the appellant has substantially complied with the terms of the decree. The application of the vendee for withdrawing the pre-emption money is allowed. The vendee will be entitled to withdraw the enhanced amount from the lower appellate Court and the original amount if not already withdrawn from the trial Court.

*K.S.K.*

FULL BENCH

*Before R. S. Narula, Ranjit Singh Sarkaria and S. C. Mital, JJ.*

AMAR CHAND,—*Appellant.*

*versus*

HARJI, AND OTHERS,—*Respondents.*

**Regular Second Appeal No. 1362 of 1960**

March 2, 1971.

*Punjab Custom (Power to Contest) Act (II of 1920)—Section 6—Punjab Pre-emption Act (I of 1913)—Section 15—Evidence Act (I of 1872)—Section 115—Code of Civil Procedure (V of 1898)—Section 11 and Order 2 Rule 2—Suit for pre-emption by a reversioner of the vendor dismissed—Subsequent suit challenging the sale, under custom, for want of consideration and legal necessity—Whether barred—Rule of estoppel,* resjudicata *or waiver referred to in* Labh Singh v. Gopi and other (1)*—Whether to be viewed as a substantive rule of Punjab Custom—Reversioner's right to restrain alienation of ancestral property—Historical background of—Stated.*

*Held,* that *bona fide* consent of the immediate reversioner, particularly of the son, given expressly or by implication, before or contemporaneously or subsequently to the alienation of ancestral immovable property validates the alienation and precludes not only the person consenting but also the remoter reversioners, from challenging it subsequently on the ground that it had not been made for consideration and legal necessity. Hence where a suit for pre-emption filed by a reversioner of the vendor is dismissed, his subsequent suit challenging the sale of the same property, under custom, for want of consideration and legal necessity is barred. (Para 15).

*Held* further that the bar of estoppel, *resjudicata* or waiver of a right to challenge an alienation, referred to in *Labh Singh* v. *Gopi and other* (1) and the subsequent cases that follow that precedent, is not to be viewed merely as a technical rule of procedural law, to be tested strictly by the

norms laid down in section 115, Evidence Act or section 11 or Order 2, Rule 2 of the Code of Civil Procedure, 1908, but is to be deemed as a substantive rule of Punjab Custom. (Paras 15 and 16)

*Held*, that historically, a reversioner's right, under custom, to restrain alienation of ancestral property is a product of the agnatic theory of joint ownership, according to which the proprietory unit was the tribe. The individual member of the tribe was entitled only to the usufruct of that portion of the land which was actually cultivated by him and his family, and to a share in that portion which still remained under joint management. In such a community, the proprietory title and the power of permanently alienating common property was vested in the whole body. In course of time, as these communities outgrew their primitive stage, the common land or a large portion of it was permanently divided amongst families and the families became the units of proprietorship. The family land came to be held by individuals as a result of devolution or sub-division, but in respect of ancestral immovable property in the hands of any such individuals 'there existed a residuary interest in all the descendants of the common ancestor even if the possibility of some among them of ever succeeding to the holder for the time being, was far too remote.' However, keeping in view that this right of a reversioner to contest an alienation militates against the citizen's ordinary right of freedom of contract, the Courts have shorn this rule of its angularities and kept it confined within legitimate bounds. Thus, one of the surviving rules of universal custom in the Punjab, which has been firmly established by a long array of judicial decisions, is, that the proper person to object to an alienation of ancestral immovable property, is the immediate reversionary heir; and if he, in good faith, concurs in the alienation, it validates the transaction and renders it immune from attack by any descendant of the common ancestor on the ground of want of consideration and legal necessity. (Para 7)

*Case referred by the Hon'ble Mr. Justice S. C. Mital on 30th July, 1970 to a larger Bench for deciding the important question of law involved in the case. The Full Bench consisting of Hon'ble Mr. Justice R. S. Narula, Hon'ble Mr. Justice R. S. Sarkaria and Hon'ble Mr. Justice S. C. Mital decided the question of law and returned the case to the Single Bench for disposing of in accordance with law on 2nd March, 1971. The Hon'ble Mr. Justice S. C. Mital finally decided the case on 21st April, 1971.*

*Regular Second Appeal from the decree of the Court of Shri G. D. Jain, Senior Sub-Judge, with enhanced appellate powers, Hissar, dated the 10th day of June, 1960 affirming that of Shri Jagdish Chandra, Sub-Judge 1st Class, Hissar, dated the 23rd December, 1959, dismissing the plaintiff's suit with costs.*

N. K. Sodhi, Advocate, for the appellant.

B. N. Aggarwal, Advocate, for respondent No. 3.

ORDER

SARKARIA, J.—The question referred for opinion to this Full Bench is:—

> "Where a suit for pre-emption filed by a reversioner is dismissed, is his subsequent suit challenging the sale of the same property, under custom, for want of consideration and legal necessity, barred?"

