interference in second appeal. Even if any presumption could be raised on the facts stated, it should be considered to have been rebutted by the disparity in the areas held by the different branches of Bhagu, the common ancestor at the material time.

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In the result, the appeal fails and is dismissed with costs.

BISHAN NARAIN, J.—I agree.

R.S.

Bishan Narain, J.

SUPREME COURT.

Before Sudhi Rajan Das, C. J., and Syed Jafar Imam, and A. K. Sarkar, JJ.

MST. KIRPAL KAUR,—*Appellant.*

versus

BACHAN SINGH AND OTHERS,—*Respondents.*

Civil Appeal No. 137 of 1953.

1957

Nov., 15th

Custom—Predeceased son's widow—Whether an heir on the death of her father-in-law—Such daughter-in-law taking possession of her father-in-law's property on his death—Whether takes it as an heir or adversely to the heirs—If adversely, whether she acquires widow's estate or full ownership by adverse possession—Daughter-in-law making a gift of a part of the property in favour of her daughter—Gift objected to by the collaterals—Dispute settled and document executed wherein she agreed to hold the property for her life and after her death her daughter to hold the same for her life but not entitled to alienate the same—Document, whether requires registration—Registration Act (XVI of 1908)—Section 49—The document not being registered, whether could be admitted into evidence to prove the nature of her possession subsequent to the date of the document—Mother making gift in favour of her daughter—Gift challenged by collaterals—Collaterals succeeding in the High Court—Mother and daughter filling appeal in the Supreme Court—Mother withdrawing from appeal—Daughter alone, whether can continue the appeal—Practice

—Special custom not pleaded nor proved—Whether should be allowed to be set up in appeal.

Held, that the general custom is that the widow of a pre-deceased son is not an heir of her father-in-law and is only entitled to maintenance out of his estate but that in some tribes a special custom prevails which makes her the heir and the onus of proving the special custom lies on those who assert it. Since no special custom has been proved in this case, the daughter-in-law cannot be held to be the heir of her father-in-law. That being so, it was impossible for her to have acquired by adverse possession title to property as his heir or to make such property good to his estate. By adverse possession she did not acquire the widow's estate but absolute estate after the expiry of 12 years as she did not go into possession as an heir of her father-in-law and she was competent to make a gift of it to her daughter.

Held, that the document executed by Harnam Kaur whereby she agreed that the lands would belong to her for her life and after her death to Kirpal Kaur for the latter's life and that none of them would be entitled to sell or mortgage the land required registration under the Indian Registration Act and, not being registered, could not be admitted in evidence even to show the nature of the possession of Harnam Kaur subsequent to the date of the document. Harnam Kaur had been in possession before the date of the document and to admit it in evidence to show the nature of her possession subsequent to it would be to treat it as operating to destroy the nature of the previous possession and to convert what had started as adverse possession into a permissive possession and, therefore, to give effect to the agreement contained in it which admittedly cannot be done for want of registration. To admit it in evidence for the purpose sought would really amount to getting round the statutory bar imposed by section 49 of the Registration Act.

Held, that where the appeal is filed by both the donor and the donee and the donor abandons it and is removed from the record as an appellant, the donee alone is entitled to prosecute the appeal to protect her rights under the alienation as her rights in no way depend on whether the alienor chooses to stand by the alienation or not.

Held, that where the special custom is neither pleaded nor proved nor even an attempt is made to do so, no question as to the special custom should be permitted to be raised in appeal.

Appeal from the Judgment and Decree, dated the 30th November, 1951, of the former PEPSU High Court in R. S. Appeal No. 49 of 1948, against the Judgment and Decree, dated the 1st May, 1948, of the Court of the Distric Judge, Patiala, in Civil Appeal No. 22 of 1946-47, arising from the Judgment and Decree, dated the 4th April, 1947, of the Court of the Sub-Judge, II Class, Bassi, in Suit No. 721 of 1945.

For the Appellant: Mr. Achhru Ram, Senior Advocate, (Mr. K. L. Mehta, Advocate, with him).

For Respondent No. 1: Mr. Raghbir Singh, Senior Advocate, Mr. S. S. Dhillon, Advocate, with him instructed by Mr. P. L. Goyal, Agent.

JUDGMENT

The Judgment of the Court was delivered by:

Sarkar, J

SARKAR, J.—The only question for decision in this appeal is whether title had been acquired to certain lands by adverse possession.

