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charge of cruelty also has been established. I would accordingly accept the appeal with costs and grant the petitioner a decree *nisi* for the dissolution of her marriage with the principal respondent.

ZAFAR ALI J.—I agree.

N. F. E.

Appeal accepted.

APPELLATE CIVIL.

Before Mr. Justice Tek Chand and Mr. Justice Agha Haidar.

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June 1.

MUZAFFAR MUHAMMAD (PLAINTIFF) Appellant

versus

IMAM DIN AND ANOTHER (DEFENDANTS) Respondents.

Civil Appeal No. 2607 of 1923.

Custom or Muhammadan Law—Alienation—Kambohs—*resident in town and non-agriculturists*—Onus probandi—*Son challenging father's sale of agricultural land.*

The father of the plaintiff, a *Kamboh*, residing at Lahore sold agricultural land in the Lyallpur district. The plaintiff brought a suit for the usual declaration, that the sale being without consideration and necessity was not binding on him. The trial Court held that the plaintiff, on whom the *onus* lay, had failed to prove that the vendor was governed by custom and not by Muhammadan Law. The facts found were that the ancestors of the plaintiff had from time immemorial lived in Lahore City and none of them had actually followed agriculture as a profession but that their main occupation had for generations been service or trade.

Held, that, in these circumstances, the *onus* of proving that this family was governed by agricultural custom was rightly laid upon the plaintiff, even though *Kambohs* are one of the dominant agricultural tribes of the Lahore district.

Muhammad Hayat Khan v. *Sandhe Khan* (1), *Nathu* v. *Rafiq Muhammad* (2), *Ghulam Muhammad* v. *Bura* (3), *Prem*

(1) 55 P. R. 1908, p. 274. (2) 270 P. L. R. 1913.
(3) (1919) 54 I. C. 387.

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Singh v. *Darbara Singh* (1), *Jamiat-ul-Nisa* v. *Hashmat-ul-Nisa* (2), followed.

Gujar v. *Sham Das* (3), and *Sita Ram* v. *Raja Ram*, (4), referred to.

Kasim v. *Hasham* (5), *Mussammat Mehtab Bibi* v. *Mst. Hussain Bibi* (6), *Muhammad Din* v. *Ahmad Din* (7), *Rahim Bakhsh* v. *Umar Din* (8), and *Taj Muhammad* v. *Sayad Muhammad* (9), distinguished.

Held further, that the plaintiff having failed to prove that the vendor was governed by agricultural custom, the case must be decided by Muhammadan Law and that under that law the plaintiff had no *locus standi* to challenge the sale.

First appeal from the decree of Lala *Jaswant Rai*, Taneja, *Senior Subordinate Judge, Lyallpur, dated the 1st May, 1923, dismissing the plaintiff's suit.*

NIAZ MOHAMMAD and MOHAMMAD MONIER, for Appellant.

MATHRA DAS and MAYA DAS, for Respondents.

JUDGMENT.

TEK CHAND J.—On the 7th of January, 1919, Iftikhar Ahmad, father of the plaintiff-appellant, sold 277 *kanals* of agricultural land in the Lyallpur district to Haji Imam-ud-Din and Haji Rahim Bakhsh, defendants-respondents Nos. 1 and 2 for Rs. 11,000. The whole of the sale-price was paid before the Sub-Registrar and on the following day was deposited by the vendor in the Punjab and Sind Bank, Lyallpur. TEK CHAND J.

On the 3rd of February, 1922, the plaintiff-appellant Muhammad Muzaffar, who is the only son of

(1) 1923 A. I. R. (Lah.) 557.
(2) 124 P. R. 1908.
(3) 107 P. R. 1887 (F.B.).
(4) 12 P. R. 1892.
(5) 39 P. R. 1906.
(6) 17 P. R. 1913.
(7) (1914) 27 I. C. 577.
(8) (1915) 29 I. C. 382.
(9) (1916) 34 I. C. 126.