The circumstances leading to this order are, that Harji, defendant-Respondent 1, sold the land in suit to Ram Karan, Defendant-Respondent 2. Two rival suits for possession by pre-emption were instituted in respect of that sale, one by the vendor's son, Amar Chand plaintiff-appellant, and another by Phusa, Defendant 3. The suit brought by the vendor's son was dismissed as time-barred, while that of Phusa was later decreed. After the dismissal of his pre-emption suit, Amar Chand instituted the usual declaratory suit under custom, alleging that the land was ancestral and the sale not being for consideration and legal necessity, would not affect his reversionary rights after the death of the vendor. In that suit, he also assailed the pre-emption decree obtained by Phusa, Defendant 3. This declaratory suit was resisted by Phusa, *inter alia*, on the ground that since Amar Chand plaintiff's suit for pre-emption had been dismissed, he was debarred from maintaining the subsequent declaratory suit brought by him. The trial Court and the first Appellate Court, following the rule enunciated in *Labh Singh* v. *Gopi and others* (1), *Gujar* v. *Auliya and others* (2), and *Mt. Alam Khatun* v. *Hayat Khan* (3), accepted the objection and dismissed the suit. Amar Chand plaintiff preferred a regular second appeal to this Court, which came up for hearing before our learned brother, S. C. Mital, J., sitting singly. It was contended before the learned single Judge by the appellant's counsel, that neither the principles of *res judicata* and estoppel on which (according to the counsel) the rulings relied upon by the Courts below are based, nor the principle of Order 2, Rule 2, Civil Procedure Code, could bar the subsequent declaratory suit of Amar Chand plaintiff. In support of this contention counsel cited a Division Bench judgment of the Punjab Chief Court in *Muhammad Din* v. *Rahim Gul and another* (4).

(1) 15 P. R. 1903.
(2) 78 P.R. 1914.
(3) A.I.R. 1938 Lah. 492.
(4) 6 P.R. 1886.

(3) The learned Single Judge observed that the attention of the learned Judges, who had decided the cases relied upon by the Courts below, had not been invited to *Muhammad Din's case supra* (4). For resolution of what seemed to be a conflict between the two Division Bench judgments, the learned Single Judge moved my Lord the Chief Justice for constitution of a Full Bench. This is how the matter has come before us.

(4) Shri N. K. Sodhi argues, as he did before the learned Single Judge, that the string of decisions led by *Labh Singh's case* (1), proceed on the assumption that the mere institution of a suit for pre-emption attracts to the subsequent declaratory suit the bar of estoppel, constructive *res judicata* and Order 2, Rule 2, Civil Procedure Code. Those propositions, proceeds the argument, judged by their pre-requisites laid down in section 115, Evidence Act, and section 11 and Order 2, Rule 2, Civil Procedure Code, are not tenable. Even if it is assumed—it is contended—that the mere institution of a suit for pre-emption by the son constitutes an assent to the sale, then also it cannot, without further proof of the vendee having changed his position to his detriment on the faith of such assent, raise an estoppel. The bar of *res judicata* according to the counsel, could not operate because the capacity of the plaintiff, the issues involved and the reliefs sought in the two suits, are substantially different, that whereas in the former suit, the plaintiff sued in his individual capacity for substitution to the original bargain, in place of the vendee, in the subsequent suit he, in a representative capacity, on behalf of the entire reversionary body, seeks to avoid the sale. On parity of reasoning, it is urged, that the subsequent suit would not be barred by Order 2, Rule 2, Civil Procedure Code.

(5) The contentions canvassed by Mr. Sodhi, though seemingly attractive, are, as will be revealed by the discussion that follows, the result of a wrong approach to the matter for determination before us. They proceed on the assumption that the rule in *Labh Singh's case* (1), is no more than an exposition of the technical doctrines of estoppel and *res judicata* contained in the aforesaid statutes. That assumption, however, is not correct.

