the force of a decree and shall be executable as such. In the circumstances, I do not think it is a fit case where the Court should exercise its discretion in favour of the plaintiff and grant him the relief prayed for. The Registrar, Co-operative Societies, shall, however, see that the matter, which has already been so much delayed, is disposed of at the earliest, in the next couple of months if possible.

In the result, the appeal is dismissed but in view of the facts of the case parties are left to bear their own costs throughout. Copy of the judgment to be sent to the Registrar, Co-operative Societies, Jullundur.

B.R.T.

FULL BENCH

Before D. Falshaw, Mehar Singh and I. D. Dua, JJ.

SHRIMATI SUKHI,—*Appellant*

versus

BARYAM SINGH AND OTHERS,—*Respondents*

Regular Second Appeal No. 609 of 1949

1959

Jan., 13th

Custom—Ambala District—Sister—Wheher preferential heir as against collaterals of sixth degree with respect to non-ancestral or acquired property—Rattigan's Digest of Punjab Customary Law—Para 24—Whether states correct rule of custom—Ancestral property—General custom as to the degree of collaterats who are entitled to succeed.

Held that—

(1) in the Ambala District a siter is a preferential heir as against the collaterals of sixth degree with respect to non-ancestral or acquired property;

(2) paragraph 24 of Rattigan's Digest is too broadly worded and is too unprecise to lay down any general and universally recognised rule of law excluding sisters from inheritance *qua acquired* property;

(3) even on the assumption that it does lay down any such rule of law, the judicial instances in the present case more than amply rebut any presumption, weak as it must be, that may possibly rise against sisters;

(4) custom is generally concerned with the conservation of ancestral holdings, and, unless as a result of proper and specific inquiry a rule of succession *qua* acquired property is found to exist, the effect of the rule contained in paragraph 24 of Rattigan's Digest must also be confined to ancestral property alone;

(5) that, if under custom as prevailing in Ambala sister is an heir with respect to ancestral property, it is legitimate to hold that she would also be an heir with respect to acquired property; anomalies and arbitrariness can and should be excluded by Courts when deciding the existence of custom;

(6) that, when there is no rule or custom applicable to a particular case, personal law of the Parties should be resorted to and

(7) even with respect to ancestral property, according to general custom, it is usually the 5th degree of collateral relationship which is considered as the customary limit for purposes of succession and the seventh degree is rare. Where the collaterals are more than seven degrees removed from the last holder, the onue generally rests on the collaterals to establish their preferential rights.

Case referred by Hon'ble Mr. Justice S. S. Dulat,—vide *his order dated 24th June, 1953 to a Division Bench for decision of law point involved in the case. The Division*

Bench consisting of Hon'ble Mr. Justice Bishan Narain and Hon'ble Mr. Justice A. N. Grover further referred the case on 22nd November, 1957 to a Full Bench for authoritative decision. The Full Bench consisting of Hon'ble Mr. Justice Falshaw, Hon'ble Mr. Justice Mehr Singh and Hon'ble Mr. Justice Dua finally decided the case on 13th January, 1959.

Regular Second Appeal from the judgment and decree of the Court of Shri G. C. Bedi, District Judge, Ambala, dated the 9th May, 1949 affirming that of Shri Jawala Dass, Sub-Judge Ist Class, Ambala, dated the 29th November, 1948, dismissing the plaintiff's suit and leaving the parties to bear their own costs. The Lower Appellate Court allowed costs to the defendants respondents.

GANGA PARSHAD JAIN with S. S. MAHAJAN, for Appellant.

DALJIT SINGH with UJJAL SINGH CHAHAL, for Respondents.

JUDGMENT

DUA, J.—The circumstances in which this case has been referred to Full Bench are these. Dua, J.

