PRIVY COUNCIL.

Before Viscount Finlay, Sir John Edge, Mr. Ameer Ali and Mr. Justice Duff.

1925

July 28.

AHMAD KHAN AND OTHERS (DEFENDANTS) Appellants

versus

Mst. CHANNI BIBI (PLAINTIFF) Respondent.

Privy Council Appeal No. 74 of 1924.

Custom—Succession—Khattar Tribe—Sister or Daughter excluding Collaterals—Acquired Property.

In a suit as to inheritance from a member of an agricultural tribe in the Punjab, called the Khattar, it was admitted that under the custom of the tribe a sister or daughter was excluded in favour of collaterals in respect of ancestral property, but it was denied that the custom applied to acquired property.

Held, that the custom could properly be proved by general evidence given by members of the family or tribe without proof of special instances; and that upon the whole evidence it was established that the custom did not apply to acquired property.

Decision of the High Court affirmed.

Appeal (No. 74 of 1924) from a decree of the High Court (Abdul Raoof and Abdul Qadir, JJ.) in Civil Appeal No. 2741 of 1917, dated 25th May 1922, reversing in part a decree of the Subordinate Judge of the Attock District at Campbellpur.

The parties were Muhammadans belonging to one of the agricultural tribes called the Khattar. The suit was brought by the respondent claiming as sister of Ali Waris Khan, who died in 1904, to succeed to the property which had descended to him from their father Muhammad Khan, upon the death of the last survivor of the latter's two widows. The plaintiff-respondent while admitting that in the tribe there was a custom

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by which a sister or daughter was excluded from succession in favour of collaterals, alleged that that custom did not apply to self-acquired property.

Both Courts in India found that part of the property claimed was self-acquired property. The Subordinate Judge dismissed the suit, but the High Court made a decree in the plaintiff's favour as to that portion of the property. The learned Judges were of opinion that the custom as alleged by the plaintiff was established by the testimony of a large number of witneses following the custom, by instances cited by them although there was no certain evidence of mutation in accordance with the instances, and by statements made by witnesses in a previous suit relating to the tribe in question.

