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costs in this Court as well as the District Judge's Court in view of all the circumstances of the case.

COLDSTREAM J.—I agree.

P. S.

Appeal accepted.

APPELLATE CIVIL.

Before Addison and Din Mohammad JJ.

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Dec. 10.

FATEH SHAH (PLAINTIFF) Appellant

versus

MST. HASSAN KHATUN AND OTHERS (DEFENDANTS) Respondents.

Civil Appeal No. 1910 of 1930.

Custom — Succession — Ancestral property — Shirazi Sayyads — *Village Jarahi* — Tahsil *Kabirwala* — *District Multan — originally belonging to the Jhang district — Daughter (married to near collateral)* versus *collaterals* — Riwaj-i-am, *Jhang.*

Held, that the plaintiff, on whom the *onus* lay, had failed to prove that among *Shirazi Sayyads* of village Jarahi, *tahsil* Kabirwala, district Multan (originally belonging to district Jhang), a daughter married to a near collateral does not exclude collaterals, in succession to her father's ancestral property.

Khizar Hayat v. *Allah Yar Shah* (1), and *Allah Wasaya* v. *Mst.Zohran* (2), referred to.

Riwaj-i-ams *of Jhang district, discussed.*

First Appeal from the decree of Mir *Ghulam Yazdani, Senior Subordinate Judge, Multan, dated 27th August, 1930, dismissing the plaintiff's suit.*

BADRI DAS and ACHHRU RAM, for Appellant.

R. C. MANCHANDA and M. C. MAHAJAN, for Respondent No.1.

VISHNU DATTA, KRISHNA SARUP and S. C. MANCHANDA, for Respondents Nos.2 to 5.

(1) (1926) I. L. R. 7 Lah. 4. (2) (1924) I. L. R. 5 Lah. 535.

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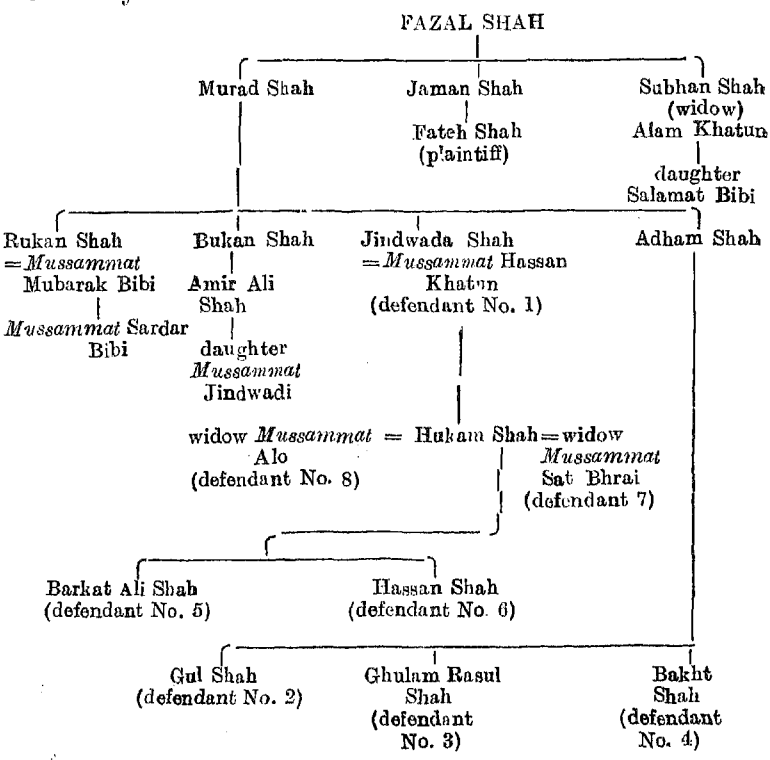
ADDISON J.—The following pedigree-table is necessary :—



