

**Raja Vs. Allahdiya and ors.**

**Raja Vs. Allahdiya and ors.**

**SooperKanoon Citation :** [sooperkanoon.com/476525](http://sooperkanoon.com/476525)

**Court :** Allahabad

**Decided On :** Feb-16-1916

**Reported in :** AIR1916All148; 33Ind.Cas.114

**Judge :** Tudball, ;Rafique and ;Walsh, JJ.

**Appellant :** Raja

**Respondent :** Allahdiya and ors.

**Judgement :**

**Tudball, J.**

1. This is a defendant's appeal arising out of a suit for possession of property. One Majua was the owner of the property, who died some forty years previous to the suit leaving a widow Musammat Waziran. She admittedly took possession of his estate and remained in such possession till the day of her death. The case for the plaintiffs was that the property in question had become hers (partly by inheritance and partly by prescription) and that they as her heirs were entitled to possession. The case for the defendant was, first, that the plaintiffs were not the heirs of Musammat Waziran at all; secondly, that Musammat Waziran was owner of only a one-fourth share in the estate as the widow of Majua and that she held the other three-fourths in lieu of her dower-debt which was discharged shortly before her death; the third point raised was that in the family of Majua a widow has only a life-interest in accordance with a custom existing in the family. The Court of first

instance framed only two issues: (1) whether the plaintiffs are heirs or the defendant? (2) Was Musammat Waziran in possession of a 3/4ths share in lieu of dower, what was the amount of dower and how would it affect the suit? The exact meaning of the first issue is by no means clear; but one point is clear that the defendant did attempt to prove a custom under which the widow took a life-estate in the estate and on her death the property went to the heirs of her deceased husband. The custom set up put forward a rule of inheritance which is contrary to the ordinary rule of the Muhammadan Law. No objection was taken to the evidence put forward to establish the custom and in fact the cross examination of the defendant's witnesses was chiefly directed to disproving the alleged custom. The Court of first instance held that the custom was established as existing among the Rajput Mussalmans and that as the parties were Rajput Mussalmans, the plaintiffs being the heirs of Waziran had no title whatsoever to the estate of Majua and that the defendant as heir of Majua was entitled to the property. It did not decide the second issue at all. It dismissed the suit. The plaintiffs appealed. In the lower Appellate Court three issues were framed by the learned District Judge and they were all decided. He held, first of all, that the plaintiffs were related to Musammat Waziran as they alleged, that is, that they were heirs of Musammat Waziran. Secondly, he held that the evidence put forward to establish the alleged custom was insufficient and, therefore, the custom was not established. Thirdly, he held that Musammat Waziran had held the property in lieu of her dower-debt of Rs. 32-8-0, that that dower-debt had been satisfied more than twelve years prior to her death and that she had acquired an absolute right of ownership in the property by prescription. On these findings he decreed the plaintiffs' suit and the defendant has come here on second appeal. A great deal of time and trouble has been devoted to discussing the question whether the decision of their Lordships of the Privy Council in the case of Muhammad Ismail Khan v. Sheomukh Rai 18 Ind. Cas. 571 : 17 C.W.N. 97 : 12 M.L.T. 644 : (1913) M.W.N. 27 : 17 C.L.J. 143 : 15 Bom. L.R. 76 (P.C.) does or does not overrule the decision in Surmast Khan v. Kadir Bad Khan 1 Agra (F.B.) R. 39 : Ed. 1874, 29 and whether or not any special custom can be set up in derogation of the Muhammadan Law in the Courts of this province. The point no doubt, is interesting, but it seems to me that it is quite unnecessary to decide it in this appeal. It was not raised in any of the Courts