The parties to this litigation are *Jats* of Kharar Tehsil, district Ambala, and Sawan, the last male holder of the property in dispute, died some time in the year 1947. The plaintiffs who are Sawan's sisters have filed the present suit for possession of the land (fully described in the plaint) as heirs entitled to succeed to their brother Sawan's property according to the custom of the tribe. It may be stated that on the death of Sawan the mutation was effected in favour of the defendants on the ground that they were collaterals and were, therefore, entitled to succeed. The plaintiffs allege that the mutation has been wrongly sanctioned in favour of the defendants and they (the plaintiffs) being the preferential heirs to the non-ancestral property left by their deceased brother were entitled to claim possession. Jit Singh, one of the

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defendants, though served, did not come to contest the suit and was, therefore, proceeded against *ex parte*. Waryam Singh and Rulia Singh, defendants Nos. 1 and 2, alone contested the suit and in their joint written statement they admitted that the plaintiffs were the sisters of Sawan deceased, the last male owner of the suit property, but denied the plaintiffs' claim to be preferential heirs. They admitted that the parties were governed by the general Zamindara Custom in matters of succession but they asserted that according to the correct rule of custom the collaterals excluded sisters both in respect of ancestral and non-ancestral property. On these pleadings the following issues were framed by the trial Court :—

(1) Whether the defendants are collaterals of Sawan deceased ?

(2) Whether according to custom the defendants collaterals succeed in preference to the plaintiffs' sisters ?

(3) Relief.

It may, at this stage, also be observed that the plaintiffs had in their plaint asserted that the suit property was not ancestral *qua* the defendants and Sawan deceased, the last male holder, and though the defendants had in their written statement denied this assertion and had pleaded that the property was ancestral, no specific issue on this plea was claimed by the defendants, with the result that no issue on the question of ancestral nature of property was framed by the trial Court, at the time of settling the issues. When this omission came to the notice of the next presiding officer of the trial Court he thought of framing an issue regarding the ancestral character of the property

but the defendants' counsel at that stage made a statement on the 27th of May, 1948, that the defendants had only incidentally alleged that the suit property was ancestral and that they were not relying in support of their case on this assertion. In view of this statement the learned Subordinate Judge considered it unnecessary to frame additional issue relating to the ancestral nature of the property. The trial Court in this connection observed that the counsel for the defendants had deliberately adopted this attitude at a later stage as he seemed to have discovered in the meanwhile that the position of the collaterals in respect of non-ancestral property was perhaps better than in respect of ancestral property.

The trial Court found under issue No. 1 that the defendants were sixth degree collaterals of Sawan, the last male holder. Under issue No. 2 the trial Court went into the matter in great detail and held that the custom as recorded in the Riwaj-i-am was not applicable to the present case as the property was not proved to be ancestral. This observation of the learned Subordinate Judge was preceded by the remarks that in Ambala District sisters have been more favourably treated in matters of inheritance than in most other places as they are allowed to succeed in the absence of daughters and daugter's sons (*vide* answer to question No. 47 of the Riwaj-i-am). The learned Subordinate Judge then considered whether the provisions of Hindu Law or general custom as recorded in para 24 of the Rattigan's Digest of Customary Law was to govern the present case. It appears that he felt bound by the decision in *Kirpa and others* v. *Bakhshi Singh and others* (1), cited on behalf of the defendants in preference to

(1) 1948 P.L.R. 220

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Munshi and others v. *Naranjan Singh and others* (1), cited on behalf of the plaintiff's counsel. I may here reproduce the observations of the learned trial Court when deciding this issue in favour of the collaterals :—

> "According to the decision in the latest authority the sisters are excluded from inheritance by the remotest collaterals in respect of non-ancestral property and the sister's position in respect of such property has been rendered worse than their position in respect of ancestral property. This seems rather anomalous but it is not for this Court to solve the anomaly and I feel helpless. The Digest of the Customary Law as compiled by Mr. Rattingan, however, authoritative it might be, cannot be treated as a good substitute for the primary record of customs. The author of the Digest had in discovering the customs relied upon the riwaj-i-ams of the various districts and also upon the reported decisions of the Courts in this province, but on referring to the few authorities noted in para 24 in support of the general custom (so-called) it would appear that it is not quite safe to regard the custom as recorded in para 24 as general in its applicability. I have my own doubts regarding the correctness of the so called general custom, as recorded in para 24 and it is rather unsafe to generalise from the material placed before us by the author."

