## APPELLATE CIVIL.

*Before Tek Chand and Agha Haidar JJ.*

1934

*May 15.*

AITBAR KHAN AND OTHERS (DEFENDANTS) Appellants

*versus*

ABDULLAH KHAN AND ANOTHER (PLAINTIFFS)
*MST.* CHANDANI BIBI AND OTHERS (DEFENDANTS) } Respondents.

**Civil Appeal No. 2384 of 1928.**

*Custom—Succession—Self-acquired property—predeceased daughter's son or sister's son*—Khattars—Mauza *Mungiwali, District Attock.*

*Held*, that among *Khattars* of *Mauza* Mungiwali, District Attock, a predeceased daughter's son is entitled to succeed to the self-acquired property of his maternal grandfather in preference to the latter's sister's son.

A daughter's son whose mother has predeceased her father is in no worse position than one whose mother has survived him.

*Remark* in paragraph 23 (1) of Rattigan's *Digest of Customary Law* explained, and case-law discussed.

*First Appeal from the decree of* Sayed *Ghulam Yazdani, Senior Subordinate Judge, Attock at Campbellpur, dated the 31st March, 1928, decreeing the plaintiffs' claim.*

MEHR CHAND MAHAJAN, for Appellants.

JAGAN NATH AGGARWAL, for Plaintiffs-Respondents.

*The order, dated 9th May, 1933, remanding the case for further enquiry on the question of custom.*

ABDUL RASHID J.

ABDUL RASHID J.—Mohammad Khan, a *Khattar* of village Mungiwali, *Tahsil* Attock, died sonless in 1873, leaving a large amount of landed property. His two widows, *Mussammat* Mehr Nishan and *Mus-*

*sammat* Bani Begam, succeeded to his estate and the property was mutated equally in the name of the two widows. *Mussammat* Bani Begam gifted half of her own share to Nawab Khan, who was the son of her husband's sister *Mussammat* Nur Bhari. *Mussammat* Nur Khanam, the daughter of Mohammad Khan, and *Mussammat* Bani Begam, challenged this gift in favour of Nawab Khan. Ultimately she secured a decree from the Chief Court, Punjab, on 16th November, 1898, declaring that the alienation by her mother would not affect her reversionary rights as an heir. *Mussammat* Nur Khanam died in 1909 and *Mussammat* Bani Begam in 1926. The plaintiffs thereupon brought the present suit for possession of the property gifted by *Mussammat* Bani Begam to Nawab Khan on the ground that they are the heirs of Muhammad Khan, the last male-holder and the defendants are not entitled to retain possession of the land gifted by *Mussammat* Bani Begam to defendants' father.

The defendants pleaded that Mohammad Khan had a brother Kazim Khan whose descendants were still alive and that in their presence the plaintiffs were not the legal heirs of the last male-holder. Further they alleged that as *Mussammat* Nur Khanam, the mother of the plaintiffs, had pre-deceased *Mussammat* Bani Begam, the plaintiffs could not obtain possession of that part of the property which *Mussammat* Bani Begam had gifted to the father of the defendants. The other pleas raised by the defendants were that the declaratory decree obtained by *Mussammat* Nur Khanam did not give any right to the plaintiffs, and that after the death of *Mussammat* Mehr Nishan, *Mussammat* Bani Begam succeeded to the former's share as absolute owner.

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The learned Senior Subordinate Judge decreed the suit of the plaintiffs, holding that according to custom the plaintiffs, who are the daughter's sons of Mohammad Khan, are entitled to succeed to his estate and that the declaratory decree obtained by their mother, *Mussammat* Nur Khanam, enures for their benefit. The fact that the plaintiffs' mother predeceased *Mussammat* Bani Begam does not deprive the plaintiffs of their right to succeed to the estate of their grandfather Muhammad Khan. He further found that it had not been proved that Kazim Khan, the brother of Mohammad Khan, had left any descendants that *Mussammat* Bani Begam and *Mussammat* Mehr Nishan had not become the absolute owners of the property and that plaintiffs, as the daughter's sons of Mohammad Khan, had preferential rights of succession to the defendants and that the defendants had not been able to prove that they had made any improvements and even if they had, they had enjoyed those improvements for a period of about 40 years and, therefore, were not entitled to any compensation on that account.

The defendants preferred an appeal to this Court and their learned counsel before arguing the case on the merits contended that the learned Subordinate Judge had not given them sufficient opportunity to examine the Officer-in-charge, Port Blair, Andaman Islands, on interrogatories in order to find out whether any male descendants of Kazim Khan were alive. Another point raised by the appellants was that the trial Court had erred in refusing to receive a large number of documents that were produced in Court by the defendants on the 13th of January, 1928. The appellants, therefore, pray that they should be allowed an oppor-

tunity to examine the Officer-in-charge. Port Blair, Andaman Islands, by means of further interrogatories and that they should be allowed to place their documentary evidence on the record.

