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allegations were made as are being made now on the strength of this document. It cannot, therefore, be believed that this old lady fabricated the document in question merely for the purpose of the present suit. I would, therefore, maintain the decree of the Court below and dismiss this appeal with costs.

BHIDE J.—I agree.

A. N. C.

Appeal dismissed.

APPELLATE CIVIL.

Before Bhide and Din Mohammad JJ.

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June 2.

SOHAN LAL (DEFENDANT) Appellant

versus

KARTAR SINGH AND OTHERS (PLAINTIFFS)
ISHAR SINGH (DEFENDANT) } Respondents

Civil Appeal No. 2727 of 1928.

Punjab Laws Act, IV of 1872, section 5 : Custom or Personal Law—presumption—Sikh Jhiwars *of Ludhiana District —Alienation of ancestral land—Hindu Law : Suit by sons to impeach the alienations of their father—immoral purposes—what the sons should prove—Antecedent debts—whether constitute necessity.*

Held, that according to the Punjab Laws Act, the initial presumption is that Hindus and Muhammadans are governed by their personal laws and if a custom modifying such laws is alleged, it must be decided on evidence and not on conjecture.

Daya Ram v. *Sohel Singh*, per Robertson J. (1) and *Abdul Hussein Khan* v. *Mst. Bibi Sona Dero* (2), relied upon.

Where a family of *Sikh Jhiwars* lived in a village among an agricultural tribe, and followed agriculture for the last two or three generations, but did not form a village community, and not a single instance was cited in which they had departed from the rules of Hindu Law—

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

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Held, that this was not sufficient to prove that the family had adopted the rules of custom in the matter of alienation of ancestral property, and they must therefore be held to be governed by Hindu Law.

Bhagwan Koer v. *Bose* (1), relied upon.

Held also, that in a suit by sons to impeach the alienations of their father under Hindu Law, it is incumbent upon the sons to prove that the debts were incurred for immoral purposes, and in the absence of such proof, the antecedent debts included in the mortgage in dispute must be held to constitute valid necessity.

Brij Narain v. *Mangal Prasad* (2), followed.

Lakhu Mal v. *Bishan Dass* (3), not followed.

First Appeal from the decree of Sardar *Kartar Singh, Subordinate Judge, 1st Class, Ludhiana, dated the 17th December, 1928, granting the plaintiffs a declaration to the effect that they can redeem the land in suit on payment of Rs.3,303-8-0 after the death of the alienor.*

J. N. AGGARWAL and S. L. PURI, for Appellant.

FAQIR CHAND and BAL KISHEN MEHRA, for (Plaintiffs) Respondents.

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BHIDE J.—This was a declaratory suit of the usual type by the sons of one Isar Singh, a *Sikh Jhiwar* of the Ludhiana District to contest a mortgage of about 85 *bighas* of ancestral land for a sum of Rs.11,000. It was alleged by the plaintiffs that Isar Singh was a man of immoral character and that the alienation was effected without valid necessity and consideration. The plaintiffs alleged that they being agriculturists were governed by custom, but also relied on Hindu Law in the alternative. The trial Court held that the plaintiffs had failed to prove that they were

(1) (1904) I.L.R. 31 Cal. 11 (P.C.). (2) (1924) I.L.R. 46 All. 95 (P.C.).
(3) (1922) I. L. R. 3 Lah. 74.

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governed by custom and applying Hindu Law has found that there was necessity for the alienation only to the extent of Rs.3,303-8-0 and has passed a decree to that effect. From this decision the alienee Sohan Lal has appealed and the plaintiffs have preferred cross-objections challenging the trial Court's finding that they are governed by Hindu Law and not by custom.

It will be convenient to deal with the question of custom first. The evidence produced by the plaintiffs on this question only establishes that their family has followed agriculture for the last 2 or 3 generations. These witnesses do not even definitely say that the plaintiffs are governed by custom as opposed to Hindu Law in the matter of alienation. It need hardly be pointed out in this connection that both under Hindu Law and the custom of agricultural tribes, alienation of ancestral immovable property is subject to restrictions, but the nature of the restrictions is somewhat different in the two cases. The learned counsel for the plaintiffs urged that the fact that the family of the plaintiffs had followed agriculture for 2 or 3 generations was sufficient to raise a presumption that the family was governed by custom. It was further urged that the plaintiffs are Sikhs by religion and '*Kamins*.' There are only three families of *Jhiwars* in the village and it was therefore argued that it may be presumed that they are governed by the same custom as the custom of the *Jats* amongst whom they live. In support of these contentions the learned counsel referred to a number of authorities such as *Faqir Muhammad* v. *Fazal Muhammad* (1), *Kasim* v. *Hasham* (2), *Muhammad Hayat Khan* v. *Sandhe*

(1) 16 P. R. 1906. (2) 39 P. R. 1906.

Khan (1), *Bhola* v. *Razzaq Shah* (2), etc. In most of these cases there were concurrent findings of fact by the Courts below and all that they show is that the fact that a family had followed agriculture or lived amongst agricultural tribes for a long time was one of the factors taken into consideration in determining whether the family was governed by custom or personal law. The learned counsel also referred to *Gujar* v. *Sham Dass* (3), in which it was laid down that there is a presumption against an unrestricted power of alienating ancestral immovable property in the case of *Jats* of the central Punjab. But this presumption was based not merely on the fact that the *Jats* followed agriculture, but on the evidence obtained in the course of an elaborate enquiry and also certain features of the agricultural village communities of the central Punjab. In the present instance the *Jhiwars* do not form a village community and not a single instance has been cited in which they had departed from the rules of Hindu Law.

