APPELLATE CIVIL.

Before Mr. Justice Martineau and Mr. Justice Jai Lal.

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Nov. 7.

KHIZAR HAYAT AND ANOTHER (DEFENDANTS) Appellants

versus

ALLAH YAR SHAH (PLAINTIFF) Respondent.

Civil Appeal No. 498 of 1921.

Custom—Succession—Collaterals or daughter's sons— Sayyads *of Kot Isa Shah, Jhang district—Ancestral property—property descended from maternal grand-father—* Riwaj-i-am.

The parties were *Sayyads* of Kot Isa Shah in the Jhang tahsil, and the question before the Court was whether by custom the plaintiff, a near collateral, had a preferential claim to a daughter's sons whose mother had not married in the family of her father.

Held, that having regard to the entries in the *Riwaj-i-ams* prepared at the settlements of 1880 and 1904, on which both sides relied, the mother of the defendants, not having married within the family, would not succeed in preference to the plaintiff, and consequently the defendants, her sons, could not claim the property of their maternal grand-father.

Held also, that the property which was originally ancestral, did not become the self-acquired property of the defendants' maternal grand-father by the fact of his having obtained it by gift from his maternal grand-mother, since it would have descended to him by inheritance even if there had been no gift, his mother, who had married her first cousin, being entitled to succeed to the property in preference to collaterals.

Mussammat Attar Kaur v. *Nikko* (1), followed.

First appeal from the decree of Lala *Khan Chand Janmeja, Senior Subordinate Judge, Jhang, dated the 1st October 1920, granting plaintiff a declaration as prayed for.*

(1) (1924) I.L.R. 5 Lah. 356 (F.B.).

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NIAZ MUHAMMAD AND MUHAMMAD MONIER, for Appellants.

TEK CHAND, M. L. PURI AND MOTI RAM, for Respondent.

The judgment of the Court was delivered by—

JAI LAL J.—Two pedigree-tables will be found at pages 207 and 209, respectively, of the printed paper book.

Maksud Shah and Abdullah Shah were two brothers. Abdullah Shah's daughter, *Mussammat* Sahib Khatun, was married to Maksud Shah's son, Pir Kamal. They had two sons, Ghulam Murtaza and Nur Zaman. Pir Kamal had two other sons by different wives. One of them is Allah Yar Shah, the plaintiff, and the other is Karam Hussain, who is a *pro formâ* defendant in this case. After the death of Abdullah Shah his widow, *Mussammat* Said Bibi, gifted some land to Nur Zaman, but Nur Zaman died sonless. She therefore made a gift of the same land to Ghulam Murtaza. The deed of gift is witnessed by Pir Kamal. Ghulam Murtaza having died his widow, *Mussammat* Allah Jawai, made a gift of the land to defendants Nos. 1 and 2, who are the sons of *Mussammat* Mundai, a daughter of Ghulam Murtaza by *Mussammat* Allah Jawai. This gift was made on the 13th July 1915. The plaintiff instituted this suit for a declaration that the gift by *Mussammat* Allah Jawai was invalid without the consent of the reversioners, alleging that the property in the hands of Ghulam Murtaza was ancestral *qua* the plaintiff. He therefore claimed possession of a half share in a part of the property which was in the actual possession of the defendants, and a declaration as regards the other part which was in possession of a mortgagee. Karam Hussain

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was alleged by the plaintiff to be the owner of the other half, and it was alleged that he had declined to join in the suit. He was therefore impleaded as a defendant. The suit was contested by defendants Nos. 1 and 2 on various grounds, but it was decreed by the Senior Subordinate Judge of Jhang, who held that the property was ancestral, that the defendants were not the legal heirs of Ghulam Murtaza, and that the gift made by *Mussammat* Mundai " was not for necessity ". Presumably he meant by this last expression that *Mussammat* Mundai was incompetent to make the gift. Both parties were agreed that they were governed by custom and not by Muhammadan Law.

The decree of the learned Senior Subordinate Judge is attacked before us on three grounds, namely :—

1. That *Mussammat* Mundai, the daughter of Ghulam Murtaza, was married to one Saleh Shah who was a collateral of Ghulam Murtaza, and therefore according to the special custom prevailing among the parties *Mussammat* Mundai and through her defendants Nos. 1 and 2 were the heirs of Ghulam Murtaza.

2. That it had not been proved that the property was originally ancestral, and that in the case of non-ancestral property daughters succeed in preference to collaterals.

3. That the gift by *Mussammat* Said Bibi to Ghulam Murtaza was not to an heir but was to one of several heirs, and therefore the gifted property became the self-acquired property of Ghulam Murtaza.

