APPELLATE CIVIL.

Before Mr. Justice Addison and Mr. Justice Bhide.

SARDAR SHAH AND OTHERS (PLAINTIFFS) Appellants

versus

MST. SARDAR BEGAM AND OTHERS (DEFENDANTS) Respondents.

1928

June 19.

Civil Appeal No. 264 of 1924.

Custom—Alienation—Gift to daughter, in presence of sons, of portion of ancestral land—Sayyads—*village Khai—District Lyallpur*—Riwaj-i-am—*burden of proof—Civil Procedure Code, Act V of 1908, Order XXII, Rule 4—deceased defendant—legal representative—when unnecessary to implead.*

Held, that *Sayyads* of village Khai in the Samundari *tahsil* of the Lyallpur district follow custom and that a father in the presence of sons can gift a small portion of the ancestral land in favour of his daughter.

Held further, that an entry in a *Riwaj-i-am* of a special custom without instances is *prima facie* proof of that custom and places the *onus* of rebuttal on the party disputing the correctness of the entry.

Beg v. *Allah Ditta* (1), *Labh Singh* v. *Mst. Mango* (2), and *Labha Ram* v. *Raman* (3), followed.

Mussammat Radhi v. *Punnu* (4), relied upon.

Held also, that where the legal representative of a deceased respondent is the appellant himself, there is no necessity for application to be made to bring to such representative's name on to the record.

First appeal from the decree of Lala *Jaswant Rai* Taneja, *Senior Subordinate Judge, Lyallpur, dated the 20th October 1923.*

JAGAN NATH, AGGARWAL and BHAGAT RAM SAWHNEY, for Appellants.

ABDUL QADIR and KHURSHAID ZAMAN, for Respondents.

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(1) 45 P. R. 1917 (P. C.)
(2) (1927) I. L. R. 8 Lah. 281.
(3) (1928) I. L. R. 9 Lah. 1.
(4) 34 P. R. 1915.

JUDGMENT.

1928

SARDAR SHAH v. MST. SARDAR BEGAM.

ADDISON J.

ADDISON J.—The plaintiffs are the minor sons of Haji Shah who, on the 24th September, 1909, gifted one-fourth of his ancestral holding in village Khai in the Lyallpur district to his unmarried sister, *Mussammat* Sahib Nishan, defendant No. 1, and another one-fourth to his two daughters, defendants Nos. 2 and 3, who were then unmarried though they married later. The daughters were by one wife and the sons by another. Haji Shah died some six years before the suit was instituted. According to the plaint, the parties are *Sayyads* who come from village Shergarh in the Montgomery district and who follow Customary Law. It was claimed that Haji Shah had no power under custom to make these gifts. It was stated that the defendants were asked to surrender the land. Defendant No. 3 assented and returned to them her one-eighth share. She was, however, impleaded as a *pro forma* defendant in the present suit which the plaintiffs thereafter brought for recovery of the one-fourth share with the sister and of the 1/8th share with the other daughter. The contesting defendants pleaded that they were governed by Muhammadan Law and that they depended for their livelihood not only on agriculture but on *Piri Muridi*. They denied that they came from Shergarh originally and stated that they had lived at village Khai from olden times. It was further claimed that, even if parties were governed by Customary Law, the gift of a small area of land in favour of a daughter and an unmarried sister was permissible. On the pleadings only one issue arose, whether parties were governed by custom, and, if so, what was the custom amongst them regarding the power of gift of a part of the ancestral property by

a proprietor. having male issue, when the gift was made in favour of daughters and a sister.

The trial Judge held (1) that it was not proved that the parties came originally from Shergarh (2), that they followed the customs of their own village Khai and not Muhammadan Law, (3) that under custom the gift to the daughter was warranted, but (4) that there was no power of gift in favour of the sister. He accordingly decreed possession of the sister's share of one-fourth of the holding, but dismissed the suit for possession of the one-eighth share of the daughter, defendant No. 2. Against this decision the sister and plaintiffs have preferred appeals.

After the institution of her appeal the sister died and no attempt has been made to bring her legal representatives on the record. In fact these representatives would appear to be the plaintiffs. The result is that the appeal of the sister has abated. That order has been made in her appeal. As regards the plaintiffs' appeal the application to bring the legal representatives of *Mussammat* Sahib Nishan on the record was not brought within time, but she was merely a *pro forma* defendant, as she was not interested in that appeal which attacked only the finding regarding the daughter. Further, the appellants were themselves her legal representatives. For these reasons there was no necessity to bring her legal representatives on the record and consequently there was no abatement of this appeal. This was admitted by the learned counsel appearing for the daughter.

I agree with the trial court that the evidence does not establish that Nadir Shah, who purchased this village and founded it at a time when it was waste

1928

SARDAR SHAH
v.
MST. SARDAR BEGAM.

ADDISON J.

land, came from Shergarh. The pedigree-table of Khai shows that he came from village Jhakkar in tahsil Montgomery of the Montgomery district (Ex. P. 8 at page 23 of the paper book). Haji Shah is a grandson of this Nadir Shah. In face of this document, the unsatisfactory oral evidence cannot be accepted. For example, plaintiffs' fourth witness admitted that Shergarh *Sayyads* and Khai *Sayyads* meet as far back as Daud and not nearer and that he could not give the number of degrees. The Shergarh *Sayyads* are Karmanis and so are those of Khai, but this does not mean that those at Khai come from Shergarh. There are Karmanis in many other places in different districts, for example, Saidan Shah, Minchinabad (Bahawalpur State), Shah Satar (Multan district), Kotli Piranwali (Jhelum district), Lahore City, etc. To say that all these are descended from one *Sayyad* Daud, whose date has not even been fixed, does not establish the proposition contended for. The pedigree table, P-7, is not proved, nor is it known from where it was taken. The pedigree-table, P-9, has not been proved, nor is it certified that it is a copy of the *Shajra-nasab* of Shergarh village. It was prepared by a *Patwari* of that village who has stated at the end of a note on the table that he had gone through the documents held by Rahmat Ali, hence the pedigree-table was prepared and supplied to the applicant. This *Patwari* did not appear in the witness box. In these circumstances this document is not proved, nor does it establish that the Nadir Shah, mentioned in it, was the founder of Khai. Further the document, Ex. D. 9, at page 81 of the Paper Book gives the 14 villages to which *Sayyads* of Shergarh, which is in the Dipalpur tahsil of Montgomery, went to, and Khai is not one of them. In these circumstances I have no

