LETTERS PATENT APPEAL.

Before Bhandari, C. J. and Tek Chand, J.

CHANAN SINGH,—*Plaintiff-Appellant.*

versus

BISHAN SINGH AND OTHERS,—*Defendants-Respondents.*

Letters Patent Appeal No. 15/P of 1951.

1957

May, 13th

Custom (Punjab)—Applicability—Tarkhans of village Thulliwal, tehsil Dhuri, district Barnala—Whether governed by custom in matters of alienation.

Held, that the Tarkhans of village Thulliwal, tehsil Dhuri, district Barnala, are not governed by Customary Law but by Hindu Law in matters of alienation.

Letters Patent Appeal under section 52, Ordinance No. 10 of 2005 of Pepsu, from the Judgment of Hon'ble Mr. Justice G. L. Chopra, passed in R.S.A. No. 334 of 2005, dated the 4th day of June, 1951, reversing that of Shri Jagan Nath Kaushal, District Judge, Barnala, dated the 16th April, 2005, and restoring the Judgment and decree of Shri Joginder Singh, Sub-Judge, III Class, Dhuri, dated the 27th January, 2004, whereby the suit of the plaintiff was dismissed with costs.

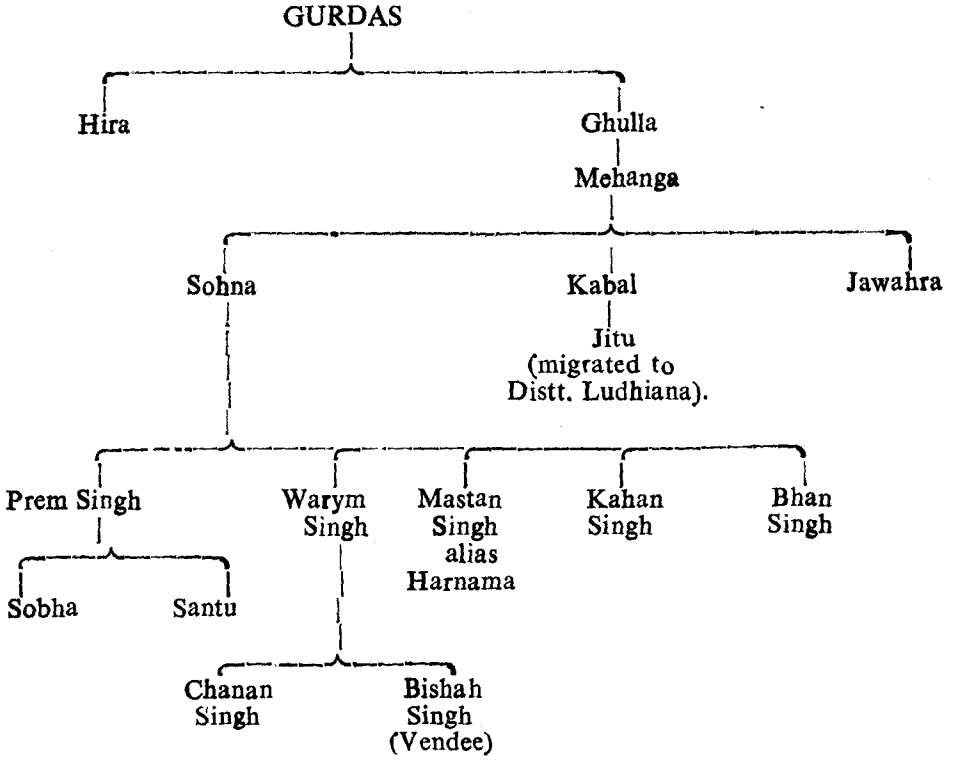
R. K. BHANDARI, for Appellant.

DALIP CHAND, for Respondents.

JUDGMENT.

Tek Chand, J. TEK CHAND, J.—This is a Letters Patent appeal from the judgment of Chopra, J., dated the 4th June, 1951, allowing plaintiff's appeal, setting aside the judgment of the District Judge, and restoring that of the trial Court. The question, which calls for decision in this appeal is whether Tarkhans, of village Thuliwal, tehsil Dhuri, are governed by agricultural custom. The facts of this case are that one Sobha Singh had sold 18 *bighas* and 6 *biswas* of land for Rs. 1,500 to Bishan Singh appellant by a registered

deed of sale dated 15th December, 1993 Bk., Chanan Singh, respondent a collateral of the vendor instituted a suit challenging the validity of the sale on the usual grounds that the land was ancestral and the transaction of the sale was without valid necessity. It was contended that the parties. who were Tarkhans were governed by the agricultural custom in matters of alienation. The pedigree table reproduced below will show the relationship of the parties:—



The contestants in this case are real brothers and the sale was effected by their first cousin Sobha Singh in favour of Bishan Singh.

