UJAGAR SINGH

v.

MST. JEO

1959

April 23.

(JAFER IMAM, A. K. SARKAR and SUBBA RAO, JJ.)

Customary Law—Proof of custom—When can be taken judicial notice of—Jat agriculturists of the Punjab—Sister inheriting brother's property in preference to collaterals—Indian Evidence Act, 1872 (1 of 1872), s. 57(1).

The question involved in this appeal was whether under the customary law of the Punjab a sister was a preferential heir in respect of her brother's self-acquired property, to a collateral. The respondent, the sister, relied on a custom, which she termed a special custom, and on that basis claimed her brother's property, and the appellant, a collateral of the 8th degree of her brother, resisted her claim relying solely on a general custom stated in paragraph 24 of the Rattigan's Digest of the Customary Laws of the Punjab to the effect that sisters were excluded by collaterals in the matter of inheritance to non-ancestral property. The Subordinate Judge, and the District Judge on appeal, held in favour of the appellant but the High Court reversed their decisions holding that, there was no such general custom as recorded by Rattigan and that it was in any event for the appellants to prove that custom and this he had failed to do. The High Court also held that the respondent had succeeded in proving the custom set up by her. It was contended on behalf of the appellant that the High Court was in error in placing the onus of proving the custom on him since the custom was a general custom as stated by Rattigan.

Held, that no distinction could be made between a general custom or other customs so far as the need of proof was concerned and the ordinary rule was that all customs, general or otherwise, had to be proved unless by repeated recognition by the courts a custom had become entitled to judicial notice under s. 57(1) of the Evidence Act.

Raja Rama Rao v. *Raja of Pittapur*, (1918) L.R. 45 I.A. 148, relied on.

Although there could be no doubt that Rattigan's Digest was of the highest authority on questions of custom of the Punjab, it was not possible, regard being had to the formidable array of conflicting decisions of the courts as to its existence, to take judicial notice of the custom mentioned in paragraph 24 of the Digest, without further proof.

Case-law reviewed.

Although the respondent had in the plaint relied on a custom and termed it a special custom, that could not amount to an

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admission which would obviate the necessity of proof of the general customs or its terms by the appellant.

Even supposing that the High Court was not correct in its finding that the respondent had proved the custom entitling her to succeed, as the custom set up by the appellant had not also been established, s. 5 of the Punjab Laws Act, 1872, applied and the case had to be decided by the personal law of the parties. The respondent was entitled to base her claim on the personal law although in her plaint she had relied on a custom. The personal law of the parties was the Hindu law and the respondent was entitled to succeed under that law also.

Daya Ram v. *Sohel Singh*, 110 P.R. 1906, *Abdul Hussein Khan* v. *Bibi Sona Dero*, (1917) L.R. 45 I.A. 10 and *Mst. Fatima Bibi* v. *Shah Nawaz*, (1920) I.L.R. 2 Lah. 98, relied on.

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 296 of 1955.

Appeal by special leave from the judgment and decree dated September 8, 1952, of the Punjab High Court in Civil Regular Second Appeal No. 327 of 1948, arising out of the judgment and decree dated November 21, 1947, of the Court of District Judge, Amritsar, in Appeal No. 212 of 1946 from the judgment and decree dated August 20, 1946, of the Subordinate Judge, 1st Class, Amritsar, in Suit No. 297 of 1945.

Achhru Ram and *R. S. Narula*, for the appellant.

Gurbachan Singh and *Madan Lal Kapur*, for the respondent.

1959. April 23. The Judgment of the Court was delivered by

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SARKAR, J.—The suit out of which this appeal arises concerns the right to certain plots of land in village Sultanwind, Tehsil and District Amritsar in the Punjab. It raises a question of the Punjab customs.

Sahib Singh, the last male owner of the lands in dispute, died in December 1918 leaving a widow Nihal Kaur. The widow succeeded to the lands but on her remarriage soon thereafter, she was divested of them and they passed to Sahib Singh's mother, Kishen Kaur who died on November 12, 1942.

On Kishen Kaur's death disputes arose between Sahib Singh's sister, Jeo, the respondent in this appeal

and his agnatic relation, the appellant Ujagar Singh, as to the ownership of the lands. The Tehsildar entered the respondent's name as the owner of the lands in the revenue records but on appeal by the appellant, the Collector of Amritsar directed the name of the respondent to be removed and the appellant's name to be entered in its place.

