

## **PUNJAB AND HARYANA HIGH COURT**

Kaur Singh Gajjan Singh

Vs

Jaggar Singh Kehar Singh

(I Dua, C.J. D.K. Mahajan, J.)

10.03.1961

### **JUDGMENT**

#### **D.K. Mahajan, J.**

1. This second appeal at the time of its preliminary hearing was admitted by me to a Division Bench subject to the directions of my Lord the Chief Justice. That is how the matter has come up before us,

2. The facts giving rise to this appeal are not in dispute. Maghar Singh was the last male holder of the property in dispute. He is a Jat and belongs to A predominantly agricultural tribe. Indeed it is not disputed that the parties are governed by the Customary Law of the Punjab in matters relating to succession and alienation. Maghar Singh died in the middle of 1959 without leaving any male or female descendants or a widow. His nearest relation is the plaintiff Jaggar Singh alias Ujagar Singh, who is his real brother. Maghar Singh before his death executed a will on the 22nd of May, 1959, whereby he bequeathed his entire property to Kaur Singh. Kaur is not related in any way to Maghar Singh and in any case he is not a preferential heir to the plaintiff Jaggar Singh alias Ujagar Singh though it is stated in the will that he (Kaur Singh) is a relation but what that relationship is, is not stated. In pursuance of the will, Kaur Singh took possession of Maghar Singh's estate. This led to the present suit by Ujagar Singh for possession of the property on the ground that the property being ancestral he is entitled to succeed to it, being the next heir. In defence, Kaur Singh set up the will executed by Maghar Singh in his favour and disputed that the property was ancestral. He also pleaded that even if the property was ancestral, Maghar Singh could will it away. In replication, Ujagar Singh disputed the execution of the will. On the pleadings of the parties, the following issues were framed:

1. Whether Maghar Singh deceased executed the will dated the 22nd of May, 1959, in favour of Kaur Singh defendant? If so, to what effect?

2. Whether the property in dispute is ancestral qua the plaintiff?
3. If issue No. 2 is proved in favour of the plaintiff, whether the deceased Maghar Singh was not competent to transfer the property by means of will under law and custom?
4. Whether the parties are governed by custom in matters of alienation? If so, what that custom is?
5. Whether the plaintiff is the next heir of the deceased Maghar Singh?

The trial Court came to the conclusion that Maghar Singh had executed the will dated the 22nd of May, 1959, in favour of Kaur Singh defendant, that the property was ancestral, that Maghar Singh was not competent to dispose of his ancestral property by will either under law or custom, that the parties were governed by custom in matters of alienation and according to that custom ancestral immovable property could not be disposed of by will and the plaintiff Ujagar Singh was the next heir of Maghar Singh.

Dissatisfied with this decision, Kaur Singh appealed to the District Judge, Sangrur, and the appeal was heard by the Additional District Judge, Sangrur, who affirmed the decision of the trial Court. Against this decision, the present second appeal has been preferred to this Court and on a reference to a Division Bench, as I have already stated, it has been placed before us for disposal.

3. The only question that has been debated before us is that in view of the provisions of the Hindu Succession Act, Maghar Singh could dispose of his ancestral immovable property by will. Before dealing with the respective contentions of the parties, it will be proper to set out the relevant provisions of the Hindu Succession Act hereinafter called the Act. These are Sections 2, 4, 6 and 30, and are as follows:

"2. (1) this Act applies--

(a) to any person, who is a Hindu by religion in any of its forms or developments, including a Virashaive, a Lingayat or a follower of the Brahme, Prarthana or Arya Samaj,

(b) to any person who is a Buddhist, Jain or Sikh by religion, and

(c) to any other person who is not a Muslim, Christian, Parsi or Jew by religion, unless it is proved that any such person would not have been governed by the Hindu Law or by any custom or usage as part of that law in respect of any of the matters dealt with herein if thin Act had not been passed.

