Faqir Chand and another
*v.*
Lal Singh and others

Mahajan, J.

to dismiss the suit. It is rather curious that in spite of the fact that this plea was raised by the defendants in their written statement, no reference was at all made by the learned District Judge to it. The entire decision of the District Judge is, therefore, vitiated and I have no option but to set aside the same. In this view of the matter, no other point arises in the appeal.

For the reasons given above, this appeal is allowed and the vendee-appellants will have their costs in this Court as well as in the Courts below.

*K. S. K.*

APPELLATE CIVIL

*Before Bishan Narain and Dua, JJ.*

PRABHU AND OTHERS,—*Appellants.*

*versus*

MST. JIWNI,—*Respondent.*

**Regular Second Appeal No. 73 of 1932.**

1959

July, 23rd

*Punjab Limitation (Custom) Act (I of 1920)—Article 2*—Terminus a quo *for suit for possession—Declaratory decree obtained by remoter reversioners—Whether enures for the benefit of a nearer reversioner who had consented to the alienation—Consenting reversioner surviving the alienor—Effect of—Remoter reversioners—Whether entitled to succeed on the death of the alienor or that of the consenting reversioner who survived the alienor.* ...

*Held* that the *terminus a quo* for a suit for possession under article 2 of the Punjab Limitation (Custom) Act, 1920 is the date on which the right to sue accrued or the date on which the declaratory decree was obtained whichever is later and the period of limitation would be three years.

*Held,* that the proposition that when a declaratory decree has been obtained by some reversioners, then the individual reversioner, who actually happens to be the next

heir at the time the succession opens, is entitled to succeed, is based on the well settled proposition of customray law that a suit for a declaration by a presumptive reversioner to assail, an alienation of ancestral property by a holder for the time being, is a representative suit and it is not meant for his exclusive personal or individual benefit; the chief or perhaps the sole object of such a suit is to get rid of or remove a common apprehended injury in the interest of all the reversioners, presumptive and contingent alike. The right to sue is based on the common danger to the inheritance of the entire reversionary body as a unit, which arises from the peculiar nature of their reversionary rights; indeed the whole reversionary body has a single cause of action to impeach or challenge the alienation made by the owner and the relief is sought for the common benefit of the whole body. But the benefit of the declaratory decree cannot accrue to those reversioners who have already lost their right and whose title has already become extinct; for instance who have by their own conduct estopped themselves from impeaching or avoiding the alienation in question. The reason is that the plaintiffs seeking the declaration cannot be assumed to be representing the reversioner who has by his conduct ratified the alienation and has consented to it; such a reversioner cannot be deemed to be represented by the plaintiffs impeaching the alienation and the latter cannot be assumed to be claiming a relief for the common benefit of themselves and the consenting reversioner; and if the relief is not being claimed on his behalf and for his benefit; such consenting reversioner can hardly claim the right to take advantage of the declaratory decree.

*Held,* that where a declaratory decree has been obtained by remoter reversioners, they are entitled to succeed on the death of the alienor, the consenting nearer reversioner having effaced himself by his consent. The *terminus a quo* for a suit for possession in such a case is the death of the alienor and not the death of the consenting reversioner for succession never remains in abeyance. It cannot be said that the alienation is both by the alienor and the consenting presumptive reversioner. *Spes successionis* is not property which can be transferred or assigned with the result that an assenting reversioner can only disentitle himself from objecting to the alienation to which he has given his consent an the remoter reversioners become entitled to challenge that alienation.

