APPELLATE CIVIL.

Before Tek Chand J.

ISMAIL AND OTHERS (PLAINTIFFS) Appellants

versus

MST. AMIRAN AND OTHERS (DEFENDANTS) Respondents.

1932

Oct. 20.

Civil Appeal No. 253 of 1932.

Custom — Alienation — Ancestral property — Will — in favour of daughters—Kahuts—Mauza *Janga, Tahsil Chakwal, Jhelum District*—Riwaj-i-am.

Held, that a sonless *Kahut* of Chakwal, in the Jhelum District, has power to bequeath his ancestral land to his daughters to the exclusion of near collaterals.

Muhammad Khan v. *Mst. Kesran* (1), and *Hadayat* v. *Alaf Din* (2), followed. Other cases referred to and discussed.

Talbot's *Customary Law of the Jhelum District*, Answer to Question 78, not accepted.

Second appeal from the decree of K. B. Sheikh *Din Muhammad, District Judge, Jhelum, dated the 12th November 1931, affirming that of* Sheikh *Muhammad Zafar, Subordinate Judge, 3rd Class, Chakwal, dated the 9th July 1931, dismissing the plaintiffs' suit.*

J. G. SETHI and M. L. SETHI, for Appellants.

DEV RAJ SAWHNEY, for Respondents.

TEK CHAND J.—One Amir Khan, a sonless *Kahut* of *Mauza* Janga, *Tehsil* Chakwal in the Jhelum District, executed a will bequeathing his ancestral land to his daughters, defendants Nos. 1 to 3. On his death the daughters took possession of the land in accordance with the will and mutation was duly effected in their names. The plaintiffs, who are the nephews of Amir Khan, deceased, have brought this suit for possession, TEK CHAND J.

(1) (1921) I. L. R. 2 Lah. 170. (2) (1929) 119 I. C. 758.

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alleging that Amir Khan had no power to bequeath his ancestral land to his daughters in the presence of near agnates, like the plaintiffs. The suit has been dismissed by both the Courts below on the ground that it had been established that under custom prevailing among the *Kahuts* of *Tehsil* Chakwal, a sonless proprietor is competent to will away his ancestral property to his daughters. The learned District Judge has, however, granted a certificate under section 41 (3) of the Punjab Courts Act to enable the plaintiffs to prefer a second appeal to this Court, and both counsel have addressed me at length on the evidence bearing on the point and the previous judicial decisions of the Chief Court and this Court.

The Answer to Question 78 of Talbot's Customary Law of the Jhelum District is no doubt against the power to make such a will, and there is an initial presumption in favour of its correctness. This entry was, however, considered at length by a Division Bench of this Court (Leslie Jones and Wilberforce JJ.) in *Muhammad Khan* v. *Mst. Kesran* (1), where it was definitely found that among *Kahuts* of Chakwal a sonless proprietor had the power to make a free disposition of his ancestral land to his daughter in the presence of his brothers or other collaterals. Before me Mr. Madan Lal Sethi contended that *Muhammad Khan* v. *Mst. Kesran* (1) was a case of a gift and not a will as described in the headnote, and in support of this contention he referred me to certain observations of Mr. Jaswant Rai, District Judge, in two cases decided by him on 22nd November, 1929 and 1st January 1930, respectively, copies of which are on the record (Exhibit P. 3 and Exhibit P. 4). In order to verify

(1) (1921) I. L. R. 2 Lah. 170.

this fact I sent for the paper-book of the case, reported as *Muhammad Khan* v. *Mst. Kesran* (1) and found that this assumption was erroneous. It is clear that the alienation, which was in dispute in that case was a will made by a sonless *Kahut* of *Mauza* Adharwal in the Chakwal *Tehsil* in favour of his daughters. It also appears that in that case a very full enquiry on the question of custom was made and the matter discussed at great length by the District Judge (Mr. Prenter) and the Judges of the High Court. The case has, therefore, a very important bearing on the point before us.

