

APPELLATE CIVIL.

Before Mr. Justice Tek Chand and Mr. Justice Bhide.
RAHMAN AND OTHERS (DEFENDANTS) Appellants

versus

SAI AND ANOTHER (PLAINTIFFS) Respondents.

Civil Appeal No. 2223 of 1924.

1928

Feb. 2.

Village Common Land—Shamilat—gift of a share in land—when deed is silent as to shamilat—onus probandi—that gift includes share in shamilat.

Held, that the onus of proving that a deed of gift of a share in land carries with it, as accessory thereto, a proportionate share of the *shamilat* lies, when the deed is silent upon the subject, upon the person who asserts that the gift operates to grant more than it purports to grant.

Fazal Shah v. Sikandar Ali (1), followed.

It is settled law that as the rights of a proprietor in the *shamilat* are not a mere accessory to the land held by him an alienation of the land does not *ipso facto* convey any rights in the *shamilat* to the alienee.

Ram Das v. Amir Shalh (2), *Ahmad v. Ahmad* (3), *Sultan Ahmad v. Parsa Ram* (4), *Saleh v. Mst. Bakhtawar* (5), *Shankar Das v. Mali* (6), *Shahadat v. Ganesh Das* (7), *Zaida v. Raja* (8), and *Maluk Singh v. Muhammad* (9), referred to.

Prem Chand v. Sardara (10), dissented from.

First appeal from the decree of Lala Kundan Lal, Senior Subordinate Judge, Gujrat, dated the 21st July, 1924, awarding the plaintiffs possession of the land in dispute.

ANANT RAM and BYRNE, for Appellants.

NANAK CHAND and DEVI DAYAL, for Respondents.

The judgment of the Court was delivered by :—

TEK CHAND, J.—The plaintiffs' father Dadu owned one-half share in Dall Pathananwali. In 1892 he

(1) 115 P. R. 1894.

(2) 113 P. R. 1901.

(3) 75 P. W. R. 1910.

(4) 2 P. R. 1917.

(5) 3 P. R. 1917.

(6) (1921) 63 I. C. 746.

(7) (1924) 78 I. C. 368.

(8) 1923, A. I. R. (Lah.) 350.

(9) 65 P. R. 1839.

(10) 10 P. R. 1894.

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made an oral gift of one-third of this share (= 1/6 of the whole) to his wife's brother Jiwan, father of the defendants. In the mutation proceedings (Ex. P. 2) no mention was made whether the gift conveyed the share in the *shamilat* appertaining to the portion of *khewat* land gifted. On a partition of the *shamilat* 180 *kanals* was allotted to the defendants and in 1920 mutation was duly effected in favour of the defendants. In 1923 the plaintiffs, who are the sons of the donor, instituted the present suit for possession of this land, alleging that the gift of 1892 comprised merely the 1/6th portion in the *khata* of Dall Pathananwali and that the donee was not entitled to the appurtenant *shamilat*. The suit has been decreed and the defendants appeal.

It is urged that the *onus* of proving that the gift in question comprised the proportionate share of the *shamilat* was wrongly placed by the lower Court on the defendants. In our opinion, this contention is devoid of all force. It was laid down by Sir Meredyth Plowden in *Fazal Shah v. Sikandar Ali*, (1), that "in the case of a deed of gift whereby a share in certain land in a village is gifted to a person, the *onus* of proving that the deed carries with it, as accessory thereto, a proportionate share of *shamilat* lies, when the deed is silent upon the subject, upon the person who asserts that the gift operates to grant more than it purports to grant". It may now be taken as settled law that as the rights of a proprietor in the *shamilat* are not a mere accessory to the land held by him, an alienation of the latter does not *ipso facto* convey any rights in the former to the alienee. See *inter alia* *Ram Das v. Amir Shah* (2), *Ahmad v. Ahmad* (3), *Sultan Ahmad v. Parsa Ram*

(1) 115 P. R. 1894.

(2) 113 P. R. 1901.

(3) 75 P. W. R. 1910.

(1), *Saleh v. Mst. Bakhtawar* (2), *Shanker Das v. Mali* (3), *Shahadat v. Ganesh Das* (4) and *Zaida v. Raja* (5). In support of his contention Mr. Anant Ram relied principally upon *Prem Chand v. Sardara* (6) but that ruling was not followed in *Ram Das v. Amir Shah* (7) and has been expressly dissented from in *Saleh v. Mst. Bakhtawar* (2). It is noteworthy that an earlier ruling of the Chief Court, *Maluk Singh v. Muhammad* (8), in which the contrary view had been taken was not referred to in *Prem Chand v. Sardara* (6). We are of opinion, that there is no presumption in favour of the *shamilat* land having been gifted and the *onus* was rightly laid on the defendants. To discharge this *onus* the defendants produced two witnesses but their evidence is worthless and was not relied on by counsel.

We have carefully examined the mutation proceedings and they leave no doubt in our mind that the donor had no intention of giving to the donee anything more than one-sixth of the *khawat* holding of Dall Pathananwali. The donor is recorded as having stated before the Deputy Superintendent that what he had gifted to the donee was "one-sixth share of the entire *khata*", and that he had put the donee in possession of the land gifted. The *shamilat* land was admittedly *banjar* at that time, and it is not alleged that the donee got possession of it.

We are, therefore, of opinion that the plaintiffs' suit was rightly decreed by the lower Court.

The appeal fails and is dismissed with costs.

A. N. C.

Appeal dismissed.

(1) 2 P. R. 1917.

(2) 3 P. R. 1917.

(3) (1921) 63 I. C. 746.

(4) (1924) 78 I. C. 368.

(5) 1923, A. I. R. (Lah.) 350.

(6) 10 P. R. 1894.

(7) 113 P. R. 1901.

(8) 65 P. R. 1889.