(1) 171 I.C. 959

This would show that but for the decision in *Kirpa's case* (1), the learned Subordinate Judge would perhaps have been inclined to decree the plaintiffs' suit. It is really infortunate that no other authorities on the point were cited before the trial Court.

On appeal before the learned District Judge, the decision of the trial Court was affirmed. The learned District Judge in addition to *Kirpa's case* (1), also referred to *Mst. Ratni* v. *Harwant Singh and others* (2), The learned counsel for the plaintiffs-appellants, however, in addition cited the cases of *Mst. Fatima Bibi* v. *Shah Nawaz* (3) and *Gurdit Singh and others* v. *Baru* (4), the latter case being from Ambala. But the learned District Judge following the decision in *Kirpa's case* (1), held against the plaintiffs-appellants.

On second appeal the case initially came up for hearing before Dulat J. who in view of conflicting opinions expressed by two Divisions Benches of this Court felt that the case had better be authoritatively decided by a larger Bench. It may be stated that before the learned Single Judge the respondents relied on *Kirpa's case* (1), and para 24 of Rattigan's Digest whereas on behalf of the plaintiff-appellant reliance was placed on *Mst. Sukhwant Kaur* v. *S. Balwant Singh and others* (5), decided by Weston, C. J., and Kapur, J. In another unreported decision by Weston, C. J., and Falshaw; J. (*Mst. Santo* v. *Surjit Singh and others* (6), also cited before Dulat, J., the view expressed in *Kirpa and others* v. *Bakhshi Singh and others* (1),

(1) 1948 P.L.R. 220
(2) 1948 P.L.R. 249
(3) I.L.R. 2 Lah. 98
(4) A.I.R. 1933 Lah. 1005
(5) A.I.R. 1951 Simla 242
(6) L.P.A. 3 of 1948

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was followed. On the case coming up before the Division Bench consisting of Bishan Narain and Grover, JJ., it was considered desirable to have the matter placed before a still larger Bench so that more authoritative decision may be given rather than adding one more Division Bench ruling to the already conflicting views expressed by different Division Benches of this Court. It is in these circumstances that this case has been placed for decision before us. The question arising for decision thus is whether according to the Customary Law of Ambala District a sister is a preferential heir as against collaterals of sixth degree with respect to non-ancestral or acquirred property.

The learned counsel has, to start with, relied on the Riwaj-i-am of Ambala District. He has strenuously contended that in Ambala District, unlike other Districts in the Punjab, the position of sister under custom even with respect to ancestral property, is very much better than in the rest of the Punjab. Question No. 47 and answer thereto in the Customary Law of Ambala District compiled in 1920 on which reliance has been placed read as follows—

> "*succession of sisters and their issue.—Question 47.*—Does the property ever devolve on sisters or their sons?
>
> 1887. The replies given state that a sister will succeed in the absence of a daughter or daughter's son. It has already been noticed that a daughter can very rarely succeed, so that the case of a sister is so extremely rare that it may be left out of account. Practically speaking, sisters never succeed, and at attestation this was strongly insisted on

by *Jats, Gujars* and *Sayads*. All the *Jats* except those of Jagadhri stated that the land would go to members of the *patti*, if of the same *got*, in preference to the sister, and even to members of the tribe if there should be none of the same *got*. This is no doubt the popular view, and in the very rare cases where sisters succeed at all, it will generally be found that they hold by consent of the collaterals and under a gift executed by their brother during his lifetime. Exceptional cases of this kind have no effect as instances of a custom.

