

## FULL BENCH

Before D. Falshaw, C.J., I. D. Dua, and Harbans Singh, JJ.  
JOGINDER SINGH,—Appellant.

versus

KEHAR SINGH AND ANOTHER,—Respondents.

**Letters Patent Appeal No. 232 of 1961.**

May, 4th.

1965

Harbans Singh,  
J.

*Hindu Succession Act (XXV of 1956)—Ss. 4, 14 and 30—Powers of alienation of property of the males and females—How far affected.*

*Held*, that the Hindu Succession Act, 1956, brought about a uniform code of succession amongst Hindus irrespective of the fact whether they were previously governed by Hindu Law or custom and to that extent both Hindu Law and Customary Law stood modified or repealed. Apart from making provision for rules of succession, section 14 enlarged the estate of a female in the property acquired by her or inherited by her either from a male or a female. The result of this was that the estate held by a Hindu female before the enforcement of the Hindu Succession Act either by inheritance or otherwise was enlarged and on the date of the enforcement of the Act she became a full owner. Similarly, any Hindu female who inherited any estate after the enforcement of the Act, inherited it as an absolute owner rather than a limited owner. Consequently the limitations on the power of alienation of a female automatically vanished. This was the necessary result of the provisions of section 14, although neither this section nor any other provision in the Hindu Succession Act purports to deal with the power of alienation of a female.

So far as the males are concerned, no corresponding provision has been made either enlarging their estate in the ancestral property or enlarging their powers of alienation over the property inherited by them. Section 30 of the Hindu Succession Act relates only to the power of a male governed by Hindu Law to dispose of his share in the coparcenary property by will, which prior to the enforcement of the Hindu Succession Act he had no right to do. Thus the only provision made in the Hindu Succession Act, so far as the question of alienation of property is concerned, relates only to the power of alienation by will by a person governed by Hindu Law. The obvious result, therefore, is that so far as persons governed by custom are concerned, they continue to be governed by the restrictions on the power of alienation of a male holder as before. Similarly the restrictions on alienations, other than disposal by will, also continue *qua* persons governed by Hindu Law.

*Held* that the limitations on the powers of a Hindu coparcener to alienate such property during his lifetime continue and in this

respect a person governed by Hindu Law and a person governed by custom are at par. Thus so far as the right of alienation *inter vivos* are concerned, Hindu males, even under the Hindu Succession Act, do not enjoy any better rights than those who are governed by custom and thus there is no question of any discrimination. Women form a category apart, for the amelioration of which Constitution by Article 15(3) specifically permits legislation. Thus the mere fact Hindu females have been given extended rights of ownership and alienation is no ground for holding that all other rules of custom or Hindu Law restricting the power of alienation of ancestral or coparcenary property, as the case may be, have automatically been abrogated.

*Case referred by Hon'ble the Chief Justice D. Falshaw and the Hon'ble Mr. Justice A. N. Grover, on 3rd September, 1964,, to a larger bench for decision of an important question of law involved in the case and the case was finally decided by the Full Bench consisting of Hon'ble the Chief Justice D. Falshaw, the Hon'ble Mr. Justice I. D. Dua and the Hon'ble Mr. Justice Harbans Singh on 4th May, 1965.*

*Letters Patent Appeal under Clause X of the Letters Patent against the judgment of the Hon'ble Mr. Justice Tek Chand dated 27th July, 1961, passed in S.A.O. No. 14 of 1960, dismissing the appeal.*

D. S. NEHRA, ADVOCATE, for the Appellant.

K. N. TEWARI, S. P. GUPTA AND NISHAT SINGH GREWAL, ADVOCATES, for the Respondents.

#### ORDER OF THE FULL BENCH

HARBANS SINGH, J.—These two appeals (L.P.A. No. 232 of 1961, L.P.A. No. 59 of 1962) under clause 10 of the Letters Patent have been referred to the Full Bench by the Letters Patent Bench presided over by my Lord the Chief Justice. In one of these appeals, namely, *Joginder Singh v. Kehar Singh and others*, the male proprietor had gifted his land and the validity of the gift was challenged by the reversioners by filing the usual declaratory suit out of which this appeal has arisen. The allegations in the plaint were that the land was ancestral and the parties were governed by custom. In the other appeal, *Inder Singh v. Jagir Singh*, the male proprietor had made a sale and the same was also challenged on similar grounds. Both the gift and the sale were made after the enforcement of the

Harbans Singh,  
J.

