

## APPELLATE CIVIL.

*Before Mr. Justice Scott-Smith and Mr. Justice Harrison.*

BAGGU AND OTHERS (PLAINTIFFS)—*Appellants*,

*versus*

Mst. DANI AND OTHERS (DEFENDANTS)—*Respondents*.

Civil Appeal No. 846 of 1919.

*Custom—Alienation—Occupancy rights—alienation consented to by the landlords—status of reversioners to challenge the alienation—what the reversioners have to prove to establish their status—Punjab Tenancy Act, XVI of 1887, section 59.*

A. B., an occupancy tenant, left his land to his daughter-in-law, Mst. D., by will, and after his death it was mutated in her name with the consent of the landlords. The plaintiff, collateral of A. B. in the 3rd degree, sued for possession. The lower Courts found that the land in suit was occupied by the common ancestor of plaintiffs and A. B. The first Court decreed the claim but the Lower Appellate Court held that as the alienation had been assented to by the landlords it could not be contested by the reversioners, and also that as the common ancestor had not been shewn to have been the proprietor or an occupancy tenant of the land in suit the plaintiffs had no *locus standi* to sue.

*Held*, that the mere fact that the landlords have consented to an alienation of the land by an occupancy tenant does not take away from the reversioners any right which they might otherwise have had to contest it under Customary Law.

*Karam Din v. Sharaf Din* (1), *Puran Chand v. Mahesha* (2), *Nikko v. Mst. Gurdai* (3), and *Bhag Singh v. Sharam Singh* (4), followed.

*Hardit Singh v. Gopal Singh* (5), distinguished.

*Held also*, that it was not necessary for the plaintiffs to prove that the common ancestor held the land as an occupancy tenant, all they had to prove was that they were the reversionary heirs of the alienor and that if the land had been the ancestral property of the plaintiffs they could have contested the alienation. These two essentials had been fulfilled in this case and the plaintiffs were therefore entitled to contest the alienation.

*Abdulla v. Allah Dad* (6), followed.

(1) 89 P. R. 1898 (F. B.).  
 (2) 69 P. R. 1800.  
 (3) 52 P. L. R. 1911.

(4) 38 P. R. 1909.  
 (5) 97 P. L. R. 1911.  
 (6) 98 P. R. 1907 (F. B.).

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*Hari Chand v. Dhera* (1), and *Fuiz Bakhsh v. Ditta* (2), referred to.

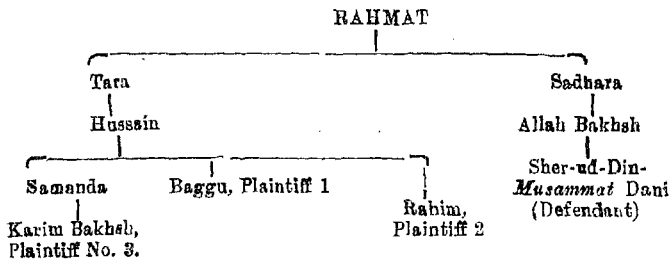
*Second appeal from the decree of N. H. Prenter, Esquire, District Judge, Lahore, dated the 21st March 1919, reversing that of Sayad Hafiz-ud-Din, Munsif, 1st Class, Chunian, District Lahore, dated the 28th November 1918, decreeing the claim.*

TEK CHAND, for Appellants.

D. N. MEHRA and BADR-UD-DIN, KURSHI, for Respondents.

The judgment of the Court was delivered by--

SCOTT-SMITH, J.—In the suit out of which the present second appeal arises the plaintiffs-appellants sued for possession of certain land in which Allah Bakhsh had occupancy rights. Allah Bakhsh during his lifetime made a will on the 21st May 1912 by which he left the land in suit to his daughter-in-law, *Mussamat Dani*, and after his death it was mutated in her name with the consent of the landlords. The pedigree table showing the relationship between the plaintiffs and Allah Bakhsh is as follows:—



The Courts below concurrently held that the land in suit was occupied by Rahmat, the common ancestor of the plaintiffs and of Allah Bakhsh. The first Court held that the plaintiffs had *locus standi* to sue as they would have been entitled to succeed to the tenancy had there been no will and decreed the claim. The Lower Appellate Court appears to have held that as the alienation was assented to by the landlords it could not be contested by the reversioners, and also that as there was no proof that Rahmat was either the proprietor or

an occupancy tenant of the land in suit plaintiffs had no *locus standi* to sue. In support of this decision the Court referred to *Abdulla v. Allah Dad* (1). It accordingly accepted the defendants' appeal and dismissed the plaintiffs' suit. The plaintiffs have preferred a second appeal to this Court.