1918. The first sentence of Mr. Kensington's reply is a correct presentment of existing custom."

It may be noticed here that in 1918, as the reply suggests, the custom appears to have undergone a change and the observation relating to *Jats* except those of Jagadhri where land was held to go to members of the *patti*, if of the same got, was deleted. The learned counsel contends that the entry in the Riwaj-i-am shows that sister is a preferential heir in the absence of daughter and that the answer does not differentiate between ancestral and acquired property. Thus, according to the learned counsel, the sister is to be preferred as an heir to the sixth degree collaterals. He further contends that if this asnwer is to be construed as referring only to ancestral property, then the position of the sister with regard to the non-ancestral property cannot be held to be worse, as this would lead to most incongruous results. In any case, there being no well-established rule of customary law excluding sisters from inheritance with respect to acquired property as against sixth

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degree collaterals Hindu Law should be applied according to which also sisters would succeed in preference to the collaterals of the sixth degree. With reference to para 24 of Rattingan's Digest of Customary Law the learned counsel submits that this paragraph is couched too widely and it does not lay down any precise or definite and correct rule of general custom in favour of collaterals and against the sisters with respect to succession to acquired property.

So far as Ambala District is concerned, in *Jagat Singh* v. *Puran Singh and others* (1), Mahajan, J., considered the scope of question No. 47 of the Riwaj-i-am of Ambala District while dealing with a dispute in respect of self-acquired property between sister's sons and collaterals of third degree among *Jats* of Tehsil Rupar (which is adjacent to Kharar) and decided the case in favour of sister's sons. The learned Judge while dealing with this question made the following significant observations:—

> "The sole issue for decision in this appeal is the question of custom, i.e., whether *qua* self-acquired property, sisters' sons are heirs to Chuhar Singh, deceased, among the tribe of the parties residing in the Ambala District, particularly in the Rupar Tehsil of that district. It may be stated at the outset that self-acquired property has not been dealt with specifically in the Riwaj-i-am, but the custom regarding sisters' sons has been laid in question No. 47 of the Riwaj-i-am. Question No. 47 reads thus:—

(1) 1947 P.L.R. 366

'Does the property ever devolve on sisters or their sons?

Ans. The replies given state that a sister will succeed in the absence of a daughter or daughter's sons. It has already been noticed that a daughter can very rarely succeed, so that the case of a sister is so extremely rare that it may be left out of account. Practically speaking, sisters never succeed, and at attestation this was strongly insisted on by Jats, Gujars and Sayds. All the Jats except those of Jagadhri stated that the land would go to members of the *patti*, if of the same *got*, in preference to the sister, and even to members of the tribe if there should be none of the same *got*. This is no doubt the popular view, and in the very rare cases where sisters succeed at all it will generally be found that they hold by consent of the collaterals and under a gift executed by their brother during his lifetime. Exceptional cases of this kind have no effect as instances of a custom.'

The above reply was recorded by Mr. Kensington in the settlement of 1887. Mr. Whitehead after quoting the above reply states the custom in the following terms in the year 1918:—

'The first sentence of Mr. Kensington's reply is a correct presentment of existing custom.'

In other words Mr. Whitehead recorded the answer to question No. 47 in these terms:—

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'The replies given state that a sister will succeed in the absence of a daughter or daughter's sons.'