Joginder Singh v. Kehar Singh and another  
 Harbans Singh, J.

Hindu Succession Act, 1956. In both the cases the land was found to be ancestral and the sale was found to be without legal necessity. The main defence taken on behalf of the defendants in both the cases was that by virtue of the provisions of the Hindu Succession Act the limitation on the powers of alienation of a male proprietor had ceased to exist and consequently the reversioners were debarred from challenging such alienations. For this reliance was placed on an Allahabad decision in *Hanuman Prasad v. Indrawati* (1). Following this, the trial Court dismissed both the suits. However, in appeal the decisions were reversed and it was held that although by virtue of section 14 of the Hindu Succession Act the estate held by a female has been enlarged into an absolute estate and as a result thereof an alienation made by a female cannot be challenged by the reversioners, there is nothing in the Act which, in any way, has enlarged, in the same manner, the estate held by a male proprietor and the limitations on his powers of alienation were in no way removed and that, consequently, there was nothing to debar the reversioners from challenging such alienations. This order was upheld by the learned Single Judge in view of a Division Bench decision of this Court in *Kaur Singh v. Jaggar Singh* (2). In this latter judgment of the Division Bench, to which my learned brother Dua, J., was a party, it was held that there was no provision in the Act enlarging the estate of a male holder and the restrictions on his power of disposal of ancestral property continued as such. It was pointed out that it was no doubt anomalous that the powers of the male proprietor to alienate property should be limited, whereas the powers of a female inheriting from such a male should be absolute, but it was held that in view of the fact that there could be a number of reasons why the Legislature considered it proper to enlarge the estate of a female without making a corresponding change in the case of a male proprietor, the Court have only to go by the provisions made in the law and if there is any anomaly it is for the Legislature to remove it.

In the two appeals before us it was urged before the Letters Patent Bench that in view of the decision in *Kaur Singh v. Jaggar Singh*, a woman has been placed in a better

(1) A.I.R. 1958 All. 304.

(2) 1961 P.L.R. 537.

position than a male owner so far as her powers of alienation are concerned; that this infringed the provisions of Article 14 of the Constitution, and that consequently "any custom or law which restricts male owners from alienating property while allowing females to do so without restriction must be regarded as an unreasonable interference with the fundamental right to own and deal with property conferred by Article 19 of the Constitution". In view of this it was further urged that the decision of the Division Bench mentioned above required reconsideration. It is in these circumstances that the matter has come up before this Bench.

Joginder Singh  
v.  
Kehar Singh  
and another  
Harbans Singh,  
J.

In the Punjab the right of succession and power of alienation are governed by personal law, i.e., in case of Muslims by Muhammadan Law and in case of Hindus by Hindu Law of Mitakshara School except to the extent to which it is modified by custom. Generally speaking predominant agricultural tribes in the Punjab, irrespective of their religion, are governed by, what is known as, agricultural custom mainly as embodied in the *riwaj-i-ams* of the districts. According to Customary Law as well as Hindu Law, a female inheriting any property has only, what is known as, a widow's estate and her rights of alienation are limited and she can alienate only for consideration and legal necessity and it makes no difference whether the property inherited by her was the self-acquired property of the last male holder or was inherited by him from his ancestor. This limitation on her power of alienation was absolute and did not even depend on the existence of reversioners. So far as males are concerned, there were similar limitations so far as ancestral property was concerned. However, power of a male holder to alienate the property was limited only if there were reversioners in existence *qua* whom the property held by the male holder could be treated as ancestral. This power to control the alienation by a male holder and to challenge any alienation so made was further hedged round by two statutes, the Punjab Limitation (Custom) Act (No. 1 of 1920) and the Punjab Custom (Power to Contest) Act (No. 2 of 1920), according to which only a reversioner within five degrees could challenge and control the power of alienation of a male holder within the period prescribed. Thus if a person had no reversioner living within five degrees his power

Joginder Singh of alienation even *qua* the ancestral property was co-  
 extensive with that over his self-acquired property. Similarly the power of a person governed by Hindu Law was  
 v. Kehar Singh and another also restricted *qua* ancestral property or what is termed as  
 Harbans Singh, coparcenary property.  
 J.

The Hindu Succession Act, 1956, brought about a uniform code of succession amongst Hindus irrespective of the fact whether they were previously governed by Hindu Law or custom and to that extent both Hindu Law and Customary Law stood modified or repealed (*see* section 4 of the Act). Apart from making provision for rules of succession, section 14 enlarged the estate of a female in the property acquired by her or inherited by her either from a male or a female. It provides as follows:—

“14(1) Any property possessed by a female Hindu, whether acquired before or after the commencement of this Act, shall be held by her as full owner thereof and not as a limited owner.

