Darshan Singh

Vs

Ram Pal Singh and Another

Civil Appeals Nos. 248, 1407 and 1753 of 1974; 1149, 773 and 1043 of 1975; 263 of 1976 and 3440 of 1982

(Dr. T.K. Thommen, K.N. Saikia, N.M. Kasliwal JJ)

20.11.1990

JUDGMENT

K.N. SAIKIA J

1. The appellants were contesting alienations under the provisions of the Punjab Custom (Power to Contest) Act, 1920, hereinafter referred to as 'the Principal Act', and their suits were at appellate stage in the High Court when the Punjab Custom (Power to Contest) Amendment Act, 1973 (Punjab Act No. 7 of 1973), hereinafter referred to as the Amendment Act came into force on 23rd day of January, 1973. The High Court dismissed the appeals taking the view that no contest to alienations was permissible after the Amendment Act came into force. Hence these eight appeals by special leave.

2. Earlier the suit Dharam Singh v. Ujaggar Singh, disputing the customary adoption of the defendant and the gift deed made in his favour and claiming title to the property mutated by that right was filed on 22-8-1966 and Judgment of the trial Court was dated 16-10-1968. On appeal the District Judge, Ludhiana by Judgment dated 12-1-1970 remanded the case and after remand the Judgment was delivered by trial Court on 26-8-1971; the appeal therefrom was filed on 29-9-1971 and the District Judge delivered Judgment on 28-2-1973. Meanwhile the Amendment Act came into force on 23-1-1973. The second appeal was filled on 25-3-1973 and it was dismissed on 3-4-1973 and it was dismissed on 3-4-1973 and it was dismissed on 3-4-1973. Special Leave Petition filed in this Court on 1-5-1973 and special leave being granted on 21-8-1973 arose Civil Appeal No. 1263 of 1973; Ujaggar Singh v. Dharam Singh.

3. The main question in the above appeal before this Court was whether the Amendment Act of 1973 would or would not apply to the pending proceedings. The appellants contention was that it would not. 0. Chinnappa Reddy, J. and E. S. Venkataramiah, J. as he then was, while dismissing the appeal on 2811-1986 held:

> In view of Section 7 of the Punjab Custom (Power to Contest) Act as amended in 1973, there is no substance in this appeal. We also notice that it has been the consistent view of the Punjab High Court that Section 7 has retrospective effect and that it also applies to pending proceedings."

4. Again in Civil Appeal No. 1135 of Chinnappa Reddy, and K. Jagannatha Shetty, JJ. while

rejecting the contention that the Amendment Act did not apply to the pending proceeding, and dismissing the appeal on 16-7-1987 held

> "The view taken by the High Court in regard to the Punjab Custom (Power to Contest) Amendment Act, 1973 in the present case has consistently been taken by the High Court right from 1973 and we do not think we will be justified in taking a different view at this stage".

5. In Bara Singh v.Kashmira Singh, Civil Appeal No. 1934 of 1972 reported in (1987) 2 JT (SC) 234, A. P. Sen and V. Balakrishna Eradi, JJ. regarding the same question of applicability of Section 7 of the Amendment Act to the pending proceedings orders on 4-1-1987:

> "Our attention is drawn to the view taken by this Court in Ujaggar Singh v. Dharam Singh (Civil Appeal No. 1263 of 1973, decided on November 28, 1986) to the effect that the Punjab Custom (Power to Contest) was is retrospective in operation and that it also applies to pending proceedings. We find that the view appears to run counter to the express provisions of sub-s. (2) of S. 1 of the Amendment Act which provides that the amendment shall be deemed to have come into force only on January 3, 1973. It cannot be disputed that S. 3 of the Amendment Act which makes S. 7 of the Act applicable to all immovable property i.e. whether ancestral or non-ancestral affects substantive rights of the parties. When the legislature has clearly indicated that Amendment Act shall be prospective in operatin, it follows that S.7 as amended cannot apply to pending proceedings instituted much earlier. We therefore feel that the view expressed in Ujagar Singh v. Dharam Singh, requires reconsideration.

Let the papers be placed before Hon'ble the Chief Justice of India for the case bieng placed before a Bench of three Judges

6. This is how nine connected appeals Singh v. Kashmira Singh, Civil Appeal No. 1934 of 1972 (reported in 1987 (2) JT (SC) 234 has since been disposed of on its merits as the appellant therein did not raise the question of retrospective operation of the Amendment Act. The remaining eight appeals, heard analogously, on the question referred to, are being disposed of by this common Judgment.

7. The main contentions of the appellants are that neither by express words nor by necessary implication the Amendment Act can be said to be retrospective and applicable to pending proceedings; more so in view of sub-section (2) of S. 1 of the Amendment Act deeming it to have come into force on 23-1-1973 and the retention of the provisions of S. 4 of the Principal Act; and that the vested rights to contest alienations could not be said to have been taken away by retrospective operation.

8. The respondents' contentions are that in view of the deletion of S. 6 and amendment of S. 7 by the Amendment Act so as to include both ancestral and non-ancestral immovable properties, there could be no question of any contest after - the Amendment Act came into force and this Court in Ujaggar Singh's case (supra) and Udham Singh's case (supra) already held that the Amendment Act is retrospective and applicable to pending proceedings and the High Court rightly dismissed the appeals. We proceed to examine the rival contentions.

9. The Punjab Laws Act, 1872 (Act 4 of 1872) was an Act for declaring which of certain rules, laws

and regulations would have the force of law in the Punjab and for other purposes. Its preamble said:

> "Whereas certain rules, laws and regulations made heretofore for the Punjab, acquired the force of law under the provisions of Section 25 of the Indian Councils Act, 1861; and whereas it is expedient to declare which of the said rules, laws and regulations shall henceforth be in force in Punjab, and to amend, consolidate or repeal others of the said rules, orders and regulations; it is hereby enacted as follows."

Section 5 of the Punjab Laws Act, 1872 provides:

> Decisions in certain cases to be according to native law:- In questions regarding succession, special property of females, betrothal, marriage, divorce, dower, adoption, guardianship, minority, bastardy, family relations, wills, legacies, gifts, partitions, or any religious usage or institution, the rule of decision shall be..-
>
> (a) Any custom applicable to the parties concerned, which is not contrary to justice, equity or good conscience, and has not been by this or any other enactment altered or abolished, and has not been declared to be void by any competent authority;
>
> (b) The Mohammedan law, in cases where the parties are Mohammedan, and the Hindu law, in cases where the parties are Hindus except in so far as such law has been altered or abolished by legislative enactment, or is opposed to the provisions of this Act, or has been modified by any such custom as is above referred to."

