APPELLATE CIVIL.

Before Harrison and Tek Chand JJ.

1931

March 16.

ROSHAN (DONEE) DEFENDANT-Appellant

versus

WADHAWA, ETC. (PLAINTIFFS)
MST. JANO (DONER) (DEFENDANT) } Respondents.

Civil Appeal No. 2683 of 1926.

Custom — Alienation — non-ancestral property—gift by widow with consent of next heir—Suit by distant collaterals contesting the alienation—locus standi *of plaintiffs—Second Appeal—Certificate—where no oral evidence was produced—whether necessary—Punjab Courts Act, VI of 1918, section 41 (1) (a) and (3).*

Mst. J., having succeeded to the land in dispute on the death of her son *D.M.*, gifted it to one *R.*, a stranger to the family, with the consent of a collateral in the fifth degree, who was the presumptive heir of *D.M.* The plaintiffs, being collaterals of *D.M.* in the ninth degree, brought the present suit for a declaration that the gift was invalid and ineffectual after *Mst. J.'s* death. The main defence was that the plaintiffs had no right to challenge the gift, as the property was non-ancestral *qua* them and the transaction had been assented to by the presumptive heir. Before the District Judge the donee relied on certain rulings of the High Court, but the learned Judge distinguished them. He, however, granted a certificate under section 41 (3) of the Punjab Courts Act. On second appeal it was objected that the certificate was not in order, as there could be no "conflict" of the evidence, none having been produced in the case.

Held, that the case fell under section 41 (1) (*a*) of the Courts Act, the point raised in second appeal being that the decision was "contrary to law" and so there was no need for a certificate at all; and that even if it could be held that the appeal came under the second part of section 41 (1) (*a*) there was evidence in the shape of precedents and the certificate would be adequate and in order.

Held also, that the property being non-ancestral *qua* the plaintiffs, they had no right to contest the alienation by *Mst. J*, made with the *bona fide* assent of the next heir.

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Mussammat Jaswant Kaur v. *Wasawa Singh* (1), and *Rangasami Goundan* v. *Nachiappa Goundan* (2), followed. Rattigan's Digest of Customary Law, para. 68, dissented from in this respect.

Second appeal from the decree of Mr. F. W. Skemp, District Judge, Gurdaspur, dated the 28th July 1926, varying that of Bawa *Daswanda Singh, Subordinate Judge, 2nd Class, Gurdaspur, dated 22nd February 1926, by directing that the gift in question is null and void, etc.*

MUHAMMAD AMIN and B. A. COOPER, for Appellant.

NAWAL KISHORE, for Plaintiffs, Respondents.

TEK CHAND J.—A preliminary objection has been taken in this appeal by Mr. Nawal Kishore that the certificate granted by the District Judge is not in accordance with section 41 (3) of the Punjab Courts Act, inasmuch as no evidence whatsoever was called in the case, and, therefore, there was no "conflict" as required by the wording of the section. In our opinion the case falls under the first portion of section 41 (1) (*a*), that is to say, the point raised on second appeal is that the decision is contrary to law, and, therefore, clause (3) *proviso* does not apply and there was no need for a certificate at all. If the contrary view were to be taken and it were to be held that the appeal came under the second part of section 41 (1) (*a*) there would be evidence in the shape of precedents and the certificate would be adequate and in order. We hold, therefore, that the second appeal is competent. TEK CHAND J.

On the merits the case is very simple. The land in dispute was acquired by one Ida, a *Randhawa Jat* of the Gurdaspur district and on his death it devolved on his son Rura and on Rura's death on *his*

(1) (1924) I.L.R. 5 Lah. 212. (2) (1919) I.L.R. 42 Mad. 523, 530 (P.C.).

