lenient sentence would only encourage others in the belief that the offence is a venial one.

The appeal is dismissed.

A. N. C.

Appeal dismissed.

APPELLATE CIVIL.

Before Sir Shadi Lal, Chief Justice and Mr. Justice Agha Haidar.

1928

Oct. 29.

IBRAHIM AND OTHERS (PLAINTIFFS) Appellants

versus

MST. SADA BIBI AND OTHERS (DEFENDANTS) Respondents.

Civil Appeal No. 833 of 1924.

Custom—Alienation—Adoption—whether equivalent to a gift to adopted son—Adoption not proved—unregistered deed—whether admissible to prove gift—Onus probandi, *that gift was to donee individually, irrespective of adoption—Will—"disposing mind"—necessity of proof of.*

Gamun (*Arain*), an illiterate old man of feeble intellect, over whom his second wife (the plaintiff's mother's sister) had acquired control, affixed his thumb-mark to a deed which after reciting that he had made plaintiff his appointed heir, described him as his adopted son and declared that he (plaintiff) should succeed upon his death to his entire estate. The deed was neither registered nor acted upon ; but, mutation *with possession* of two-thirds of his (self-acquired) landed property having been effected after the executant's death in favour of the sons of his two brothers, plaintiff sued upon the deed, claiming that, although in a previous suit his adoption had been held to be invalid by custom, the deed should have the same effect as a gift of his land by the adoptive father to an adopted son ; and, in the alternative, as a testamentary disposition.

Held that, assuming that an adoption could be viewed as tantamount to a gift, the document relied upon could not, for want of registration, be admitted in evidence to prove the gift, and that oral evidence was equally inadmissible.

Held further, that the *onus* lay upon the plaintiff to prove that Gamun ever intended to gift his property to him individually, *i.e.*, irrespective of his supposed character as an adopted son, and that he had failed to discharge that *onus*.

Sant Singh v. *Sada* (1), distinguished.

Held also that, supposing the deed could be held to be a will, the plaintiff upon whom the *onus* lay had failed to prove that the testator had "a disposing mind", *i.e.*, that he was able to understand his position, could appreciate his property, and form a judgment with respect to the parties whom he chose to benefit by it after his death.

Harwood v. *Baker* (2), and *Safton* v. *Hopwood* (3), followed.

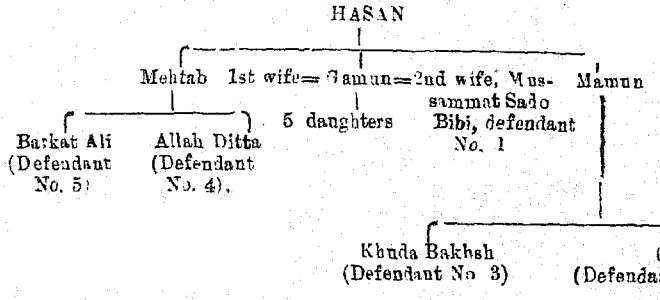
First appeal from the decree of Kwaja *Abdus Samad, Subordinate Judge, 1st class, Lyallpur, dated the 22nd December 1923, dismissing the plaintiffs' suit.*

ZAFARULLAH KHAN and BASHIR AHMAD, for Appellants.

SAIN DAS and LABHA RAM, for Respondents.

The judgment of the Court was delivered by :—

SIR SHADI LAL C.J.—The dispute in this case relates to the estate of one Gamun, an *Arain* of the Lyallpur District, who died in 1914. The following pedigree-table explains the relationship of the defendants with the deceased Gamun—



(1) 63 P. R. 1912. (2) (1840) 3 Moo. P. C. 282 : 50 R. R. 37
(3) 1 F. and F. 179.

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It is common ground that Gamun originally belonged to a village in the Hoshiarpur District, and that he migrated to the Lyallpur District when he was granted a square of land in the latter district. Now, the plaintiff Karim Bakhsh, who is already in possession of one-third of the square, claims the remaining two-thirds on two grounds:—(1) that he was appointed by Gamun to be his heir and is consequently entitled to inherit his estate; (2) that the deceased made a testamentary disposition in his favour. The trial Judge has negatived his claim, and against the dismissal of his suit he has preferred a first appeal to this Court.

It is admitted on behalf of Karim Bakhsh that he was the son of *Mussammat* Sado Bibi's sister and was in no way related to her husband Gamun. It is, however, claimed by him that he was brought up by Gamun and treated as an adopted son. The evidence to prove this allegation is of an unsatisfactory character, and is insufficient to prove his claim as an appointed heir.

