APPELLATE CIVIL

Before Bal Raj Tuli, J.

MST. BAHTERI AND OTHERS,—*Appellants*

versus

SHER SINGH AND OTHERS,—*Respondents*

Regular Second Appeal 557 of 1959.

November 19, 1968

Custom (Punjab Gurgaon District, Jat Tribe)—Entry in Riwaj-i-am unsupported by instances—Importance of—Presumption in favour of such custom—Whether arises—Entry in Riwaj-i-am of Gurgaon District contrary to the general custom stated in para 31 of Rattigan's Digest of Customary Law—Whether prevails—Onus to prove custom contrary to that stated in Riwaj-i-am—On whom lies.

Held, that it is not the universal view that the entry in the Riwaj-i-am should not be given any importance if it is not supported by instances. On the basis of the entry in the Riwaj-i-am a presumption does arise in favour of the custom stated therein and this custom being confined to the district or the tribe to which it relates, will serve as a special custom which will prevail against the general custom. (Para 10)

Held, also that in view of the entry in the Riwaj-i-am of Gurgaon Disitrict, as applicable to the Jat tribe, to the effect that a widow loses all her rights in her husband's property if she be proved unchaste or marries again by Karewa which is contrary to the general custom stated in para 31 of Rattigan's Digest of Customary Law, the onus of proving that the unchastity of a widow does not cause the forfeiture of her life-interest in her husband's estate rests on the widow or persons claiming through her. (Paras 5 and 10)

Second appeal from the decree of the Court of Shri P. N. Thukral, Additional District Jundge, Gurgaon, dated the 5th day of January, 1959, affirming with costs that of Shri B. L. Malhotra, Senior Sub-Judge, Gurgaon, dated the 12th November, 1957, granting the plaintiffs a decree for possession of the land in suit against the defendants.

G. P. JAIN, G. C. GARG AND S. P. JAIN, ADVOCATES, for the Appellants.

SURRINDER SARUP, ADVOCATE, *for* RAM SARUP, ADVOCATE, for the Respondents.

JUDGMENT.

TULI, J.—One Bhagwana, a Jat of Mauza Khandewala in tehsil Gurgaon was the last male-holder of the land in suit measuring 290 Kanals 9 Marlas. He died childless on 9th of April, 1955,

leaving behind his widow Mst. Bhateri, defendant No. 1. On the 20th of January, 1956, she transferred by exchange 15 Kanals 18 Marlas of land out of the estate inherited by her from her husband in favour of Mohlar, defendant No. 3 and on the 23rd of January, 1956, she sold 8 Kanals 2 Marlas of land by a registered sale deed in favour of Mata Din, defendant No. 2. The plaintiffs are the collaterals of Bhagwana, deceased and they filed a suit for possession of the entire estate left by Bhagwana on the allegations that his widow Mst. Bhatheri entered into a Karewa marriage with one Amrit, son of Mohlar, defendant No. 3 or in any case she had become unchaste as she gave birth to a child on the 7th of May, 1956, i.e., about thirteen months after the death of Bhagwana and that under custom she forfeited her rights in the estate left by Bhagwana and the plaintiffs have become entitled to the possession thereof. In the alternative, the plaintiffs prayed for declaration that the alienations by exchange and sale, as aforesaid, were unauthorised under the rule of agricultural custom governing the parties and having been made without consideration and legal necessity were ineffectual and inoperative as against their reversionary rights after the death of Mst. Bhatheri. It was stated in the plaint that Mst. Bhatheri had married Amrit in the Karewa form in August, 1955, and began to live with him in his house and gave birth to a daughter about one year after the death of Bhagwana.

(2) The defendant contested the suit on various grounds, *inter alia,* that the plaintiffs have no *locus standi* to file the suit, the alleged unchastity and Karewa marriage of Mst. Bhatheri were denied, the correctness of the valuation of the suit for purposes of Court fee and jurisdiction was challenged; it was pleaded that there was a daughter of Bhagwana and in her presence the plaintiffs suit was not maintainable; plea of estoppel was also raised and it was added that the alienations were valid and binding on the plaintiffs by reason of the fact that they had been made for consideration and legal necessity or as an act of good management. The defendants also raised an objection that the suit was bad for multifariousness.

