Privy Council Appeal No. 43 *of* 1947

Mohammad Jan and another – – – – – *Appellants*

v.

Rafi-Ud-Din and others – – – – – – *Respondents*

Same - - - - - - - - - - - *Appellants*

v.

Mumtaz Hussain and others - - - - - *Respondents*

(Consolidated Appeals)

FROM

THE HIGH COURT OF JUDICATURE AT LAHORE

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 18TH OCTOBER, 1948

Present at the Hearing :

LORD DU PARCQ
LORD NORMAND
SIR JOHN BEAUMONT

[*Delivered by* SIR JOHN BEAUMONT]

These are consolidated appeals from two judgments and decrees of the High Court of Judicature, Lahore dated respectively the 4th November, 1943, which set aside two judgments and decrees of the Court of the District Judge, Attock District, at Campbellpur, dated the 28th April, 1941, affirming two judgments and decrees of the Court of the Subordinate Judge 1st Class at Campbellpur dated the 12th December, 1940.

The case raises the question whether the Qureshis, a Mohammadan tribe in the Punjab, of the village Paur Miana, are precluded by custom from alienating ancestral property except for necessity or with requisite consents.

The property was owned by two brothers, Abdulla and Ghias-ud-Din, and it is conceded that in their hands the property in suit was ancestral property.

On the 26th August, 1924, Abdulla and Ghias-ud-Din sold part of the lands in suit to the appellants, Mohammad Jan and Shera, for Rs.1,800 by a registered sale deed, and on the 29th May, 1938, they sold the remainder of the lands in suit to the appellant Mohammad Jan for Rs.60. Subsequently Abdulla died.

On the 1st March, 1940, the respondent Mumtaz Hussain who was a son of Ghias-ud-Din, commenced the first suit from which these appeals arise in the court of the Senior Subordinate Judge at Campbellpur claiming a declaratory decree that the sale of the lands on the 26th August, 1924, was without consideration and valid necessity and was ineffectual, null and void.

On the 30th March, 1940, the respondents Rafi-ud-Din and Manzur Hussain, who were the sons of Abdulla, commenced the second suit from which these appeals arise in the same court claiming a decree for possession of half of the lands so sold as aforesaid, representing their father's share.

The learned Subordinate Judge held that it had not been proved that the parties were governed by custom and dismissed the suit. On appeal the District Judge took the same view. In a second appeal to the High Court the learned judges held that it was proved that the parties were governed by custom which restricted the free alienation of ancestral property, and they passed a decree in favour of the plaintiffs subject to repayment to the purchasers of so much of the consideration as they held to have been justified by necessity. From this decision special leave to appeal to His Majesty in Council was granted by the Board.

It was at one time held by the courts in the Punjab that the effect of section 5 of the Punjab Laws Act, 1872, was to make custom the primary law of the Punjab in relation to the matters specified in that section and to cast upon anyone alleging that he was governed by personal law the burden of so proving. But in a Full Bench decision of the Punjab Chief Court reported in the Punjab Records Vol. 41, p. 390, this view was dissented from and in the judgment of Mr. Justice Robertson it was laid down that it lies upon the person asserting that he is ruled in regard to a particular matter by custom, to prove that he is so governed, and not by personal law, and further to prove what the particular custom is, and that there is no presumption created by the section of the Act in question in favour of custom. The principle of this decision was expressly approved by this Board in *Abdul Hussein Khan* v. *Bibi Sona Dero*, 45 I.A., p. 10, where the material passage of the judgment of Mr. Justice Robertson was quoted *in extenso*. It must therefore be accepted that in the Punjab the burden lies upon those who assert that they are governed by custom to prove the fact, and to establish the particular custom, and if such evidence is not available the parties are governed by their personal law, which in the present case is the Mohammadan Law.

