LAHORE HIGH COURT

Abdul Rafi Khan

Vs

P. Lakhshmi Chand

(Bhide, J.)

09.07.1934

JUDGMENT

Bhide, J.

1. The plaintiff Abdul Rafi Khan, who is a minor son of Shamshad Ali Khan, a Rajput land owner 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 29th April 1915 and 21st July 1916, for ₹ 26,000/- and ₹ 28,000/- respectively, in favour of Pandit Lakhahmi Chand, defendant 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 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 eon 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 a custom according to which the vendor had 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.

2. 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., Chhatar 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 19th May 1934. The application was thus admittedly out of time by nine 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 three or four 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 three or four 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 tahail 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 for valid necessity, and lastly that no necessity for the alienations in question had been established.

3. 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 Riwajiam of the Gohana tahsil, which, he urged, had been misinterpreted by the trial Court. The judicial decisions relied on by him were Exs. P.8, P-11, P-13, P-9 and P-10. The first three are of little value. Ex. P-8 is a judgment by Agha Mohammad Sultan Mirza, in which he merely follows an earlier judgment of his (Ex. 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 Exs. P-11 and P-13 the point of custom was either assumed or not argued. Ex. P-9, Agha Mohammad Sultan Mirza, Munsif, First Class, 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 Das*[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 Munsif went on to point out that most of the decisions in which it was held that 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*[4] 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*[5] The last decision relied on (Ex. P-10) was by the District Judge, Karnal, in which he referred to the entries in the Riwajiam 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 in *Giani v. Tek Chand*[6] on the ground that these relate to the Rohtak tahsil. I shall presently deal with the Riwajiam 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*[7] and *Ghansham v. Balak Ram*[8] The latter was a case of gift by a Brahman in Jhajjar tahsil and is not in

[1]1922 Lah 69 [3](1887) 107 PR 1887 [5](1895) 73 PR 1895
[2](1895) 73 PR 1895 [4] Civil Appeal No. 235 of 1896 [6]1922 Lah 69
[7]1914 Lah 140 [8]1916 Lah 145

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 Riwajiam. It makes no reference also to the enquiry made under the orders of Mr. Clifford in

Civil Appeal No. 235 of 1896 and it has not been followed in subsequent rulings as pointed out in *Kela v. Mam Chand*[9]

4. The respondents relied on a certain number of judicial decisions copies of which have been marked as Exs. D-50 to D-56 and D-62. Most of these judgments are based on the enquiry made under the orders of Mr. Clifford in *Har Dayal v. Mam Raj*[10] referred to above, the last one containing a useful resume of the more important earlier decisions. It is true that some of these judgments do not relate to the Gohana tahsil, but the enquiry 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 : see, e.g., *Sheoji v. Ali Khan*[11] and *Telu v. Chuni*[12] and was recently endorsed in a Division Bench judgment relating to the Gohana tahsil reported as *Behari v. Bhola*[13] The view expressed by the learned Munsif in Ex P 9 that the inquiry made under the orders of Mr. Clifford was a superficial one, cannot be supported. In *Telu v. Chuni*[14] it was pointed out by Scott Smith, J., that the enquiry was a very exhaustive one. It appears from the record of that inquiry that all available 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 Ex. D-58).

5. 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*[15] with reference to the central districts of the Punjab, but was extended to the whole of the province in *Ramji Lal v. Tej Ram*[16] But the presumption appears to have been based on 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 *Hasan v. Jahna*[17] that the rule laid down in 73 *Ramji Lal v. Tej Ram*[18] 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 Mohammedans in this province is that they are governed by Hindu and Mohammedan Law and if a custom modifying these laws is alleged it has to be proved. As pointed out by Robertson, J., in *Daya Ram v. Sahel Singh*[19]

[9]1924 Lah 102
[10] Civil Appeal No. 235 of 1896
[15](1887) 107 PR 1887
[16](1895) 73 PR 1895
[11](1913) 20 IC 475
[12]1933 Lah 339
[17](1904) 71 PR 1904
[18](1895) 73 PR 1895
[13](1913) 20 IC 378
[14](1913) 20 IC 378
[19](1906) 110 PR 1906

a view which has been endorsed by their Lordships of the Privy Council in *Abdul Husain Khan v. Sona Dero*[20] 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.

6. 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. Lachhmi*[21] and *Amin Chand v. Bujha*[22] and *Gurbhaj v. Lachhman*[23] 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*[24] 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 *Har Dayal v. Mam Raj*[25] Coming now to the Riwajiams, 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 preemption in the event of a sale (vide answers to questions 25 and 27 at p. 176, Vol. 2). It appears however that the Riwajiams 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 and answer with respect to sales of ancestral land in the Rawajiam of this tahsil prepared in 1879 are in the following terms (vide Ex. P-4):

> **Question.**
> Under what circumstances can a proprietor sell his Immovable property?
> Are there any circumstances under which he cannot do so?
> **Answer.**
> 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.
> He is not competent to effect a sale or mortgage to follow immoral pursuits.

7. 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 to a considerable extent in the Rohtak and other districts forming part

[20]1917 PC 181 [22]1916 Lah 128 [24](1895) 73 PR 1895
[21]1916 Lah 141 [23]1925 Lah 341 [25] Civil Appeal No. 235 of 1896

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*[26]

8. 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.

9. 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 tenants in the village, where the land was situated had become very strained and three members of the family including, the father of the vendor had been recently murdered. Security proceedings were taken Under Section 107, Criminal P.C., against the tenants but unfortunately these proved anfractuous. 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 Exs. D-l 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 Com-missioner dated 23rd April 1915 (vide Ex. D-l3). 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 ₹ 11,000/- and also purchased mortgagee rights in other land for ₹ 24,682/-, shortly after the sales (vide Exs. D-63 and 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 ₹ 8,000/- or ₹ 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 vendor to the purposes mentioned in the sale dead, 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

[26]1933 Lah 339

pursuits.

10. The consideration for the two sales as stated in the deeds was ₹ 26,000/- and ₹ 28,000/-. The learned Senior Subordinate Judge has held that only ₹ 24,000/- and ₹ 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 ₹ 48,000/- (vide Ex.D-3). Considering this fact, there is no adequate ground to hold that the land was sold below its market price.

11. 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*[27] 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.

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

Tek Chand, J.

13. I agree.

[27]1925 Lah 396