This suit was instituted on the 15th of March, 1927, and the 17th of October, 1927, was fixed for the recording of evidence. The defendants put in their interrogatories for the examination of the Officer-in-charge, Port Blair, on the 20th of October, 1927, but they did not deposit the expenses for the issue of the commission. The commission fee was paid on the 7th of December, 1927, and then the interrogatories were issued. A reply was received from the Deputy Commissioner, Andaman Islands, on the 5th of March, 1928, showing that, in spite of a thorough search, he had not been able to discover any trace of Kazim Khan. He, however, was prepared to make a further search if further particulars about the date of the deportation of Kazim Khan were supplied to him. The names of any of the descendants of Kazim Khan were not given in any of the interrogatories. The descendants after the receipt of the reply from the Deputy Commissioner, Andaman Islands, asked for further extension of time for giving further particulars, but their application was rejected by the Senior Subordinate Judge on the 14th of May, 1928, on the ground that these applications were vexatious and were intended to delay the disposal of the suit. The defendants did not at any time supply any information to the Court about the names of the descendants of Kazim Khan. They did not definitely allege that Kazim Khan had left any descendants and it is significant that in the previous suit Nawab Khan, father of the defendants, had de-

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posed that no other male collateral of Mohammad Khan was alive. In these circumstances I am of the opinion that the learned Senior Subordinate Judge was right in disallowing further interrogatories to be sent to the Andaman Islands for the purpose of collecting information as to whether Kazim Khan had ever married or had left any descendants.

The second objection taken by the appellants seems to me to be a sound one. The defendants' pleader stated on the 8th of August, 1927, in answer to a question by the Senior Subordinate Judge that he intended later on to produce copies of judgments and mutation orders showing that daughter's sons do not succeed. These documents were not in possession of the defendants and they had to secure attested copies of these official documents. By the 13th of January, 1928, they had collected 93 documents most of which were attested copies of mutation entries. On that date the defendants' evidence had not been closed and these documents were tendered in evidence in order to corroborate the testimony of the witnesses who had orally deposed to the existence of a custom whereby the daughter's sons do not succeed in the tribe to which the parties belong. As the defendants had not yet closed their case, and as these documents were not in the possession or power of the defendants and as there could be no possible danger of such documents having been fabricated I am of the opinion that the learned Subordinate Judge ought to have allowed the production of these documents on the 13th of January, 1928. On that date, however, the learned Subordinate Judge passed an order to the effect that he was not prepared to place these documents on the record at that stage and that the defendants may, if so advised, produce

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them on the date fixed for arguments. In accordance with this order of the 13th January, these documents were again presented to the trial Court just before the beginning of arguments in the case and were returned by it. In view of all the circumstances enumerated above, I am of the opinon that the learned Subordinate Judge ought to have allowed the defendants to place on the record the 93 documents that were tendered by them on the 16th January, 1928, as evidence in the case. It cannot be said that, in the absence of these documents there had been any final and proper trial of issue No. 6. I would, therefore, send the case to the trial Court under Order 41, rule 25 of the Civil Procedure Code, and direct the Court to allow the defendants to produce the above-mentioned documents in evidence. The respondents will also be allowed to produce evidence in rebuttal on issue No. 6 if they wish to do so. After the recording of this additional evidence the lower Court should give a finding on this issue. The evidence and the finding of the lower Court will be submitted to this Court within three months. The parties have been directed to appear before the Senior Subordinate Judge on the 16th June. The appellants will deposit in Court on that day Rs. 100 which will be paid to the respondents irrespective of the costs of the suit.

JAI LAL J.

JAI LAL J.—I agree.

*The final order of the Court after remand.*

TEK CHAND J.

TEK CHAND J.—This should be read in continuation of the order of the Division Bench, dated the 9th May, 1933 (1), by which the case was remanded under Order XLI, rule 25, Civil Procedure Code, for further enquiry on the question of custom, the defendants

(1) See page 160 *supra*.

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appellants having been allowed a further opportunity to produce certain documentary evidence. The proceedings on remand, however, were infructuous as the appellants did not put in an appearance before the Senior Subordinate Judge and consequently the evidence, which they proposed to lead, was never tendered. Mr. Mehr Chand Mahajan, Advocate, for the appellants has not been able to show any adequate reason for the non-appearance of his clients in the lower Court and, therefore, the case must be decided on the evidence produced at the trial.

