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AGHA HAIDAR J.

preliminary objection prevails and the appeal is accordingly dismissed with costs.

*P. S.*

*Appeal dismissed.*

## APPELLATE CIVIL.

*Before Tek Chand and Skemp JJ.*

1935

*May 15.*

ISHAR DAS (DECEASED) THROUGH HIS REPRESENTATIVE AND OTHERS (DEFENDANTS) Appellants

*versus*

BHAGWAN DAS (PLAINTIFF) Respondent.

**Civil Appeal No. 1904 of 1930.**

*Custom or Hindu Law — Alienation — Gift of ancestral property to sister's son* — Lakhanpal Brahmins — Mauza *Lakhanpal* — Tahsil *Phillour* — *District Jullundur* — Onus probandi — *that they are governed by custom* — Locus standi *of donor's brother to contest the gift.*

*Held*, that in the case of Brahmins the initial presumption is in favour of personal law, which those asserting custom have to disprove.

*Abdul Hussein Khan v. Sona Dero* (1) and *Vaishno Ditti v Rameshri* (2), relied upon. Other case-law, discussed.

*And*, that the plaintiff in the present case had failed to prove that Lakhanpal Brahmins of *Mauza* Lakhanpal, Tahsil Phillour, District Jullundur, are governed by custom in the matter of alienation of ancestral property.

*Held also,* that by Hindu Law the plaintiff had no *locus standi* to challenge the gift of his separated brother of ancestral and self-acquired property in favour of their sister's son.

*Second Appeal from the decree of* Khan *Zaka-ud-Din Khan, District Judge, Jullundur, dated 2nd April, 1930, modifying that of* Lala *Ram Rang, Subordinate Judge, 2nd Class, Jullundur, dated the 11th*

(1) (1918) I. L. R. 45 Cal. 450 (P. C.). (2) (1929) I. L. R. 10 Lah. 86, 103 (P. C.).

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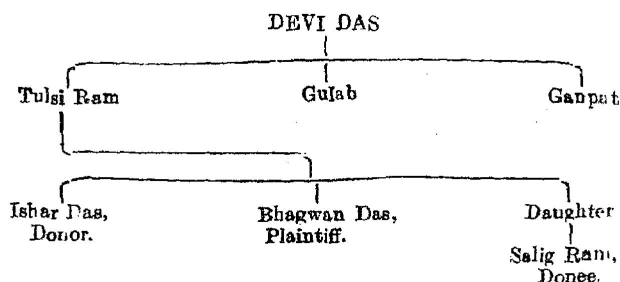
*April, 1929, by granting the plaintiff a declaratory decree that the gift of the land in dispute shall not affect his reversionary rights after the death of the donor, but dismissing his suit in respect of the house and shop in dispute.*

FAKIR CHAND and YASHPAL GANDHI, for Appellants.

ACHHRU RAM and INDAR DEV, for Respondent.

SKEMP J.

SKEMP J.—The parties to this case are Brahmins, *got* Lakhanpal, of village Lakhanpal, Tehsil Phillour, District Jullundur. The pedigree-table is as follows :—




On the 10th September, 1923, Ishar Das, defendant 1, gifted 39 *kanals* 13 *marlas* out of his holding, a house and a shop to Salig Ram, defendant 2, his sister's son. On the 24th April, 1928, Bhagwan Das, the donor's brother, sued for a declaration that the gift would not affect his reversionary rights. He alleged that the parties were governed by Punjab custom. The defendants pleaded that they were governed by Hindu Law and that in any case a gift in favour of a sister's son was valid; they further alleged that the property was not ancestral.

The Subordinate Judge held that the property was not ancestral and that the plaintiff had failed to prove that in matters of alienation Brahmins of

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village Lakhanpal followed custom. He dismissed the suit. On appeal the learned District Judge held that the land was ancestral and that the parties were governed by Punjab custom. He therefore accepted the appeal and granted the plaintiff a declaration with reference to the land in dispute but, agreeing that the house and shop were non-ancestral, he dismissed the suit in reference to them.

He granted the defendants a certificate under section 41 of the Punjab Courts Act on the point whether Lakhanpal Brahmins of Lakhanpal were governed by custom.