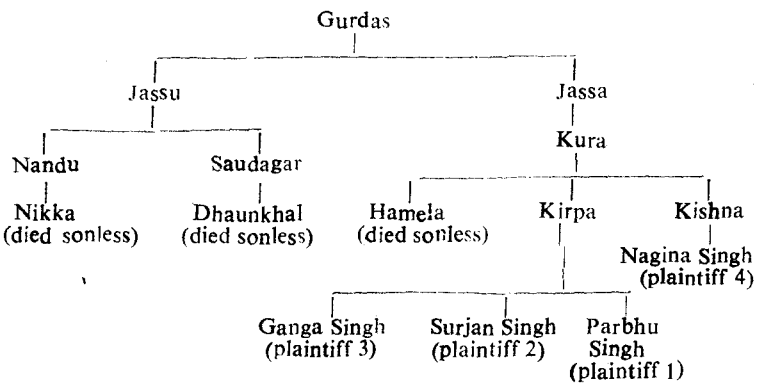
*Regular Second Appeal from the decree of Shri J. S. Bedi, District Judge, Ambala, dated the 24th day of October, 1951, affirming that of Shri Jawala Dass, Sub-Judge Ist Class, Ambala, dated the 18th August, 1950, dismissing the plaintiffs' suit. Both the Courts directed the parties to bear their own costs.*

RAJ KUMAR AGGARWAL, for Appellants.
RAJINDAR NATH, for Respondent.

JUDGMENT

Dua, J.

DUA, J.—The following pedigree-table shows the relationship of the parties to this litigation:—




Nikka, the last male-holder of the suit land, made a gift of it in favour of his daughter Mst. Jiwni on 25th of October, 1929. Dhaunkhal, the next nearest presumptive reversioner, consented to the gift. Kirpa, father of plaintiffs Nos. 1 to 3, Kishna, father of plaintiff No. 4 and Hamela (who later died sonless), as remoter reversioners, thereupon instituted the usual declaratory suit impeaching the gift so far as their reversionary right was concerned. This suit was decreed on 3rd of April, 1930, the declaration granted being that the lienation would not affect the plaintiffs' reversionary rights after the death of Nikka. In 1941 Nikka, the donor, died. On 5th of February, 1942, Kishna and Mamela, sons of Kura, and the present plaintiffs Nos. 1 to 3 filed a suit for possession of the

gifted land but the same was dismissed in default on 8th October, 1942, when they were absent but the counsel for defendant No. 1, Mst. Jiwni was present. This suit was thus dismissed under Order IX, rule 8, Code of Civil Procedure. On 8th of February, 1950, Dhaunkhal also died. The present suit was instituted by Parbhu Singh, Surjan Singh and Ganga Singh, sons of Kirpa and Nagina Singh, son of Kishna for possession of the suit land on the ground that their predecessors-in-interest had already obtained a decree for declaration holding that the gift would not affect their reversionary rights after Nikka's death. Both the Courts below have dismissed the suit as barred by time, they have also concurred in holding that Dhaunkhal's consent to the gift, in the eye of law, gave it the colour of an alienation by both Nikka and Dhaunkhal, with the result that the plaintiffs should have asked for a declaration that the gift in question should not affect their reversionary rights after the death of both Nikka and Dhaunkhal; having, however, asked for a declaration that the gift should not affect their reversionary rights after Nikka's death only, the relief claimed and granted was incomplete and, therefore, the plaintiffs could not wait till after Dhaunkhal's death; time according to the Courts below thus started running from the date of Nikka's death. The trial Court had also held the suit to be barred by reason of the dismissal in default of the previous suit in the lifetime of Dhaunkhal and in the Court of the learned District Judge the appellants did not choose to assail this finding of the Court of first instance. It is against this decree that the plaintiffs have come up on second appeal.

Before us also Mr. Raj Kumar counsel for the appellants did not address any arguments on issue No. 2 under which the trial Court had held that

Prabhu and others *v.* Mst. Jiwni

Dua, J.

