plaintiffs' suit with costs. The plaintiffs are to pay the defendant's costs here and in the Court of the Senior Subordinate Judge.

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RADHA SINGH.

HILTON J.

P. S.

Appeal accepted.

APPELLATE CIVIL.

Before Shadi Lal C.J. and Rangi Lal J.

IQBAL SINGH, MINOR, THROUGH *MST.* RAGHBANS KAUR (PLAINTIFF) Appellant

versus

JASMER SINGH AND OTHERS (DEFENDANTS) Respondents.

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Jan. 30.

Civil Appeal No. 1357 of 1928.

Hindu Law—Alienation—by Jat, *resident in Kalsia State — of ancestral property in British India — whether custom applicable—Punjab Laws Act, IV of 1872, section 5—Hindu's power of alienation for antecedent debt—explained.*

The plaintiff, a grandson of J. S. (a permanent resident of the Kalsia State) brought the present suit for a declaration that a mortgage made by J. S. of his ancestral land in *Mauza* Babiani in the Ferozepore district of British India was invalid by custom and should not affect his reversionary rights. The trial Court held that J. S. had unrestricted power to dispose of his property and also that there was both consideration and necessity for the alienation. In the appeal before the High Court the crucial question was whether J. S. had unrestricted power of alienation or could not dispose of his ancestral property except for necessity.

Held, that section 5 of the Punjab Laws Act provides that custom in the Punjab is the first rule of decision in all questions specified therein. But it is nowhere laid down that a presumption arises in favour of the existence of custom to the exclusion of personal law, and it is for the person relying upon a rule of law contrary to his personal law to allege and prove it.

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Abdul Hussain Khan v. *Sona Dero* (1), approving the *dictum* of Robertson J. in *Daya Ram* v. *Sohel Singh* (2), followed.

Held also, that the plaintiff had entirely failed to prove the existence of a custom in the Kalsia State restraining a *Jat* of that State from transferring his ancestral property in the manner suggested by him and that the mere fact that the alienor happens to own landed estate in the Ferozepore district cannot have the effect of subjecting him to the restrictions imposed by the rule of custom applicable to a *Jat* tribe of that district. The validity of the mortgage in dispute must, therefore, be judged by Hindu Law which is the personal law of the mortgagor.

Held further, that by the Hindu Law, a Hindu may sell or mortgage, not only his own interest, but the interest of his sons, grandsons and great-grandsons in the co-parcenary property in order to pay off an antecedent debt of his own, provided the debt was not incurred for immoral or illegal purposes.

And, as the main consideration of the mortgage in suit consisted of two items of debts actually due to creditors, which items were truly independent of and not part of the transaction in question, they were "antecedent debts" and the mortgage was, therefore, binding upon the plaintiff, the mortgagor's grandson.

Brij Narain v. *Mangal Parsad* (3), and *Ram Rakha Singh* v. *Ganga Parsad Mukaradhwaj* (4), relied on.

Held also, that even if the custom invoked by the plaintiff was applicable, the alienation, having been made for the payment of a just debt which was neither immoral, illegal or opposed to public policy and had not been incurred as an act of reckless extravagance or of wanton waste or with the intention of destroying the interest of the reversioners, would be binding on the plaintiff who could not, therefore, recover the property without discharging the debt for which it had been mortgaged.

Kirpal Singh v. *Balwant Singh* (5), approving *Devi Ditta* v. *Saudagar Singh* (6), relied upon.

(1) (1918) I. L. R. 45 Cal. 450.
(2) 110 P. R. 1906 (F. B.).
(3) (1924) I. L. R. 46 All. 95 (P. C.).
(4) (1927) I. L. R. 49 All. 123.
(5) 26 P. R. 1913 (P. C.).
(6) 65 P. R. 1900.

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First appeal from the decree of Lala *Khan Chand, Janmeja, Senior Subordinate Judge, Ferozepore, dated 6th February 1928, dismissing the plaintiff's suit.*

SHUJA-UD-DIN and SHAMAIR CHAND, for Appellant.