This is the main point in appeal, but the appellants also challenged the District Judge's finding that the land was ancestral. Mr. Achhru Ram, for the respondent, has invited our attention to the statement of owners recorded at the Settlement of 1885 which said that about 240 years previously, *i.e.* 1645 A.D., Bhiwani Das and Datta, caste Brahmin Lakhanpal, founded the village. In the second or third generation their descendants partitioned the cultivated area which was divided among their descendants. The land gifted amounts to 39 *kanals* 13 *marlas* being about two thirds of Ishar Das's holding which amounts to one half of 111 *kanals*. The excerpt produced by the Special Kanungo shows that out of the land gifted four *khasra* numbers (area 14 *kanals* 5 *marlas*) were in 1852 owned by Devi Das, 4/5 and a collateral in the sixth degree, 1/5. The remainder of the area gifted was in 1852 either *shamilat deh* or *shamilat patti* or partly *shamilat* and partly the property of Devi Das and Datta.

In these circumstances there is no indication whatever that the land is self-acquired. We are unable to hold that there are reasons for disturbing the

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learned District Judge's finding of fact that the land is ancestral. Mr. Fakir Chand, for the appellants, also relied on the fact that in 1906 Tulsi Ram gifted half of his total holding to his two sons and suggested that this would make the property non-ancestral. We are entirely unable to assent to this proposition, based on a single sentence quoted, apart from its context, from *Sri Ram Major v. Ramji Das* (1). The finding of the District Judge that the house and shop gifted are not ancestral has not been disputed before us.

As to the main point in appeal, whether the Brahmins of this village are governed by Hindu Law or by Punjab Custom, Mr. Fakir Chand for the appellants urged that the initial presumption is that Brahmins are governed by Hindu Law and that the presumption has not been rebutted. For the first proposition he relied on Rattigan's Customary Law, paragraph 61 Explanation 1 (page 235, 11th edition): "The presumption embodied in the above canon, so far as it affects ancestral immovable property, cannot be predicted of non-agricultural classes, such as Sayads, Brahmins, Khatris and Bedis. In the absence of proof to the contrary the presumption is that these classes observe the principles of their personal law."

He also relied upon *Salig Ram v. Badhawa* (2), a judgment of Sir Shadi Lal C. J. and Zafar Ali J. in a case of Brahmins of Gokalgarh village in Ambala District. Sir Shadi Lal said, "It is beyond dispute that the initial presumption in the case of Brahmins is that they are governed by their personal law." *Khazan Chand v. Pars Ram* (3), a case of Datt Brahmins of District Gujrat, decided by Abdul Raoof and Addison JJ., is to the same effect. In both

(1) 59 P. R. 1909. (2) (1923) I. L. R. 4 Lah. 254.
(3) (1925) I. L. R. 6 Lah. 524.

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these cases it was held that the presumption had not been rebutted. Mr. Achhru Ram, for the respondents, did not contest the general proposition, but urged that in this case the *onus* had been discharged by the following facts:—The Brahmins of this village constitute a compact village community descended from a common ancestor who had founded the village nearly three centuries ago. The entire land is owned by the Brahmins who provide the only *lambardar*. Both sides gave evidence that Brahmins till the land with their own hands.

There is a good deal against this. It is to be accepted and is not very important that among these Brahmins marriages are celebrated according to Vedic rites, that they wear the sacred thread and that widow re-marriage is not permitted (see statement of Buta Ram, P.W.1, and other witnesses). It is more important that many of the Brahmins do not till with their own hands and that they have non-agricultural connections. Thus Basant Ram (P.W.2) says Arains and Jats are occupancy tenants in this village. Amritsaria (P.W.6) states that neither the donor, Ishar Das, nor the donee, Salig Ram, till with their own hands and he himself does not cultivate. Many of the witnesses are married in non-agricultural families, *e.g.* Buta Ram says that Bhagwan Das is married in the family of a shopkeeper in the town of Nakodar. Buta Ram's own sister is married to a *Mahant*. The granddaughter of Basant Ram (P.W.2) is married in a family which does not carry on cultivation. The sister and daughter of Lachhman Das (P.W.4) are married in Sahukar families. Similarly Buta Ram's son Bhag Mal, is a school master. Basant Ram (P.W.2) has two sons, one a *mistry* in an Electric Company, the other an overseer. One of the sons is

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married in Nawanshahr. Lachhman Das (P.W.4) has two sons, one a school master, the other a *mistry* and his brother is employed in a Girls' College. Several of the witnesses deal in sugar. Two, Basant Ram and Lachhman Das, have cases of their own and appear to be personally interested in alleging custom. Lachhman Das states that nobody has ever sold his land. In that case how has a custom restricting alienation grown up? Buta Ram says that the priests also carry on cultivation, from which it may be inferred that the Brahmins of this village include priests.

