APPELLATE CIVIL.

Before Mr. Justice Broadway and Mr. Justice Zafar Ali.

ZAKAR HUSSAIN AND ANOTHER (PLAINTIFFS) Appellants

versus

MST. GHULAM FATIMA AND OTHERS (DEFENDANTS) } Respondents.
NAWAB SHAH AND ANOTHER (PLAINTIFFS) }

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Nov. 9.

Civil Appeal No. 2798 of 1922

Custom—Alienation—Will—Ancestral property—Sabzwari-Sayads *of village Maw, tahsil Phillaur, district Jullundur*—Riwaj-i-am.

Held, that it had been proved that by special custom among *Sabzwari-Sayads* of village Maw a bequest of ancestral land to a daughter is valid.

Mussammat Bano v. *Fateh Khan* (1), referred to.

Second appeal from the decree of Rai Sahib Lala *Ganga Ram* Wadhwa, *District Judge, Jullundur, dated the 11th August 1922, affirming that of* Sayad *Nisar Qutab, Junior Subordinate Judge, Jullundur, dated the 25th October 1921, dismissing the plaintiffs' suit.*

BADRI DAS, for Appellants.

NIAZ MUHAMMAD, for Respondents.

The judgment of the Court was delivered by—

ZAFAR ALI J.—On the 21st September 1917, one Sardar Ali, a sonless agricultural *Sabzwari-Sayad* of village Maw in the Phillaur tahsil of the Jullundur district, executed and registered a will by which he bequeathed half of his land to his wife and half to his two daughters, and made the further provision that on the death of his widow her share too should

(1) 48 P. R. 1903 (F.B.).

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go to the daughters. About two years later, *i.e.*, on the 11th November 1919, Sardar Ali died, and his widow and daughters succeeded to his estate in accordance with the will. His collaterals in the fourth degree, who are according to general custom his next reversionary heirs, disputed his power to divert the inheritance by making a will in favour of daughters, and they sued for a declaration that the will was invalid, being contrary to custom. This claim was based on the assumption that the land was ancestral. The ladies pleaded that according to a special family custom obtaining among *Sabzwari-Sayads* a sonless proprietor was competent to bequeath his estate to his daughters, and they further pleaded that the land was not ancestral *quâ* the plaintiffs. The collaterals did not succeed in either of the Courts below which concurred in finding that the custom pleaded by the defendants did exist, and that out of the 309 *kanals* 8 *marlas* of land left by the testator only 80 *kanals* 8 *marlas* was ancestral. The District Judge, however, granted a certificate for second appeal on the ground that the evidence with regard to the custom was " rather " conflicting.

There can be no manner of doubt that agricultural *Sayads* of the Jullundur district follow custom and not their personal law, and that daughters have no right of inheritance among them. The question is, can a father give ancestral land to a daughter by will or gift? According to the *Riwaj-i-am* a *Sayad* proprietor possesses no power to dispose of ancestral property by gift or will. Questions 79 and 90 (A) of the latest *Riwaj-i-am* of the district and the answers thereto run thus :—

" *Q. 79.*—Can a proprietor make by word of mouth, or in writing, a disposition of his property to take effect after his death?"

"*Answer.*—All the tribes of the Nakodar and *Phillaur* tahsils state that a man can dispose of his self-acquired property by a written will but he cannot dispose of his ancestral property. The *Sayads*, *Sheikhs*, *Mughals*, *Pathans* and miscellaneous Muhammadans of the Nawanshahr tahsil also say so. * * * The *Pathans*, *Sayads* and *Sheikhs* of the Jullundur tahsil state that a man with full rights may dispose of his property by a written deed, while the other tribes of this tahsil say that they have no right to make a written or oral will."

"*Q. 90 (A).*—Can a father make a gift of the whole or any specific share of his property, moveable or immoveable, ancestral or acquired, to his daughter, otherwise than as her dowry, to his daughter's son, to his sister or her sons, or to his son-in-law? Is his power in this respect altered if he has (1) sons, (2) near kindred and no sons? If the consent of the near kindred is essential to such gifts, state the degree of kindred towards him, in which the persons must stand by whom such gifts can be prohibited?"