On June 11, 1945, the respondent filed a suit against the appellant asking for a declaration that she was the owner of the lands. In paragraph 3 of the plaint it was stated that the respondent "came into possession of the properties left by Kishen Kaur, as the heir of her father and brother, according to the Zamindara Custom prevalent in Mauza Sultanwind among the people of the Got (Sub-caste) Bheniwal and the custom of the family of her father". In paragraph 5 it was stated, "According to the afore-mentioned special custom, the right of inheritance of the daughter and her descendants and in their absence that of the sister and her descendants to the property left by her father and brother is preferential to that of the collaterals beyond the fifth degree; no matter whether the property is ancestral or self-acquired." The defence taken in the written statement of the appellant was that "According to the General Custom and the Custom of the District of Amritsar, the plaintiff as his sister is in no way the heir of the property left by (her) brother in presence of the reversionary heirs, no matter whether the land is ancestral qua reversionary heirs or it is self acquired. There is no particular family, Got or village custom of the District of Amritsar." In substance, the position taken by the appellant was that he as the agnatic relation or collateral of Sahib Singh was entitled to the properties under the general custom of the Punjab in preference to the respondent. The question that the suit involved was, who was the preferential heir of Sahib Singh.

The suit was heard by the Subordinate Judge, Amritsar, who found that the appellant was a collateral of Sahib Singh of the eighth degree and that the properties in dispute were not ancestral. He held that the respondent had based her claim on a special

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custom but had not been able to establish it by necessary evidence and therefore the appellant was to be considered as the preferential heir under the general custom.

The respondent then appealed to the District Judge, Amritsar. That learned Judge confirmed the findings of the Court below that the land was not ancestral and that the appellant was a collateral of Sahib Singh of the eighth degree. He then held that the general custom of the Punjab among the agriculturists which the parties were, was, as stated in para. 24 of Rattigan's Digest of the Customary Law of the Punjab, that "sisters are usually excluded as well as their issues" and therefore put the onus of proving any special custom entitling the sister to succeed on the respondent. On the evidence led by the respondent he came to the conclusion that she had failed to discharge the onus and thereupon dismissed the appeal.

The respondent took the matter up in further appeal to the High Court of Punjab. Kapur J. who delivered the main judgment of the High Court, observed that para. 24 of Rattigan's Digest did not lay down the custom correctly and that the statement there was too broad. He held that the onus of proving the custom whereby a sister was excluded from the inheritance lay on the appellant and that he had failed to discharge that onus. He also held that even if the onus lay on the respondent of proving a custom giving her the right to succeed, she had succeeded in discharging that onus. Soni J., another member of the bench which heard the appeal, delivered a short judgment in effect agreeing with the view of Kapur J. In the result the High Court allowed the appeal and upheld the respondent's claim. The present appeal is from this judgment of the High Court.

It is not in dispute that the parties belong to an agriculturist Jat tribe and are members of the Bheniwal sub-caste of village Sultanwind in Tehsil and District Amritsar. The genealogical table on the record would show that the appellant was a ninth degree collateral of Sahib Singh and this is what the High Court found. It was not in dispute in the High Court

nor before us that the properties were not the ancestral properties of Sahib Singh.

Mr. Achhru Ram appearing for the appellant contended that the learned Judges of the High Court were wrong in placing the onus on his client. His contention was that the general custom in the Punjab among the agriculturist tribes was that sisters were excluded by collaterals in the matter of succession to both ancestral and non-ancestral properties and that custom had been correctly set out in Rattigan's Digest. That being so, according to him, the respondent was not entitled to the properties unless she established a special custom of the tribe or family, entitling her to succeed in preference to the collaterals and the onus of doing this must, therefore, be on her. He contended that she had failed to discharge the onus.

Eminent Judges have from time to time pointed out that the use of the expression "the general custom of the Punjab" is inaccurate. Plowden, J. in *Ralla* v. *Buddha* (1) at page 223 said, "It seems expedient to point out that there is strictly speaking no such thing as a custom or a general custom of the Punjab, in the same sense as there is a common law of England,—a general custom applicable to all persons throughout the province, subject (like the English common law) to modification in its application, by a special custom of a class, or by a local custom." Young C. J. said in *Mussammat Semon* v. *Shahu* (2), "There is no such thing as general customary law known to the Legislature." In *Kesar Singh* v. *Achhar Singh* (3) Addison A. C. J. said that the expression "general custom of the Punjab" was clearly a misnomer.

