

After giving the entire matter my careful consideration, I am of the view that the Central Act is a valid piece of legislation and must prevail over "the existing Indian laws" to the extent to which it comes in conflict with those laws.

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others
Mahajan, J.

For the reasons recorded above, these petitions must succeed. I, therefore, allow them and quash the orders of arrest issued against the petitioners.

G. D. KHOSLA, C. J.—I agree.

G. D. Khosla,
C. J.

K. L. GOSAIN, J.—I agree.

Gosain, J.

B.R.T.

FULL BENCH

Before S. S. Dulat, Tek Chand and Prem Chand Pandit, JJ.

HARCHARAN SINGH alias HARCHAND SINGH—
Appellant.

versus

ISHER SINGH AND OTHERS,—Respondents.

Regular Second Appeal No. 718 of 1954.

1960

Punjab Custom (Power to Contest) Act (II of 1920)—Section 6—Fifth degree collateral successfully contesting the will made by the last male holder in respect of ancestral property, obtaining possession and after some time gifting it to his sister's sons—After his death the beneficiary under the will of the last male holder obtaining probate and filing suit for possession of the property against the donees from the fifth degree collateral—Donees pleading invalidity of the will under custom—Whether entitled to do so.

Sep., 6th

Held, that the facts, which are not in dispute, leave no doubt that as soon as Harnama died, a dispute about the will arose and Nand Singh—fifth degree collateral—

challenged the will. He actually succeeded in persuading the revenue authorities that the alleged will was of no consequence and, in the result, he obtained an order in his favour and got possession of the land. Nand Singh thus actually contested the alienation made by Harnama through his will and it is that contest that the donees from him are continuing against the claim of the beneficiary under the will of Harnama. Nand Singh had, on the death of Harnama, acquired all the rights in the property which lawfully belonged to him and all those rights vested in him when he gifted the property to Ishar Singh and others. The donees are thus competent to show that Harnama's will, relied upon by Harcharan Singh, was invalid *qua* the ancestral property in answer to his claim to the possession of that property and there is nothing in section 6 of the Punjab Custom (Power to Contest) Act, 1920 to warrant the conclusion that they are not competent to do so.

Second appeal from the decree of the Court of Shri Harbans Singh, District Judge, Ludhiana, dated the 29th day of March, 1954, modifying that of Shri C. G. Suri Sub-Judge, 1st Class, Ludhiana, dated the 19th October, 1953, (decreeing the plaintiff's suit for possession of the property in dispute as prayed for against the defendants and further ordering that the decree would be ex parte against defendant No. 4 and defendants No. 1 to 3 would pay the plaintiff's costs) to the extent of dismissing the plaintiff's suit qua the land which had been found to be ancestral and affirming the rest of the decree regarding house property which had been found to be non-ancestral, and leaving the parties to bear their own costs throughout.

KRISHAN SARUP THAPAR, ADVOCATE, for the Appellant.

ATMA RAM AND N. L. WADHERA, ADVOCATES for the Respondents.

JUDGMENT

Dulat, J.

DULAT, J.—Harnama, a Jat of village Lalheri in the Ludhiana District, owning a small area of agricultural land and also a house, made a will concerning his property on the 28th of May, 1946, in favour of his sister's son Harcharan Singh.

Harnama died on the 2nd of June, 1946, and a dispute arose about the property, the claimants being Nand Singh, a fifth-degree collateral of Harnama, who claimed as his heir, and Harcharan Singh, who claimed under the will. The revenue authorities entered mutation in favour of Nand Singh on the 19th of July, 1946, and the revenue officer, after considering the parties' claims, sanctioned mutation in favour of Nand Singh on the 28th of January, 1948. On the 28th of March, 1950, Nand Singh made a gift of this property to his own sister's sons—Ishar Singh and others and the revenue authorities sanctioned mutation in their favour on the 11th of May, 1950. Nand Singh then died and after his death Harcharan Singh applied for probate of the will in his favour and obtained a grant on the 24th of May, 1951. On the 3rd of October, 1951, he filed a suit in the civil Court for the possession of the property, the defendants, of course, being Ishar Singh and others, apart from a mortgagee of the land. The main defence was that the suit property was ancestral *qua* Nand Singh and the will, therefore, made by Harnama was invalid under the rule of custom applicable to the parties. In reply to this, the plaintiff claimed that such a defence was not open to Ishar Singh and others as they were not the collaterals of Harnama and were, therefore, not competent to control his alienation.

