APPELLATE CIVIL.

Before Mr. Justice Abdul Raoof and Mr. Justice Fforde.

1925

Feb. 16.

LACHHMI NARAIN (DEFENDANT) Appellant,

versus

MUHAMMAD JI, ETC. (PLAINTIFFS)
MUHAMMAD GHAUS AND ANOTHER (DEFENDANTS) } Respondents.

Civil Appeal No. 1303 of 1921.

Custom—Alienation—Tarkhans *of Hassan Abdal, District Attock—Muhammadan Law.*

Held, that it had not been proved that *Tarkhans* of Hassan Abdal, Attock district, are governed in matters of alienation by custom and not by their personal law.

Civil appeals 933 of 1911 and 1582 of 1920 (unreported), distinguished.

First appeal from the decree of Rai Sahib Lala *Diwan Chand, Senior Subordinate Judge, Attock, at Campbellpur, dated the 29th April 1921, granting the plaintiffs a declaration.*

M. S. BHAGAT and DEV RAJ SAWHNEY, for Appellant.

L. C. MEHRA and DEVI DAYAL, for Respondents.

JUDGMENT.

FFORDE J.—This is a suit for a declaration that a mortgage executed by the defendant Muhammad Ghaus on the 18th August 1920 shall not affect the reversionary rights of the plaintiffs.

The trial Court has granted a decree for the declaration sought. The case now comes before us on appeal from that decision. In the Court below the plaintiffs claimed that the mortgage in question was

void, inasmuch as the mortgagor was a minor at the time of executing the deed. They further contended that the parties were governed by custom, and that the property being ancestral Muhammad Ghaus had no absolute power of disposal. The defendant Lachhmi Narain, the mortgagee in question, on the other hand, contended that even if Muhammad Ghaus was a minor at the date in question the plaintiffs were estopped from setting up his minority to avoid the transaction, inasmuch as they had themselves benefitted by it as they had received one-half of the mortgage money to redeem a prior mortgage made by Muhammad Ghaus to themselves in May 1920.

In the course of the arguments before us, however, Mr. Lal Chand, Mehra, for the respondents admitted that if custom is not established his case must fail. It is therefore only necessary to decide whether or not the parties are governed by custom or by Muhammadan Law in matters of alienation.

The parties are not members of an agricultural tribe nor is their main occupation agriculture, and there is, therefore, no initial presumption against free power of alienation. The evidence shows that Muhammad Ghaus is a shop-keeper dealing in shoes, *lungis* and caps, while his father used to work at a water-mill as a carpenter.

As there is no presumption in favour of a restricted power of alienation it is necessary for the plaintiffs to prove a special custom in this respect. The Court below has held that a special custom restricting alienation has been proved, but it has based its decision on two cases, the first being No. 933 of 1911 decided by the Chief Court in 1914 and the other No. 1582 decided by the High Court in 1920. The former of these two cases decided merely that

1925

LACHHMI NARAIN v. MUHAMMAD JI.

custom in this particular family governed the parties in a particular mode of succession to property, and did not decide any point of custom in respect of alienation. The decision of the High Court in the other case was confined to dismissing an appeal from the District Judge on the ground that there was no certificate, and the decision of the District Judge in favour of custom restricting alienation was itself based on case No. 933 of 1911, which, as I have already pointed out, had nothing to say to alienation. I may also point out that the first Court in that case had held that the parties were not governed by custom and it referred to suit No. 630 of 1914 (*Fazal Ilahi* v. *Umar*) decided on the 11th December, 1914, in which it was decided that *tarkhans* of the same village to which the parties belong were not governed by custom in respect of alienation.

The evidence in the present case directed to proving a special custom in restriction of alienation consists of the testimony of two witnesses, namely, Muhammad Kasam (P. W. 3) and Husain Bakhsh (P. W. 4). Muhammad Kasam states that Muhammad Ghaus dealt in shoes, *lungis* and caps and that his father worked as a carpenter. In respect of the matter of custom he says as follows:—"We follow custom. Two cases went up to High Court." In other words, he bases his view that the parties follow custom by reference to the two cases which I have already discussed.

Hussain Bakhsh uses almost the identical expression used by this previous witness in attempting to prove custom. He says "We follow custom. In two cases *tarkhans* of Ḥassan Abdal have been declared as following custom". These are the same two cases referred to by the previous witness.

It is quite clear upon the evidence in this case that no special custom restricting the parties in matters of alienation has been established. I must accordingly hold that the Personal Law applies, according to which the alienation by Muhammad Ghaus could not be challenged by the plaintiffs.

* * * * * * *

For these reasons I would accept this appeal and setting aside the decree of the trial Court dismiss the suit with costs.

ABDUL RAOOF J.—I agree.

N. F. E.

Appeal accepted.

APPELLATE CIVIL.

Before Justice Sir Henry Scott-Smith and Mr. Justice Martineau.

DHIAN SINGH AND OTHERS (PLAINTIFFS) Appellants, 1925

versus *Feb. 26*

GURDIT SINGH (DEFENDANT) Respondent.

Civil Appeal No 1445 of 1921.

Indian Evidence Act, I of 1872, section 114, illustration (i)—Suit on hundis—*allegation of loss of documents—plea of discharge—Burden of proof.*

Where plaintiff sued for money due upon *hundis*, but alleged their loss, whilst defendant admitted execution, but pleaded payment and subsequent destruction of the documents:

Held, that failing production of the *hundis* by the defendant there is no presumption that the *hundis* have been discharged [Indian Evidence Act, section 114, illustration (*i*)] and the *onus* is upon the defendant to prove payment.

Chuni Kuar v. *Udai Ram* (1), and *Jagan Nath* v. *Kamta Singh* (2), followed.

Kundan Lal v. *Begam-un-Nisa* (3), distinguished.

(1) (1883) I. L. R. 6 All. 73. (2) (1915) 32 I. C. 349.
(3) (1918) 47 I. C. 337 (P. C.).