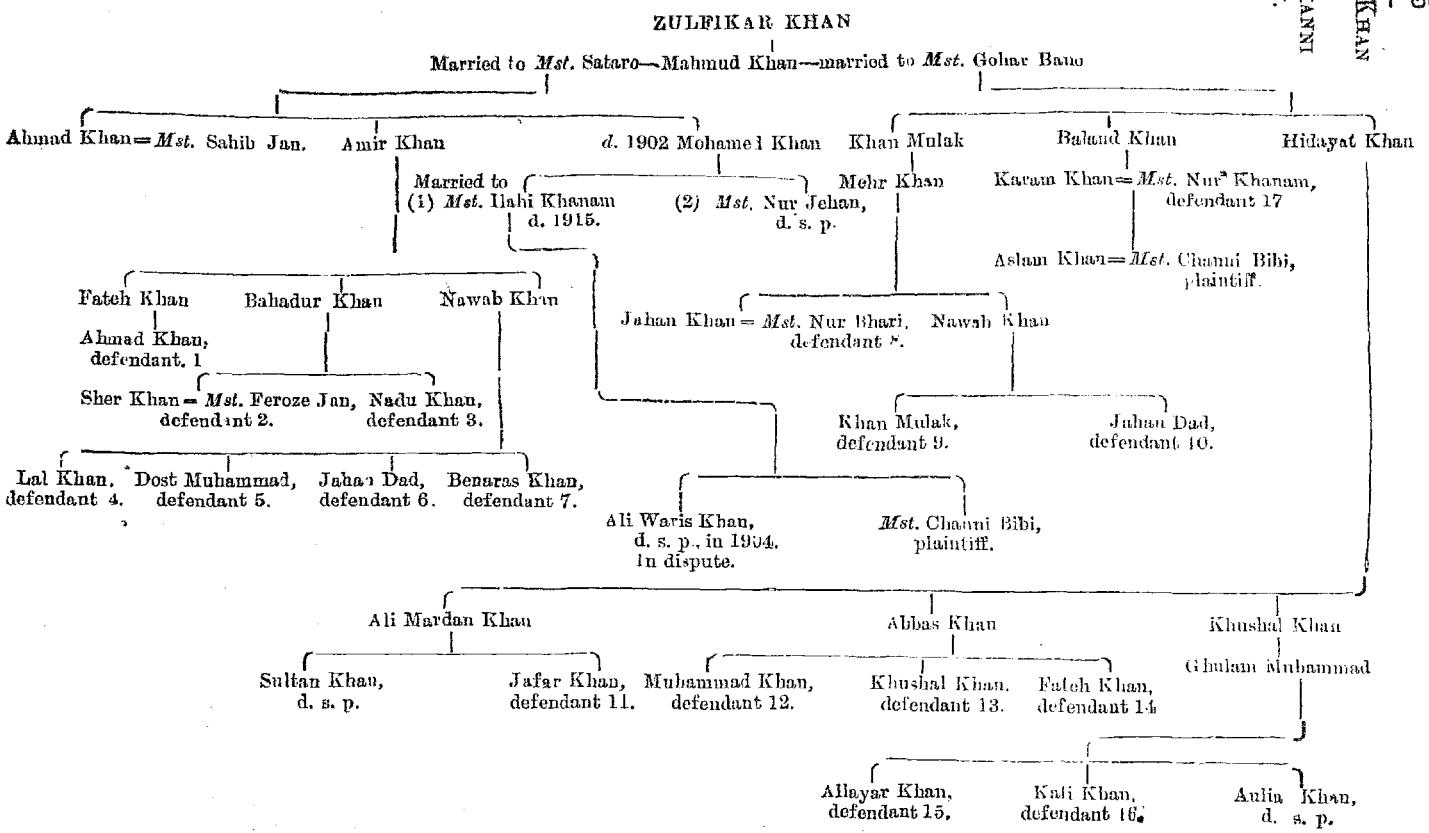
DE GRUYTHER K.C. and E. B. RAIKES, for the Appellants.

ABDUL MAJID, for the Respondent.

The judgment of their Lordships was delivered by—

MR. AMEER ALI—This appeal arises out of a suit brought by the respondent *Mussammat* Channi Bibi in the Court of the District Judge at Attock, for the establishment of her title in respect of certain lands which she claimed by right of succession to her deceased brother, Ali Waris Khan.

The following table will show the relationship of the parties in these proceedings :—


ZULFIKAR KHAN
Married to Mst. Sataro—Mahmud Khan—married to Mst. Gohar Banu
Ahmad Khan=Mst. Sahib Jan.
Amir Khan
d. 1902 Mohamed Khan
Khan Mulak
Baland Khan
Hidayat Khan
Married to (1) Mst. Ilahi Khanam d. 1915.
(2) Mst. Nur Jehan, d. s. p.
Mehr Khan
Karam Khan=Mst. Nur Khanam, defendant 17
Aslam Khan=Mst. Channi Bibi, plaintiff.
Fateh Khan
Bahadur Khan
Nawab Khan
Jahan Khan=Mst. Nur Bhari, defendant 8.
Nawab Khan
Ahmad Khan, defendant 1
Sher Khan=Mst. Feroze Jan, defendant 2.
Nadu Khan, defendant 3.
Khan Mulak, defendant 9.
Jahan Dad, defendant 10.
Lal Khan, defendant 4.
Dost Muhammad, defendant 5.
Jahan Dad, defendant 6.
Benaras Khan, defendant 7.
Ali Waris Khan, d. s. p., in 1904. In dispute.
Mst. Channi Bibi, plaintiff.
Ali Mardan Khan
Abbas Khan
Khushal Khan
Ghulam Muhammad
Sultan Khan, d. s. p.
Jafar Khan, defendant 11.
Muhammad Khan, defendant 12.
Khushal Khan, defendant 13.
Fateh Khan, defendant 14
Allayar Khan, defendant 15.
Kali Khan, defendant 16.
Aulia Khan, d. s. p.