Explanation.-- The following persons are Hindus, Budhists, Jainas or Sikhs by religion, as the case may be:

(a) any child, legitimate or illegitimate, both of whose parents are Hindus, Budhists, Jainas or Sikhs by religions;

(b) any child, legitimate or illegitimate, one of whose parents is a Hindu, Budhist, Jaina or Sikh by religion and who was brought up as a member of the tribe, community, group or family to which such parent belongs or belonged;

(c) any person who is a convert or reconvert to the Hindu, Buddhist, Jaina or Sikh religion.

(2) Notwithstanding anything contained in Subsection (1), nothing contained in this Act shall apply to the members of any Scheduled Tribe within the meaning of Clause (25) of Article 365 of the Constitution unless the Central Government, by notification in the Official Gazette, otherwise directs.

(3) The expression "Hindu" in any portion of this Act shall be construed as if it included a person who, though not a Hindu by religion, is, nevertheless a person to whom this Act applies by virtue of the provisions contained in this section".

"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;

(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.

(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".

"6. When a male Hindu dies after the commencement of this Act, having at the time of his death an interest in a Mitakshara coparcenary property, his interest in the property shall devolve by survivorship upon the surviving members of the coparcenary and not in accordance with this Act.

Provided that, if the deceased had left him surviving a female relative specified in class I of the

Schedule or a male relative specified in that class who claims through such female relative, the interest of the deceased in the Mitakshara coparcenary property shall devolve by testamentary or intestate succession, as the case may be, under this Act and not by survivorship.

Explanation I.--For the purposes of this section the interest of a Hindu Mitakshara coparcener shall be deemed to be the share in the property that would have been allotted to him if a partition of the property had taken place immediately before his death, irrespective of whether he was entitled to claim partition or not.

Explanation 2---Nothing contained in the proviso to this section shall be construed as enabling a person who has separated himself from the coparcenary before the death of the deceased or any of his heirs to claim on intestacy a share in the interest referred to therein".

"30. (1) Any Hindu may dispose of by will or other testamentary disposition any property, which is capable of being so disposed of by him in accordance with the provisions of the Indian Succession Act, 1925, or any other law for the time being in force and applicable to Hindus.

Explanation.-- The interest of a male Hindu in a Mitakshara coparcenary property or the interest of a member of a tarwad, tavazhi, illom, kutumba or kavaru in the property of the tarwad, tavazhi, illom, kutumba or kavaru shall, notwithstanding anything contained in this Act or in any other law for the time being in force, be deemed to be property capable of being disposed of by him or by her within the meaning of this sub-section. .

(2) \*\*\*\*\*".

4. Before dealing with the question that requires determination, it will be in the fitness of things to refer to the state of law that prevailed before the coming into force of the Hindu Succession Act both as regards the customary law of the Punjab and the Mitakshara school of Hindu law. It is a settled proposition that Hindus living in the Punjab are governed by the Mitakshara school of Hindu law with such modifications as are recognised by the custom other than the customary law of the Punjab. So far as the customary law of the Punjab is concerned, it governs all agricultural communities irrespective of their caste or their religion.

In other words, it is only the Predominantly agricultural tribes whose main source of livelihood is agriculture, with a few exceptions here and there, that have been held to be governed by what is known as the customary law of the Punjab. The general rules governing such tribes are to be found in the well-known treatise *Of the Punjab Customary Law* by Rattigan, a book of unquestioned authority, as observed by their Lordships of the Privy Council in *Mt. Subhani v. Nawab*, ILR (1941) Lah 154: (AIR 1941 PC 21). The special customs governing such tribes are

recorded in the manuals of customary law prepared at each regular Settlement for each district. These are prepared after due enquiry from the inhabitants of those districts.

5. Male proprietors governed by Hindu law in the Punjab have absolute power of disposal over all property excepting coparcenary property. Coparcenary property can only be alienated for a valid necessity. It may be mentioned that all ancestral property would be coparcenary property while all coparcenary property need not necessarily be ancestral property. It is well known that the female owners hold a life estate in all property inherited by them. With regard to stridhana, however, the position is that a maiden has an absolute power of disposal over it the only disqualification would be on account of her minority. A married woman, however, could absolutely dispose of stridhana known as *saudayika*, but not stridhana other than *saudayika*. The position of a widow qua stridhana is the same as that of a maiden. Thus it will be seen that in the case of male proprietors, the only restriction is with regard to coparcenary property, but with regard to property other than coparcenary property, the right of disposal is absolute, but, in the case of a female, the right of absolute disposal is very much restricted.