"*Answer:*—All tribes in the Phillaur, Jullundur and Nakodar tahsils except Jat Muhammadans of the Nakodar tahsil admit that a father can make a gift of any part of his self-acquired property, moveable or immoveable, to his daughter, otherwise than as her dowry, to his daughter's sons, to his sister or her sons, or to his son-in-law, even in the presence of sons or near kindred. He, however, cannot make a gift of his ancestral property without the consent of sons or near kindred. * * *"

As against the above the defendants set up a special family custom and we have to determine whether they have succeeded in establishing it. As

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already stated the parties belong to a particular sub-caste of *Sayads* known as *Sabzwari* as distinguished from *Hussaini* and other sub-castes. No less than three gifts by sonless proprietors have already gone unchallenged in their family. The first of these was a gift of land made by Taqi Shah (see the pedigree-table of the parties given in the judgment of the trial Court) to his son-in-law Hussain Shah (grandfather of Sardar Ali, testator). The second and third are gifts of land by Chanan Shah and Muhammad Bakhsh, respectively, to Kale Shah, father of the said Sardar Ali. These were gifts *inter vivos* but "under the Punjab Customary Law the distinction between the power to gift *inter vivos* and the powers of testation is a matter of degree and form only, and when the power of gift is shown to exist, an initial presumption arises that there is a co-extensive power of testation" *Mussammat Bano* v. *Fateh Khan* (1).

Along with these unchallenged gifts we have to take into consideration the following instances of inheritance by or gifts to daughters amongst agricultural *Sayads* of the district :—

1. Four instances of gifts to daughters or sons-in-law are cited in the pedigree-table of the *Sabzwari-Sayads* of village Shahpur in the Nawanshahr tahsil of the Jullundur district.

2. In "*Faiz Khatun* v. *Qazi Mahbub Alam*" where the parties were *Sayads* of Jullundur City the following occurs in the judgment of the learned District Judge : (Exhibit D. 2, dated 30th January 1906). "The parties and other *Sayads* own plenty of land in Jullundur City. Some of them appear to be true *Sayads* others not. But in both classes of cases even

(1) 48 P. R. 1903 (F.B.).

in nearly related cases to the family of parties there are a series of instances as given by the Patwari in which the daughter has succeeded her father to the exclusion of her uncle. There are instances too of a daughter succeeding a daughter and of a husband succeeding a wife to the exclusion of a near collateral. All this shows that a daughter does succeed in preference even to a near collateral and if she succeeds to her father, much more must she succeed to her mother. * * * ''

3. In *Saraj-ud-Din* v. *Mussammat Hassan Bibi* where also the parties were agricultural *Sayads* of Jullundur City it was held by the Chief Court that a nephew of the last male owner was not entitled by custom to exclude his daughter from succession. The case was decided by Lal Chand J., and the following is an excerpt from his judgment (Exhibit D. 1, dated 22nd November 1906) :—" But it is contended that by custom plaintiff as a nephew is entitled to exclude Saddar Din's daughter from succession. No such custom is definitely proved on the record, the result of the enquiry conducted by the first Court being that daughters have succeeded in the majority of instances.''

4. In *Shah Nawaz* v. *Muhammad Shah*, the District Judge (old style) found that *Sayads* of village Hajipur in the Nakodar tahsil of the Jullundur district were not governed by custom and that a gift of land in favour of daughters was valid as against the plaintiff who was an agnate of the donor (see judgment Exhibit D. 8, dated 9th April 1906).

5. In *Nizam Din* v. *Game Shah*, the parties were *Sayads* of Jullundur and the plaintiff contested a gift to a daughter's sons. The District Judge agreeing with the trial Court arrived at the conclusion that the

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gift was valid by custom. His judgment (Exhibit D. 3, dated the 13th August 1907) runs thus :—"The parties have been held to follow custom and the burden of proof is on defendants to prove that the gift was valid by custom. The burden is not so heavy in this case as it would be amongst agriculturists pure and simple. There was a recent case from this district (Chief Court Civil Appeal No. 64 of 1906, Exhibit P. 3) in which the question was whether daughters succeeded to the exclusion of the collaterals amongst *Sayads*. It was held they did not, but the entry in the *Riwaj-i-am* was in favour of the daughters. The *Wajib-ul-arz* prepared at the first settlement is in favour of the gift. That of the latter Settlement says the parties follow the *Riwaj-i-am* which under the heading miscellaneous tribes says that such gifts have not been made. I think these facts greatly minimise the *onus* placed on defendants. Turning to the evidence produced by defendants we find no less than 13 cases of these gifts quoted by the Patwari from his register of mutations, with no objections from any collaterals. No instance has been adduced where the collaterals successfully contested such a gift, and there is practically no evidence against the very strong evidence produced by defendants in favour of the gift."