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Both trace their descent from one Zulfikar Khan through his son Mahmud Khan. Mahmud had two wives, named respectively Sataro and Gohar Bano. By Sataro he had three sons, respectively named Ahmad Khan, Amir Khan and Mohamed Khan. By Gohar Bano he had also three sons named Khan Mulak, Baland Khan and Hidayat Khan.

It is in evidence that Mohamed Khan died in 1902, leaving him surviving two widows *Mussammat* Ilahi Khanam and *Mussammat* Nur Jehan. The latter died in 1905. By Ilahi Khanam, who lived until 1915, Mohamed Khan had a son, Ali Waris, and a daughter, the plaintiff in this case. Ali Waris died in 1904; and the litigation relates to his inheritance.

The defendants are the descendants of the brothers and half-brothers of Mohamed Khan.

The parties belong to one of the agricultural tribes of the Punjab, called the Khattar.

The plaintiff whilst admitting the existence in her tribe of a custom under which a daughter or a sister is excluded in favour of collaterals from inheritance in respect of " ancestral " property, denies its application to " self-acquired property."

She states that there is no special or general custom prevailing in the Khattar tribe under which collaterals like the defendants deprive a daughter or a sister of the right of succession to property acquired by the father or brother.

The defendants plead that by the custom prevailing in the tribe or in the family, females are excluded from succession irrespective of the character of the property whether it was ancestral or self-acquired. The parties went to trial on that issue.

There are two properties in dispute, one called *Surag Salar*, the other *Kharala*. The Senior Sub-

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Judge of Attock before whom the case came for trial, found as a fact that *Surag Salar* was " self-acquired property " within the meaning of the custom alleged by the plaintiff, and that *Kharala*, save and except 416 Kanals of land, was " ancestral." But as regards the plaintiff's claim he held that she had failed for absence of specific instances to establish satisfactorily the custom under which she claimed her brother's inheritance. He accordingly dismissed her suit in respect of both the properties.

The High Court of Lahore, on the plaintiff's appeal, have given her a decree in respect of *Surag Salar* and 416 Kanals of *Kharala* which appears to have been admittedly purchased by Mohamed Khan, and dismissed her suit regarding the ancestral village of *Kharala*.

The appeal to this Board is by the defendants the collaterals who claimed the succession of Ali Waris in preference to Channi Bibi, the sister.

The two points that have been raised before their Lordships really form the kernel of the case.

The first is: does *Surag Salar*, as has been found by the Courts in India, constitute in fact " self-acquired property " within the meaning of the custom alleged ?

The question whether *Surag Salar* was the " self-acquired " property of the plaintiff's father turns upon the construction of the revenue settlement which began in 1852 and was completed in the year 1863. The settlement was in fact made with Amir Khan and Baland Khan representing the two branches of Mahmud Khan's family.

The settlement papers make it perfectly clear that prior to the settlement of 1863, the family of Mahmud Khan had no right in *Surag Salar*. That about the close of the Sikh rule his sons had forcibly ousted

another family that had been settled at *Surag Salar* for over 40 years. As already stated they had no title in the property; they had installed themselves there by force and on the establishment of British rule in the Punjab, when settlement proceedings were begun they applied for settlement with them on the strength of certain advances or payments they had made to the Sikh Government. The settlement proceedings lasted several years and concluded only in 1863.

In the course of the proceedings a thorough inquiry was made as to title and possession. In the Punjab the Settlement Officer in the early days of British rule combined in his person both judicial and administrative functions. He had to investigate into the actual conditions of the occupation of lands in respect of which the settlement proceedings were instituted and to give effect to ascertained facts in accordance with the result of his enquiry whether the occupation was by virtue of any right or title. There can hardly be any dispute that whilst the settlement proceedings were proceeding Mahmud Khan had died, for the settlement was made with his sons.

