APPELLATE CIVIL.

Before Mr. Justice LeRossignol and Mr. Justice Martineau.

JAIMAL AND OTHERS (PLAINTIFFS) Appellants,

versus

GANESHI MAL AND OTHERS (DEFENDANTS), Respondents.

1923

Feby. 22.

Civil Appeal No. 881 of 1920.

Civil Procedure Code, Act V of 1908, Order II, rule 2—suit for redemption of a mortgage—whether barred by previous suit for possession against the defendants as trespassers.

In 1904, the plaintiffs brought a suit for possession against the mortgagees under a mortgage executed by their father on the ground that the defendants were trespassers and that the mortgage was not binding upon the plaintiffs by reason of absence of consideration and legal necessity. They now sued for redemption of the mortgage, and the lower Courts held that their present suit was barred by the previous one.

Held, that the present cause of action was not the same as the cause of action in the 1904 suit, and that consequently the present suit was not barred by order II, rule 2 of the Code of Civil Procedure.

Barkhurdar v. *Chhalta Mal* (1), distinguished.

Dhanpat Mal v. *Jhaggar Singh* (2), referred to.

Second appeal from the decree of Rai Bahadur Misra *Jwala Sahai, District Judge, Ludhiana, dated the 9th December* 1919, *affirming that of E. Lewis, Esquire, Junior Subordinate Judge, Ludhiana, dated the* 30*th May* 1919, *dismissing the claim.*

JAGAN NATH, for Appellants.

NAND LAL, for Respondents.

The judgment of the Court was delivered by—

LEROSSIGNOL J.—The plaintiffs in this case prayed to redeem the land in suit which had been mortgaged by their father for Rs. 1,525 in the years 1897 and 1898. The Courts below have dismissed the suit on the

(1) 119 P. R. 1918. (2) 93 P. R. 1903 (F. B.)

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ground that it is barred by Order II, rule 2 of the Civil Procedure Code, inasmuch as in 1904 the appellants brought a suit against the mortgagees for possession on the ground that they were trespassers and that the mortgage by their father was not binding upon them by reason of absence of consideration and legal necessity.

In our opinion this appeal must succeed. Order II, rule 2 of the Code, provides that a person entitled to more than one relief in respect of the same cause of action may sue for all or any of such reliefs but shall not afterwards sue for any relief omitted, and the first question for consideration is whether the cause of action in both suits is the same. It was laid down in *Dhanpat Mal* v. *Jhaggar Singh* (1) that where mortgagors have obtained a decree for redemption and have failed to execute it, another suit to redeem will lie for the reason that the cause of action is not the same. The allegation against the present appellants is that in 1904, they did not ask to redeem, and may, therefore, not do so now. They are thus placed in a worse position than if they had secured a decree for redemption in 1904 and failed to execute it. But we are quite clear that the cause of action now is not the same cause of action as in 1904. In 1904 the cause of action was a mortgage to which the plaintiffs objected *ab initio*. They were attempting to avoid it and had they prayed for redemption they would have *ipso facto* admitted their liability to redeem the mortgage; in other words such a prayer would have cut at the roots of their claim. On the cause of action recited in the 1904 case no redemption was possible. The cause of action in the present suit is the mortgage now admitted as binding on the plaintiffs *plus* a refusal of the mortgagees to accept redemption on the terms offered by the plaintiffs. *Barkhurdar* v. *Chhatta Mal* (2) is cited by the learned District Judge as being on all fours with the present case, a proposition which we cannot admit. This case is very easily distinguishable so that it is not necessary for us to express any opinion whether we are prepared to follow the decision above cited.

(1) 93 P. R. 1908 (F. B.). (2) 119 P. R. 1918.

In short our finding is that the present cause of action and that of 1904 are quite different, and we accept the appeal and remand the case to the first Court for decision on the merits. Costs to be costs in the cause.

C. H. O.

Appeal accepted—
Case remanded.

APPELLATE CIVIL.

Before Mr. Justice Broadway and Mr. Justice Moti Sagar.

SAMAIL AND OTHERS (PLAINTIFFS) Appellants,

versus

AHMADA AND *Mst.* WALLAN (DEFENDANTS), Respondents.

1923

Feb. 21.

Civil Appeal No. 2272 of 1918.

Custom—Alienation—Ancestral property—gift in favour of a collateral in presence of other collaterals—Gilotar Jats—Jhang District.

Held, that the entry in the *Riwaj-i-am* of the Jhang District and the instances proved establish the custom set up by the defendants by which a male proprietor is empowered to make a gift in favour of a collateral in presence of other collaterals.

Beg v. *Allah Ditta* (1), referred to.

First appeal from the decree of Lala *Narinjan Das, Senior Subordinate Judge, 1st Class, Jhang, dated the 28th March 1918, dismissing the plaintiffs' suit.*

C. L. GULATI, for Appellants.

NANAK CHAND, for Respondents.

