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that on both occasions the plaintiffs, like other members of the brotherhood, joined the marriage parties and took part in the festivities.

I am of opinion that the learned District Judge has rightly held that the marriage of Palu with *Mussammat* Ishari was valid by custom and that Thakar Das, defendant, is Palu's legitimate son and, therefore, entitled to succeed to his estate.

The appeal fails and I would dismiss it with costs throughout.

Harrison J.

Harrison J.—I agree.

*A. N. C.*

*Appeal dismissed.*

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## APPELLATE CIVIL.

*Before Broadway and Johnstone JJ.*

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*March 30.*

NARAIN DAS (Plaintiff) Appellant

*versus*

DHARAM DAS (Defendant) Respondent.

**Civil Appeal No. 872 of 1927.**

*Landlord and Tenant—tenant holding over—after notice that he would be charged double the amount of rent—Discretion of Court to decree a lesser amount—Second Appeal—whether competent.*

In an agreement of tenancy-at-will the defendant-tenant having held over, after being duly served with notice to vacate the premises failing which he would be charged double the rate of rent agreed upon, the landlord claimed double the amount of rent for the period of holding over. The District Judge on appeal granted less than the amount claimed. The landlord presented a second appeal to the High Court.

*Held* (dismissing the appeal) that it is a matter of discretion resting with the Court to decide whether a tenant contumaciously holding over should be penalised to the extent of

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making him pay double the rent or some lesser amount, and that the lower Appellate Court's conclusion could not be said to be against law.

*Second appeal from the decree of* Lala *Ghanshyam Das, Additional District Judge, Delhi, dated the 4th January 1927, modifying that of* Lala *Radha Kishen, Subordinate Judge, 2nd Class, Delhi, dated the 6th March 1926, and granting the plaintiff a decree for Rs. 1,346-9-0.*

KISHEN DIAL, for Appellant.

SHAMAIR CHAND and QABUL CHAND, for Respondent.

BROADWAY J.

BROADWAY J.—One Narain Das of Delhi leased a *kothi* belonging to him to one Dharm Das. A rent deed was drawn up, the rent reserved being Rs. 130 *per mensem, plus* Rs. 4-1-0 house tax. The period of the lease was three years. For some unknown reason this rent deed was not registered and on the 23rd of January 1925 Narain Das issued a notice to Dharam Das calling upon him to vacate the said *kothi* by the 23rd of February 1925, and pointed out that if he failed to do so, rent would be charged at double the rate, *i.e.* Rs. 268-2-0 *per mensem* inclusive of house tax. Dharam Das failed to vacate and on the 5th of October 1925 Narain Das instituted the suit against Dharam Das for the recovery of Rs. 2,145. This sum was made up as follows :—

2 months' rent at Rs. 134-1-0 ... Rs. 268-2-0

7 months' rent at Rs. 268-2-0 ... Rs. 1,876-14-0

The trial Court granted the plaintiff a decree in full which resulted in an appeal by Dharam Das to the District Court. The learned Additional District Judge held that the tenancy was a tenancy at will, that

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Dharam Das had held over but that it was not incumbent, as a matter of law, on the Court to penalise a tenant by making him pay double the rent agreed upon. He accordingly accepted the appeal and granted the plaintiff a decree for Rs. 1,346-9-0. The whole of the house tax was allowed; for two months the rent allowed was Rs. 130 a month and for the seven months' holding over the rent was enhanced to Rs. 150 *per mensem*.

Against this decree Narain Das has preferred this second appeal through Mr. Kishen Dial, urging that the learned Additional District Judge of Delhi was wrong in his view of the law, inasmuch as he misdirected himself on the question of what amounted to contumacy. It would appear that the learned Additional District Judge is somewhat confused on this point, but it seems to me that his conclusions cannot be said to be against law. It is a matter of discretion resting with the Court to decide whether a tenant contumaciously holding over should be penalised to the extent of making him pay double the rent or some lesser amount. In the present case the learned Additional District Judge has come to the conclusion that the circumstances are such that the situation would be met by an enhancement of Rs. 20 *per mensem*. I am not prepared to say that this view is wrong and I cannot regard it as against law.

I, therefore, dismiss this appeal with costs.

JOHNSTONE J.

JOHNSTONE J.—I agree.

*A. N. C.*

*Appeal dismissed.*

## APPELLATE CIVIL.

*Before Coldstream and Dalip Singh JJ.*

FAZAL DAD AND OTHERS (PLAINTIFFS) Appellants

*versus*

*MST.* GHULAM SUGHRA AND OTHERS (DEFENDANTS) Respondents.