10. The custom with which we are concerned in these cases is succinctly stated by Rattigan in his Digest of Customary Law in the Punjab, at para 59 as under:

> "59. Ancestral immovable property is ordinarily inalienable (especially amongst 'Jats' residing in the central districts of the Punjab), except for necessity or with the consent of male descendants, or, in the case of a sonless proprietor, of his male collaterals. 'Provided' that a proprietor can alienate ancestral immovable property at pleasure if there is at the date of such alienation neither a male descendant nor a male collateral is in existence (No. 36 P. R. 1895; No. 55 P.R. 1903, FB)"

11. The degrees of collaterals eligible to contest an alienation on the basis of the above custom being not limited by the custom itself, there arose need to enact certain restrictions in respect of suits in which the alienation of immovable property or the appointment of heir was contested by descendants or collaterals on the ground that it was contrary to custom. It appears that in 1917 the local Government had appointed a committee to investigate in detail the main problem of codification, and it referred to this committee the question of the form which the subsidiary measure to restrict the rights of alienation to contest should take. The committee prepared a Draft Bill which was circulated for opinion in June 1917 and the Bill was prepared after necessary changes. The Principal Act was accordingly passed. It contained only seven sections. It extended to Punjab. As defined in S. 2, "alienation" includes any testamentary disposition of property. "Appointment of an heir" includes any adoption made or purporting to be made according to custom. Stating the scope of the Act S. 3 provides that the Act shall apply only in respect of alienation of immovable property or appointment of heirs made by persons who in regard to such alienation or appointment were governed by custom. Section 4 is the saving section and it says

> "This Act shall not affect any right to contest any alienation or appointment of an heir made before the date on which this Act comes into force".
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> Thus, the Principal Act did not affect alienations or appointments made before the date on which it came into force. Section 5 preserved the rights of a female and said:
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> "Nothing in this Act shall apply to any alienation or appointment of an heir made by a female."
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> Section 6 before it was omitted by the Amendment Act of 1973 stood as follows:
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> "6. Limitation on the right to contest alienations and appointment of heirs:- Subject to the provisions contained in Section 4 and notwithstanding anything to the contrary contained in Section 5, Punjab Laws Act, 1872, no person shall contest any alienation of ancestral immovable property or any appointment of an heir to such property on the ground that such alienation or appointment is contrary to custom, unless such person is descended in male lineal descent from the great-great-grandfather of the person making the alienation or appointment".

Section 7 dealt with alienation of non-ancestral property. Before amendment by the Amendment Act of 1973, it said:

> "Alienation of non-ancestral property:-Notwithstanding anything to the contrary contained in Section 5, Punjab Laws Act, 1872, no person shall contest any alienation of non-ancestral immovable property or any appointment of an heir to such property on the ground that such alienation or appointment is contrary to custom".

12. Parties agree that owing to multiplicity of suits and uncertainty of alienations the State Legislature felt the need for amendment of the law for the changing society. This is quite natural. Sir Henry Maine said in. his Ancient Law, confining to progressive societies :

> "With respect to them it may be laid down that social necessities and social opinion are always more or less in advance of Law. We may come indefinitely near to the closing of the gap between them, but it has a perpetual tendency to reopen. Law is stable; the societies we are speaking of are progressive. The greater or less happiness of a people depends on the degree of promptitude with which the gulf is narrowed." (Everyman's Lib. Edit. p. 15).

13. The Punjab Custom (Power to Contest) Amendment (Punjab Ordinance No. 2 of 1973) was promulgated with effect from January 23, 1973. The Amendment Act repealed that Ordinance. It is stated at the Bar that the Ordinance only omitted S. 6 of the Principal Act. The Statement of Objects and Reasons of the Punjab Custom (Power to Contest) Amendment Bill, 1973 was:

> In matters regarding alienation of immovable property, Section 5 of the Punjab Laws Act, 1872, provides that the rule of decision should be the custom applicable to parties concerned. The custom in Punjab made ancestral immovable property ordinarily inalienable except for legal necessity or with the consent of male descendants or in the case of sonless proprietor, of his male collaterals. The male lineal descendants of the person making the alienation had the right to contest alienation. The right to contest was limited to some extent by S. 6 of the Punjab

> Custom (Power to Contest) Act, 1920.
>
> 2. Along with the repeal of the Punjab Pre-emption Act, 1913, it was considered that the right to contest alienation of immovable property whether ancestral or non-ancestral that it is contrary to custom, should also be done away with. Hence this Bill". (Emphasis supplied)

14. The Amendment Act received the assent of Governor of Punjab on the 6th of April, 1973 and was first published in the Punjab Government Gazette Extraordinary dated April 9, 1973. As provided in 5. 1 it shall be deemed to have come into force on the 23rd day of January, 1973. By S. 2 of the Amendment Act S. 6 of the Principal Act shall be omitted, and by S. 3 in S. 7 of the Principal Act, for the words "non-ancestral immovable property" the words "immovable property. whether ancestral or non-ancestral" shall be substituted. After amendment S. 7 would read as follows:

> "7. Alienation of non-ancestral property.- Notwithstanding anything to the contrary contained in Section 5, Punjab Laws Act, 1872, no person shall contest any alienation of immovable property whether ancestral or non ancestral or any appointment of an heir to such property on the ground that such alienation or appointment is contrary to custom."

15. The question now is what was the effect of the Amendment Act. We have seen that the object of S. 5 of the Punjab Laws Act, 1872 was to settle for Punjab the rule of decision in question stated in clauses (a) and (b) of the Section. The Punjab Laws Act settled this question laying down the first rule ,any custom applicable to the parties concerned which was not contrary to justice, equity and good conscience, and which had not been, by the Act itself or by any other enactment, altered or abolished, and had not been declared to be void by any competent authority'. Clause (b) provided that the principle of Mohammedan Law in cases where the parties were Mohammedan and the Hindu Law, in cases where the parties were Hindus, should be the other rule of decision except in so far as such law has been altered or abolished by legislative enactment, or is opposed to the provisions of that Act, or has been modified by any such custom as referred to thereinabove. Thus the legislature intended that the Hindu and Mohammedan Laws should be applied where no such customary rule prevailed In Vaishno Ditti's case, (1929) ILR 10 Lab 86 at p. 103: (AIR 1928 PC 294 at p. 299), it was held that in cases where the custom was alleged a duty was also imposed upon the Court to endeavour to ascertain the existence and nature of that custom. In Thakur Gokulchand v. Parvin Kumari, AIR 1952 SC 231 : 1952 SCR 825, it was held that S. 3 of the Principal Act applied only in respect of alienation of immovable property or appointment of heirs made by persons who in regard to such alienations or appointments were governed by custom. In Ujagar Singh V. Mst. Jeo, AIR 1959 SC 1041 :1959 Supp (2) SCR 781, it was held by this Court that the plaintiff was entitled to fall back on her personal law where the parties to a suit had based their respective claims on the basis of a custom but neither side established the respective custom set up by them.

