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therefore, no jurisdiction to entertain the suit and on this ground the whole proceedings taken by him, including the proceedings on appeal, are vitiated. We, therefore, uphold the objection raised by the learned counsel for the appellants, set aside the decrees of the Courts below and dismiss the plaintiffs' suit with costs throughout.

A. N. C.

Appeal accepted.

APPELLATE CIVIL.

Before Tek Chand and Bhide JJ.

ABDUL RAFI KHAN (PLAINTIFF) Appellant

versus

LAKHSHMI CHAND (DECEASED) AND OTHERS (DEFENDANTS) Respondents.

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July 9.

Civil Appeal No. 403 of 1926.

Custom — Alienation — Ancestral property — Rajputs *of* Tahsil *Gohana, District Rohtak — Full power of alienation — except for immoral purposes* — Riwaj-i-am.

Held, that by custom an alienation of ancestral property by a male proprietor of the Gohana *Tahsil* of the Rohtak District cannot be challenged unless it is made for immoral purposes.

Behari v. *Bhola* (1) and other cases, referred to.

Riwaj-i-ams, discussed.

First Appeal from the decree of Lala *Munshi Ram, Senior Subordinate Judge, Rohtak, dated 23rd November, 1925, dismissing the plaintiff's suit.*

M. L. PURI and M. C. SUD, for Appellant.

J. N. AGGARWAL, SHAMAIR CHAND, J. L. KAPUR and QABUL CHAND, for Respondent No. 1.

NAND LAL, for PRABHU DIAL, Respondent.

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(1) (1933) I. L. R. 14 Lah. 600.

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BHIDE J.—The plaintiff Abdul Rafi Khan, who is a minor son of Shamshad Ali Khan, a *Rajput* landowner of Gohana in the Rohtak District, brought this suit for a declaration that two sales of ancestral land effected by Shamshad Ali Khan by sale-deeds, dated the 29th April, 1915, and 21st July, 1916, for Rs.26,000 and Rs.28,000 respectively, in favour of *Pandit* Lakshmi Chand, defendant No. 1, should not affect his reversionary rights. It was alleged that the parties are governed by custom and that the sales being effected without any valid necessity are not binding on the plaintiff. Defendant No. 1 had transferred portions of the land sold to him to other persons and these were all impleaded as defendants.

The vendees denied that the plaintiff was a son of the vendor Shamshad Ali Khan and further raised the pleas that the suit was barred by limitation, that according to the custom prevailing in the Gohana *Tahsil* of the Rohtak District the vendor could alienate ancestral land even without necessity, provided the alienation was not effected for immoral purposes, and finally that the alienations were, in fact, made for valid necessity.

The trial Court found that the plaintiff was the son of the vendor and the suit was within time, but held that the parties were governed by custom according to which the vendor had full power to alienate the land, except for immoral purposes, and lastly that the sales were effected for valid necessity. On these findings the suit was dismissed and the plaintiff has appealed.

A preliminary objection was raised that the suit had abated in part as the vendee *Pandit* Lakhshmi Chand and two of the subsequent transferees, *viz.*, Chatar and Ramji Lal, had died, and no applications

had been made within time to bring their legal representatives on the record. As regards *Pandit* Lakhshmi Chand, it appears that he died at Delhi on 9th February, 1934, while the application to bring his legal representative on the record was made on the 19th May, 1934. The application was thus admittedly out of time by 9 days; but it was explained on behalf of the appellant that he lives usually in Hardwa Ganj in the Aligarh District, that his next friend is a *pardanashin* lady and that *Pandit* Lakhshmi Chand having died in Delhi, she did not come to know of the death in time. A similar explanation was offered in respect of the delay in making applications to bring on the record the legal representatives of the other two deceased respondents. On behalf of the respondents it was alleged that these two respondents died about 3 or 4 years ago and it was, therefore, urged that such abnormal delay should not be condoned. But there is nothing on the record to show that these respondents died 3 or 4 years ago. In view of all the circumstances, we consider that sufficient cause has been shown for the delay in making the applications for impleading the legal representatives of the deceased respondents and we accordingly set aside the abatement of the appeal in respect of the three respondents.

On the merits of the appeal, the learned counsel for the appellant contended that the finding of the learned Senior Subordinate Judge, that an alienation made by a *Rajput* proprietor of the Gohana *Tahsil* of the Rohtak District could not be challenged unless it was made for immoral purposes, was incorrect; that the custom governing the *Rajputs* was the same as the general custom in the province according to which alienations of this kind are not binding unless made

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for valid necessity, and lastly that no necessity for the alienations in question had been established.

