APPELLATE CIVIL.

Before Bhide and Din Mohammad JJ.

1934

May 19.

FEROZE KHAN (PLAINTIFF) Appellant,

versus

UMAR HAYAT, ETC. (DEFENDANTS) Respondents.

Civil Appeal No. 1295 of 1928.

Custom—Succession—Self-acquired property—Janjuha Rajputs *of Jhelum District — Married daughters — whether exclude collaterals*—Riwaj-i-am—Onus probandi.

Held, that in view of the entries in the *Riwaj-i-am* of the Jhelum District, the initial presumption in the case of succession to self-acquired landed property among *Janjuha Rajputs* of that District, is in favour of the collaterals, and that the *onus* is therefore on the married daughters to prove that even after their marriage they excluded the collaterals, although the property was the self-acquired property of their father.

Beg. v. *Allah Ditta* (1), followed.

Held also, that this presumption had been successfully rebutted by the evidence on the record, and it had been established that by custom married daughters among *Janjuha Rajputs* of the Jhelum District have a preferential right to succeed to the self-acquired landed property of their father, as against the collaterals.

Khuda Yar v. *Fatteh* (2), *Sultan* v. Mst. *Sharfan* (3), *Mussammat Nadran* v. *Muhammad Hussain* (4), *Muhammad* v. Mst. *Jiwani* (5), and *Khan Beg* v. Mst. *Fateh Khatun* (6), also para. 23 (2) of Rattigan's Digest of Customary Law, referred to.

First Appeal from the decree of Lala *Hardyal, Senior Subordinate Judge, Lyallpur, dated the 10th February, 1928, dismissing plaintiff's suit.*

NANAK CHAND and MEHR CHAND SUD, for Appellant.

(1) 45 P. R. 1917 (P. C.).
(2) 8 P. R. 1906.
(3) (1929) I. L. R. 10 Lah. 249.
(4) 1931 A. I. R. (Lah.) 450.
(5) 1934 A. I. R. (Lah.) 363.
(6) (1932) I. L. R. 13 Lah. 276.

1934

FEROZE KHAN
v.
UMAR HAYAT.

DIN MOHAMMAD J.

SHAMAIR CHAND, LADHA RAM and QABUL CHAND, for Respondents.

DIN MOHAMMAD J.—The parties to this suit are *Janjuha Rajputs* of Jhelum. One Mirza Khan of Pindi Saidpur, *Tahsil* Pind Dadan Khan, was granted about four squares of land in the district of Lyallpur whose proprietary rights he acquired during his life-time. On his death he left him surviving a widow *Mussammat* Karam Bibi who succeeded to the usual life estate and two daughters Irshad Begam and Mastura Begam. *Mussammat* Karam Bibi died on the 24th of September, 1916, and on her death the whole ancestral property of Mirza Khan was inherited by his reversioners while the entire self-acquired property situated both in the district of Jhelum as well as in the district of Lyallpur was mutated in favour of her daughters. On the death of Irshad Begam her share of the property devolved half and half on her husband and her minor daughter *Mussammat* Sardar Begam, respectively. On the death of the husband his share was mutated half and half in the names of his two sons Ayyub Khan and Ummar Hayat, and on the death of the former, his share passed on to the latter. On the death of Mastura Begam her estate went to her son Aurangzeb. The present position therefore is that Umar Hayat is in possession of $\frac{1}{4}$th of the self-acquired property of Mirza Khan, deceased, *Mussammat* Sardar Begam holds $\frac{1}{4}$th, while the remaining half is held by Aurangzeb. Mirza Khan had three brothers, named, Nadir Ali, Nawab Khan and Sarfraz Khan whose descendants were alive at the time when the present suit was brought by Feroze Khan, one of the two sons of Sarfraz Khan for the recovery of the possession of Mirza Khan's self-acquired lands in the

1934

FEROZE KHAN
v.
UMAR HAYAT.