Before the Settlement Officer there were two parties arrayed against each other as claimants to the property of *Surag Salar*. Ghazan Khan represented the family which had been in possession of Surag Salar for over 40 years. They were placed in the category of plaintiffs; whilst Amir Khan and Baland Khan representing the family of Mahmud Khan were the defendants. Both belonged to the tribe of Khattar.

It is not necessary in this judgment to refer in detail to the proceedings which culminated in the settlement; it is enough to state the result of the enquiry embodied in Robkar Ex. F. 7. It runs thus :—

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"There is no doubt that the village originally belonged to the plaintiffs. The defendants' possession is of 22 years' standing. The defendants suffered a loss of thousands of rupees. If they had not made the village *abad*, it would have been totally ruined. Now the point for determination is whether the plaintiff's suit is entertainable or not, owing to their ejectment which took place 22 years ago. So it is clear that the plaintiff's suit has been pending since 1852, *i.e.*, for the last 11 years. In other words, the defendants' possession is considered to have existed since 11 years before the institution of the suit. The period is a period during which such a suit is cognizable. It is less than 12 years. Under these circumstances the plaintiff's suit is cognizable. The plaintiffs are original proprietors of the village. As a matter of fact, the defendants have no concern with the inheritance. The plea of the defendants that they purchased the village is worthless. They produce a sale-deed which is also worthless because they previously made no mention of the sale, nor is there any proof in respect thereof nor yet as to their possession before *Sambat*, 1898. The plaintiffs were continuously in proprietary possession before the said *Sambat*. The opinion of Munshi Hukam Chand, Extra Assistant Commissioner, is that either Rs. 10 *per cent.* should be fixed for the plaintiffs as *talauqadari* dues or the village held the parties' property in equal half shares."

* * * * * *

"It is therefore ordered that the cultivated land of one-half of the village be considered as the property of plaintiff No. 1 and that of the other half as the property of the defendants. The objection raised by plaintiff No. 2 as to two wells that they were separately sunk by the plaintiffs and that they should be

given to them or to plaintiff No. 1 is worthless, because if the defendants had not made them *abad*, while they were in possession (of the village) they would have totally been ruined and useless. They are in working order. They should, therefore, remain the property of plaintiff No. 1 and the defendants in equal half shares."

Again, the proceedings before the Court of the Settlement Officer (Exhibit P.-8) are instructive :—

" The plaintiff's ancestors again made the village *abad* after it had become desolate. They are, therefore, considered owners. Only the defendants' possession, which is of 20 years' standing, is to be taken into consideration. But it is not worth consideration, because the plaintiff's suit has been pending since the beginning of the British rule. An appeal was filed therein in the Commissioner's Court which remanded the case to the District Court for further enquiry which was made in this case. Under these circumstances the ejectment for 12 years during the British rule is not worth consideration, because if a complete enquiry had been made at that time, the plaintiffs would have got their right. The defendants' possession is considered to have existed since 8 years before the British rule. The Extra Assistant Commissioner has two proposals to me. One of them is that the plaintiffs should get Rs. 10 per cent. as *talauqadari* dues. Under the above circumstances I consider the plaintiff's right to be superior thinking that the defendants had been in actual possession since 8 years before the British rule. The other proposal of the Extra Assistant Commissioner is that in view of the fact that the defendants shared profit and loss, the village should be given to both the parties in equal half shares."

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The final decision of the Settlement Officer concerning the half share settled with Mahmud's family is contained in Exhibit D. 39, as follows :—

"The proprietors descended from Zulfikar Khan and Fateh Khan will collect the produce of the entire land, cultivated by them and by the tenants, distribute it among themselves according to the shares shown in the *Khewat* papers, and pay the Government revenue according to ancestral shares in addition to Rs. 17 *per cent.* on account of cesses as under."