Briefly stated, the facts are that one Mohammad Khan, a *Khattar* of *Mauza* Mungiwali, Attock district, died sonless in 1873, leaving him surviving two widows, *Mussammat* Bani Begam and *Mussammat* Mehr Nishan, and a daughter *Mussammat* Nur Khanam. He also had a sister's son Nawab Khan, father of the present defendants. On his death, his estate devolved on the two widows and was mutated equally in their names. In 1883 *Mussammat* Bani Begam gifted the land in dispute, which is a part of her husband's estate, to Nawab Khan. In 1891 *Mussammat* Nur Khanam, daughter of Muhammad Khan by *Mussammat* Bani Begam, brought a suit against Nawab Khan for a declaration that she was the next heir of Muhammad Khan and that the gift by her mother *Mussammat* Bani Begam in favour of Nawab Khan was ineffectual against her rights. The suit was decreed by the Court of first instance in 1895, and this decree was upheld by the Chief Court on the 16th November, 1898 (Ex. P. 2).

*Mussammat* Nur Khanam died in 1909 in the lifetime of her mother *Mussammat* Bani Begam. *Mussammat* Bani Begam died in 1926 and a few months later, on the 14th March, 1927, the plaintiffs

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who are the sons of *Mussammat* Nur Khanam, brought the present suit against the descendants of Nawab Khan for possession of the gifted land, alleging that they were the heirs of Mohammad Khan and that the declaratory decree, obtained by their mother *Mussammat* Nur Khanam, enured for their benefit.

The suit was resisted by the donees on numerous grounds which, it is not necessary for the purpose of this appeal, to set out in detail here. They pleaded (*inter alia*) that *Mussammat* Bani Begam was the absolute owner of the land which had devolved on her from her husband; that in the tribe of *Khattars* the daughter's son was not an heir at all to his maternal grandfather, even in regard to his self-acquired property and where no collaterals were in existence, and that, in any case, a daughter's son could not succeed where his mother had died before succession opened out. It was also averred that the defendants had effected various improvements on the property, for which the plaintiffs, in the event of their being successful, should pay compensation.

The learned trial Judge has found against the defendants on all these points and has decreed the suit. The defendants appeal.

Mr. Mehr Chand in his arguments before us has very properly not argued the first point that *Mussammat* Bani Begam was the absolute owner of the property and had full and unrestricted power of disposition over it. The fact that she and her co-widow *Mussammat* Mehr Nishan had succeeded equally to the entire estate of their deceased husband Muhammad Khan to the exclusion of the daughter of the deceased, raises a presumption that the widows had succeeded on the usual life estate under the Customary Law.

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The matter is, however, put beyond doubt by the decision in the declaratory suit instituted by *Mussammat* Nur Khanam, whereby the gift was held to be ineffectual after her death as against the daughter or other heirs of Muhammad Khan.

The second point, that in this tribe a daughter's son is not in the line of heirs even in regard to self-acquired property and in the absence of any male kinsmen (as is the case here), has also been dropped by Mr. Mehr Chand, and I have no doubt that it was without any force whatever.

The main point that has been argued before us is that according to custom prevailing in the tribe of the parties particularly, and the agriculturist communities of the Punjab generally, a *pre-deceased* daughter's son does not succeed to the property of his maternal grandfather where the daughter had not herself actually succeeded. The *riwaj-i-am* of the district does not contain any entry bearing on this point, nor was either party able to produce any judicial decisions, mutations or other documentary evidence in support of their respective contentions. Both sides, however, produced considerable oral evidence, the witnesses making bald statements that the custom was as alleged by the party who had called them. We have been taken through this evidence by the learned counsel for the appellant, but I have been so little impressed by it that I do not think it necessary to discuss it in this judgment. The evidence produced by the defendants is particularly weak and bears the stamp of improbability on the face of it. Their witnesses tried to make out that a widow in this tribe succeeds absolutely and is full owner of the estate of her husband. This is clearly contrary to the entry in

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the *riwaj-i-am*, the decision of the Chief Court in the declaratory suit, and several reported cases from this and allied tribes in this district. The witnesses also stated categorically that a daughter's son does not succeed at all to his grandfather under any circumstances. This statement also is contrary to the entry in the *riwaj-i-am* and is absurd on the face of it. On the particular question involved in the case, the witnesses deposed that a predeceased daughter's son is excluded by a sister's son and expressed the opinion that, according to the custom, as enunciated by them, the defendants excluded the plaintiffs. Now, as already stated, Nawab Khan (donee) was the son of the sister of Muhammad Khan and Nawab Khan's mother had died long ago. The proposition propounded by the defendants' witnesses, therefore, is that while a daughter's son is excluded from succession to his maternal grandfather where the daughter had predeceased her father, a sister's son succeeded even though the sister had died in the lifetime of her brother. It is hardly necessary to say that so startling a custom can be accepted only, if evidence of the clearest possible kind be forthcoming in support of it. The witnesses frankly expressed their inability to name a single instance in which the rule of succession propounded by them had been actually followed, and they hopelessly contradicted themselves in cross-examination.

