significant to note that the plaintiff-petitioner herself being a party to the sale deed could not sue for a mere declaration that the sale deed was fraudulent and the vendees had not acquired any title thereunder. The sale deed had to be cancelled, otherwise, title in the land had already passed to the vendee under the deed. In the present case, the plaintiff-petitioner had to get the sale deed, to which she was a party, cancelled, before she could seek possession of the land. Thus, the substantive relief being the cancellation of the sale deed, it is article 1, Schedule I of the Act, which was applicable to the suit of the plaintiff-petitioner.

16. In this view of the matter, no other point arises in these revision petitions and the same are therefore, dismissed, with no order as to costs. However, the plaintiff-petitioner is allowed two months' time to make up the deficiency in the Court-fee already paid by her.

*S. S. Sandhawalia, C. J.*—I agree.

*S. P. Goyal, J.*—I also agree.

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*N. K. S.*

FULL BENCH

*Before S. S. Sandhawalia, C.J., M. R. Sharma and G. C. Mital, JJ.*

RATI RAM and another,—*Appellants*

*versus*

SHIV CHARAN and others,—*Respondents*

*Regular Second Appeal No.* 140 *of* 1969.

July 23, 1981.

*Custom—Rohtak District—Powers of a sonless proprietor in Rohtak tehsil—Such proprietor—Whether competent to make testamentary disposition of ancestral land in favour of a close relation in lieu of services.*

*Held*, that the power of a sonless proprietor in Rohtak Tehsil to alienate his ancestral property for consideration is recognised even when there is no necessity for sale provided of course, the alienation is not for an immoral purpose. The consideration for an alienation may either he made in cash or in kind, i.e., in the form of services and since there is no distinction between a transfer *inter vivos* and a transfer which takes effect after the death of the transferor, it would be reasonable to infer that testamentary disposition of ancestral land in favour of a close relation in lieu of services is recognised under the Customary Law. (Para 10).

*Case referred by Hon'ble Mr. Justice M. R. Sharma, on 5th March, 1980, to a Full Bench for deciding the important question of law involved in the case. The Full Bench consisting of Hon'ble the Chief Justice Mr. S. S. Sandhawalia, Hon'ble Mr. Justice M. R. Sharma, and Hon'ble Mr. Justice G. C. Mittal, decided the case finally on 23rd July, 1981.*

*Regular Second Appeal from the decree of the Court of Shri B. S. Yadav, Additional District Judge, Rohtak, dated the 30th day of October, 1968, affirming that of Shri V. B. Bansal, Sub-Judge 1st Class, Rohtak, dated the 23rd November, 1966, decreeing the suit of the plaintiff against defendants No. 1 and 2 regarding the disputed land but dismissing the same regarding the disputed houses and also dismissing the suit against defendants Nos. 3 to 5 as no relief has been claimed against them and leaving the parties to bear their own costs.*

U. D. Gaur, Advocate, *for the Appellant.*

H. L. Sarin, Sr. Advocate with R. L. Sarin, Advocate, *for the Respondent.*

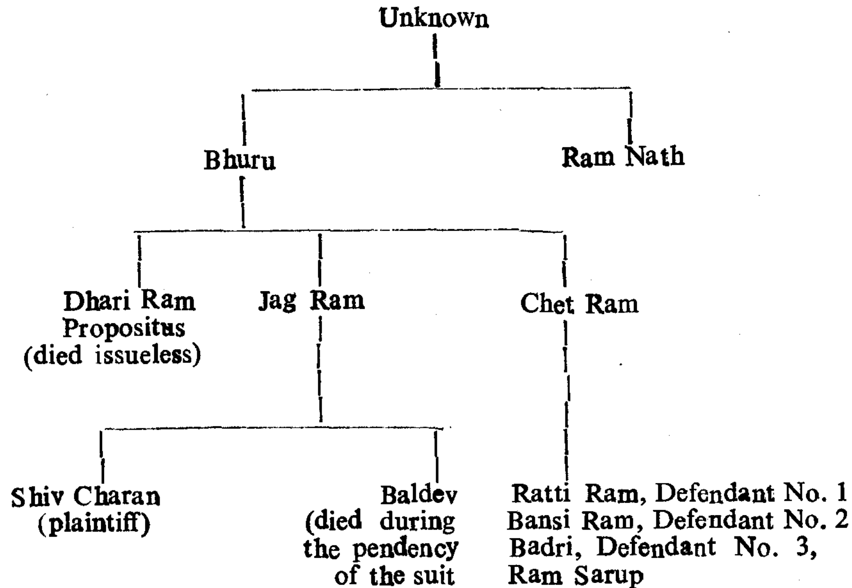
JUDGMENT

*M. R. Sharma, J.*

(1) Whether a sonless Gaur Brahmin governed by customary law and belonging to Rohtak Tehsil, is competent to make a testamentary disposition of his property in favour of a close relation in lieu of services or not, is the short question which we are called upon to decide in this case.

