

Darshan Singh And Anr. Etc. Etc vs Ram Pal Singh And Anr. Etc. Etc on 20 November, 1990

Equivalent citations: 1991 AIR 1654, 1990 SCR SUPL. (3) 212, AIR 1991 SUPREME COURT 1654, 1991 AIR SCW 1651, (1990) 4 JT 561 (SC), 1992 (1) SCC(SUPP) 191, 1990 (4) JT 561, 1992 SCC (SUPP) 1 191, (1991) 1 LANDLR 245, (1991) 1 RRR 167

Author: K.N. Saikia

Bench: K.N. Saikia, T.K. Thommen, N.M. Kasliwal

PETITIONER:

DARSHAN SINGH AND ANR. ETC. ETC.

Vs.

RESPONDENT:

RAM PAL SINGH AND ANR. ETC. ETC.

DATE OF JUDGMENT 20/11/1990

BENCH:

SAIKIA, K.N. (J)

BENCH:

SAIKIA, K.N. (J)

THOMMEN, T.K. (J)

KASLIWAL, N.M. (J)

CITATION:

1991 AIR 1654 1990 SCR Supl. (3) 212

1992 SCC Supl. (1) 191 JT 1990 (4) 561

1990 SCALE (2) 1114

ACT:

Punjab Custom (Power to Contest) Act, 1920: Section 7
Alienations of immovable property--Contesting of--Effect of
Punjab Custom (Power to Contest) Amendment Act, 1973 Whether
retrospective and applicable to pending proceedings.
Punjab Laws Act 1872, Section 5.

Punjab Pre-emption Act, 1913 Effect of Punjab Pre-emption (Repeal) Act, 1973--What is.

Punjab Limitation (Custom) Act 1920.

Hindu Succession Act 1956, Section 4.

Jurisprudence--Custom and law--Relationship--What is.

Statutory Interpretation.

Retrospectivity of statute----What is.

Practice and Procedure.

Appeal--Whether a continuation of a suit--Change in law-Effect on pending proceedings.
Words and Phrases--'Contest'--Meaning of.

HEADNOTE:

The appellants in the appeals were contesting alienations under the provisions of the Punjab Custom (Power to Contest) Act, 1920 and their suits were at the appellate stage in the High Court when the Punjab Custom (Power to Contest Amendment Act, 1973 came into force on the 23rd day of January, 1973.

The High Court dismissed the appeals taking the view that no contest to alienations was permissible after the 1973 Amendment Act came into force.

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In *Ujagar Singh v. Dharam Singh & Ors.*, a Division Bench of this Court while dismissing the appeal on 28.11.1986, held that Section 7 of the Punjab Custom (Power to Contest) Act as amended in 1973 has retrospective effect and that it also applies to pending proceedings.

In another Civil Appeal viz. *Udam Singh & Ors. v. Tarsera Singh & Ors.* another Division Bench rejected the contention that the Amendment Act did not apply to pending proceedings and dismissed the appeal on 15.7.1987.

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However, in *Bara Singh v. Kashmira Singh & Ors.*, a Division Bench while considering the same question as regards the applicability of the Amending Act to pending proceedings, held on 4.1.1987, that the view expressed in *Ujagar Singh v. Dharam Singh & Ors.*, appears to run counter to the express provisions of sub-section (2) of Section 1 of the Amendment Act which provides that the amendment shall be deemed to have come into force only on January 3, 1973 and that it cannot be disputed that Section 3 of the Amendment Act which makes Section 7 of the Act applicable to all immovable property affects the substantive rights of the parties, and that the matter requires reconsideration and that the matter be placed before a bench of three Judges by the Chief Justice.

The main contentions of the appellants in the appeals were that neither by express words nor by necessary implication the 1973 Amendment Act can be said to be retrospective and applicable to pending proceedings, and that more so in view of sub-section (2) of Section 1 of the Amendment Act deeming it to have come into force on 23.1.1973, and that it

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pal Act; the vested rights to contest alienations could not be said to have been taken away by retrospective operation.

The respondents' contentions however were that in view of the deletion of Section 6 and the amendment of Section 7 by the Amendment Act 1973 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 Ujagar Singh's case having already held that the Amendment Act is retrospective and applicable to pending proceedings, the High Court has rightly dismissed the appeals.