16. Section 6 of the Principal Act limited the right to contest any alienation to ancestral immovable property as being contrary to custom to such persons as are descendants in the male lineal descent from the great-grandfather of the person making the alienation or appointment. Thus the right to contest, which was available to persons before the coming into force of the Principal Act had been taken away from persons other than those mentioned in S. 6 to the extent that they would not be able to contest the alienation of ancestral immovable property., Section 7 put a complete bar to contest of any alienation of ancestral or non-ancestral immovable property or appointment of an heir

to such property on the ground that such alienation or appointment was contrary to custom.

17. From the Statement of Objects and Reasons of the Amendment Bill, 1973, there is no doubt that along with the repeal of the Punjab Pre-emption Act, 1973 it was considered that the right to contest alienation of immovable property whether ancestral or non-ancestral on the ground that it was contrary to custom should be done away with. The Punjab Pre-emption (Repeal) Act, 1973-Punjab Act No. 11 of 1973 by S. 2 repealed the Punjab Pre-emption Act, 1913. Section 3 of that Act puts a complete bar to pass decrees in suit for pre-emption and said:

> "On and from the date of commencement of the Punjab Pre-emption (Repeal) Act, 1973, no Court shall pass a decree in any suit for pre-emption."

By S. 4 of the Punjab Pre-emption (Repeal) Act, 1973, the Punjab Pre-emption (Repeal) Ordinance, 1973 was repealed. There is no doubt that from the commencement of the Punjab Pre-emption (Repeal) Ordinance 1973 was repealed. There is no doubt that from the commencement of the Punjab Pre-emption (Repeal) Act, 1973 no Court shall pass a decree in any suit for pre-emption. It is common ground that that Act has done away with any claim of pre-emption from the date of the commencement of that Act. In other words, from that date the customary pre-emption has been done away with. There can, therefore, be no doubt that the Amendment Act similarly had the object and purpose of doing away with the custom of contesting alienation. That was sought to be achieved firstly by deleting the provision of S. 6 and secondly by putting a complete bar to contesting allenations or appointments of heirs in respect of both ancestral and non-ancestral immovable property. There can, therefore, be no doubt that the intention of the legislature was to do away with the custom of contesting alienation altogether. There is also no doubt about the competence of the legislature in passing the Amendment Act with a view to do away with the custom.

18. In Halsbury's Laws of England, 4th Edn. Vol. 12, Para 441, we read:

> "441. Abolition only by statute Custom, being in effect local common law within the locality where it exists, can only be abolished or extinguished by Act of Parliament. An Act of Parliament may abolish a custom either by express provision or by the use of words which are inconsistent with the continued existence of the custom."

The intention of the legislature being clear, in case of the Pre-emption Act by repeal of the Act itself the legislature put an, end to that custom. Has the legislature similarly put an end to the custom of contesting alienation either by express provision or by the use of words which are inconsistent with the continued existence of the custom? The effect of omission of S. 6 only by the Amendment Act, as was done by the Ordinance, might perhaps have been ambiguous as it could even meant that the restriction was removed or that it would not be restricted to collaterals. The provisions of S. 7 that no person shall contest any alienation of immovable property whether ancestral or non-ancestral or any appointment of an heir to such property on the ground of such alienation or appointment is contrary to custom undoubtedly puts an end to contest of any alienation. This should normally leave no doubt that the use of the above words and expression are inconsistent with the continued existence of the custom.

19. Mr. Rajinder Sachar, the learned counsel for appellants argues that S. 4 throws veritable doubt to such a conclusion and that giving of retrospective effect to the Amendment Act was neither expressed nor implied except to the extent that though it received the assent of the Governor of Punjab on April 6, 1973 and was published in the Punjab Government Gazette Extraordinary on

April 9, 1973, the Amendment Act shall be deemed to have come into force on the 23rd day of January, 1973. Admittedly this was because that was the date of the corresponding Ordinance repealed by the Act.

20. We first take the question of S. 4. As we have already noted that the Act shall not affect any right to contest any alienation or appointment of an heir made before the date on which the Principal Act came into force. This means the restriction or limitation as to the degree of collaterals as also the nature of the property, namely, the immovable property whether ancestral or non-ancestral would not be there. The Amendment Act of 1973 having not omitted or deleted this provision, consequently those rights having not been affected, those would continue till the Amendment Act came into force on January 23, 1973 and even later. If that was so, counsel asks, what is the justification in holding that the rights that accrued before the Amendment Act came into force would be put to an end by the Amending Act?

21. Mr. Sehgal, the learned counsel for the respondents has two answers. First, in view of the Punjab Customs Limitation Act, 1920 having prescribed a period of limitation of six year and three years, it is fallacious to say that those rights continued till 1973, or that contests already made would continue beyond fifty years.

22. It is true that the Punjab Limitation (Custom) Act, 1920 is an Act to amend and consolidate the law governing the limitation of suits relating to alienation of ancestral immovable property and appointments of heirs by persons who follow customs in Punjab. That Act was passed after obtaining previous sanction of the Governor General under S. 79(2) of the Government of India Act, 1915. It was the outcome of proposals by the Punjab Customary Law Conference convened by the Lieutenant Governor in 1915. It repealed the Punjab Limitation (Ancestral Land Alienation) Act, 1900. S. 5 of the Act provided for dismissal of suits of the descriptions specified in the Act if instituted after the period of limitation prescribed in the Act has expired. It said:

> "Subject to the provisions contained in ss . 4 and 25 (inclusive) of the Indian Limitation Act, 1908, and notwithstanding anything to the contrary contained in the first schedule of the said Act, every suit of any description specified in the schedule annexed to this Act, instituted after the period of limitation prescribed therefor in the schedule shall be dismissed, although limitation has not been set up as a defence."

23. In the Schedule, in cases of a suit for declaration that an alienation of ancestral immovable property will not, according to custom, be binding on the plaintiff after the death of the alienor or similar suits a limitation period of six years has been provided and in cases in which a declaratory decree is obtained a limitation of three years has been provided. Mr. Sehgal is, therefore, right in his submission that pre-Principal Act rights could not continue beyond 23-1-1973 and those already contested were also not likely to continue so long.

24. Secondly, Mr. Sehgal submits, the fact that S.4 was not omitted even after more than 50 years would not justify the inference of the intention of the legislature not to do away with the custom of contesting alienation. Mr. Sachar's reply to the first answer is that the period of limitation was for an institution of the suit and assuming that suits have been instituted within limitation there is no bar to continuation of the suits. Counsel refutes the submission that S. 7 would be a bar to continuation of such contest in view of the legal position that the amended provision of S. 7 in the Act will also be covered by the expression of 'this Act' in S. 4. Counsel relied on the dictum of Vivian Bose, J. that when a subsequent Act amends the earlier one in such a way as to incorporate itself or a part of

itself into the earlier, then the earlier Act must thereafter be read and construed (except where that would lead to a repugnancy, inconsistency or absurdity) as if the altered words had been written into the earlier Act with pen and ink and the old words scored out so that there is no need to refer to the amending Act at all. There is no doubt that taking to the logical extreme that would be so,. but in view of the fact that the 1973 Act having come into force after more than 50 years, the legislature might perhaps consider the amendment not necessary or might have thought that after such distance of time no question of any contest of pre-Principal Act rights would be possible or probable. Weque leges neque senatus consulta ita seribi possunt utomnis casus qui quandoque in sediriunt comprehendatur; sed sufficit ea quae plaeramque accidunt conteneri. Neither laws nor Acts of a Parliament can be so written as to include all actual or possible cases; it is sufficient if they. provide for those things which frequently or ordinarily happen. What is material is to see the expressed objects and reasons and the language used. Halsbury's Laws of England, Vol. 12 Para 442 says:

> "As a general rule, if the provisions of an Act of Parliament are repugnant to the continued existence of the custom, the custom will be treated as abrogated and destroyed, although the Act does not actually extinguish the custom by express words. Although the question whether the custom is destroyed of not has been said to turn on the question whether the statute is an affirmative or a negative statute, this distinction appears to be merely one of the factors to be considered in determining whether or not the statute is repugnant to the custom. As a corollary to this rule, no one can allege a custom against an Act of Parliament, unless the custom be saved or preserved by another Act of Parliament."

25. Applying the above principle and considering the stated objects and reasons of the Amendment Act, namely, to do away with the custom, and the negative provision of S. 7 of the Amendment Act, we are of the view that continuance of the custom is inconsistent with them. Consuetudo semel reprobate non potest amplius induci. A custom once disallowed cannot be again brought forward.

26. The view we have taken appears to be consistent with the provisions of the Hindu Succession Act which left only the right to contest unaffected. It is the common case of the parties that they are governed by the Hindu Succession Act, 1956 (No. 30 of 1956). S. 4 of the Act provides for overriding effect of the Act and says :

> "4. (1) Save as otherwise expressly provided in this Act,-
>
> (a) any text, rule or interpretation of Hindu Law or any custom or usage as part of that law in force immediately before the commencement of this Act shall cease to have effect with respect to any matter for which provision is made in this Act;
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> (b) any other law in force immediately before the commencement of this Act shall cease to apply to Hindus in so far as it is inconsistent with any of the provisions contained in this Act.
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> (2) For the removal of doubts it is hereby declared that nothing contained in this Act shall be deemed to affect the provisions of any law for the time being in force providing for the prevention of fragmentation of agricultural holdings or for the fixation of ceilings or for the devolution of tenancy rights in respect of such holdings."

27. The above provisions in effect lay down that in respect of the matters dealt with by the Act it repeals all existing laws, whether in the form of enactments or otherwise, which are inconsistent. with this Act. The result is that immediately on coming into operation of the Act the law of succession hitherto applicable to the parties, by virtue of any text, rule or interpretation of Hindu law or any custom or usage having the force of law ceased to have effect in respect of the matters expressly dealt with by the Act. The overriding effect of the Act has been emphasised in the decisions in S. S. Munna Lal v. S. S. Rajkumar, AIR 1962 SC 1493: 1962 Supp (3) SCR 418, Giasi Ram v. Ramjilal, AIR 1969 SC 1144: (1969) ISCC 813, Punithavalli Ammal v. Ramalingam (Minor), AIR 1970 SC 1730: (1970) 3 SCR 894, Commr. of Wealth-tax, Kanpur v. Chander Sen, AIR 1986 SC 1753 : (1986) 3 SCC 567 and Yudhishter v. Ashok Kumar, AIR 1987 SC 558: (1987) 1 SCC 204.

28. In Giasi Ram v. Ramjilal (AIR 1969 SC 1144) (supra) where the parties were Hindu Jats of Punjab it was held by this Court that the Principal Act was enacted to restrict the rights exercisable by members of the family to contest alienations made by holder of ancestral property. By virtue of S. 6 of the Act no person was entitled to contest an alienation of ancestral immovable property unless he was descended in the male lineal from the great grandfather of the alienor. Under the customary law in force in the Punjab a declaratory decree obtained by the reversionary heir in an action to set aside the alienation of ancestral property enured in favour of all persons who ultimately took the estate on the death of the alienor for the object of a declaratory suit filed by a reversionary heir impeaching an alienation of ancestral estate was to remove a common apprehended injury, in the interest of the reversioners. The decree did not make the alienation a nullity it removed the obstacle to the right of the reversioner entitled to succeed when the succession opened. By the decree passed in the suit filed by Giasi Ram, it was declared that the alienations by Jwala were not binding after his lifetime and the property will revert to his estate. This Court observed that it was true that under the customary law the wife and the daughters of a holder of ancestral property could not sue to obtain a declaration that the alienation of ancestral property would not bind the reversioners after the death of the alienor. But a declaratory decree obtained in a suit instituted by a reversioner competent to sue had the effect of restoring the property alienated to the estate of the alienor and that once the property alienated reverted to the estate of Jwala at the point of his death and all persons who would, but for the alienation, have taken the estate will be entitled to inherit the same. It was further observed that if Jwala had died before the Hindu Succession Act, 1956 was enacted the three sons would have taken the estate to the exclusion of the widow and the two daughters. After the enactment of the Hindu Succession Act the estate devolved by virtue of Ss. 2 and 4(1) of the Hindu Succession Act, 1956, upon the three sons, the widow and the two daughters. The fact that the widow and the daughters were not eligible to contest an alienation under the Principal Act would be of no effect on their succession according to the Hindu Succession Act.

29. In Smt. Manshan v. Tej Ram, 1980 Supp SCC 367: (AIR 1980 SC 558), following Giasi Ram (AIR 1969 SC 1144) (supra) it was held that by virtue of Ss. 4 and 8 of the Hindu Succession Act, on the date of death of the last male holder in 1957, the daughters became the preferential heirs in suppression of the prevalent custom. The effect of the declaratory decree passed in 1950 was merely to declare that whosoever would be the next reversioner to the estate of the last male holder at the time of his death would get the property in respect of which the declaratory decree was made and not necessarily the person in whose favour the declaratory decree was passed.

30. The overriding effect of the Hindu Succession Act was recognised in a series of decisions of the Punjab and Haryana High Court wherein it was held that Punjab Agricultural Custom, in so far as it was applicable to Hindus, was no longer in force as regards the matters of succession which were

now governed by the provisions of that Act, Taro v. Darshan Singh, AIR 1960 Punj 145 : ILR (1959) Punj 2253, Hansraj v. Dhanwant Singh, AIR 1961 Punj 510 : 1LR(1961)1 Punj 369, Banso v. Charan Singh, AIR 1961 Punj 45, Kaur Singh v. Jaggar Singh, AIR 1961 Punj 489, Kalu v. Nand Singh, AIR 1974 Punj and Har 50.

31. The result is that any rule or law of succession previously applicable to those who were governed by custom would after the coming into force of the Hindu Succession Act be permissible only in respect of the matters for which no provision is made under the Act. However the Hindu Succession Act does not appear to have abrogated any rule or customary law in Punjab relating to restrictions on alienation by a male proprietor over and above what could be done under Hindu Law. The right of reversioners, besides those who could do so under Hindu Law, to challenge or contest any alienation could not be said to have ceased to exist. This being the position, it was still necessary to do away with the right to contest such an alienation as the legislature desired. The Amendment Act was the measure adopted.