The reason given for saying that there is no such thing as general custom in the Punjab is that custom there is tribal and even with the same tribe there are different customs for different localities. So Sir Charles Roe had said in his Tribal Law in the Punjab, "Under such circumstances, seeing that the origin of all the tribes is not the same, and that even with

(1) 50 P.R. 1893. (2) (1934) I.L.R. 17 Lah. 10, 11.
(3) (1935) I.L.R. 17 Lah. 101, 106.

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tribes of the same origin local and social conditions have greatly differed, it would be impossible that there could be a single body of Customary or Tribal law, common to the whole of the Punjab": see Rattigan's Digest (13th Ed.) p. 157. Each tribe has its own customs and in the Punjab there are many tribes.

None the less however the expression "general custom of the Punjab" has been frequently used. It has been used for a purpose which appears clearly from the observations of Addison J. in *Kartar Singh* v. *Mst. Preeto* (1), set out below:

"In fact it had become customary even in the Courts to look upon custom as a thing generally followed and to place the burden of proof upon any person who asserted that his custom was not the same as the so called general custom of the Province. If this person succeeded in proving the custom he alleged, the name, 'special custom' was given to it." The reported decisions very often proceeded on the basis that if there was a general custom, it did not have to be proved; that anybody wishing to rely on a custom at variance with the general custom, must prove it or fail in his claim.

It seems to us wrong to say that a general custom need never be proved. It is stated in Halsbury's Laws of England (3rd Ed.) Vol. 11, Art. 319 at p. 171, "All customs of which the Courts do not take the judicial notice must be clearly proved to exist—the onus of establishing them being upon the parties relying upon their existence". No distinction is here made between a general custom and other customs. Section 48 of the Evidence Act also contemplates the proof of a general custom. In *Daya Ram* v. *Sohel Singh* (2), Robertson J., said at p. 410:

"..... It lies upon the person asserting that he is ruled in regard to a particular matter by custom, to prove that he is so governed, and not by personal law, and further to prove what the particular custom is."

These observations were approved by the Judicial

(1) (1935) I.L.R. 17 Lah. 296, 299. (2) 110 P.R. 1906.

Committee in *Abdul Hussein Khan* v. *Bibi Sona Dero* (1).

It therefore appears to us that the ordinary rule is that all customs, general or otherwise, have to be proved. Under s. 57 of the Evidence Act however nothing need be proved of which courts can take judicial notice. Therefore it is said that if there is a custom of which the courts can take judicial notice, it need not be proved. Now the circumstances in which the courts can take judicial notice of a custom were stated by Lord Dunedin in *Raja Rama Rao* v. *Raja of Pittapur* (2), in the following words, "When a custom or usage, whether in regard to a tenure or a contract or a family right, is repeatedly brought to the notice of the Courts of a country, the Courts may hold that custom or usage to be introduced into the law without necessity of proof in each individual case." When a custom has been so recognised by the courts, it passes into the law of the land and the proof of it then becomes unnecessary under s. 57(1) of the Evidence Act. It appears to us that in the courts in the Punjab the expression "general custom" has really been used in this sense, namely, that a custom has by repeated recognition by courts, become entitled to judicial notice as was said in *Bawa Singh* v. *Mt. Taro* (3) and *Sukhwant Kaur* v. *Balwant Singh* (4).

Is there then a custom that sisters are excluded by collaterals in the matter of inheritance to non-ancestral properties of which the courts ought to take judicial notice? Mr. Achhru Ram contends that such is the position and it is recognised as such in Rattigan's Digest paragraph 24. There is no doubt that Rattigan's Digest is of the highest authority on questions of the customs of the Punjab. But we can take judicial notice of a statement of custom therein contained only if it has been well recognised by decisions of courts of law. We have been taken through a large number of reported decisions on the question and it seems to us that the custom as stated by Rattigan

(1) (1917) L.R. 45 I.A. 10, 13.
(2) (1918) L.R. 45 I.A. 148, 154, 155.
(3) A.I.R. 1951 Simla 239.
(4) A.I.R. 1951 Simla 242.