Fateh Shah instituted the present suit for possession of ten specified areas of land. His case was that on the death of Subhan Shah in 1897 his widow, *Mussammat* Alam Khatun, succeeded him. On the death of the latter in 1909 she was succeeded by her unmarried daughter *Mussammat* Salamat Bibi. *Mussammat* Salamat Bibi died unmarried on the 29th January, 1927. The revenue authorities then mutated the land left by Subhan Shah in the name of *Mussammat* Hassan Khatun, defendant No.1, although according to the plaintiff he was entitled to one-half and the descendants of Murad Shah were entitled to the other half. *Mussammat* Hassan Khatun was recognised by the revenue authorities as another daughter of Subhan Shah, who had married Jindwada Shah, son of Murad

Shah, a near collateral. It was set out in the plaint that she was not the daughter of Subhan Shah and it was further claimed that, even if she was so, she was not entitled to succeed to the property as she had married. It was further set out that even if *Mussammat* Hassan Khatun was entitled to succeed she had lost that right as she did not claim her share of the property on the death of her mother *Mussammat* Alam Khatun, when *Mussammat* Salamat Bibi, the unmarried daughter, alone succeeded.

The first six areas of land mentioned were in the name of *Mussammat* Salamat Bibi. Areas Nos.7 to 9, however, were in the name of Hukam Shah, son of Jindwada Shah and *Mussammat* Hassan Khatun. It was alleged in the plaint that this was done by *Mussammat* Salamat Bibi on the 3rd April, 1916, and that this transfer was not binding on the plaintiff. Item No.10 consisted of occupancy rights granted by Government and it was claimed that these rights should also go to the collaterals.

In paragraph 2 of the plaint it was stated that the common ancestor Fazal Shah, a *Shirazi Sayyad*, acquired the lands in dispute. This will make all the property ancestral. It was further set out that this Fazal Shah originally belonged to village Lal Isan in the Montgomery district and had brought with him to Multan district the custom prevailing in the Montgomery district, according to which married daughters did not inherit, even though they were married to near collaterals.

When the suit was instituted both Adham Shah and Hukam Shah were alive. They died during the pendency of the suit and their sons, defendants Nos.2 to 6, were brought on the record as their representatives. Adham Shah and his sons supported the case

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of the plaintiff, but Hukam Shah and his sons denied the plaintiff's claim and stated that *Mussammat* Hassan Khatun was entitled, as a daughter married to a near collateral, to succeed to her father's lands. It was of course in the interest of Hukam Shah, being the son of *Mussammat* Hassan Khatun, to support her claim. As regards areas Nos.7 to 9 it was pleaded that Subhan Shah sold all his property in villages Faridke and Bhupri Mohammad Rehman to Hukam Shah in 1896, but by inadvertance areas Nos. 7 to 9 were omitted from the mutation then recorded, although Hukam Shah was in possession of these areas since 1896. It was claimed that all that *Mussammat* Salamat Bibi did in 1916 was to set right what had been effected by Subhan Shah in 1896. As regards property No.10 it was said that that was a question to be decided by the Government which still owns the land.

The trial Court found that Subhan Shah did sell areas Nos.7 to 9 to Hukam Shah in 1896 and that Hukam Shah was in possession of those areas since that date. As regards property No.10 it was admitted in appeal that the question of succession to it did not arise in the present suit, the matter being one for the Revenue authorities. As regards the other issues the trial Court found that *Mussammat* Hassan Khatun was the legitimate daughter of Subhan Shah and that she married Jindwada Shah, a near collateral. It further found that according to custom such a married daughter succeeded in preference to the collaterals. The suit was accordingly dismissed with costs and the plaintiff has appealed.