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the vendor, instituted the suit, out of which this appeal has arisen, for the usual declaration alleging that the land was ancestral, that his father, the vendor, did not possess unrestricted powers of alienation over it and that the sale being without consideration and necessity was not binding on him. Shortly after the institution of the suit, the vendor Iftikhar Ahmad died on the 16th of May, 1922, and on the application of the plaintiff-appellant the plaint was amended into one for possession.

The main pleas raised by the defendants-vendees were that the plaintiff had no *locus standi* to contest the alienation as the vendor was governed by Muhammadan Law and not by custom and that in any case, the alienation was for consideration and necessity and binding upon the plaintiff.

The learned Subordinate Judge placed on the plaintiff the *onus* of proving that the vendor was governed by custom and not by Muhammadan Law and held this issue unproved. On the question of consideration and necessity he found that consideration in full had passed and that though it could not be definitely said that immediate and urgent necessity existed for the transaction at the time of the alienation, the sale was an act of good management as the vendor lived in Lahore and could not efficiently manage the land in the Lyallpur district and it was more profitable to sell it and invest the sale-proceeds in a Bank. He held, therefore, that the transaction was binding on the plaintiff, especially when the money deposited in Banks had been taken possession of by the plaintiff on the vendor's death. He accordingly dismissed the suit. The plaintiff has preferred a first appeal to this Court, and we have heard Mr. Niaz Mohd. on his behalf.

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The first question argued is that the *onus* had not been rightly placed on the plaintiff. It is contended that the vendor was a *Kamboh*, which is one of the dominant agricultural tribes in the Lahore district, and, therefore, there is a presumption that he was governed by the general agricultural custom of the province and did not possess unrestricted power of alienation over ancestral land. As stated already, the trial Court had placed on the plaintiff the *onus* of proving that the family of the vendor was governed by custom. It does not seem to have been objected at the time when the issues were framed or at any stage of the trial in the Court below that the *onus* was wrongly placed on the plaintiff. Nor do we find this point specifically taken in the grounds of appeal to this Court. Therefore strictly speaking the plaintiff-appellant was not entitled to agitate this question for the first time at the hearing of the appeal. Having regard, however, to the general importance of the question, we allowed Mr. Niaz Mohd. to address us on this point. It is clear from the evidence given by the plaintiff himself as D. W. 3 that his ancestors had from time immemorial lived in Lahore City, and none of them had actually followed agriculture as a profession but that their main occupation for generations had been service or trade. The plaintiff's grandfather Muhammad Bakhsh was employed as a teacher in a Jail and seems to have been a man of great influence in the town of Lahore, so much so that a street inside the Akbari Gate is known after him as *Gali Muhammad Bakhshwala*. His son Iftikhar Ahmad, the vendor, served in the Las Bela State as Head Accountant for a number of years and on retirement lived in the town of Lahore. The other relations of the plaintiff have been or are employed in various offices at Lahore.

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It has not been shown that any one of them had had anything to do with the plough, except that like many other capitalist proprietors, living in towns, they had invested their earnings in purchase of small plots of land in the suburbs of Lahore like Qilla Gujar Singh, Gari Shahu, Sultanpur, Miran di Khui or Ichhra. It is conceded that none of the plaintiff's ancestors had ever been connected with any compact village community or that any of his collaterals actually carried on agricultural operations. Mr. Niaz Mohammad is unable to point out to any evidence that might controvert these facts but he argues that the mere fact that the vendor's family belongs to one of the dominant agricultural tribes of the Lahore district is by itself sufficient to shift the *onus* on to the defendants to prove that its members are not governed by custom, even though they have never belonged to a village community and had never, so far as is known, followed agriculture as a profession. In other words, he argues that every member of an agricultural tribe must be presumed to be governed by custom regardless of his residence, occupation, connection with village life and family tradition. But, as pointed out by Lal Chand J. (Johnstone J. concurring) in the case of *Muhammad Hayat Khan* v. *Sandhe Khan and others* (1), the mere fact that a person belongs to a well-known agricultural tribe is not by itself sufficient to raise a presumption that his power of alienation over property, ancestral or acquired, is restricted. As observed by the learned Judge at page 274 of the Report, "In order to apply the initial presumption against the power of alienation laid down by the Full Bench judgment in *Gujar* v. *Sham Das* (2), it is necessary to prove, not merely that the family belongs