Mr. Achhru Ram relies also upon judicial instances. The first is Civil Appeal No.376 of 1895, decided on 8th July, 1896, by a Division Bench of the Chief Court. This concerns an alienation by Brahmins of this village and the Bench said, "The mortgagor Nihala is a Brahmin but an agriculturist and we have no doubt that being a sonless proprietor he had no power to mortgage his land without necessity and that plaintiffs, his brothers, have a right to dispute the mortgage. The only question is as to the extent of the necessity." There was no further discussion. He also relied on the judgment of a Munsif, decided on the 14th November, 1889. It appears that Gulab Devi, widow of Uttam of this village, gifted her husband's property to her daughter's son Beli. The collaterals contested the gift on the basis of custom, but the dispute was compromised. It was agreed that half the land should be given to Beli: the other half was to remain in possession of Gulab Devi and her deceased son's widow for their lives and then go to the collaterals. This instance is of no value. He also relied upon a suit in which Lala Rangi Lal, Subordinate Judge, 2nd Class, held on the 31st July,

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1911, that in this village Brahmins were governed by customary law in matters of succession. This was affirmed by the Divisional Judge. An appeal was rejected by the Chief Court on a preliminary point.

These are the only instances. *Rai Bahadur* Hotu Singh's Customary Law of the Jullundur District is silent on the point.

Mr. Achhru Ram also relies on a number of cases in which Brahmins have been held to be governed by agricultural custom. They are *Devi Ditta Singh v. Dropti* (1), *Bishen Das v. Ram Dhan* (2), *Tahl Das v. Malik Singh* (3), *Jai Ram v. Sardar Singh* (4), *and Ram Lal v. Gopi* (5). He also cited *Prem Singh v. Darbara Singh* (6) a case dealing with Kalals, in which Scott-Smith and Fforde JJ. said, " One clear principle to be extracted from the authorities is that one of the most important tests to be applied in determining whether a particular caste is or is not governed by agricultural custom, is to ascertain whether or not they form a compact village community, or, at least, a compact section of the village community. If they do so, the presumption is strongly in favour of the applicability of custom. This presumption in favour of custom has been applied even in cases of Brahmins."

This no doubt was the older view, but since full force came to be given to the observations of Robertson J. in *Daya Ram v. Sohel Singh* (7), greater weight is attached to personal law. Robertson J. said at page 410, dealing with section 5 of the Punjab Laws Act :—

" In all cases it appears to me under this Act, it lies upon the person asserting that he is ruled in re-

(1) 56 P. R. 1909.
(2) 63 P. R. 1910.
(3) 2 P. R. 1914.
(4) 23 P. R. 1914.
(5) 24 P. R. 1914.
(6) (1923) 72 I. C. 775.
(7) 110 P. R. 1906, p. 410 (F. B.).

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gard 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 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."

This passage was quoted with very high approval by their Lordships of the Privy Council in *Abdul Hussein Khan v. Sona Dero* (1), a case from Sind. Lord Buckmaster quoted the passage with the following remarks:—

" This contention was dealt with by Mr. Justice Robertson at page 410 of the report in words which so aptly and expressly declare the true relation of the necessity of proof as between customary and established law that they may with advantage be reproduced."

(1) (1918) I. L. R. 45 Cal. 450 (P.C.).

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The passage was quoted again in 1928 by their Lordships of the Privy Council in *Vaishno Ditti v. Rameshri* (1), a case from the North-West Frontier Province. It is partly owing to these rulings that the view is now accepted that in the case of Brahmins the initial presumption is in favour of personal law, which those asserting custom have to disprove.

The plaintiff-respondents have produced two judicial instances, but these judgments were delivered under the influence of the older view that in this province the rule of agricultural custom applies in matters of succession and alienation even to non-agricultural tribes settled as agricultural communities. This may very often be the fact, but it is not the first rule. The first rule is that non-agricultural tribes, especially Brahmins, follow their personal law and that those asserting agricultural custom have to prove it. Here the point favouring the plaintiffs is the existence of a compact village community for nearly three centuries. On the other hand, these Brahmins still include priests, their connections are largely with non-agricultural families, and many of them follow non-agricultural vocations.

For these reasons I am of opinion the *onus* is not discharged. I would, therefore, accept this appeal and set aside the judgment and decree of the learned District Judge and dismiss the plaintiff's suit, but in view of the peculiar circumstances direct that the parties bear their own costs throughout.

TEK CHAND J.

TEK CHAND J.—I agree.

*A. N. C.*

*Appeal accepted.*

(1) (1929) I. L. R. 10 Lah. 86, 103 (P.C.).