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cannot be said to have been so well recognised as to have become entitled to judicial notice from courts without further proof. We find in the law reports a very large number of cases on the subject of a sister's right to inherit, one group of which takes the view that there is no custom excluding sisters from inheritance when there are collateral relations of the last male holder and another group taking the contrary view. It would neither be possible nor profitable to refer to all these cases here but some may be mentioned.

We shall first mention the cases which do not recognise that a custom excluding sisters from the inheritance exists. In *Makhan* v. *Musammat Nur Bhari* (1) certain seventh degree collaterals of the last male holder sued the latter's sister for possession of his properties. No claim appears there to have been made by the collaterals that there was any general custom entitling them to succeed in preference to the sister. The case having been returned to the Chief Court after the enquiry directed by it, Elsmie, J. held:

"The result of the further enquiry is to show that the plaintiffs have been unable to prove that they are by custom entitled to exclude the sister of the last owner. On the other hand, there is some evidence, though not much, to show that sisters have inherited. It is indeed quite clear that no well defined custom is made out one way or the other."

The result was that the sister was held entitled to a share of the properties that came to her under the Mohammedan law, the parties being Mohammedans and no custom having been proved one way or the other. This was a case decided in 1884.

In *Sheran* v. *Mussammat Sharman* (2) in which the collaterals were the plaintiffs and the sister the defendant, it was observed:

"On the question of inheritance, for the plaintiffs it has been contended that under the general Customary Law of the Punjab governing agricultural communities, the collaterals in the male line, fifth in

(1) 116 P.R. 1884. (2) 117 P.R. 1901.

descent from the common ancestor, exclude sisters, but we are not prepared to assent to the wide proposition that such a general custom exists."

It was also there held that there was no general custom in the Mooltan District whereby collaterals were preferred to a sister. In the end, no custom having been found to exist favouring either side and the parties being Mahomedans, the Mohammedan law was applied and the sister got a share.

In *Bholi* v. *Kahna* (1), it was remarked that paragraph 24 of Rattigan's Digest was rather broadly stated and hardly warranted by the authorities quoted for and against.

In *Mussammat Bhari* v. *Khanun* (2), where the contest was between the ninth degree collaterals and a sister, the onus of proving that the collaterals were entitled to succeed in preference to the sister was placed on the collaterals who were the plaintiffs in the suit, and as the collaterals were unable to discharge the onus placed on them, they lost.

In *Mst. Fatima Bibi* v. *Shah Nawaz* (3), it was said that the general rule laid down in paragraph 24 of Rattigan's Digest was open to the criticism that it was based mainly on authorities regarding ancestral property and on the generally accepted principles of agnatic succession which do not apply in the case of self acquired property. It was also held that the reported decisions were not such that a general rule could be said to exist on the question of a sister's right to succeed which was so widely accepted that it would justify a court in coming to any definite conclusion based on custom.

In *Samo* v. *Sahu* (4) it was said that the court below was wrong in placing the onus on the sister in a contest between her and the collaterals of the fourth degree, for, there was no such thing as general customary law known to the legislature and that Rattigan's Digest on Customary Law merely showed that according to judicial decisions a large number of tribes were governed by certain customs in certain matters.

(1) 35 P.R. 1909.
(2) 20 P. R. 1919.
(3) (1920) I.L.R. 2 Lah. 98.
(4) (1934) I. L. R. 17 Lah. 10, 11.

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In *Jagat Singh* v. *Puran Singh* (1), a case decided in 1944, it was oberved at p. 369:

"As I have indicated above there is no rule of special custom when a contest arises between a sister or a sister's son against a near collateral. Then one has to fall back on general custom. There is no rule of general custom on that point. It is no doubt true that in paragraph 24 of Rattigan's Digest it has been stated that sisters and their sons are in general not heirs but that has been said in very wide terms. It may be applicable to cases of ancestral property, but it is difficult to say there is any special rule of general custom when a contest arises between a sister and collaterals of the third or fifth degree and the property is self acquired."

In this case neither a general nor a special custom having been proved to exist, the Court based its decision on the personal law of the parties, namely, the Hindu law.

