Equivalent Citation: AIR 1925 Lah 530, 89Ind. Cas.648

IN THE HIGH COURT OF LAHORE

Decided On: 02.04.1925

Appellants: **Fateh and Ors.**
Vs.
Respondent: **Alayar and Ors.**

JUDGMENT

Fforde, J.

1. This is an appeal from the decision of the District Judge upholding the decree of the trial Court.

2. The suit was brought for a declaration that a gift of 161 kanals 10 marlas of land, together with a house, made by the defendants Allah Yar in favour of the defendants Sultan, shall not affect the plaintiffs reversionary rights after the death of the first named defendant;.

3. The donee is a son of the donor's sister and is on the male side related to the donor in the fourth degree.

4. The plaintiffs are the collaterals of the donor in the third degree and the property has been found by both Courts to be ancestral.

5. The only question for determination in this appeal is whether or not the gift, which was by registered deed dated the 30th August 1920, is valid by custom. The parties are Kahuts of Chakwal Tahsil in the Jhelum District.

6. The District Judge held that this gift to a sister's son is valid by custom and he has based his finding principally upon a decision of his own in Civil Appeal No. 365 of 1920 in which he held that among Kahuts of this tahsil a gift to a daughter's son was valid by custom. Mr. Jagan Nath Bhandari for the appellants has referred to a number of authorities; amongst others Hamira v. Ram Singh [1907] 184 P.R. 1907 in which it was pointed out that the position of a daughter's son is on a very different footing from that of a sister's son in a matter of this kind. At page 645 of the judgment in the case mentioned, Clarke, C. J., who delivered the judgment of the Full Bench, expresses himself as follows;

In no system of law that we are aware of are the claims of daughters and sisters placed on the same footing and we cannot imagine that the agriculturists of this province by a subtle train of reasoning would ever have put them on the same footing.

7. It is obvious, therefore, that an instance-concerning a gift to la daughter's son does not support the defendant's case. Moreover, in Civil Appeal No. 365 of 1920 the collaterals were in the seventh degree, whereas here they are in the third. And, further, in the former case there was a delay of 13 years in bringing the suit, which raises some presumption that the collaterals acquiesced in the gift. In his reasons in support of the gift the learned District Judge has given weight to the fact that the donee rendered service to the donor. It is stated in Exception (3) to Section 59 of Rattigan's Digest of Customary Law that alienations in favour of relations are very generally recognised by custom in cases where the alienee has rendered services to the alienor in the management of the land when the latter was himself incapable of managing it. But, as Mr. Jagan Nath Bhandari has pointed out the instances supporting this proposition are all concerned with alienations of a moderate part of the alienor's estate and no instance has been cited in which a transfer of the whole estate has been sanctioned on this ground.

8. Mr. Talbot's General Code of Tribal Custom in the Jhelum District supplies no

evidence in support of such a gift. Mr. Jagan Nath has moreover referred us to a decision of Mr. Addison (Civil Appeal No. 1771241 of 1922) where it was held that in the Jhelum District a gift to a sister's son is invalid.

9. Sir Muhammad Iqbal for the respondents relies upon two cases in support of his contention that the present gift is valid by custom. In the first of these cases Muhammad Khan v. Mt. Kesram A.I.R. 1921 Lah. 221 it was held that among Kahuts of tahsil Chakwal, district Jhelum, a sonless proprietor has the power to make a free disposition of his ancestral land to a daughter in the presence of collaterals. In the other case Khuda Bakhsh v. Shamas [1910] 68 P.R. 1910 it was held that among Kahuts of the same tahsil and district as in the previous case a bequest of ancestral land made by a childless proprietor in favour of his sister's son with the consent of his brother is valid by custom. In the latter case, however, the decision was largely based on the fact that not only did the donee render services to the donor, but the gift was consented to by the first agnate.

10. No evidence of instances of such a gift as the present one has been furnished by the respondents. The general custom admittedly is that such an alienation is invalid, and it lays upon the respondents who set up a special custom to prove such. This they have failed to do.

11. I would accordingly accept the appeal and decree the plaintiffs' claim with costs throughout.

Le Rossignol, J.

12. I agree.