Mr. Mehr Chand, however, strongly relied on a Remark in paragraph 23 (1) of Rattigan's Digest of Customary Law where it is stated that "a daughter's son is not recognised as an heir of his maternal grandfather except in succession of his mother," and from this he attempted to argue that the general custom

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among the agricultural tribes of the province was that a predeceased daughter's son loses all rights to succeed even to the self-acquired property of his maternal grandfather by the simple circumstance that his mother had died before succession opened out. No authority or instance in support of this Remark (if it is to be interpreted in the manner suggested) has been cited in the Digest and Mr. Mehr Chand was unable to refer us to a single case in which it had been followed by the Punjab Chief Court or this Court. On the other hand, there are several reported cases in which this dictum has been considered and invariably rejected. The first case bearing on the point is *Miran Bakhsh* v. *Mussammat Mehr Bibi* (1), to which special significance attaches, as one of the Judges who decided it was Sir Henry Rattigan, whose knowledge of Customary Law was unrivalled and who had edited several editions of his father's *Digest of Customary Law* in which the aforesaid Remark appears. In this case it was held that "there was no foundation for the contention that the daughter's sons whose mother had predeceased her father were in a worse condition than those whose mother had survived him." It was also observed that there was no authority on which the alleged distinction could be supported and the general principle of Customary Law which favoured the succession of daughter and daughter's sons certainly did not contemplate any such rule.

The question was next considered by the Letters Patent Bench, presided over by Shadi Lal C. J. and Martineau J. in *Gobinda* v. *Nandu* (2), where the learned Judges after referring to the above remark in

(1) 41 P. L. R. 1916. (2) (1924) I. L. R. 5 Lah. 450.

paragraph 23 of the Digest observed " that no case or instance could be cited in support of it. Whatever the exact meaning of the remark may be, we consider that there is no reason for holding that custom excluded a daughter's son from inheritance on the ground of his mother having predeceased her father."

The matter came up again for decision before another Division Bench (Abdul Raoof and Martineau JJ.) in *Chambeli* v. *Bishna* (1), where the learned Judges followed *Mussammat Jaswant Kaur* v. *Wasawa Singh* (2), and declined to accept the " Remark " in the *Digest* as a correct statement of the Customary Law of the province.

Harrison and Dalip Singh JJ. had occasion to consider this question in *Nizam-ud-Din* v. *Muhammad Bashir Khan* (3), and again in *Mussammat Jantan* v. *Ahmad* (4), and in both cases they rejected the " Remark " as not recording the custom correctly. The same view was taken in *Mst. Jano* v. *Din Muhammad* (5) by Bhide J. sitting in single Bench. Recently the question was discussed at length by another Division Bench in *Ilahi Bakhsh* v. *Ghulam Nabi* (6), in a case from the Gujranwala district, and it was held that custom did not make the right of a daughter's son to succeed to the property of his maternal grandfather contingent upon his mother having survived her father and on her having actually inherited his property. It was suggested that what was really intended to be conveyed was " that a daughter's son succeeds only in tribes among whom, and to property to which, the right of the daughter to succeed to her father's property was recognised by custom."

(1) (1924) 78 I. C. 778.
(2) (1924) I. L. R. 5 Lah. 212.
(3) (1927) I. L. R. 8 Lah. 536.
(4) 1928 A. I. R. (Lah.) 221.
(5) 1929 A. I. R. (Lah.) 238.
(6) (1933) I. L. R. 14 Lah. 404.

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No judicial decision or other authority has been cited before us for the contrary view and after hearing appellants' counsel at length I see no reason to dissent from the long course of decisions supporting the right of a predeceased daughter's son to succeed to the self-acquired property of his maternal grandfather. I hold, therefore, that the plaintiffs are the heirs of Muhammad Khan and as such entitled to the benefit of the declaratory decree passed in favour of their mother *Mussammat* Nur Khanam by the Chief Court in 1898.

The only other point argued before us was that the appellants had built certain houses on the gifted property and were entitled to get compensation for them from the plaintiffs-respondents. It appears that in constructing these houses they had demolished, without any authority, the houses which originally existed on the gifted land. This obviously they had no power to do. It seems that some of the so-called improvements were made in or about 1922, long after the declaratory decree had been passed, and it is also in evidence that at that time the plaintiffs had served a notice on the defendants not to interfere with the property. In these circumstances the so-called improvements cannot be said to have been made *bonâ fide* and I have no doubt that the learned Subordinate Judge has rightly rejected the defendants' claim for compensation.

For the foregoing reasons I would uphold the decree of the lower Court and dismiss this appeal with costs.

AGHA HAIDAR J.

AGHA HAIDAR J.—I agree.

*A. N. C.*

*Appeal dismissed.*