As against the above instances the plaintiffs cited the following :—

(1) *Akbar Shah* v. *Chanan Shah* (Exhibit P. 8). The gift in this case was in favour of a sister and so the instance is of little value in the present case.

(2) *Amir Shah* v. *Hussain Ali* (Exhibit P. 6). This related to a gift by a widow and is not in point.

(3) *Mussammat Ghulam Janat* v. *Muhammad Anwar* (Exhibit P. 3). In this case, which went up to the Chief Court, it was decided that among

Sayads of village Dakoha in the Jullundur district daughters were not entitled to succeed in the presence of their father's uncle. This is distinguishable because there was no will or gift in favour of daughters.

(4) In *Ali Muhammad* v. *Mussammat Gauhar Sultan* (Exhibit P. 4) the parties were *Sayads* of Jullundur City and the District Judge (old style) found that a will in favour of daughters and widow was not valid by custom and was inoperative as against the brother of the testator. This is the only instance in support of plaintiffs' case.

(5) *Mussammat Nur Begam* v. *Sultan Ali* (Exhibit P. 5). In this case the parties were *Hussaini Sayads* of village Lootera Kalan in the Jullundur tahsil. The Munsif who decided the case came to the conclusion that daughters could not succeed in the presence of nephews.

(6) *Ali Sher* v. *Shah Begam* (Exhibit P. 7). This was a case of gift of ancestral land by a widow. The parties were *Sayads* of village Kotla in the Jullundur tahsil. It was held that the widow was not competent to make the gift.

(7) *Sardar Ali* v. *Malak Shah* (Exhibit P. 9). The plaintiff in this case was the testator Sardar Ali, and he brought the suit to contest a sale of ancestral land by a near collateral. It was found that the parties were governed by custom and that the sale was without necessity and devoid of consideration. This can be of no assistance to the plaintiffs.

The above instances with the exception of No. 4 have very little bearing on the question of custom that arises in this case. On the other hand, the instances cited by the defendants show that gifts to daughters are very common among *Sayads* of the Jullundur dis-

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trict and that in case of contest they have generally been held valid. There is observable a general tendency among sonless *Sayads* to leave their property to daughters instead of collaterals, and as daughters are excluded from succession by custom, sonless proprietors make wills or gifts in their favour. We therefore are of opinion that the concurrent finding of the Courts below on the question of custom is correct and we dismiss the appeal with costs.

C. H. O.

Appeal dismissed.

APPELLATE CIVIL.

Before Mr. Justice Broadway and Mr. Justice Zafar Ali.

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Nov. 11.

BHONDU MAL (PLAINTIFF), Appellant

versus

MUHAMMAD AHMAD-MUSHTAQ AHMAD (DEFENDANTS), Respondents.

Civil Appeal No. 2764 of 1925.

Civil Procedure Code, Act V of 1908, Order XXXVII, rule 1, clause (e) (added by the Lahore High Court)—Suit on negotiable instruments—Summary procedure in—extension of, to District Judge and Sub-Judges, 1st class, of the Delhi Province—Validity of clause—Sections 122, 128—Consistent with "body" of the Code—meaning of.

The Senior Subordinate Judge at Delhi, in dealing with two suits upon *Hundis* instituted in his Court, applied the summary procedure laid down in Order XXXVII of the Civil Procedure Code. He held that he had jurisdiction to do so under clause (*e*), added to rule 1 of the Order by the Lahore High Court, which clause is to the effect that the Courts of the District Judge and Subordinate Judges of the 1st class of the Delhi Province shall have these powers. It was contended that inasmuch as the Lahore High Court was not mentioned in rule 1 of Order XXXVII, the addition thereto of sub-clause (*e*) by the Lahore High Court amounted to a