(2006) 12 P&H CK 0122

High Court Of Punjab And Haryana At Chandigarh

Case No: Second Appeal No. 457 of 2005

S. Gobind Singh	APPELLANT
Vs	
Kesho Ram and another	RESPONDENT

Date of Decision: Dec. 29, 2006

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Section 53

Citation: AIR 2006 P&H 37

Hon'ble Judges: Teja Singh, C.J; Chopra, J

Bench: Division Bench

Advocate: Anant Ram, for the Appellant; Gurbachan Singh and Dalip Chand, for the Respondent

Judgement

Chopra, J.
This second appeal has arisen under the following circumstances:

2. One Panna Lal obtained a money decree against Gurbachan Singh in the year 1934. After the judgment-debtor''s death execution was taken by Chaudhri Kesho Ram, a transferee of the original decree-holder against Lalji his son and one-half of a house situate in Sangrur representing the share of the deceased judgment-debtor was attached. S. Gobinder Singh father of Gurbachan Singh objected to the attachment and his objection petition being dismissed he brought the suit giving rise to this appeal for a declaration that the house could not be proceeded against, because under custom which his family followed, his son Gurbachan Singh who predeceased him or his grandson Lalji could not claim any interest in it. An alternate plea was also taken that even under the personal law the house or any share in it could not be attached or sold in execution of a personal decree against his deceased son even though the latter had left a son. The decree-holder contested the suit on all the grounds. Lalji who was than a minor was represented by a guardian appointed by the Court. He resisted the suit on the ground that under Hindu law, by

which they were governed, the grandson was entitled to one half share in the house. It may be mentioned here that Lalji has now attained the age of majority and is represented by a separate counsel B. Dalip Chand. He now falling in line with his grandfather, wants to go back from the plea taken by his court-guardian and supports the present appeal. An application for this purpose has also been presented on his behalf. But in the light of the decision arrived at in the case it is of no importance and no further reference need be made to it. The trial Sub-Judge found that the family of the plaintiff was governed by Hindu law, according to which share of Lalji in the house must be deemed to be property of the deceased in his hands, and that the presence of the plaintiff, the father of the deceased did not create any difference. He was further of the opinion that even if the plaintiff be held to be governed by custom, it had not been proved what that custom was or that under it a son had no share in the ancestral property of his father in the latter''s life-time. The suit was consequently dismissed. On appeal by the decree-holder, the learned District Judge, Sangrur agreed with the trial Sub Judge that the plaintiff was governed by Hindu law and that under it the attachment was unassailable. He accepted the proposition that the plaintiff being a Jat originally belonging to a village in Ludhiana District; would be presumed to be governed by custom of the place; but on facts he found that the presumption had been rebutted and that it had been proved that the plaintiff had abandoned that custom and had adopted his personal law by migrating to Sangrur and by taking up service which was his main source of livelihood. He, however, did not agree with the trial Sub-Judge that under custom also the house was validly attached, because he was of the opinion that the general custom of the Punjab would be presumed to apply unless any special custom to the contrary was alleged and proved. He further found that under the general custom a son or a grandson had no interest in the property of his father or grand-father in the latter''s life-time. Holding the plaintiff to be governed by Hindu law he dismissed the appeal with costs. This is plaintiffs'' second appeal.

3. It is vehemently contended by Rai Bahadur Anant Ram, the learned counsel for the appellant that there was an initial presumption in favour of the plaintiff being governed by custom and that the presumption was in no way rebutted by the facts relied upon by the District Judge. After a careful consideration of all the facts on record, I am of the opinion that the contention must be accepted.