(3) On the pleadings of the parties, the following issues were framed by the learned trial Court:—

1. Whether the suit is maintainable in the present form ?

2. Whether the suit is properly valued for purposes of Court fee and jurisdiction ?
3. Whether the plaintiffs are the collateral-heirs of Bhagwana, deceased husband of Mst. Bhatheri ?
4. Whether defendant No. 1 contracted Karewa with Amrit ?
5. Whether she is unchaste? If so, what is its effect?
6. Whether the exchange and sale in dispute are acts of good management and for consideration and necessity?
7. Whether Mst. Bhatheri was competent to make the alienations ?
8. Whether the plaintiffs are estopped from filing the suit ?
9. Relief.

Issues Nos. 1, 2, 6 and 8 were decided against the defendants, issues Nos. 3 and 4 in favour of the plaintiffs and issue No. 5 against the plaintiffs. Issue No. 7 was not decided in view of the finding on issue No. 6. As a result the plaintiffs were held entitled to the possession of the estate left by Bhagwana and were awarded a decree for possession of the land in suit with costs against the defendants on the 12th of November, 1957. The defendants filed an appeal in the Court of the District Judge, Gurgaon which was dismissed on the 5th of January, 1959. Aggrieved from the decree passed by the learned lower appellate Court the defendants have filed the present appeal in this Court.

(4) The learned lower appellate Court held that Mst. Bhatheri gave birth to a child which had not been conceived from her husband Bhagwana and that there was no alternative but to hold that the birth of the child to her was either the result of her unchastity or remarriage and as such she would forfeit the estate of her husband in either ease. He further found that in August, 1955, when Karewa Marriage between Mst. Bhatheri and Amrit is alleged to have taken place, Amrit had a wife living and according to section 11 of the Hindu Marriage Act, 1955, which had come into force, with effect from 18th of May, 1955, there could be no second marriage between Amrit and Mst. Bhatheri. In this view of the matter it was held hat she had not remarried Amrit in Karewa form and that the child was the result of unchastity on her part. On the basis of the Customary Law of Gurgaon District it was held that unchastity resulted in the forfeiture of the widow's estate which Mst. Bhatheri had inherited from her husband Bhagwana.

(5) Learned Counsel for the appellants has contended vehemently on the basis of the finding that Mst. Bhatheri had become unchaste and had not remarried in Karewa form, that according to para 31 of Rattigan's Digest unchastity does not cause a forfeiture of her life interest in the estate of her deceased husband and the onus is on those who assert the existence of a custom sanctioning forfeiture. According to the entry in the Riwaj-i-am of Gurgaon District as applicable to the Jat tribe it is mentioned that if a widow be proved unchaste or marries again by Karewa she loses all rights of her husband's property. This is the custom which prevails in the Ahir tribe and the custom prevailing in the Jat tribe is the same as in Ahir tribe, but no instances have been given. The matter came up before Addison, J. in *Bhajna* v. *Mst. Bheoli* (1) in which it was held "that as according to the Riwaj-i-am of the Gurgaon District, the unchastity or remarriage of a widow among Ahirs of tahsil Rewari, district Gurgaon, causes a forfeiture of her life estate, the onus of rebutting the correctness of this statement was upon the widow and that she had failed to do so." It was held by the learned Judge as under :

"The general rule for the Punjab is given in paragraph 31 of Rattigan's Digest of Customary Law, 11th edition. It is to the effect that unchastity of a widow sometimes causes a forfeiture of her life interest but the onus is on those who assert the existence of such a custom. On the other hand, the Riwaj-i-am is clear that in the Gurgaon District unchastity does cause a forfeiture of the life estate. It was at one time held that a Riwaj-i-am, which was not supported by instances or which was opposed to general custom, should be considered unreliable but since the Privy Council judgement, *Beg* v. *Allah Ditta* (2) this can no longer be held to be good law. Their Lordships were of opinion that an entry in the Riwaj-i-am was a strong piece of evidence in support of an alleged custom which it lay upon the other side to rebut, even assuming that the rule laid down in the entry was against the general custom in the Punjab. The Privy Council judgment was considered in *Labh Singh* v. *Mst Magno* (I.L.R. 8 Lahore 281) where it was said that in view of the Judicial Committee's clear exposition