It is not necessary to refer to the restrictions placed on a female in regard to the enjoyment of the property inherited by her because there also the position of a male proprietor is different from that of a female proprietor. The position of a widow governed by the customary law is analogous to that of a widow governed by Hindu law : vide *Rabidat v. Mt. Jawali*, 48 Pun LR 350: (AIR 1946 Lah 353) (FB).

6. The position of a male proprietor governed by the customary law is that he has absolute power of disposal over non-ancestral property, but the ancestral property can only be disposed of for necessity or as an act of good management. Ancestral property is property, which is held by the common ancestor and comes down by descent to his heirs. All other property is non-ancestral. Alienations of a very small portion of ancestral property in certain circumstances are permitted for certain purposes though strictly speaking they are not necessary purposes. While dealing with the power of disposal of ancestral property in the hands of a male proprietor, Mahajan J. (as he then was) in *Karnail Singh v. Naunihal Singh*, 47 Pun LR 164 at p. 173: (AIR 1945 Lah 188 at p. 193) observed as under:--

"It has never been held and cannot be held that a male proprietor governed by custom can borrow money for necessity only and that any debts incurred by him for other purposes are breaches of duty on his part towards the reversionary body. On the other hand, it is an admitted proposition of custom that a male proprietor is not bound to nurse and preserve his ancestral property for the benefit of his reversioners. He is not a sort of trustee on their behalf. He is entitled to enjoy the estate in his hands in any way he likes and is its full owner provided he does not waste it and

does not act in a reckless manner and with the intention of causing injury to the reversioners."

The unauthorised alienations of ancestral property are subject to control by the collaterals. But only collaterals of the fifth degree of the alienor can avoid the same by means of a suit. This is so because of the provisions of the Punjab Limitation (Custom) Act (No. I of 1920) and the Punjab Custom (Power to Contest) Act (No. II of 1920).

7. In the year 1956, the Hindu Succession Act was enacted. It has brought a revolutionary change so far as the respective heirs under the Hindu law and the customary law are concerned. The rules of succession under the Hindu law as well as the customary law have been abrogated and the succession is now governed by the rules-laid down in the Act. The Act provides a list of heirs who would inherit to a male and a list of heirs who would inherit to a female.

The other important change introduced in this Act is that a female lawfully in possession of property, whether before or after the commencement of the Act, has been made the full owner thereof and with regard to the coparcenary property, a coparcener has been given a right to dispose of his undivided interest in the same by will. The Act only overrides those provisions of the Hindu Law or the customary law which are inconsistent with it. See in this connection Section 4 of the Act. In this context it has to be seen whether the Act has modified or in unmistakable terms-had the intention to modify the restrictions attaining to the alienation of ancestral immovable property in the hands of a male holder.

8. It is contended by the learned counsel for the appellant that on the coming into force of the Act a male proprietor governed by the customary law of the Punjab has absolute power of disposal over the ancestral property. The learned counsel seeks to support his argument on a number of grounds.

9. His first ground is that the right to control an alienation of ancestral property is inherent in the right of succession to that property. Only those reversioners can control the alienations of a male proprietor, who are connected with him within five degrees from the common ancestor. In this connection it is pointed out that under the Act persons; not so connected with the common ancestor have intervened in the line of heirs and most of the persons so connected have been postponed. Therefore, it must be assumed that the right of reversioners to control the alienation of ancestral immovable property stands abrogated, For this reliance has been placed on Sections 2, 4 and 30 of the Act.

Further support for this is sought to be derived from the provisions of Section 14 of the Act. It is urged that as the females have been made full owners of the property possessed by them irrespective of its character, it must be assumed that the intention of the Legislature was to make

the male owners also full owners of the same, it could not be the intention of the legislature to discriminate between two sexes and put the females on a higher pedestal than the males.