(2) In order to properly understand the facts out of which this controversy has arisen, it would be useful to have a look at the

following pedigree table :—




(3) Chet Ram was adopted as a son by Ram Nath. Dhari Ram deceased had 1/4th share in land measuring 66 Kanals 5 Marlas and 1/4th share in two houses specified in the plaint. On May 6, 1964 he executed the will, dated 6th May, 1964 (Exhibit DW1/1) bequeathing his share in the aforementioned property in favour of Rati Ram and Bansi Ram, defendants-appellants Nos. 1 and 2. Dhari Ram died on April 25, 1965. Shiv Charan, plaintiff-respondent No. 1, filed a suit for declaration and permanent injunction to the effect that the parties were Gaur Brahmins governed by customary law and Dhari Ram propositus was debarred from making testamentary disposition of his property which was ancestral *qua* him in favour of Rati Ram and Bansi Ram who were remote collaterals. Rati Ram and Bansi Ram defendant-appellants contested the pleas raised in the plaint and asserted that the Will in dispute was valid as the same had been made in lieu of services.

(4) The learned trial Judge struck the following issues in the case :—

1. Whether the property in suit is ancestral *qua* the plaintiff ? OPP.

2. Whether the parties are governed in matters of alienation by custom, if so, what that custom is ? OPP.

3. If issues Nos. 1 and 2 are proved in favour of the plaintiff whether the will amounts to alienation ? OPP.

4. Relief.

(5) Under issue No. 1, it was held that the land in dispute was ancestral, but the house property was not proved to be ancestral. Under issue No. 2 it was held that the parties were governed by custom under which Dhari Ram deceased could not make a testamentary disposition of his ancestral property. Under issue No. 3, it was held that disposition by Will amounted to an alienation. On these findings, the learned trial Judge decreed the suit filed by Shiv Charan respondent to the extent of the land in dispute and dismissed the same *qua* the share of Dhari Ram deceased in the house property, Rati Ram and Bansi Ram went in appeal which was dismissed by the learned Additional District Judge, Rohtak. The Appellate Court affirmed the finding regarding the ancestral nature of the land in dispute and held that the parties were governed by custom. On the point whether Rati Ram and Bansi Ram had rendered services to the propositus or not, it observed as under :—

> "I may mention here that there is sufficient evidence on the file to show that the appellants rendered services to Dhari during his life time and also performed his death ceremonies. Jag Ram who was brother of Dhari used to reside in village Dubaldhan Majra where he was married. This fact is clear from the plaintiff's evidence and defendant's evidence and it was not disputed before me. Dhari owned only two Killas of land and one can easily imagine that so much area is not sufficient for the livelihood of a person. Dhari was unmarried and as is clear from the statement of P.W. 8 Bansi he used to reside with the appellants and the appellants used to give him food and clothing. He has further stated that the appellants used to render service to Dhari. To the same effect are the statements of D.W. 2 Shri Ram, D.W. 5 Pehlad Singh, D.W. 6 Lachhman Dass and D.W. 7 Subha

Chand. Learned counsel for the respondent No. 1 has not been able to advance any agrument that why the statements of these witnesses should not be believed. The plaintiff-respondent No. 1 Shiv Charan has admitted that his father used to reside in village Majra and he also got his education there. Therefore, I have no hesitation in holding that the appellants rendered service to Dhari."

Inspite of this finding, it non-suited Rati Ram and Bansi Ram appellants on the ground that it was not open to a sonless proprietor to dispose of his ancestral land by making a Will.

(6) The defendant-appellants filed a second appeal which came up for final hearing before me on May 8, 1980. Before me, it was argued that under Riwaj-i-am of Rohtak Tehsil a sonless proprietor could alienate his land even when there was no necessity for sale, provided the same was not made for an immoral purpose and also there was no restriction against such a proprietor to make a gift of his land for services. On this basis, it was submitted that the restriction placed on the powers of a sonless proprietor regarding testamentary disposition was unreasonable. On this point I had on an earlier occasion in (*Bhim Singh* vs. *Mahi Pat and others*) (1), taken a view in favour of the appellant, but that view was reversed by the L.P. Bench in *Mahipat and others* vs. *Bhim Singh and others* (2).