In answer to question No. 28 of the Riwaj-i-am, as regards daughters it has been stated that in the absence of 5th degree collaterals they succeed to the ancestral property of their father. It follows, therefore, that sister amongst the Jats of Ambala is an heir to the ancestral property of her brother in the absence of collaterals up to the 5th degree and in the absence of a daughter or a daughter's son. The same rule has been laid down in the Riwaj-i-am concerning Rupar Tehsil

Apart from the Riwaj-i-am three instances have been relied upon on behalf of the sister to prove the custom set up in this case. The first instance is furnished by a decision of the Punjab Chief Court reported in *Bishen Singh* v. *Bhagwan Singh* (1), and this has been mentioned in the Riwaj-i-am of the Rupar Tehsil itself. It is no doubt true that that was a case of a sister against the proprietary body but it was observed in that case that a sister would succeed to the non-ancestral property in the absence of near collaterals. The next case is reported as *Gurdit Singh and others* v. *Baru* (2). Here it is not clear that it was a contest between a sister and the collaterals, but it was held that a sister would exclude collaterals regarding self-acquired property. Then an instance has been placed

(1) 28 P.R. 1904
(2) A.I.R. 1933 Lah. 1005

on this record. That is the instance which is proved by Exhibits P. 9 to P. 11 of this record (*Hazara Singh* v. *Mst. Nihali*). This case related to non-ancestral property which had been gifted by the mother of the last male-holder in favour of the sister of the last male-holder. It was held that the gift was valid amongst the Jats of Rupar as an acceleration of succession. It appears in view of these instances and in view of the entries in the Riwaj-i-am that sisters in the Ambala District amongst the tribes following custom are in favourable position than they are elsewhere and they are regarded as heirs even to ancestral property in the absence of fifth degree collaterals and daughters and their sons. The instances mentioned above show that they have been given preference *qua* self-acquired property over collaterals of a certain degree. There is really no instance in point when contest arose between a very near collateral and a sister or sister's son regarding self-acquired property and the matter has to be determined on general principles if a rule of custom specifically on the point cannot be discovered. 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 the 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

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in very wide terms. It may be applicable to cases of ancestral property, but it is difficult to say that there is any special rule of general custom when a contest arises between a sister and collaterals of the 3rd or 5th degree and the property is self-acquired. It is true that so far as ancestral property is concerned collaterals up to the 5th degree have pre-...ference both over the daughter and sister but the daughter is situated in a very favourable position so far as self-acquired property is concerned when she comes into competition with a collateral because the rule of general custom is that a daughter excludes collaterals of all degrees so far as self-acquired property is concerned. Under the custom laid down in the Riwaj-i-am of the Ambala District a sister has been placed in the scheme of inheritance next to the daughter and if a daughter excludes all collaterals as regards self-acquired property it follows that the sister must be given the same position after the daughter as she possesses as regards ancentral property. If one has to exclude logic as it should be excluded in finding out a rule of custom then all that can be said on the facts of this case is that concerning self-acquired property there is no specific rule either of special or general custom applicable to the issue in dispute in this case and that being so the Courts below rightly fell back on Hindu Law to discover the proper rule of law applicable to this case and that is that sister's sons are superior heirs to

> collateral of 3rd degree under that system."

It is true that a couple of months later in another case from Ambala District (*Kirpa etc.* v. *Bakhshi Singh etc.* (1), where also there was a dispute with regard to the self-acquired property between sister's sons and collaterals of the 4th degree, Harries, C. J., relying almost exclusively on para 24 of Rattigan's Digest decided against sister's sons and in favour of collaterals, and Mahajan, J., agreed with that decision. It is unfortunate that *Jagat Singh's case* (2), decided on the 30th of October, 1944, was not brought to the notice of the learned Judges; the only case holding the contrary view, which was referred at the hearing by the counsel on behalf of the sisters, was *Mst. Fatima Bibi* v. *Shah Nawaz* (3), in which doubt had been thrown upon the accuracy of the statement of the general custom mentioned in para 24 of Rattigan's Digest. Had *Jagat Singh's case* (2), been cited before the Bench deciding *Kirpa's case* (1). I am not quite sure if the fate of the decision would not have been different. Three instances in favour of sisters were relied upon by Mahajan, J., in *Jagat Singh's case* (2). In view of the following observations of the Judicial Committee in *Mussammat Subhani* v. *Nawab* (4), it would not have been proper to ignore this important judicial instance.