(1) 55 P. R. 1908. (2) 107 P. R. 1887 (F.B.).

to an agricultural tribe, but also that its main occupation is agriculture. As further explained in *Ramji Lal* v. *Tej Ram* (1), the presumption in favour of a restricted power of alienation applies to members of agricultural tribes who are members of village communities. But where a family, though members of an agricultural tribe, has altogether drifted away from agriculture as its main occupation, and has settled for good in urban life and adopts trade, industry or service as its principal occupation and means and source of livelihood, I am not inclined to hold that any initial presumption would exist or apply, that the power to alienate ancestral immoveable property by the members of such family is necessarily restricted." These *dicta* of Lal Chand J. have been cited with approval and followed in a number of rulings, see *Nathu* v. *Rafiq Muhammad* (2), *Ghulam Muhammad* v. *Bura* (3) and the more recent decision in *Prem Singh* v. *Darbara Singh* (4). Similarly Shah Din J. (Robertson J. concurring) in *Jamiat-ul-Nisa* v. *Hashmat-ul-Nisa* (5), refused to raise any presumption that a family of *Awans*, settled in Ludhiana City was governed by custom. There, as here, it was found that for generations past no member of the family actually cultivated land but that the ancestors of the parties followed service or other independent means of livelihood and had acquired agricultural land in a village merely as means of investment. At page 564 of the report the learned Judge remarked: "Unless, therefore, it can be predicated in this case upon the materials before us that there is a definite rule of Customary Law which governs the parties to this appeal in

(1) 73 P. R. 1895 (F. B.).
(2) 270 P. L. R. 1913.
(3) (1919) 54 I. C. 387.
(4) (1923) A. I. R. (Lah.) 557.
(5) 124 P. R. 1908.

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matters of succession, we must fall back, for the decision of the point in issue, upon the personal law, though ostensibly the tribe to which the parties belong may be said to be governed generally by custom and not by Muhammadan Law. Starting then with these premises, we have to ascertain whether it has been shown, having regard to the nature of the property in dispute, to the parties' caste and station in life, to their occupations and their social environments and to the rule of succession which may have been observed in the family in the past, that the application of the personal law must be excluded in favour of a well-defined rule of custom by which the parties are governed in matters of inheritance ".

It is well-known that the foundation of the rule of Punjab Customary law, which restricts the powers of a male proprietor to alienate ancestral land is that in most Punjab villages land was held by members of certain tribes on principles of agnatic relationship. As explained by Roe J. (who it may be remarked was one of the leading exponents of the agnatic theory) in the leading case of *Gujar* v. *Sham Das* (1), the basis of the rule is that in most of the Punjab villages land is held by a male proprietor " as a member of a village community which at no distant period held the whole of their lands jointly recognizing in the individual member only a right of usufruct, that is, a right to enjoy the profits of the portion of the common land actually cultivated by him and his family, and to share in those of the portion still under joint management. In such a community the proprietary title and the power of permanently alienating parts of the common property, is vested in the whole body." Again in

(1) 107 P. R. 1887 (F.B.)

Sita Ram v. *Raja Ram* (1), the said learned Judge observed that " the whole principle underlying the enjoyment of and succession to land in villages held by a body of proprietors belonging to one tribe or descended from a common ancestor is that the land does not belong absolutely to the individual holder for the time being—it belongs to the family or community."

Now it will be conceded that by no stretch of reasoning can such a state of things be predicated with regard to a family that is not known to have ever lived in a village, or held land on communal basis, the mere fact that they belong to a tribe whose members usually form compact village communities, being wholly immaterial. Indeed, if persons belonging to such tribes leave village life, migrate to towns, drift away from agriculture, depend on trade, industry or service and adopt modes of life followed by non-agricultural communities, the presumption would be that they follow the personal law which governs their urban neighbours and associates.

