23 (4) being nowhere conferred upon the High Court expressly or impliedly by the Income-Tax Act, no such power can be exercised merely by virtue of the general inherent jurisdiction of the High Court, if any.

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In view of our decision on the preliminary objection raised by the Commissioner, the question need not be answered, but even if it were permissible to us to consider the merits of the case we would have had no hesitation in holding that the order was neither arbitrary nor reckless nor capricious, and would thus have answered the question formulated by this Court in the affirmative.

The assessee will pay the costs of this reference to the Commissioner of Income Tax.

A. N. K.

APPELLATE CIVIL.

Before Addison and Din Mohammad JJ.

WALI DAD (PLAINTIFF) Appellant,

versus

MST. IMAM KHATUN AND OTHERS (DEFENDANTS) Respondents.

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Jan. 27.

Civil Regular Second Appeal No. 636 of 1937.

Custom — Alienation — Will — Mair Minhas Rajputs *of Tahsil Chakwal, District Jhelum — Ancestral as well as self acquired property — Will in favour of daughter's daughter in absence of sons — Testation and gift* inter vivos, *powers of — whether co-extensive.*

Held, that, by custom, a sonless *Mair Minhas Rajput* of Tahsil Chakwal, District Jhelum has power, in the presence of his brothers, to bequeath his ancestral as well as self-acquired property to his daughter's daughter.

Held also, that the power of testation is co-extensive with the power of gift *inter vivos* and no distinction is drawn

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between the two powers by the various tribes in the Talbot's Customary Law.

Mussammat Nadran v. *Muhammad Hussain* (1), relied upon.

Other case-law reviewed.

Second appeal from the decree of Mr. D. Falshow, District Judge, Jhelum, dated 13th March, 1937, reversing that of Mian *Ghulam Ali Khan, Senior Subordinate Judge, Jhelum, dated 30th October, 1936, and dismissing the plaintiff's suit.*

ACHHRU RAM, for Appellant.

GHULAM MOHY-UD-DIN, for Respondents.

The judgment of the Court was delivered by—

ADDISON J.—Karam, a Mair Minhas of Tahsil Chakwal in the Jhelum District, made a will on the 7th July, 1931, in favour of his daughter's daughter, *Mussammat* Imam Khatun. Shortly after that he was murdered. The present suit has been brought by his brother Wali Dad for a declaration that the will was invalid by custom. The trial Court held that the ancestral property could not be bequeathed by Karam but that the self-acquired property could, and he granted the plaintiff a declaration with respect to the ancestral property. On appeal the learned District Judge has held that Karam had power in the absence of sons to bequeath his ancestral and self-acquired property to whomsoever he wished. He, therefore, accepting the defendants' appeal, dismissed the suit. This second appeal has been brought by Wali Dad in this Court on the usual certificate granted under section 41 of the Punjab Courts Act.

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

The subject of the power of alienation of the Mohammadan tribes of the Jhelum District has been frequently before the Courts. Custom has always had its deepest roots in the central districts of the Punjab and it is doubtful if originally it had much hold upon the northern district of Jhelum. The Riwaj-i-Am of 1880 of the Jhelum District, which is given as Appendix I of the Riwaj-i-Am prepared by Mr. Talbot in 1901, is quite definite on this point. As regards gifts, it was said by all tribes that a proprietor could give away all or part of his property in his lifetime, provided he made over possession but that no one gave all his property to his daughter or a stranger in the presence of sons but no one denied his power to do so. As regards wills, all tribes except Awans said that the owner of property could dispose of it by will but in practice this was not done as the power of gift was sufficient. In 1880, therefore it is clear that there was unrestricted power of gift or will, whether the property was ancestral or non-ancestral.

According to the Answer to Question 78 of Mr. Talbot's Customary Law of Jhelum District, Awans and all Musalman tribes of Chakwal, also Hindus except Brahmans, are reported as having said that ancestral property could not be disposed of by will, but self-acquired property could be so disposed of. Other tribes gave other replies and Mr. Talbot added a note that in spite of judicial decisions to the contrary no tribe admitted an unlimited power of bequest as regards ancestral land. He admitted the previous entry in the old Riwaj-i-Am and stated that Courts had often followed it but he added that he considered it incorrect. His opinion may be better explained by the circumstance that, at the time he was writing, it

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was usually considered that there was a sort of general custom prevalent throughout the Punjab which was far from being the case. Although, therefore, in accordance with the statement in the Riwaj-i-Am of Mr. Talbot's compilation, the burden of proof may be upon the grand-daughter, that burden is practically displaced by the clear entry in the former Riwaj-i-Am and by the judicial decisions based on it.

The subject is discussed at length by one of us in *Mussammat Nadran* v. *Muhammad Hussain* (1) where most of the authorities are reviewed. Reference, therefore, need only be made to some of the earlier decisions.

In Sabalam v. *Mst. Sarfraz* (2) it was found that by the custom prevailing among Jhanjuas of the Jhelum Tahsil, alienation of land in favour of a daughter by will was permitted.

In *Fazal* v. *Mst. Bhagbari* (3) it was held that, among Mohammadan Rajputs of the Chakwal Tahsil, a proprietor without male issue could by custom make a will leaving his entire estate to his daughter to the prejudice of his near collaterals; and Mair Minhas are Rajputs.

There was, however, a decision in *Haidar Khan* v. *Jahan Khan* (4) where it was held that it had not been established that a sonless Mair Mana (Rajput) in the Chakwal Tahsil was competent to alienate his ancestral property by will or gift in favour of his sister's sons in the presence of his first cousin without his consent.

This decision, however, was not followed in *Sher Jang* v. *Ghulam Mohi-ud-Din* (5) where the subject was

(1) (1931) 132 I. C. 209.
(2) 122 P. R. 1884.
(3) 93 P. R. 1885.
(4) 50 P. R. 1902.
(5) 22 P. R. 1904.

exhaustively discussed. It was found in that case that, amongst Mohammadan Mair Rajputs of the Chakwal Tahsil, a gift by a sonless proprietor of half his ancestral property in favour of his daughter's son in presence of his agnatic heirs was valid by custom, while in *Hassan* v. *Jahana* (1) it was held that by custom among Moghals of the Chakwal Tahsil of the Jhelum District, a gift by a sonless proprietor of the whole or a substantial part of his ancestral immoveable property to his relations in the female line was valid without the consent of his agnatic male heirs.

Again in *Faiz Bakhsh* v. *Jahan Shah* (2) it was held that among Mair Rajputs of the Chakwal Tahsil, a gift by a childless proprietor of his entire estate in favour of two grand-nephews in the presence of other nephews and grand-nephews was valid.

In *Hayat* v. *Mst. Gullan* (3) it was held that by custom among Mair Rajputs of the Chakwal Tahsil a sonless proprietor was competent to devise the whole of his ancestral estate in favour of his daughter in the presence of his brother.

Pahalwan Khan v. *Bagga* (4) is a similar decision with respect to Mohammadan Gujjars of the Jhelum Tahsil.

There is only one other case that need be referred to, namely, *Mst. Rakhi* v. *Baza* (5), where it was held that sonless Awans of Talagang Tahsil of the Jhelum District were not entitled to dispose of their ancestral property by will, though the Judges, who decided the case, considered that they had power to gift their ancestral property.

(1) 71 P. R. 1904.
(2) 96 P. R. 1907.
(3) 87 P. R. 1918.
(4) I. L. R. (1929) 10 Lah. 581.
(5) I. L. R. (1924) 5 Lah. 34.

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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.

1938

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.