32. After the Amendment Act there has been a series of decisions of the Punjab and Haryana High Court holding that the Amendment Act applies to the pending cases also. Bant Singh v. Gurpreet Singh, (1 913) 75 Pun LR 797; Gurdial Singh v. Piara Singh, 1973 Cur LJ 529 (Punj); Charan Singh v. Gehl Singh, (1974) 76 Pun LR 125; Jit Singh v. Karnail Singh, (1975) 77 Pun LR 488: (AIR 1975 Punj and Har 292); Surjit Kaur v. Zail Singh, (1977) 79 Pun LR 690 : (AIR 1977 NOC 377). Mr. Sehgal submits that five single Benches and one Division Bench have taken the view that the Amendment Act affected the pending cases and that no contrary view has been taken by any learned Judge of the High Court of Punjab and Haryana so far.

33. The view taken by this Court in Ujaggar Singh and Udham Singh's cases have to be viewed in this context. Stare decisis et non quieta movere. To adhere to precedent, and not to unsettle things which are established. In Raj Narain Pandey v. Sant 12 in Prasad Tewari, (1973) 2 SCC 35: (AIR 1973 SC 291), it was observed in paragraph 10 that in the matter of a local statute, the view taken by the High Court over a number of years should normally be adhered to and not disturbed. A different view would not only introduce an element of uncertainty and confusion, it would also have the effect of unsettling transactions which might have been entered into on the faith of those decisions. As observed by Lord Evershed M.R. in the case of Brownsea Haven Properties v. Poole Corpn., 1958 Ch 574 : (1958) 1 All ER 205 (CA), there is well established authority for the view that a decision of long standing on the basis of which many persons will in the course of time have arranged their affairs should not lightly be disturbed by a superior Court not strictly bound itself by the decision. We respectively agree. The High Court's line of reasoning, as in these cases, has been that the power to contest cannot be allowed to be exercised after the amendment of S. 7 by the Amendment Act.

34. The meaning of the word 'contest' is according to Black's Law Dictionary, to make defence to an adverse claim in a Court of law; to oppose, " resist or dispute; to strive to win or hold; to controvert, litigate, call in question, challenge to defend. The contest continues right up to the final decision or, in other words the right to contest comes to an end only when a final decision is given one way or the other putting an end to the litigation between the parties with regard to the alienation. It is well settled proposition of law that appeal is a continuation of a suit and any change in law, which has taken place between the date of the decree and the decision of the appeal has to be taken into consideration. When a suit filed by a reversioner is dismissed and he files an appeal then before the appellate Court also he is contesting the alienation. If he does not contest or challenge the alienation, then he cannot achieve success. Therefore, when the axe has fallen before the contest was over, let

the axe lie where it falls.

35. Mr. Sachar relies on Thakur Gokulchand v. Parvin Kumari (AIR 1952 SC 231) (supra), Garikapatti Veeraya v. N. Subbiah Choudhury, 1957 SCR 488 : (AIR 1957 SC 540), Jose Da Costa v. Bascora Sadasiva Sinai Narcornim (1976) 2 SCC 917 : (AIR 1975 SC 1843), Govind Das v. Income-tax Officer (1976) 1 SCC 906 : (AIR 1977 SC 552) Henshall v. Porter (1923) 2 KB 193, United Provinces v. Mst. Atiqa Begum, 1940 FCR 110 : (AIR 1941 FC 16), in support of his submission that the Amendment Act was not made retrospective by the legislature either expressly or by necessary implication as the Act itself expressly provided that it shall be deemed to have come into force on 23rd January, 1973; and therefore there would be no justification to giving it retrospective operation. The vested right to contest which was created on the alienation having taken place and which had been litigated in the Court, argues Mr. Sachar, could not be taken away. In other words, the vested right to contest in appeal was not affected by the Amendment Act. However, to appreciate this argument we have to analyse and distinguish between the two rights involved, namely, the right to contest and the right to appeal against lower Court's decision. Of these two rights, while the right to contest is a customary right, the right to appeal is always a creature of statute. The change of the forum for appeal by enactment may not affect the right of appeal itself. In the instant case we are concerned with the right to contest and not with the right to appeal as such. There is also no dispute as to the propositions of law regarding vested rights being not taken away by an enactment which is ex facie or by implication not retrospective. But merely because an Act envisages a past act or event in the sweep of its operation, it may not necessarily be said to be retrospective. Retrospective, according to Black's Law Dictionary, means looking backward; contemplating what is past; having reference to a statute or things existing before the Act in question. Retrospective law, according to the same Dictionary, means a law which looks backward or contemplates the past; one which is made to affect acts or facts occurring, or rights occurring, before it came into force. Every statute which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability in respect to transactions or considerations already past. Retroactive statute means a statute which creates a new obligation on transactions or considerations already past or destroy or impairs vested rights.

36. Halsbury's Laws of England, 4th Edn., Vol. 44, at paragraph 921 we find :

> "921. Meaning of 'retrospective'. It has been said that 'retrospective' is somewhat ambiguous and that a good deal of confusion has been caused by the fact that it is used in more senses than one. In general, however, the Courts regard as retrospective any statute which operates on cases or facts coming into existence before its commencement in the sense that it affects, even if for the future only, the character or consequences of transactions previously entered into or of other past conduct. Thus a statute is not retrospective merely because it affects existing rights; nor is it retrospective merely because a part of the requisites for its action is drawn from a time antecedent to its passing."

37. We are inclined to take the view that in the instant case Legislature looked back to 23rd January, 1973 and not beyond to put an end to the custom and merely because on that cut off date some contests were brought to abrupt end would not make the Amendment Act retrospective. In other words, it would not be retrospective merely because a part of the requisites for its action was drawn from a time antecedent to the Amendment Act coming into force. We are also of the view that while providing that "no person shall contest any alienation of immovable property whether ancestral or

non-ancestral or any appointment of an heir to such property", without preserving any right to contest such alienations or appointments as were made after the coming into force of the Principal Act and before the coming into force of the Amendment Act, the intention of the legislature was to cut off even the vested right; and that it was so by implication as well. There is no dispute as to the proposition that retrospective effect is not to be given to an Act unless the legislature made it so by express words or necessary implication. But in the instant case it appears that this was the intention of the Legislature. Similarly Courts will construe a provision as conferring power to act retroactively when clear words are used. We find both the intention and language of the Amendment Act clear in these respects.