(1) I.L.R. (1931) 12 Lah. 752.
(2) 45 P.R. 1917 (P.C.).

of the law it could no longer be held to be the established rule that a statement in the Riwaj-i-am opposed to general custom and unsupported by instances was of no judicial value. Such an entry was *prima facie* proof of the custom and placed the onus of rebuttal upon the party disputing the correctness of that entry. The same view was taken in *Kahan Singh* v. *Gopal Singh* (3) and *Labha Ram* v. *Raman* (4). It follows taht it was for the plaintiff in this case to rebut the entry in the Riwaj-i-am which is against her.

It was held in *Mussammat Bhurian* v. *Mst. Puran,* (5), that amongst Ahirs of Delhi District no special custom had been proved whereby unchastity worked a forfeiture of the life estate of a widow. I have been carefully through that judgment and nothing is said in it about any entry in the Wajib-ul-arz or Riwaji-i-am. This case, therefore, cannot effect that decision in the present case.

It remains to be decided whether the widow has rebutted the presumption arising from the entry in the Riwaj-i-am of 1879. It is true that in three cases the Subordinate Courts have decided against this entry but they did so on the ground that the rule in the Riwaj-i-am was not supported by instances. Having regard to the decision quoted above, I must hold that these decisions were bad in law and cannot, therefore, be taken to be instances rebutting the entry in the Riwaj-i-am. That being so, effect must be given to that entry."

(6) In that case three instances of judicial decision were cited before the learned Judge which were not accepted him. The learned counsel for the appellants has contended that the judgment of Addison J. cannot have much weight in view of the more recent decisions of this Court. He has referred to a Division Bench judgment of this Court in *Hardayal and others* v. *Mst. Dakhan* (6) in which the judgment of Addison J. was considered. In that case it was submitted that according to question No.15 of the Riwaj-i-am

(3) I.L.R. 8 Lahore 527.
(4) I.L.R. 9 Lahore 1.
(5) 105 P.R. 1885.
(6) A.I.R. 1953 Pb. 209.

of Sirsa notorious unchastity results in forfeiture of the estate by a widow. Answer to question No.15 in the Riwaj-i-am was as follows:—

> "If a sonless widow has succeeded to her husband's estate, and be proved unchaste, or leave her husband's house to reside permanently with her parents or elsewhere, or marry by 'Nikah' or 'Karewa' any one except a near agnate of her husband, she loses all right to her husband's estate."

(7) The learned Judges referred to para 31 of Rattigan's Digest of Customary Law and the judgment of their Lordships of the Supreme Court in *Gokul Chand* v. *Parvin Kumari* (7) and held that "as far as the Riwaj-i-am of sirsa is concerned, there is nothing to show that any women were called when the Riwaj-i-am was compiled. Nor is there any proof that this custom has the sanction of long usage nor are there any instances in support of this custom". In the absence of the instances in support of the answer to question No. 15, the learned Judges held that the onus to prove that the unchastity caused forfeiture was on the plaintiff which he had failed to prove. No presumption was allowed to be raised in favour of the plaintiff on the basis of question No. 15 in the Riwaj-i-am. On the same parity of reasoning, the learned counsel for the appellants submits that no intances having been cited at the trial of the suit by witnesses of either party, the general custom stated in para 31 of Rattigan's Digest of Customary Law should be given effect to in preference to the entry in the Riwaj-i-am.