> "A judicial decision, though of comparatively recent date, may contain, on its records, evidence of specific instances, which are of sufficient antiquity to be of value in rebutting the resumption. In

(1) 1948 P.L.R. 220
(2) 1947 P.L.R. 366
(3) I.L.R. 2 Lah. 98
(4) I.L.R. 1941 Lah, 154 at p. 187

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such a case, the value of the decision arises from the fact not that it is relevant under sections 13 and 42 of the Indian Evidence Act as forming in itself a 'transaction by which the custom in question was recognised, etc.,' but that it contains, on its records, a number of specific instances relating to the relevant custom. To ignore such judicial decisions merely on the basis of the *riwaj-i-am* would add greatly to the perplexities and difficulties in proving a custom".

Applying this observation of the Judicial Committee to the instant case I might as well say that to ignore the judicial instance in *Jagat Singh's case* (1), merely on the basis of paragraph 24 of the Rattigan's Digest would similarly add greatly to the perplexities and difficulties in proving a custom. The next case from Ambala District is *Sawai Singh and others* v. *Ude Singh and others* (2), where sister's son was preferred to collaterals of the 7th degree with respect to non-ancestral property. Here again J. L, Kapur, J., observed that para 24 of Rattigan's Digest did not lay down a correct statement of the custom prevailling in the Punjab as regards non-ancestral property and holding that sister under Hindu Law has a very high place in order of succession, in the absence of the established custom dealing with the right of succession with respect to non-ancestral property, the principles embodied in Hindu Law were applied to the case. In this Judgment not only was *Kirpa's case* (3), noticed and commented upon but two other Letters Patent Appeals (*Santi* v. *Surjit Singh* (4), and *Banti* v. *Harnam Singh* (5), in

(1) 1947 P.L.R. 366
(2) 1951 P.L.R. 328
(3) 1948 P.L.R. 220
(4) L.P.A. 3 of 1948
(5) L.P.A. 15 of 1949

which by one judgment decisions were given against sisters and in favour of collaterals by relying on para 24 of Rattigan's Digest, were also considered and not followed. Quite a number of other decisions in which the correctness of the statement of custom laid down in para 24 of Rattigan's Digest had been doubted were also noticed by the learned Judge and after considering them all. he came to the conclusion that sister was entitled to succeed with respect to acquired property as against collaterals In the 7th degree. Dealing with the argument on which the decision in *Kirpa* v. *Bakhshish Singh* (1), was based the learned Judge observed as follows:—

> "What Mr. Tek Chand wishes me to hold is that although in regard to ancestral property a sister or sister's son would exclude a collateral beyond the 5th degree, she would be excluded in the matter of non-ancestral property. The proposition appears to be rather incongruous. The right of an agnate to succeed is because of his connection with the common ancestor who held the land and it appears to me that it does not stand to reason that such an agnate should not be able to succeed to ancestral property, but in regard to non-ancestral property he will be able to succeed. Before the rule was laid down by Harries, C. J., in *Kirpa* v. *Bakhshish Singh* (1), it had not been shown that this distinction was ever drawn against the females that they should be able to

(1) 1948 P.L.R. 220

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inherit ancestral property but not non-ancestral. Besides the attention of the learned Chief Justice deciding *Kirpa* v. *Bakhshish Singh's case* (1), was not drawn to the previous judgments of the Lahore High Court in *Gurdit Singh* v. *Baru* (2), and *Munsi* v. *Niranjan Singh* (3). The two Letters Patent Appeals which were decided by Weston, C.J., and Falshaw, J.; *Santi* v. *Surjit Singh* (4), and *Banti* v. *Harnam Singh* (5), merely followed the judgment of Chief Justice Harries.

Personal Law of the parties to the dispute is Hindu Law under which now a sister has a very high place. If there is no custom established in regard to the sisters, the question has to be decided in accordance with Hindu Law and this principle was recognised by their Lordships of the Privy Council in *Abdul Hussain Khan* v. *Sona Dero* (6).