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The trial Court found that the agricultural land in suit was ancestral but the house was not. The Court, however, held that, in view of section 6 of the Punjab Custom (Power to Contest) Act, 1920, the donees from Nand Singh, namely, Ishar Singh and others, were not competent to challenge the validity of the will made by Harnama in favour of the plaintiff, and, on this conclusion,

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the Court decreed the plaintiff's suit for possession. On appeal, however, the District Judge came to a contrary conclusion on this point and held that the objection raised by Ishar Singh and others against the validity of Harnama's will was competent and that the will was under custom invalid as far as the ancestral property was concerned. On this view the learned District Judge allowed the appeal and dismissed Harcharan Singh's suit as far as the agricultural land was concerned but allowed the decree concerning the house to stand. Harcharan Singh, thereupon, filed a second appeal in this Court concerning the agricultural land. This came up, in the first instance, before Shamsher Bahadur J., sitting alone, who referred it to a Division Bench and the Division Bench, in view of the importance of the law point involved in the case, decided to refer the appeal to a larger Bench. Harcharan Singh's second appeal is thus now before us.

The only question in the case is whether, Ishar Singh and others can be heard to say that the will made by Harnama in favour of Harcharan Singh appellant is under custom invalid. This, of course, they are saying in defence to Harcharan Singh's claim to the property under the will. The objection on behalf of the appellant is based on the Punjab Custom (Power to Contest) Act, 1920, section 6 of which says—

“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."

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The objection, in short, is that Ishar Singh and others are not descended from the great-great-grandfather of Harnama and they cannot contest the alienation by will made by Harnama. On behalf of the respondents, on the other hand, the contention is that Ishar Singh and others are in this litigation merely representing Nand Singh, being transferees from him, and all defences open to Nand Singh must be open to the respondents, and that, in any case, the contest regarding the will was in fact in the present case raised by Nand Singh, who was admittedly competent to contest the will, and that the present respondents are merely continuing the claim which Nand Singh had during his lifetime made, namely, that the will was invalid, the property in question being ancestral *qua* him. The facts, which are not in dispute, leave no doubt that as soon as Harnama died, a dispute about the will arose, and Nand Singh immediately challenged the will. He actually succeeded in persuading the revenue authorities that the alleged will was of no consequence and, in the result, he obtained an order in his favour and got possession of the land. There is therefore substance in the assertion that the alienation made by Harnama through the will in question was actually contested by Nand Singh and it is that contest raised by Nand Singh himself that the present respondents are continuing. On principle there seems no reason why they should not be permitted to do so.

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Mr. Thapar in support of the appeal urged that the right to challenge an alienation is personal to a reversioner, and that it is not capable of being transferred to another person, the suggestion being that when Nand Singh transferred the property by gift to Ishar Singh and others, he could not have transferred to them his personal right to challenge the will made by Harnama. There is, in my opinion, no force in the suggestion, for what was transferred by Nand Singh was not merely the right to challenge any alienation but the property itself with all the rights appertaining to it, and it is to be observed that at that time the property itself vested in Nand Singh. Mr. Thapar in this connection relied on a Full Bench decision of the Punjab Chief Court in *Tota and another v. Abdulla Khan and others* (1), but, in that case, a mere expectation to inherit certain property had been transferred and what the Full Bench held was that such an expectancy was not capable of being transferred, which is a very different matter. The transfer in that case was made in the lifetime of a widow whose alienation was in question and obviously the property did not vest at that time in the reversioner. That decisions, therefore, is not in point. This matter was fully explained by Tek Chand J., in the Lahore High Court in *Thakar Singh and others v. Mst. Uttam Kaur and others* (2), where the learned Judge pointed out the distinction between a transfer made by a reversioner at a time when he is merely expecting to inherit certain property and a transfer made after the property has vested in the reversioner, and he held that an assignment or a transfer made after the vesting of the property stands on a wholly different footing. In the present case, Nand Singh had on the death of Harnama acquired all the rights