It appears that the family of the parties first came from Jhang district to Montgomery district where they settled for some sixty years. Thereafter

they left the Montgomery district and scattered in various directions. Some twenty years later some of the family returned to the Montgomery district and about the same time the ancestor of the parties, Fazal Shah, migrated to village Jarahi in the Sarai Sidhu *tahsil* of the Multan district. *Tahsil* Sarai Sidhu is now called *tahsil* Kabirwala. There is a note in the pedigree-table of village Lal Isan in the Montgomery district which has been exhibited as D.18. It was recorded in 1868 and is to the effect that this village Lal Isan was formerly included in the Government forest. Five generations before Lal Isan, their common ancestor, migrated from Pirwala village in the Pargana and district of Jhang to Lal Isan in the Montgomery district and obtained a *Sanad* from the authorities after paying *Nazrana*. The village was occupied for sixty years and was thereafter deserted on account of famine and the proprietors went to different places. The village remained deserted and the area uncultivated for some twenty years. Later on, the sons of Dadu Shah, Farid Shah, Mahbub Shah, Rajan Shah, Lal Shah, Khawaja Shah and Najaf Shah came again to Lal Isan in the time of *Maharaja* Ranjit Singh (*i.e.* before the British occupation) and re-started cultivation. This note makes it clear that these *Shirazi Sayyads* were not natives of Montgomery district, but immigrants thereto from Jhang.

Exhibit P.27/B recorded on the 17th October, 1877, is the corresponding note in the pedigree-table of village Jarahi in *tahsil* Kabirwala, district Multan, to which the parties to this suit belong. According to it village Jarahi was desolate and the ancestors of the parties brought their flocks and camels from village Lal Isan to it in order to find grazing. It was in the time of *Maharaja* Ranjit Singh that Fazal Shah, the

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common ancestor of the parties, migrated to this desolate area. Shortly afterwards he was joined by Ahmad Shah, his real brother, who was given one-third of certain wells. Another well was sunk by Murad Shah and his descendants own it according to ancestral shares.

It is clear from these two historical notes that this family originally belonged to the Jhang district. They migrated first to Lal Isan village in the Montgomery district with their flocks and herds in order to find grazing. They settled there for some time and again scattered in various directions in order to find food and grazing for their cattle. Twenty years after leaving Lal Isan some members returned to it while Fazal Shah, the ancestor of the parties, about the same time went to village Jarahi in Kabirwala *tahsil* of the Multan district. All this happened in the time of *Maharaja* Ranjit Singh before the British occupation and before any statement of custom was recorded. It is also clear that the Multan branch of the family has kept up no sort of connection with the Montgomery branch. Malhar Shah (P.W.8), one of the principal witnesses for the plaintiff who belongs to the Montgomery district, has stated that he did not even know whether the Multan branch of the family were *Shias* or *Sunnis* and that they never used to go to village Jarahi on such an important occasion as *Muharram*. He further stated that they had no relations with the residents of village Jarahi, and no marriage between the *Sayyads* of Lal Isan and the *Sayyads* of Jarahi had ever taken place. There is in fact no evidence that these branches of the family retained any sort of connection with each other.

There is no dispute that custom is followed by this family and not their personal law, and the principal question to be decided in this appeal is what custom do

the parties follow as regards the succession of a daughter, who is married to a near collateral, to her father. Exhibit D.16 is a copy of a judgment, dated the 25th October, 1877, of a Civil Court in the Jhang district. The plaintiff in that case was a cousin of the deceased. The point at issue was whether according to the custom obtaining among the *Sayyads* of Shah Jewana, a daughter in the absence of male issue was entitled to succeed to the immovable property left by her father to the exclusion of his cousins. It was held that it was established on the evidence that a daughter, in the absence of male issue, succeeded to her father's property, provided she was married to one of his heirs, *i.e.* a collateral. It was further stated that this was the general custom there and that there were many such instances in that part of the country. This is an important decision in view of the circumstance that this family came originally from Jhang district. In the latest Customary Law of the Jhang district compiled in 1929 it is stated in the answer to question No. 39 that the general custom in Jhang now is that daughters succeed in the absence of male collateral kindred within five degrees, though certain tribes profess a different custom, *e.g.* some *Sayyads* of Chiniot *tahsil* alleged that if any person had neither sons nor nephews then daughters inherited in preference to the male collateral kindred, whilst amongst *Sayyads* and *Qureshis*, in the absence of collaterals of the fourth degree, daughters did inherit, especially those daughters who were married to collaterals within five degrees. This later compilation of the general customary law is not, however, the same as that stated in the prior compilations. These are set out in *Khizar Hayat* v. *Allah Yar Shah* (1), where it