JAGAN NATH AGGARWAL, JIWAN LAL KAPUR and ASA RAM, for Respondents.

SHADI LAL C. J.—On the 3rd of May, 1925, Jasmer Singh, a *Jat* of the Kalsia State, made a mortgage of his agricultural land and houses situate in the village Babiani of the Ferozepore district, to Mukand Singh and Kishan Singh as a security for Rs. 27,725. The plaintiff Iqbal Singh, a grandson of the mortgagor, has brought the present action to obtain a declaratory decree that the alienation, being without consideration and necessity, shall not adversely affect his right to succeed to the estate after the death of the alienor. SHADI LAL C.J.

The trial Judge holds that the mortgagor had an unfettered power of disposition and that he is not governed by the rule of custom which imposes a restriction upon the power of a proprietor to alienate his ancestral property. The learned Judge also finds that there was consideration as well as necessity for the mortgage, and he has accordingly dismissed the suit. Against the decree dismissing his suit the plaintiff has appealed to this Court, and it is admitted on behalf of the respondents that the property mortgaged to them is ancestral *qua* the plaintiff.

The crucial question for determination is whether Jasmer Singh had an unrestricted power of alienation,

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or could not dispose of his ancestral property except for necessity. It is to be observed that Jasmer Singh is not a resident of a British district, but permanently lives in Kalsia State, a foreign territory situate on the east of the Punjab. He not only received a *jagir* from the State, but is also related to the ruler thereof; and claims descent from ancestors who also were independent rulers at one time. He deposes that he is the sole proprietor of the village Babiani in which the property in dispute is situate, and pays a visit to the village only after every five or six years. Indeed, he admits that he has not been to the village for ten or twelve years. It is clear that he is not a member of any village community, nor can he claim that he or his ancestors followed agriculture as a profession.

There can be no doubt that Jasmer Singh has no connection with the Ferozepore district, except that he is a proprietor of landed estate in that district, and that he occasionally pays visits to the place after long periods. There is not a scintilla of evidence on the record that in the Kalsia State, where he permanently resides as a subject of the State, he is governed by any custom which is at variance with the rule of the Hindu Law on the subject. Can such a person invoke a custom on the ground that, if he had been permanently residing in a village of the Ferozepore district, he might have been governed by the custom applicable to the *Jats* living in the rural area of that district? Now, section 5 of the Punjab Laws Act provides that custom in the Punjab is the first rule of decision in all questions specified therein. But it is nowhere laid down that a presumption arises in favour of the existence of custom to the exclusion of the personal law.

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The section merely prescribes that custom shall govern the parties in certain matters in the first instance, but it is for the person relying upon a rule of custom contrary to his personal law to allege and prove it. In support of his allegation he may rely upon an entry in the *riwaj-i-am*, applicable to the members of his tribe residing in a local area, and in that case the presumption may arise in favour of the existence of custom, and the *onus* is then thrown on the opposite party to rebut it. But, whether he invokes a presumption in favour of custom or produces evidence to prove it, the fact remains that he has to assert and prove its existence; and that only when it is established, it is to be adopted as the rule of decision in supersession of the personal law. If any authority were needed on the subject, I would refer to the judgment of the Privy Council in *Abdul Hussein Khan* v. *Sona Dero* (1), where their Lordships make it clear that it is incumbent upon the plaintiff to allege and prove the custom on which he relies. They also quote with approval the following passage from the judgment of Robertson J. in *Daya Ram* v. *Sohel Singh* (2) :—

"In all cases it appears to me under this Act, 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. There is no presumption created by the clause in favour of custom; on the contrary, it is only when the custom is established that it is to be the rule of decision. The Legislature did not show itself enamoured of custom rather than law, nor does it show any tendency

(1) (1918) I. L. R. 45 Cal. 450 (P. C.). (2) 110 P. R. 1906 (F. B.).

