by virtue of their rights of inheritance in their father's property, under the Mohammadan Law, by which it is alleged they are governed. It is further alleged in the plaint that the agreement made in July 1916 between the decree holder Duni Chand and Fazal Hussain, son of Khuda Bakhsh deceased, whereby the latter stood surety and hypothecated the houses in suit to the decree holder as additional security for payment of the decretal amount due from the Judgment debtors was void as having been effected under undue influence and in

any case not capable of being enforced against the plaintiffs, who were no parties to that deed. The defendant denied the material allegations in the plaint, repudiated the alleged gift in favour of the widow, repelled the imputation that the agreement of 1916 was not fairly obtained and asserted that the plaintiffs were governed by custom and not by their personal law, and that by custom daughters were not entitled to a share in their father's inheritance. On these pleadings nine issues were raised, and set down for trial; of these reference need be made here only to 3.

1. Was the house No. 2 given to Mt. Fahiman plaintiff by her husband in lieu of her dower.

2. Are the plaintiffs and parties except Duni Chand bound by Mohammadan Law ? If not what governs them ?

3. Did Fazal Hussain stand surety under undue influence, and if so what was that ?

2. The Subordinate Judge found on evidence that the alleged gift in favour of the widow was not proved, that the plaintiffs were governed by their personal law and not by custom and that the deed of hypothecation was obtained by the

decree-holder under circumstances, which did not make it binding upon the plaintiffs. In this view the Subordinate Judge dismissed the claim of the widow, but decreed the claim of the daughters to the extent of 42-64th share in both the houses.

3. On appeal the learned District Judge confirmed the finding of the trial Court on the 1st issue, but disagreed with its findings on the other two issues, and held that plaintiffs were governed by custom, under which daughters were excluded from inheritance, and that the hypothecation of the houses in suit in favour of the decree-holder was a perfectly valid transaction and could not be questioned in a court of justice on any legal or equitable grounds. The result of these findings was that the plaintiffs' suit was dismissed in its entirety with costs in both Courts.

4. Against this judgment and decree the plaintiffs have preferred a second appeal to this Court. The finding as to the alleged gift with respect to house No. 2 in favour of the widow, being obviously a finding of fact is not questioned in this appeal, and the learned counsel for the appellants has confined his arguments to house No. 1 only, in which the daughters are claiming a 42-64th share under their personal law.

5. The sole question for determination therefore is whether the plaintiffs are governed by custom or by Mohammadan Law, On this question we are decidedly of opinion that the finding of the Court below is wrong and that the plaintiffs must be held to be governed by their personal law. The plaintiffs, who are Kureshis, though they originally belonged to Chiviot, have now been living in the town of Lahore for a large number of years, and the property in dispute is also situate in this town. They are not agriculturists and have been carrying on the profession of masonry for more than one generation. The rule of law is that if any custom is shown to govern the parties, that custom must be held applicable, but if no custom is shown to apply then the personal law of the parties governs the case. It has been held by this Court in 175 R.R. 1883 that Kureshis of Wazirabad are governed by Mohammadan Law. In 92 P.R. 1901 Kureshis of the Gujranwala town were held governed by

their personal law in the absence of a special custom to the contrary. In 5 P.R. 1906 the learned Judges observed speaking generally, it may, we think, be safely predicated of Kureshis that they are not members of an agricultural tribe. They belong to a tribe, which came originally from Arabia, or at least tradition so has it, and they claim to be the tribe to which the Prophet belonged. Prima facie, therefore, the members of this tribe would be zealous of adhering to the principles of their personal law, the Muhammadan Law and in their case, even when we find them holding land, "the same presumption cannot be predicated" regarding them as a class as may properly be made, as a result of experience in regard to agricultural tribes, either personally or in particular localities." In 39 P.R. 1886 the case which the learned District Judge has professedly followed, it was held that in matters of alienation Kureshis of Jhang District followed custom, but it was nowhere laid down that in matters of succession also they were governed by custom and not by their personal law. On a full consideration of the whole case we are of opinion that it has not been shown that the plaintiffs are bound by custom nor what custom if any they are bound by. They are as already stated not agriculturists and the evidence on the record in this case justifies the view that Muhammadan Law applies. We accordingly accept the appeal, and hold that plaintiffs are governed by that law, and setting aside the decree of the lower appellate Court grant them a decree for a declaration that they are entitled to a 42-64th share in house No. 1 and that this share is not liable to attachment and sale in execution of Duni Chand's decree against his judgment-debtors. Respondents will pay the costs of the appellants throughout.

© Manupatra Information Solutions Pvt.
Ltd.