and Devki Nandan is not that of a landlord and tenant because Gurcharan Singh is not liable to pay rent to Devki Nandan. His liability merely was to pay compensation to Devki Nandan for use and occupation and not rent. Therefore, it must be held that there is no relationship of landlord and tenant between Devki Nandan and Gurcharan Singh. In this view of the matter, the Rent Controller, as well as the appellate authority have no jurisdiction to entertain the petition of Devki Nandan under section 13 of the East Punjab Urban Rent Restriction Act. The remedy of Devki Nandan, in fact, was in the ordinary civil Courts for ejectment of the licensee.

(5) For the reasons recorded above, I allow this petition and set aside the order of the appellate authority as well as Rent Controller ordering eviction of Gurcharan Singh, petitioner. I, however, leave the parties to bear their own costs throughout.

R. N. M.

APPELLATE CIVIL

Before D. K. Mahajan, J.

BATTO AND OTHERS,—*Appellants*

versus

SMT. PUNIAN,—*Respondent*

Regular Second Appeal No. 1043 of 1968

October 13, 1969

Custom (Gurgaon District)—Unchaste Brahmin widow in Gurgaon District—Whether loses her husband's estate—Custom of Brahmins—Whether identical with that of Jats and Rajputs.

Held, that under the Custom of Gurgaon District, an unchaste Brahmin widow does not lose her husband's estate. The author of *Riwaj-i-am* of the District has doubted the general statement to the contrary made by the persons who were consulted at its preparation. The custom of Jats is identical to the custom of Rajputs as well as Brahmins. The custom is that a widow who does not leave her husband's house, even if she becomes unchaste retains her husband's estate. (Para 7 and 8)

Second Appeal from the decree of the Court of Shri Banwari Lal Singal, Additional District Judge, Gurgaon, dated the 22nd day of June, 1968,

reversing that of Dewan Hukam Chand Gupta, Sub-Judge, 1st Class, Palwal, District Gurgaon, dated the 5th January, 1967 and granting the Plaintiff a decree for possession of the land in suit.

D. C. AHLUWALIA AND H. L. SARIN, ADVOCATES, for the appellants.

P. S. JAIN AND V. M. JAIN, ADVOCATES, for the respondents.

JUDGMENT

In this case the parties are Gaur Brahmans of district Gurgaon. The last male-holder was Bidhu who died on the 19th February, 1940, leaving behind his widow Mst. Punian, mother Mst. Bhuri and sister Batto. On his death the land was mutated in the name of his widow. She continued in possession till a mutation was entered on the 15th November, 1952, in favour of Bhuri the mother of Bidhu on the ground that Mst. Punian had contracted a Karewa marriage with Tirlok Chand. Bhuri gifted the land to the fourth degree collateral of her son Bidhu on the 23rd April, 1964. The present suit was filed by Punian for possession of her husband's estate on the ground that Tirlok Chand, defendant No. 3, who is the son of Khemi, committed rape on her and thereby she became pregnant and gave birth to a child. Thereafter the defendants who are the donees, turned her out of their house and got the land mutated in favour of Mst. Bhuri on the ground that the plaintiff had contracted Karewa marriage with Tirlok Chand. Mst. Bhuri died during the pendency of the suit and her daughter Batto was impleaded as her legal representative.

(2) The defendants in their written statement took the position that the plaintiff was of immoral character and had contracted Karewa with one Sukhi of Gailab; that she was a contesting party to mutation and therefore, estopped from bringing the present suit; that the defendants had become owners of the suit land by adverse possession; and that by remarriage and in any case by reason of her unchastity, the plaintiff had forfeited the right to retain her husband's estate. It was also pointed out that a suit had been filed by Tirlok Chand previously and he had obtained a declaratory decree that plaintiff had not contracted Karewa marriage with him and the child born to the plaintiff was not his. On the pleadings of the parties the following issues were framed :—

(1) Whether the plaintiff contracted Karewa marriage with Sukhi, as alleged ? If so, its effects ?

(2) Whether the plaintiff became unchaste after the death of her husband namely Bidhu and if so, is there any custom governing the family of parties whereby she loses her rights to possess the inheritance of her husband and that thus she is deprived of the land in dispute ? (as recast)

(3) Whether the plaintiff became pregnant through defendant No. 3 and gave birth to a child from his loin ? If so, its effect ?

(4) Whether the plaintiff is estopped to challenge the mutation, as alleged in the written statement ?

(5) Whether the suit is time-barred ?

(6) Whether the defendant has become owner of the suit land by adverse possession ?

(7) Whether the family of Bidhu is governed by custom in matters of Karewa in case of a widow and whether the custom is that consequent upon such Karewa she forfeits her rights in the inheritance of her husband ? (as recast)

(8) Whether issue No. 3 is *res judicata* between the plaintiff and defendants ?

(3) The trial Court held that the plaintiff had contracted marriage with Sukhi; that the plaintiff was unchaste; that she had become pregnant through defendant No. 3 and had given birth to a child; that the plaintiff was estopped from bringing the present suit; that the suit was barred by time; that the plaintiff-defendants had become owners by adverse possession; that the parties were governed by custom and that the finding on issue No. 3, namely, that plaintiff had become pregnant through defendant No. 3, was *res-judicata.* The suit was accordingly dismissed. Against this decision, the plaintiff preferred an appeal to the Court of Additional District Judge, Gurgaon. The learned Judge allowed the appeal and reversed the decision of the trial Court. The plaintiff's suit was decreed. It was found by the learned Additional District Judge that the plaintiff had not contracted Karewa marriage with Sukhi, that the plaintiff had not become unchaste, that she had

been by force subjected to illicit sexual intercourse, that the plaintiff was not estopped from challenging the mutation, that the suit was not barred by time, that the defendants had not become owners of the land in dispute by adverse possession and that the parties were governed by custom and there being no remarriage or unchastity, the plaintiff had not forfeited her husband's estate. Against this decision, Batto and Khemi and her sons have preferred the present second appeal.