below. The parties fought each other in both these Courts on a simple question of fact and in the view which I take as to the evidence which has been called to establish the alleged custom, I find it unnecessary to touch upon the point. The only other point which has been argued before us is the question of the sufficiency or otherwise of the evidence which was produced in the Court of first instance to prove the alleged custom. We have been taken over that evidence at full length. To my mind it is impossible to say that that evidence clearly establishes either a broad caste custom among Rajput Mussalmans in this village or district or province generally and that it certainly does not prove any Custom in the family of Majua himself. The only possible doubt that could arise on the point arises from the fact that two at least of the plaintiffs' witnesses in their cross-examination made admissions which were considerably in favour of, the defendant's allegation. But taking the evidence as a whole it simply amounts to a bare bald statement that a certain custom exists. There is the same class of bald statement on the other side that the Muhammadan Law of succession prevails among them. Of the only two instances which are mentioned one is decidedly against the custom. It is the instance mentioned by Jahangira called on behalf of the defendant and it is an instance in his own family. The other instance mentioned by him leaves the matter somewhat in doubt, for his statement that the widow of Gumani got the estate in lieu of her dower is inconsistent with the existence of a custom such as that alleged by the defendant. The defendant to prove the custom called only two witnesses, one being a Hindu who merely stated that the custom existed. The other Jahangira made the same bald statement and mentioned two instances in which the custom was not followed and none in which it had been observed. I agree with the Judge of the Court below that the evidence on the record is quite insufficient and inadequate to establish the custom alleged. I, would, therefore, dismiss the appeal and maintain the decision of the Court below.

**Rafique, J.**

2. I am also of opinion that this appeal should be dismissed. It arises out of a suit brought by the plaintiffs-respondents as heirs of one Musammat Waziran against Raja, the defendant-appellant, a cousin of Majua, her husband, for the possession

of property that admittedly belonged to him. He died about 40 years and Musammat Waziran about 6 months prior to the institution of the suit. The plaintiffs-respondents on their admission that the property belonged to Majua would have no right to it but for the allegation that Musammat Waziran had by her long possession of about forty years acquired an absolute title to it. They based their claim on that allegation. The defendant-appellant resisted the suit on various grounds--three of which were that the plaintiffs-respondents were not the heirs of Musammat Waziran, that under a family custom--the parties being Rajput Mussalmans--a widow succeeds to a life-estate in the whole of the husband's property in default of issue, and that in any case Musammat Waziran got 1/4th of the husband's property as her share under the Muhammadan Law and retained the 3/4ths in lieu of her dower. The learned Subordinate Judge framed two issues on two different dates none of which raised the question of custom. But it seems that evidence was given bearing on the question of the alleged custom. The learned Subordinate Judge in a very short judgment came to the conclusion that the custom was proved and he dismissed the claim. On appeal one of the pleas taken by the plaintiffs was that no custom could be set up in contravention of the ordinary Muhammadan Law (vide the fourth ground of appeal). The learned District Judge, however, did not discuss the fourth ground of appeal, but on a review of the evidence in the case came to the conclusion that the custom alleged by the defence had not been established. He accordingly accepted the appeal and decreed the claim. The defendant has come up on second appeal to this Court and contends that the evidence on the record proves the custom and that he is entitled to succeed in preference to the heirs of Musammat Waziran. During the course of arguments on behalf of the parties a question has been raised whether a custom can be set up in contravention of the Muhammadan Law. For the appellant reliance is placed chiefly on the case of Muhammad Ismail Khan v. Sheomukh Rai 18 Ind. Cas. 571 : 17 C.W.N. 97 : 12 M.L.T. 644 : (1913) M.W.N. 27 : 17 C.L.J. 143 : 15 Bom. L.R. 76 (P.C.). On behalf of the respondents reliance is placed on the case of Sarmast Khan v. Kadir Dad Khan 1 Agra (F.B.) R. 39 : Ed. 1874, 29 and a series of decisions subsequent to that case. The question raised is one of great interest and importance, but I do not think that it need be considered in the present case in view of the evidence in support of the alleged custom. I do not,

