APPELLATE CIVIL.

Before Addison and Agha Haidar JJ.

SARDAR KHAN AND OTHERS (PLAINTIFFS) Appellants

versus

MST. AISHA BIBI AND OTHERS (DEFENDANTS) Respondents.

1932 *Nov. 22.*

Civil Appeal No. 2308 of 1926.

Custom—Alienation—Gift of immoveable property to daughter and her aulad*—meaning of—whether includes female as well as male children—Gurdaspur District—*Riwaj-i-am *of 1865, Questions 13 and 14—effect of—Evidence—Parties to suit called as witnesses by other side.*

Held, that, whatever etymological meaning the word '*aulad*' may have, in common parlance the word connotes both male and female children and should not be restricted to the male issue only to the exclusion of the female issue; and that the word '*aulad*' in the answer to Question 13 of the *Riwaj-i-am* of 1865 of the Gurdaspur District should be construed accordingly as including both the male and the female children and not as limited only to the males.

Sita Ram v. *Raja Ram* (1), *Mussammat Dhan Devi* v. *Mst. Malan* (2), *Kallu Mal* v. *Chahindi* (3), *Saidan* v. *Fazla* (4), and *Fakir* v. *Ramzan* (5), relied on.

Mussammat Rakhi v. *Mst. Fatima* (6), not followed.

Durga Parshad's and Fallow's dictionaries, referred to.

Held also, that if contrary to the repeated observations of their Lordships of the Privy Council, parties persist in putting their opponents into the witness box as their witnesses and the evidence of such witnesses goes against them, such parties cannot have any legitimate grievance if the Court accepts the evidence of those witnesses.

First appeal from the decree of Bhagat *Jagan Nath, Senior Subordinate Judge, Gurdaspur, dated the 22nd July, 1926, dismissing the plaintiffs' suit.*

(1) 12 P. R. 1892 (F. B.) pp. 60, 61.
(2) 114 P. R. 1900.
(3) (1916) 36 I. C. 222.
(4) (1922) 69 I. C. 177
(5) (1926) I. L. R. 7 Lah. 466.
(6) 89 P. R. 1892.

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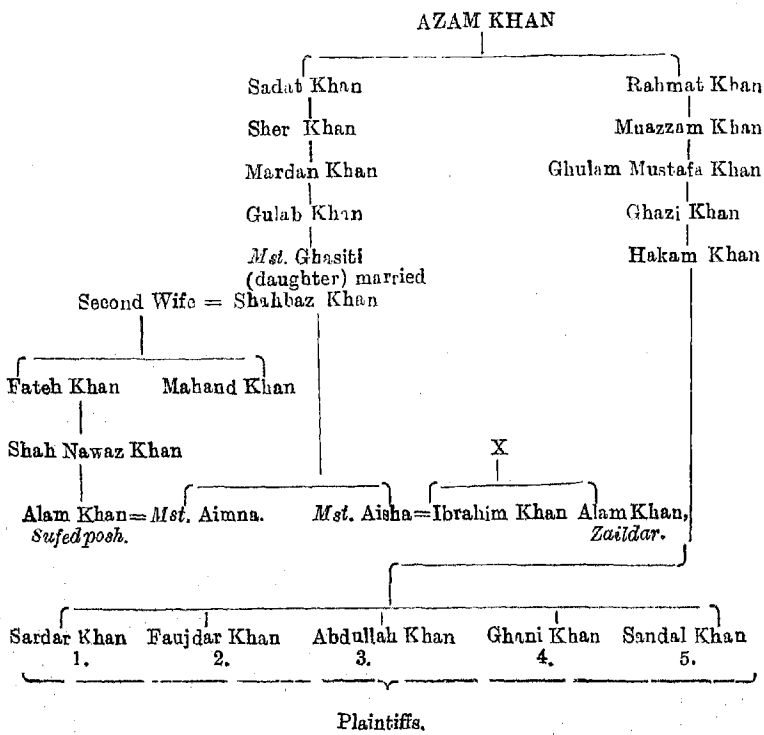
MEHR CHAND, MAHAJAN, and MOHAMMAD AMIN, for Abdul Rashid, for Appellants.

BADRI DAS and GHULAM MOHY-UD-DIN, for Respondents.

AGHA HAIDAR J.