*Explanation.*—In this sub-section, ‘property’ includes both movable and immovable property acquired by a female Hindu by inheritance or devise, or at a partition, or in lieu of maintenance, or arrears of maintenance, or by gift from any person, whether a relative or not, before, at or after her marriage, or by her own skill or exertion, or by purchase or by prescription, or in any other manner whatsoever, and also any such property held by her as *stridhana* immediately before the commencement of this Act.

(2) \* \* \* \* \*  
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The result of this was that the estate held by a Hindu female before the enforcement of the Hindu Succession Act either by inheritance or otherwise was enlarged and, on the date of the enforcement of the Act she became a full owner. Similarly, any Hindu female who inherited any estate after the enforcement of the Act inherited it as an absolute owner rather than a limited owner. Consequently the limitations on the power of alienation of a

female automatically vanished. This was the necessary result of the provisions of section 14, although neither this section nor any other provision in the Hindu Succession Act purports to deal with the power of alienation of a female.

Joginder Singh  
v.  
Kehar Singh  
and another  
—  
Harbans Singh,  
J.

So far as the males are concerned, no corresponding provision has been made either enlarging their estate in the ancestral property or enlarging their powers of alienation over the property inherited by them. Section 30 of the Hindu Succession Act, however, provides as follows:—

“30. 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.

*Explanation.*—The interest of a male Hindu in a Mitakshara coparcenary property or the interest of a member of a *tarwad*, *tavazhi*, *illom*, *kutumba* or *kavaru* in the property of the *tarwad*, *tavazhi*, *illom*, *kutumba* or *kavaru* shall, notwithstanding anything contained in this Act or in any other law for the time being in force, be deemed to be property capable of being disposed of by him or by her within the meaning of this sub-section (now section).”

This relates only to the power of a male governed by Hindu Law to dispose of his share in the coparcenary property by will, which prior to the enforcement of the Hindu Succession Act, he had no right to do. Thus the only provision made in the Hindu Succession Act, so far as the question of alienation of property is concerned, relates only to the power of alienation by will by a person governed by Hindu Law. The obvious result, therefore, is that so far as persons governed by custom are concerned, they continue to be governed by the restrictions on the power of alienation of a male holder as before. Similarly the restrictions on alienations, other than disposal by will, also continue *qua* persons governed by Hindu Law.

Joginder Singh v. Kehar Singh and another  
 Harbans Singh, J.

From the above it is clear that as the law stands at present a Hindu female has a better right and title in the property and a more extensive right of alienation over the property inherited by her than even the person from whom she had inherited such property. We are not concerned in the present case whether Parliament was within its rights to place the females in this respect on a higher pedestal as it has done. Section 14 of the Hindu Succession Act is not for consideration in the present case, because it does not involve the right of a female to possess or alienate any property. The sole point, however, for consideration is whether by the mere fact that larger rights have been given to females by virtue of section 14, the customary rules, placing restrictions on the power of alienation of a male proprietor over the ancestral property in his hands, have ceased to be operative. The learned counsel for the appellants pressed three points:—

- (i) that as a result of the provisions of section 14 of the Hindu Succession Act, reversioners have ceased to exist;
- (ii) that the basis of control over ancestral property held by male proprietors was the agnatic theory and as since a long time inroads have been made into this agnatic theory and as a result of section 14 of the Hindu Succession Act, this theory must be treated to have been completely wiped out, so, it must be held that there is no control left over males so far as alienation of ancestral property is concerned; and
- (iii) that this custom controlling the power of male proprietors to alienate the ancestral property was unreasonable in the present circumstances and the Courts should refuse to enforce the same.

With regard to the first point no arguments were addressed as to how by virtue of section 14 or any other provision either in the Hindu Succession Act or any other law, the reversioners have ceased to exist. Reversioners are a body of persons who are likely to inherit the property held by a particular person—whether male or female. As already stated, under custom only collaterals within five degrees

are entitled to challenge or control the alienation of a male proprietor. There is nothing from which it can be inferred that their power to control alienation has ceased to exist. In the Full Bench case of *Amar Singh and others v. Sewa Ram and others* (3), the question referred to the Bench was as follows:—

Joginder Singh  
Kehar Singh  
and another  
Harbans Singh,  
J.

