APPELLATE CIVIL.

Before Shadi Lal C. J. and Gordon-Walker J.

BAKHSH, DECEASED, THROUGH HIS REPRESENTATIVES (PLAINTIFF) Appellant

versus

MOHAMMAD KHAN AND ANOTHER (DEFENDANTS) Respondents.

1931

Jan. 6.

Civil Appeal No. 2528 of 1926.

Custom—Alienation—Ancestral property—Awans *of village Bharpur Khillan, district Rawalpindi*—inter vivos—*and by will—distinction.*

Held, that though *Awans* of Shahpur, Rawalpindi, Attock and Mianwali possess very wide powers of alienation *inter vivos* in respect of ancestral property, they have no such power to dispose of ancestral property by will.

Mussammat Rakhi v. *Baza* (1), relied upon.

Second appeal from the decree of Lt.-Col. J. Frizelle, Additional District Judge, Jhelum, dated the 22nd June 1926, reversing that of Pandit *Banshi Ram, Subordinate Judge, 4th Class, at Chakwal, dated the 2nd February 1926, and dismissing the plaintiff's suit.*

J. L. KAPUR, for Appellant.

SAIN DASS, for Respondents.

SHADI LAL C. J.—On the 17th March, 1924, Raja, an *Awan* of the village Bharpur Khillan in the district of Rawalpindi, made a will devising the property in dispute to the two sons of his maternal uncles. On the 24th March, 1924, Raja died. The present suit was brought by his collaterals to recover possession of his estate on the ground that the property

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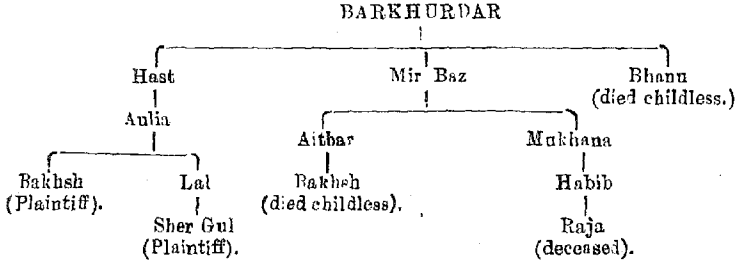
alienated by him was ancestral *qua* the plaintiffs, and that he had no authority to dispose of it by will. The trial Judge decided both the points in favour of the plaintiffs and decreed their claim. On appeal the learned District Judge held that "the lower Court has wrongly found the whole of the property to be ancestral", and on that finding he has dismissed the suit. The estate disposed of by the will consists of four plots of land and a residential house, but the learned District Judge has not recorded any definite finding as to the ancestral character or otherwise of each of these properties.

The following pedigree table explains the relationship of the plaintiffs to the deceased Raja :—



In order to establish their claim the plaintiffs have to prove that the estate descended to Raja from the common ancestor Barkhurdar, and the determination of this question depends upon the entries made at the time of the settlement of 1860. Now, one of the four plots of land measuring 35 *kanals* and 3 *marlas* was entered in 1860 as the property of Mir Baz, son of Barkhurdar, and Aulia, the son of Barkhurdar's, eldest son Hast, in equal shares. Considering that Barkhurdar's third son Bhanu had died, and that the remaining two sons or their descendants owned and cultivated this holding in equal shares, the trial judge decided that it was inherited by them from their

common ancestor Barkhurdar. This conclusion is in accord with various rulings of the High Court and has not been expressly dissented from by the learned District Judge. The holding, must, therefore, be held to be ancestral *qua* the plaintiffs.

The plaintiffs must succeed also in respect of a share in a joint holding which is recorded in the revenue papers as the *Shamilat* of the proprietors who were descendants of Gahra. It appears that Gahra was the founder of the village, and in the pedigree table prepared at the time of the settlement of 1860 Barkhudar, the father of Hast and Mir Baz, is shown as one of the descendants of Gahra. The learned District Judge, however, observes that the revenue papers do not show "any connection between Barkhurdar and Gahra," but this is obviously an error committed by him. As stated above the pedigree table makes it clear that Barkhurdar was a descendant of Abdullah, one of the grandsons of Gahra. The *Shamilat* area, which came from Gahra to his descendants, must, therefore, be treated as ancestral property *qua* the plaintiffs.

The other two plots of land were held in 1860 by Mir Baz in two shares and Aulia in one share, and the learned District Judge points out that, if the land had been ancestral, Mir Baz and Aulia would have held it in equal shares. The learned Judge was, therefore, justified in coming to the conclusion that the plaintiffs, on whom the *onus* rested, had not succeeded in establishing the ancestral nature of these two plots of land; and there is no ground for disturbing his finding in second appeal. Nor is there any evidence on the record that the house disposed of by the will had descended to Raja from his ancestor Barkhurdar.

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Coming now to the question of custom relating to the alienation of ancestral property, we find that it has been repeatedly held that the *Awans* of Shahpur, Rawalpindi, Attock and Mianwali possess very wide powers of alienation *inter vivos* in respect of ancestral property, but as decided in *Mussammat Rakhi* v. *Baza* (1) they have no such power to dispose of ancestral property by will. A clear distinction has been drawn between an alienation *inter vivos* and an alienation by will, and indeed, it was admitted by the defendants' counsel before the trial Judge that Raja had no power to make a testamentary disposition of his ancestral property. In so far as the two ancestral plots of land are concerned, the will made by Raja must be held to be inoperative.

For the aforesaid reasons I would accept the appeal so far as to decree the plaintiffs' suit for possession of two plots, namely, 35 *kanals* and 3 *marlas* and 1/24th share of 581 *kanals* and 11 *marlas*. I would direct the parties to bear their own costs throughout the litigation.

GORDON-
WALKER J.

GORDON-WALKER J.—I agree.

N. F. E.

Appeal accepted in part.

(1) (1924) I. L. R. 5 Lah. 34.