AGHA HAIDAR J.—I am indebted to the learned counsel, who appeared in this case for an able and exhaustive argument, and I appreciate the manner in which Mr. Mehr Chand, Mahajan, counsel for the appellants, has presented the tangled mass of this protracted litigation in a clear and lucid form.

The following pedigree-table may be sub-joined here for facility of reference :—



In 1873, Gulab Khan made a gift of the property in suit, which covered an area of 740 *kanals* of land,

in favour of his son-in-law, Shahbaz Khan, the husband of his only daughter *Mussammat* Ghasiti. Gulab Khan died in 1877. Litigation started soon afterwards, but with that litigation we are not concerned except only to this extent that it was finally decided, on the 19th July, 1890, that in the presence of Hakam Khan, the father of the present plaintiffs, the suit was not maintainable at the instance of one Ghulam Hassan Khan, a collateral.

On the 29th November, 1890, Shahbaz Khan made a gift of 197 *kanals* of land in favour of his two daughters by *Mussammat* Ghasiti, namely, *Mussammat* Aisha and *Mussammat* Aimna. On the 22nd March, 1892, he executed two sale deeds—one in favour of his son-in-law Ibrahim Khan, the husband of his daughter *Mussammat* Aisha, and Ibrahim Khan's brother, Alam Khan, *zaildar*, and the other in favour of Shah Nawaz Khan, the father of Alam Khan, *sufedposh*, the husband of his other daughter *Mussammat* Aimna. Each of these two sale deeds related to an area of 281 *kanals*, 15 *marlas* of land. There was some litigation in the year 1893, launched by the sons of Shahbaz Khan, by his other wife. We are not, however, concerned with it, and so it need not be considered any further.

On the 11th April, 1895, Shahbaz Khan executed another sale deed of 21 *kanals* of land, and a house in favour of Shah Nawaz Khan, the father of Alam Khan, *sufedposh*. In 1898, the present plaintiffs brought a suit to contest this last alienation. The defendants to this suit were Shahbaz Khan, his wife *Mussammat* Ghasiti, and Shah Nawaz Khan. The plaintiffs alleged that, as *Mussammat* Ghasiti had no male issue by Shahbaz Khan, the property, in the ab-

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sence of such male issue, shall revert to the collaterals on the death of Shahbaz Khan and *Mussammat* Ghasiti. In other words, they denied the rights of the two daughters to succeed to the property. The defence raised was that Shahbaz Khan was the absolute owner of the property under the gift of 1873 and that the said gift was a personal one and was not intended to benefit *Mussammat* Ghasiti and her daughters. Both the District Judge, and the Divisional Judge held that the gift was for the benefit of the daughter *Mussammat* Ghasiti, and her *aulad* (male issue) and, in the absence of such male issue, the plaintiffs were granted a declaration that their reversionary rights would not be affected after the death of Shahbaz Khan and *Mussammat* Ghasiti. It may be observed that in this suit the daughters, although in existence, were not impleaded as parties. Against this decision an appeal was preferred to the Chief Court of the Punjab. While this appeal was pending, three separate suits were instituted on the 7th August, 1900, by the present plaintiffs—(1) Suit No. 55 related to the sale deed executed by Shahbaz Khan in favour of Ibrahim Khan and Alam Khan, *zaildar;* (2) Suit No. 56 was against Shahbaz Khan and *Mussammat* Ghasiti *and their daughters,* and (3) Suit No. 57 related to the sale in favour of Shah Nawaz Khan, the father of Alam Khan, *sufedposh.* In suit No. 56 the plaintiffs prayed that the gift by Shahbaz Khan to his daughters shall not affect their reversionary rights after the death of Shahbaz Khan and *Mussammat* Ghasiti. The defence in the three suits was very much on the same lines as in the suit of 1898. In suit No. 56, however, the daughters filed a separate written statement in which they pleaded that their father was the absolute owner of the pro-

perty, and that the gift was made to him personally. The trial Court dismissed the three suits holding that the property was in the absolute ownership of Shahbaz Khan. The matter was taken up in appeal to the Divisional Judge, who, by his judgment dated the 10th October, 1901, granted a decree to the two minor plaintiffs, namely Sandal Khan and Ghani Khan only. As regards the other appellants he held that the suit was barred by limitation. Three appeals arising out of these three suits were filed in the Chief Court and all the four appeals came up for hearing on the 26th/27th February, 1904. In the three appeals, the declaration granted to the two minor plaintiffs by the lower Appellate Court was affirmed, but as regards the suit of 1898, the declaration was granted to all the plaintiffs. Shahbaz Khan died in 1912 and *Mussammat* Ghasiti in October, 1922.