hesitation in holding with the trial Court that it has not been proved that Nadir Shah came from Shergarh.

Khai itself used to be in the Montgomery tahsil of Montgomery district, though it is now in the Samundari tahsil of Lyallpur district. In the settlement of 1857, when Nadir Shah was the sole proprietor, he stated as regards the custom relating to alienation that he had full powers of alienation (Ex. D. 4). In the settlement of 1872 it is recorded in the *Riwaj-i-am* of tahsil Dipalpur (D. 9) that daughters do not succeed by inheritance, but that a proprietor could give a share to his daughter's issue equal to that of a son. The *Sayyads* of Shergarh alone objected to this assertion of custom. No instances were given but as will appear later, this is not important. It was also stated that, though daughters were not heirs, they could be given the whole estate in the absence of male issue and instances of this were given. It is clear therefore that all the *Sayyads* of Dipalpur tahsil are governed by custom and that in it there is a very large power of alienation in favour of daughters amongst these *Sayyads*. Again, in the *Riwaj-i-am* of 1872 of Montgomery tahsil, in which Khai was then situated (D 7), the custom amongst the *Sayyad* tribe is stated as follows:—The father is competent to gift some of his land to his daughters during his lifetime without the consent of his collaterals or sons, while in the absence of sons he can gift the whole. Further, the father can gift his whole estate as his daughter's dower in the absence of sons and in the presence of sons he can grant a portion of his estate as her dower without the consent of anyone. The statement of customary law, prepared by the revenue authorities, is thus entirely in favour of a gift of a portion of his estate by a

1928

SARDAR SHAH v. MST. SARDAR BEGAM.

ADDISON J.

father to his daughter in the presence of sons. In the present case, defendant No. 2 has received $1\frac{1}{4}$ squares out of some 18 or 20 squares and that is not excessive. The oral evidence is not convincing and I have no doubt that the *Riwaj-i-am*, though no instances are given, must prevail. The *Riwaj-i-am* of Montgomery tahsil (D. 7) is signed by three of the sons of Nadir Shah, namely, Fazal Shah, *Zaildar*, Hassan Bakhsh and Sayyad Muhammad, *lambardar*, who was the father of Haji Shah.

It is now too late in the day to contend that a *Riwaj-i-am* without instances is of little evidentiary value. In circumstances similar to the present it was held in *Mussammat Radhi* v. *Punnu* (1) that a mere entry of the custom in the *Wajib-ul-arz* without instances would be sufficient to shift the *onus* to near collaterals. Their Lordships of the Privy Council in *Beg* v. *Allah Ditta* (2) laid down that in such cases the *onus* would be on the persons contesting the custom. It was held in *Labh Singh* v. *Mst. Mango* (3) that in view of the Judicial Committee's clear exposition of the law recorded in the case last mentioned it could not be said to be an established rule that a statement in a *Riwaj-i-am* opposed to general custom and unsupported by instances possessed little evidentiary value. An entry therein of a special custom was *prima facie* proof of that custom and placed the *onus* of rebuttal on the party disputing the correctness of the entry. I might add that the custom in the present case is not of a very special character as the district is Montgomery where custom is largely influenced by Muhammadan Law and daughters are

(1) 34 P. R. 1915. (2) 45 P. R. 1917 (P. C.).
(3) (1927) I. L. R. 8 Lah. 281.

1928

SARDAR SHAH v. MST. SARDAR BEGAM.

favoured to an extent unknown in the central districts of the Punjab. Lastly, the same principle was followed in *Labha Ram* v. *Raman* (1).

For the reasons given it is clear that the parties follow custom and that a gift, such as the present was, could be made under the custom applicable to the parties to a daughter by the father in the presence of male issue. I would dismiss the appeal with costs.

ADDISON J.

BHIDE J.—I agree.

BHIDE J.

N. F. E.

Appeal dismissed.

APPELLATE CIVIL.

Before Mr. Justice Addison and Mr. Justice Bhide.

SECRETARY OF STATE (DEFENDANT) Appellant

versus

DYAL MAL-GUJAR MAL (PLAINTIFFS) and ISMAILJI AND OTHERS (DEFENDANTS) } Respondents.

1928

June 21.

Civil Appeal No. 2610 of 1925.

Indian Railways Act, IX of 1890, section 72: Risk-Note G —execution of—by consignor's agent—Firm's name signed instead of his own—Route agreed upon—deviation—loss by fire—risk note invalidated—Second Appeal—late plea.

Held, that section 72 (2) (*a*) of the Railways Act, which lays down that a Risk-Note should be "signed by or *on behalf of* the person sending or delivering to the Railway Administration the animals or goods" is sufficiently complied with by an agent of the consignors signing the firm's name instead of his own, provided it be proved that in doing so he signed on behalf of the firm.

Mohabarsha Bankapur v. *Secretary of State* (2), distinguished.

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(1) (1928) I. L. R. 9 Lah. 1. (2) (1916) 32 I. C. 393.