The defendants traversed the plea of the plaintiff on all points and denied that the parties were governed by the rule of custom prevailing among

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agriculturists. The trial Court framed the following issues:—

(1) Whether the land in dispute is ancestral *qua* the plaintiff ? O.P.

(2) Whether the parties are governed by customary law ? O.P.

(3) Whether the sale was effected for legal necessity ? O.P.

The trial Court dismissed the plaintiff's suit deciding all the three issues in defendants' favour.

Against the decision of the trial Court an appeal was instituted by the plaintiff Chanan Singh in the Court of the District Judge, Barnala, who allowed the appeal and set aside the judgment of the trial Court. It was held that the land in dispute was ancestral *qua* the plaintiff. On the second issue it was held that Tarkhans followed custom and not personal law. The sale was held not to be for legal necessity. In the result plaintiff's suit was decreed and a declaration was granted to him that the sale would not affect his rights of revision after the death of the alienor. Bishan Singh then instituted a regular second appeal in the Pepsu High Court, which was disposed of by Chopra, J. It was held that the parties were governed by Hindu law which conferred unrestricted right of alienation of the separated property on the owner regardless of the fact whether it was ancestral or self-acquired. It was, therefore, held that the plaintiff had no right to challenge the alienation in question. In view of the above finding it was considered unnecessary to dispose of the other issues. Defendants' appeal was allowed. Chopra, J., in view of the importance of the question involved as to whether Tarkhans of village Thuliwal, tehsil Dhuri, are governed by custom, has under section 52 of Ordinance X of 2005 Bk., certified the case to be a fit one for appeal to a Division Bench.

Shri Ram Karan Dass Bhandari has urged that the following factors showed that the parties were governed by custom in matters of alienation:—

(1) Gurdas, the common ancestor of the parties, settled in the village at the time of its foundation.

(2) Gurdas acquired land as a proprietor.

(3) The parties own land since the foundation of the village.

(4) The parties cultivate land themselves and mainly live on agriculture.

(5) The daughters are generally excluded from inheritance.

(6) The *karewa* ceremony is performed among Tarkhans and thus they follow custom in social matters.

(7) They reside in village Thuliwal, where custom generally prevails.

(8) The parties who are Tarkhans are *kamins* of the village, who generally follow the custom of the proprietors.

Our attention has been drawn to Exhibit P.B., which is *kafiat-i-dehi* of the village. It is stated therein that during the time of the Malerkotla Rulers this village was founded by two sons of Molu. People of other tribes and castes also came at different times and became proprietors. The name of Gurdas carpenter, the ancestor of the parties, is also mentioned in the list of persons given in *kafiat-i-dehi* and it is indicated that he became a proprietor after breaking the *banjar* land. Mr. Ram Karan Dass has also referred to the statement of P. Ws. 2, 3, 4, 5, and 6, which are to the effect that his clients depend on agriculture for their livelihood. The total amount of land with Tarkhans in this village is comparatively little being one *hal* out of 23 *hals*. It is

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argued on behalf of the respondents that this fact by itself is not sufficient for determining whether parties are governed by customary law or by personal law though at the time of foundation of the village they were brought in by the founder and given land to cultivate which they did as proprietors. Mr. Dalip Chand Gupta contends that the total area of land owned by the entire family did not exceed 165 *bighas*. The whole village was divided into 23 ploughs and the land under one plough was about 140 *bighas*. The land held by the family was not sufficient for their livelihood and the parties were doing carpenter's work to maintain themselves. In order to determine whether a tribe not primarily agricultural follows custom or personal law, the following considerations require determination:—

(a) whether a tribe exclusively or primarily follows agriculture or, in addition, follows service, occupation or business.

It has not been proved to our satisfaction that the tribe is primarily agricultural. They were brought in to assist as carpenters and there is no proof on the record that they gave up their original occupation. It cannot be said on this record that carpentry is a subsidiary occupation. It is true that a family, which has been in the main agricultural, does not cease to be governed by customary law simply for the reason that some members of it are educated and have taken service under Government, but in this case, from the insufficient area of land and from the fact that they are still pursuing their original occupation, it cannot be said that the tribe exclusively or primarily follows agriculture.

(b) Whether the tribe forms a compact village community, or *patti* in the village or lives in a heterogeneous village.

This is an important test and it has not been shown that the carpenters form a compact village community and the village is also a heterogeneous village. In *Thakar Das and another* v. *Chet Ram and others* (1), Achhru Ram, J., rightly laid stress upon this test. It was observed at page 369:—

> "What is required is not that the particular tribe or section of the population should constitute a large section of the village community. What is required is that they must constitute a compact section of such community. The compactness does not consist in numbers or in the extent of the land owned. It presupposes some amount of homogeneity. It is only if the parties concerned own a considerable area of the land of a village situate more or less in one locality and have their residences also largely in one particular locality and their lands or houses are not found to be interspersed with the lands and houses of other sections of the village community or persons belonging to other tribes, that they can be said to form a compact section of the village community."

