

APPELLATE CIVIL.

Before Mr. Justice Scott-Smith and Mr. Justice Abdul Raoof.

NATHU AND ANOTHER (DEFENDANTS)—*Appellants,*

versus

BANNA AND OTHERS (PLAINIFFS)—*Respondents.*

Civil Appeal No. 866 of 1919.

Custom—Alienation—gift by sonless proprietor of ancestral land in favour of his paternal aunt's grandson—Khu'sha Jats—Mauza Jandoli, tahsil Garhshankar, district Hoshiarpur—Second appeal—on question of custom—confined to question set out in the certificate.

Held, that in Second appeal the question of custom must be confined to that set out in the certificate granted by the District Judge.

Held also, that no custom had been proved among *Khulsha Jats* of Tahsil Garhshankar by which a sonless proprietor can gift his ancestral land to his paternal aunt's grandson in the presence of collaterals.

Rattigan's Digest of Customary Law, article 59, referred to.

Held further, that it had not been shewn that the original tribal bond in *Mauza Jandoli* had been broken and that a sonless proprietor had an unrestricted right of alienation.

Second appeal from the decree of F. W. Kennaway, Esq., District Judge, Hoshiarpur, dated the 10th January 1919, affirming that of Lala Ganga Ram, Wadhwa Senior Subordinate Judge, Hoshiarpur, dated the 15th January 1915, decreeing the claim.

TEK CHAND, for Appellants.

FAQIR CHAND, for Respondents.

The judgment of the Court was delivered by—

ABDUL RAOOF J.—The facts out of which this second appeal has arisen are as follows:—

One Nathu, a sonless *Khulsha Jat*, of *Mauza Jandoli* in the Garhshankar Tahsil of the Hoshiarpur District, made a gift on the 11th September 1913 of 160 *kanals* 11½ *marlas*, his ancestral land, in favour of Atra, grandson of *Mussammatt Indan*, a sister of his father *Megha-*

The plaintiffs, the collaterals of Nathu, instituted this suit for the usual declaration that the said gift being unwarranted under the Customery Law shall not be binding on the plaintiffs after Nathu's death. The suit was resisted by Nathu and Atra on the following grounds, namely—(1) that the gifted property was not ancestral; (2) that the village being inhabited by different tribes its inhabitants did not form a compact village community and were, therefore, not bound by the rigid rules of custom of agricultural tribes in the matter of alienations and adoption; (3) that the defendant Atra was adopted by Nathu in 1890 and as the adopted son he was the next heir of the donor and in his case the gift must be looked upon as a mere acceleration of his right of inheritance and valid; (4) that Atra's father, Bura, was adopted by Nathu's uncle, Kharak Singh, more than sixty years ago and Atra must be looked upon as a first cousin of Nathu and not as the grandson of the sister of his father and the gift being in favour of a reversioner must be treated to be good; and (5) that in any case the suit was barred by limitation, as it was virtually a suit for a declaration that the alleged adoption of Atra was invalid or never, in fact, took place.

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To these pleas in defence the plaintiffs replied as follows:—

(1) that the land was ancestral; (2) that the parties were governed by the general custom applicable to agriculturists and that no special custom justifying a gift in favour of the grandson of a father's sister existed; (3) that the adoption of Atra by Nathu was not warranted by the custom governing the parties; and (4) that the alleged adoption of Bura, Atra's father, by Kharak Singh amounted to a mere appointment of an heir and did not transfer Bura completely from his natural family into the family of Kharak Singh, the adopter, and that, therefore, Atra could not be looked upon as a first cousin of Nathu.

The trial Court found that the land was proved to be ancestral; that the custom governing the parties did not justify the adoption of Atra by Nathu as his son; that the adoption of Bura by Kharak Singh was a mere appointment of an heir and thus Atra as Bura's son could not be treated as a member of Kharak Singh's

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family ; that neither of the alleged adoptions affected the validity of the gift which was invalid, as Nathu had not an unrestricted power of alienation according to custom, and that the suit being one for setting aside the gift was not barred by Article 118 of the Limitation Act which applies to suits of the particular kind mentioned in the Article. There was also a defence put forward by Atra to the effect that he had paid off certain encumbrances on the land in question and was thus entitled to a charge on it, but the trial Court relying on *Rup Narain v. Mst. Gopal Devi* (1) held that the question could not be dealt with in the present suit as it could not arise till the death of the alienor. As a result of these findings the trial Court granted a decree in favour of the plaintiffs.