“Are the collaterals (reversioners) of the last Hindu male holder entitled to file, or, if filed already, to continue, a suit, after the enforcement of the Hindu Succession Act, challenging an alienation effected, prior to the enforcement of the Act, by an intervening female heir, who at the time of the alienation held only a widow’s estate?”

The answer given by the Full Bench was in the affirmative. Mehar Singh, J., while dealing with the question observed—

“There is nothing in the Hindu Succession Act, that has directly or indirectly taken away the rights of reversioners as such. The Act in no way abolishes either reversioners or their rights or status. Where there is a restriction and control over the alienation of property, there the position of law before and after the Act continues to be the same and the next reversioner is entitled in law to the protection of his reversion.”

Gosain, J., also generally agreed with these views. Dulat, J., however, observed that a suit by collaterals, for declaration that a gift made by a widow in favour of her husband’s daughter is invalid, would be incompetent. The reasons given in paragraph 14 of the judgment for coming to this view, however, show that the widow was alive at the time the Hindu Succession Act came into force and under the Act the daughter, who was the donee in the case before the Full Bench, was a preferential heir than any other collateral irrespective of the fact whether the property was ancestral or self-acquired of the last male owner, and in view of this the collateral had no chance of succession and consequently a suit filed by him would be meaningless and futile. That, however, does not mean

(3) I.L.R. (1960) 2 Punj. 343=1960 P.L.R. 537.



Joginder Singh that the collaterals had ceased to exist or that they had  
 v. no right to challenge an alienation, which right they en-  
 Kehar Singh joyed under the customary law. No doubt, after the en-  
 and another forced enforcement of the Hindu Succession Act, reversioners would  
 Harbans Singh, not be entitled to challenge any alienation made by a  
 J. female, but that would be not because reversioners have  
 ceased to exist but because the estate held by a female  
 gets enlarged into an absolute estate after the enforcement  
 of the Act, and consequently the powers of alienation of a  
 female cannot be controlled.

That argument is certainly not available in the case of an alienation made by a Hindu male proprietor, because there is no corresponding provision in the Hindu Succession Act, or in any other enactment enlarging the estate or the right of alienation over ancestral property.

So far as the second argument is concerned, no doubt the customary rules placing a check over the power of alienation of a male proprietor are based mainly on what is known as agnatic theory. The desire of the tribesman was that the property should remain within the family or the tribe and consequently prohibited the alienation of ancestral property except for consideration and legal necessity. Similarly, it was urged that adoption was also permitted within the tribe. According to the learned counsel judicial decisions, have made inroads into this agnatic theory by giving right of inheritance to daughters, by allowing adoption outside the tribe and the like, and that as a result of giving absolute ownership to the female heirs this agnatic theory has been completely wiped out. There seems to be a fallacy in this argument. Prior to the enforcement of the Hindu Succession Act, except where the customs specifically recognised it as such, daughters could not inherit ancestral property. The case reported as *Mst. Subhani v. Nawab* (4), merely recognised the fact that the statements in the *riwaj-i-am* regarding the custom governing a tribe have nothing to do with the self-acquired property and consequently a daughter would be a preferential heir to such property as against collaterals, under the personal law governing the parties, viz., Hindu Law. This right was further extended to sisters, but this was as a result of interpretation of customary rules or their application to certain type of property. If subsequently by the

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(4) I.L.R. 1941 Lah. 154.

Hindu Succession Act, it has been provided that notwithstanding any custom to the contrary daughters shall be heirs along with sons and that sisters would be heirs along with the brothers, that does not, in any way, affect either the agnatic theory or the rules of custom, which govern the parties so far as the question of alienation of ancestral property is concerned. By virtue of section 4, of the Hindu Succession Act, the rules of succession as provided in the Act have to take precedence over all other rules or laws governing succession. The Hindu Succession Act, therefore, supercedes custom only to the extent to which provisions have been made therein.

Joginder Singh  
"Kehar Singh  
and another  
—————  
Harbans Singh,  
J.

So far as the last point is concerned, the learned counsel for the appellants could not suggest how and why this rule of control over alienation is unreasonable to such an extent as to persuade the Courts to declare it as void and not enforce it. Paragraph 1 of Rattigan's Digest of Customary Law, runs as follows:—

"1. A custom to be valid must

- (a) not be contrary to justice, equity or good conscience;
- (b) not have been declared to be void by any competent authority before the passing of the Punjab Laws Act, i.e., the 28th March, 1872;
- (c) not contravene any express law;
- (d) be ancient, certain and invariable."