(1) 66 P.R. 1897

(2) I.L.R. 10 Lah. 613

in the property which lawfully belonged to him and all those rights vested in him when he gifted the property to Ishar Singh and others. No objection to such a transfer can be taken on the basis of the decision in *Tota and another v. Abdulla Khan and others* (1). Reference was then made to a Division Bench decision of the Punjab Chief Court in *Jawala Sahai and others. v. Ram Singh and others* (2), which does, to a great extent, support Mr. Thapar's contention, but that decision was expressly dissented from by the Division Bench of the Lahore High Court in *Thakar Singh and others v. Mst. Uttam Kaur and others* (3), and, if I may add with respect, for very good reasons. The learned Judges of the Chief Court purported to base their decision on the Full Bench decision of 1897 which decision was, however, not applicable.

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Mr. Thapar then contended that in the present case Nand Singh, although disputing the will, had never approached a competent Court of law and obtained a decision setting aside the will, and it cannot, therefore, be said that he had contested the will. The argument ignores the facts, for it is clear that there was, in view of the facts, no occasion for Nand Singh to have gone to any Court. He asserted his right to succeed to the property treating Harnama's will as non-existent, and he succeeded in obtaining possession of the property and he remained in possession till he gifted it to the present respondents. I do not see how in these circumstances Nand Singh needed to approach any Court, for he had succeeded without resort to pointless litigation. It was said that the will of Harnama was not wholly void but

(1) 66 P.R. 1897.
(2) 67 P.R. 1909.
(3) I.L.R. 10 Lah. 613

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only voidable at the instance of Nand Singh and Nand Singh never had it set aside by Court. The nature of a voidable transaction was explained by a Division Bench of the Calcutta High Court on the basis of an earlier Privy Council decision and the case is *Nishakar Chakravarti and others v. Ram Kumar Tewari and others* (1), the relevant observations being as follows :—

“But it was explained by Lord Davey in *Bijoy Gopal Mukerjee v. Krishna Mahishi Devi* (2), that although such an alienation is not absolutely void and is *prima facie* voidable at the election of the reversionary heirs, there is in fact nothing for the Court either to set aside or cancel as a condition precedent to their right of action. They may, if they think fit, affirm the transaction or they may, at their pleasure, treat it as a nullity without the intervention of any Court and they show their election by commencing an action to recover possession of the property.”

The suggestion, therefore, that Nand Singh, not having started any litigation about the will, cannot be said to have contested it, is, in my opinion, without force, there being no doubt whatever that Nand Singh treated Harnama's will as a nullity. Can it then be said that on the death of Nand Singh, the transferees from him cannot be permitted to say that Harnama's will was invalid? I see no reason why they should be so debarred. There is nothing in section 6 of Punjab Act II of 1920 to warrant such a conclusion once it is clear, as is clear in this case, that Harnama's will was in fact

(1) 16 I.C. 634.

(2) 4 A.L.J. 329 (P.C.).

contested it, and I cannot agree that the mere accident of that person's death would invalidate the plea or prevent his transferees from proving it. On the facts of the present case, therefore, I would hold, in agreement with the learned District Judge, that Ishar Singh and others were competent to show that Harnama's will, relied upon by Harcharan Singh, was invalid *qua* the ancestral property. As no other point is raised in support of the appeal, I would dismiss it but, in all the circumstances, leave the parties to bear their own costs in this Court.

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TEK CHAND, J.—I agree.

Tek Chand, J.

P. C. PANDIT, J.—So do I.

Pandit, J.

B.R.T.