In this case no attempt of any kind has been made on behalf of the plaintiffs to show that they qualified themselves in this test. On the other hand there is no proof that the few Tarkhan families that are in this village form a compact village community.

For determining the applicability of the customary law of agricultural tribes these are the two main tests and neither of them has been established in this case. Neither the plaintiffs have been shown to live on agriculture as their profession, nor have they been proved to form a compact section of such a

(1) A.I.R. 1949 E.P. 367

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community. Besides two tests, there are other tests also, which are generally taken into consideration for determining this point but they are not considered to be weighty where the two earlier tests are not being fulfilled.

(c) The next test is, whether, the parties not being members of a primarily agricultural tribe, were settled with the founders. If they were, that fact strengthens the likelihood of custom being followed.

In this case according to the *kafiat dehi* Exhibit P.B., it is stated that Gurdas Tarkhan, the common ancestor of the parties, was settled in this village by the proprietors as a *Kamin* and became a proprietor by breaking the *banjar* land. It is true, as laid down in *Bhag Singh and others* v. *Sharam Singh and others* (1), that where *kamins* settled in a village with the founders who held a large area of land had abandoned the proper calling of their castes, and adopted agriculture as their occupation, thereby drifting into the fold of the agricultural tribes, it might well be presumed that they follow customary laws, relating to alienation. On the facts of this case, however, it cannot be deduced with any conviction that the carpenters had abandoned the proper calling of their castes and adopted agriculture as their occupation instead. There is no proof that the parties had abandoned their hereditary calling and adopted the profession of agriculture so as to assume the status of a member of a purely agricultural community.

(d) The next is as to how long parties, not being members of a primarily agricultural tribe, have followed agriculture. If they have done so for a very considerable period, the likelihood of their being governed by custom is no doubt strengthened.

(1) 38 P.R. 1909

In this case there is no convincing proof led to show that the main source of livelihood of the Tarkhans in this village was agriculture to the exclusion of their ordinary pursuits.

(e) Whether the parties, not being members of a primarily agricultural tribe, cultivate the lands themselves, or are owners cultivating through others. If the later, there is no presumption in favour of custom; if the former, the possibility of custom being followed is strengthened

The parties have not led any cogent evidence to prove that they have been cultivating land themselves and not through others. In this case the land as already pointed out is small in area and even if it be assumed that they have been tilling the land themselves that would not by itself be sufficient to include them among agricultural tribes and, therefore, absolve them from personal law.

(f) Whether the parties, not being members of a primarily agricultural tribe, hold a large or small portion of the village area.

As already stated a very small portion of land is held by the carpenters and this holding is not sufficient to draw a presumption in their favour, that they follow customary law.

(g) The fact as to whether the parties, not being primarily agricultural, hold a share in the *shamilat* or not, can be considered; if they do, it may tend to establish that custom is followed.

No evidence has been led to show whether in this case, there is a *shamilat* or its extent. Assuming there is a *shamilat* in which the parties have a share,

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that would be a very minor consideration as compared to other considerations, which far outweigh the former and which have greater cogency.

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(h) Another test, is, whether alienations have been frequent and allowed to pass unchallenged or not; if they have, that fact becomes relevant to prove that the right of free alienation, as opposed to ordinary customary restrictions, exists, though the fact cannot be pressed too far in mixed communities.

In this case, there have been no contested or uncontested alienations from which an inference can be drawn one way or the other.

(i) Whether the parties furnish *lambardars*. If they do, that is a fact in favour of custom being followed.

In this village Tarkhans do not furnish any *lambardars*.

(j) That fact as to whether the locality where customary law generally prevails has sometimes been taken into consideration.

But that is a matter which has a very little probative value. From the mere fact that the parties have been living in rural area, it does not, from that fact alone, follow that they are governed by customary law, especially in view of other important countervailing circumstances.

(k) The fact whether the caste or tribe observes custom in social matters and not strict law is sometimes treated as material consideration for assistance in deciding whether it has adopted custom.

There is oral evidence on the record led by the plaintiffs to show that Karewa form of marriage is practised by the Tarkhans. Even if that be so, from the

observance of such a custom it cannot be concluded that the tribe observed custom in all other matters to the exclusion of personal law. A family or a small community may be observing customary rule in one particular matter, but from that it cannot be argued that in all matters it is necessarily governed by custom. Pursuit of certain practices in particular social matters does not show that the personal law in other matters is inapplicable. Adoption of irregular marriage practices is no indication that in matters of alienation also customary law prevails. In this case, however, there is a vague statement of a general character without indicating that Karewa marriages are common or occasional. The proof that a tribe has adopted this or that rule of custom which is followed by an admittedly agricultural tribe is no warrant that it must follow all other rules governing that tribe.