The cases decided since 1950 all take the view that there is no general custom giving collaterals preference to sisters in matters of inheritance. They are *Sukhwant Kaur* v. *Balwant Singh* (supra), *Maulu* v. *Mst. Ishro* (2), *Harnam Singh* v. *Mst. Gurdev Kaur* (3) and *Shrimati Bui* v. *Ganga Singh* (4).

We now come to the other group of cases which seem to recognise the general custom excluding sisters from inheritance when there are collaterals of the last male holder.

In *Hamira* v. *Ram Singh* (5), the Court approved of the decision in *Shidan* v. *Fazal Shah* (6), the judgment in which is set out as an appendix to the report. In the latter case the contest was between a sister and collaterals of the seventh degree and it was held that the onus of proving a custom entitling the sisters to succeed rested on them and this was based on paragraph 24 of Rattigan's Digest, an entry in the Riwaji-am which applied to the parties and certain reported decisions. Obviously, Rattigan was relied upon.

(1) (1944) 49 P.L.R. 366.
(2) (1950) 52 P.L.R. 261.
(3) (1957) 59 P.L.R. 609.
(4) (1959) 61 P.L.R. 145.
(5) 134 P.R. 1907.
(6) (1907) P.R. at p. 646.

In *Harnamon* v. *Santa Singh* (1) it was said that the burden of proving that the sister was entitled to succeed in preference to a collateral lay on her. The same view was taken in *Mussammat Nurbhari* v. *Abdul Ghani Khan* (2), *Mussammat Hussein Bibi* v. *Nigahia* (3), *Jagu* v. *Bhago* (4), *Began* v. *Ali Gohar* (5), *Kirpa* v. *Bakshi Singh* (6) (case decided in 1944), *Santi* v. *Ujagar Singh*, Ex. D. 6 in the present case (decided in 1944) and *Mussammat Ratni* v. *Harwant Singh* (7). In some of these cases paragraph 24 of Rattigan's Digest was expressly approved of as applying to non-ancestral properties.

It will thus appear that there is a formidable array of authorities in support of either view. In this state of conflict of judicial decisions we are not prepared to say that a custom giving preference to collaterals over sisters in the matter of inheritance to non-ancestral properties has been so widely or uniformly recognised by courts as would justify us in taking judicial notice of it. It is important also to note that it is recognised that a Punjab custom is fluid and capable of adapting itself to varying conditions, as stated in *Hassan* v. *Jahana* (8) and that the decisions for the last ten years are uniformly against the view expressed in paragraph 24 of Rattigan's Digest. We therefore come to the conclusion that the High Court was right in its view that it could not be held on the authority of paragraph 24 in Rattigan's Digest that a general custom excluding sisters from inheritance as against collaterals, existed.

It was then said that in the plaint it had been admitted by the respondent that there was a general custom as alleged by the appellant and so no proof of that general custom was required in this case. We do not think this contention is justified. No doubt in her plaint the respondent referred to a custom entitling her to succeed and termed it a special custom. We are unable to read the reference to a special custom as

(1) (1912) 13 I.C. 711.
(2) 100 P.R. 1916.
(3) (1919) 1 Lah. 1.
(4) (1926) 96 I.C. 907.
(5) A.I.R. 1934 Lah. 554.
(6) (1948) 50 P.L.R. 220.
(7) (1948) 50 P.L.R. 249.
(8) 71 P.R. 1904.

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amounting to an admission of a general custom or its terms.

That being the position we have to see if either side led any evidence in support of its claim. So far as the appellant is concerned he has relied on the alleged general custom and sought to support it by reference to paragraph 24 of Rattigan's Digest. It view of what we have said earlier we do not think that Rattigan's Digest can be taken as correctly laying down the custom on the point. Neither do we think that the reported decisions show the existence of any such general custom. There is nothing else on which the appellant has sought to rely. We therefore think that the appellant has failed to establish the custom alleged by him.

