

## APPELLATE CIVIL.

Before Harrison and Tek Chand JJ.

AHMAD DIN (PLAINTIFF) Appellant

versus

MULLAN MAHMUD AND OTHERS (DEFENDANTS)

Respondents.

Civil Appeal No. 194 of 1924

*Custom—Alienation—Ancestral property—sonless Mair—Tahsil Chakwal—District Jhelum—Gift to collateral in 8th degree—in presence of collaterals in 3rd degree.*

*Held*, that by custom a sonless Mair of Tahsil Chakwal, District Jhelum is entitled to make a gift of his ancestral property to one of his collaterals in the presence of other collaterals equally or more nearly related.

*Niaz Ali v. Ahmad Din (1)*, and *Faiz Bakhsh v. Jahan Shah (2)*, followed. *Fateh v. Alayar (3)*, distinguished.

*Second appeal from the decree of Mr. J. Addison, District Judge, Jhelum, at Rawalpindi, dated the 29th October 1923, affirming that of Sardar Kartar Singh, Subordinate Judge, 2nd Class, Jhelum, dated the 27th April 1923, dismissing the plaintiff's suit.*

ANANT RAM, for Appellant.

SHAMAIR CHAND and MUHAMMAD AMIN, for Respondents.

TEK CHAND J.—On the 11th of August 1921 one Mian Muhammad, a Mair of Mauza Odherwal in the Chakwal Tahsil of the Jhelum District, gifted his agricultural land and house to Ghulam Shah, defendant No. 2, who was his sister's son and also a collateral in the 8th degree. The plaintiff Ahmad

(1) 109 P. R. 1882.

(2) 96 P. R. 1907.

(3) (1925) I. L. R. 6 Lah. 352.

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Din, who is a collateral of the donor in the third degree, brought a suit for a declaration that the property being ancestral the gift was invalid by custom and ineffectual as against his reversionary rights. The suit has been dismissed, both Courts having found that under custom a childless *Mair* can make a gift of his ancestral property to one of his agnatic relations in the presence of others equally or more nearly related. The learned District Judge has, however, granted a certificate to the plaintiff to prefer a second appeal to this Court on the question, whether a gift can be made by a sonless *Mair* to a collateral of the 8th degree in the presence of collaterals in the third degree.

The oral evidence on the record is inconclusive. The witnesses make bald statements, supporting the allegation of the party who called them, but are unable to cite any instance in which the custom alleged by them had been followed. The *riwaj-i-am* of the district prepared by Mr. Talbot in the course of the Settlement of 1901 is also of no assistance, as the question does not appear to have been investigated by him or his subordinates. There are, however, some rulings of the Chief Court which are directly in point. In *Niaz Ali v. Ahmad Din* (1), it was held after a very full enquiry that a gift by a sonless *Mair* proprietor of this district in favour of one nephew to the exclusion of other nephews was valid by custom. This ruling was followed in *Faiz Bakhsh v. Jahan Shah* (2), the parties to which were *Mair Rajputs* of the Chakwal *Tahsil* and where it was held that a gift by a childless proprietor of his entire estate in favour of two of his grandnephews in the presence of

(1) 109 P. R. 1882.

(2) 96 P. R. 1907.

other nephews and grandnephews was valid by custom. There is also a well-considered judgment of *Rai Buta Mal*, Divisional Judge of Jhelum, dated the 25th of March 1897 (Exhibit D-3), in which a gift in favour of a collateral of the 7th degree was upheld in spite of objection by a collateral related in the 6th degree.

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As against these decisions, counsel for the appellant relies on *Fateh v. Alayar* (1). But that case is not really in point as the only question decided was that the gift by a *Kahut* of *Tahsil Chakwal* of the whole of his ancestral property to his sister's son was invalid as against the collaterals of the third degree. It is no doubt true that the donee in that case was also related to the donor on the male side in the 4th degree, but an examination of the judgment shows that the decision proceeded solely on the ground, that a gift to a sister's son was invalid, and the fact of the donee's agnatic relationship to the donor was not taken into consideration at all. The previous rulings of the Chief Court bearing on the point were not discussed and there is nothing to indicate that the learned Judges applied their minds to this aspect of the case. Mr. Shamair Chand attacked the correctness of this ruling in so far as it held that the gift to a sister's son is invalid by custom in the presence of the collaterals, and in support of his contention he cited earlier rulings of the Chief Court in which a contrary view had been taken. It is, however, unnecessary to go into that question for the purposes of this case.

In my opinion the weight of authority is decidedly in favour of the view taken by the Courts

(1) (1925) I. L. R. 6 Lah. 352.

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below, that a sonless *Mair* is entitled to make a gift of his ancestral property to one of his collaterals in the presence of other collaterals equally or more nearly related. This view receives support from the fact that the power of disposition over ancestral property enjoyed by sonless proprietors of the *Mair* and other Muhammadan agricultural tribes in the Jhelum District is very extensive.

The appeal fails and I would dismiss it with costs.

HARRISON J.

HARRISON J.—I agree.

A. N. C.

*Appeal dismissed.*

## APPELLATE CIVIL.

*Before Broadway and Johnstone JJ.*

FAZLA AND ANOTHER (PLAINTIFFS) Appellants

*versus*

ZAINULAB DIN (DEFENDANT) Respondent.

Civil Appeal No. 848 of 1927.

*Civil Procedure Code, Act V of 1908, section 92—Suit for removal of majawar from property held to be waqf—misconduct—assertion of exclusive title—whether amounts to.*

*Held*, that the denial by a *mahant* of the *waqf* character of property and his setting up an adverse claim to it are sufficient to render him an unfit person to continue in office.

The *majawar* of the *khankah* of a deceased saint (held to be *waqf*), on being found to have made such a denial in his pleadings was held accordingly to have been rightly removed from office.

*Harji Mal v. Devi Ditta Mal* (1), *Ajudhia Das v. Loku Malik* (2), and Mulla's Principles of Mahomedan Law (9th Edition), paragraph 472, relied upon.

*Second appeal from the decree of Rai Bahadur Lala Ranai Lal, District Judge, Gujranwala, dated*