(1934) 07 CAL CK 0002

Calcutta High Court

Case No: None

Musammat Mahboob Begum		APPELLANT
	Vs	
Tulshi Bibi		RESPONDENT

Date of Decision: July 20, 1934

Citation: 156 Ind. Cas. 1000

Hon'ble Judges: Patterson, J; Mitter, J

Bench: Division Bench

Judgement

@JUDGMENTTAG-ORDER

1. This Rule was issued on these opposite parties Tulshi Bibi, Najibannessa Bibi, Gabu alias Rabia Khatun to show cause why the petitioner in this Rule Musammat Mahboob Begum should not be substituted as an heir of the deceased Furrok Bibi both in the appeal and the Rule, which is connected with the appeal, now pending this Court. It appears that one Golam Jellani Khan a wealthy Peshwari Muhammadan died intestate in March 1927 at Talligunj leaving considerable movable and immovable properties; that Tulshi Bibi one of the opposite parties brought a Title Suit for partition in respect of the property left by Golam Jellani Khan and account, valuing the suit at Rs. 1,60,000 in the Court of the First Subordinate Judge at Alipore. Her allegation was that the late Golam Jellani Khan left three widows, Tulshi Bibi, Farrokh Bibi and Najibannessa and one minor daughter Gabu, alias Rabia Bibi by the plaintiff. The plaintiff-appellant alleged that according to the special custom of the Peshwari clan to which Golam belonged his three widows are alone entitled to the estate and the plaintiff Tulshi is accordingly entitled to one-third share in the same. Furrokh Bibi and the other widows denied the allegation that the plaintiff Tulshi was ever married to Golam or that her daughter Gabu alias Rabia Bibi was born in lawful wed-lock. The defendant further contended that the plaintiff not being in possession of any portion of the properties mentioned in the schedule of the plaint could not maintain the suit in its present form without payment of proper court-fees. The Subordinate Judge found that the plaintiff was not in possession of any of the

properties devolved on her and ordered her to pay ad valorem court-fees for her alleged share within a fortnight of the order which was passed on the July 31, 1929. The opposite party took time and ultimately she failed to deposit the same and the plaint was accordingly rejected on November 27, 1929. Against this dismissal of the plaint which was lodged by the said Tulshi Bibi she has preferred an appeal in this Court which has been numbered as Appeal from Original Decree No. 53 of 1930. In connection with same appeal a Civil Rule, namely Rule No. 436 F of 1934 was obtained for the appointment of a Receiver on the allegation that Farrok Bibi died on March 28, 1934 and that her officers were going to dispose of the estate belonging to Golam worth about Rs. 15,000. In that petition it is stated that it is not mentioned that Farrok Bibi left any heirs. It appears according to the affidavit of the petitioner that the petitioner Tulshi Bibi is not an heiress of Farrok Bibi under the Muhammadan Law, she being her paternal uncle''s daughter, and the materal uncle''s daughter of Golam. This is contested by the opposite parties who say that under the Customary Law of the Kakezai tribe the petitioner is not the heiress to the late Farrok Bibi. This matter came before us sometime ago and we asked the opposite party to produce before us any Customary Law which would modify the ordinary law of succession of the Muhammadans. The learned Advocate has produced several books with reference to the Customary Law of the Punjab but no book with regard to the custom of this particular tribe has been placed before us. We would, therefore, proceed to decide the case according to the ordinary Muhammadan Law of succession and judged by that law it is not a case which excludes the present petitioner from the heirship of the estate of Farrok Bibi. It is a well-established rale that where a person relies upon custom as modifying the ordinary law the burden is on him or her to establish the existence of such custom. Reference may be made to a decision of their Lordships of the Judicial Committee in the case of Abdul Hossein Khan v. Sona Dero 43 Ind. Cas. 306 : 45 C 450 : 16 A.L.J. 17 : 4 P.L.W. 27 : 34 M.L.J. 48 : 22 C.W.N. 363 : 23 M.L.T. 117 : 27 Cri.L.J. 240 : 1 P.L.R. 1918 : 20 BL.R. 528 : 12 S.L.R. 104 : 45 I.A. 10 (P.C.) where it is pointed out that no presumption can be made in favour of the existence of a usage or custom if it were not proved that such a custom or usage prevails at all in that place. It is incumbent upon the person who alleges the existence of such a custom to prove the custom on which he relies. In the present case the opposite parties have failed to establish that there is any custom amongst this tribe which would exclude the operation of the ordinary law of succession. The petitioner in this case is a distant kindred and consequently she is the legal representative of Farrok Bibi. Accordingly we direct that in place of Farrok Bibi the name of the petitioner should be substituted as her legal representatative both in this Rule as well as in the appeal. The Rule is made absolute. No order is made as to costs.

2. In view of the order made in this Rule the order of the Registrar made in Appeal from Original Decree No. 53 of 1930 on April 20, 1934, will stand vacated.