Even if the onus was on the sisters, the onus is a very light one and the cases that I have cited above are good instances and are sufficient to discharge the onus. I am, therefore, of the opinion that the Courts below have rightly come to the conclusion that sisters' sons are better heirs than the collaterals."

It may at this stage be stated that in the last-mentioned judgment the following cases were referred

(1) 1948 P.L.R. 220
(2) A.I.R. 1933 Lah. 1005
(3) 171 I.C. 959
(4) L.P.A. 3 of 1948
(5) L.P.A. 15 of 1949
(6) I.L.R. 45 Cal. 450

in which it has been held that sisters under the customary law are entitled to inherit self-acquired property in preference to various degrees of collaterals: (i) *Gurdit Singh* v. *Baru* (1), a case from Rupar Tehsil, (Ambala District), where it was held that sisters were entitled to inherit acquired property in the presence of the 5th degree collaterals, (ii) *Munshi* v. *Niranjan Singh* (2), in which in the the absence of 5th degrees collaterals the sisters or the sisters' sons were held to succeed to non-ancestral property in preference to the collaterals of the more remote degree or of a daughter or daughter's son, (iii) *Maulu* v. *Ishro and others* (3), a Letters Patent Appeal, decided by Kapur and Soni, JJ., affirming the judgment of Mahajan, J:; in R:S:A: No: 52 of 1945 holding sisters to be preferential heirs with respect to acquired property. (iv) *Mst. Sukhwant Kaur* v: *S: Balwant Singh and others* (4), where a Division Bench consisting of Weston, C. J. and Kapur, J:, decided in favour of sisters against 12th degree collaterals. This case was undoubtedly from Amritsar District but it was expressly observed in the judgment that para 24 of Rattigan's Digest did not record a correct statement of custom and that the exclusion of sisters from inheritance to self-acquired property had not received that notoriety as to be taken judicial notice of. After this discussion comes the passage which I have already quoted above. There is yet another decision of this Court in *Kali Ram* v. *Bisna* (5), decided on 8th December, 1953, in which J. L. Kapur; J:; had an occasion to consider the Riwaj-i-am of Ambala District and the various cases in which sister's right as regards acquired property had been upheld. The learned Judge

(1) A.I.R. 1933 Lah. 1005
(2) 171 I.C. 969 (D.B.)
(3) A.I.R. 1950 E.P. 289
(4) A.I.R. 1951 Simla 242
(5) R.S.A. 420 of 1949

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approved all those cases and upheld the sister's claim with respect to non-ancestral property. I might at this stage also refer to an unreported judgment by a Division Bench by which two Letters Patent Appeals Nos. 3 and 15 of 1948 and 1949, respectively, were disposed of. These cases were undoubtedly from Ambala District but reliance was almost exclusively placed on para 24 of Rattigan's Digest as interpreted in *Kirpa and others* v. *Bakhshi Singh and others* (1). The counsel appearing for the sisters in this case relied on *Sukhwant Kaur's case* (2), but it was distinguished by Weston, C. J., who wrote the main judgment on the ground that it was a case from Amritsar District and the contest was between a sister and collaterals as far removed as the 12th degree; and that it was authority for its own particular facts. With the utmost respect I must confess my inability to appreciate and to endorse this distinction. Para 24 of Rattigan's Digest does not fix any limit to the degree of collateral relationship while laying down the rule of absolute exclusion of sisters from inheritance, and if para 24 lays down the correct rule of law then obviously *Sukhwant Kaur's case* (2), was not correctly decided. The learned Chief Justice, however, does not say that *Sukhwant Kaur's case* (2), was wrongly decided. *Munshi's case* (3), was also relied upon by the learned counsel appearing on behalf of the sisters in *Kirpa's case* (1), but this decision was also distinguished by Weston, C. J., by merely observing that that was a case of ancestral property and the contest was between the collaterals of 7th degree and a sister and sister's sons. In the end it was observed that "although there are remarks in the judgment of *Mst. Sukhwant Kaur's case* (2), which can be