(7) Mr. U. D. Gaur, the learned counsel for the appellants submitted that the view taken by the L.P. Bench could not be allowed to stand in view of the observations made by the Supreme Court in *Mst. Mali* vs. *Ranbir Singh and others* (3). Since this judgment had not been cited before me when I decided the second appeal or before the L. P. Bench when the case came up before it, I recommended that this case should be decided by a larger Bench. My Lord the Chief Justice ordered this case to be decided by a Full Bench. This is how the case has come up before us.

(1) R.S.A. 889/72, decided on 7th November, 1974.

(2) 1979 R.L.R. 361.

(3) Unreported Judgments of S.C. Vol. II, 1970, Page 395.

(8) As far as the power of a sonless proprietor governed by customary law in Rohtak Tehsil to alienate the ancestral land without necessity, is concerned, the rule has now been well settled that it is open to him to do so provided of course the sale is not for an immoral purpose. In Topper's book on Customary Law, 1879 Edition, Question No. 27 and its answer when translated, read as under:

*Question.* Can the reversioners object to an alienation of ancestral or non-ancestral property made by a sonless proprietor?

*Answer.* The alienation cannot be objected to. However, it can be challenged, and the right of pre-emption is recognised.

On the basis of the above question and answer, it was held by a Division Bench of the Lahore High Court in *Kala and others* vs. *Mam Chand and others,* (4), that a sonless proprietor of Rohtak Tehsil had wide powers of alienation over ancestral property. In *Sube Singh and another* vs. *Kanhaya and others* (5), it was laid down that a Jat holding agricultural land in Jhajjar Tehsil of Rohtak district in Punjab had by custom a power to transfer it for consideration and such a transfer was not liable to be set aside at the instance of his son or other reversionary heir unless the sale was for immoral purposes. The custom relating to gifts to strangers is described in question No. 102 and answer thereto in the Customary law of the Rohtak District compiled by E. Joseph in 1910. The question and answer read as under:

*Question*: Given the rules regarding the power of a proprietor to make gifts of his property, moveable or immovable, ancestral or acquired, to persons who are not related to him, or in charity. Is the consent of the sons, if such there be or of the near relatives, necessary? If of the near relatives, who are considered such? How does (1) the absence of sons, (2) the circumstances that the property is divided, affect the power of the proprietor to make such gifts?

I.R. 1924 Lahore 102.
)64 (2) S.C. Reports 899.

*Answer.* Pathans of Jhajjar outside Guriani *Zail* and Shekhs reply that a man can give any or all of his property, joint or divided, by will or in charity, to any person without let or hindrance by his heirs.

All other tribes throughout say there is no restriction in the gift of movable property ; as to immovable, self-acquired or ancestral, he can but give *dohli* of 25 *biswas* in charity without the consent of his heirs-this may be either of joint or of divided property."

Curiously enough, there is no mention either in the question or in the answer thereto whether the gift in lieu of services was valid or not. Nor is the gift in lieu of services covered by any other question or answer contained in this compilation. That being, so we have to fall back upon the general custom prevailing in the State on this point. In Rattigan's Digest of Customary Law, 14th Edition, paragraph 59, Exception 3, it has been mentioned that ancestral immovable property is ordinarily inalienable, but this principle is subject to the following exception :—

> "Alienations in favour of relations between whom and the alienor there is some special tie, as by their having been brought up by him or by their being associated with him or by their assisting him in cultivation or rendering him services in the management of the land when he was himself incapable of doing so, are very generally recognised by custom."

It is thus obvious that a gift can be made in favour of a close relation in lieu of services.

(9) I may now come to the question of Will. The principle of customary law on this point is summed up in question No. 93-A and answer thereto in the Customary Law compiled by E. Joseph which read as follows :—

> "Jats, Ahir, Hindu Rajputs of Jhajjar, Brahmans, and Pathans of Guriani *zail*, have no custom of making Wills and say that, if any one made one it would be inoperative. Pathans of Gohana and Hindu and Muhammadan Rajputs

of Gohana and Rohtak say that a Will must be in writing and is complied with, but must not transgress the recognised rules of inheritance of ancestral property. Pathans of Jhajjar outside Guriani *zail* and Shekhs of Jhajjar say that a man can make a Will orally or in writing, dealing with one-third of his property, movable or immovable, ancestral or acquired, but not with more. No instances are produced by Pathans or Rajputs of a Will except one by Mussummat Dhanna, Rajputni of Gohana, in favour of Allah dad, son of Faujdar Khan, and this was never operated on."