(6) To appreciate the premises on which the rule in *Labh Singh's case* (1), is founded, it is necessary to get a clear idea about the nature of a reversioner's right, under custom, to restrain alienations of ancestral property. Historically, this right is a product of the agnatic

theory of joint ownership, according to which the proprietary unit was the tribe. The individual member of the tribe was entitled only to the usufruct of that portion of the land which was actually cultivated by him and his family, and to a share in that portion which still remained under joint management. 'In such a community, the proprietary title and the power of permanently alienating common property was vested in the whole body'. In course of time, as these communities outgrew their primitive stage, the common land or a large portion of it was permanently divided amongst families and the families became the units of proprietorship. The family lands came to be held by individuals as a result of devolution or sub-division, but in respect of ancestral immovable property in the hands of any such individuals there existed a residuary interest in all the descendants of the common ancestor even if the possibility of some among them of ever succeeding to the holder for the time being, was far too remote. "The owner-in-possession was not regarded as having the whole or sole interest in the (ancestral immovable) property and power to dispose of it, so as to defeat the expectations of those who are deemed to have a residuary interest and who would take the property if the owner died without disposing of it". (Per observations of Roe, J.,—later on Sir Charles Roe—in *Gujar* v. *Sham Dass* (5). Originally, all reversioners of the common ancestor, however, remote, had a right to restrain unnecessary alienations of ancestral land by the owner-in-possession.

(7) While much of this anachronistic theory has passed into the fossils of judicial history, a few of its products in a somewhat attenuated form survive to the present day. The right of each and every reversioner, howsoever, remote, to challenge an alienation came to be greatly restricted about the later half of the 19th century, even long before the Legislature stepped in to pass the Punjab Custom (Power to Contest) Act, 1920. Considerations of convenience, equity and public policy and the need to interpret the custom in the light of changing conditions had not a little to do with the development of the principles that survive to this day. Keeping in view that the right of a reversioner to contest an alienation militates against the citizen's ordinary right of freedom of contract, the Courts have

(5) 107 P.R. 1886.

shorn this rule of its angularities and kept it confined within legitimate bounds. (See the observations of Jai Lal, J., in *Khuda Yar* v. *Imam Din* (6)). Thus, one of the surviving rules of universal custom in the Punjab, which has been firmly established by a long array of judicial decisions, is that the proper person to object to an alienation of ancestral immovable property, is the immediate reversionary heir; and if he, in good faith, concurs in the alienation, it validates the transaction and renders it immune form attack by any decendant of the common ancestor on the ground of want of consideration and legal necessity. This principle was lucidly summed up by Robertson J., in *Labhu* v. *Mst. Nihali* (7), as follows:—

> "So we find that in the immense majority of cases custom has established the sound and reasonable principle that an alienation once made openly and in good faith by the alienor, and acquiesced in, also reasonably and in good faith, by those competent at the time to contest it, shall have finality, and shall not be open to contest by others who may later on come into a position which would, had they held it, have given them the right to contest the alienation at the time. The right to make a permanent alienation good against all comers, with the consent of the collaterals,—is one of the commonest features of Punjab custom."

(8) There is ample authority in support of the proposition that the validating consent of the male descendants (*vide* para 59 of the Rattigan's Digest of Customary Law), may be given prior to, or contemporaneously with, or subsequent to, the alienation. (See *Khuda Yar's case* (6) *ibid*). In *Faqir Chand* v. *Mst. Bishan Devi* (8), a Division Bench consisting of Abdul Rashid, Acting C.J., and Achhru Ram, J., held that the consent of the descendants in the case of an alienation by the father of the ancestral property validates the alienation and para 67 of Rattigan's Digest of Customary Law gives the remoter reversioners no right to challenge it. In *Santa Singh* v. *Banta Singh* (9), a Full Bench (consisting of Abdul Rashid, C.J. Mahajan

(6) A.I.R. 1927 Lah. 521.

(7) 66 P.L.R. 1905.

(8) (1946) 48 P.L.R. 406.

(9) A.I.R. 1950 Lah. 77.

and Khosla, JJ.), after reviewing the case-law on the subject held that if the grandfather alienates the ancestral immovable property and the father gives his consent *bona fide* to the alienation, the grandsons have no right to challenge it.

(9) The stage is now set for noticing briefly the rulings that have been cited at the bar.