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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 a rule of decision, but only 'any custom applicable to the parties concerned which is not .....'; and it therefore appears to me clear that when either party to a suit sets up 'custom' as a rule of decision, it lies upon him to prove the custom which he seeks to apply; if he fails to do so, clause (*b*) of section 5 of the Punjab Laws Act applies and the rule of decision must be the personal law of the parties subject to the other provisions of the clause."

Now, what is the evidence produced by the plaintiff to establish the custom upon which he places his reliance. There is no evidence to prove the existence of a custom in the Kalsia State restraining a *Jat* of that State from transferring his ancestral property in the manner suggested by the plaintiff, and, as stated above, the mere fact that the alienor happens to own landed estate in the Ferozepore district cannot have the effect of subjecting him to the restrictions imposed by the rule of custom applicable to the *Jat* tribe of that district. This contention, if accepted, would lead to the absurdity that Jasmer Singh would be governed in the matter of the power to alienate ancestral property, not by one rule but by various rules depending upon the different localities in which the property sought to be alienated may be situate. Similarly, various rules would apply to the devolution of his estate on his dying intestate. But custom, as recognised in this Province, cannot vary in respect of the same person with the locality of the property.

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It is unnecessary to dilate upon the subject, since the plaintiff, who was bound to establish the custom set up by him, has wholly failed to prove it. The validity of the transaction must, therefore, be judged by the Hindu Law which is the personal law of the mortgagor. It is significant that the deed executed by him gives a clear indication of the law which he thought was applicable to him. In order to provide for partial redemption of the mortgaged property by each of his descendants, he makes the following statement :—"I and my grandsons, Iqbal Singh and Jagirdar Pal Singh, and my sons, Ghamdur Singh and Jagjit Singh, are members of a joint and undivided Hindu family according to the Hindu Law and custom. According to the Hindu Law, each member of the family becomes a co-parcener in the family from the date of his birth. The sons and the grandsons have admittedly a right in the mortgaged property on account of its being joint. For this reason, if any member of the family out of my sons and grandsons wants to redeem during my life time his proportionate share of the ancestral property, to which he will be entitled on my death according to the pedigree-table, in accordance with law, on payment of the mortgage money the mortgagees shall be bound to release such an ancestral share on receipt of proportionate amount of mortgage money. Whoever redeems the land, shall, like the mortgagees, be recorded as a mortgagee in the revenue papers and shall not acquire absolute proprietary rights like myself by mere payment of the mortgaged money."

This statement of the law by Jasmer Singh acquires importance when it is remembered that there

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is no suggestion that he is, in any way inimically disposed towards the plaintiff. The plaintiff is a minor and, though the suit is brought on his behalf by his mother, all the circumtsances show that it is a collusive suit, and that Jasmer Singh seeks to avoid his own alienation by putting forward his minor grandson as a nominal plaintiff.

Now, what is the rule of the Hindu Law which governs the transfer in question? As stated in paragraph 259 of Mulla's Hindu Law, a Hindu may sell or mortgage, not only his own interest, but the interest of his sons, grandsons and great-grandsons in the co-parcenary property, in order to pay off an antecedent debt of his own, provided the debt was not incurred for immoral or illegal purposes. There is not a tittle of evidence to show that the debts, the payment of which was secured by the mortgage, were incurred for immoral or illegal purposes. Excluding the three petty items of Rs. 300, Rs. 131 and Rs. 20 which were required for defraying the cost of the stamp and other expenses for the conveyance, the consideration consisted of two main items, namely, Rs. 16,700 due to Ram Singh, the father of the mortgagee Mukand Singh, on a bond, dated the 20th of November, 1921, and Rs. 10,574, due to the mortgagee Kishan Singh himself on a bond, dated the 27th of March, 1922. There is ample evidence on the record and, indeed, it is admitted by the learned counsel for the appellant, that the debts were actually due to the creditors as stated in the deed. It is also clear that the debts were truly independent of, and not part of, the transaction in question. They, therefore, satisfy the definition of 'antecedent debt' as given by their Lordships