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*April 7.*

**Civil Appeal No. 3087 of 1925.**

*Custom — Will — Ancestral property — in favour of daughters*—Chattha Jats *of Wazirabad* tahsil, *District Gujranwala—contested by collaterals in 4th degree.* Riwaj-i-am—*effect of entry in—allocation of* onus probandi—*not rebutted by ordinary presumption that power of making wills and gifts is co-extensive.*

The plaintiffs, collaterals in the 4th degree of one *S. K.*, a *Chattha Jat* of *tahsil* Wazirabad in the Gujranwala district, brought the present suit for a declaration that a will executed by *S.K.*, by which he bequeathed his ancestral property to his two minor daughters, should not affect their reversionary rights.

*Held*, that an entry in a *Riwaj-i-am*, even when unsupported by instances, shifts the *onus* on to the person who con tends that that entry is incorrect.

*And* that the defendants (the daughters) had failed to disprove the correctness of the entry in the *Riwaj-i-am* of the Gujranwala district which provides that daughters only inherit ancestral property where there are neither male lineal descendants nor collaterals in the 4th degree.

*Riwaj-i-am*, Gujranwala District, answer to question 47, referred to.

*And also*, that they had failed to disprove the correctness of the further entry in the *Riwaj-i-am* which states that a proprietor cannot make a disposition of his property to take effect after his death by word of mouth or in writing; the fact that ordinarily speaking a wide power to make gifts may lead to an initial presumption that a similar power exists to make bequests being rebutted by the entry in the *Riwaj-i-am*.

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*Riwaj-i-am*, answer to question 82, referred to, also *Sukha* v. *Amira* (1), *Mussammat Rakhi* v. *Baza* (2), and *Mussammat Rakhi* v. *Baza* (3).

*Semble*, that the power to make a gift of ancestral property to a daughter is limited to a daughter who is resident in her father's house.

*First appeal from the decree of* Shahzada *Sultan Asad Jan, Senior Subordinate Judge, Gujranwala, dated the 30th October 1925, dismissing the plaintiffs' suit.*

ZAFARULLAH KHAN and NAZIR HUSSAIN, for Appellants.

MOHAMMAD SHAFI and JAGAN NATH AGGARWAL, for Respondents.

DALIP SINGH J.

DALIP SINGH J.—One Sardar Khan, a *Chatta Jat* of *Tahsil* Wazirabad in Gujranwala district, is alleged to have executed a will on the 20th December, 1921, whereby he bequeathed his ancestral property to his two minor daughters, he himself being sonless. The plaintiffs, who are reversioners in the fourth degree of Sardar Khan, brought a suit praying for a declaration that the will was not proved, that, even if proved, Sardar Khan had no disposing mind at the time, and, further, that the will was invalid and null and void according to law and custom and would not affect the reversionary rights of the plaintiffs. The defendants joined issue on all the above allegations and various issues were struck by the trial Court which are printed at page 9 of the paper book.

The trial Court held that the will was duly proved to have been executed by Sardar Khan, and that he had a disposing mind at the time, that he was authorised, by custom, to make such a will, and that

(1) 81 P. R. 1893. (2) (1923) 75 I. C. 659.
(3) (1924) I. L. R. 5 Lah. 34.

various collaterals other than the plaintiffs had accepted the will and, therefore, the plaintiffs were bound by the will. It, therefore, dismissed the plaintiffs' suit.

The plaintiffs have come in appeal, and three points arise for decision in this appeal.

The first point is: Was the will executed by Sardar Khan. The will was attested by five witnesses and also by the scribe of the will, one Ghulam Hussain. Two of the attesting witnesses, namely, Hayat Muhammad and Shamas Din, were not produced. It is stated that they had been won over by the plaintiffs. In my opinion, no reliance can be placed on the evidence of the scribe who practically admits that he is not telling the truth as regards the will. Similarly, no reliance can be placed on the evidence of Nawab Khan who throughout this case has taken up wavering attitudes and whose evidence is, to my mind, intrinsically improbable. He states that he does not know the signatures of Sardar Khan, and that he attested the will, without knowing whether Sardar Khan had made such a will or not, merely because he stood to benefit under the will. I do not think that this is in the least probable, and I have no hesitation in rejecting his evidence. I see no reason, however, to doubt the evidence of Rala Singh and Hira Singh, the other two attesting witnesses produced. They are residents of a neighbouring village and they state that they had gone to see Sardar Khan on the day on which the will was executed. They are not shown to be in any way interested in either of the parties and the discrepancies, which have been pointed out in their evidence, are not such as, to my mind, throw real doubt on the execution of the will by Sardar