Two suits (Nos. 163/208 of 1922/1925 and 1/209 of 1923/1925), out of which the present two appeals have arisen, were instituted on the 20th November 1922, against the two daughters of Shahbaz Khan and *Mussammat* Ghasiti and certain other alienees. We are not concerned with these alienees any longer because they relinquished all the rights that they had in favour of the two daughters of Shahbaz Khan. The result, therefore, is that, in the present litigation, there is a straight fight between the plaintiffs on the one side and the two ladies *Mussammat* Aisha and *Mussammat* Aimna, on the other. The plaintiffs prayed that a decree for possession may be passed in their favour against the defendants. The defence put forward by the daughters is printed at page 7 of the paper book and is to the effect that they were the legal heirs and in possession of the property. They fore-

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stalled the point of *res judicata* which was urged against them, by pleading that the judgment of the Chief Court did not affect their rights. They concluded by saying that they were the heirs to and donees of the property in suit. The question of *res judicata*, which was raised and contested in the present suits, was fought up to the High Court and it was held by a Bench of this Court on the 22nd July, 1925, that, in the previous litigation the question as to the right of the daughters when succession actually opened, had not been finally decided and that, therefore, the daughters were not barred in their defence by the rule of *res judicata*. The trial Court held that the *Riwaj-i-am* of 1865 was in favour of the plaintiffs but the general customary law, as the learned Senior Subordinate Judge has chosen to put it, and the oral evidence on the record had the effect of rebutting the presumption raised by the *Riwaj-i-am* and on this ground the plaintiffs' two suits were dismissed. Against these two decrees two appeals were filed and both of them are before us for disposal.

The solitary point, which was seriously argued by the learned counsel for the appellants, was that on the death without any male issue of Shahbaz Khan and *Mussammat* Ghasiti, the original donees, the property reverted to the collaterals of Gulab Khan, and that the daughters of *Mussammat* Ghasiti have no right to succeed. In other words, he urged that in the case of a gift of ancestral property in favour of a father who has only daughters, the property on the death of the donee reverted to the collaterals of the donor in the presence of the daughters of the donee. Several passages were cited in argument from the *Riwaj-i-am* of Gurdaspur district of the year 1865 by

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the learned counsel for the appellants, but reliance was chiefly placed upon Questions 9 and 13 of the *Riwaj-i-am* and their answers. Special stress was laid upon Question 13 and its answer. These may be translated as follows:—

"*Question* 13—In case a daughter or her '*aulad*' die *lawald* after becoming the owners of property, does that property revert to the collaterals of her father or to the collaterals of her husband's father?

Answer—If a daughter or her husband or her '*aulad*' die *lawald* after becoming owners of property, then the property, which has come as the heritage of the daughter's father, reverts to the heirs of the daughter's father. The heirs of the husband of the daughter have nothing to do with it."

I have purposely left the words '*aulad*' and '*lawald*' untranslated, as the meaning of these words is the subject matter of controversy in the appeal. The argument of Mr. Mehr Chand Mahajan is that the word '*aulad*' should be construed as meaning the male issue only and, as *Mussammat* Ghasiti had not left any male issue, the property reverted to the collaterals of the original donor, Gulab Khan, namely, the plaintiffs. He relied upon the case of *Mussammat Rakhi* v. *Mussammat Fatima* (1), in which undoubtedly the word '*aulad*' is interpreted as meaning male issue, but the authority of this case has been considerably shaken by a number of subsequent decisions, and, having regard to what has been laid down in *Mussammat Dhan Devi* v. *Mussammat Malan* (2); *Kallu Mal* v. *Chahindi* (3); and *Saidan* v. *Fazla* (4), it cannot be said to be good law.

(1) 89 P. R. 1892.
(2) 114 P. R. 1900.
(3) (1916) 36 I. C. 222.
(4) (1922) 69 I. C. 177.