10. The other ground urged is that the restriction under the Hindu law over the disposal of coparcenary property has been removed vide Section 30 of the Act. Therefore, the intention of the Legislature was to remove all restrictions on the powers of the male proprietors regarding all types of property both under Hindu law and the customary law of the Punjab, inasmuch as the object of the Hindu Succession Act was to make a uniform law of succession with regard to all Hindus who may, before the Act, have been governed by different laws of succession.

11. After giving careful consideration to all these arguments, I have arrived at the conclusion that there is no merit in either of them.

12. So far as the first argument is concerned, the answer is to be found in the Full Bench decision of this Court in *Amar Singh v. Sewa Ram*, 62 Pun LR 537: (AIR 1960 Punj 530). At p. 539 (of Pun LR): (at p. 533 of AIR), it has been observed by Mehar Singh J. as under:--

"The position of the law both under Hindu law and custom continues to be the same even after the enforcement of the Act in regard to a person who is still restricted and controlled in his rights of alienation of property with him. The Act does not deal with this aspect of the law, except in one case that of limited estate and that of a Hindu female who has been made full owner of the property in her possession on the date of the enforcement of the Act. It is clear that it is not anything in the Act that has directly taken away the rights of a reversioner as such, but what has happened is that one class of persons whose right to alienate property was previously restricted and controlled has had its right enlarged and enhanced to full ownership, with the result that in that case, it follows without more, all restrictions and control over the power of alienation have been removed.

There is not one single word in the Act which makes reference to reversioners or the rights of reversioners or the status of reversioners. The Act in so many words does not abolish either reversioners or their rights or status. Where there is a restriction and control over the alienation of property, there the position of law before and after the Act continues to be the same and the next reversioner is entitled in law to the protection of his reversion, but obviously where there is no such restriction or control, the question of anybody wanting to protect anything does not arise for there are no rights, in such circumstances, to be protected."

As a matter of fact, even Section 14 of the Act notices that in certain circumstances a Hindu female may still hold limited estate and where she does hold that estate, the reversioners would undoubtedly have the right to control her acts qua that estate.

13. So far as giving larger rights to females is concerned, it may well be that in view of the inferior status enjoyed by the females, the Legislature thought fit to put the females on a higher pedestal. This could be done in view of the provisions of Article 15(3) of the Constitution. For the sake of convenience, Article 15 is reproduced below:

"15 (1) The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth Or any of them.

(2) No citizen shall, on grounds only of religion, race, caste, sex, place of birth or any of them, be subject to any disability, liability, restriction or condition with regard to--

(a) access to shops, public restaurants, hotels and places of public entertainment; or

(b) the use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of State funds or dedicated to the use of the general public.

(3) Nothing in this Article shall prevent the State from making any special provision for women and children.

(4) Nothing in this Article or in Clause (2) of Article 29 shall prevent the State from making any special provision for the advancement of any socially & educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes."

14. The learned counsel for the respondent sought to contend that Section 14 of the Act creates no anomaly for it merely confers full ownership on the females as distinct from absolute ownership. The word full owner according to learned counsel was used to equate females with the male owners, but this contention cannot be accepted because the word 'full owner' has been interpreted to mean an absolute owner by their Lordships of the Supreme Court in Gummalapura Taggina Matada Kotturaswamy v. Setra Veerawa, AIR 1959 SC 577. Therefore, the anomaly pointed out by the learned counsel for the appellant does exist, but then this may be a case of casus omissus and it is not in our province to supply the lacuna.

The words of the statute are clear so far as the female owners are concerned. As regards male owners, no provision has been made enlarging their estate and the restrictions on the disposal of certain property have continued as such with the only exception as regards coparcenary property as set out in Section 30 of the Act. As a matter of fact, Section 30 itself envisages the existence of these restrictions for in the operative part it Proceeds on the basis that only that property can be disposed of by will by a Hindu, 'which is capable of being so disposed of by him', in accordance with the provisions of the Indian Succession Act or any other law for the time being in force and

applicable to Hindus. It is well known that in the Punjab as regards persons governed by the customary law, the notion of coparcenary property is foreign. A clear distinction has always been maintained between Hindus governed by the Mitakshara school of Hindu law and Hindus governed by the customary law of the Punjab.