As regards the point of custom, the oral evidence is of little value and was not relied on by either party. The learned counsel for the appellant relied mainly on certain judicial decisions and the *Riwaj-i-am* of the Gohana *Tahsil* which, he urged, had been misinterpreted by the trial Court. The judicial decisions relied on by him were Exhibits P/8, P/11, P/13, P/9 and P/10. The first three are of little value. Exhibit P/8 is a judgment by Agha Mohammad Sultan Mirza, Munsiff, 1st class, which merely follows an earlier judgment of his (Exhibit P/9) in which he has dealt with the question at some length. He also relies on a judgment of Lieutenant-Colonel Knollys, dated 29th March, 1920, and one of Mr. Anderson. The former appears to have been set aside by this Court in *Giani* v. *Tek Chand* (1), while the latter is not on the record. In Exhibits P/11 and P/13, the point of custom was either assumed or not argued. In Exhibit P.9, Agha Mohammad Sultan Mirza, has discussed the question of custom at some length. In *Ramji Lal* v. *Tej Ram* (2), a Full Bench decision of the Punjab Chief Court, it was held that the rule laid down in *Gujar* v. *Sham Dass* (3), with respect to the central districts of the Punjab, that there was a presumption that ancestral immovable property could not be alienated by a member of a village community without necessity, was applicable to the whole of this province. Starting with this presumption, the learned Munsiff went on to point out that most of the decisions in which it was held that

(1) (1923) I. L. R. 4 Lah. 111. (2) 73 P. R. 1895 (F. B.).
(3) 107 P. R. 1887.

the proprietors of land in the Rohtak District had unrestricted powers of alienation were based on an enquiry made under the orders of Mr. Clifford, Divisional Judge, in *Har Dayal* v. *Mam Raj* (Civil Appeal No. 235 of 1896). He criticised the enquiry and expressed the opinion that it was of a superficial character and insufficient to displace the presumption as regards the existence of restrictions on the power of alienating ancestral immovable property as laid down in *Ramji Lal* v. *Tej Ram* (1). The last decision relied on (Exhibit P/10) was by the District Judge, Karnal, in which he referred to the entries in the *Riwaj-i-am* of the Gohana *Tahsil* and held that they did not show that a male proprietor could alienate land without necessity. He distinguished the rulings reported as *Giani* v. *Tek Chand* (2), *Uggar Sain* v. *Telu* (3) and *Kala* v. *Mam Chand* (4) on the ground that these relate to the Rohtak *Tahsil*. I shall presently deal with the *Riwaj-i-am* of the Gohana *Tahsil*, the terms of which were not discussed by the learned District Judge in this ruling, and which in my opinion was not correctly interpreted by him. The learned counsel for the appellant further relied on two reported rulings *Budal* v. *Kirpa Ram* (5) and *Ghansham* v. *Balak Ram* (6). The latter was a case of gift by a *Brahman* in Jhajjar *Tahsil* and is not in point. The former (which appears from a reference to the record to be a case from Gohana *Tahsil*) is, no doubt, in appellant's favour; but this *ruling* does not discuss any previous decisions or the *Riwaj-i-am*. It makes no reference also to the enquiry made under the orders of Mr. Clifford in Civil Appeal No. 235 of

(1) 73 P. R. 1895 (F. B.).
(2) (1923) I. L. R. 4 Lah. 111.
(3) (1923) I. L. R. 4 Lah. 113.
(4) (1923) I. L. R. 4 Lah. 282.
(5) 76 P. R. 1914.
(6) (1916) 36 I. C. 215

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1896 and it has not been followed in subsequent rulings as pointed out in *Kala* v. *Mam Chand* (1).

The respondents relied on a certain number of judicial decisions, copies of which have been marked as Exhibits D/50 to D/56 and D/62. Most of these judgments are based on the inquiry made under the orders of Mr. Clifford in Civil Appeal No. 235 of 1896, referred to above,—the last one containing a useful résumé of the more important earlier decisions. It is true that some of these judgments do not relate to the Gohana *Tahsil*, but the inquiry ordered by Mr. Clifford in the aforesaid appeal covered the whole of the Rohtak District and was not confined to any particular *Tahsil*. As a result of Mr. Clifford's decision in that appeal, which was subsequently followed in a large number of cases, a note was appended to the answer to question 102, in the compilation of the customary law of the district by Mr. Joseph in the year 1911, to the effect that a sonless proprietor in the Rohtak District can sell or mortgage his land without necessity and such alienations cannot be impugned unless made for immoral purposes. This view has now been followed in several reported decisions *Sheoji* v. *Fajar Ali Khan* (2) and *Telu* v. *Chuni* (3), and was recently endorsed in a Division Bench judgment relating to the Gohana *Tahsil* reported as *Behari* v. *Bhola* (4). The view expressed by the learned Munsiff in Exhibit P/9 that the inquiry made under the orders of Mr. Clifford was a superficial one cannot be supported. In *Telu* v. *Chuni* (3), it was pointed out by Scott Smith J. that the inquiry was a very exhaustive one. It appears from the record of that inquiry that all the available

(1) (1923) I. L. R. 4 Lah. 282.
(2) 230 P. L. R. 1913.
(3) 231 P. L. R. 1913.
(4) (1933) I. L. R. 14 Lah. 600.

mutations regarding sales and mortgages were examined and every effort was made to ascertain the custom in the district as far as practicable. It is remarkable that no instances of any attempt to challenge alienations on the ground of want of necessity prior to 1893 were forthcoming (*vide* Exhibit D/58).