the present suit was barred by reason of the dismissal in default of the previous suit. The counsel, however, contended that the previous suit being premature cannot operate as a bar to the present suit. The trial Court had repelled this argument by holding that the previous suit was not premature and this finding was not attacked during arguments in the appeal before the learned District Judge. In these circumstances it would hardly be open to the learned counsel to raise this point on second appeal. I am, however, also of the view that the suit has been rightly dismissed on the ground of limitation. The learned counsel has contended that under Article 2 of the schedule of the Punjab Limitation (Custom) Act, I of 1920, the suit is within limitation. This schedule prescribes a period of six years for a suit for possession of ancestral immovable property, which has been alienated, on the ground that the alienation is not binding on the plaintiff according to custom, when no declaratory decree of the nature referred to in Article 1 of the schedule has been obtained; in case such a declaratory decree has been obtained the period of limitation is three years. In the present case a declaratory decree has been obtained. The *terminus a quo* for the present suit for possession would thus be the date on which the right to sue accrued or the date on which the declaratory decree was obtained whichever is later and the period of limitation would be three years. The crucial point to be determined in this case, therefore, is the date on which the right to sue accrued. The learned Advocate for the appellants contends that though Dhaunkhal had consented to the gift and because of this consent, the remoter reversioners of Nikka, namely Kishna, Kirpa and Hamela instituted the suit for declaration and secured the usual decree and though Dhaunkhal was not entitled to take

advantage of this declaratory decree, having consented to the gift in qestion, nevertheless the present plaintiffs had no right to institute a suit for possession during the lifetime of Dhaunkhal. In support of his contention he has relied on *Ali Mohammad* v. *Mt. Mughlani and others* (1). It is not possible for me to sustain this contention. The Full Bench decision in *Ali Mohammad's case* (1), if anything, goes against the appellants. Mahajan, J. (as he then was) who wrote the main judgment in this case summarised his conclusions at page 193. Conclusion No. 4 clearly shows that an alienation with the consent of the next presumptive reversioner, though not valid at the time when made, will become indefeasible if the consenting reversioner outlives the widow and the inheritance becomes vested in him and if a declaratory decree has already been granted in respect of such an alienation that decree will become infructuous and inoperative. This is precisely what has happened in the instant case. It may be borne in mind that in *Ali Mohammad's case* (1), the next presumptive reversioner who had given his consent to the alienation had died during the lifetime of the donor. It is true that in conclusion No. 3 it has been suggested that in case of the next presumptive reversioner consenting to the alienation and the remoter reversioners securing a decree for declaration assailing the alienation, the declaratory decree should provide that it shall not enure for the benefit of the consenting reversioner or persons deriving title from or through him. This suggestion illustrates, and is based on, the correct legal position, viz., that the consenting presumptive reversioner is in law disentitled from challenging the alienation. If the consenting reversioner is debarred or estopped by his conduct from instituting a suit for, the usual customary declaration, it

(1) A.I.R. 1946 Lah. 180 (F.B.)

Prabhu and others *v.* Mst. Jiwni

Dua, J.

is not easy to discover the basis for permitting him to reap tht fruits of the declaratory decree obtained by the remoter reversioners. To permit him to do so would clearly be conferring on him a right to approbate and reprobate which is hardly permissible. The proposition, that when a declaratory decree has been obtained by some reversioners, then the individual reversioner, who actually happens to be the next heir at the time the succession opens, is entitled to succeed, is based on the well settled proposition of cutomary law that a suit for a declaration by a presumptive reversioner to assail, an alienation of ancestral property by a holder for the time being, is a representative suit and it is not meant for his exclusive personal or individual benefit; the chief or perhaps the sole object of such a suit is to get rid of or remove a common apprehended injury in the interest of all the reversioners, presumptive and contingent alike. The right to sue is based on the common danger to the inheritance of the entire reversionery body as a unit, which arises from the peculiar nature of their reversionary rights; indeed the whole reversionary body has a single cause of action to impeach or challenge the alienation made by the owner and the relief is sought for the common benefit of the whole body. But the benefit of the declaratory decree cannot accrue to those reversioners who have already lost their right and whose title has already become extinct; for instance who have by their own conduct (in the present case by consent) estopped themselves from impeaching or avoiding the alienation in question. The reason is that the plaintiffs seeking the declaration cannot be assumed to be representing the reversioner who has by his conduct ratified the alienation and has consented to it; such a reversioner cannot be deemed to be represented by the plaintiffs impeaching the alienation and the latter