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of the Privy Council in *Brij Narain* v. *Mangal Parsad* (1). It is true that one of the debts was due to the mortgagee himself and the other to the father of the second mortgagee, but to constitute an antecedent debt, it is not necessary that the creditor and the alienee shall be different persons. What the law requires is that the two transactions must be dissociated in time as well as in fact. As laid down in *Ram Rakha Singh* v. *Ganga Parsad Mukaradhwaj* (2), where a previous mortgage deed is renewed in favour of the same mortgagee, and the consideration for the subsequent mortgage deed is the amount due on the earlier one, the alienation would be one for an antecedent debt, unless the first debt was a mere device and was incurred merely for the sake of creating an antecedence in time and with a view to support the subsequent deed. No such device has been suggested, much less proved in the present case. The alienation does not, therefore, violate the rule of the Hindu Law and is binding upon the alienor's grandson.

Nor is it open to objection, even if it be tested by the rule of custom invoked by the plaintiff. The antecedent debts were due, not to outsiders, but to one of the mortgagees and the father of the second mortgagee, and the judicial decisions require that in such a case the alienee, who is *primâ facie* fixed with the knowledge of the nature of the debts and of the purposes for which the money borrowed has been spent, has to prove that the debts were incurred for necessary purposes. But it has been repeatedly held that an alienation can be validly made for the payment of a just debt which means a debt which is actually due,

(1) (1924) I. L. R. 46 All. 95 (P. C.). (2) (1927) I. L. R. 49 All. 123.

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is not immoral, illegal or opposed to public policy, and has not been contracted as an act of reckless extravagance or of wanton waste or with the intention of destroying the interest of the reversioners. This was the rule enunciated in the leading case of *Devi Ditta* v. *Saudagar Singh* (1), and has been approved by the Privy Council in *Kirpal Singh* v. *Balwant Singh* (2).

The evidence on the record shows that Jasmer Singh's dealings with his creditors extended over a period of nearly sixteen years, from 1909 to 1925. During this period he educated his eldest son Zorawar Singh, the father of the plaintiff, and also the second son Ghamdur Singh, at the Aitchison Chiefs College, Lahore, where the expenses of education were sufficiently high. He performed the marriage of his sons in accordance with the practice of the society to which he belonged, and had to provide for maintenance of his sons, Rs. 2,700 per annum and 100 *ghumaons* of land for the eldest son, and Rs. 2,100 and 50 *ghumaons* of land for the second son. He also built houses in the district of Ferozepore where his landed property was situate, and constructed a road, more than a mile in length, leading to one of his houses. He admits that he had to discharge the debt of his father, and that old age and illness necessitated his residence in a hill station during the summer months for several years. The plaintiff has wholly failed to prove that Jasmer Singh was a man of immoral character, or indulged in reckless extravagance or waste; or that he was hostile to his sons or grandsons in the slightest degree. Indeed, he is anxious to recover the estate in question

(1) 65 P. R. 1900. (2) 26 P. R. 1913 (P. C.).

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for his descendants without paying the debts due to his creditors.

It must be remembered that he is related to a ruling Prince and occupies a high status in society. He had, therefore, to perform various social functions and to maintain himself according to his station in life. All the circumstances of the case warrant the finding that the debt in question satisfies the test prescribed by the judgment in *Kirpal Singh* v. *Balwant Singh* (1). The plaintiff cannot, therefore, recover the property without discharging the debt for which it has been mortgaged.

The result of the above discussion is that the suit brought by the plaintiff has been rightly dismissed. I would accordingly affirm the decree of the trial Judge and dismiss the appeal with costs.

RANGI LAL J.—I concur.

RANGI LAL J.

A. N. C.

Appeal dismissed.

(1) 26 P. R. 1913 (P. C.).