The appeal is accordingly allowed and the order of the learned Judges dismissing the Writ Petition is set aside. The relief to which the appellant would be entitled would be, having regard to the fact that appellants failed in their attempt to impugn the constitutional validity of the Act etc., a declaration that they are entitled to the benefit of the notification exempting them from the payment of sales tax in respect of textile goods in stock with them on December 14, 1957, and restraining the respondents from levying or collecting sales tax from them in respect of such stock. As the appellants challenged unsuccessfully the constitutional validity of the Sales Tax Act before the High Court we do not consider that the order for costs passed by the learned Judges of the High Court should be interfered with. The appellants, however, will be entitled to costs in this Court.

Appeal allowed.

SUBE SINGH & ANR.

v.

KANHAYA AND OTHERS

(A. K. SARKAR, M. HIDAYATULLAH and J. C. SHAH JJ.)

1963

April 9

Custom—Ancestral agricultural lands in Jhajjar Tehsil, Rohtak District of Punjab—Unrestricted power of a Jat to transfer it for consideration—No right of son or reversionary heirs to get it set aside unless transaction is for immoral purposes—No distinction between sonless holder and holder having son—Authority not followed for a long period, ignored by this Court.

A jat holding ancestral agricultural land in Jhajjar Tehsil of Rohtak district in Punjab has by custom a power to transfer

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it for consideration. Such transfer is not liable to be set aside at the instance of his son or other reversionary heir unless the sale was for immoral purposes.

The courts have consistently recognised such a power in a proprietor having sons in spite of the observation in Joseph's Customary Law Manual that "whether proprietor with sons has the same power is a more doubtful case", and that power must now be recognised.

There is a great deal to be said in favour of the contention that the existence of a son does not affect that power as the restriction on power to alienate where it exists, is besed on the agnatic theory.

Budal v. *Kirpa Ram*, 76 P.R. 1914, not followed.

Telu v. *Chuni*, 231 P.L.R. 1913, *Giani* v. *Tek Chand*, (1923) I.L.R. 4 Lah. 111, *Behari & Ors.* v. *Bhola & Ors*, (1933) I.L.R. 14 Lah. 600, *Abdul Rafi Khan* v. *Lakshmi Chand*, (1935) I.L.R. 16 Lah. 505, *Ram Datt* v. *Khushi Ram*, A.I.R. (1935) Lah. 692, *Pahlad Singh* v. *Sukhdev Singh*, A.I.R. (1938) Lah. 524, *Sohan Lal* v. *Rati Ram*, Regular Second Appeal No. 136/43 (unreported) Pb. High Court, *Suraj Mal* v. *Birju*, Civil Regular Second Appeal No. 693 of 1952 (unreported), Pb. H.C. *Sheoji* v. *Fajar Ali Khan*, 230 P.L.R. 1913 and *Gujar* v. *Sham Das*, 107 P.R. 1887, referred to.

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 311 of 1962.

Appeal by special leave from the judgment and decree dated February 7,1960 of the Punjab High Court in Regular First Appeal No. 190 of 1953.

Shiv Charan Singh and *Janardan Sharma*, for the appellants.

Achhru Ram and *Brijbans Kishore*, for respondents Nos. 1 to 3.

1963. April 9. The Judgment of the Court was delivered by

SARKAR J.—The appellants are the sons of Umed Singh, one of the respondents in this appeal. They filed a suit for a declaratory decree that the sale of certain lands by their father Umed Singh was void against them and the other reversionary heirs. The contesting respondents are the purchasers of the lands from the father.

It is not in dispute that the lands are ancestral and that the parties are Jats of Jhajjar Tehsil in Rohtak District. The only question is as to the existence of a custom giving a Jat, holding agricultural ancestral lands in Jhajjar Tehsil in District Rohtak in Punjab, free power to transfer them for consideration.

The trial Court and the High Court of Punjab in first appeal, held that there was such customary power. Indeed, in view of the large number of decisions in which it has been consistently held that a sale or mortgage of ancestral land by a holder is not liable to be set aside at the instance of his sons or other reversionary heirs, unless the transaction was for immoral purposes, it is impossible to take any other view.

We were referred to over a dozen cases and we are sure there are more. The earliest of these was decided in 1913 and the latest in 1956. Excepting in one case to which we shall later refer, nowhere has it been held that the transfer by way of a sale or mortgage of ancestral property by a holder is liable to be set aside at the instance of a son or a reversionary heir unless the transaction had been for immoral purposes. The present is not a case of that kind for though the appellants alleged that the sale was for immoral purposes it has been found that it was not so. We may refer here to some of these cases: *Telu* v. *Chuni* (1), *Giani* v. *Tek Chand* (2),

(1) 231 P.L.R. 1913. (2) (1923) I.L.R. 4 Lah. 111.