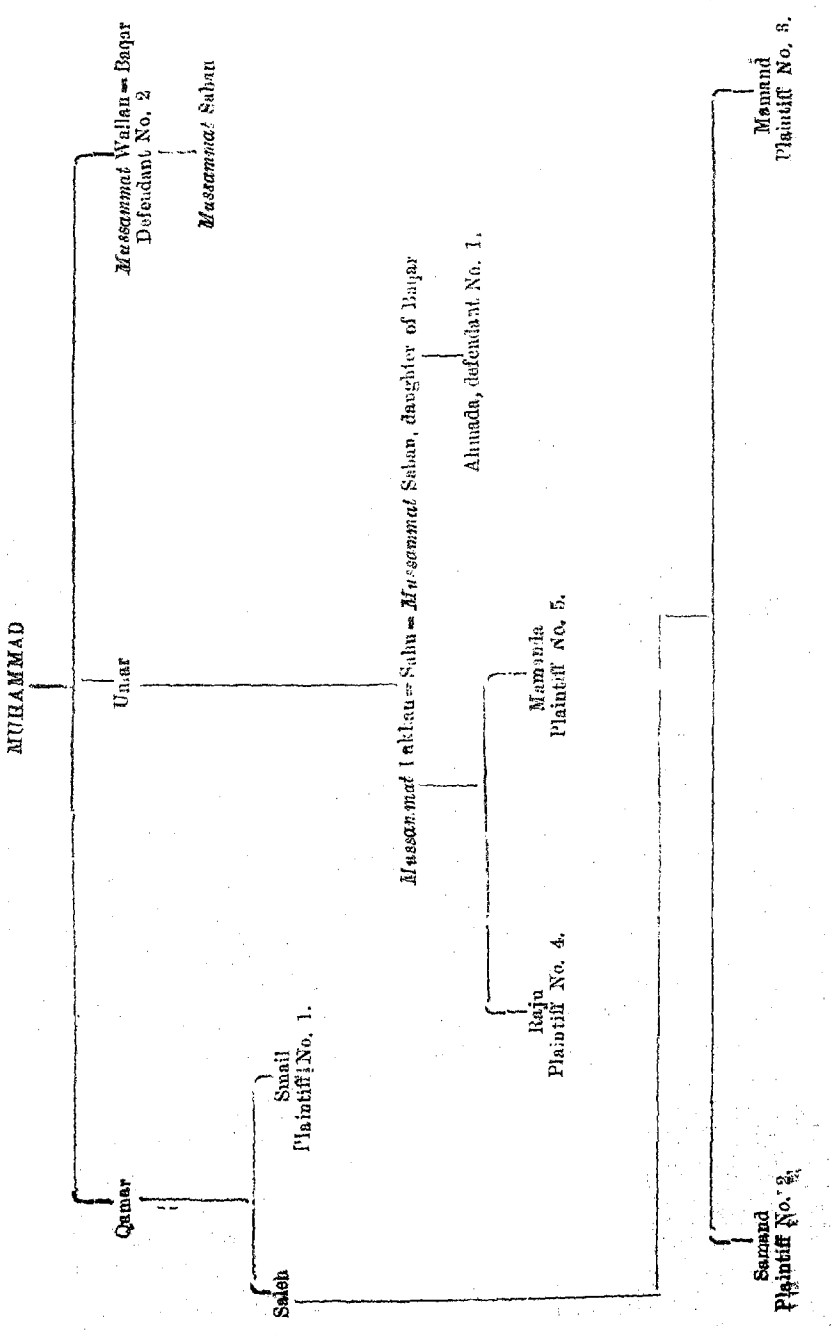
The judgment of the Court was delivered by

(1) 45 P. R. 1917 (P. C.).

1923

SAMAIL v. AHMADA.

BROADWAY J.—The parties to this suit are related as under:—



1923

SAMAIL v. AHMADA.

Baqar made a gift of his land in favour of Ahmada, who is his daughter's son as well as the son of his nephew. His right to do so has been impeached by Samail and others, the plaintiffs in this case, who are also the collaterals of Baqar. Baqar is dead but the plaintiffs sought a declaration of their rights, inasmuch as his widow *Mussammat* Wallan, is still alive. The parties are *Gilotar Jats* of the Jhang District and the defence set up on behalf of Ahmada was that, by the custom of their tribe, Baqar had the power to make a gift in his (Ahmada's) favour. The trial Court has, after a careful inquiry, come to the conclusion that Baqar was competent to make the gift, and the plaintiffs have, therefore, come up to this Court in appeal through Mr. C. L. Gulati whom we have heard.

As stated above the parties are *Gilotar Jats* of the district of Jhang, and according to the *Riwaj-i-am*, this tribe recognises the right of a male proprietor to gift lands in favour of collaterals. The *Riwaj-i-am* has been held by their Lordships of the Privy Council in *Beg* v. *Allah Ditta* (1) to be a strong piece of evidence in support of the custom therein declared. In the present case there is practically no rebuttal of the entry in the *Riwaj-i-am*, whereas the defendants have succeeded in proving several instances of gifts made by male proprietors in favour of collaterals to the exclusion of other collaterals. The evidence on the record, both documentary and oral, supports the entry in the *Riwaj-i-am*, and we are, therefore, satisfied that the view taken by the Court below is correct and that among the *Gilotar Jats* of the Jhang District, the custom set up by the defendants by which a male proprietor is empowered to make a gift in favour of a collateral, has been established.

We accordingly dismiss the appeal with costs.

C. H. O.

Appeal dismissed.

(1) 45 P. R. 1917 (P. C.).