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The last mentioned three cases coupled with the two dictionaries—Durga Parshad's and Fallon's—leave no room for doubt whatsoever that the word '*aulad*' cannot be construed in a restricted sense, namely, "male issue" only, but that, on the other hand, it has got a wider meaning, and includes the descendants and offspring of both sexes. There is a passage in the Full Bench decision *Sita Ram* v. *Raja Ram* (1), where the following observation occurs :—

"Other tribes go further, and allow gifts to, or adoption of, certain males closely connected with them in the female line, such as daughters' sons or husbands' or even sisters' sons. But I entirely concur with the remarks of Sir Meredyth Plowden, which I have already quoted, that where this is done it is done from a tender feeling to benefit the direct descendants of the old stock, and not in order to benefit the family into which a daughter of the tribe happens to have married."

I may observe that this case was followed recently in *Fakir* v. *Ramzan* (2). Speaking generally, and without any reference to the authorities, it cannot be doubted for a moment that, while making the gift in favour of Shahbaz Khan, the donor, Gulab Khan, really intended to benefit his daughter *Mussammat* Ghasiti and the children of that daughter, and I do not think that his benefaction was intended to be confined to the male children of his daughter, and not to her female children. Whatever etymological meaning the word '*aulad*' may have, in common parlance, the word '*aulad*' connotes both the male and the female children, and it is difficult to imagine a case where

(1) 12 P. R. 1892 (F. B.) pp. 60, 61. (2) (1926) I. L. R. 7 Lah. 456.

the use of the word '*aulad*' would be restricted to the male issue only to the exclusion of the female issue. This being so, I would hold that the word '*aulad*' in the answer to Question 13 of the *Riwaj-i-am* means both the male and female children, and is not limited only to the males.

It may further be observed that the parties produced oral evidence in support of their respective cases. Sher Khan, P. W. 2, in a way supports the defendants. He cites the instance of one Imam Din of the village Borewal, who gifted the land to his daughters, and the suit of the collaterals of the donor was dismissed. Akbar Khan, P. W. 3, is a hostile witness, and his evidence cannot be relied upon. Alam Khan, *Zaildar*, P. W. 5, who was impleaded as a defendant, has been cited as a witness by the plaintiffs. This witness also quotes the instance from the village Borewal, which supports the custom relied upon by the defendants. Ibrahim Khan, P. W. 6, gives his opinion only. *Mussammat* Aishan has also given evidence in the case on behalf of the plaintiffs and has supported her case. If, contrary to the repeated observations of their Lordships of the Privy Council, parties choose to put their opponents into the witness box as their witnesses, and the evidence of such witnesses goes against them, they cannot have any legitimate grievance if the Court accepts the evidence of those witnesses.

On the defendants' side there are seven witnesses. Six of them give their opinion in support of the custom relied upon by the contesting defendants namely, the daughters. Such evidence is admissible in proof of the custom, and, if believed, a Court of Justice can very well act upon it. I do not see any

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reason why these witnesses should not be believed when they express their opinion in favour of the custom relied upon by the defendants. Ismail Khan, D. W. 4, also cites the instance of the village Borewal. Qasim Khan, D. W. 1, Sher Khan, D. W. 3, and Ismail Khan, D. W. 7, further depose to an instance of this custom in the village Jastarwal, where one Ibrahim got some land by gift, and, on his death, his daughter *Mussammat* Ghulam Fatima succeeded him. The result, therefore, is that, apart from the *Riwaj i-am*, which on the interpretation placed by me on the word '*aulad*' is not against the defendants, and is, in fact, comprehensive enough to support their title, a fairly large body of witnesses give their opinion as to the existence of the custom relied upon by the contesting defendants. This evidence together with the instances from the villages of Borewal and Jastarwal fully establishes the defence and is sufficient to defeat the plaintiffs' claim.

In conclusion, I may observe that Mr. Badri Das, counsel for the respondents, did not attempt to support the reasoning on which the judgment of the Senior Subordinate Judge, was based. He supported the decree on his own line of argument. This he was perfectly entitled to do.

I will, accordingly, affirm the decrees of the Senior Subordinate Judge, dated the 22nd July, 1926, and dismiss with costs throughout both the appeals preferred by the plaintiffs.

ADDISON J. ADDISON J.—I agree.

N. F. E.

Appeals dismissed.