The decisions on which the learned counsel for the appellant has sought to rely appear to proceed mainly on the ' presumption ' as to the existence of restrictions on the power of alienation of ancestral immovable property by a member of a village community. This rule was originally laid down in *Gujar* v. *Sham Das* (1), with reference to the central districts of the Punjab, but was extended to the whole of the Province in *Ramji Lal* v. *Tej Ram* (2). But the presumption appears to have been based in the latter ruling merely on an inference drawn from the origin and character of a village community and not on any positive evidence as to the existence of such restrictions, outside the central districts of the Punjab. It was pointed out by Chatterjee J. in *Hassan* v. *Jahana* (3) that the rule laid down in *Ramji Lal* v. *Tej Ram* (2) could not be accepted without some limitation and that the words ' creed, tribe and locality apart ' should be read into it. According to the Punjab Laws Act, the initial presumption in the case of Hindus and Muhammadans in this Province is that they are governed by Hindu and Muhammadan Law, and if a custom modifying these laws is alleged it has to be proved. As pointed out by Mr. Justice Robertson in *Daya Ram* v. *Sohel Singh* (4)—a view which has been endorsed by their Lordships of the

(1) 107 P. R. 1887 (F. B.).
(2) 73 P. R. 1895 (F. B.).
(3) 71 P. R. R. 1904.
(4) 110 P. R. 1906 (F. B.).

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Privy Council in *Abdul Hussein Khan* v. *Sona Dero* (1)—" the legislature did not show itself enamoured of custom rather than law, nor does it show any tendency to extend the ' principles ' of custom to any matter to which a rule of custom is not clearly proved to apply. It is not the spirit of Customary Law, nor any theory of custom or deductions from other customs which is to be the rule of decision but only any custom applicable to the parties concerned." It has been pointed out in later rulings of the Punjab Chief Court, as well as of this Court, that custom is not a matter of theory but of fact, that it is not always logical and cannot be deduced by inferences [cf. *Pala Singh* v. *Mt. Lachhmi* (2), *Amin Chand* v. *Bujha* (3) and *Gurbhaj* v. *Lachhman* (4)]. In view of these authorities, I must say with all deference that the rule as to presumption laid down in *Ramji Lal* v. *Tej Ram* (5), is open to question, and this was sufficiently demonstrated in the case of the Rohtak District by the inquiry made under the order of Mr. Clifford in Civil Appeal No. 235 of 1896.

Coming now to the *Riwaj-i-ams*, it appears that in Tupper's Customary Law compiled in 1879 it was stated that a proprietor in the Rohtak District had unrestricted power of alienation, and the reversioners could only exercise their right of pre-emption in the event of a sale (*vide* answers to questions 25 and 27 at page 176, Vol. II). It appears, however, that the *Riwaj-i-ams* for the different *Tahsils* of the Rohtak District varied, and the wide proposition as stated above does not seem to be sustainable at least in the case of the Gohana *Tahsil*. The relevant question

(1) (1918) I.L.R. 45 Cal. 450 (P.C.). (3) 107 P. R. 1915.
(2) 105 P. R. 1915. (4) (1925) I.L.R. 6 Lah. 87, 90, 91.
(5) 73 P. R. 1895 (F. B.).

and answer with respect of sales of ancestral land in the *Riwaj-i-am* of this *Tahsil* prepared in 1879 are in the following terms (*vide* Exhibit P/4).

Question.	*Answer.*
Under what circumstances can a proprietor sell his immovable property ?	Every proprietor is competent to sell or mortgage his immovable property, whether ancestral or self-acquired, for payment of revenue and fine imposed by Court and for defrayal of marriage, funeral and household expenses, and expenses of a pilgrimage to Mecca.
Are there any circumstances under which he cannot do so ?	He is not competent to effect a sale or mortgage to follow immoral pursuits.

