

Sardar Nisar Ali Khan and others— - - - - *Appellants*

v.

Mussammāt Fatima Sultan and others - - - *Respondents*

FROM

THE HIGH COURT OF JUDICATURE AT LAHORE

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE
OF THE PRIVY COUNCIL, DELIVERED THE 28TH APRIL, 1941

Present at the Hearing:

LORD ATKIN

LORD RUSSELL OF KILLOWEN

LORD ROMER

SIR GEORGE RANKIN

LORD JUSTICE CLAUSON

[*Delivered by* LORD RUSSELL OF KILLOWEN]

This is an appeal from a judgment and decree of the High Court of Judicature at Lahore, which reversed a judgment and decree of the Assistant Collector of Lahore, and dismissed the suit of three of the present appellants.

The suit was brought by three sons of the late Sir Fateh Ali Khan against seven defendants, viz., Sir Fateh's widow and his five daughters. A fourth son who was absent in England was also joined as a defendant.

The relief claimed was a declaratory decree to the effect that the plaintiffs and the defendant son were the heirs of Sir Fateh, and exclusive owners of the lands specified in the plaint; and that the defendants, the widow and daughters, had no right therein. The foundation of the claim was that by the custom of the family women did not inherit. The family are Shiah Mahomedans of the Asna Ashari sect.

The alleged custom was admitted by the widow and all the daughters, except one, viz., Fatima Sultan.

The Assistant Collector held that the alleged custom has been proved, and gave judgment decreeing the suit on the 8th May, 1935.

Fatima Sultan appealed to the High Court and on the 18th January, 1937, the judgment of that Court was pronounced allowing the appeal and dismissing the suit.

From that decision the four sons have appealed to His Majesty in Council.

The question for their Lordships' consideration is whether the plaintiffs have proved the alleged family custom; but before stating the conclusion which they have reached, their Lordships think it advisable to recall certain statements previously made by the Board when dealing with alleged departures from the ordinary laws of succession.

In *Ramalakshi Ammal v. Sirantha Perumal Sethurayar* (14 Moo. I.A. 570 at p. 585) the Board stated that:—

“It is of the essence of special usages modifying the ordinary law of succession that they should be ancient and invariable: and it is further essential that they should be established to be so, by clear and unambiguous evidence.”

and in *Abdul Hussein Khan v. Bibi Sona Dero* (45 I.A. 10) their Lordships observed (at p. 19) that “in every case of this kind the burden of proof lies heavily upon the plaintiff.”

Furthermore, their Lordships in the last-mentioned case repeated with approval a passage from the judgment in *Mirabivi v. Vellayana* (I.L.R. 8 M. 464 at p. 465) which runs thus:—

“ But instances of this kind will be found to occur where there is no doubt that the family is governed by pure Mahomedan law. Indeed in many parts of the country it is unusual for Mahomedan ladies to insist on their unquestioned rights. They will often prefer being maintained by their brothers to taking a separate share for themselves. . . . Moreover Mahomedan females are so much under the influence of their male relatives that the mere partition of the property among the males without reference to them, cannot count for much.”

In the present case the evidence is neither clear nor unambiguous. The cases deposed to of successions in the family by males only are of comparatively recent date and are all capable of some explanation other than the alleged custom. No case of any such succession was proved which was consistent only with the existence of the alleged custom, i.e., which could only have taken place if the alleged custom in fact prevailed in the family.

Their Lordships agree with the conclusion which the High Court reached after a careful examination and analysis of the evidence adduced by the plaintiffs; and they concur in the view that (1) the plaintiff Nisar Ali's former denial of the alleged custom, (2) the recording of Ali Mahamad Khan's land (after enquiry from his son) as having devolved upon his heirs according to Mahomedan law and (3) the mutation of land in favour of Sir Fateh's widow and daughters as well as his sons, are three strong pieces of evidence against the contentions of the plaintiffs.

After considering the evidence adduced their Lordships feel no doubt that the plaintiffs have failed to prove that the alleged custom of excluding women from succession exists in the family.

Their Lordships think it right to add that they have an uneasy feeling that the Assistant Collector was to some extent influenced in arriving at a view in favour of the plaintiffs by certain words used by Lord Tomlin in delivering the judgment of the Board in the case of *Nisar Ali Khan v. Mohammed Ali Khan* (59 I.A. 268 at p. 272). In the course of the judgment it was stated that this family “ are Shiah Mahomedans of the Asna Ashari sect governed by the Imamia Law. By family custom women do not inherit.” The question of the existence of such a family custom was in no way before the Board for consideration, or determination. The sentence was taken from the respondent's printed case merely as a description, and what was thought to be a proper description, of the family. It was in no sense, nor was it intended to be, a pronouncement, much less a decision, upon this vexed question of family custom. It should not have been counted as of any weight in arriving at a decision in the present litigation. It was, in their Lordships' opinion, unfortunate that the Assistant Collector should have been misled into regarding it as a pronouncement of importance and relevant to the present case.

For the reasons which they have indicated their Lordships are of opinion that this appeal should be dismissed, and they will humbly advise his Majesty accordingly.

The appellants will pay the costs of the appeal.

In the Privy Council

SARDAR NISAR ALI KHAN and others

v.

MUSSAMMAT FATIMA SULTAN
and others

DELIVERED BY
LORD RUSSELL OF KILLOWEN