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Behari v. *Bhola* (1), *Abdul Rafi Khan* v. *Lahshmi Chand* (2), *Ram Datt* v. *Khushi Ram* (3), *Pahlad Singh* v. *Sukhdev Singh* (4) *Sohan lal* v. *Rati Ram* (5) and *Suraj Mal* v. *Birju* (6).

Learned counsel for the appellants contended that none of these cases dealt with the custom existing in Jhajjar Tehsil and, therefore, they could not be authorities on which the present case could be decided. We have first to observe that this statement is not correct for the case of *Pahlad Singh* v. *Sukhdev Singh* (4), dealt with the custom in Jhajjar Tehsil. That appears from the judgment of the District Judge in that case which is Exh. D. 5 in this case. Furthermore, we notice that many of the cases to which we have earlier referred treated the custom giving the holder unrestricted right to transfer ancestral property for consideration, as existing in the whole district of Rohtak : see for example, *Telu* v. *Chuni* (7) and *Sheoji* v. *Fujar Ali Khan* (8). It also appears from the Riwaj-i-am for Rohtak District recorded in Joseph's Customary Law Manual, vol. XXIII p. 50, compiled at the settlement of 1909 that "the power of alienating for consideration is far wider than in the Punjab proper." In view of all this we think that the Courts below were not in error in holding that the Jats of Jhajjar Tehsil in Rohtak District had unrestricted power to transfer land for consideration provided of course the transfer was not for immoral purposes.

Learned counsel for the appellants then contended that most of the cases on which the respondents relied were cases of sonless holders and even if these cases were rightly decided, those which recognised unrestricted power in the case of a holder having a son were not justified by the Riwaj-i-am entries and should not be followed.

(1) (1933) I.L.R. 14 Lah. 600. (2) (1935) I.L.R. 16 Lah. 505.
(3) A.I.R (1935) Lah. 692. (4) A.I.R. (1938) Lah. 524.
(5) Regular Second Appeal 136 of 1943 (Unreported) Pb. H.C.
(6) Civil Regular Second Appeal No. 693 of 1952 (Unreported) Pb. H.C.
(7) 231 P.L.R. 1913. (8) 230 P.L.R. 1913.

We are unable to accept this contention. We find nothing in the Riwaj-i-am entries which would show that the decisions were not justified. In Joseph's Manual it is said that "a sonless proprietor has full power to alienate his property by sale or mortgage even if there is no necessity". It is true that it has also been said there that "whether a proprietor with sons has the same power is a more doubtful case." In spite of this, however, the Courts have since 1913 consistently held that the power of a holder even where he has sons to alienate ancestral property for consideration is unrestricted. It is not now possible nor would it be right to upset the law settled by these decisions on the slender ground of the doubt expressed in Joseph's Manual. In Tupper's Statements of Customary law vol. 2, dealing with Rohtak District, it has been said at p. 178 that "it is quite common for people to sell or mortgage their land. In cases of sale, the right of pre-emption is observed" : (paragraph 25). This statement makes no distinction between the case of a man with a son and one without a son. We find nothing in the records of custom to which our attention has been drawn to justify the view that the case of the holder of an ancestral property having a son is different in this regard from that of a holder without one. Furthermore, it would be strange if the existence of sons made any difference that the point was not noticed in any of the very large number of cases dealing with the custom. We think that there is a great deal to be said in favour of the contention of Mr. Achhru Ram that the restriction on the power to aliente where it exists is based on the agnatic theory and therefore, no distinction can be made between a sonless holder and a holder having a son: see *Gujar* v. *Sham Das* (1).

We come now to the only case which takes a different view and on which the appellant naturally laid great stress, namely, *Budal* v. *Kirpa Ram* (2).

(1) 107 P. R. 1887. (2) 76 P. R. 1914.

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That was a case of a sonless holder. It was held that among Jats in the Rohtak District there was no unlimited power in holders of ancestral property to alienate it. This case has however not been followed in any of the subsequent decisions and in most cases its authority has been discounted. That we think is enough to prevent us at this distance of time from reviving the view taken in that case. Furthermore, as was pointed out, this case does not refer to the earlier authorities, for example, *Telu* v. *Chuni* (1). The only authority to which it refers is Tupper's Customary Manual, but the view expressed there was not accepted as sufficient authority because in the introduction Tupper said (p. 173), that Mr. Purser who gave him the paper from which he prepared his record "did not consider that it can be relied on in doubtful points". This is hardly any reason for there was nothing to show that the customary power was doubtful. It would thus appear that the decision in *Budal* v. *Kripa Ram* (2) was not a satisfactory one.

In this view of the matter we think that the learned Subordinate Judge and the High Court came to the correct conclusion that in Jhajjar Tehsil a Jat holder had unrestricted power to alienate his ancestral land for a consideration.

The appeal is dismissed with costs.

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(1) 231 P. L. R. 1913. (2) 76 P. R. 1914.