APPELLATE CIVIL.

Before Sir Henry Rattigan, Chief Justice.

1919

July 21.

Mussammat ALAM BI AND OTHERS, (DEFENDANTS) *Appellants,*

versus

LATTU, ETC. (PLAINTIFFS) AND

Mussammat MUHAMMAD BI, ETC. (DEFENDANTS) *Respondents.*

Civil Appeal No. 458 of 1919.

Punjab Courts Act, III of 1914, section 41 (3)—Second appeal on point of custom—limitation—appeal filed beyond time on account of delay in obtaining a certificate—custom—Khanadamadi Langaryal Jats, *Tehsil Kharian—appointment by widow under instructions from her husband.*

Appellant on 8th February 1919 filed a second appeal in the Chief Court against the decree of the District Judge, dated 26th August 1918. She did not apply to the latter for a certificate till 21st November 1918 explaining that she was not aware of the necessity of a certificate till advised by a lawyer at Lahore. The District Judge granted a certificate on 3rd February 1919.

Held, that under the circumstances and having regard to the provisions of clause (3) of section 41 of the Punjab Courts Act the appeal should be held to be within time.

Held also, that among *Langaryal* Jats of Tehsil Kharian, who recognise the practice of making a *Khanadamad,* a widow who has received instructions in that behalf from her husband has full power to make a particular person a *khanadamad.*

Rattigan's Digest of Customary Law, paras. 39 and 41, referred to.

Second appeal from the decree of C. L. Dundas, Esquire, District Judge, Jhelum, dated the 26th August 1918.

S. A. RAZAK, for Appellants.

BADR-UD-DIN, Kureshi, for Respondents.

SIR HENRY RATTIGAN, C. J.—A preliminary objection is urged by Mr. Badr-ud-Din that the

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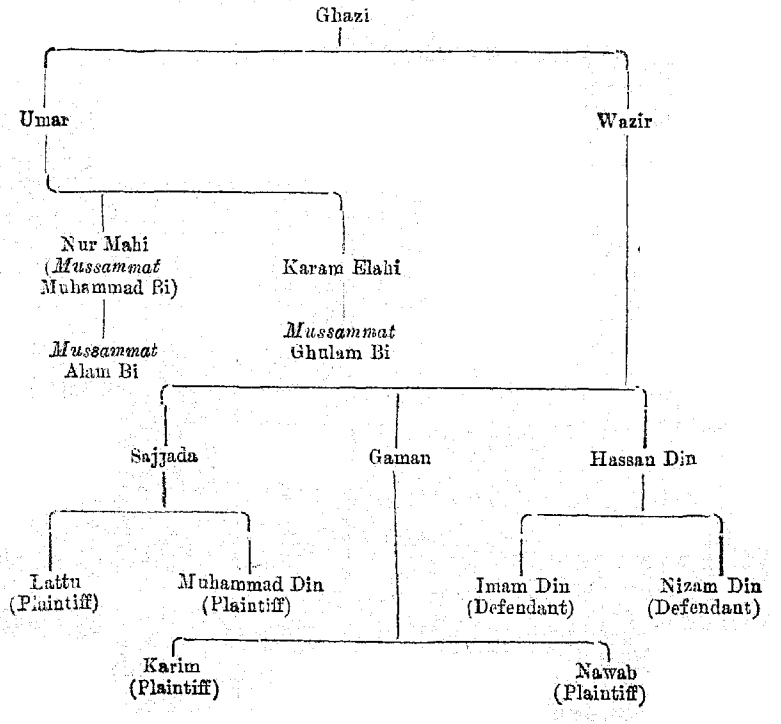
appeal to this Court is barred by limitation. It appears that the decree of the District Judge was passed on the 26th August 1918, and the present appeal was not filed until the 8th February 1919. On the 21st November 1918, however, *Mussammat* Alam Bi, the appellant, applied to the District Judge for a certificate under section 41 (3) of the Punjab Courts Act, 1914, explaining that her delay in applying for the certificate was due to the fact that she had erroneously supposed that a second appeal would lie as of right to the Chief Court and that she had not discovered her mistake until sometime after the passing of the decree when she consulted a lawyer at Lahore. The District Judge apparently accepted her application and granted her a certificate on the 3rd February 1919. In the circumstances and having regard to the provisions of clause 3 of section 41 of the Act I must hold that the objection is untenable and that the appeal is within time. I accordingly proceed to deal with it on the merits.

