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As pointed out, however, in *Mussammat Nadran* v. *Muhammad Hussain* (1), the power of testation is co-extensive with the power of gift and in fact in Mr. Talbot's Customary Law no distinction is drawn between the two powers by the various tribes.

In the circumstances we hold that it has been established that Karam had power to make such a will and we dismiss this appeal with costs.

A. K. C.

Appeal dismissed.

APPELLATE CIVIL.

Before Addison and Din Mohammad JJ.

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Jan. 31.

UMRA AND OTHERS (PLAINTIFFS) Appellants,

versus

FATEH-UD-DIN AND OTHERS (DEFENDANTS) Respondents

Civil Regular Second Appeal No. 741 of 1937.

Custom — Alienation — Gift — Ancestral land — Arains *of Jullundur Tahsil — sonless proprietor — whether competent to make a gift of ancestral land to relations.*

Held, that by custom, among the *Arains* of Jullundur Tahsil a sonless proprietor is competent to make a gift of his ancestral land in favour of his relations.

Abdulla v. *Khair Din* (2) and *Barkat Ali* v. *Jhandu* (3), relied upon.

Ilahia v. *Qasim* (4), distinguished.

Second appeal from the decree of Sardar *Teja Singh, District Judge, Jullundur, dated 2nd April, 1937, affirming that of* Lala *Basant Lal, Subordinate Judge, 4th Class, Jullundur, dated 10th February, 1936, dismissing the plaintiff's suit.*

(1) (1931) 132 I. C. 209.
(2) (1920) 57 I. C. 248.
(3) 127 P. R. 1907.
(4) 24 P. R. 1905.

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L. M. DATTA, for Appellants.

ACHHRU RAM, for Respondents.

The Judgment of the Court was delivered by—

ADDISON J.—The collaterals of Imam Din instituted two suits for a declaration that two gifts of land made by Imam Din in favour of his sister's son and a collateral respectively would not affect their reversionary rights upon his death. The trial Judge dismissed the suits and the District Judge dismissed the appeals. He has, however, granted a certificate under section 41 of the Punjab Courts Act for second appeals to this Court on the question of custom involved.

This judgment will dispose of both appeals which are Nos.741 and 785 of 1937. The answer to question 84 (A) of the Customary Law of the Jullundur District compiled in 1914 is to the effect that the *Arains* and *Awans* of the Jullundur Tehsil say that in the absence of male issue they can alienate by gift the whole or part of their property in favour of their relations without the consent of their legal heirs. This is definite enough but the answer to question 90 (A) throws some doubt upon the question. That question was as to whether a father could make a gift of his property to his daughter, his daughter's son, his sister or her sons or his son-in-law, and the answer given is that all tribes in the Jullundur Tehsil admitted that a father could gift his self-acquired property to his daughter, to his daughter's sons, to his sister or her sons, or to his son-in-law even in the presence of sons or near kindred but could not make a gift of his ancestral property without the consent of sons or near kindred. The *Awans* and *Arains* of Jullundur Tehsil are not specially noted as objecting to this reply, though the answer given to question 90 (A) seems to be

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in part contradiction of the answer given to question 84 (A) so far as they are concerned. It may be noted here that the parties are *Arains* of Jullundur Tehsil.

In *Ilahia* v. *Qasim* (1) it was held that the defendants had failed to prove that by custom among *Arains* of the Jullundur *tehsil* a sonless proprietor was competent to gift his ancestral property to his sister's son in the presence of his male agnates. That decision appears to be in favour of the appellants but was given before the present Customary Law was compiled.

In *Barkat Ali* v. *Jhandu* (2) it was held that by custom among *Awans* of the Jullundur District a childless proprietor was not competent to make a free and absolute gift of his ancestral land to strangers and non-relations in the presence of his male agnates.

In *Abdulla* v. *Khair Din* (3), another Division Bench held on the Customary Law that among *Awans* of the Jullundur *tahsil* a gift by a sonless proprietor of ancestral land partly to his sister's son and partly to his mother's sister's son was valid. They relied upon *Barkat Ali* v. *Jhandu* (2) as stating that though *Awan* proprietors had by custom undoubtedly large powers of disposition, these powers did not extend to gifts to complete strangers. The learned Judges, who decided that case, had apparently in view the terms of the Customary Law. The Judges, who decided *Abdulla* v. *Khair Din* (3), therefore, held that as given in the answer to question 84 (A), *Awans* of the Jullundur *tahsil* in the absence of male issue could transfer the whole or part of their property in favour of their relations without the consent of their legal heirs. The

(1) 24 P. R. 1905. (2) 127 P. R. 1907.
(3) (1920) 57 I. C. 248.

APPELLATE CIVIL.

Before Addison and Din Mohammad JJ.

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Feb. 1.

MUNICIPAL COMMITTEE, BATALA (DEFENDANT) Appellant,

versus

WALI MOHAMMAD AND OTHERS (PLAINTIFFS) Respondents.

Civil Regular Second Appeal No. 828 of 1937.

Indian Evidence Act (I of 1872), S. 13 — Documents by which a party and his predecessors-in-interest had previously asserted a right to deal with the property in suit — Whether admissible in evidence — Value of such evidence.

Held, that the documents purporting to be instances in which plaintiff and his predecessors-in-interest had asserted a right to deal with the property in suit, are admissible in evidence.

Ihsan Ilahi v. *Ata Ullah* (1), approved.

Other case law discussed.

Held also, that such evidence is usually of little value and a Court should not place exaggerated importance on this kind of evidence which is little more than an admission in favour of the person making it and is in this country often manufactured for the purpose of creating evidence for use later on in a claim to ownership.