The defendants appealed and Mr. L. M. Waring, District Judge of Hoshiarpur, being of opinion that Article 118 applied to the case, dismissed the suit as being barred by time. On a second appeal being preferred by the plaintiffs a Division Bench of the Chief Court constituted by Shadi Lal and Wilberforce J. J. held that the suit was not barred under Article 118 of the Limitation Act, set aside the decision of Mr. Waring and remanded the case for trial on the merits. The case came up for decision before Mr. F. W. Kennaway, District Judge, who generally agreed with the trial Court in the decision on the merits and dismissed the appeal.

The defendants thereupon preferred the present second appeal on the basis of a certificate granted by the District Judge. On the appeal being called on for hearing Mr. Fakir Chand, the learned *Vakil* for the plaintiffs-respondents, raised a preliminary objection and argued that the certificate was defective and that the second appeal could not be maintained. In the alternative he argued that in any case the question of the validity of the adoption of Atra could not be raised as the certificate was not granted in respect of the question of adoption, and that it was only confined to the question of the validity of the gift. We found force in this latter contention and we, therefore, ruled that the argument must be confined to the question of the validity of the gift alone and that the appellants were not entitled to

question the correctness of the findings of the Courts below with regard to the invalidity of the adoption of Atra according to custom. The only question, therefore, to be determined in this appeal is whether the gift in question is warranted by the custom applicable to the parties. The question of the ancestral nature of the property and that of a charge on the land in favour of Atra arising out of the plea relating to the alleged discharge of encumbrances on the land by Atra have not been urged in this Court and need not be considered. Having regard to the argument addressed to us by Mr. Tek Chand on behalf of the defendant-appellants the following questions arise for determination, namely—(1) whether the gift is valid under custom ; (2) whether the village bond is broken and alienations in the village have been made without restriction and, therefore, Nathu had an unrestricted power of alienation ; and (3) whether there are any special reasons for upholding the gift in the present case.

The general custom is thus stated in Article 59 of Rattigan's Digest of Customary Law :—

“Ancestral immoveable property is ordinarily inalienable (especially amongst *Jats* residing in the Central Districts of the Punjab), except for necessity or with the consent of male descendants, or, in the case of a sonless proprietor of his male collaterals. Provided that a proprietor can alienate ancestral immoveable property at pleasure if there is at the date of such alienation neither a male descendant nor a male collateral in existence.”

Now, in this case there are male collaterals. Therefore, Nathu had no power to make the gift in question in favour of Atra, his father's sister's grandson.

Mr. Tek Chand has argued that the village tie in this particular case is shown to have been broken and the general custom has lost its hold upon the *Jats*. He has quoted instances from Humphrey's *Riwaj-i-am* showing that there have been gifts in favour of sister's and daughter's sons and other relations. There are instances of gifts in favour of sister's sons to be found at page 232, paragraphs 167 to 180, with the exception of paragraph 169 where the gift in favour of a sister's son was set aside at the instance of cousins and it was held that the gift of ancestral property was invalid without service being proved to have been rendered to the donor. At page 243, paragraph 296, is an instance of a

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gift in favour of a father's sister's son. In this case, however, there was only a mutation and there was no contest. At pages 238, 243 and 245 are to be found instances of gifts to other relations, but these instances do not carry us very far. There is some divergence to be found in these instances from the general custom. Nothing is shown which can justify us in holding that a gift in favour of a father's sister's grandson is allowed.

Mr. Tek Chand has relied on the following special circumstances to be found in the present case and has asked us to uphold the gift :—

- (a) Atra was associated with Nathu in the work of cultivation and had rendered service to him and in fact he had been brought up from his childhood by Nathu ;
- (b) Nathu's land was mortgaged with third parties and Atra got it redeemed with money supplied by Atra's brothers ; and
- (c) In 1890 Atra's name was struck off from the mutation register relating to his father's land in consequence of his adoption by Nathu.

These special circumstances cannot be held to justify a gift which is opposed to the general custom. It was open to the defendant to establish a special custom, but on the findings of the Courts below an attempt to establish the alleged custom failed. No special custom having been established the gift must fall to the ground. There is not sufficient material on the record to support the contention that the original tribal bond has been broken and that a sonless proprietor has an unrestricted right of alienation.

The argument that the gift must be held to be valid on the ground of services rendered by Atra to Nathu also cannot prevail, because the rule requires that the gift in order to be valid in return for services must be in favour of an agnate, and Atra, appellant, can in no sense be said to be an agnate.

After considering all the circumstances of the case we entirely agree with the view taken by the learned District Judge. We accordingly dismiss the appeal with costs.

G. H. O.

Appeal dismissed.