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Khan. It is pointed out that, while Rala Singh says that Hira Singh was already present when he arrived at the place where Sardar Khan was, Hira Singh deposes that he and Rala Singh went together to the place. It is further pointed out that Rala Singh says that the will was executed by Sardar Khan himself and Hira Singh states that it was dictated by Sardar Khan and Nawab Khan. I see no great discrepancies in their statements such as would throw doubt on the presence of the witnesses at the time. It is further contended that the will seems to have been written without erasure, and it is not likely that this would have been the case if the will was written down at the dictation of Sardar Khan. It seems to me perfectly possible that Sardar Khan and Nawab Khan discussed the terms of the will and the scribe then proceeded to draft the will in a suitable language. He may possibly have made a pencil draft or taken notes of the various points arising in the will, and I see no difficulty in construing the evidence of Rala Singh and Hira Singh as saying no more than that, after Sardar Khan and Nawab Khan had discussed the terms of the will, the scribe took down the gist of their decisions and wishes. There is other evidence, too, that Sardar Khan had expressed the intention of making a will of this kind, see the evidence of D. W. Prem Singh (page 38), D. W. 6 Khuda Dad (page 17) and D. W. 4 Ghulam Rasul (page 16). There is also evidence that, after the making of the will, Sardar Khan mentioned the fact that he had made such a will to D. W. 6 Khuda Dad (page 18) and D. W. Prem Singh (page 39, line 10). The will itself moreover is a perfectly natural will in the circumstances of the

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case, nor do I hold that it is so complicated a document that Sardar Khan could not possibly have understood the terms of the will or that it was beyond the power of the scribe to draft such a will. The will leaves the whole of his property to his daughters and makes provision for the maintenance of his two widows, whether they live together or whether they decide to live separately, and I see nothing complicated or difficult in such a will. I would, therefore, hold that the execution of the will is duly proved.

The second question that arises is whether Sardar Khan had a disposing mind on the point. Of course, the *onus* of this lies on the propounder of the will, but there is the initial presumption in the case of a will, which is natural and simple, that, where execution is proved, the testator did intend what he purports to have done by the will. Rala Singh and Hira Singh both depose that Sardar Khan was in his senses, and Hira Singh deposes that the terms of the will were discussed between Sardar Khan and Nawab Khan. In the circumstances I would hold that Sardar Khan had a disposing mind and would decide this point in favour of the defendants.

The third point that arises is the one about which much controversy has taken place in arguments in this Court and that is the question whether Sardar Khan was, by custom, authorised to make such a will. In the *Riwaj-i-am* of the Gujranwala District, 1913, it is provided that daughters only inherit ancestral property where there are neither male lineal descendants nor collaterals up to fourth degree, either in the descending or ascending line, nor widow, see the an-

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swer to Question 47 at page 30 of the printed *Riwaj-i-am*. The rulings of this Court, following the Privy Council ruling, are now clear that the entry in a *Riwaj-i-am*, even when unsupported by instances, shifts the onus on to the person who contends that that entry is incorrect. Nothing whatsoever has been shown by the respondents to cast any doubt upon the entry. All that the learned counsel for the respondents could refer to in the documentary evidence was the exhibit printed at page 173 of the paper-book. He contended that that exhibit, read with the oral evidence, showed that Rupa's daughters, Rajan and Daya Kaur, had succeeded to Rupa's estate in the presence of Rupa's brother, Gurmukh. In the first place, the entry does not, to my mind, prove anything of the kind; but, even if it did, I do not think that one instance could possibly rebut the presumption raised by the *Riwaj-i-am*. On the other hand, the appellants rely on the judgment printed at page 169, where it was held that a daughter did not succeed in preference to collaterals of the fourth degree. This is an instance of *Chattha Jats* of this very *Tahsil*. It is true in that case the facts, as given in the judgment, show that the contest was really between collaterals and a sister; but, whether through an oversight or otherwise the decision proceeded as if the case was one of a contest between collaterals of the fourth degree and a daughter. I would, therefore, hold that the defendants-respondents have failed to rebut the presumption raised by the *Riwaj-i-am* and would hold that, among the *Chattha Jats* of the Wazirabad *Tahsil*, it is not proved that daughters succeed in preference to collaterals of the fourth degree.