The finding that Rahmat, the common ancestor, occupied the land is a finding of fact and is based upon evidence which is referred to by both the Courts in their judgments. Counsel for the respondent sought to uphold the judgment of the Lower Appellate Court by contending that there was no proof that Rahmat occupied the land, but as the finding is one of fact and is based on evidence, we did not allow him to argue the point.

It is common ground that the landlords consented to the alienation by Allah Bakhsh in favour of his daughter-in-law, but there is ample authority for holding that this consent does not bind the reversioners. In *Puran Chand v. Mahesha* (2) it was held, following the Full Bench ruling in *Karam Din v. Sharaf Din* (3)—

“That the plaintiff as reversionary heir of an occupancy tenant was competent to dispute the validity of the alienation, in favour of a stranger, of his ancestor's occupancy rights although such alienation had received the assent of his landlords.”

Again in *Nikka v. Mussammatt Gurdai and others*, (4), it was held—

“That like the alienations of ancestral land under the Punjab Customary Law, a transfer of ancestral occupancy rights, without necessity or consideration, is liable to be contested by the alienor's collaterals whose rights to object to the alienation remain intact, and are enforceable so long as the occupancy rights in question, which are extinguishable only by Statute, are not extinguished under the provisions of the Punjab Tenancy Act.”

It was further held—

“That where an occupancy tenant alienates his rights in the tenancy with the consent of the landlord, the occupancy rights do not become extinct by operation of law or by the act of the landlord and the alienor's collaterals can contest the alienation.”

(1) 58 P. R. 1907 (F. B.)

(2) 69 P. R. 1900

(3) 59 P. R. 1898 (F. B.)

(4) 52 P. L. R. 1911

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In *Bhag Singh and others v. Sharam Singh and others* (1), it was held that—

“A reversioner is not debarred from suing to protect his reversionary interest against an alienation of occupancy rights merely because such alienation has also been challenged by the landlord as an invalid alienation.”

In *Hardit Singh v. Gopal Singh* (2), which is referred to by the Lower Appellate Court, the tenancy was self-acquired of the alienor and, therefore, the case is not on all fours with the present one. We are, therefore, clear that the mere fact that the landlords have consented to the alienation of the land by Allah Bakhsh does not take away from the reversioners any right which they might otherwise have had to contest it under the Customary Law.

The next question is whether the plaintiffs, by reason of being the heirs of Allah Bakhsh, under section 59 of the Tenancy Act, have a right to contest the alienation, or whether it was necessary for them to prove that the common ancestor Rahmat was also an occupancy tenant of the land. In *Hari Chand and others v. Dhera and others* (3) it was laid down that—

“Where a general agricultural custom is found to prevail as regards alienation of proprietary rights, the presumption is, unless the contrary can be shown, that such a custom is also applicable to occupancy rights. The *onus* of proving a special custom antagonistic to such a rule rests on the party asserting the existence of such a custom.”

In *Faiz Bakhsh and others v. Ditta and others* (4) it was held that the *onus* lay on the plaintiff to prove that by custom he is entitled to question the validity of the alienation of occupancy rights made by his father. As it was considered that there was some conflict between this ruling and that in *Hari Chand and another v. Dhera and others* (3) the question was referred to the Full Bench in the case of *Abdullah v. Allah Dad and others* (5). The judges in that case considered that there was no substantial conflict between the two cases referred to, and they laid down that—

“When a collateral seeks to restrain an alienation of any occupancy right by an occupancy tenant, proof that such a power

(1) 93 P. R. 1909.

