

## APPELLATE CIVIL.

*Before Young C. J. and Rangī Lal J.*

ALI AND OTHERS (PLAINTIFFS) Appellants

*versus*

ZIADA AND OTHERS (DEFENDANTS) Respondents.

**Civil Appeal No. 2220 of 1930.**

*Custom — Alienation — Ancestral property — Vains — Shahpur District — whether have unrestricted powers of alienation—Rivaj-i-am.*

*Held*, that the Vains of the Shahpur District, who are included among the miscellaneous Mussalman tribes of that district, have unrestricted powers of alienation over their ancestral immovable property, if they have no son or son's son.

*Bahadur v. Qadu* (1), *Sher Muhammad Khan v. Dost Muhammad Khan* (2), Customary Law of the Shahpur District, Answer to Question No. 12, and *Wajib-ul-arz*, relied upon.

*First Appeal from the decree of Sheikh Ata Ilahi, Subordinate Judge, 1st Class, Shahpur at Sarqodha, dated 26th May, 1930, dismissing the plaintiffs' suit.*

MEHR CHAND SUD, for Appellants.

R. C. MANCHANDA and S. C. MANCHANDA, for Respondents.

The judgment of the Court was delivered by—

YOUNG C. J.—This appeal arises out of a suit to challenge a mortgage on the usual ground of want of consideration and necessity. The plaintiffs are the mortgagor's collaterals in the third degree and they belong to the Vains tribe of the Shahpur District. The trial Court held that the land in suit was ancestral *qua* the plaintiffs but that the powers of alienation of members of the Vains tribe were unrestricted. On these findings the suit was dismissed. The plaintiffs have appealed.

(1) 1921 A. I. R. (Lah.) 210.

(2) 1925 A. I. R. (Lah.) 231.

The learned counsel appearing on their behalf urged that before the mortgage the mortgagor had gifted the land in suit to one Walli and was, therefore, not competent to effect the mortgage. This contention has, in our opinion, no force, because it appears from the statement of Walli himself that the gift was incomplete. He stated that possession was never given to him and that mutation was not sanctioned in his favour. He also added that the donor made an application repudiating the gift. It is also clear from Walli's statement that he was consenting to the mortgage in question. The plaintiffs came into Court on the allegation that they were in possession of the land at the time of the suit. It is, therefore, not open to counsel to contend that possession under the gift ever passed to Walli.

The next point raised by counsel is that it is not established that the mortgagor had unrestricted powers of alienation. The Customary Law of the Shahpur District divides the land-owning tribes of the district into two classes, *firstly*, the main tribes and, *secondly*, the miscellaneous Mussalman tribes. The main tribes include the *Awans*, *Gondals*, *Ranjhas* and *Khokhars*. The *Vains* tribe would, therefore, be included among the miscellaneous Mussalman tribes. According to the answer to Question 12 among *Awans* and miscellaneous Mussalman tribes, "a father, having sons or son's sons, cannot make a gift of immovable property to a person not related to him without the consent of the sons. A proprietor having no son or son's son, can, without the consent of agnate heirs, make a gift of immovable property, ancestral or acquired, divided or not, to a person not related to him." The power to make a gift certainly implies a power to make a mortgage. In the present case, the mortgagor had no

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son or son's son, and the mortgage is to a person not nearly related to him. It is clear that according to the *Riwaj-i-am*, the mortgagor had full powers to effect the mortgage. Counsel has, however, urged that there is nothing to show that any members of the *Vains* tribe were consulted when this *Riwaj-i-am* was prepared. We, however, find that the *Wajib-ul-arz* of the village in which the parties live, clearly shows that all the proprietors have unrestricted powers of alienation. Moreover, the Special *Kanungo* deposed that in this village sales and mortgages had been continuously effected. The plaintiffs were not able to cite a single instance in which an alienation was successfully contested. In the case reported as *Bahadur v. Qadu* (1), it was held that *Harls* of the Shahpur District had unrestricted powers of alienation. *Harls* did not belong to any of the main tribes and apparently fell under the category of miscellaneous Mussalman tribes. Similarly in *Sher Muhammad Khan v. Dost Muhammad Khan* (2), *Tiwanas*, who are among the miscellaneous Mussalman tribes, were held to have unrestricted powers of alienation. The plaintiffs, in this case, came into Court on the allegation that the mortgagor's powers of alienation were restricted, but they made no attempt to prove this allegation.

We are not satisfied that the decision of the Lower Court as to the property in suit being ancestral *qua* the plaintiffs, is correct, but it is unnecessary to go into that matter in view of our finding that the mortgagor's powers of alienation were unrestricted.

The appeal is dismissed with costs.

P. S.

*Appeal dismissed.*