4. The plaintiff is a Sikh Jat, a predominantly agricultural tribe of the Punjab. It is admitted that he originally belonged to Sibian, a village in Tehsil Jagraon District Ludhiana, and that he still owns property there. It was his father Sardar Rattan Singh who migrated from that village and started residing in Sangrur where he joined service. It cannot be denied that before the family migrated to Sangrur they were governed by the general Customary law of the Punjab. Normally, it would be presumed that the family carried with them the custom which governed them before they migrated and to have retained that custom even by settling in Sangrur. The presumption, of course, is rebuttable and under the circumstances it was for

the defendant to prove that the deceased''s family had abandoned custom and had adopted Hindu law. B. Gurbachan Singh, the learned counsel for the decree-holder does not dispute this proposition and it was also accepted by the learned District Judge. He, however, contends that he had succeeded in rebutting that initial presumption. He argues that inspite of the fact that the plaintiff was a Jat and his original home was in village he had ceased to be governed by custom because (1) he no longer belonged to the village; (2) he and his father had taken service as their main source of livelihood and (3) it was not shown that he depended upon agriculture. These are exactly the points relied upon by the learned District Judge to come to the conclusion that the plaintiff was no longer governed by custom and had taken to his personal law. It has now to be seen how far these facts stand proved and whether they are enough to support the decision arrived at by the District Judge.

4a. The defendant examined two witnesses namely Moti Ram and another Chaudhri Moti Ram both of Sangrur and also gave his own statement in support of his allegations. The defendant stated that because the plaintiff had shifted to Sangrur he should be governed by custom of that place and not that of Sibian. It was only on this ground that he was prepared to say that the plaintiff was governed by Hindu law. He, however, admitted that the plaintiff still owned property in the village. Moti Ram''s opinion that the plaintiff was governed by Hindu law was based on the fact that the marriages in the plaintiff''s family were performed by Pheras and not by Anand ceremony. He, however, had no personal knowledge that it was so. He had only heard about it from a Mukhtiar of the plaintiff and could not give the year when any marriage took place. Ch. Moti Ram is a dismissed Mukhtiar of the plaintiff and admits that there have been criminal as well as civil litigation between him and the plaintiff. The cases went upto the High Court and ended in plaintiff''s favour. His evidence is to the effect that the plaintiff originally followed Hindu law but had adopted Sikh Dharam for the last 7 or 8 years. This statement is hardly understandable. It is not denied even by the defendant that the plaintiff and his father were Sikh Jats of village Sibian and that that they originally followed custom. This is all the evidence of the defendant on the point. The plaintiff also has given his own statement and has examined Babu Singh, a Jat of his village. He stated that he originally belongs to village Sibian where he still owns considerable property which fact is also corroborated by his witness. He further avers that he had acquired property including agricultural land in Sangrur as well. It was his father S. Rattan Singh, who in the first instance came to Sangrur and took up service but they had not given up going to their village off and on. In fact his residence according to him was at both places, namely Sangrur and Sibian. All that this evidence comes to is that the plaintiff and his father joined service at Sangrur and are residing there for some time. It has not been proved that they had given up following custom in social matters nor has any instance been cited where they might have followed personal law in matters of succession or alienation. Before a person belonging to a

predominant agricultural tribe can be held to have given up custom, which governed his tribe, it must be shown that he had severed his connection with agriculture or his village community. The evidence in this case, however, leads to show that the plaintiff still owns considerable landed property in village Sibian and has purchased agricultural land in Sangrur as well. To say that he has severed his connection with agriculture does not appear to be correct. It is not necessary that an agriculturist must till or cultivate land himself. Most of the biswedars who own land and sometimes reside in towns do not cultivate land themselves and yet it cannot be said that they do not follow custom. Great stress is being laid on the fact that the plaintiff''s family has given up rural life and pursuits by taking to service for two or three generations. The mere fact that a person originally belonging to a rural community and to a predominantly agricultural tribe settles in a town and joins service does not necessarily lead to the conclusion that he has abandoned the old custom governing his ancestors and has adopted the law which prevails in the locality in which he takes his abode. Custom must be the ordinary rule of decision in such a case unless it is indisputably established that the party concerned had abandoned his rural proclivities and had severed all his connections with the rural community. No such thing has been shown to exist in the present case. I am, therefore, of the opinion that the defendant has not succeeded in rebutting the presumption that the plaintiff is governed by custom.