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was mentioned that the *Riwaj-i-am* prepared at the settlement of 1880 provided that a daughter and her descendants succeeded only if the former be married in the family of a near relation. Again 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 grandfather be not in existence, then such daughters succeed provided they are married in the family of the father. In the neighbouring district of Muzaffargarh, which lies between Jhang and Multan, a somewhat similar custom prevails. This appears from the report in *Allah Wasaya* v. *Mst. Zohran* (1). In this case it was held that a daughter loses her right of succession to ancestral property in presence of her father's brother's grandsons by marrying outside the family. It will be apparent from this discussion that in the Jhang district the rights of daughters have been gradually lessened when statements as regards custom were recorded at the various settlements, but their rights are still considerable.

As regards Montgomery district, the custom is not the same as in the districts further west already referred to. At page 78 of the paper-book the custom of *Sayyads* of the Montgomery *tahsil* prepared at the settlement of 1872 is set out and is to the effect that daughters remain in possession of their father's property, in the absence of sons, until their marriage. After marriage they loss all right in the estate, *i.e.* they have an interest in the property until marriage, just as a widow has.

The various customary laws compiled for the Multan district are quite clear, as regards the custom in Kabirwala *tahsil*, to which these *Sayyads* belong,

(1) (1924) I. L. R. 6 Lah. 535.

Mr. Roe compiled the Customary Law of Multan district in the year 1879 and this was reprinted in 1901. At page xix of this compilation as regards *tahsil* Sarai Sidhu (*i.e.* Kabirwala) the answer of all Muhammadans was as follows :—

" If the daughter has married a collateral of her father she will succeed to the exclusion of the collaterals, and after her, her children will succeed. But if she has not thus married she will not succeed."

In Emerson's Customary Law compiled in 1923-24 the answer to question No. 59 is as follows :—

When there are no sons, in the case of unmarried daughters, with certain exceptions, they succeed until marriage. As regards married daughters, with certain exceptions, all tribes asserted that in the presence of collaterals within the necessary degrees they were excluded. Amongst the exceptions are the *Sayyads* of Kabirwala *tahsil*, except *Bokhari Sayyads*. These *Sayyads* of Kabirwala *tahsil*, except *Bokhari Sayyads*, asserted that a daughter married to a near collateral excluded other collaterals.

This is the same so far as *Sayyads* are concerned as was set out in the year 1879 by Sir Charles Roe. This statement is entitled to great weight because of the words " except *Bokhari Sayyads*." These *Bokhari Sayyads* asserted that they followed the rule of the other tribes according to which married daughters were always excluded. Had the *Shirazi Sayyads*, to which this family belongs, wished to do so they also could have stated that their custom was that married daughters were also excluded. They had taken up their residence in village Jarahi in Multan district before 1830 A. D. and long before any statement of custom was recorded or prepared in any district; yet in

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all the customary laws of the Multan district the statement of all *Sayyads* in the Kabirwala *tahsil*, except *Bokhari Sayyads*, has been that a daughter married to a near collateral excludes other collaterals. The burden is thus heavy upon the plaintiff to establish that a daughter married to a near collateral does not exclude other collaterals.

Certain witnesses, who are *Sayyads* of the Montgomery district, have tried to establish that in that district among *Shirazi Sayyads* daughters married to near collaterals have not succeeded. The only two instances of this kind clearly established are with respect to the daughters of Karam Shah and *Pir* Ali Shah. In my judgment these two instances of the Montgomery district are unimportant, as I have already shown that the parties to this suit have long been separated from those who remained in Montgomery and that these *Sayyads* had never, like the *Bokhari Sayyads*, asserted a custom other than that daughters married to near collaterals succeeded.