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son Din Muhammad. Din Muhammad died unmarried and his mother *Mussammat* Jano, defendant No. 2, succeeded on the usual widow's estate. On the 26th of July 1919 *Mussammat* Jano gifted the entire land by a registered deed to Roshan, defendant, who is a stranger to the family. It has been found as a fact that the then living next heir of the donor was one Karim Bakhsh, who was related to Din Muhammad in the fifth degree. It seems that Karim Bakhsh's relationship with Din Muhammad was disputed at the time A settlement was however arrived at, according to which Karim Bakhsh received Rs. 200 in cash from the donee and executed a deed admitting the gift to be valid and relinquishing "whatever rights he had in the property." Karim Bakhsh died childless a few years later.

On the 6th August, 1925, the present suit was brought by Wadhawa and Buta, plaintiffs, who are related to Din Muhammad in the 9th degree, for a declaration that the gift was invalid and would be ineffectual after *Mussammat* Jano's death. The main defence raised was that the plaintiffs had no right to challenge the gift, as the gifted property was non-ancestral *qua* the plaintiffs and the transaction had been assented to by the then presumptive heir Karim Bakhsh. Before the District Judge the donee relied on *Mussammat Jaswant Kaur* v. *Wasawa Singh* (1), but the learned Judge distinguished it on grounds which are clearly untenable and which the respondents' learned counsel frankly admitted his inability to support. He conceded that the principle of *Mussammat Jaswant Kaur* v. *Wasawa Singh* (1) fully applied to the present case, but he contended

(1) (1924) I. L. R. 5 Lah. 212.

that it had been decided wrongly. It was laid down in that case that the rule enunciated in para. 68 of Rattigan's Digest must be taken to apply to those cases only in which the property alienated by the widow in possession of her husband's estate was ancestral of him and the person who sues to challenge the alienation and that it has no application to cases in which the property is non-ancestral *qua* him. I have no doubt that this is a correct exposition of the law. Indeed it seems to me that para. 68 of the Digest is expressed in terms which are much too wide, and I have no doubt that its accuracy will have to be tested some day in the light of the recent decisions of their Lordships of the Privy Council bearing on the question of the validity of alienations made by a *Hindu* widow, to which the next heir has given his assent or which he has ratified subsequently. It is, however, not necessary to cover the whole ground in the case before us. It will be sufficient for our present purposes, if we confine ourselves to the case of property which is non-ancestral *qua* (*a*) the last male owner, (*b*) the heir presumptive who has given his assent, and (*c*) the remote heir who sues to challenge it. In such a case neither of the two last named persons has a real reversionary interest in the property in the sense in which they would have had if the property had been ancestral. Admittedly none of them has a right to control the dealings of the other with it. It follows therefore that if the former has given his assent *bona fide* to the alienation by the female proprietor, the latter has no right to question it. As pointed out by their Lordships of the Privy Council in *Ranqasami Gounden* v *Nachiappa Gounden* (1), "such an alienation

(1) (1919) I. L. R. 42 Mad. 523. 530 (P.C.).

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made with the assent of the next heir really amounts to two transactions, (1) a surrender by the widow in favour of the next heir, and (2) a further transfer by the latter to the alienee." It is obvious that the remoter heir has got no right to contest either (1) or (2) and therefore he cannot have a *locus standi* to challenge the transaction as a whole.

It is conceded that in the present case if *Mussammat* Jano had died without making the alienation in question. the property would have devolved on Karim Bakhsh as the next heir of the last male owner and Karim Bakhsh would have become its absolute owner possessing full power to alienate it, with or without necessity. In that case the plaintiffs could not have contested his dealings with the property, and if this is so, it is difficult to see how they can be allowed to contest the alienation of the same property by *Mussammat* Jano, fortified, as it is, with the assent given *bonâ fide* by the next heir Karim Bakhsh.

In my opinion *Mussammat Jaswant Kaur* v. *Wasawa Singh* (1) was correctly decided and fully applies to the case before us. I hold that the plaintiffs have no right to maintain the suit and the finding of the learned District Judge to the contrary cannot be sustained. I would accordingly accept the appeal, set aside the judgment and decree of the lower appellate Court and dismiss the plaintiff's suit with costs throughout.

HARRISON J.

HARRISON J.—I agree.

A. N. C.

Appeal accepted.

(1) (1924) I. L. R. 5 Lah. 212.