For the contrary proposition Mr. Niaz Mohammad has referred to a number of rulings which I shall now briefly discuss. The first case cited was *Kasim* v. *Hasham* (2). This case related to *Lohars* of the small town of Kunjah in the Gujrat district, who along with *Tarkhans*, were found to own most of the agricultural land there and formed a compact village community and whose main occupation was agriculture. This case, instead of supporting the appellant is really against him, as it shows that persons belonging to a non-agriculturist tribe, may by adopting agriculture as their main source of livelihood and forming themselves into a village community be proved to adopt

(1) 12 P. R. 1892. (2) 39 P. R. 1906.

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customary rules of succession. The next case relied on was *Mussammat Mehtab Bibi* v. *Mussammat Hussain Bibi* (1), where the question to be decided was whether a *Kashmiri* carrying on the business of a comb maker in the town of Jhelum, was competent to devise by will the whole of his property in favour of his daughter, and it was proved by a large volume of evidence that *Kashmiris* of Jhelum town had been making bequests of self-acquired property unfettered by the rules of Muhammadan Law. The case has obviously no bearing on the point to be decided here.

Mr. Niaz Mohammad next referred to *Muhammad Din* v. *Ahmad Din* (2), and *Rahim Bakhsh* v. *Umar Din* (3), both of which were cases of *Arains*, residents of Lahore city. In the former it was found as a fact that though the parties resided in the town, their main profession was agriculture and they actually cultivated their own land which was situate in the suburbs of the town. In the latter case the parties were *Gulfrosh Arains* and the only question involved was as to the power of a proprietor to make wills, in derogation of the restrictions placed on testamentary power by Muhammadan Law. *Taj Muhammad* v. *Sayad Muhammad* (4), again was a case of *Arains* of Jullundur city relating to the power of making wills, and there also it was found that these *Arains* had consistently exercised full testamentary power unrestricted by rules of Muhammadan Law. It is clear that none of these rulings touches the point now before us.

On a review of the authorities and after giving full consideration to the arguments of the learned counsel, I hold that the *onus* to prove that the power

(1) 17 P. R. 1913.
(2) (1914) 27 I. C. 577.
(3) (1915) 29 I. C. 382.
(4) (1916) 34 I. C. 126.

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of the vendor to alienate ancestral land was restricted, was rightly placed in this case on the plaintiff-appellant.

Now let us see whether the plaintiff has succeeded in discharging this *onus*. Reliance is placed on two instances in the family of the vendor, in which it is alleged that custom and not Muhammadan Law was followed. The first of these is the case of Muhammad Jamil, a cousin of the vendor, who is alleged to have succeeded to the whole of the estate left by his father to the exclusion of his mother. The only witness who gave evidence relating to this matter is P. W. 4 Saif-ul-Haq, a clerk in the Military Accounts Department at Lahore. No mutation or other revenue entry relating to the succession to Muhammad Habib's property was referred to nor has any member of the family of Muhammad Habib, having direct knowledge of the facts relating to this succession, been produced. It is obvious that the oral testimony of Saif-ul-Haq who is a young man, 27 years of age, is insufficient to prove this instance.

The second instance in which custom is alleged to have been followed in the family is a decision of Lala Kundan Lal, Munsif, Lahore, *in re*: *Dina Nath* v. *Mst. Bhagan*, etc., decided on the 2nd of February 1914 (Ex. P. 9). But that was a case in which the ancestors of the then plaintiff Dina Nath, who were the proprietors of certain agricultural land in *mauza* Sultanpur, one of the suburbs of Lahore, had allowed one Allah Bakhsh to build a house on an open site on the usual non-proprietary tenure. On Allah Bakhsh's death a dispute arose as to whether the site underneath the house built by Allah Bakhsh would revert to the proprietor or whether it would be taken by his daughter *Mussammat* Barkat Bibi or by his

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collaterals Siraj Din, etc. It had to be only incidentally decided whether the defendants were governed by custom or Muhammadan Law. The main question in issue was whether the site would on Allah Bakhsh's death, revert to the latter. A perusal of the judgment shows that very little evidence on the rule of succession prevailing in Allah Bakhsh's family was led and ultimately the case was decided in favour of the proprietor. It is obvious that this case is of no value as an instance in support of the point now in issue.