Second appeal from the decree of Lala *Purshotam Lal, Senior Subordinate Judge, Gurdaspur, dated 19th March, 1937, affirming that of* Sardar *Gurdyal Singh, Subordinate Judge, 1st Class, Batala, dated 26th October, 1936, awarding the plaintiff possession of the site in dispute.*

HEM RAJ MAHAJAN, for Appellant.

GHULAM-MOHI-UD-DIN, for Respondents.

(1) 1937 A. I. R. (Lah.) 688.

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The Judgment of the Court was delivered by—

ADDISON J.—The only question involved in this second appeal is whether the documents Exs. P. 1, P. 2 and P. 3 are admissible in evidence. If they are, the appeal must be dismissed as concluded by a finding of fact.

Ex. P. 1 is a document purporting to be a mortgage deed of the property in suit executed by the predecessors-in-interest of the plaintiff in favour of a third party in 1873 while Ex. P. 2 and Ex. P. 3 are other instances where the plaintiff asserted a right to deal with the property.

In the Full Bench decision *Gujju Lall* v. *Fatteh Lall* (1) it was held that the word " right " as used in section 13 of the Evidence Act referred to something distinct from ownership, that is, a right, which attaches either to some property or to status; in short, an incorporeal right which, though transmissible, is not tangible or an object of the bodily senses. If this decision is correct, the documents in question would be inadmissible in evidence. The same decision was arrived at by another Full Bench in *Surender Nath Pal Chowdhry* v. *Brajo Nath Pal Chowdhry* (2).

In *Tepu Khan* v. *Rajoni Mohun Das* (3) another Full Bench, however, pointed out that the rule laid down in the above-mentioned Full Bench decisions had been materially qualified by the decision of their Lordships of the Privy Council in *Ram Ranjan Chuckerbutty* v. *Ram Narain Singh* (4) and *Bitto Kunwar* v. *Kesho Pershad* (5) and in *Monmatha Nath Mitra* v. *Rajeswar Ray Chaudhuri* (6) a Division Bench, presided over by the Chief Justice, held that a *kabala* in

(1) I.L.R. (1881) 6 Cal. 171 (F.B.).
(2) I.L.R. (1886) 13 Cal. 352 (F.B.).
(3) (1898) 2 C. W. N. 501 (F.B.).
(4) (1894) L. R. 22 I. A. 60.
(5) (1897) L. R. 24 I. A. 10.
(6) I. L. R. (1928) 55 Cal. 355.

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favour of the tenant which contained a recital that the holding conveyed by the said deed was the homestead land of the executant of the deed was admissible in evidence as a transaction within the meaning of section 13 of the Evidence Act in a suit in which the nature of the tenancy was agitated.

A Division Bench of the Patna High Court held in *Sabran Sheikh* v. *Odoy Mahto* (1) in a suit in which the plaintiffs claimed the land as their *man* land and the defendant claimed it as his *jote*, that an *ekrarnama*, produced by the plaintiffs, addressed by a third person to an ancestor of the plaintiffs, in which the land in suit was described as *man* land, was admissible under section 13 of the Evidence Act. Another Division Bench of the same Court in *Maharaja Bahadur Keshava Prasad Singh* v. *Brahmdev Rai* (2) held that it was permissible to use recitals in sale deeds to show the nature of the title that was being asserted and as transactions relevant under section 13 of the Evidence Act by which a right was claimed or asserted on some past occasion. In *Ram Kishun* v. *Niranjan Pande* (3), however, another Division Bench held that the word " right " as used in section 13 of the Evidence Act meant an incorporeal right as distinct from ownership of property, *Gujju Lall* v. *Fateh Lall* (4) being followed. The decisions of the Calcutta and Patna High Courts are therefore not very helpful on the question.

The Bombay, Madras and Allahabad rulings are in favour of the view that such documents are admissible in evidence. In *Ranchhoddas Krishnadas* v. *Bapu Narhar* (5) it was said that the words " rights and

(1) I. L. R. (1922) 1 Pat. 375.
(2) I. L. R. (1934) 13 Pat. 45.
(3) I. L. R. (1933) 12 Pat. 285.
(4) I. L. R. (1881) 6 Cal. 171 (F. B.).
(5) I. L. R. (1886) 10 Bom. 439.

customs " in section 13 must be understood as comprehending all rights and customs recognised by law, and, therefore, included a right of ownership. The same view was taken in *Ramasami* v. *Appavu* (1), *Venkatasami* v. *Venkatreddi* (2), *Vythilinga* v. *Venkatachala* (3) and *Nallasiva Mudaliar* v. *Ravan Bibi* (4). The decision of the Allahabad High Court is *The Collector of Gorakhpur* v. *Palakdhari Singh* (5).

Only one decision of this Court has been referred to, namely, *Ihsan Ilahi* v. *Ata Ullah* (6) which was decided by a single Judge. It was held that such documents were admissible in evidence. It seems to us that the preponderance of authority is in favour of the view that these documents are admissible in evidence and we so hold. It might, however, be stated that such evidence is usually of little value and a Court should not place exaggerated importance on this kind of evidence, which is little more than an admission in favour of the person making it and is in this country often manufactured for the purpose of creating evidence for use later on in a claim to ownership.

On this finding, we dismiss the appeal but make no order as to costs of this court.

A. K. C.

Appeal dismissed.

(1) I. L. R. (1889) 12 Mad. 9.
(2) I. L. R. (1892) 15 Mad. 12.
(3) I. L. R. (1893) 16 Mad. 194.
(4) 1921 A. I. R. (Mad.) 383.
(5) I. L. R. (1890) 12 All. 1 (F.B.).
(6) 1937 A. I. R. (Lah.) 688.