**Ghulam Hassan Vs. Mst. Saja**

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**Court** : Jammu and Kashmir

**Decided On :** May-25-1983

**Reported in** : AIR1984J& K26

**Judge** : Mufti Baha-Ud-Din Farooqi, C.J.

**Acts** : Mohammadan Law; ;Code of Civil Procedure (CPC) , 1908 - Sections 100 to 101; ;Agrarian Reforms Act

**Appeal No.** : Civil Second Appeal No. 15 of 1983

**Appellant** : Ghulam Hassan

**Respondent** : Mst. Saja

**Advocate for Pet/Ap.** : K.N. Bhat, Adv.

**Disposition** : Appeal dismissed

**Judgement** :

Mufti Baha-Ud-Din Farooqi, C.J.

1. This is a second appeal arising out of a suit for joint possession. The dispute in the suit related to landed property left by one Qadir Lone. The plaintiff's case was that she being a Khananishin daughter of Qadir Lone was entitled to share the disputed land equally with her brother Ghulam Hassan, and, alternatively, she was entitled to succeed to 1/3rd share as a daughter simpliciter under the Mohammadan Law. The defendant resisted the suit on the plea that the plaintiff was not a Khananishin daughter and that there was a custom governing the partition under which the plaintiff could succeed to the property of her father only if she was a Khananishin daughter and not otherwise. The lower Courts concurrently held that the plaintiff is not a Khananishin daughter. They have further held that the defendants have not been able to establish the custom pleaded by them that a daughter can inherit only as a Khananishin daughter or not at all. They have also held that in the absence of the proof of such custom the plaintiff was entitled to inherit the property as a daughter simpliciter. The decision is fully in conformity with the law laid down by this Court in the case of Mst. Khatji v. Mst. Mukhti, AIR 1963 J & K 4, in which it has been held that there is no well established custom in the valley to the effect that if a daughter fails to establish her status as a Khananishin daughter, she cannot succeed to the property even as a daughter simpliciter under Mohammadan Law. Such a custom is to be specifically pleaded and established by independent and cogent evidence by the party who seeks to rely on such custom.

2. The argument of the learned counsel for the appellant however is that the decision runs contrary to the pronouncement of the Board of Judicial Advisors in Lassi Ganai v. Reshi Mir ((1949-50) 8 J & K LR 117). The opinion of the Board has been considered by this Court in the case of Mst. Khatji (AIR 1963 J & K 4) (supra) and it has been observed as under (at p. 6):--

'Their Lordships in that case noticed the answer to Question 58 of Sant Ram Dogra's Book and pointed out that even on a plain interpretation of the answer given by Mr. Dogra it could not lead to an irresistible inference that even if a daughter, fails to prove that she was a Khana Nishin daughter, she is completely excluded from inheriting her father's property even under the personal law. Their Lordships further held that such a custom cannot be said to have well established so as to enable the Courts to take judicial notice of it, but was a custom which has to be pleaded and proved by cogent evidence. In this connection their Lordships observed as follows :

'Learned Advocate for the defendant respondents relied on the answer to question No. 58 in Mr. Sant Ram Dogra's Book on Custom. The question and the answer thereto run thus:

Question 58. In what circumstances are daughters entitled to inherit?

Answer: Daughters inherit only when they reside with their husbands, in their father's home and are made Dukhtar-i-Khanna Nishin, otherwise not.

It is contended that the word 'only' and 'otherwise not' imply that a daughter who was not a Khana Nishin daughter was excluded from inheritance absolutely and not merely as against particular relations. A literal construction may lend support to this argument but it is extremely doubtful, to say the least, that the implications of that construction were present either to the mind of Mr. Dogra or that of the persons on whose information the custom was recorded. It is in the highest degree improbable that the answer would have been as recorded if the question had been put clearly as to whether such a daughter could not be allowed to inherit whoever else may take the property, for instance the Crown by escheat or a very distant kindred. Probably they had such relations in their mind as a widow, cousins, and the like, and, it may be as against such heirs the daughter's right under Mohammadan Law is not to prevail. For these reasons the answer to question No. 58 cannot be regarded as free from ambiguity where total exclusion of the daughters is in question. Evidence in proof of a custom in derogation of, personal law should be unambiguous.'

3. These observations provide a complete answer to the argument of the learned counsel which must, therefore, be rejected.

4. Learned counsel contended next that, acting under the Agrarian Reforms Act, the trial Court had at one time transferred the, suit for disposal to the Collector Agrarian who sent it back to the trial Court on the plea that the suit was not cognizable by him and, that in the circumstances the trial Court was debarred from trying the same an the principle of res judicata and consequently the impugned decision was vitiated. This is a mixed question of fact and law which cannot be allowed to be raised for the first time in the second appeal. The argument must fail.

5. The result therefore is that this appeal fails and is hereby dismissed in limine. At this stage learned counsel for the appellant asked for permission to file an appeal

under the Letters Patent. But in view of the fact that the case does not involve any substantial question of law, I decline to grant such permission.