Ram Ditta was a Hindu Jat of village Bhathal in District Bassi which was originally in Patiala but subsequently came to be included in Patiala and Eastern Punjab States Union. He died in April, or May, 1920, leaving certain lands which were the subject matter of dispute in the suit out of which this appeal arises. Ram Ditta had a son named Jeona who predeceased him leaving a widow, Harnam Kaur. Harnam Kaur has a daughter, Kirpal Kaur and the latter is the appellant before us. Kirpal Kaur has a son of the name of Satwant Singh. Ram Ditta had certain collateral relations and the dispute was between them on the one hand and Harnam Kaur and Kirpal Kaur

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on the other. These collaterals are the contesting respondents in this appeal.

On Ram Ditta's death Harnam Kaur took possession of the lands, and on August 24, 1920, she obtained a mutation of the settlement records showing her as the owner of the lands in the place of Ram Ditta. By a deed dated November, 27, 1929, she purported to make a gift of half of the lands to Kirpal Kaur on the occasion of the latter's marriage. Thereafter an attempt was made to obtain a mutation of the settlement records showing Kirpal Kaur as the owner of the lands given to her but on the objection of the collaterals the mutation was refused on May 12, 1930. This gift gave rise to various litigation both civil and criminal between Harnam Kaur and Kirpal Kaur on the one hand and the collaterals on the other. Mutual friends intervened to put an end to this unhappy state of affairs and at their efforts a settlement of the disputes was arrived at. On February 6, 1932, a document was executed by Harnam Kaur whereby she agreed that the lands would belong to her for her life and after her death to Kirpal Kaur for the latter's life and that none of them would be entitled to sell or mortgage the lands. The document further stated that Harnam Kaur had previously created a mortgage on the lands and that she would have the right to create another mortgage on them to pay off certain specified debts due by her and such mortgage would be binding on the collaterals but after her death there would be no other burden on the collaterals. This document was never registered. In 1936, Harnam Kaur created another mortgage on the lands and this mortgage was subsequently transferred to Satwant Singh, son of Kirpal Kaur. In 1939, Harnam Kaur again made a gift, this time of the entire lands, to Kirpal Kaur and the latter thereafter obtained a mutation of the settlement

records showing her as the owner of the lands in the place of Harnam Kaur. This eventually brought about the institution of the suit out of which the present appeal arises.

This suit was filed in March, 1945, by some of the collaterals against Harnam Kaur, Kirpal Kaur and Satwant Singh impleading certain other collaterals who did not join as plaintiffs, as defendants. It sought a declaration that the gift of the lands by Harnam Kaur to Kirpal Kaur and the mortgage of 1936, were illegal and were not binding on the collaterals who were the then reversionary heirs of Ram Ditta. The suit was contested by Harnam Kaur, Kirpal Kaur and Satwant Singh.

The Court of first instance framed the following issues for trial :—

(1) Are the plaintiffs the collaterals of Jeona ?

(2) Is the property in dispute ancestral ?

(3) Was the mortgage in dispute effected for legal necessity ?

(4) Is the gift in dispute valid according to custom ?

(5) Is the suit time barred ?

(6) Had Harnam Kaur acquired a right to the lands by adverse possession at the time of the gift to Kirpal Kaur ?

The first five issues were decided in favour of the plaintiffs, and the sixth against them. With regard to the sixth issue it appears to have been admitted before the learned trial Judge by both parties that according to the general custom governing the parties a widow of a pre-deceased

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son, as Harnam Kaur was, was entitled to maintenance only when there were collaterals of the degree that the collaterals in this case are. The learned Judge held that the possession of Harnam Kaur was, therefore, adverse to the collaterals and that as she had admittedly been in possession since 1920 and as the relations between her and the collaterals had been unfriendly, she had acquired at the date of the gift an absolute title to the lands by adverse possession. It was contended before him that the agreement of February 6, 1932, though not admissible in evidence in the absence of registration to prove that Harnam Kaur and Kirpal Kaur had only life estates in the lands, was admissible to show the nature of Harnam Kaur's possession and that it showed that her possession was not adverse. The learned Judge did not accept this contention. In the above view of issue No. 6 he dismissed the suit.