It was claimed, however, by the learned counsel for the appellant that there occurs in this family an instance at variance with the custom set out in the *Riwaj-i-am*. This has reference to *Mussammat* Sardar Bibi, daughter of Rukan Shah. On the death of Rukan Shah's widow, *Mussammat* Mubarik Bibi, Jindwada Shah, Adham Shah and Amir Ali Shah were recorded as heirs to, and owners of the estate of, the deceased. A report was made to the *Patwari* by Jindwada Shah and Adham Shah on the 23rd February, 1895 (see Exhibit P.24) in which it was stated that *Mussammat* Sardar Bibi, the daughter, was alive, but had been married to Adham Shah's son and that the collaterals were entitled to the property. Later, however, namely, on the 1st July, 1895, when the case

came before the Naib-Tahsildar, Adham Shah stated that *Mussammat* Sardar Bibi was an unmarried virgin and that mutation should be effected in her favour. It was directed that an enquiry should be made. The case again came before the revenue authorities on the 17th September, 1895, when it was recorded that the collaterals had no objection to the mutation being effected in their names and this was accordingly done. *Mussammat* Sardar Bibi was never present on any of these occasions. Gul Shah, one of the defendants, who is a son of Adham Shah, was examined as P.W.12. He stated as a witness that *Mussammat* Sardar Bibi did not dispute the mutation though Adham Shah and Jindwada Shah did have a dispute about the succession to Rukan Shah. He added that *Mussammat* Sardar Bibi died about a year after the dispute. He himself was not present when the marriage of *Mussammat* Sardar Bibi to his brother took place. Sher Shah (D.W.1) has stated that in fact only the *Nikah* took place between *Mussammat* Sardar Bibi and Adham Shah's son and that she died after this *Nikah* and before the marriage was consummated. Hukam Shah, now deceased, was also examined as a witness. He denied that *Mussammat* Sardar Bibi was ever married to Adham Shah's son. He further said that she died a virgin. He did not exactly remember whether she died before or after her mother because one died a short time after the other. It will be apparent from this discussion that it is not clearly established whether *Mussammat* Sardar Bibi was married to Adham Shah's son. In any case, it has been proved that she died very shortly after her mother without any issue and before the marriage was consummated. She also had the right up to consummation to repudiate the marriage. These circumstances

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explain why the dispute which took place at the time of mutation was settled in favour of the collaterals. As she died before consummation of the marriage and without issue the property in any case went to the collaterals and this so-called instance, therefore, does not advance the plaintiff's case very much, if at all.

Exhibit P. 25 is also relied upon by the learned counsel appearing for the appellant. This is the mutation in favour of *Mussammat* Jindwadi (see pedigree-table) daughter of Amir Ali Shah, on the death of her mother. Mutation was sanctioned in her name till her marriage. It was claimed that these last words prove that married daughters do not succeed in this family. They do nothing of the kind. It is only a daughter married to a collateral who succeeds as full owner, whilst an unmarried daughter succeeds to a sort of limited estate till she marries, and if she marries an outsider she loses the property altogether. If, however, she marries within the family she becomes a full owner and passes on the property to her issue (see the answer to question No.65 of Emerson's Customary Law). This instance, therefore, is not in favour of the plaintiff.

The only other instance relied upon is the exclusion of defendant No.1, *Mussammat* Hassan Khatun, by her unmarried sister *Mussammat* Salamat Bibi in 1909. In this respect reliance was placed on the answer to question No.63 of Emerson's Customary Law, where it is stated that where the right of a daughter to succeed is recognised, no distinction is made between married, unmarried and widowed daughters. It was contended on the strength of this reply that *Mussammat* Hassan Khatun should have succeeded along with her unmarried sister. This does not seem to me to be correct. The reply to question