There can, however, be no doubt that *Mussammat* Sado Bibi, who had no issue by Gamun, was anxious to benefit her sister's son and that she induced her husband to execute a deed of adoption in favour of Karim Bakhsh and to gift the land in the ancestral village to him. His nephews Allah Ditta and Barkat Ali promptly filed a suit in October 1908, to resist this invasion on their right to succeed to the property and obtained a decree in January 1909, declaring that the alleged adoption was invalid under the Customary Law by which the parties were governed and would not adversely affect their title to the ancestral property of Gamun.

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The evidence on the record shows that Gamun was an old man of feeble intellect, and that his wife had acquired a complete mastery over him. The document, on which the present claim is founded, was executed by him on 1st April 1911, and is variously described as a deed of adoption or a will. The executant, after reciting that he had been treating Karim Bakhsh as his adopted son and had previously appointed him to be his legal heir, declared that the latter should be regarded as his adopted son and should succeed upon his death to his entire estate consisting of moveable and immoveable properties. It is, however, significant that neither in his life time, nor after his death, was this deed acted upon, and that, on the 12th of September 1913, he himself asked the Revenue Officer to enter a mutation relating to his landed estate in the Lyallpur district in favour of Karim Bakhsh on the ground that he had orally gifted the property to the latter. His nephews again intervened, with the result that the mutation was disallowed apparently on the ground that he was incapable of understanding his affairs and making a valid disposition of his property.

No further action was taken in the life-time of Gamun, and upon his death in 1914 the estate was mutated, not in favour of Karim Bakhsh, but in favour of *Mussammat* Sado Bibi. In October 1917, there was, however, a division of the estate among the various claimants, in pursuance of which, one-third of the square was mutated in favour of Karim Bakhsh on the basis of a gift to him by *Mussammat* Sado Bibi ; and the remaining two-thirds, with the exception of two *killas* (which were kept by for her own maintenance) were given to Qaim and Khuda Bakhsh who shared the acquisition with their cousins

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Allah Ditta and Barkat Ali. Subsequently the two *killas* kept by her for her maintenance were gifted by her to her relative Abdullah, but this alienation was resented by the nephews. In October 1922, they brought an action for the declaration that the gift of one-third of the square made by her to Karim Bakhsh should not affect their reversionary rights after her death. In the following month Karim Bakhsh retorted by instituting the present suit, claiming possession of the land alienated by her to her nephews, and based his title on the deed executed by Gamun in his favour on the 1st April, 1911. The suit brought by the nephews against Karim Bakhsh has been dismissed, and there is no longer any dispute about his title to one-third of the square gifted to him by *Mussammat* Sado Bibi. The question for determination in this appeal is whether he has established his claim to the remaining two-thirds.

The evidence produced by him to prove the execution of the document, upon which he rests his claim, consists of the testimony of two attesting witnesses, who are neither disinterested nor reliable persons. It, however, appears that the genuineness of the thumbmark of Gamun on the instrument in question was not seriously disputed in the trial Court, and we may take it that he had executed the deed in the sense that he had affixed his thumb-mark to it. The evidence adduced by the defendants, however, shows that he was not in his proper senses at that time ; and this evidence, reinforced as it is by the various infructuous attempts made by him under the influence of his wife to benefit her sister's son, clearly points to the conclusion that he was not a free agent and did not possess a disposing mind.

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The learned counsel for the appellant, while conceding that in view of the judgment pronounced by the Hoshiarpur Court in January 1909, the adoption of Karim Bakhsh by Gamun cannot be regarded as a valid transaction, contends that the adoption though invalid should have the same effect as a gift of his land by the adoptive father to the adopted son. It is true that the land in dispute was the self-acquired property of the deceased, and it has been held in *Sant Singh* v. *Sadda* (1), that an adopted son, who has obtained possession of non-ancestral land, may be allowed to retain it, even though his adoption may be invalid *qua* the ancestral property. It must, however, be remembered that in the present case the adopted son is not in possession of the estate and that it is he who has brought the suit for the recovery of the property from the heirs of the deceased who have been in possession of it since 1917. Now, assuming, for the sake of argument, that an adoption may be viewed as tantamount to a gift, we are clear that the document, upon which the plaintiff relies, cannot for want of registration be admitted in evidence in order to prove the gift, and that oral evidence is equally inadmissible. It is, however, urged that the deed contains a mere recital of adoption which event took place many years before its execution. But we do not know when the alleged adoption took place and whether Gamun ever intended to give his property to Karim Bakhsh irrespective of his supposed character as an adopted son. The proposition of law is firmly established that, where a gift is made to a person who is described as possessing a particular character or relationship, that gift may be made to him absolutely as an individual, or

(1) 63 P. R. 1912.