*Prima facie* the opinion expressed is against the power of a proprietor on ancestral property to make a Will, but here again there is no mention either in the question or in the answer whether a Will could be made in lieu of services or not. If a Will as a mode of alienation can be equated with a gift then it would be reasonable to assume that a Will could be made in lieu of services, on the basis of the third exception to paragraph 59 of the Rattigan's Digest extracted above. In *Mst Mali's case* (supra), the Supreme Court observed as under :—

"Coming to the second point, it seems to us that the Hindu Succession Act has not made any change as far as the right of a female to challenge an alienation made by the last male holder of ancestral land is concerned. It is true that under section 8 of the Hindu Succession Act a daughter is an heir if a male Hindu dies intestate. But Section 20 of the Act provides that "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 (39 of 1925), or any other law for the time being in force and applicable to Hindus". The Punjab Customary Law is a law for the time being in force within the meaning of section 30 and was applicable to the testator Chandgi Ram. Under the Punjab Customary Law applicable to jats in Rohtak District Chandgi Ram could alienate his property except for immoral purposes. In *Abdul Rafi Khan* vs. *Lakshmi Chand* (6), it was held

(6) I.L.R. (1935) 16 Lah. 505.

by a Division Bench of the Lahore High Court that "by custom an alienation of ancestral property by a male proprietor of the Gohana Tehsil of the Rohtak District cannot be challenged unless it is made for immoral purposes." Rattigan states in para 56b that "customary law recognises on distinction between the power of making verbal or written transfers of property *inter vivos,* nor where an unrestricted power of transfer is recognised to exist, between a transfer *inter vivos* and one to take effect upon the death of the transferor. The form of alienation is treated as immaterial."

(10) As noticed earlier, "the power of a sonless proprietor in Rohtak Tehsil to alienate his ancestral property for consideration is recognised even when there is no necessity for sale, provided of course the alienation is not for an immoral purpose. The consideration for an alienation may either be made in cash or in kind, i.e. in the form of services and if there is no distinction between a transfer *inter vivos* and a transfer which takes effect after the death of the transferor, as laid down by the Supreme Court, it would be reasonable to infer that testamentary disposition of ancestral land in favour of a close relation in lieu of services is recognised under the customary law. At the cost of repetition, I would like to mention that question No. 93-A and the answer thereto do not expressly cover the case of a testamentary disposition of ancestral property in lieu of services."

(11) Recently, A. S. Bains, J., had an occasion to consider a similar question in *Smt. Chhota* v. *Daryao Singh and another* (6A). In that case, the right of a Brahmin to dispose of his property by will was upheld. I am in respectful agreement with this view.

In an earlier case, *Bhajna* v. *Mihan etc.* (7), A. D. Koshal, J. (as his Lordship then was), laid down that a land-owner could not alienate his ancestral land by making a will to the exclusion of his sons. Even then the learned Judge observed as under:—

"That the case of a sonless proprietor in the matter of alienation of a part of his ancestral holding in favour of a near

(6-A) R.S.A. 466/72, decided on 1st May, 1978.

(7) 1972 C.L.J. 208.

relation who had tendered him services stands on a footing entirely differentt from that of a proprietor having sons, admits of no doubt. In this connection, reference may usefully be made to *Buta Singh & Nihal Singh* v. *Uttam Singh*, (8)."

(12) As noticed earlier, Dhari Ram propsitus, whose will is being questioned in this case, was also sonless. Thus, in a way the view taken by A. D. Koshal, J., also supports the view taken by me.

(13) I would, therefore, answer the question in the affirmative and as a consequence thereof allow the appeal and set aside the judgments and decrees of both the Courts below and dismiss the suit. The parties, however, are left to bear their own costs.

*S. S. Sandhawalia, C.J.*—I agree.

*Gokal Chand Mital, J.*—I also agree.

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*N. K. S.*

FULL BENCH

*Before S. S. Sandhawalia C.J., B. S. Dhillon and J. V. Gupta JJ.*

COMMISSIONER OF INCOME-TAX,—*Applicant.*

*versus*

M/S. PATRAM DASS RAJA RAM BERI, ROHTAK,—*Respondent.*

*Income Tax Reference No.* 56 *and* 57 *of* 1976.

July 28, 1981.

*Income-tax Act* (*XLIII* of 1961)—*Sections* 139, 271(1) (*a*) *and* 276-*CC*—*Delay in filing of return of income—Levy of penalty under section* 271(1) (*a*)—Mens rea—*Whether a relevant consideration in the matter of such levy—Penalty proceedings—Nature of.*

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(8) 115 Punjab Records 1891.