therefore, propose to discuss it and proceed to examine the evidence. I find that seven witnesses were examined on behalf of the plaintiffs and two for the defence. The -statements-in-chief of the plaintiffs' witnesses show that they were examined to prove the relationship of the plaintiffs to Musammat Waziran--which was one of the issues in the case, the other being whether she entered in possession of her husband's estate in lieu of her dower. No question as to the custom set up for the defence was put to the first three witnesses in cross-examination. However, three of the plaintiffs' witnesses stated in cross-examination that a custom existed at variance with the Muhammadan Law. But the said three witnesses, Niamat, Nanua and Salim, were not quite in accord as to the custom. Niamat said that a custom obtained among the Rajput Mussalmans under which a widow got a life-estate in her husband's entire property in case of his death without issue. But he went on to say that the widow could give a share to the male collaterals of her husband -if she liked to and if she did not, they got nothing. According to Niamat the widow, it seems, would get an absolute estate. Nanua, after deposing in cross-examination to a vague custom, admitted that the widow and the male collaterals got their shares whatever they were. According to this statement of Nanua ordinary Muhammadan Law, is observed. Salim stated that a widow succeeds to her husband's entire property for life in case of his death without issue and after her death the husband's heirs get it. But as to Musammat Waziran he said that she got possession 'waisahi,' that is, casually. Of the two defence witnesses Sada Ram is a Hindu. He said that a widow in Majua's family succeeded to a life-estate. But in case of Majua he said that Majua when dying settled the succession by directing that after his death his wife Musammat Waziran was to take the whole property for life and after her death his heirs. Had the custom set up for the defence obtained in the family of Majua, where was the occasion for Majua to make an oral Will? Jahangira deposed to the custom alleged for the defence and in the same breath said that Musammat Waziran got her husband's property in lieu of her dower. The two statements are obviously inconsistent. It is impossible on this evidence to hold that a certain and uniform custom is proved by which in the family of Majua or among the Mussalman Rajputs a widow of a childless person takes a life-estate in the property of her deceased husband. Moreover it does not appear from the evidence how is the heir of the last male owner to be traced, whether under the

Hindu or the Muhammadan Law. The written statement of the defendant-appellant is also silent on the point. No instance of the observance of the alleged custom has been given; indeed on the contrary two instances against it have been mentioned in the evidence for the defence. The two instances are of Gumani and Fakhruddin. Gumani's widow is said to have entered on possession of her husband's property in lieu of her dower and after the death of Fakhruddin's widow her heirs and not her husband's got the property. I, therefore, agree with my learned colleague that the evidence in the case has not made out the very vague and uncertain allegation as to custom contained in the twelfth paragraph of the defendant's written statement.

**Walsh, J.**

3. I agree with some hesitation that this appeal must be dismissed on the ground contained in the judgment of the District Judge that the evidence in this case is not sufficient to establish the existence of the custom as a fact. Speaking for myself, I should have preferred to adopt and do prefer the judgment of the learned Additional Subordinate Judge; so much depends upon how the case is brought and the way the evidence is given. There was a great deal of evidence which if accepted alone undoubtedly was sufficient. It satisfied the Subordinate Judge and I am inclined to think that on the whole he was in the best position to decide what was after all a question of degree, namely, sufficiency in a particular locality or a particular community. What is sufficient for a particular community might obviously be insufficient for a large province. I suspect from the evidence in this case that this custom does exist and will eventually be established. The history of customs established step by step and recognized by law is in almost every case that of a struggle on the part of a community to find a legal recognition for something they have unconsciously recognized and acted upon themselves and of an indisposition on the other hand by the Courts to open the door to, what I may call, new matter. But as the world and the community is progressive so is the law, and the whole history of judicial interpretation in cases of custom shows that eventually by the weight of facts Courts have been led to open the door and to give the recognition which the community seeks. It is for that reason, if for no other, that I welcome the decision of the Privy Council that this is a question of fact. In my

opinion the Privy Council decided that in the case of Abraham v. Abraham 9 M.I.A. 195 : 1 W.R. (P.C.) 1 : 1 Suth. P.C.J. 501 : 2 Sar. P.C.J. 10 : 19 E.R. 716 in 1863 and any attempt to exclude evidence upon the point, whether due to a decision of this or that Full Bench Court is to my mind inconsistent with the old ruling of the Privy Council. I am rather confirmed in that view by the fact that the parties themselves in this case in the Courts below never regarded it as anything else than a question of fact from first to last. As the question has been strenuously argued, I want to say one word about Section 37 of the Bengal, North-Western Provinces and Assam Civil Courts Act. To my mind that section means that the Muhammadans are governed by the Muhammadan Law and the Hindus by the Hindu Law, and that neither of them against their will should be subjected to the law of the other, or to the English, or any other law. I do not think that the section applies to a dispute between Muhammadans themselves or on the other hand to a dispute between Hindus themselves; where for example, as in this case, a point is raised by a Muhammadan himself that he, if it can be proved in fact, should be allowed by the law to apply to himself an exception to the general Muhammadan Law which would otherwise be applicable to him. I read the section to mean that the Muhammadan Law is not to be applied to a Hindu against his will, but that a man is free to adopt for himself any special custom which he pleases.

4. The appeal will stand dismissed with costs including fees on the higher scale.

**SooperKanoon - India's Premier Online Legal Search - [sooperkanoon.com](http://sooperkanoon.com)**