The phraseology used is not perhaps happy but it seems clear from the answer that the only circumstances in which a proprietor *cannot* sell his property are when the sale is intended for immoral purposes. The first portion of the answer mentions in a general way what are considered to be necessities, but apparently without being exhaustive. The learned counsel for the appellant urged that the concluding portion of the answer was redundant, but there seems to be no justification for holding it to be so. It was a definite answer in reply to the question as to the circumstances under which a proprietor could *not* alienate his immovable property, and there is no justification for ignoring it. Reading the answer as a whole, it seems to me that a proprietor in the Gohana *Tahsil* can alienate immovable property freely except for immoral purposes. This rule is in consonance with Hindu Law, which, as is well-known, prevails

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to a considerable extent in the Rohtak and other districts forming part of the old Delhi territory. The correctness of the custom as stated above was affirmed by the inquiry made by Mr. Clifford and has been accepted in many subsequent decisions. It was also accepted recently in *Behari* v. *Bhola* (1).

I accordingly hold that the learned Senior Subordinate Judge was right in his conclusion that the plaintiff had no *locus standi* to challenge the sales in dispute unless they were proved to have been made for immoral purposes. The plaintiff has produced a certain amount of evidence to show that the vendor was a man of immoral character, but it is by no means convincing. The vendor was less than 20 years of age at the time of the sales and it can hardly be believed that he was addicted at that age to prostitution, drink, and other vices as stated by the witnesses. Besides, most of the evidence relates, as pointed out by the learned Senior Subordinate Judge, to a later period. There is nothing to show that the consideration for the sale-deed was intended for immoral purposes, and the sales cannot therefore be held to be invalid on this ground, according to the custom governing the parties.

In view of the above finding, it is not necessary to go into the question of necessity for the sales; but I may point out briefly that the sales appear to have been necessitated by peculiar circumstances and may reasonably be looked upon as an act of good management, even according to the custom, generally prevailing in the province. It appears that the relations between the family of the plaintiff and their tenants in the village, where the land was situated, had become very strained and three members of the family

(1) (1933) I. L. R. 14 Lah. 600.

including the father of the vendor had been recently murdered. Security proceedings were taken under section 107, Criminal Procedure Code, against the tenants but unfortunately these proved infructuous. As a result, the members of the family, finding their position in the village precarious sold their lands one by one as they found it difficult to manage them or recover rent (*vide* Exhibits D/1 to D/7 and D/10). It is therefore not surprising to find that the vendor Shamshad Ali, who was a youngster aged less than 20, had lost his parents and was living with his maternal relations in the United Provinces, found it necessary to adopt the same course. It may be noted that the sales were made with the sanction of the Deputy Commissioner under the Punjab Alienation of Land Act. The circumstances necessitating the sale were mentioned in Shamshad Ali's application to the Deputy Commissioner, dated the 23rd April, 1915 (*vide* Exhibit D/13). It was also stated in the sale-deeds that the vendor wanted to buy other land. Further it is in evidence that he did actually buy some land in the United Provinces for Rs.11,000 and also purchased mortgagee-rights in other land for Rs.24,682, shortly after the sales (*vide* Exhibits D/63, D/66). The land was bought in the name of *K*. Mohammad Mahfuz Ali Khan, father-in-law of the vendor, and he gifted it in favour of the vendor's wife; but there is ample evidence on the record to show, as pointed out by the learned Senior Subordinate Judge, that this was merely a device to defeat the claims of possible pre-emptors. Further, there is evidence on the record to show that Shamshad Ali built a house for himself at a cost of about Rs.8,000 or Rs. 9,000 in 1917-18. It is well-established that a vendee is not expected to see to the application of the money by the

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vendor to the purposes mentioned in the sale-deed, but the facts stated above are sufficient to show that the vendee acted in good faith and that the money was not wasted on any immoral pursuits.

The consideration for the two sales as stated in the deeds was Rs.26,000 and Rs.28,000. The learned Senior Subordinate Judge has held that only Rs.24,000 and Rs.23,000 out of the consideration were satisfactorily proved to have been paid and the rest was probably fictitious. It was urged that the vendee cannot be held to have acted in good faith unless it was shown that the above sums represented the proper market value of the land sold. But the evidence on the record shows that Fayyaz Ali Khan, who was a co-sharer to the extent of one-half share in the same *khata*, sold his share for Rs.48,000 (*vide* Exhibit D/3). Considering this fact, there is no adequate ground to hold that the land was sold below its market price.

In view of all the facts stated above, I feel no hesitation in holding that the sales in question were fully justified in the circumstances of the case and were an act of good management. In *Jai Singh* v. *Darbara Singh* (1), a sale of ancestral land by a person governed by ordinary custom was upheld as an act of good management, when the land was bringing him little income and he found it necessary to migrate to China to make a living. The same principle would apply to the present case.

On the above findings, this appeal must fail and I would accordingly dismiss it with costs.

TEK CHAND J.

TEK CHAND J.—I agree.

A. N. C.

Appeal dismissed.

(1) (1925) I. L. R. 6 Lah. 137.