The question again came up for consideration in a recent case reported as *Hadayat* v. *Alaf Din* (2) and Jai Lal J., concurring with *Muhammad Khan* v. *Mst. Kesran* (1), refused to follow the *Riwaj-i-am* and upheld the power of a sonless *Kahut* of Jhelum District to will away his ancestral property to near relations between whom and the alienor there existed a special tie.

The respondents have produced a copy of the judgment of *Diwan* Sita Ram, Senior Subordinate Judge, Jhelum, dated the 5th of March, 1927 (Exhibit D. 2) in which a will of ancestral property in favour of the daughter was upheld as against near collaterals. Similar instances of the same custom are found in Exhibits D. 3 and D. 4 which are decisions of *Sheikh* Mohammad Hussain, Subordinate Judge, and Mr. Martineau, Divisional Judge, Rawalpindi, dated the 15th of December, 1928 and 11th of October, 1913, respectively.

It may also be noted that the *Riwaj-i-am* is not in favour of *gifts* of ancestral property by *Mussalman*

(1) (1921) I. L. R. 2 Lah. 170. (2) (1929) 119 I. C. 758; A.I.R. (Lah.) 639.

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sonless proprietors in favour of their daughters to the exclusion of near collaterals. But there are numerous judicial decisions in which a custom, upholding such gifts has been found to exist. See *Fazal* v. *Mst. Bhagbhari* (1), *Sher Jang* v. *Ghulam Mohi-ud-Din* (2), *Hassan* v. *Jahana* (3) and *Hayat* v. *Mst. Gulan* (4).

For the appellants, Mr. Madan Lal has strongly relied on *Mussammat Rakhi* v. *Baza* (5) and a Single Bench decision of Coldstream J. in *Mirza Khan* v. *Khuda Dad* (6). The former, however, is a case among *Awans* and the learned Judges, who decided that case, took particular care to restrict the effect of their judgment to *Awans* only. Judicial decisions relating to *Awans* are not uniform, and as parties to this litigation do not belong to that tribe I do not think it necessary to discuss them in detail. *Mirza Khan* v. *Khuda Dad* (6) is also distinguishable on the ground that the will in that case was in favour of a second cousin and not the daughter, and *Muhammad Khan* v. *Mst. Kesran* (7) was not referred to. If the case is, therefore, to be confined to a will in favour of a second cousin it is not strictly in point. If, however, it is to be taken as a judicial pronouncement against the power of a sonless *Kahut* to gift ancestral property to his daughter, I must respectfully decline to follow it in preference to the well-considered decision in *Muhammad Khan* v. *Mst. Kesran* (7).

The appellants' counsel further referred me to *Ghulam Hussain* v. *Nur* (8), but that was a case in which a *Kahut* proprietor had gifted ancestral property to his daughters in the presence of his own sons.

(1) 93 P. R. 1885.
(2) 22 P. R. 1904.
(3) 71 P. R. 1904.
(4) 87 P. R. 1918.
(5) (1924) I. L. R. 5 Lah. 34.
(6) 1929 A. I. R. (Lah.) 146.
(7) (1921) I. L. R. 2 Lah. 170.
(8) 1925 A. I. R. (Lah.) 71.

Obviously that case has no bearing on the point before me.

The whole question of the power of a sonless *Mussalman* of Jhelum District to bequeath ancestral property and the effect of the entry in Talbot's *Riwaj-i-am* has been recently considered by Addison J. in *Mussammat Nadran* v. *Muhammad Hussain* (1) who has held that notwithstanding the entries in the *Riwaj-i-am* the power to bequeath exists as much as the power to gift *inter vivos*.

The oral evidence on the record is inconclusive and not based on any well-ascertained instances. The plaintiffs' own witness Lal Khan (P. W. 1), however, admitted that "custom of wills prevailed at one time," but he stated that it had been "abrogated about five years ago." It is hardly necessary to say that the custom, if it existed formerly, could not be validly abrogated merely because the witness was not aware of its exercise for a few years.

After careful consideration of the evidence on the record and the arguments adressed to me, I see no reason to dissent from the conclusions of the learned Judges of the Courts below and dismiss this appeal with costs.

N. F. E.

Appeal dismissed.

(1) (1931) 132 I. C. 209.