cannot be assumed to be claiming a relief for the common benefit of themselves and the consenting reversioner and if the relief is not being claimed on his behalf and for his benefit, such consenting reversioner can hardly claim the right to take advantage of the declaratory decree. As observed by Din Mohammad, J., on behalf of the Bench, in *Ram Bhaj* v. *Ahmad Said Akhtar Khan* (1), a suit brought by a reversioner is for the benefit of all the reversioners entitled to sue. It is well established that a consenting reversioner is estopped from challenging the alienation and is not entitled to sue for setting it aside. Mahajan, J., in the Full Bench decision, thus appears to me to have merely suggested that in the interest of avoiding the possibility of legally incompetent and futile or frivolous litigation, declaratory decree in such a contingency should itself clearly provide that the consenting reversioner cannot take advantage therefrom. There is also another way of considering this matter. The declaratory decree in the present case provided that the alienation by gift by Nikka in favour of his daughter Mst. Jiwni would not affect the plaintiffs' reversionary rights after the death of defendant No. 1, the donor. This would mean that as soon as Nikka died the reversioners would be entitled to exercise their right as Nikka's heirs as if no gift had been made to their detriment or prejudice. If Dhaunkhal had, by giving his consent to the gift, waived, given up or signed away his rights in the gifted property by being disentitled to challenge the gift; then; obviously right to claim possession of this property would immediately accrue to the present plaintiffs. Nikka having thus died in 1941 the present suit for possession would clearly be barred under Article 2(b) of Schedule 1 of Punjab Act, I of 1920. It is well-established that succession never remains in

(1) A.I.R. 1938 Lah. 571

Prabhu and others *v.* Mst. Jiwni

Dua, J.

abeyance. As soon as Nikka died, the succession opened and his estate vested in the next heirs of the deceased.

As a matter of fact the counsel for the appellant does not contend that Dhaunkhal could take advantage of the declaratory decree obtained by the present plaintiffs' predecessors-in-interest. He submits that the learned District Judge has wrongly observed that Dhaunkhal was entitled to take benefit of the decree and that succession opened in his favour on Nikka's death. I think to this limited extent the counsel is right and the learned District Judge does not appear to have understood the real basis and the ratio of *Rahman* v. *Suraj Mal and others* (1) and *Indar Ram* v. *Iqbal Mohd. and others* (2). The former decision dealt with the case of an afterborn reversioner whose right to sue was kept alive on account of the existence of other reversioners and the latter decision also dealt with the case of the reversioners who had not lost their right of impeaching the alienation. In both the cases the actual reversioners entitled to succeed, when the succession opened, were permitted to sue for possession by taking benefit of the declaratory decree obtained earlier by other reversioners. The following observations of Mahajan, J., at page 80 of [*Rahman* v. *Suraj Mal and others* (1)] clearly show what was intended to be decided in the case:—

> "Obviously for the benefit of persons who had already lost their right a representative suit could not have been brought and, therefore, the declaratory decree obtained could not enure for the benefit of persons whose title had already become extinct."

(1) A.I.R. 1945 Lah. 76
(2) A.I.R. 1948 E.P. 5

While considering this aspect it would be relevant also to state that the observations of the two Courts below, in the instant case, that consent by Dhaunkhal would in the eye of law amount to alienation both by Nikka and Dhaunkhal would seem to run counter to the reasoning underlying the judgment of Mahajan, J., in *Ali Mohammad's case* (1) and of Achhru Ram, J., in *Indar Ram* v. *Iqbal Mohd. and others* (2), *Spes Successionis* is not property which can be transferred or assigned with the result that an assenting reversioner can only disentitle himself from objecting to the alienation to which he has given his consent. And this merely gives to the remoter reversioners a right to challenge the alienation to which the next presumptive reversioner has assented *See para* 67, Rattigan's Digest of Customary Law.