In *Mst. Ram Devi* v. *Mst. Shiv Devi* (8) it was observed by Robertson J. as under:—

> "There is no doubt that a distinction must be drawn between the nature of the forfeiture of a widow's estate by a widow who remarries and by a widow who is proved to be unchaste. In the case of forfeiture by re-marriage throughout the Province the woman ceases altogether to be the widow of her deceased husband, loses all rights and every kind of interest in his estate, and becomes a member of another family. The case of forfeiture by unchastity where it is established, is different. The woman does not cease to be the widow of her deceased husband nor does she become

(7) A.I.R. 1952 S.C. 231.
(8) 108 P.R. 1913.

a member of another family. By custom she forfeits a special form of maintenance recognised in this Province, i. e., the possession for life of her husband's estate and it is a question more often answered perhaps in the affirmative than in the negative, whether, she is not even then entitled to maintenance from her husband's relatives"

(8) In *Shrimati Dayal Kaur* v. *Balwant Singh and others* (9), it was held by I. D. Dua, J. (as his Lordship then was) that unchastity on the part of a widow does not entitle forfeiture of her rights in her deceased husband's estate and that the trend of public opinion in the matter of custom is also moving with the decisions of the Courts, the preponderance of which is against forfeiture of widow's rights in her deceased husband's estate by reason of unchastity or Karewa with her deceased husband's brother. The case related to Sainis of Kharar Tahsil, district Ambala.

(9) In *Mst. Sukho* v. *Balwant Singh and another* which was decided by a Division Bench (Tek Chand and Gosain, JJ.) of this Court, the parties belonged to Kangra District and the custom was that unchastity, if proved, i.e., by the widow leaving her husbands house or by her having an illegitimate child, involved loss of her husband's estate, the question arose whether a widow who had become unchaste could succeed to the estate of her father-in-law. It was held by the learned Judges that she had such a right on the ground that—

"The custom does not provide anywhere that a widow by reason of her unchastity after the death of her husband will cease to be the widow of her husband. Obviously, therefore, the widow continue to have her status as the widow of her husband and will as such be entitled to represent him in matters of future succession."

On the basis of these authorities, the learned counsel for the appellants submits that the mere entry in the Riwaj-i-am does not cast the onus of proving that unchastity of a widow does not result in the forfeiture of her life interest in the estate of her deceased husband, on the widow or her alienees but the onus still rests on the plaintiffs to prove by instance that by unchastity she loses her life interest as has been stated in para 31 of Rattigan's Digest of

(9) I.L.R. 1959 Pb. 1122.
(10) 1961 P.L.R. 729.

Customary Law. In **Mst. Kesro** v. **Mst. Parbati (11)**, a Division Bench (Chopra and Gosain, JJ.) of this Court held that—

> "A presumption of correctness attaches to the Riwaj-i-am unless it is proved to be not a trustworthy document."

In view of the entry in the Riwaj-i-am without instances, it was held that amongst Gaddis of Kangra District there existed a custom by virtue of which a widow on becoming unchaste forfeited life interest in the property of her husband.

(10) It is thus clear that it is not the universal view that the entry in the Riwaj-i-am should not be given any importance if it is not supported by instances. On the basis of the entry in the Riwaj-i-am a presumption does arise in favour of the custom stated therein and this custom being confined to the district or the tribe to which it relates, will serve as a special custom which will prevail against the general custom as stated in para 31 of Rattigan's Digest or Customary Law. In view of the entry in the Riwaj-i-am and the decision of Addison J., above referred to, the onus of proving that the unchastity of Mst. Bhatheri did not cause the forfeiture of her life interest in Bhagwana's estate rested on the defendants and they having led no evidence on the point, the plaintiffs must have the benefit of the presumption which arises in their favour from the entry in the Riwaj-i-am, No instance either way was cited by any of the parties and, therefore, on the presumption arising from the entry in the Riwaj-i-am it has been rightly decided that on account of unchastity Mst. Bhatheri forfeited her rights in Bhagwana's estate. The suit of the plaintiffs has, therefore, been rightly decreed.

(11) Mst. Bhatheri lost her life interest in Bhagwan's estate in August 1955 when she became unchaste and began to live with Amrit, as has been found by the Courts below. She had, therefore, no right to effect the sale and the exchange in favour of defendants Nos. 2 and 3. Those transactions cannot, therefore, be upheld.

(12) For the reasons given above, this appeal fails and is dismissed with costs.

K.S.K.

(11) I.L.R. 1958 Pb. 156.