DIN MOHAMMAD J.

district of Lyallpur to the extent of his own share. This suit was instituted on the 9th of October 1926 against Umar Hayat, Aurangzeb and *Mussammat* Sardar Begam on the allegation, *inter alia*, that according to the custom prevailing in the tribe of the parties, a daughter was excluded from the landed property of her father, even if it was self-acquired. The defendants denied this custom on which an issue was framed casting the burden of proof upon the plaintiff to prove his preferential right as against the daughters of Mirza Khan. The learned Subordinate Judge, after examining in detail the oral evidence led by the parties as well as the instances cited by them, came to the conclusion that the custom relied upon by the plaintiff was not proved and consequently he dismissed his suit with costs.

The plaintiff has preferred an appeal to this Court, mainly on the ground that as the entries in the *Riwaj-i-am* of the Jhelum district prepared by Mr. Talbot in 1900 were against the succession of married daughters both as regards ancestral and the self-acquired property, the trial Court erred in law in placing the *onus* on him and that even if it had been rightly placed, he has succeeded in discharging it and is therefore entitled to a decree. Mr. Nanak Chand, who appeared on his behalf, has strenuously urged before us that in view of the pronouncement of their Lordships of the Privy Council in *Beg* v. *Allah Ditta* (1) and the subsequent rulings of this Court based thereon and in face of the reply given by the representatives of the *Janjuha* tribe to questions Nos. 57 and 58 of the *Riwaj-i-am*, the initial presumption lay in favour of the appellant. He contends that for the last eight or

(1) 45 P. R. 1917 (P. C.).

nine years, the law has been gradually laid down that even in the case of a *Riwaj-i-am* unsupported by instances, the presumption lies in favour of its correctness and a duty is cast upon those who challenge it to rebut this presumption. This is no doubt true. I have, therefore, no hesitation in holding that the *onus* should have been placed on the daughters to prove that even after their marriage they excluded the collaterals, if the property was the self-acquired property of their father. The learned counsel for the respondents has very frankly conceded this proposition of law, but he contends that the presumption in such cases is so weak that on a mere proof of a small number of instances to the contrary it stands rebutted and the *onus* is then shifted on to the collaterals to prove that they exclude the married daughters from the self-acquired property of their father. I may, however, note here that the case as originally presented by the plaintiff was that a daughter succeeds in no case (paragraph 7 of the plaint) and as this was evidently against the entries of the *Riwaj-i-am*, which recognises the right of an unmarried daughter to succeed to her father's estate, whatever the nature of the property, the learned Subordinate Judge appears to have placed the *onus* on the plaintiff. It is only because the retention of the self-acquired property after the marriage is opposed to the entries in the *Riwaj-i-am* and is being claimed by the daughters that the *onus* should have been placed on them.

It becomes necessary, therefore, to closely examine and scrutinise the evidence of the parties both oral and documentary to see whether sufficient material has been brought on the record one way or the other. For the plaintiff reliance is placed on the oral evidence

1934

FEROZE KHAN
v.
UMAR HAYAT.

DIN MOHAMMAD J.

as well as on the copies of mutations, Exhibits P-3 to P-17 (*a*), in most of which, I may say at once, it has not been clearly established that the property, which was the subject matter of the mutation, was the self-acquired property of the last male owner. Exhibit P. 3, is a case from the village of the parties. Fateh Ali, a *Janjuha Rajput*, was succeeded by his daughter *Mussammat* Begam Jan and the record shows that the collaterals in whose favour a mutation had been entered by the *Patwari* after the marriage of *Mussammat* Begam Jan, did not agree to the step taken by him and she is still enjoying the land. The plaintiff produced this copy with the object of showing that daughters forfeit their inheritance on marriage. This, however, is not proved by this document.

Exhibit P-4 relates to village Sherpur. It is no doubt true that on the death of one Karim Ullah Khan his property was mutated in the names of his collaterals in the presence of his daughter *Mussammat* Razia, but it is admitted by the plaintiff himself that she was only one year old at the time of her father's death and afterwards died in her infancy. Similarly as shown by Exhibit P-5, on the death of *Mussammat* Sultan Begam her daughter *Mussammat* Said Begum was ignored in favour of her husband's collaterals, but the mortgagee rights, which alone constituted the self-acquired property of her father, were only valued at Rs. 75 and as she is married to a respectable gentleman of the position of Lieutenant Sahib Khan (D. W. 3), it appears that she did not think it worth her while to claim that infinitesimal share of her father's estate. Even if these two instances were taken at their face value, they do not help the plaintiff's case. Exhibit P-4 rather proves that in thus depriving the daughter