To hold that a person is governed by agricultural custom solely on the ground that his family has followed agriculture or lived amongst an agricultural tribe for 2 or 3 generations would be to substitute conjecture for proof. There is, at best a possibility of such a family adopting the rules of custom; but whether it has actually done so or not is a question of fact which must be decided on evidence and not on conjecture. According to the Punjab Laws Act the initial presumption is that Hindus and Muhammadans are governed by their personal laws and if a custom modifying such laws is alleged it must be proved. It would not be out of place to draw atten-

(1) 55 P. R. 1908. (2) 7 P. R. 1911.
(3) 107 P. R. 1887.

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tion here to a passage from the judgment of Mr. Justice Robertson in *Daya Ram* v. *Sohel Singh* (1) which explains the precise position in this respect clearly and which was cited with approval by their Lordships of the Privy Council in *Abdul Hussein Khan* v. *Bibi Sona Dero* (2).

" In all cases it appears to me under this Act, (*i.e.* the Punjab Laws 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 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 . . . . . ';
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."

In the end I may also mention that it does not seem to be quite correct to say either that the plaintiffs' family has been solely dependent on agricul-

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

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ture or that they are ordinary *kamins* and may have copied the customs of the proprietors. Their grandfather Kahn Singh is said to have been a *Kardar* or *Thanedar* of Basant Singh, and Isar Singh, father of the plaintiffs, is also said to have been a liquor contractor.

It was urged that the plaintiffs are *Sikhs*, but in the absence of any proof of any custom *Sikhs* also must be held to be governed by Hindu Law, *Bhagwan Koer* v. J. C. Bose (1). After carefully considering the evidence on the record and the arguments advanced by the learned counsel for the plaintiffs I feel no hesitation in agreeing with the conclusion of the learned Judge of the trial Court that the plaintiffs have failed to establish that they are governed by custom in the matter of alienation of ancestral property and they must, therefore, be presumed to be governed by Hindu Law.

On the merits the plaintiffs have practically no case under Hindu Law. The alienation was effected mostly in lieu of antecedent debts of Isar Singh and as the plaintiffs are the sons of Isar Singh, such debts would constitute valid necessity for the alienation unless it was proved that the debts were illegal or immoral. The oral evidence produced by the plaintiffs to prove that Isar Singh is a drunkard and a man of immoral character is meagre, vague and altogether unconvincing and is contradicted by the defendant's witnesses who give him a good character. It was moreover incumbent on the plaintiffs to prove that the debts were incurred for immoral purposes [*vide Ulfat Rai* v. *Tej Narain* (2)], and there is no evidence forthcoming to prove any connection between

(1) (1904) I. L. R. 31 Cal. 11 (P. C.). (2) (1927) I. R. R. 8 Lah. 632.

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the debt and the alleged immorality. The antecedent debts are mostly supported by previous mortgage deeds and *bahi* accounts and there is no good reason to doubt their genuineness. It may be mentioned here that Isar Singh has a large family consisting of some 12 persons and he had to incur expenditure in connection with the marriages of five of his children. Only an item of Rs.300 is not supported by any *bahi* account but this was borrowed long ago. It is moreover supported by the evidence of Shri Ram and I do not think it would be justifiable to insist on better proof of this comparatively small and old item. The learned Subordinate Judge has disallowed some of the antecedent mortgage debts on the ground that they were not independent of the mortgage security. He has relied in this respect on *Lakhu Mal* v. *Bishen Das* (1), but it was conceded before us that this ruling cannot be considered to be good law in view of a later decision of their Lordships of the Privy Council reported as *Brij Narain* v. *Mangal Prasad* (2). The result is that all the antecedent debts included in the mortgage in dispute must be held to constitute valid necessity. The only other items out of the consideration which require discussion are :—

(*a*) Rs.1,100 left with the mortgagee for sinking a well.

(*b*) Rs.700 received in cash before the Sub-Registrar.

No well has yet been sunk, but the amount will be claimed as a charge only if and when the well is sunk. As regards item (*b*) however there seems to be no satisfactory evidence as to necessity. The learned counsel merely urged that it forms only a small portion

(1) (1922) I. L. R. 3 Lah. 74. (2) (1924) I. L. R. 46 All. 95 (P. C.).

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of the consideration. But even so there is no reason why it should be allowed to burden the land in the absence of any proof as to necessity [*cf. Bahadur Singh* v. *Des Raj* (1)].

On the above findings I would accept the appeal and, modifying the decree of the trial Court, grant plaintiffs a declaration to the effect that the mortgage in dispute shall not affect their rights in respect of Rs.700 out of the consideration. The decree will be, however, without prejudice to the rights of the mortgagee to enforce such rights as he may have under the mortgage against Isar Singh himself by sale of the ancestral property including his sons' share [*cf. Bahadur Singh* v. *Des Raj* (1), referred to above.]

The plaintiffs have succeeded only to a very small extent. I would, therefore, leave the parties to bear their costs throughout.

DIN MOHAMMAD J.—I agree.

DIN MOHAMMAD J.

P. S.

Appeal accepted.

(1) 53 P. R. 1901.