The respondents did not appear upon this appeal and their Lordships have therefore not had the advantage of any argument in support of the judgment appealed from. Counsel for the appellants challenged the judgment on the ground that the learned judges had ignored the rule abovementioned, and had held that the presumption was in favour of the parties being governed by custom, relying for this conclusion upon paragraph 59 of Rattigan's Digest of Customary Law in the Punjab, which lays down that ancestral immovable property is ordinarily inalienable except for necessity or with the consent of male descendants, or in the case of a sonless proprietor, of his male collaterals. It is said that, whilst Rattigan's Digest of Customary Law is a recognised authority upon the Character of Customs in the Punjab, it has no application until the parties are proved to be governed by custom in relation to the matter in suit, and a question then arises as to the scope of the particular custom; and that the High Court misapplied paragraph 59. It must be confessed that there are passages in the judgment of the High Court which lend support to this criticism, but their Lordships are disposed to think that this is not the true basis of the judgment. The learned judges must have been very familiar with the rule established in *Abdul Hussein Khan* v. *Bibi Sona Dero* and they probably took its existence for granted. Their Lordships think that the view the learned judges took was that entries in the Riwaj-i-am established that Qureshis of the district in question were governed by custom, and that in that situation paragraph 59 of Rattigan's Digest was sufficient to establish that the custom precluded unrestricted alienation of ancestral land. Entries in Riwaj-i-am are always regarded as of great importance in establishing custom, and it is important to notice the entries on which the High Court relied in the present case. The entries are exhibits P-20, P-21 and P-22, which contain extracts from the Riwaj-i-am of Rawalpindi District at the time of the second settlement in 1884. In exhibit P-20 the question put was " Can a proprietor having no male issue make a gift or not?" and the answer on behalf of the Qureshis was " A proprietor having no male issue is not competent to make a gift ". Exhibit P-21 dealt with the interest which daughters took in their father's estate. In exhibit P-22 the question was " Is there any distinction between ancestral and acquired property as regards the power of making gifts?" and the

answer of the Qureshis was " A proprietor can make a gift of his self-acquired property. He cannot make a gift of ancestral property without the consent of his sons ". These entries do establish that the Qureshis of Rawalpindi District (which formerly included the Attach District) were to some extent governed by custom in 1884. If this had not been so it would have been simple to answer all the questions by saying that Qureshis were not governed by custom. Further, the subject matter of the questions in P-20 and P-22 was gift, which is a form of alienation. There is, however, a big jump from a custom which restricts gifts, to one which restricts alienations for value. Unlike the common law, customs do not grow and develop to meet the changing needs of society. As was well pointed out by Mr. Justice Tek Chand in the case of *Muharram Ali* v. *Barkat Ali* I.L.R. 12 Lahore, 286 custom cannot be extended by logical process, it can only be established by evidence. If the contention be that a custom existing in 1884 against a proprietor making a gift of ancestral property without the consent of his male issue had developed by 1940 into a custom extending such restriction to alienations for value, the extension should have been proved by evidence. There is no such evidence. There are no instances on the record of any alienations for value by members of this community having been challenged. As the learned Subordinate Judge noted evidence was given of many such alienations which had not been challenged though, as he justly observed, it is possible, if improbable, that all those alienations were supported by necessity. However that may be, in the absence of any evidence to prove the existence of a custom against alienating ancestral property for value their Lordships are not prepared to hold that such a custom exists.

For these reasons their Lordships will humbly advise His Majesty that this appeal be allowed, that the two decrees of the High Court of Lahore dated the 4th November, 1943, be set aside, that the two decrees of the District Judge dated the 28th April, 1941, be restored, and that the costs of the appeals to the High Court be paid by those of the parties who were appellants in those appeals. The respondents must pay the costs of this appeal.

(60615) Wt. 8062—31 180 11/48 D.L.

In the Privy Council

MOHAMMAD JAN AND ANOTHER

v.

RAFI-UD-DIN AND OTHERS
and connected appeal (consolidated)

DELIVERED BY SIR JOHN BEAUMONT

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