(10) In *Labh Singh's case* (1), K. S. had brought a suit to enforce his right of pre-emption in respect of sale of land by M. S. K. S.'s suit was eventually dismissed as he was unable to deposit the pre-emption money. Thereafter, M. S. mortgaged the remaining half of his land. K. S. sued again to impeach the mortgage. The suit was compromised, according to which, K. S. paid the mortgage amount with interest. After the death of M. S., the grandsons, of K. S. sued for possession of the land alienated by M. S., on the ground that the sale was without necessity and did not bind them. Delivering the judgment of the Division Bench, Chatterji, J., made these illuminating observations:—

> "We are disposed to think that Kahan Singh, by bringing his suit for pre-emption on the sale by Mehtab Singh, abandoned any right he had to challenge it on the ground of want of necessity, or other reason sufficient to make it voidable by him. Such a suit raised a presumption which of course was not conclusive, that the sale was not bad on the ground of necessity, but it necessarily waived all rights to set it aside for want of necessity. We are disposed to think also that the plaintiff is bound by the waiver on the part of his grandfather.....The person in enjoyment of property, or entitled to the right to object to the alienation, must be allowed a certain latitude of judgment as to the mode in which the property or the right should be protected when invaded or put in jeopardy by others, and in our opinion his successors and descendants must be held to be bound by the action so taken by him. *It would be intolerable, and would put an end to all finality in proceedings in a Court of Justice, if it were otherwise.* This may best be illustrated by a concrete example, suppose a landowner governed by Customary Law is sued in respect of land held by him by some one claiming to be a relation of the last owner and to be a

co-heir. He finds the claim indisputable and thinks it best to admit it, and a decree is passed against him, and the successful claimant thereafter holds the land for many years. Should his descendants or collateral heirs be allowed to ignore the decree after his death, and alleging that the admission was unauthorised and amounted to waste of the property to sue for recovery of possession of the land decreed? A considerable limitation would be introduced in the rule of *res judicata* if this is allowed. Had Kahan Singh obtained a decree for pre-emption and recovered the property on payment of the price, would the plaintiff have been allowed to set aside the decree on the ground that it was an act of waste which prejudiced his rights? What difference does it make that no decree was obtained in this case because the purchase-money was not deposited. We think, therefore, that Kahan Singh's waiver binds the plaintiff who is on that account precluded from making the present claim."

(11) From what has been quoted above, it is manifest that when the learned Judges spoke of the "intolerable situation putting an end to all finality in proceedings in a Court of justice that would result if they held otherwise", they were, without deviating from the age-old rule of custom, according to which consent of the immediate reversioner validates an alienation of ancestral immovable property, giving it a dynamic interpretation consistent with the equitable and just principles of estoppel and waiver.

(12) No authority has been cited at the bar, nor has any come to my notice, wherein the rule in *Labh Singh's case* (1), was departed from. It was reiterated in *Gujar* v. *Auliya* (2). It was again followed by Jai Lal, J., in *Kishan Singh* v. *Amar Singh* (10).

(13) In *Mt. Alam Khatun* v. *Hayat Khan* (3), a Mohammedan gifted certain property to his wife in lieu of dower. After the death of the husband the widow remarried and the brother of her husband brought a suit for pre-emption alleging that the transaction was a sale and not a gift. The suit was dismissed. Subsequently, he brought a suit for declaration (under custom) that he had acquired

(10) 118 I.C. 910.

a title to the property on the ground of remarriage of the widow and that the gift was null and void against him. While observing that the subsequent suit was not barred either under section 11 or under Order 2, Rule 2, Civil Procedure Code, Din Mohammad, J., following the ratio of *Gujar* v. *Auliya* (2), held that the plaintiff was debarred from challenging the gift in the subsequent suit as by bringing the suit for pre-emption he should be taken to have consented to the transaction in the eye of law.

(14) The last case in this chain is *Santa Singh* v. *Tara Das* (11). That is a judgment by Sir Jai Lal as President of the Patiala Judicial Committee. Following the rule in *Labh Singh's case* (1), it was held that a mere institution of a suit by the reversioner for pre-emption of sale of ancestral immovable property amounts to an admission of the genuineness and legality of the sale and that the reversioner is precluded from subsequently contesting the validity of the sale on the ground of want of consideration and necessity.

(15) From the above conspectus, it will be clear that the learned Judges in the above cases were referred to estoppel, waiver or *res judicata* not in the technical sense as a pure rule of procedural law, but were invoking those principles as a branch of the Punjab Customary Law governing the parties in such matters. These cases are all illustrations of the well-settled principle of custom that *bona fide* consent of the immediate reversioner, particularly of the son, given expressly or by implication, whether given before or at the time of the alienation or afterwards, validates the transfer of the ancestral immovable property by the father and precludes not only the person consenting but also the remoter reversioners, from challenging the alienation subsequently on the ground that it had not been made for good consideration and legal necessity.