15. Thus it will be seen that nowhere under the Act any restrictions attaching to the powers of a male proprietor governed by the customary law of the Punjab in respect of ancestral immovable property have been abrogated.

16. It may not be out of place to mention that a right of alienation does not depend on the right to inherit. A right of alienation has only reference to the nature of the property. Therefore, the mere fact that the Act was enacted for the purposes of succession would not lead to the conclusion that in fact it was dealing with the right of alienation with regard to different types of property. Wherever the Legislature thought fit to confer a right of alienation with regard to any type of property, a specific provision has been made in the Act.

17. Two arguments of desperation may now be noticed. One of them was based on Article 14 of the Constitution, and is to the effect that there is discrimination between the powers of alienation so far as males and females are concerned. This argument has no force whatever. Article 15 of the Constitution gives the power to Parliament to make such a law. Moreover, women as a class are different from men as a class, and the legislation has merely removed their disability. There is no discrimination inter se a class.

18. The second argument is that the restrictions placed on the alienation of ancestral property are unreasonable and, therefore, they offend the provisions of Article 14 of the Constitution. How this is so is not easy to comprehend, neither was the learned counsel serious in this contention. The restriction is that ancestral immovable property cannot be disposed of except for necessity. What is unreasonable in this has not been pointed out and even then this restriction is only so long as there are reversioners within the fifth degree. In the absence of such reversioners, the restriction disappears. If the reversioners consent to an alienation without necessity, even then the restriction disappears. Therefore, there is no force in this contention either.

19. After giving the entire matter a careful consideration and keeping in view the scheme of the Act, it cannot be held that the restrictions with regard to the male proprietors power of alienation respecting ancestral property have been abrogated by the Act.

20. In the result, this appeal fails and is dismissed. In view of the difficult nature of the question involved the parties are left to bear their own costs throughout.

Dua, J.

21. The vexed question which calls for determination in this controversy is whether in view of the provisions of the Hindu Succession Act (No. 30 of 1956) a Hindu male-holder governed by the Punjab custom is now free to dispose of his ancestral immovable property by will and his reversioners have, therefore, no right to question and avoid such a disposition. I fully agree with my learned brother Mahajan, J., that the provisions of the Hindu Succession Act have no such effect. I would, however, merely add a few words of my own without repeating the facts.

22. The primary rule of construction of statutes is to ascertain the Legislative intent and to carry it into effect. In the course of the interpretative process, the Court might consider the evils, which existed and which the Legislative wing of the Government was endeavouring to correct and on the basis of that and of the language of the statutory instrument in question, arrive at a judgment as to what, in all probability, Parliament intended.

If there is no ambiguity in a statute and the language is plain, precise and clear, the duty of the Court is easy, but ambiguity may arise otherwise than from defective, faulty or imprecise language or expressions, for instance, from the general scope and meaning of a statute when all its provisions are examined as a whole. It is in this sense that the appellant's contention in the present controversy has been developed before us.

It has been argued that by conferring on Hindu females absolute power of disposition with respect to their immovable property and also by declaring the interests of a male Hindu in a Mitakshara coparcenary property to be capable of being disposed of by him by will or other testamentary disposition, without similarly declaring the interest of a Hindu male-holder, governed by the Punjab Customary law, in his ancestral immovable property, to be capable of being disposed of by will etc., an anomaly, which could not have been reasonably intended by Parliament, has arisen. The counsel has described this consequence to be unjust and unreasonable and we are, therefore, asked to hold that all limitations on the power of testamentary disposition of Hindu males governed by the Punjab custom with respect to their ancestral immovable property must also be deemed to have been removed and that a male-holder can now freely dispose of such property by will, without there being any right in his reversioners to question and avoid such a disposition.

23. I agree with the counsel that if by virtue of Section 14 of the Hindu Succession Act, as has now authoritatively been laid down by the Supreme Court in AIR 1959 SC 577, a female Hindu has been given a right of absolute ownership over her property, whereas a Hindu male-holder of ancestral immovable property governed by the Punjab custom is still subject to restrictions on his

power of disposition, then there does arise an anomaly, the basis or justification of which is not easy to comprehend.