Without, however, pursuing this matter any further I think, on either view, the plaintiffs cannot succeed. Even assuming, for the sake of argument, that Dhaunkhal had a right to succeed to the property in question on Nikka's death because of the declaratory decree secured by the other reversioners in 1930, then that decree would become wholly infructuous, inoperative and useless so far as the present plaintiffs-appellants are concerned, because immediately on Nikka's death the property in suit would vest in Dhaunkhal, who being in fact the next heir would be the male-holder of the property in suit. This decree would thus have become wholly ineffective on the vesting of Nikka's estate in Dhaunkhal. On Dhaunkhal's death the question would have to be determined as to who is his next heir, and succession to Dhaunkhal's estate cannot possibly be determined by a reference to the declaratory decree obtained by the other reversioners in 1930 with respect to the gift

(1) A.I.R. 1946 Lah. 180 (F.B.)
(2) A.I.R. 1948 E.P. 5

Prabhu and others *v.* Mst. Jiwni

Dua, J.

made by Nikka as the last male-holder in favour of his daughter. Mr. Raj Kumar contends that Dhaunkhal died issueless. This may or may not be so; it is, however, not possible for us to go into this mixed question of fact and law on second appeal for the first time, because the present plaintiffs have not come into Court as Dhaunkhal's heirs and this matter has not been fully and properly tried and adjudicated upon. The plaintiffs' claim in the plaint was based on Nikka being the last male-holder; it is not permissible to them now to found their claim on the ground that Dhaunkhal was the last male-holder and that the plaintiffs are his heirs. On this basis, therefore, it is not competent for the plaintiffs to ask for relief and their suit must fail. In the alternative, as already discussed above, if Dhaunkhal had no lawful right to succeed and it was the plaintiffs who were the actual lawful heirs of Nikka *qua* the property in question, then also the suit would be barred by limitation under Article 2(b) of the Schedule of Punjab Act, I of 1920. It would thus appear that from whichever point of view this matter is considered the present plaintiffs cannot possibly claim a decree for possession in the present suit filed nearly 9 years after the death of the last male-holder.

Mr. Raj Kumar, the learned Advocate for the appellants, also referred us to *Ruldu Singh* v. *Sanwal Singh* (1), in which at page 199 a distinction has been drawn between the date on which the right to sue for possession accrues and the date on which the period of limitation begins to run. It is difficult to see how this distinction can help the counsel on the facts of the present case. In the same report and at the same page a little lower down, however, it is observed by Sir Shadi Lal, C. J., who

(1) I.L.R. 3 Lah. 188

Prabhu and others v. Mst. Jiwni

Dua, J.

wrote the judgment, that it would be absurd that each successive reversioner should have twelve years for a suit for possession from the date of the death of the preceding reversioner. This observation, in my view, goes dead against the appellants' contention, and indeed the plaintiffs' suit must, according to the ratio of this case and the principle underlying this decision, be held to be out of time.

For the reasons given above, this appeal fails and is hereby dismissed with costs.

Bishan Narain, J.

BISHAN NARAIN, J.—I agree

*B. R. T.*

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APPELLATE CIVIL

*Before K. L. Gosain and Harbans Singh, JJ.*

MST. TARO.—*Appellant.*

*versus*

DARSHAN SINGH AND OTHERS.—*Respondents.*

1959

July 23rd

**Regular Second Appeal No. 771 of 1952 with Cross-Objections.**

*Hindu Succession Act (XXX of 1956)—Sections 2 and 4—Scope of—Provisions of the Act—Whether apply to Hindu Jats who were governed by Punjab agricultural custom in matters of succession prior to the enforcement of the Act—Last male holder dying succeeded by his widow—Determination of the next heir—Law applicable—Whether as in force at the time of the death of the last male-holder or of his widow.*

*Held,* that prior to the coming into force of the Hindu Succession Act, 1956, every person was governed by his personal law, which, in the case of Hindus and Sikhs, was the Hindu law as modified by custom. Thus, custom including agricultural custom modified the Hindu law so far as the Hindu Jats were concerned to the extent to which it went counter to the provisions of strict Hindu