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it may be made to him on account of that relationship, so that if the relationship fails, the gift cannot take effect. The *onus* is upon the plaintiff to prove that a gift irrespective of the relationship was ever made to him, and this *onus* he has failed to discharge.

Coming now to the alternative ground of attack, we have to determine whether Gamun made such a testamentary disposition of his property as would sustain the present claim. Now, supposing that the deed executed by him in April, 1911, may be held to be a will, it is obvious that the mere fact that an illiterate person puts his thumb-mark on a document written by another person does not raise any presumption that he had a disposing mind. It is true that the Subordinate Judge, in arriving at his finding adverse to the plaintiff, has been influenced by some inadmissible evidence, such as the report made by Mr. Salusbury in his capacity as Revenue Assistant and the deposition of Captain Hallilay in a criminal case ; but after excluding it from consideration, we still hold that the plaintiff has not succeeded in discharging the *onus* as to the due execution of the will which was undoubtedly upon him. As observed by their Lordships of the Privy Council in *Harwood* v. *Baker* (1), the testator " must also have capacity to comprehend the extent of his property and the nature of the claims of others whom, by his will, he is excluding from all participation in his property ". To the same effect are the following observations of Crosswell J., in *Safton* v. *Hopwood* (2) :—

" It is not sufficient in order to make a will that a man should be able to maintain an ordinary

(1) (1840) 3 Moo. P. C. 282 : 50 R. R. 37. (2) 1 F. and F. 179.

conversation and to answer familiar and easy questions. He must have more mind than suffices for that. He must have what the old lawyers called 'a disposing mind;' he must be able to dispose of his property with understanding and reason. This does not mean that he should make what other people may think a sensible will or a reasonable will or a kind will * * * *. But he must be able to understand his position ; he must be able to appreciate his property, to form a judgment with respect to the parties whom he choses to benefit by it after his death, and if he has capacity for that, it suffices."

It must be remembered that Gamun left him surviving not only four nephews but also five daughters by his first wife, but the alleged will excludes all of them from participation in his estate. Further, if he had intended this document to evidence the final disposition of his property, one would expect that he would have taken the precaution of getting it registered. Indeed, it is doubtful whether he was even conscious of its existence, but at any rate he did not attach any importance to it because, as stated above, in September 1913, he put forward an oral gift to Karim Bakhsh in order to induce the revenue authorities to effect a mutation of the land in his favour. Nor did Karim Bakhsh himself assert his claim to the estate on the death of Gamun. It was *Mussammat* Sado Bibi in whose favour the property was mutated, and this could not be the case if the disposition contained in the document was considered by Karim Bakhsh to be a valid transaction. It is futile for him to urge that he was ignorant of the existence of the will until it was produced by *Mussammat* Sado Bibi in the suit brought by her nephews in October 1922.

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Upon a careful examination of the entire material before us, including the conduct of the plaintiff himself, we have reached the conclusion that he has failed to establish his title to the property. We accordingly affirm the judgment of the lower Court and dismiss the appeal with costs.

N. F. E.

Appeal dismissed.

REVISIONAL CRIMINAL.

Before Sir Shadi Lal, Chief Justice.

1928

Sept. 21.

ALLA DIA, Petitioner

versus

THE CROWN, Respondent.

Criminal Revision No. 1111 of 1928.

Criminal Procedure Code, Act V of 1898, section 341—Accused—deaf and dumb—Reference to High Court—whether competent.

Held, that where the accused (a deaf-mute) can understand the proceedings—though only by signs—a reference by the District Magistrate to the High Court under section 341 of the Criminal Procedure Code is not entertainable.

Case referred by F. L. Brayne, Esquire, District Magistrate, Gurgaon, with his letter No. 813 of 19th May 1928.

MUHAMMAD AMIN, for Petitioner.

BISHEN NARAIN, for Government Advocate, for Respondent.

JUDGMENT.

SHADI LAL C.J.

SIR SHADI LAL C.J.—This reference under section 341, Criminal Procedure Code, does not satisfy the requirements of the law and cannot, therefore, be entertained. It is true that the accused is a deaf-mute, but the following paragraph from the