The parties are *Langaryal Jats* of *Tahsil* Kharian in the Gujrat District and the following pedigree-table will illustrate their relationship :



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It appears that on the 22nd December 1917 Karam Ilahi applied to the revenue authorities for sanction to a mutation in respect of some 67 Kanals 1 Marla of land which he said he had gifted to his daughter *Mussammat* Ghulam Bi. On the same date a similar application was filed by *Mussammat* Muhammad Bi, who stated that she had gifted a similar amount of land to her daughter Alam Bi. *Mussammat* Ghulam Bi is married to the defendant Imam Din and *Mussammat* Alam Bi is married to the defendant Nizam Din. Plaintiffs, who are collaterals related to the common ancestor in the same degree as Imam Din and Nizam Din, brought two suits praying for declaratory decrees to the effect that the aforesaid gifts should not affect their reversionary rights on the death of the donors. Defendants pleaded that donees were married to collaterals who stood in the position of *Khanadamads* to the donors ; and that according to the custom of the parties the gifts were valid. The first Court found in favour of the defendants as regards both gifts and dismissed the plaintiffs' suits. Plaintiffs appealed in both cases to the District Judge, who held that the gift to Imam Din by Karam Ilahi was valid inasmuch as Karam Ilahi had made Imam Din his *Khanadamad* as he was entitled by custom to do, and that in any event a gift to a daughter by a sonless male proprietor in lieu of services rendered is valid by the custom of the tribe. As regards the gift by *Mussammat* Muhammad Bi, however, the learned Judge held that the plaintiffs' suit must succeed on the grounds (1) that the gift was really one by *Mussammat* Muhammad Bi to her daughter and that *Mussammat* Muhammad Bi had no right of herself to appoint the daughter's husband a *Khanadamad* ; (2) that the next reversioner, Karam Ilahi, had colluded with the widow, and that consequently his consent to the alienation was no bar to plaintiffs' claim ; and (3) that the evidence adduced to prove that Nur Mahi, the husband of Muhammad Bi, had made an oral will in favour of Nizam Din did not command credence. He accordingly accepted plaintiffs' appeal as regards the gift of *Mussammat* Muhammad Bi and decreed their claim. Subsequently, as I have already stated, the learned Judge granted defendants a certificate to the effect

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that "there was a question regarding the validity "of a custom involved, namely, whether a gift to a "daughter by a sonless widow proprietor in lieu of "services rendered is valid amongst *Langaryal Jats.*" It appears to me that the learned Judge has entirely misunderstood the nature of the defence in the case in which he has decreed the plaintiffs' claim. Defendants' allegation is that Nur Mahi, some years previously when he was about 80 years of age, had taken Nizam Din into his house with the object of eventually marrying him to his daughter *Mussammat* Alam Bi. Nizam Din at that time was about 8 or 9 years of age and the girl was even younger; and as a result it was decided to wait for some years before their marriage was effected. But there can be no doubt from the evidence on the record, especially that of the *lambardar* Nur Din, that Nur Mahi fully intended to make Nizam Din a *Khanadamad* as soon as a marriage could be effected between the boy and the girl. Nur Mahi died in 1911 and within a few months of his death his widow *Mussammat* Muhammad Bi effected the marriage between Nizam Din and her daughter *Mussammat* Alam Bi; and she, Nizam Din, Nur Din and other witnesses all state that this marriage was effected in accordance with the express desire of the deceased Nur Mahi, and that the latter had expressly enjoined *Mussammat* Muhammad Bi to make Nizam Din a *Khanadamad*. The widow, therefore, in carrying out her late husband's wishes must be taken to have acted under his instructions, and the ordinary principle of customary law is that where the practice of making a *Khanadamad* is recognised as it has been found to be in Karam Ilahi's case, a widow, who has received instructions in that behalf from her husband, has full power to make a particular person a *Khanadamad* (see the Digest of Customary Law, paragraphs 39 and 41). The learned District Judge has erred in supposing that it was any part of defendants' case that Nur Mahi himself made Nizam Din a *Khanadamad*, as it is admitted on all hands that Nur Mahi died before the marriage took place. Nur Mahi no doubt fully intended that Nizam Din should become his resident son-in-law; and I see no reason whatever to doubt the evidence that he openly expressed this intention on many occasions

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and in all probability in more definite terms when he found that his end was approaching. The question, therefore, whether a sonless widow can, of her own authority, make a gift to her daughter or make her son-in-law a *Khanadamad* does not arise in the present case.

For the reasons given I accept this appeal; and setting aside the order of the District Judge I dismiss the plaintiffs' suit with costs throughout.

Appeal accepted.

APPELLATE CIVIL.

Before Mr. Justice Abdul Raoof.

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Nov. 19.

MANJI AND OTHERS (DEFENDANTS)—*Appellants.*

versus

GHULAM MUHAMMAD AND OTHERS (PLAINTIFFS) AND DULA RAM AND OTHERS (DEFENDANTS) } *Respondents.*

Civil Appeal No. 772 of 1919.

Common land—abadi—encroachment by one of the co-sharers—suit for ejectment by some of the other co-sharers without proof of material or substantial injury and without asking for partition.

The plaintiffs and some other persons are the owners of 9/16th share of Pana Opra, one of the Panas of the town Toshan, the remaining co-sharers (butchers by trade) own the rest of the Pana. The plot in dispute is a vacant site in the Pana which was alleged to have been in long occupation of Defendants Nos. 3 and 4 who sold it to Defendants 1 and 2, two of the co-sharers in the rest of the Pana, under two deeds of sale, dated 6th August 1916. The plaintiffs alleged that the plot in dispute was part of the common land in Pana Opra, that defendants 1 and 2 under the deeds of sales had taken exclusive possession of it on 11th December 1917, and begun to make constructions upon it, and the plaintiffs had taken proceedings against them in the Criminal Courts which were dismissed on 4th