The plaintiffs then took the matter up in appeal to the District Judge of Patiala. Harnam Kaur and her side never took any exception to the issues found against them by the trial Judge. The learned District Judge was, therefore, only concerned with the sixth issue. It was contended before him on behalf of the plaintiffs that Harnam Kaur's possession was not adverse to them as she had been in possession claiming only a right of maintenance and this was sought to be supported by the Patwari's report in connection with the mutation of August 24, 1920. The learned District Judge held that the report, a reference to which will be made later, did not show any assertion on the part of Harnam Kaur that she claimed to be the heir of Ram Ditta or that she was in possession in lieu of her maintenance. With regard to the agreement of February 6, 1932, he held that it was of no assistance to the collaterals. In the result he dismissed the appeal.

The collaterals then went up in appeal to the High Court of Patiala and Eastern Punjab States Union. The High Court took the view that in coming to the conclusion that Harnam Kaur's possession was adverse to the collaterals the Courts below had proceeded on the basis that being the widow of Ram Ditta's pre-deceased son she was not an heir to him and, therefore, her possession of Ram Ditta's estate was necessarily adverse to his heirs, the collaterals. The High Court felt that in doing so the Courts below were thinking of Hindu Law under which the widow of a pre-deceased son was not an heir but was entitled to maintenance only, and had overlooked the fact that the parties being Punjabi Jats, were governed by custom. The High Court then referred to paragraph 9 of Rattigan's Digest of Customary Law—which is a book of unquestioned authority on Punjab customs—where it is stated that "the widow of a sonless son who pre-deceases his father, is, in some tribes permitted to succeed to his share" and held that it appeared from the Patwari's report mentioned earlier that Harnam Kaur was regarded as Ram Ditta's heir and that was why mutation in her favour had been sanctioned. The High Court then proceeded to hold that it was legitimate to presume from this that the tribe to which Ram Ditta belonged recognised the right of a widow of a predeceased son to succeed her father-in-law in the place of her husband in preference to the collaterals of the deceased. The High Court thought that in view of this custom, which it found was proved in this case, Harnam Kaur was entitled to the possession of the lands and no presumption could, therefore, arise that she was holding them adversely to the collaterals. The High Court also held that the agreement of February 6, 1932, was admissible in evidence to prove the nature of Harnam Kaur's possession of the lands though it was not admissible to prove title

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as it had not been registered. The High Court was of the view that the agreement showed that since its execution the nature of Harnam Kaur's possession was permissive and not adverse and as at the date of the agreement she had not been in possession for the requisite period, she never acquired title by adverse possession, whatever may have been the character of her possession prior to it. The High Court lastly held that in any event, Harnam Kaur had entered into possession as heir of her father-in-law and, therefore, adverse possession by her would be considered as creating only a widow's estate in her and therefore she had not become an absolute owner and the nature of the estate acquired by her by adverse possession was that of a widow's estate governed by the customary law with no power of alienation. The High Court, therefore, allowed the appeal and decreed the suit.

From this judgment of the High Court the present appeal to us arises. The appeal had been filed by Harnam Kaur and Kirpal Kaur, but later Harnam Kaur abandoned it and she was removed from the record as an appellant. The appeal before us now, therefore, is only by Kirpal Kaur.

Learned counsel for the respondents, by which we mean the contesting respondents, contended that Kirpal Kaur alone was not competent to appeal because the alienations challenged had been made by Harnam Kaur. We cannot accept this contention. Kirpal Kaur as the alienee is certainly entitled to prosecute this appeal to protect her rights under the alienation. Her rights in no way depend on whether the alienor chooses to stand by the alienation or not.

The points argued before us were the same as were canvassed in the High Court. With regard to the special custom, which the High Court held governed the parties to this case, learned counsel

for the appellant contended that no such custom had been pleaded and no issue about it framed, nor indeed any hint of it given at any earlier stage of the proceeding in any of the courts below. We feel that these contentions are justified. In the plaint no mention of the custom is to be found. The plea as to adverse possession was raised by Harnam Kaur and Kirpal Kaur in an amended written statement that they filed. The plaintiffs never filed any replication setting up the special custom alleged by them as they should have done if they wished to rely on it in answer to the case made by the defendants by the amendment. Furthermore, as earlier stated, it was admitted by both parties before the trial Judge, that the custom governing the parties was that the widow of a pre-deceased son was only entitled to maintenance out of her father-in-law's estate. As learned counsel for the appellant pointed out, the passage in Rattigan's Digest makes it clear that the general custom is that the widow of a pre-deceased son is not an heir of her father-in-law but that in some tribes a special custom prevails which makes her the heir, and that the onus of proving the special custom lies on those who assert it. It was therefore in this case for the respondents to have pleaded and proved the special custom. As already stated, they neither pleaded the special custom, nor proved it nor even made an attempt to do so. After Harnam Kaur and Kirpal Kaur had closed their case, the respondents were given a chance to produce evidence in rebuttal but even then they did not make any attempt to establish the special custom. In these circumstances, in our view, no question as to the special custom should have been permitted by the High Court to be raised.