38. Craies on Statute Law, 7th Edn. at page 389 has stated as under:

> "It is obviously competent for the legislature, in its wisdom, to make the provisions of an Act of Parliament retrospective, and no one denies the competency of the Legislature to pass retrospective statutes if they think fit, and many times they have done so. Before giving such a construction to an act of Parliament one would require that it should either appear very clearly in the terms of the Act or arise by necessary and distinct interpretation, and perhaps no rule of construction is more firmly established than this that a retrospective operation is not to be given to a statute so as to impair an existing right or obligation otherwise than as regards matter of procedure, unless that effect cannot be avoided without doing violence to the language of the enactment."
>
> We agree with the above statement of law. However, applying the Amending Act of 1973 to alienations prior to 23-1-1973 does not necessarily mean its retrospective operation.

39. In Rafiquennessa v. Lal Bahadur Chetri (dead) Through His Representatives (1964) 6 SCR 876 : (AIR 1964 SC 1511), on the question of retroactivity of S. 5 of Assam Non-Agricultural Urban Areas Tenancy Act, 1955, referring to Athlumney ex parte Wilson (1898) 2 QBD 547 the Constitution Bench observed (at p. 1514 of AIR):

> "In order to make the statement of the law relating to the relevant rule of construction which has to be adopted in dealing with the effect of statutory provisions in this connection, we ought to add that retroactive operation of a statutory provision can be inferred even in cases where such retroactive operation appears to be clearly implicit in the provision construed in the context where it occurs. In other words, as statutory provision is held to be retroactive either when it is so declared by express terms, or the intention to make it retroactive clearly follows from the relevant words and the context in which they occur."

40. In Mithilesh Kumari v. Prem Behari Khare, (1989) 2 SCC 95 : (AIR 1989 SC 1247), this Court while interpreting S. 4 of the Benami Transactions (Prohibition) Act, 1988 observed at para 21 :

> "However, a statute is not probably called a retrospective statute because a part of the requisites for its action is drawn from a time antecedent to its passing. We must look at the general scope and purview of the statute and at the remedy sought to be applied, and consider what was the former state of law and what the legislation contemplated. Every law that takes away or impairs rights vested agreeably to

> existing laws is retrospective, and is generally unjust and may be oppressive. But laws made justly and for the benefit of individuals and the community as a whole, as in this case, may relate to a time antecedent to their commencement. The presumption against retrospectivity may in such cases be rebutted by necessary implications from the language employed in the statute. It cannot be said to be an invariable rule that a statute could not be retrospective unless so expressed in the very terms of the section which had to be construed. The question is whether on a proper construction the legislature may be said to have so expressed its intention."

41. In the instant case the words "no person shall contest any alienation on the ground that such alienation is contrary to custom" are very significant. A plain reading of the above provision even when construed prospectively leads to the result that the right to contest being contrary to custom has been totally effaced and taken away. Thus no person has any right to contest any alienation of immovable property whether ancestral or non-ancestral on the ground of being contrary to custom after 23-1-1973. This provision will thus apply to all pending actions whether at the stage of trial or before the appellate Court. It is well settled that an appeal is a continuation of the suit and if a right to contest an alienation on the ground of being contrary to custom has been taken away, such right to contest cannot be permitted even at the stage of first appeal or second appeal.

42. The proposition that appeal is a continuation of a suit and is only a rehearing of it is well established by a catena of decisions of this Court. In Harbhajan Singh v. Mohan Singh (1974) 2 SCC 364: (AIR 1974 SC 2068) interpreting S. 3 of the Punjab Pre-emption (Repeal) Act, 1973 which provided that on and from the date of Punjab Pre-emption (Repeal) Act. 1973 no Court shall pass a decree in a suit pre-emption, and the appellant challengedthe correctness of a decree passed by the High Court dismissing a suit for pre-emption, after the Act came into force this Court observed that the appeal was a rehearing and if the High Court were to confirm the decree allowing the suit for pre-emption, it would be passing a decree in a suit for pre-emption, for, when the appellate Court confirms a decree, it passes a decree of its own.

43. In another case under the Punjab Pre-emption (Repeal) Act, 1973, Sadhu Singh v. Dharam Dev (1981) 1 SCC 510 : (AIR 1980 SC 1654), this Court held that where a decree was passed by the trial Court prior to the coming into force of the Act but was challenged in appeal after the Act was passed and affirmed on appeal, that would fall within the mischief of S. 3 while the case was pending in the High Court. The decree challenged in appeal was reopened and the appellate hearing was a rehearing of the whole subject-matter and when a decree was passed in appeal the first decree merged in the appellate decree and it came within the scope of S. 3 which interdicted the passing of a decree even on appeal. Official Liquidator v. R. Desikachar, AIR 1974 SC 2069 : (1975) 1 SCR 890 was applied. The above principle was reiterated in Lakshmi Narayan Cuin v. Niranjan Modak (1985) 1 SCC 270 : (AIR 1985 SC 111), where sub-sec. (1) of S. 13 of the West Bengal Premises and Tenancy Act was to be interpreted and the suit was instituted before the Act came into force and that sub-section directed the Court it at to make any order or decree for possession subject of course to statutory exceptions, it was held that the legislative command in effect deprived the Court of its unqualified jurisdiction to make such order or decree. "It is true that when the suit was institutited Court possessed such Jurisdiction and could pass a decree for possession. But it was divested of that jurisdiction when the Act was brought into force and the language of the sub-section made that abundantly clear." Shah Bhojraj Kuverji Oil Mills and Ginning Factory v. Subbash Chandra Yograj Sinha (1962) 2 SCR 159 : (AIR 1961 SC 1596) was applied

44. In Mithilesh Kumari (AIR 1989 SC) (supra) also this Court observed (Para 24):

> "Lachmeshwar Prasad Shukul v. Keshwar Lal, AIR 1941 FC 51 : 1940 FCR 84, is an authority for holding that the hearing of appeal under the procedural law of India is in the nature of rehearing and therefore in moulding the relief to be granted in a case on appeal, the appellate Court is entitled to take into account even facts and events which have come into existence after the decree appealed against. Consequently, the appellate Court is competent to take into account legislative changes since the decision under appeal was given and its powers are not confined only to see whether the lower Court's decision was correct according to the law as it stood at the time when its decision was given. Once the decree of the High Court has been appealed against, the matter became sub judice again and thereafter this Court had seisin of the whole case, though for certain purposes, e.g., execution, the decree was regarded as final and the Courts below retained jurisdiction in that regard. This was followed in Shyabuddinsab v. Gadag-Betgeri Municipal Borrough (1955) 1 SCR 1268: (AIR 1955 SC 314), where after the judgment of the High Court and after grant of special leave by this Court the legislation was passed, and it was applied by this Court. Their Lordships referring to King v. General Commissioner of Income-tax (1916) 2 KB 249 and K. C. Mukherjee, Official Receiver v. Ramratan Kuer, (1935) 63 Ind App 47 : AIR 1936 PC 49 rejected the contention that unless there are express words in the amending statute to the effect that the amendment shall apply to pending proceedings, it cannot affect the proceedings. In Dayawati v. Inderjit (1966) 3 SCR 275 : AIR 1966 SC 1423 it has been held that the word 'suit' includes an appeal from the judgment in the suit. The only difference between a suit and an appeal is that an appeal only reviews and corrects the proceedings in a cause already constituted but does not create the cause. In Mohanlal Jain v. His Highness Maharaja Shri Sawai Man Singh (1962) 1 SCR 702 : AIR 1962 SC 73 it was observed that "A person is 'sued' not only when the plaint is filed against him, but is 'sued' also when the suit remained pending against him. The word 'sued' covers the entire proceeding in an action." In Amarjit Kaur v. Pritam Singh (1975) 1 SCR 605: (AIR 1974 SC 2068) it has been held that an appeal is a rehearing and in moulding relief to be granted in a case on appeal, the appellate Court is entitled to take into account even facts and events which have come into existence after the passing of the decree appealed against."