(4) The matter regarding estoppel, remarriage and adverse possession are not open to review in second appeal. The decision of lower appellate Court on these matters is based on evidence. No error of law has been committed. The learned counsel for the appellant has rightly not agitated the same in second appeal. No arguments were advanced on the question of limitation.

(5) The only question that has seriously been debated before me is that by giving birth to a son, the plaintiff has become unchaste, and, therefore, by reason of unchastity she has forfeited the right to retain the husband's estate. The contention of the learned counsel for the appellant is that in the *Riwaj-i-am* of district Gurgaon, it is stated :—

> "If a widow be proved unchaste, or marries again by *karao*, she loses all right in her husband's property. Our widows do not marry again."

This is the reply given by the Rajput tribe. So far as the Brahmins are concerned, their reply is the same as that of the Rajputs. There is a note by the compiler regarding this answer and that note reads thus :—

> "No instance of the unchastity or remarriage of a widow. It would seem that when a widow leaves her husband's house, she loses her interest in his property."

It is, therefore, obvious that so far as *Riwaj-i-am* is concerned, it does support the contention of the learned counsel and, therefore, according to the consistent trend of judicial decisions, an initial presumption does arise in favour of the custom set up by the defendants.

(6) The contention of the learned counsel for the respondent, on the other hand, is that this presumption has been rebutted in this case inasmuch as :—

(a) That the women were not consulted at the preparation of the *Riwaj-i-am*. Therefore, the presumption of the *Riwaj-i-am* entry, which is against the interest of the females, is considerably weakened.

(b) That the *Riwaj-i-am* is not supported by instances.

(c) That the instances proved on the record clearly rebut the presumption arising out of the *Riwaj-i-am*.

(d) That the *Riwaj-i-am* is opposed to the general customs of the province.

No exception is taken to (a) and (b). As to (c) it is pointed out, that there are two instances in favour of the custom recorded in the *Riwaj-i-am*. These instances are :—

(i) *Bhajna* v. *Mt. Bheoli* (1); and

(ii) *Shrimati Khilyan and another* v. *Bhajan Lal and others*, (2).

So far as the first instance is concerned, it is of no assistance for the simple reason that the case was decided merely on the basis of the presumption arising from the *Riwaj-i-am* entry. In fact, in that case there were three instances against the *Riwaj-i-am* entry and no weight was attached to them and the case was decided on the basis of the *Riwaj-i-am* entry alone. This decision is no longer good law in view of the authoritative pronouncement of the Privy Council in *Mst. Subhani and others* v. *Nawab and others* (3), and the decision of the Supreme Court in *Jai Kaur and others* v. *Sher Singh and others* (4). On the other hand, these three instances would be enough, in my opinion, to rebut the *Riwaj-i-am* entry. So far as the second instance *Shmt. Khilyan and another* v. *Bhajan Lal and others* (2) is concerned, in that case the question as to unchastity of the widow losing her husband's estate did not directly arise. It arose incidentally. In that case the question was whether the adoption by an unchaste widow was valid or not. While dealing

(1) A.I.R. 1932 Lah. 177.
(2) R.S.A. 720 of 1952 decided on 21st August, 1959.
(3) I.L.R. 1941 Lah. 154.
(4) A.I.R. 1960 S.C. 1118.

with the validity of the adoption incidentally it was observed that such a widow loses her husband's estate as well. The fact of the matter is that no instances were either considered or relied upon.

(7) On the other hand *Mamraj* v. *Bhola and others* (5) is a case of Jats of Gurgaon District. The case was remanded and an enquiry was ordered to find out if there was a custom among the Jats whereby an unchaste widow lost her husband's estate. After enquiry, it was found that there was no custom in Gurgaon whereby an unchaste widow loses her husband's estate. Similarly, in *Ghuray* v. *Mst. Romali and another* (6), it was observed that an unchaste widow in Gurgaon District does not lose her husband's estate. I may mention that the custom of Jats is identical to customs of Rajputs as well as Brahmins. Besides these instances there are the three instances which find mention in the decision of Lahore High Court in *Bhajna* v. *Mt. Bheoli* (1). Thus all the instances are against the custom recorded in the *Riwaj-i-am.*

(8) The most important matter is that the author of the *Riwaj-i-am* doubted the correctness of the general statement regarding such a custom as made by the persons who were consulted at its preparation. It is observed by the compiler that the custom seems to be that a widow who does not leave her husband's house even if she becomes unchaste, retains her husband's estate. This statement is entirely in consonance with paragraph 37 of Rattigans Digest of Customary Law and, therefore, (c) and (d) stand established. I am, therefore, clearly of the view that the appellants have failed to prove that the unchastity of Mst. Punian has resulted in forfeiture of her husband's estate.

(9) No other contention has been advanced by the learned counsel.

(10) For the reasons recorded above, this appeal fails and is dismissed, but there will be no order as to costs.

(11) The oral request made by the learned counsel for leave to appeal under clause 10 of the Letters Patent is declined.

R. N. M.

(5) 78 Punjab Records 1869.

(6) 1969 Cur. L.J. 678.