Dismissing the appeals, this Court,

HELD: 1(a) The Punjab Laws Act, 1872 was an Act for declaring which of certain rules, laws and regulations would have the force of law in the Punjab. [222H]

(b) A custom prevailed in Punjab that 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. [223G-H]

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(c) 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 a 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. [224B]

(d) The object of Section 5 of the Punjab Laws Act, 1872 was to settle for Punjab the rule of decision in question stated in clauses (a) and (b) thereof. The 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. Thus the legislature intended that the Hindu and Mohammedan Law should be applied where no such customary rule prevailed. [226G-227D] i73

Vaishno Ditti's case 1929 Lab. (10) 86 (P.C.) at p. 103; Thakur Gokulchand v. Parvin Kumari, AIR 1952 SC 231= [1952] SCR 825 and Ujagar Singh v. Mst. Jeo, AIR 1959 SC 1041, referred to.

2(a) Alongwith 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 on the ground that it was contrary to custom should be done away with. The Punjab Pre-emption (Repeal) Act, 1973 by Section 2 repealed the Punjab Pre-emption Act, 1913. [226B-D]

(b) The intention of the legislature is therefore clear,

that in case of the Pre-emption Act by repeal of the Act itself the legislature put an end to that custom. [228F]

3. The right to contest an alienation to a limited extent was conferred by Section 6 of the Punjab Custom (Power to Contest) Act, 1920. [224H]

4. Section 7 of the Principal Act puts a complete bar to contest of any alienation of ancestral or non-ancestral immovable property or

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appointment of an heir to such property on the ground that such alienation or appointment was contrary to custom. [227F]

The provisions of Section 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 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 is inconsistent with the continued existence of the custom. [228H-229A]

5. Neque leges neque senatus consulta ita serioi possunt ut omnis casus qui quandoque in sediriunt comprehendatur; sed sufficit ea quae plerumque accidunt contineri. 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. [230H-231B]

6. 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. i7

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and reasons of the Amendment Act, namely, to do away with the custom, and the negative provision of Section 7 of the Amendment Act, the view is that continuance of the custom is inconsistent with the statute. [231C-D]

Halsbury's Law of England, Vol. 12 Para 442 relied on.

7. Consuetudo semel reprobata non potest amplius induci. A custom once disallowed cannot be again brought forward. [231E]

8. Section 4 of the Hindu Succession Act 1956 provides overriding effect of the Act. In effect it lays 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. [232F-233D]

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S.S. Munna Lal v. S.S. Rajkumar & Ors., AIR 1962 SC 1493; 1962 Supp. (3) SCR 418; Giasi Ram & Ors. v. Ramjilal
JUDGMENT:

Ammal v. Ramalingam (Minor) & Anr., AIR 1970 SC 1730: [1970] 3 SCR 894; Commissioner of Wealth Tax, Kanpur & Ors. v. Chunder Sen & Ors., AIR 1986 SC 1753: [1986] 3 SCC 567; Yudhishter v. Ashok Kumar, AIR 1987 SC 558: [1987] 1 SCC 204; Smt. Manshan & Ors. v. Tej Ram & Ors., [1980] Supp. SCC 367; Taro v. Darshan Singh, AIR 1960 Punjab 145: ILR 1959 Punjab 2253; Hansraj v. Dhanwant Singh, AIR 1961 Punjab 510:

ILR (1961) 1 Punjab 369; Banso v. Charan Singh, AIR 1961 Punjab 45; Kaur Singh v. Jaggar Singh, AIR 1961 Punjab 489 and Kalu v. Nand Singh, AIR 1974 P & H 50, referred to.

9. Any rule of 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 such 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. [234A-C] i73 Bant Singh v. Gurpreet Singh, [1973] 75 PLR 797; Gur-

dial Singh v. Piara Singh, [1973] 13 Cur. L.J. 529; Charan Singh v. Gehl Singh, [1974] 76 PLR 125; Jit Singh v. Karnail Singh, [1975] 77 PLR 488; Surjit Kaur v. Zail Singh, [1977] 79 PLR 690; Raj Narain Pandey & Ors. v. Sant Prasad Tewari & Ors., [1973] 2 SCC 35 and Brownsea Haven Properties v. Poole Corpn., [1958] Ch. 574 (CA): (1958) 1 All E.R. 205, referred to.

10(a) An 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. [235B-C] Thakur Gokulchand v. Parvin Kumari, (supra); Garikapatti Veeraya L N. Subbian Choudhury, [1957] SCR 488; Jose Da Costa v.

Bascora Sadasiva Sinai Narcornim, [1976] 2 SCC 917; Govind Das v. The Income Tax Officer, [1976] 1 SCC 907; Henshail v. Porter, [1923] 2 L.R. King's Bench Div. 193 and United Provinces v. Mst. Atiga Begum, [1940] 2 FCR 110, referred to.

10(b) Contest continues right up to the final decision. 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. [235A-B]

11. 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 transaction or considerations already past or destroys or impairs vested rights. [236B] Halsbury's Laws of England, 4th Edn. Vol. 44 para 921.