As against this we have the important fact that on the death of Tafakhar Ahmad, the elder brother of the vendor, Iftikhar Ahmad, the latter claimed 1/6th share in his property according to Muhammadan Law. In 1915 he actually instituted a suit against *Mussammat* Mehran and *Mussammat* Malan, the widows of the deceased brother, and *Mussammat* Rahmat Bibi, his daughter, and in the plaint it was definitely asserted that "the family was admittedly governed by the *Shara*." Reference was also made to a *Fatwa* given at the instance of the parties by the *Anjuman-i-Numania*, Lahore, to the effect that the property of the deceased was divisible in accordance with Muhammadan Law. In that litigation Iftikhar Ahmad produced a number of witnesses to prove that the family was governed by Muhammadan Law and he ultimately succeeded in obtaining a decree in his favour against the widows and daughters of his brother (Ex. D. 5).

It is clear from the above discussion of the evidence that the plaintiff has not only been unable to prove any instances in the family where custom was followed, but that on the other hand there is at least one instance in which his own father succeeded to his brother under Muhammadan Law.

Counsel next relied upon certain instances amongst *Kambohs* of the suburbs of Lahore. He first referred to Ex. P. 10, which is a judgment *in re*: *Mahi* v. *Mussammat Amir Bibi* passed by a *Munsif* on the 29th of May 1889. The parties to that case were *Kambohs*, residents of Lahore and the land in dispute was situate in *mauza* Naulakha. The dispute related to a claim by a widow co-sharer for partition of a joint *khata*, and it was held that the widow co-sharer in possession of a life estate had no right to claim partition in her lifetime. The sole question litigated was whether a widow co-sharer could, under the Punjab Land Revenue Act, claim partition. The question as to whether Muhammadan Law or custom governed the powers of alienation among *Kambohs* was neither considered nor decided.

Ex. P. 7 is a decision by the Land Acquisition Officer, Lahore, between certain *Kambohs* to the effect that collaterals were entitled to take the compensation money in preference to daughters. The judgment is a very brief one and does not state to what place the parties belonged.

Ex. P. 8 is a judgment of the Divisional Judge, Lahore, *in re*: *Nur Din* v. *Mussammat Bhagan*, dated the 30th of March 1894. The case related to the *Kambohs* of Garhi Shahu, and it was held that a widow was not entitled to alienate property without necessity. Ex. P. 16 is an *ex-parte* judgment, also relating to *Kambohs* of Gari Shahu. The defendant in that case did not appear and no evidence was led on the question of custom. The last instance relied upon by Mr. Niaz Mohammad is Ex. P. 4 a judgment *in re*: *Hassan Din* v. *Hukam Din* by a *Munsif*, 1st Class, Lahore, on the 21st of March 1921. It again

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relates to *Kambohs* of *mauza* Ichhra where, as is well-known, many agriculturists cultivate lands with their own hands. It is obvious that none of these judgments is of any assistance in determining the power of alienation of a male proprietor belonging to the family of the plaintiff. The oral evidence led by the plaintiff is worthless and has not been discussed before us. Mr. Niaz Mohammad did not place any reliance upon the so-called instances of succession, deposed to by these witnesses, with regard to which they were unable to give the necessary particulars.

After a careful examination of the evidence on the record I have reached the conclusion that the plaintiff-appellant has failed to discharge the *onus* that lay on him to prove that his family was governed by custom and not by Muhammadan Law, and that his father did not possess unrestricted power of alienation over ancestral property. I must, therefore, hold that he had no *locus standi* to contest the sale in question. In this view of the case it is not necessary to go into the question of necessity. It need only be mentioned that Mr. Niaz Mohammad has not contested the finding of the lower Court that full consideration had passed or that the sale-proceeds were invested by the vendor in a Bank.

For the foregoing reasons, I would dismiss the appeal with costs.

AGHA HAIDAR J.

AGHA HAIDAR J.—I agree.

N. F. E.

Appeal dismissed.