(1) Another test is of the circumstances under which the parties have acquired land.

I have already referred to *kafiat-i-dehi* of the year 1962-63 Bk., where it is stated that Gurdas Tarkhan, the common ancestor of the parties became owner by breaking the *banjar* land on account of his being a *kamin*. Carpenters, Weavers, Ironsmiths, Chamars and others were menials and their services were necessary for the growth and existence of the village community. Carpenters were settled as village menials and their services were necessary for mending agricultural implements, house-hold furniture, for making or repairing carts, persian wheels, ploughshares and other similar articles. Their services were as necessary for the village community as those of blacksmiths. Most of these tribes were occupational groups and their services were repaid by giving them either customary dues or where land was plentiful by giving them small parcels of land for tilling. From the fact that they were given some *banjar* land by the

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settlers of the village for purposes of their livelihood, it does not follow that they can be classed among the dominant agricultural tribes like jats.

The above tests were first enunciated by Ellis in his Notes on Punjab Custom (Second Edition) pages 28 to 32 and they have been accepted as a proper *indicia* for determining the contentions in favour of or against the applicability of customary law as against personal law. Reference may be made in this connection to *Partab Singh* v. *Mothu* (1), *Genda Singh and others* v. *Dasondha Singh and others* (2), *Mt. Bhagwani and others* v. *Sita Ram and others* (3). Applying these tests I cannot persuade myself to accept the contention of the plaintiff—appellant that Tarkhans of village Thuliwal, tehsil Dhuri, are governed by agricultural custom in matters of alienation and not by Hindu Law. As observed by their Lordships of the Supreme Court in *Gokal Chand* v. *Parvin Kumari* (4), "there is no presumption that a a particular person or class of persons is governed by custom, and a party, who is alleged to be governed by a customary law must prove that he is so governed and must also prove the existence of the custom set up by him." *See* also *Abdul Hussein Khan* v. *Bibi Sona Dero* (5), *Daya Ram* v. *Sohel Singh* (6).

Our attention has been drawn to certain decided cases in which it was held that carpenters (Tarkhans) followed customary law, but those decisions are not a helpful guide for determining the applicability of customary or personal law to the parties in this locality. In *Rahim Baksh and others* v. *Natha and others* (7), it was held that among Tharkhans of the Sialkot District a sonless male proprietor is incompetent by custom to gift more than a 1/20th share of his

(1) (1926) 86 I.C. 998
(2) (1931) 133 I.C. 113
(3) A.I.R. 1931 Lah. 491
(4) A.I.R. 1952 S.C. 231
(5) 45 I.A. 10 (P.C.)
(6) 110 P.R. 1906 at p. 410
(7) (1911) 12 P.L.R. 255

ancestral immovable property in favour of his daughter to the prejudice of his collaterals of the fifth degree. This decision is based upon certain instances and *wajib-ul-arz* of 1855 and, therefore, is no guide for determining the custom of Tarkhans in tehsil Dhuri. In *Genda Singh and others* v. *Dasaundha Singh and others* (1), it was held that Ramgarhia Tarkhans of Mauza Kang Arainan in the Phillaur Tehsil of the Jullundur District were in matters of alienation, governed by the Agricultural Customary Law of the Punjab and not by their personal law; and amongst them a gift of ancestral land in favour of a sister's son is invalid and ineffective against the reversioners.

The *ratio decidendi* was that they followed agriculture since then, they cultivated the land themselves; that they hold a quarter share of the village area; that they had a share in the *shamilat* and they had furnished *lambardars*. The qualifications that Tarkhans of Phillaur Tehsil possess are not shared by the Tarkhans of Dhuri Tehsil in this case. In *Faqir* v. *Shadi and another* (2),Uppal Tarkhans of Shorian in the Kharian Tehsil of the Gujrat District, were held to be governed by agricultural custom and not by Mahomedan Law, and there was ample evidence on the record of that case, that they were the only landlords of the village and followed other customs of agriculturists. They lived by agriculture and the only *lambardar* of the village was of their tribe. These tests are wanting in this case.

For the reasons stated above I unhesitatingly come to the conclusion that Tarkhans of village Thuliwal, tehsil Dhuri, are not governed by customary law but by Hindu Law in matters of alienation. In the result the Letters Patent Appeal fails and is dismissed with costs throughout.

BHANDARI, C.J.—I agree.

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(1) (1913) 133 I.C. 113
(2) A.I.R. 1934 Lah. 481