(16) If the principle of estoppel and waiver enunciated in *Labh Singh's case* (1), and those following it is a part and parcel of the substantive rule of custom, then it will not be a correct approach to test that principle with the technical norms laid down in section 115 of the Evidence Act, or any other statute. Thus considered, it will be clear that the Division Bench in *Muhammad Din's case* (4),

(11) 3 Patiala Judicial Committee Reports 84.

*ibid.*, does not lay down any contrary rule. Rather, it is consistent with the *ratio* of *Mt. Alam Khatun's case* (3) *ibid.*, wherein it was held that the subsequent suit was not barred as *res judicata* or under Order 2, Rule 2, Civil Procedure Code.

(17) In *Muhammad Din's case* (4), the plaintiffs jointly with others instituted a suit for pre-emption, which was eventually dismissed. Thereafter, they brought a second suit to recover certain plots of the land so sold, on the ground that it belongs to them and not to the vendor. It was held by the learned Judges that the second suit was not barred (on the principle of Order 2, Rule 2, Civil Procedure Code) by reason of the plaintiff's not having claimed the ownership of the land in the former suit, first, because of the plaintiffs in the two suits were acting in different capacities, as in the first suit they were propounding a private and exclusive title: secondly, because the words "matter which might and ought to have been made 'ground of attack' " in Explanation II section 13 (corresponding to Explanation IV of section 11), Civil Procedure Code, show that a plaintiff is not bound to assert at once all his titles to property or to be estopped from hereafter advancing them.

(18) It will be seen that the subsequent suit in *Muhammad Din's case* (4), was not a reversioner's suit under custom for avoiding a voidable sale. It was based on the ground of title simplicitor, viz., that the vendor had no title or interest in the plots in suit and that, consequenly, the sale of those plots was a nullity, which did not exist in the eye of law. No question of the application of any rule of custom was involved in that case.

(19) In this connection, it may be remembered that an alienation by a male proprietor of ancestral immovable property or by a widow of her life estate under custom (or even under Hindu Law) in excess of his/her powers is not altogether void but only voidable by the reversioners, who may (in the words of the Privy Council in *Ramagowda Annagowda* v. *Bhausheb* (12), 'either singly or as a body be precluded from exercising their right to avoid it either by express ratification or by acts which treat it as valid or binding'. While in *Muhammad Din's case* (4), the plaintiff was alleging in the subsequent suit that the sale was altogether void, in the instant case, out

(12) I.L.R. 52 Bom. 1 at p. 7.

of which this reference has arisen the sale in question was only voidable.

(20) For the foregoing reasons, I would answer the question referred to this Bench in the affirmative.

NARULA, J.—I concur in the answer proposed by my learned brother Sarkaria, J., as also in the entire reasoning on which it is based.

S. C. MITAL, J.—I entirely agree with my learned brother Sarkaria, J.

*K.S.K.*

FULL BENCH

*Before D. K. Mahajan, Prem Chand Pandit and S. S. Sandhawalia, JJ.*

M/S. AMAR SINGH-MODI LAL,—*Petitioner.*

*versus*

STATE OF HARYANA AND ANOTHER,—*Respondents.*

**Civil Writ No. 2004 of 1970.**

March 25, 1971

*Mines and Minerals (Regulation and Development) Act (LXVII of 1957)—Sections 3(e), 14 and 15—Constitution of India (1950)—Seventh Schedule, List 1, Entry 54—Section 3(e)—Whether ultra vires Entry 54—Declaration of "brick earth" as minor mineral by notification under the section—Whether unconstitutional and suffers from excessive delegation of power—Sections 14 and 15—State Government—Whether precluded from levying royalty on "minor minerals"—Minor Minerals Concession Rules (1949)—Rules 20, 28, 37 and 44—Persons not holding prospecting licence or mining lease from the State Government—Whether can be charged royalty—Constitution of India (1950)—Article 226—Writ—Whether can be issued prima facie, subject to the decision of a Civil Court.*

*Held,* (per majority Sandhawalia and Pandit, JJ., Mahajan, J., Contra.) that no taint of unconstitutionality attaches to section 3(e) of Mines and