The anomaly becomes more glaring when we find that even the interest of a male Hindu in Mitakshara coparcenary property is also to be deemed to be capable of being disposed of by will. We have, however, to see if the Legislative intent, as is discernible from the language of the statute, is helpful in removing the anomaly, for if it is not so capable, then the remedy does not lie in interpretation but in its amendment by the Legislative branch of the Government, which alone is invested with law-making power.

24. Section 4 of the Hindu Succession Act, on which reliance has been placed, merely provide for the over-riding effect of this Act in respect of matters dealt with by it. Counsel has not been able to draw our attention to any provision of this Act, which directly concerns itself with the power of a male-holder to will away his ancestral immovable property. Reference has been made to Chapter III which is headed as 'Testamentary Succession'. This chapter contains only one section namely, Section 30, which, as I read it merely preserves or retains the power of a Hindu to dispose of by Will or other testamentary disposition property, which is capable of being so disposed of by him, in accordance with the provisions of the Indian. Succession Act or of any other prevailing law applicable to Hindus.

The explanation to this section undoubtedly lays down that the interests of a male Hindu in a Mitakshara coparcenary property, shall, notwithstanding anything to the contrary in this Act or any other law for the time being in force, be deemed to be capable of being disposed of within the meaning of this section. It is clear -- and it is not possible to contend to the contrary -- that a Hindu governed by the Customary law has no absolute power of disposal by will over his ancestral immovable property; this power is subject to well-recognised restrictions and his reversioners within the prescribed degree are entitled to control and question such dispositions. Those limitations do not seem to me to have been expressly curtailed or abrogated by this section.

25. The contention raised is that the explanation to Section 30 should be deemed, by necessary implication, also to extend to the ancestral immovable property of a Hindu male-holder governed by the Punjab custom. It is emphasised that in order to avoid an obvious anomaly (the counsel also calls it an inconsistency) this Court would be justified in thus extending the scope of the explanation. I do not find it possible to accede to this contention. It is true that if on examination the general object, purpose, or meaning of an enactment is found to be inconsistent with the literal import of a section, then the section may, if possible, be construed in accordance with such purpose.

This rule appears to be similar to the rule of inferred consequences of the Legislative measure. But in order to justify or warrant such a change in the sense of the section, the Legislative intent must be manifestly clear and fairly or plainly expressed, for it is not the duty of the Courts to unduly stretch the words used by the Legislature to fill in gaps or omissions. In this connection, it would not be out of place to mention that the Hindu Succession Act, as its preamble shows, has been enacted by Parliament primarily to amend and codify the law relating to intestate succession among Hindus.

It is, therefore, a little difficult to spell out, by process of construction of the language, a Legislative intent to do away with the existing limitations imposed by the Punjab custom on a Hindu male-holder in respect of testamentary disposition of his ancestral immovable property. These limitations are well-recognised and constitute the core of the agnatic theory. In the absence of express words or of words sufficiently flexible to admit of a construction, which may reasonably include ancestral immovable property of a male-holder governed by Punjab custom, I find myself unable to impute to parliament an intention to extend the deeming provision Of the explanation to such ancestral immovable property. Legislature, generally speaking, is not presumed to make any substantial alteration in the existing law beyond what it expressly declares or beyond the immediate scope and object of a good statute.

26. I may at this stage also in passing observe that the proviso to Section 6 and the repealing Section 31 of the Act also seem to suggest that Parliament, while enacting this statute, felt more concerned with enlarging the rights of Hindu women than with abrogating all limitations and restrictions on Hindu males in respect of the disposition or their immovable property. May be that in its anxiety to ameliorate the position of Hindu women, Parliament failed to notice the anomalous consequences, which have arisen on account of the provisions of this Act, but then the remedy for this omission lies not with us but elsewhere.

27. I would, therefore, in agreement with my learned brother, dismiss the appeal as Proposed by him.

28. Before finally parting with the case, however, it is desirable to draw the attention of Parliament to the anomaly mentioned above so that if our interpretation is right and the anomaly does need removal, the position may be set right.