Admittedly, the rule of control over alienation has been recognised and enforced by the Courts since the earliest times and has not been held to be contrary to justice, equity and good conscience. The main argument of the learned counsel was that this rule, as a result of the changed circumstances, has become archaic and should be treated as contrary to justice, equity and good conscience. Now, as is mentioned in clause (d) above, a custom to be valid must be ancient, certain and invariable and, therefore, this rule cannot be held to be invalid simply because it is an old one or archaic. Moreover the rule cannot be held to be contrary to justice, equity and good conscience simply because in view of the Hindu Succession Act larger powers have been conferred on the females than over the

Joginder Singh males. This distinction is certainly not immoral and cannot be said to be opposed to public policy.

v.  
Kehar Singh  
and another

Harbans Singh,  
J.

In *Kaur Singh v. Jaggar Singh* (2), referred to above, the main argument was that as according to the Explanation appended to section 30 of the Hindu Succession Act, a Hindu governed by Mitakshara law was entitled to dispose of by will his undivided interest in the coparcenary property, a similar right should be taken to have been granted to a Hindu male governed by custom so far as the ancestral property was concerned, because the "ancestral property" was similar to "coparcenary property". Dua, J., while delivering a concurrent judgment, at page 545 observed as follows:—

"The contention raised is that the Explanation to section 30 should be deemed, by necessary implication, also to extend to the ancestral immovable property of a Hindu male holder governed by the Punjab custom. It is emphasised that in order to avoid an obvious anomaly. \* \* \* \* \* this Court would be justified in thus extending the scope of the Explanation. I do not find it possible to accede to this contention. \* \* \* \* \* In this connection, it would not be out of place to mention that the Hindu Succession Act, as its preamble shows, has been enacted by the Parliament primarily to amend and codify the law relating to inter-state succession among Hindus. It is, therefore, a little difficult to spell out, by process of construction of the language, a legislative intent to do away with the existing limitations imposed by the Punjab custom on a Hindu male holder in respect of testamentary disposition of his ancestral immovable property. These limitations are well-recognised and constitute the core of the agnatic theory. In the absence of the express words or of words sufficiently flexible to admit of a construction, which may reasonably include ancestral immovable property of a male holder governed by the Punjab custom, I find myself unable to impute to the Parliament an intention to extend the deeming provisions of the Explanation to such ancestral immovable property. Legislature,

generally speaking, is not presumed to make any substantial alteration in the existing law beyond what it expressly declares or beyond the immediate scope and object of a good statute.”

Joginder Singh  
v.  
Kehar Singh  
and another  
Harbans Singh,  
J.

None of the two cases before us is of testamentary disposition. According to the Explanation to section 30, right is given to a Hindu male to dispose of even coparcenary interest by will. The limitations on the powers of a Hindu coparcener to alienate such property during his lifetime continue and in this respect a person governed by Hindu Law and a person governed by custom are at par. Thus so far as the right of alienation *inter vivos* are concerned, Hindu males even under the Hindu Succession Act do not enjoy any better rights than those who are governed by custom and thus there is no question of any discrimination. Women form a category apart, for the amelioration of which Constitution by Article 15(3) specifically permits legislation. Thus the mere fact that Hindu females have been given extended rights of ownership and alienation is no ground for holding that all other rules of custom or Hindu Law restricting the power of alienation of ancestral or coparcenary property, as the case may be, have automatically been abrogated.

In view of the above, I feel that no grounds have been made out to doubt the correctness of the Bench decision in *Kaur Singh's case* and there appears to be no merit in these two appeals, which are hereby dismissed with no order as to costs.

D. FALSHAW, C.J.—I agree.

INDER DEV DUA, J.—I agree with the order proposed.  
B.R.T.

Falshaw C.J.  
Inder Dev Dua,  
J.

#### FULL BENCH

*Before S. S. Dulat, A. N. Grover and P. C. Pandit, JJ.*

SURINDER NATH UTTAM,—Appellant.

*versus*

THE STATE OF PUNJAB AND ANOTHER,—Respondents.

Letters Patent Appeal No. 66 of 1963.

*Constitution of India (1950)—Art. 226—Allegation of mala fides against the respondents made in a petition but denied by respondents—Whether to be enquired into—Procedure to be followed if enquiry is to be held stated.*

1965  
May, 12th.