No.59 shows that where there are no sons or widows unmarried daughters take a limited estate until marriage. Upon their marriage the question then arises as to whether married daughters, who become full owners and pass on succession to their issue, are entitled to succeed *as against collaterals*, and amongst *Sayyads* of the Kabirwala *tahsil* the answer to this is that a daughter married to a near collateral excludes collaterals. The question only arises at that time between married daughters and collaterals. Even if she should have succeeded along with her sister and did not succeed she cannot now be excluded by collaterals whose rights come after hers according to the reply to question No.59. It is for the collaterals to show that they have a better title and it is clear from what has been said that they have failed to do so, and I have no hesitation in holding that *Mussammat* Hassan Khatun, who married a near collateral, is entitled under the custom prevailing in this family of *Shirazi Sayyads* in village Jarahi in the Kabirwala *tahsil* of Multan district to exclude the collaterals.

This finding is sufficient to dispose of the whole appeal, but as arguments were addressed to us as regards areas Nos.7 to 9, I shall proceed to discuss them separately. I may at once mention that I disagree with the finding of the trial Court that these fields were actually sold to Hukam Shah in 1896 by Subhan Shah and that all that *Mussammat* Salamat Bibi did in 1916 was to correct the revenue entries with respect to them. These three areas are in village Bhupri Mohammad Rehman. Mutation in favour of Hukam Shah with respect to lands sold to him by Subhan Shah in village Bhupri Mohammad Rehman is Exhibit D.6. Mutation was entered in the register on the 10th February, 1896. Subhan Shah appeared

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before the *Patwari* and stated that he had sold a quarter share out of *khatas* Nos. 7, 8 and 29 and 3/16th. The share out of *Khasra* No.36, *Khata* No. 134/6. The mutation was sanctioned on the 18th March, 1896. Certain lands were at the same time sold to Hukam Shah by Subhan Shah in village Faridke. This mutation (Exhibit D.7) was entered in the register on the 8th February, 1896, when Subhan Shah appeared before the *Patwari* and stated that he had sold his estate in this village and village Bhupri Mohammad Rehman to Hukam Shah for Rs.1,100. This mutation was sanctioned on the 19th July, 1896. Reliance is placed on the words of Subhan Shah in this second mutation to the effect that he had sold his estate in villages Faridke and Bhupri Mohammad Rehman to Hukam Shah, but these words cannot be taken to override the clear meaning of the words in mutation Exhibit D.6 in respect to village Bhupri Mohammad Rehman in which particular *khatas* are specified. Besides, areas Nos.7 to 9 in village Bhupri Mohammad Rehman came to Subhan Shah upon the death of *Mussammat* Gul Bibi, widow of Shah Nawaz (see Exhibit D. 5). This mutation was reported to the *Patwari* on the 11th December, 1895, and it was sanctioned on the 10th January, 1896, *i.e.* a month before the mutations of sales in favour of Hukam Shah were even entered in the registers. Had it been intended by Subhan Shah to sell these areas in village Bhupri Mohammad Rehman to Hukam Shah he could have specified the *khatas* with respect to them just as he did with respect to the land which he held there before *Mussammat* Gul Bibi's death. These areas Nos.7 to 9, therefore, must go along with areas Nos.1 to 6 unless the transfer to Hukam Shah by *Mussammat* Salamat Bibi in 1916, cannot now be attacked on the ground of limitation. The suit was instituted more than 12

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years after the transfer, but within 12 years of *Mussammat* Salamat Bibi's death. It was contended, however, on behalf of the respondents that as the land is ancestral the suit attacking the transfer in 1916 is barred by limitation under Punjab Act I of 1920. It appears to me that this contention must prevail. But the point is not important in view of my finding as regards custom.

The contention that *Mussammat* Hassan Khatun was not the daughter of Subhan Shah was not seriously pressed before us and it is sufficient to say that on the record it is clearly established that she is his daughter.

For the reasons given I would dismiss the appeal with costs.

DIN MOHAMMAD J.—I agree.

DIN MOHAMMAD J.

P. S.

Appeal dismissed.