Furthermore, we are unable to agree with the High Court that there is evidence in this case to

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prove the special custom. As already stated, the High Court thought that it might be presumed from the Patwari's report that the special custom governing the tribe to which the parties belonged prevailed. This report of the Patwari is dated June 9, 1920, and was made in connection with the proceedings for the mutation of the name of Ram Ditta to that of Harnam Kaur soon after the former's death. That report reads as follows :

> "Sir, Ram Ditta, son of Begha, Jat, Bhathal, died a month back. Mst. Harnam Kaur, widow of Jeona, who is the real daughter-in-law of the deceased, is the heir and is in possession of the property. Hence the mutation having been entered is hereby submitted for orders."

Upon this report the following order was made :—

> "The factum was confirmed in the general gathering in presence of Bhana, Arjan Singh and Narain Singh, lambardars and of Mst. Harnam Kaur, the daughter-in-law of the deceased. Hence the mutation of the holding of Ram Ditta deceased in favour of Mst. Harnam Kaur, widow of Jeona, Jat, is hereby sanctioned. Dated.....24th August, 1920, A.D."

The report, no doubt, states that Harnam Kaur was Ram Ditta's heir. It is said that she could be an heir only under the special custom and hence the special custom must be deemed to have been proved in this case. But the report of the Patwari shows that in his own opinion Harnam Kaur was the heir of Ram Ditta. We do not know, how he came to have such an opinion or whether he had based it on the special custom. The report was

not evidence given in court and is not strictly admissible to prove the custom and, in fact, the report was not tendered as evidence of the custom. It is said that the Patwari's report indicated that there must have been an application by Harnam Kaur claiming the mutation on the basis that she had succeeded to the lands as the heir of Ram Ditta under the special custom. No such application is, however, on the records. We are unable to draw any presumption as to what statement might have been made in the application, if there was one. We do not think that the order of August 24, 1920, carries the matter further. It is said that when the order stated that "the factum was confirmed" it meant that the factum of the custom was confirmed. We cannot accept this contention. The factum referred to may well have been the death of Ram Ditta or that Harnam Kaur was the daughter-in-law of Ram Ditta. Even if it could be said that the factum confirmed was the special custom, the same difficulty would arise again, namely, that the order would show that it is only the opinion of the lambardars as to the existence of the special custom. Such opinion, for the reasons earlier stated, would not be evidence in this case to prove the custom. Further in the operative part of the order the mutation is not stated to be based on the ground that Harnam Kaur was the "heir" of Ram Ditta. We are, therefore unable to hold that the Patwari's report or the order thereon proves that Harnam Kaur was the customary heir of Ram Ditta and had got into possession in 1920, as such heir and, therefore, could not have been in adverse possession.

It is then said that the agreement of February 6, 1932, showed that since its date her possession was permissive. The High Court has held that the agreement was admissible to prove the nature

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of her possession. In *Varatha Pillai* v. *Jeevarathnammal* (1), it was held that a document which should have been registered but was not, was admissible to explain the nature of the possession of a person. What had happened there was that two widows who were in possession of a property in equal shares, presented a petition to the Collector on October 10, 1895, whereby after reciting that they had on October 8, 1895, given away the property as *stridhan* to one Duraisani, they prayed that orders might be passed for transferring the villages into her name. On this petition the property was registered in the name of Duraisani and she was put in possession and thereafter continued in possession till her death in 1911. The question was whether Duraisani had acquired title to the property by adverse possession. It was held that though the petition in the absence of registration could not be admitted to prove a gift, it might be referred to for showing that the subsequent possession of Duraisani was as a donee and owner of the land and not as trustee or manager for the two donors and therefore to show that the nature of such possession was adverse to them. We cannot agree that on the authority of *Varatha Pillai's* case the agreement of February 6, 1932, can be admitted in evidence in the case in hand to show the nature of Harnam Kaur's possession of the lands subsequent to its date. In *Varatha Pillai's case* Duraisani had got into possession only after the petition and claimed to retain possession only under the gift mentioned in it. The petition was therefore, admissible in evidence to show the nature of her possession. In the present case Harnam Kaur had been in possession before the date of the document and to admit it in evidence to show the nature of her possession subsequent to it would be to treat it as operating to destroy the nature of the

(1) (1918) 46 I.A. 285

previous possession and to convert what had started as adverse possession into a permissive possession and, therefore, to give effect to the agreement contained in it which admittedly cannot be done for want of registration. To admit it in evidence for the purpose sought would really amount to getting round the statutory bar imposed by section 49 of the Registration Act.