That there was a special custom governing the parties according to which a widow was competent to make a gift of the estate in her hands.

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After hearing counsel we are of opinion that the conclusions of the learned Senior Subordinate Judge are correct. The parties are *Sayyads* of Kot Isa Shah in the tahsil of Jhang. The learned counsel on both sides rely on the *Riwaj-i-ams* prepared at the settlements of 1880 and 1904.

We will first dispose of the contention of the learned counsel for the appellants that defendants Nos. 1 and 2 were entitled to succeed to the estate of Ghulam Murtaza owing to their mother *Mussammat* Mundai having been married to Saleh Shah, a collateral. He is stated to be a collateral in about the 20th degree (see the statement of *Sayyad* Allah Yar Shah, D. W. 21, at page 188 of the printed record). Beyond this our attention was not drawn to any other evidence regarding the relationship of Saleh Shah. The *Riwaj-i-am* prepared at the Settlement of 1880 provides that a daughter and her descendants succeed only if the former be married in the family of a 'near relation'. The *Riwaj-i-am* prepared in connection with the Settlement of 1904 provides that married daughters do not generally succeed, but if a collateral descended from a common grand-father be not in existence, then such daughters succeed provided they are married in the family of the father. It is quite clear that Saleh Shah is not a near relation, nor does he belong to the family of Ghulam Murtaza. Therefore according to the custom *Mussammat* Mundai would not succeed to the estate of Ghulam Murtaza in preference to the plaintiff, and consequently her sons defendants 1 and 2 cannot claim the property in dispute as heirs of Ghulam Murtaza. In this connection the learned counsel for the appellant relied upon the statement of Allah Yar Shah, plaintiff, which is to be found at pages 145 and 146 of the printed book, and in which

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he stated that the descendants of Pir Kamal, Shah Jamal, Abdul Rehman and Sher, the ancestors of the parties, are considered as members of the same *kuf* (family), and that if a daughter is married in the same family (*kuf*) she gets the property. But in the same statement the witness made it quite clear that the daughter of Ghulam Murtaza was married in another family and therefore was not entitled to inherit the property left by Ghulam Murtaza. In our opinion, having regard to the pleadings and taking his entire statement into consideration, Allah Yar Shah cannot be taken to admit the claim of defendants Nos. 1 and 2 to succeed to the property in suit in preference to the plaintiff. The *Riwaj-i-am* is quite explicit on the point and we have no hesitation in holding that the plaintiff was entitled to succeed to the ancestral property of Ghulam Murtaza in preference to defendants Nos. 1 and 2.

We find that there is no distinction according to the *Riwaj-i-am* between the ancestral and self-acquired immoveable property for the purposes of succession. We are further of opinion that the property in the hands of Ghulam Murtaza was ancestral *qua* the plaintiff and that it did not lose its character as such by the fact of the gift made in favour of Ghulam Murtaza by *Mussammat* Said Bibi.

According to the *Riwaj-i-am* Ghulam Murtaza was the next male heir to *Mussammat* Said Bibi because his mother *Mussammat* Sahib Khatun having been married to Pir Kamal, a nephew of Abdullah Shah, was entitled to succeed in preference to the collaterals. The gift, therefore, by *Mussammat* Said Bibi was to a person who was connected with the donor and who would have succeeded to the property apart from the gift. Under such circum-

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stances property which was originally ancestral did not become the self-acquired property of the donee. *Mussammat Attar Kaur* v. *Nikkoo* (1) is an authority in support of this proposition.

We agree with the Senior Subordinate Judge that the property in the hands of *Mussammat* Said Bibi was the ancestral property of her husband. The learned counsel for the appellant did not seriously contest this finding, and therefore we need not discuss it at any length. We may remark in passing that the whole of the property in suit was not the subject of gift by *Mussammat* Said Bibi. Only a very small fraction of it was gifted by her. The rest of it appears to have come to Ghulam Murtaza by inheritance and not by gift.

There is no satisfactory evidence in support of the contention of the appellant that a widow among the *Sayyads* of Kot Isa Shah in the *Tahsil* of Jhang has by special custom power to make a valid gift of property inherited by her from her husband. The learned counsel for the appellant practically conceded that on the present record it was not possible for him to claim that such a custom had been proved.

We are therefore of opinion that the property in suit is ancestral as regards the plaintiff, and that *Mussammat* Allah Jawai was not competent to make a gift thereof to defendants Nos. 1 and 2. The plaintiff's suit was rightly decreed by the learned Senior Subordinate Judge, and we dismiss this appeal with costs.

C. H. O.

Appeal dismissed.

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(1) (1924) I.L.R. 5 Lah. 356 (F.B.).