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The next question is the direct question arising in this case whether it is proved that Sardar Khan could make a will in favour of his daughters. At page 63 of the printed *Riwaj-i-am*, in answer to Question 82, it is definitely stated that a proprietor cannot make a disposition of his property to take effect after his death by word of mouth or in writing. Here again, therefore, the onus lay on the defendants-respondents to prove that the entry in the *Riwaj-i-am* was incorrect. Not a single instance has been cited to the contrary. On the other hand, all the instances relate either to gifts or bequests to daughters, who had never left their father's house, or to resident sons-in-law. These are specially provided for in the *Riwaj-i-am* where it is admitted that a sonless proprietor can make such gifts of ancestral property or bequeath it by will to a daughter or son-in-law who is a *gharjawai* or *khanadamad*. The whole argument of the learned counsel for the respondents in fact was something to this effect. He contended that there was a wide power of gift to daughters and daughters' sons in this tribe; he contended that they were an endogamous *Muslim* tribe and, therefore, daughters occupied a more favourable position than they did among other tribes. He then contended that customary law, as a rule, recognised no distinction between a power to make gifts *inter vivos* and bequests by will, and he, therefore, contended that it should be presumed that the power to make gifts included the power to leave property by bequest. In the first place, though it is true that, ordinarily speaking, a wide power to make gifts may lead to an initial presumption that a similar power exists to make bequests, yet the two are not necessarily co-

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existent or co-extensive. It was so held in *Sukha* v. *Amira* (1), and in *Mussammat Rakhi* v. *Baza* (2), which decision went in Letters Patent appeal and is reported as *Mussammat Rakhi* v. *Baza* (3). In the latter case it was held that, though *Awans* have practically an unlimited power of gift, they had no such power to leave property by bequest, and that the initial presumption arising under the customary law was rebutted by the entry in the *Riwaj-i-am*. There is no counter entry *qua* the right to make bequests in any of the previous *Riwaj-i-ams*, and I would, therefore, hold that the defendants-respondents have failed to discharge the onus which rested on them of proving that the entry in the *Riwaj-i-am* as to the power to make bequests is wrong. This really finishes the case; but, in view of the value of the property and the possibility of an appeal to their Lordships of the Privy Council, I would further add that, to my mind, it is not proved that the power to make gifts is unlimited as the learned counsel for the respondents would have us hold. As regards the power to make gifts, the entry in the *Wajib-ul-arz* of 1854 states that a sonless proprietor may make a gift in writing in favour of his female issue in the absence of male issue, see page 240 of the paper book. In 1868, in a somewhat confused question and answer, it was stated that "a proprietor, who has no male issue and who himself is alive, has power to make a gift in writing in respect of his entire property in favour of his daughter or her descendants *in his lifetime* without obtaining the consent of his near relatives and also to put them in possession thereof."

(1) 81 P. R. 1893. (2) (1923) 75 I. C. 659.
(3) (1924) I. L. R. 5 Lah. 34.

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Thereafter in 1891 the *Mussalman Chatthas* stated that daughters and resident sons-in-law had no right at all to succeed to ancestral property even where there was a deed of gift or will, see pages 251-254. This answer was subsequently repudiated, and in the 1913 *Riwaj-i-am* the *Chatthas* stated that a sonless proprietor had a right to gift or will his ancestral property in favour of a daughter who is resident in her father's house or to a resident son-in-law or to the son of such a daughter. They denied the right to make a gift to a daughter other than one who was resident in her father's house and they expressly denied any power to make a will whatsoever. In face of these entries in the *Riwaj-i-am*, the argument, from general principles as to *Mussalman* endogamous tribes, has really no force and further it is not proved on the record that the *Chatthas* are an endogamous tribe The last *Riwaj-i-am* must, in my opinion, prevail unless it is shown conclusively that the entry in it is wrong and the mere fact that the statements in 1854 and 1868 gave somewhat wider powers of gift to the proprietors without dealing with the question of wills at all cannot possibly prove that the entry as to wills in the present *Riwaj-i-am* is incorrect, whatever it may prove as to power to make gifts *inter vivos*.

I would, therefore, accept the appeal and decree the plaintiffs' suit with costs throughout.

COLDSTREAM J.

COLDSTREAM J.—I agree.

*A. N. C.*

*Appeal accepted.*

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