of the self-acquired property of her father, the *Riwaj-i-am* was being ignored, which, by virtue of the reply to question No. 57, conferred the estate on her until marriage at least. The rest of the documentary evidence mostly concerns *Machhis*, *Maliars*, *Jats* and *Awans* of Jhelum, but though the custom amongst all the tribes is uniform, these instances do not help the plaintiff, inasmuch as it is not clear, as has been indicated above, that the property concerned in these mutations was self-acquired. It would appear, therefore, from the above *resumé* of the plaintiff's evidence that he has not been able to quote any instance in which a married daughter was ousted by the collaterals of her father in the matter of succession to his self-acquired property. According to the *Riwaj-i-am* of the district, there is no distinction between ancestral or self-acquired property so far as the succession of daughters until marriage is concerned and there can be no presumption therefore that the land to which the daughters had originally succeeded and of which they were deprived at the time of their marriage was only self-acquired, as was urged by the learned counsel for the appellant when explaining the value of the instances cited by him.

As against this, the defendants have produced both oral and documentary evidence to show that the daughter has successfully asserted her claim to the self-acquired property of her father as against the collaterals in spite of the definite entry in the *Riwaj-i-am*. They have quoted instances to show that not only before the Revenue officers but even in the Civil Courts, this claim has been recognised. Exhibits D-3, D-4, D-5, D-12, D-15, D-16, D-23 and D-24 relate to the previous course of succession to the land in suit as

1934

FEROZE KHAN
v.
UMAR HAYAT.

DIN MOHAMMAD J.

well as to the other self-acquired property of Mirza Khan and in almost all these cases the contesting reversioners remained unsuccessful in establishing their claim. Exhibit D.-2 proves that *Mussammat* Fazal Nur, a married daughter of Shah Alam Khan, a *Janjuha Rajput* of Bajwala, succeeded to his self-acquired property in the presence of a collateral Shah Nawaz, who by mutual compromise was assigned 4 *kanals* of *banjar* land only. Exhibits D-17, D-18 and D-19 show that *Mussammat* Sardar Begam, daughter of Sarfraz, *Gakhar*, retained her father's estate even on her marriage, although the reversioners went up to the Court of the District Judge. Exhibit D-13 is the copy of a judgment of the Subordinate Judge at Pind Dadan Khan, upholding the claim of *Mussammat* Said Begam, daughter of Nawab, *Janjuha*, as against his collaterals. Exhibit D-21 is a copy of the order of the Collector, Jhelum, upholding the right of *Mussammat* Karam Nur who had succeeded to her father Nawaz, a *Rajput* of *Tahsil* Chakwal, to retain her inheritance even after her marriage. It will be interesting to note that some of the instances cited by the plaintiff himself clearly refuted his contention that a daughter does not succeed to her father's estate in any case, as they clearly indicated that, a daughter had originally inherited her father's estate.

From the defendants' instances, it would be evident that in almost all cases where there had been a contest between the collaterals and the daughters as regards self-acquired property of the last male owner, the claim of the daughters not only to succeed to the property but also to retain it, even after their marriage, has been invariably recognised. These instances in my view would be quite sufficient to shift the *onus*

on to the plaintiff to prove that he had a superior claim to the married daughters of Mirza Khan.