45. Mr. Sachar refers us to Colonial Sugar Refining Co. v. Irving, 1905 AC 369 at p. 372, wherein an application was made to the Judicial Committee to dismiss an appeal from the judgment of the Supreme Court of Queensland, on the ground that the power of the Court below to give leave to appeal had been abrogated by S. 39 of the Australian Commonwealth Judiciary Act, 1903. The action in which the appeal was brought was commenced on October 25, 1902, the Judiciary Act came into force on August 25, 1903 and the leave to appeal was given on September 4, 1903. The Judicial Committee dismissed the application, Lord Macnaghten saying : "As regards the general principles applicable to the case there was no controversy. On the one hand it was not disputed that if the matter in question be a matter of procedure only, the petition (to dismiss) is well founded. On the other hand, if it be more than a matter of procedure, if it touches a right in existence at the passing of the Judiciary Act, it was conceded that in accordance with a long line of authorities from the time of Lord Coke to the present day, the appellants (the Sugar Co.) would be entitled to succeed. The Judiciary Act is not retrospective by express enactment or by necessary intendment. And, therefore, the only question was whether the appeal to his Majesty in Council a right vested in the appellants at the date of the passing of the Act, or was it a mere matter of procedure? It was held

that to deprive a suitor in a pending action of an appeal to a superior tribunal which belonged to him as of right is a very different thing from regulating procedure." It was observed that there was no difference between abolition of an appeal altogether and transferring the appeal to a new tribunal. In either case there was an interference with existing rights contrary to the well known general principle that statutes are not to be held to act retrospectively unless a clear intention to that effect was manifested. However, in that case the right to contest itself was not taken away as in this case.

46. Mr. Sachar then refers us to Garikapatti Veeraya v. N. Subbiah Choudhury, 1957 SCR 488 : (AIR 1957 SC 540). There the application for special leave to appeal arose out of a suit instituted on April 22, 1949 and valued at Rs. 11,400/-. The trial Court dismissed the suit and the High Court in appeal reversed that decision on February 10, 1955. Application for leave to appeal to Supreme Court was refused by the High Court on the ground that the value did not come up to Rupees 20,000 It was contended on behalf of the appellant that he had a vested right of appeal to the Federal Court under the law as it then stood and that Court having been substituted by the Supreme Court, he was as of right entitled to appeal to that Court under Art. 135 of the Constitution. This Court held that the contention of the applicant was well founded that he had a vested right of appeal to the Federal Court on and from the date of the suit and the application for special leave should be allowed. It was observed that the vested right of appeal was a substantive right and it was governed by the law prevailing at the time of commencement of the suit and comprised all successive rights of appeal from Court to Court, which really constituted one proceeding. Such a right could be taken away only by subsequent enactment either expressly or by necessary implication. The vested right of appeal in that case was acquired under the old law as contemplated by under Art. 135 of the Constitution in relation to which the jurisdictional power of the Federal Court were exercisable at the commencement of the Constitution and as such it was within the purview of the appellate jurisdiction of the Supreme Court, and the appeal was entertainable by it. Art. 135 could not be limited to such cases only where the right of appeal had actually arisen in a concrete form, not merely potentiality immediately before the Constitution. At page 494 of the report we find that the petitioner contended that as from the date of the institution of the suit he acquired a vested right to appeal to the Federal Court which had since been replaced by the Supreme Court. This Court observed that this proposition of law has been firmly established in English jurisprudence and this decision is accepted as sound, and cited with approval in leading text books and had been followed and applied in numerous decisions in England and India including the Privy Council itself in Delhi Cloth and General Mills Co. Ltd. v. Income-tax Commr. (1927) 54 Ind App 421 : ILR 9 Lab 284 : (AIR 1927 PC 242). Colonial Sugar Refining Co. Ltd. v. Irving (1905 AC 369) (supra) in effect laid down that, while provisions of a statute dealing merely with matters of procedure may properly, unless that construction be textually inadmissible, have retrospective effect attributed to them. provisions which touch a right in existence at the passing of the statute are not to be applied retrospectively in the absence of express enactment or necessary intendment. It would be seen that these cases dealt with the vested right of appeal and not the right for effectuation of which the right to appeal was there. In the instant case, what was taken away was the basic right to contest alienation irrespective of whether it was in a suit or an appeal.

47. In Govind Das v. Income-tax Officer, (AIR 1977 SC 552) (supra) and the United Provinces v. Mst. Atiqua Begum (AIR 1941 FC 16) (supra), the Courts reiterated the above principle. The same principle was also reiterated in Jose Da Costa v. Bascora Sadasiva Sinai Narcornim (supra) in paragraph 31 at page 925 (of 1976(2) SCC 917) : (Para 28 at p. 1849 of AIR 1975 SC 1843) relying on Delhi Cloth and General Mills Co. Ltd. v. Income-tax Commr. (AIR 1927 PC 242) (supra), Garikapatti Veeraya V. N. Subbiah Choudhury (AIR 1957 SC 540) (supra). All the above cases are clearly distinguishable on facts inasmuch as no question of doing away with any statutorily

confirmed custom arose in any of them.

48. We are of the view that the right to appeal involved in the above cases has to be distinguished from the right to contest involved in this case. While the right to appeal implies the continuation of the right sought to be effectuated in the appeal, in the instant case the power to contest itself constituted the custom which the legislature wanted to do away with. To take away the power to contest means nothing else than doing away with the custom itself. The right to contest wherever needed, namely, at any stage of a suit is expressly barred.