5. Some of the authorities that support the view that I take may be referred to with advantage. The following observation was made by a Division Bench of the Lahore High Court in AIR 1944 117 (Lahore) .

No doubt it is open to a family to abandon custom and to adopt its personal law but in order to determine that this has effectively been done unequivocal circumstances must exist which point to that conclusion. The mere fact that a person belonging to a tribe, which is predominantly agricultural tribe and was consulted at the time of the preparation of the riwaj-i-am, migrates to a town or temporarily ceases to cultivate land would not be enough to justify the conclusion that he has abrogated customary law altogether. Custom, unlike a cloak cannot be cast off at one''s mere volition. Mere occupation of the parties concerned is not to be taken as a conclusive factor in determining whether the parties were governed by their personal law or customary law.

6. In Pahlwan v. Lal, A. I. R. 1947 Lah. 49: (225 I. C. 349), Achhru Ram J. while considering the case of a family that had migrated for some generations from Jhang District to Multan observed as follows:

Quite irrespective of the time when they left, their original home, normally the parties should be presumed to have carried with themselves the custom which governed them before they migrated from one District and to have retained that custom even while they settled in another District. The presumption, of course, is rebuttable.

7. Mumtaz Hussain v. Mt. Nek Akhtar, A. I. R. 1947 Lah. 280: (49 P. L. R. 67 (S.B.)) was the case of a family of Syeds of Gurdaspur District who had settled down in Ichhra, a suburb of Lahore and had for some generations taken to service. The case was decided by a Special Bench and it was held that:

Where members of a tribe are consulted at the time of the preparation of the Riwaj-i-am that raises the initial presumption that the tribe was governed by custom and the onus would lie upon any person alleging the contrary to displace this initial onus.

Once it is proved that a certain person was a member of the tribe the onus of showing that he had abandoned the custom rests on the party alleging the same. The mere fact that a member of such a tribe and the ancestors had taken up service and he was living in another place is not sufficient to discharge the onus.

8. Recently in Mt. Parvin Kumari v. Gokal Chand Rala Ram, A. I. R. 1949 E. P. 35 : (50 P. L. R. 151), Teja Singh J., now the learned Chief Justice of our High Court, discussed the case of a Rajput who hailed from a village in Hoshiarpur District and had taken service in Hoshiarpur. It was argued in the case that the family had migrated from the village in a town, that they no longer depended upon agriculture as their main source of livelihood and that the plaintiff and his father had taken up non-agricultural occupations. These facts were not found to be sufficient to prove that the plaintiff had ceased to be an agriculturist or that he had severed all connections with his village and his community, and consequently he wag held to be still following the custom of his ancestors.

9. It is not disputed before us that under the general custom prevalent in the Punjab a son has no interest or right of disposal in the property of his father during his life time whether it be self-acquired or ancestral qua him. The onus rests very heavily on those who wish to prove a rule of custom contrary to the general custom of the province. No such thing has been alleged much less proved in this case. The learned trial Sub-Judge relying on some of the older decisions of the Lahore High Court opined that there is no such thing as general custom in the Punjab and that in every case a party relying upon custom as the rule of decision must in addition to proving that he follows custom must prove what that custom is. It is true that at one time the view of the Lahore High Court was that there is no such thing as the general custom of the Punjab. But in face of what was held by their Lordships of the Privy Council in the well-known case of AIR 1941 21 (Privy Council) this view is no longer good law. It is now well-recognised that once it is established that a party followed custom he can rely upon the general custom of the province and leave to his opponent to prove any special rule to the contrary.