The learned counsel for the respondents has invited our attention to several authorities of the Punjab Chief Court as well as of this Court to show that the *Riwaj-i-am* of 1900 prepared by Mr. Talbot had been declared to be inconsistent and unsatisfactory. Reference may be made among others to *Khudayar* v. *Fatteh* (1). In *Sultan* v. *Mst. Sharfan* (2), a Division Bench of this Court observed that the declaration in Talbot's Customary Law that a married daughter cannot inherit even the self-acquired moveable property of her father verges on an absurdity. In *Mst. Nadran* v. *Muhammad Hussain* (3) Addison J. followed an earlier *Riwaj-i-am* in preference to this *Riwaj-i-am*. In *Mohammad* v. *Mst. Jiwani* (4), Abdul Rashid J. decided in favour of the daughters on the basis of two instances which he thought were sufficient to rebut the presumption created by the entries in the *Riwaj-i-am* under discussion. Similarly in a case from Shahpur reported in *Khan Beg* v. *Mst. Fateh Khatun* (5), it was remarked by Tek Chand and Coldstream JJ. that where the custom recorded in the *Riwaj-i-am* is opposed to the rules generally prevailing, the presumption will be considerably weakened and where the *Riwaj-i-am* affected adversely the right of females who had no opportunity whatever of appearing before the revenue authorities, the presumption will be weaker still and only a few instances might be sufficient to rebut it. It may also be useful to indicate that the author himself expressed a doubt as to the correctness of some of the

(1) 8 P. R. 1906.
(2) (1929) I. L. R. 10 Lah. 249.
(3) 1931 A. I. R. (Lah.) 450.
(4) 1934 A. I. R. (Lah.) 363.
(5) (1932) I. L. R. 13 Lah. 276.

1934

FEROZE KHAN
v.
UMAR HAYAT.

DIN MOHAMMAD J.

replies that he had recorded in his compilation. In the note appended to the reply to question No. 57 he has remarked that the answers were somewhat doubtful as they were opposed to the general custom prevalent amongst the agricultural tribes of the Province. In the preface to his book also he suggested that most of the statements made to him were those of the persons interested in them and could not serve as a sure guide to determine the real state of affairs. He observes as follows :—" The Code may be taken to be a correct record of the Customary Law of the people, as stated by them, but it does not follow that it is in all cases a correct record of the customs actually existing, as the more intelligent tribesmen, who usually act as spokesmen on an occasion of this kind, sometimes allow their opinion as to what customs are expedient to override their knowledge of the customs as they are." Moreover, it is a matter of common knowledge that the trend in these days is in favour of daughters especially in case of all Muhammadan tribes residing in the northern districts of the Punjab and people are now generally being found inclined to right the immeasureable wrong they had so far been doing to their female heirs. Daughters have been treated of late as a favoured class when opposed to the collaterals of a remote degree, even in the case of ancestral property, and the learned counsel for the respondents has invited our attention to various authorities of this Court relating to a number of districts in the Province where the right of daughters to succeed to the self-acquired property of their father even in the presence of brothers and nephews has been clearly recognised. Reference may also be made in this connection to paragraph 23 (2) of Rattigan's Digest of Customary Law where this has

been laid down as a general custom of the Province implying thereby that the exclusion of daughters from the self-acquired property of their father should be treated as an exceptional case.

1934

FEROZE KHAN v. UMAR HAYAT.

In view of the above, I have no hesitation in holding that the learned Subordinate Judge arrived at a right conclusion in dismissing the suit of the plaintiff and I would dismiss this appeal with costs.

DIN MOHAMMAD J.

BHIDE J.—I agree that the presumption attaching to the entries in the *Riwaj-i-am* has been rebutted by the evidence on the record and that this appeal must therefore, be dismissed with costs.

BHIDE J.

P. S.

Appeal dismissed.

APPELLATE CIVIL.

Before Bhide and Din Mohammad JJ.

MUSSAMMAT SANTI, deceased, through her representatives (PLAINTIFF) Appellant

versus

RAM KISHEN AND OTHERS (DEFENDANTS) Respondents.

1934

May 24.

Civil Appeal No 481 of 1928.

Custom—Alienation—Declaratory decree obtained by reversioners—whether enures for benefit of daughter—Suit by daughter for possession of land alienated by her father—Limitation—Indian Limitation Act, IX of 1908, Article 144—Punjab Limitation (Custom) Act, I of 1920, Section 7, Article (2) (b).

One S. S. died in October 1915. The plaintiff *Mst.* Santi, his daughter, brought the present suit in January 1926 for possession of land which he had alienated in favour of defendants. In the meantime certain collaterals of S. S. had obtained declaratory decrees to the effect that the alienations of the land now in dispute made by S. S. in favour of the present defendants shall not affect their reversionary