49. Mr. Sachar lastly relies on the decision in Henshall v. Porter (1923 (2) KB 193) (supra). By S. 1 of the Gaming Act, 1922, no action under S. 2 of the Gaming Act, 1935 to recover back money paid in respect of gaming debts "shall be entertained in any Court". The plaintiff, after the Act of 1922 came into force, issued a writ in respect of cause of action which had arisen before that Act came into force. It was held by the King's Bench that the plaintiff's cause of action vested in him before the Act of 1922 came into force, was not divested on the Act coming into force, and that he was entitled to recover. Relying on earlier decisions, namely, Bowling v. Camp (1922).WN 297, Beadling v. Goll (1922) 39 TLR 128, Smithies v. National Association of Operative Plasterers (1909) 1 KB 310, Gillmore v. Shooter (1677) 2 Mod 310, it was held that the expressions "no action shall be brought" and "no action shall be entertained" could not be said to have been intended to divest a vested right and as such the words "no action shall be brought" did not debar an existing claim as "it could not be presumed that the Act had a retrospect to take away an action to which the plaintiff was then entitled." However, McCardie, J. observed that the whole legislation and law on betting and gaming was to a large extent ambiguous in policy and obscure in its working and the general drift of the statutes had been towards repression of betting and gaming and the question of policy was for Parliament and not for the Courts and that it was a social rather than a legal question. The learned Judge further observed :

> "I see no basis of policy which assists the interpretation of the Act of 1922 with respect to the point before me. On the other hand I think it sound and just in this case to apply the long recognised and useful rule that vested rights are not to be deemed destroyed by a statute unless the enacting words are clear."

50. In the instant case, as we have seen, the express intention of the legislature was to do away with the custom of contesting alienations and negative expression has been used in the section and as such it is clearly distinguishable from Henshall v. Porter (1923 (2) 1KB 193) (supra).

51. Considering the above principles, the provisions of the Principal Act, the statement of objects and reasons and the provisions of the Amendment Act and the decisions of the Punjab High Court and of this Court, we are of the view that S. 7 of the Principal Act as amended by the Amendment Act is retroactive and is applicable to pending proceedings. The decisions of this Court dated 28-11-1986 in Ujaggar Singh v. Dharam Singh (Civil Appeal No. 1263 of 1973) and in Udham Singh v. Tarsem Singh (Civil Appeal No. 1135 of 1974) dated 15-7-1987 do not need reconsideration.

52. The result is that these appeals fail and are dismissed, but under the facts and circumstances of the cases, without any order as to costs.

53. In course of the arguments it transpired that some of the appellants might have had right to contest the allenations under the Hindu Law. Doubts have been expressed as to whether after these appeals are dismissed any such claim would be tenable in law inasmuch as, it is submitted, the right

under the Principal Act was a statutory right which has now been taken away. The answer to the question would depend on what resulted when the Punjab Laws Act and the Principal Act were passed. There appears to be no doubt that by the former the customs were preserved and by the latter the customary right to contest alienation was regulated. This would be clear from the following analysis.

54. In the matter of a custom in relation to law three different relations have to be distinguished. First, a custom may be only judicially noticed. This belongs to the realm of evidence and validity of the custom. Secondly, a custom may be legally confirmed, and regulated. In this case the custom remains as custom law only confirming or regulating it. Thirdly, a statute may be passed on basis of a custom in which case the custom is transformed into statutory right an thereafter it is not treated as a custom.

55. Austin in the Province of Jurisprudence Determined, Lecture V (page 163) discussing the meaning of the term law and laws proper or properly so-called and laws improper or improperly so-called and the difference between positive law and positive morality, and showing that customary law is also a creature of the sovereign, said :

> "For example : Customary laws are positive laws fashioned by judicial legislation upon pre-existing customs. Now till they become the grounds of judicial decisions upon cases, and are clothed with legal sanctions by the sovereign one or number, the customs are merely rules set by opinions of the governed, and sanctioned or enforced morally : Though, when they become the reasons of judicial decisions upon cases, and are clothed with legal sanctions by the, sovereign one or number, the customs are rules of positive law as well as of positive morality."

In his Lecture XXX Austin said :

> "The laws or rules styled customary may be divided into two classes : those which are enforced by the tribunals without proof of their existence; and those which must be proved, before the tribunals will enforce them.
>
> Laws or rules of the former class are styled notorious . Or it is said that the tribunals take judicial notice of them. Those of the latter class require proof, like any other fact on which the decision in the particular case depends."

56. According to Austin a custom becomes a customary law only when it is clothed with the legal sanction in the judicial mode. A custom becomes law only when enforced by the political sanction. "Law styled customary law then is merely judicial law founded on custom, and owes its existence as law, like every other law to the sanction of sovereign authority."

57. Luis Recasens Siches in 'Human Life, Society and Law' at page 111 wrote :

> "The Problem of Customary Law. Perhaps someone may believe at first sight that the existence of customary law, that is, of juridical customs, raises some difficulty with regard to the difference between it and the rules of social behaviour, from the fact that, similar to what is true of them, it manifests itself by means of the usual forms of collective behaviour. But, in truth, there is no difficulty whatever, for customary law is as much law as is statutory : it has exactly the same essential meaning as the latter."

58. In Halsbury's Laws of England, 4th Ed. Vol. 12 Paragraph 443, dealing with effect of confirmation of a custom by statute it is said :

> Where an Act of Parliament has, according to its true construction, embraced and confirmed a right which has previously existed by custom, that right becomes henceforward a statutory right, and the lower title by custom is merged in and extinguished by the higher title derived from the Act of Parliament unless the Act of Parliament merely intended to confirm the right as a custom. Where the custom has been so extinguished, the old rights do not re-emerge on the repeal of the Act or, it seems, at the termination of a temporary Act. It appears that the custom would not be affected by the repeal of the Act if the Act merely confirmed and recognised the custom."

59. However, the intention of the legislature and the provisions of the statute have to be carefully examined to ascertain the result. "An Act of Parliament which recognises the existence and validity of a custom may not operate to create new statutory rights in favour of the persons or classes of persons who might formerly have benefited by the custom. Such a statute may merely have the effect of sanctioning the validity of the custom as a custom, without merging the custom in the higher title by statute."

60. In the instant case we are of the view that the custom was confirmed and regulated by the Punjab Laws Act and the Principal Act and it was done away with by the Amendment Act. No statute was passed on the basis of the custom itself so as to transform the custom itself into a higher statutory right. Therefore, either before or after the custom has been done away with by the Amendment Act, the rights of the parties under Hindu Law remain unaffected and will provide the rule of decision where alienations are contested under Hindu Law. It was observed by Robertson, J. in Daya Ram v. Sohel Singh, 110 PR (1906) 390 that "in all cases under S. 5 of 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." These observations were approved by the Privy Council in Abdul Hussein Khan v. Bibi Sona Dero (1917) 45 Ind Ap 10 (13): (AIR 1917 PC 181 at p. 183). This was reiterated by this Court in Salig Ram v. Munshi Ram (1962) 1 SCR 470 : (AIR 1961 SC 1374) holding that "where the parties are Hindus, the Hindu Law would apply in the first instance and whosoever asserts a custom at variance with the Hindu Law, shall have to prove it........"

61. As we find that in these appeals the cases of the appellants under Hindu Law were not gone into by the High Court or lower Courts, we order the cases to be sent back forthwith to the High Court and direct the High Court to examine the cases of the willing appellants under the Hindu Law after hearing the parties and, if needed, giving them opportunity to adduce further necessary evidence. The willing appellants may appear before the High Court for necessary instructions in this regard. We order accordingly.

Order accordingly.

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