In their Lordships' judgment, the Settlement Officer having regard to the conflicting claims of the plaintiffs on one side and of the defendants on the other made an equitable division of the property between the two sets of claimants. The plaintiffs (Ghazan's people) had the original title by long occupation; the defendants had ousted them to a considerable extent and had undertaken some liabilities in respect of the payment of revenue, etc. The Settlement Officer, therefore, came to the conclusion that it would be equitable to settle half of the lands with the descendants of Khazan Khan who were the plaintiffs in the proceedings, and give the other half to the descendants of Zulfikar Khan. *Surag Salar* was thus in no sense ancestral property—it had not been acquired by their ancestor Zulfikar or Mahmud Khan and handed down to their successors. The settlement was effected in fact with Amir Khan and Baland Khan as representing the family of Zulfikar Khan and the title of proprietors was declared to be with them for the family. The direction contained in Document D. 39, page 180, shows the character of the settlement with the defendants' family.

Their Lordships are clearly of opinion that the judgment of the Subordinate Judge and of the learned

Judges of the High Court with regard to *Surag Salar* is right.

As regards the custom in respect of which the two Courts in India have differed, their Lordships think the Subordinate Judge was in error in putting aside the large body of evidence on the plaintiff's side merely on the ground that specific instances had not been proved. They are of opinion that the learned Judges of the High Court are right in holding that a custom of the kind alleged in this case may be proved by general evidence as to its existence by members of the tribe or family who would naturally be cognisant of its existence and its exercise without controversy.

There is a large body of oral evidence establishing the custom, wholly unrebutted by the defendants who have relied exclusively on the *Riwaj-i-Am*. The Judges of the High Court have commented on these documents, and their Lordships see no reason to differ from them.

The Judges of the High Court have referred to the evidence of Sirdar Mohammed Hyat Khan, a distinguished officer of the Government, which if admissible would be conclusive in the case; but it is urged by the appellants' counsel that it cannot be put in evidence as it is not in compliance with the requirements of the Indian Evidence Act, I of 1872. Their Lordships are not prepared to say that in the circumstances of the case it was erroneously admitted but assuming it is inadmissible it forms only one item in the mass of evidence on which the plaintiff relied and which has been thoroughly examined by the High Court.

On the whole their Lordships are of opinion that this appeal should be dismissed and they will humbly

advise His Majesty accordingly. The appellants will pay to the respondent the costs.

A. M. T.

Appeal dismissed.

Solicitors for the Appellants: *Ranken, Ford & Chester.*

Solicitors for the Respondent: *Francis & Harker.*

APPELLATE CIVIL.

Before Mr. Justice Abdul Raoof and Mr. Justice Addison.

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July 4.

PUNJAB COMMERCIAL SYNDICATE AND ANOTHER } (PLAINTIFFS) Appellants.

versus

PUNJAB CO-OPERATIVE BANK, LIMITED, IN LIQUIDATION AND ORS. } (DEFENDANTS) Respondents.

Civil Appeal No. 2546 of 1921.

Ex-parte *Decree—Suit by third parties to set it aside on the ground of fraud— necessity for setting forth particulars of the fraud alleged and for alleging and proving collusion directed against themselves.*

The respondent Bank sued, in October 1917, B. D. and his 3 brothers on 2 promissory notes claiming an equitable mortgage on land measuring about 17 kanals. The proceedings were *ex-parte* throughout against B. D. In April 1919, on a compromise between the Bank and the 3 brothers the former gave up its claim against the brothers while they admitted that the decretal amount would be a charge on the land in question which was B. D.'s self-acquired property, and that certain other self-acquired property of B. D. and his one-fourth share of the ancestral property would also be liable for the debt. After this an *ex-parte* decree was passed against B. D. with a lien on the land.

On the 6th May 1918 the present Syndicate and K. L. appellants sued B. D. and his 3 brothers for recovery of Rs. 27,000. In this case also the proceedings were *ex-parte* against B. D. and on a compromise with the 3 brothers an *ex-parte* decree was passed in July 1919 against B. D. only,