Lastly, the High Court held that as Harnam Kaur had entered into possession as the heir of Ram Ditta she could, at most, be considered to have acquired by adverse possession a widow's estate in the lands and could not therefore, make a gift of them. The High Court had referred to *Bura Mal* v. *Narain Das* (1), as an authority for this proposition. In our view, that case is of no assistance. There a female who was not an heir of the last full owner but was only entitled to maintenance, took possession of the properties in lieu of her maintenance by an arrangement with the heirs of the owner, and in those circumstances it was held that her possession could not be adverse to the heirs. There is no evidence of any such arrangement in this case, nor is it the case of the respondents that such an arrangement had ever been made. The High Court also referred to the case of *Pandappa Mahalingappa* v. *Shivalingappa* (2), This case was based on *Lajwanti* v. *Safa Chand* (3), and it would be enough to refer to the latter case. There the following observations occur :—

> "It was then argued that the widows could only possess for themselves ; that the last widow Devi would then acquire a personal title; and that the respondents and not the plaintiffs were the heirs of

(1) 102 Pb. Record 1907
(2) A.I.R. 1946 Bom. 193
(3) (1924) 51 I.A. 171, 176

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Devi. This is quite to understand the nature of the widows' possession. The Hindu widow, as often pointed out, is not a life renter, but has a widow's estate—that is to say, a widow's estate in her deceased husband's estate. If possessing as widow she possesses adversely to any one as to certain parcels, she does not, acquire the parcels as stridhan, but she makes them good to her husband's estate."

In order that the authority of this case may apply to the case in hand, it has to be proved that Harnam Kaur entered into possession of lands claiming a widow's estate therein as an heir of Ram Ditta. We find no evidence to prove that such was her claim. The Patwari's report earlier referred to can not be construed as such a claim. It was only the Patwari's opinion of the situation. It cannot therefore, be said in this case that Harnam Kaur was in possession claiming a widow's estate in the lands, as the customary heir of her father-in-law. Furthermore, in *Lajwanti's Case* (1), the widows who were found to have acquired title by adverse possession were undoubtedly the heirs of their husband and would have succeeded to his properties if a posthumous son whose existence was assumed by the Judicial Committee, had not been born to him. It was possible for these widows to hold property as heirs of their husband and make them good to his estate. *Lajwanti's Case* therefore was concerned with a female who was admittedly an heir. That is not the case here. As we have already stated, the special custom under which alone Harnam Kaur could have become an heir of Ram Ditta has not been proved. On the case as made and the evidence before us, it must be held that Harnam Kaur could never have been

(1) (1924) 51 I.A. 171, 176

the heir of Ram Ditta. That being so, it was impossible for her to have acquired by adverse possession title to property as his heir or to make such property good to his estate. We think that the following observation of the Judicial Committee in *Sham Koer* v. *Dah Koer* (1), applies to this case :—

> "Assuming that Bhau Nath Singh was a member of an undivided Hindu family governed by the Mitakshara law, as the Lower Court found and the High Court assumed, neither his widow nor his son's widow would be entitled to anything more than maintenance out of his estate. Their possession, therefore, of the three villages in question would be adverse to the reversionary heirs unless it was the result of the arrangement with them. If the possession was adverse, the rights of the reversionary heirs would of course be barred at the expiration of twelve years from the date of Bhau Nath Singh's death, or the date of the widows taking possession, which seems to have been at or shortly after his death."

As there is no evidence of any arrangement with the respondents under which Harnam Kaur can be said to have taken possession of the lands, her possession must be taken to have been adverse to the collaterals. Admittedly such possession commenced in 1920 on the death of Ram Ditta and has continued ever since. So at the date of the mortgage and gift, Harnam Kaur had acquired a title to the lands by adverse possession. The respondents' claim must fail.

We, therefore, allow the appeal with costs throughout.

B.R.T.

(1) (1902) 291 I.A. 132, 135-136