10. The learned counsel for the respondent laid some stress on the local law of the erstwhile Jind State and tried to impress that according to it the rule of decision in every case in the State must be the personal law of the parties. He further argued

that the law recognises rule of decision by custom only in cases where both the parties agree that they are governed by custom. Reliance for this purpose is placed on Ss. 1 and 2 of chap. 3 of Qanun Diwani of the State of the year 1874 A. D. Section 1 provides that the rule of decision in the State is that all Hindus are governed by Hindu law and Mahomedans by Mahomedan law. Section 3 lays down that in some cases without regard to Sharah or Shashter custom of the country or family is kept in view. It further provides that when such an occasion arises that the parties are bound by the custom of the country, tribe or family and agree to the custom applicable then the case would be decided accordingly but proof and verification of custom would be taken. This is almost a literal translation of the following in vernacular:

Bazi Jagah Bila I Lehaz sharah wa shashter ke riwaj mulk par nazir hoti hei ya dastoor khas kisi firqa ya khandan par. Jahan aiysa moqa ho ke mukhasmeen riwaj mulk ya dastoor firqa ya khandan ki paband aur razamand hon pos tariq par faisla deeya jawega lakin saboot wa tasdeeq riwaj leajawege.

11. The contention of the respondent is that custom can be relied upon only in cases where both the parties agree to be governed by custom and in all other cases the rule of decision would be their personal law. I am not prepared to put such a restricted interpretation on what has been reproduced above. It does not appear to have been intended to mean that mere denial of a party would deprive the other of the right to prove that he was governed by custom and not by personal law. If this interpretation is accepted, the rule of decision would rest at the sweet-will of the party whose interests are not served by custom. Mere denial of the defendant in this case cannot result in depriving the plaintiff of his right to prove that he brought with him the custom that he followed in his original home village. After a careful reading of the two sections together, which I must observe have not been very happily worded, I am of the opinion that all what they mean is that the first rule would be the personal law of the parties concerned; in case where custom is set up and proved the custom so proved would be given effect to; and where the parties agree to a particular custom then the decision would be according to that custom. This local law of the State which is not in conflict with law in the Punjab does not in any way support the case of the defendant nor does it affect the decision arrived at by me.

12. The alternate plea of the appellant that even under Hindu law Lalji, son of the deceased judgment debtor, could not be said to be in possession of any property of the deceased which could be proceeded against in execution of the decree in the presence of the plaintiff, need hardly be discussed in view of my finding that the family of the plaintiff is not governed by Hindu law and that the house is immune from attachment under custom which is the guiding rule in this case. I would, however, only like to observe that I am in perfect agreement with the learned District Judge that the plea has no force. It is contended on behalf of the appellant

that where a Hindu father incurs a debt and dies in the lifetime of his father his sons are relieved from their pious obligation to pay the debt from the joint family property. Reliance is placed on Binda Prasad and Another Vs. Raj Ballabh Sahai,) which no doubt supports this view. It does not require mush of reasoning to show that the ratio decidendi adopted in the case is not correct. There is no reason why a son should not remain under his pious obligation to pay his father''s debts although his grand-father is alive. He is liable to pay the debts to the extent of the joint family property in his hands. In the life time of his grand father he is liable to the extent of his share in the family property which undoubtedly accrues to him because of the death of his father. The share of Gurbachan Singh in the joint family property along with that of his son could undoubtedly be proceeded against in his lifetime for payment of the decretal amount. After his death this would be deemed his property in the hands of his son under S. 53, Civil P. C., and would be liable to be attached and sold in execution of the decree. The presence of the grand-father, the plaintiff cannot create any difference. The observations made in Binda Prasad and Another Vs. Raj Ballabh Sahai, were not approved by a Division Bench of the Lahore High Court in AIR 1933 857 (Lahore) and on facts almost similar to those of the present case it was held that
the sons are under a pious obligation to pay their father''s debt to the extent of the family property in their hands. And this obligation is not taken away simply because their father dies in the life time of their grand-father. Hence the sons'' share can be attached and sold in execution of a decree obtained against them as representatives of their father.

13. The prior view of the Allahabad High Court must be considered to have been overruled by a Full Bench of the same High Court in Chotey Lall Vs. Ganpat Rai and Another where it was held that:

The liability of Hindu son under the pious obligation for the debt of his father is not confined to the special case where the family consists of father and sons but it subsists even when there are other coparceners in the family like father''s brother.