(3) 12 P. R. 1904.

(2) 97 P. L. R. 1911.

(4) 115 P. R. 1901.

(5) 98 P. R. 1907 (F.B.).

of restriction exists in respect of proprietary rights would be relevant."

They said that—

"When such a suit is brought, the initial *onus* lies on the plaintiff, but when he has proved first, that he is entitled to succeed to occupancy rights on the death of the occupancy tenant, and, second that had the subject-matter in question been a proprietary right instead of a right of occupancy he could have maintained the suit, the *onus* will be shifted and it will be upon the person who asserts that no such custom obtains as to occupancy rights to prove that contention."

Counsel for the respondents contends that if the subject matter of the present suit had been the proprietary rights the plaintiffs could not have contested the alienation unless it had been proved that Rahmat was the proprietor, and therefore he contends that the plaintiffs cannot contest the alienation of occupancy rights unless they prove that Rahmat was an occupancy tenant. The Lower Appellate Court seems to have adopted this view, but in our opinion the Full Bench in the case of *Abdulle v. Allah Dad and others* (1), did not intend to lay down any such rule. It certainly did not dissent from the decision of the Division Bench in *Hari Chand and another v. Dhera and others* (2), and according to that decision all that the plaintiff has to prove is that a general agricultural custom prevails as regards the alienation of proprietary rights and the presumption then is that such a custom is also applicable to occupancy rights. Now, it is not contended in the present case that if Rahmat had been the proprietor of the land in suit and the proprietary rights had been alienated by Allah Bakhsh the plaintiffs could not have contested that alienation. We, therefore, find in the present case that (1) plaintiffs are the reversionary heirs of Allah Bakhsh and (2) that if the land had been the ancestral property of the plaintiffs they could have contested the alienation. In our opinion, therefore, the two essentials laid down by the Full Bench in *Abdulla v. Allah Dad and others* (1) are fulfilled and the plaintiffs are entitled to contest the alienation.

The remarks in the penultimate paragraph of the Lower Appellate Court's judgment as to the custom of the parties in matters of inheritance are *obiter* and do not affect the question for decision.

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(1) 98 P. B. 1907 (F. B.)

(2) 12 P. B. 1904.

We accept the appeal and setting aside the order of the Lower Appellate Court restore the decree of the first Court with costs throughout.

*A. R.*

*Appeal accepted.*

### APPELLATE CIVIL.

*Before Mr. Justice Scott-Smith and Mr. Justice Abdul Qadir.*

LAKHU MAL (DEFENDANT)—*Appellant,*

*versus*

BISHEN DAS & OTHERS—

(PLAINTIFFS).

RAM CHAND—(DEFENDANT)

} *Respondents.*

Civil Appeal No. 3026 of 1917.

*Hindu Law—joint family property in the hands of the sons—how far such property is liable for the payment of mortgage debts incurred by the father.*

*Held,* that family property in the hands of the sons is bound by a mortgage executed by their father, during his lifetime, to pay off antecedent debts, only if two conditions have been fulfilled, firstly, the mortgage must have been to discharge an obligation antecedently incurred and secondly, the obligation antecedently incurred must have been incurred wholly apart from the ownership of the joint estate.

*Sahu Ram Chandra v. Bup Singh* (1), *Brij Narain Rai v. Mangal Prasad* (2), and *Bankhandi Rai v. Kishori Mandal* (3), followed.

*First appeal from the decree of Sayyad Wali Shah, Subordinate Judge, Rawalpindi, dated the 31st July 1917, decreeing plaintiffs' claims.*

M. S. BHAGAT, for Appellant.

SHEO NARAIN, for Respondents.

The judgment of the Court was delivered by—

ABDUL QADIR, J.—This is a first appeal against a declaratory decree passed by the Senior Subordinate Judge, Rawalpindi, setting aside two mortgage deeds and one sale-deed executed by defendant (1), Ram Chand, in favour of Lakhu Mal, defendant (2), as

(1) (1917) I. L. R. 39 All. 437 (P. C.). (2) (1918) I. L. R. 41 All. 235.

(3) (1920) 81 Indian Cases 102.

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