We have next to see whether the respondent has proved the custom which she set up. We think that she has. The High Court has discussed the evidence led by the respondent, and found it acceptable. We have no reason to take a contrary view. Some reference to the evidence may now be made. Ex. P. 4, Settlement Record of 1852, proves that in the village Sultanwind Sajja Singh and Majja Singh succeeded to the properties of Nodh Singh as his sister's sons in the presence of collaterals. Mr. Achhru Ram contended that the statement in Ex. P. 4, that Sajja Singh and Majja Singh were the sister's sons of Nodh Singh was wrong for, in Ex. P. 5, the Settlement Records of 1891 and 1892, they were described as the daughter's sons of Nodh Singh and Baghel Singh, his brother. He contended that on the authorities it is clear that on a conflict between two settlement records the later one in date has to be accepted. That appears to have been held in a number of cases of which *Alo* v. *Sher* (1) may be mentioned. But it seems to us that this is a point which should have been raised in the trial Court which does not appear to have been done, for, then the respondent could have led evidence to show which of the two settlement records put the matter correctly. Ex. P. 9 which is a settlement record of 1852 of the same village, shows that on Gandhi's

(1) A.I.R. 1927 Lah. 607.

death his sister's son succeeded to his properties though there were collaterals. Mr. Achhru Ram's comment was that in 1852 things were so unsettled in the Punjab that no one cared for lands and that was the reason why the collaterals allowed Gandhi's sister's son to succeed to his properties. This is an explanation which we are unable to accept. Exhibit P. 7 is a settlement document of the Bheniwal tribe in the village Sultanwind prepared in 1891-92. It shows that Mst. Chandi, the sister of Buta Singh, succeeded to his properties. It was said that the pedigree did not show that any collateral was alive. But this is not right because it shows that Buta Singh's great grand uncle, Tara Singh, was alive. Mr. Achhru Ram says that that must be a mistake and Tara Singh who was Buta Singh's great grand uncle could not have been alive when the latter died. This again is a matter which should have been cleared up in the trial Court and we do not think it right to speculate about it.

It remains to consider two entries in the Riwaji-i-am. We have first the Riwaji-i-am of 1913-14. The entry there is in this form:

"Q. 70.—Does property ever devolve on sisters and/or upon their sons?

A. All tribes.—The property never devolves upon sisters and their issues."

At the foot the case of *Bholi* v. *Kahna* (1) is cited. Now it is well established that Riwaji-i-am entries are to be taken as referring to customs relating to succession to ancestral properties unless it is stated to be otherwise. So it was stated in the Full Bench decision of the Lahore High Court in *Mst. Hurmate* v. *Hoshiaru* (2) at p. 235:

"It is reasonable, therefore, to assume that when manuals of Customary law were originally prepared and subsequently revised, the persons questioned, unless specifically told to the contrary, could normally reply in the light of their own interest alone and that, as stated above, was confined to the ancestral property

(1) 35 P.R. 1909. (2) (1943) I.L.R. 25 Lah. 228, 235.

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only. The fact that on some occasions the questioner had particularly drawn some distinction between ancestral and non-ancestral property would not have put them on their guard in every case, considering their lack of education and lack of intelligence in general. Similarly the use of the term "in no case" or "under no circumstances" would refer to ancestral property only and not be extended so as to cover self-acquired property unless the context favoured that construction".

The Full Bench was really authoritatively laying down a rule which had been the prevailing opinion in the courts in the Punjab. In the Riwaji-i-am of 1913-14 we find nothing in the context to show that the answer there recorded was intended to apply to self acquired property. That being so, it does not prove any custom against the right of a sister to inherit the self acquired property of her brother.

The other Riwaji-i-am was that of the year 1940. It was in these terms:

"Q. 68.—Does property ever devolve upon sisters or sister's son?

A. All tribe.—

(1) In the case of an unmarried sister or sisters the property is entered in her or their name till marriage.

(2) Married sister or sisters or their descendants did not get the property in any case."

Here again there is nothing in the context to indicate that the answers were given in regard to non-ancestral property. So this does not help the appellant either.

In this Riwaji-i-am eight instances are given. Some of them deal with the self acquired property. That does not in our opinion indicate that the answer recorded in the Riwaji-i-am was intended to cover succession to self acquired property also. It is not disputed that the instances mentioned under the entries in the Riwaji-i-am are often collected by the officer in charge of the preparation of the record. It is impossible to say whether any, and if so, which, instance recorded in the Riwaji-i-am had been supplied

by the tribesmen in answer to questions put to them by the Settlement Officer. It is not possible therefore to say that there is any indication in the instances in this Riwaji-i-am entry that the answers were intended to cover self acquired property also.