12. Courts will construe a provision as conferring power to act retroactively when clear words are used. Both the intention and language of the Amendment Act is clear in these respects. Applying the Amending Act of 1973 to alienations prior to 23.1.1973 does not necessarily mean its retrospective operation. [237A-B, E] i73 Rafiquennessa v. Lal Bahadur Chettri (Dead) Through His Representatives & Ors., [1964] 6 SCR 876; Athlumney Ex Parte Wilson, [1898] 2 Q.B.D. 547 and Mithilesh Kumari & Anr. v. Prem Behari Khare, [1989] 2 SCC 95, referred to.

13. In the instant case, the Legislature looked back to January 23, 1973 and not beyond to put an end to the custom and merely because on that cut off date. Some contests were brought to an abrupt end would not make the Amendment Act retrospective. [236F]

14. 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 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. [239F-G] Harbhajan Singh v. Mohan Singh & Ors., [1974] 2 SCC 364; Sadhu Singh & Anr. v. Dharam Der & Ors., [1981] 1 SCC 510; Official Liquidator v. R. Desikachar, AIR 1974 SC 2069;

[1975] 1 SCR 890; Lakshmi Narayan Guin & Ors. v. Niranjana Modak, [1985] 1 SCC 270; Shah Bhojraj Kuverji Oil Mills & Ginning Factory v. Subhash Chandra Yograj Sinha, [1962] 2 SCR 159; Lachmeshwar Prasad Shukul v. Keshwar Lal, AIR 1941 FC 51; 1940 FCR 84; Shyabuddinsab v. Gadag Betgeri Municipal Borrough, [1955] 1 SCR 1268; King v. General Commissioner of Income Tax, [1916] 2 KB 249; K.C. Mukherjee, Official Receiver v. Ramratan Kuer, [1935] LR 631A 47; AIR 1936 PC 49; Dayawati v. Inderjit, [1966] 3 SCR 275; AIR 1966 SC 1423; Mohanlal Jain v. His Highness Maharaja Shri Sawai Man Singh, [1962] 1 SCR 702; AIR 1962 SC 73; Amarjit Kaur v. Pritam Singh, [1975] 1 SCR 605; Colonial Sugar Refining Co. v. Irving, [1905] AC 369 at 372; Garikapatti Veeraya v. N. Subbiah Choudhury, [1957] SCR 488; Delhi Cloth and General Mills Co. Ltd. v. Income Tax Commissioner, [1927] LR 54 IA 421; ILR 9 Lab. 284; Colonial Sugar Refining Co. Ltd. v. Irving, [1905] AC 369; Govind Das and Ors. v. The Income Tax Officer & Anr., [1976] 1 SCC 907; The United Provinces v. i7 and Anr. v. Bascora Sadasiva Sinai Narcornim & Ors., [1976] 2 SCC 917; Delhi Cloth and General Mills Co. Ltd. v.

Income-tax Commissioner, [1927] LR 54 IA 421; Garikapatti Veeraya v.N. Subbiah Choudhury, [1957] SCR 488, referred to.

15. The right to appeal has to be distinguished from the right to contest. 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. [243B] Henshall v. Porter, (supra); Bowling v. Camp, [1922] W.N. 297; Beadling v. Golf, [1922] 39 Times L.R. 128; Smithies v. National Association of Operative Plasterers, [1909] 1 K.B. 310 and Gillmore v. Shooter, [1677] 2 Mod. 310, referred to.

16. Considering the 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, Section 7 of the Principal Act as amended by the Amendment Act is retroactive and is applicable to pending proceedings. The decision 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. [244B-C] 17(a) 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 the basis of a custom in which case the custom is transformed into a statutory right and thereafter it is not treated as a custom. [244F-G]

(b) A custom becomes a customary law when it is clothed with the legal sanction in the judicial mode. A custom becomes law only when enforced by the political sanction. [245E] Austin Province of Jurisprudence Determined, Lecture V (P. 163) and Lecture XXX, referred to. 173 Daya Ram v. Soheli Singh & Ors., 110 PR (1906) 390; Abdul Hussein Khan v. Bibi Sona Dero, [1970] L.R. 45 I.A. 10(13) and Salig Ram v. Munshi Ram, [1962] 1 SCR 470, referred to. In the instant case, the custom was confirmed and regulated by the Punjab Laws Act, 1872 and the Punjab Custom (Power to Contest) Act, 1920 and it was done away with by the Punjab Custom (Power to Contest) Amendment Act 1973. 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. [246F-G] the cases of the appellants under Hindu Law were not gone into by the High Court or lower Courts, the cases were sent back to the High Court with a direction to examine the cases of the willing appellants under Hindu Law after hearing the parties and, if needed, giving them an opportunity to adduce further necessary evidence. [247C] &