14. In F. Phagu Mal v. Dhani Ram, A. I. R. 1931 Lah. 101: (148 I. C. 930) a decree for the debts of the deceased father was sought to be executed against the joint family property in the hands of his son in the life time of his father. Bhide J. dissenting from the Allahabad view in Binda Prasad and Another Vs. Raj Ballabh Sahai, and following AIR 1933 857 (Lahore)

that the joint family property in the hands of the grand-son is liable for the debts of his father even though his grandfather was alive.

15. The point under Hindu law seems to be quite clear and I am of the opinion that the decision of the case would have been quite different if the plaintiff was found to be governed by that law but as the rule of decision in this case is custom under which a son has no share in the property of his father during his life time I hold that

the suit must succeed. This appeal is consequently accepted and the plaintiff''s suit is decreed. In view of the contentious nature of the points involved the parties are left to bear their own costs throughout.

Teja Singh, J.

16. I am in agreement with my learned brother that the plaintiff-appellant continues to be governed by custom which applied to his family before his father migrated from Ludhiana to Jind. That the plaintiff''s family was governed by general agricultural custom and according to that custom the property owned by him could not be attached in execution of money decree against his son is not denied. All that was urged before us was that since the plaintiff''s father took up service in Jind State it should be held that he gave up all connections with his ancestral village and ceased to be bound by custom. As my learned brother has pointed out the onus to prove that custom no longer applied to the plaintiff''s family and that be was governed by Hindu law in all matters rested upon the respondent side but he has not been able to discharge it. The respondent has not been able to prove a single instance from the plaintiff''s family from which it could be inferred that they had given up custom in favour of personal law and the mere fact that the plaintiff and other members of his family did not cultivate the land with their own hands could not help him, nor do I think much hangs by the fact that the plaintiff was in service and so was his father, because there are thousands of people who have taken up service either to augment their source of livelihood or to improve their status in life but they still continue to follow custom like an ordinary agriculturist. Some of the respondent''s witnesses deposed that marriages in the plaintiff''s family were performed according to Hindu law and not according to the Anand ceremony which is prevalent among the Sikhs. I have no hesitation in holding that this is not material either, because a large majority of Sikhs, including agriculturist Sikhs, adopted the system of Anand marriage only recently and previously the majority of Sikhs observed the same marriage ceremonies as the Hindus and yet so far as the agriculturist Sikhs were concerned they followed Customary law in matters of succession, alienation, etc.

17. As regards the law prevalent in the Jind State it was laid down in Qanun-i-Diwani of 1874 A. D., that where it is proved that the parties are governed by custom or a special custom peculiar to a particular community or family, the same must be applied. Reference in in this connection should be made to S. 2, Chap. III of the said Qanun. The respondent''s counsel drew our attention to the word "Razamand" used in the said section and argued that no custom could be made the rule of law in a case unless it was acceptable to both sides. This interpretation is not only not warranted by the words of the section, but would make the section altogether nugatory for the simple reason that when a custom is alleged by one party and the decision of the case rests thereon, the other party is bound to deny it with the result that there would be no "Razamandi" of both parties and hence even if there be

ample evidence in support of the custom the Court would not be able to apply it. The relevant part of the section in Urdu reads as below:

Jahan aisa mauka ho ke mukhasmeen riwaj mulkya dastoor firqa ya khandan ki paband aur razamand honoos tariq par faisla deeya jawegalakin saboot wa tasdeeq riwaj liya jawega.

Obviously, the word ''Razamand'' has to be read along with ''Paband'' and in my judgment all that they mean is that a custom shall be held applicable when it is found that it is binding upon and acceptable to the parties, but the binding nature as well as the acceptance of it is to be determined by the evidence to be adduced and not on the basis of the attitude that they adopt in the case. In other words, it should be established by evidence that a custom alleged and relied upon has been followed by the parties and they are bound by it. In view of the fact that it was proved in this case that the plaintiff''s family was governed by custom the condition laid down in S. 2 of the Qanun-i Dewani was Satisfied and the same must be given effect to.

18. In the result I concur with my learned brother in allowing the appeal and in decreeing the plaintiff''s suit but leaving the parties to bear their own costs throughout.