Now of the eight instances given in the Riwaji-i-am two are concerned with self acquired property where there were no collaterals and the sisters were allowed to succeed. The remaining six are concerned with ancestral property. In four of these, the last male owner died without leaving any reversioner and in each such case the married sisters succeeded to the property. In the fifth one, the sisters were unmarried at the time of the brother's death and they were allowed to take possession of the properties. But this instance shows that on their marriages taking place they were dispossessed of the properties which apparently thereupon went to the collaterals. These seven instances therefore do not help either side. They show that sisters were allowed to succeed in respect of both kinds of properties in the absence of any collaterals and that sisters were on their marriages divested of the ancestral properties to which they had succeeded on their brothers' deaths, they being at that time unmarried. The last instance deals with the Rajput Mohammedan tribe of Tehsil Ajnala which is in the District Amritsar, the district to which the parties to the present litigation belong. This instance shows that a sister was allowed to succeed to the ancestral property left by the brother in preference to his collaterals of the sixth degree. This therefore is an instance of a custom in a neighbouring Tehsil under which sisters were allowed to succeed in the presence of collaterals nearer in degree than the collateral in the present case. In these circumstances we agree with the learned Judges of the High Court that the respondent was able to prove a custom whereby a sister was entitled to succeed in preference to the collateral relations of her brother.

We think it also right to say that even if it had been held that the respondent was not able to establish a custom entitling her to succeed she would get the

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properties under the Hindu law. The parties are Sikhs to whom the Hindu law applies. Since the Hindu Law of Inheritance (Amendment) Act, 1929, a sister is an heir under the Hindu law in preference to collaterals and that Act would be applicable to the devolution in this case. It is however said that as the respondent had not made any claim in the plaint on the basis of Hindu law but on the contrary relied on custom, it was not open to her to fall back on the Hindu law on failing to establish the custom.

We do not think that this is the correct position. Section 5 of the Punjab Laws Act, 1872, provides that in questions regarding succession, the rule of decision shall be (a) any custom applicable to the parties; (b) the personal law of the parties except in so far as modified by custom or legislation. In the Full Bench case of *Daya Ram* v. *Sohil Singh* (1) Robertson, J., said at p. 410:

"It therefore appears to me clear that when either party to a suit sets up "custom" as a rule of decision, it lies upon him to prove the custom which he seeks to apply. If he fails to do so clause (b) of section 5 of the Punjab Laws Act applies and the rule of decision must be the personal law of the parties subject to other provisions of the clause."

As we have earlier said this observation was approved by the Judicial Committee in *Abdul Hussain Khan* v. *Bibi Sona Dero* (2). In *Fatima Bibi* v. *Shah Nawaz* (3), a case to which we have earlier referred, the Court allowed the plaintiff's sisters, who had based their claim on custom and not on the personal law, to fall back on Mohammedan law, the personal law of the parties, on their failure to establish the custom, no custom against them having been proved by the collaterals. There are a number of other authorities, to which it is not necessary to refer, in which personal law was resorted to when no custom on either side was established. We agree that that is the correct view to take. We therefore think that even if the respondent had been unable to prove the custom in

(1) 110 P.R. 1906. (2) (1917) L.R. 45 I.A. 10, 13.
(3) (1920) I.L.R. 2 Lah. 98.

her favour she is entitled to succeed in the suit on the basis of the personal law of the parties, namely, the Hindu law.

Further, we see no prejudice to the appellant if such a course is adopted. It is not disputed that if the Hindu law applied, the respondent would be entitled to the properties in preference to the appellant. The only defence to the claim under the Hindu law that the appellant could take would be a custom. The custom on which the appellant relied for his case was a general custom entitling the collaterals to succeed in preference to sisters. We have earlier held that no such general custom has been proved in this case. Therefore it seems to us in the interest of justice and for the reason that litigation should come to an end that it is right that the respondent should succeed in the suit as her brother's heir under the Hindu law.

There remains one other matter to be mentioned. The respondent had filed an application for an order that by reason of certain agreements and certain proceedings arising out of the decree in her favour passed in this case by the High Court, the appellant should not have been given leave by this Court to institute the present appeal and the leave granted under Art. 136 of the Constitution should be revoked. As, in our view, the respondent succeeds on the merits of the case we think it unnecessary to express any opinion on this question.

In the result we dismiss the appeal with costs.

Appeal dismissed.