(1) 1948 P.L.R. 220
(2) A.I.R. 1951 Simla 242
(3) 1937 P.L.R. 579=A.I.R. 1937 Lah. 701

brought in aid of the contentions of Mr. Tek Chand, in the face of the authority of *Kirpa's case* (1), which is directly in point, the Letters Patent Appeals must be dismissed." Still another case dealing with the custom as prevailing in Ambala District is (*Harkesh, etc.* v. *Surjan, etc.*) (2), decided by Harnam Singh and Dulat, JJ., in which the 7th degree collaterals were held disentitled to succeed in the presence of sister's son. In *Harkesh Nihala and others* v. *Surjan Hamela* (3), Dulat, J., who wrote the main judgment referred to *Mst. Jeo* v. *Ujagar Singh* (4), in which it had been observed that the broad proposition laid down in para 24 of Rattigan's Digest could not be entirely approved. The learned Judge considered the question and answer No. 47 in the Riwaj-i-am and after referring to the cases of *Jagat Singh* v. *Puran Singh and others* (5), *Maulu* v. *Mst. Ishro and others* (6), and *Munshi and others* v. *Naranjan Singh and others* (7), came to the conclusion that the rule of custom applicable to the Thanesar Tehsil and also the neighbouring District of Ambala is that in respect of self-acquired property a sister and a sisters' sons are preferred to remote collaterals, *Mst. Hussain Bibi and others* v: *Nigahia and others* (8) (case of Muhammadan Rajputs of the Jullundur District), *Mst. Sant Kaur* v: *Sher Singh* (9), (case of Jats of Amritsar District), and *Mst. Began* v. *Ali Gohar* (10) (case of Muhammadan Gujars of the Hoshiarpur District), were distinguished as based on statement of custom contained in the respective Riwaj-i-ams of these districts. *Kirpa and others* v. *Bakhshi Singh and*

(1) 1948 P.L.R. 220
(2) R.F.A. 207 of 1949
(3) A.I.R. 1955 N.U.C. 4961
(4) 1953 P.L.R. 1
(5) 1947 P.L.R. 366
(6) A.I.R. 1950 E.P. 289
(7) A.I.R. 1937 Lah. 701
(8) I.L.R. 1 Lah. 1
(9) I.L.R. 4 Lah. 392
(10) I.L.R. 16 Lah. 4

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others (1), was also brought to the notice of the learned Judges, but Dulat, J., after referring to the earlier decisions of Mahajan, J., in the cases *Maulu* v. *Mst. Ishro and others* (2), which was affirmed on Letters Patent Appeal by Kapur and Soni, JJ., and the appellate decision is reported as A:I:R: 1950 E.P. 289, and *Jagat Singh* v. *Puran Singh and others* (3), refused to follow *Kirpa's case* (1), There is yet another unreported case from Ambala District in which Mahajan and Achhru Ram, JJ., gave a decision in favour of the sister with respect to self-acquired property though in that case it was observed by Achhru Ram, J., that exact degree of relationship of the collaterals was not known. (*See Hans Raj* v. *Ganga Ram* (4)), decided on 30th April, 1947),. With reference to this case it may be observed that if para 24 of Rattigan's Digest is supposed to contain the correct custom then sister can never inherit irrespective of the existence or otherwise of collaterals of any degree. This para in unqualified language lays down an absolute rule excluding sisters from succeeding, and states that sisters as well as their issues are usually excluded. The latest case in favour of sisters from Kharar Tehsil, Ambala District, is *Harnam Singh* v. *Mst. Gurdev Kaur, etc.* (5). decided by a Division Bench on 3rd September, 1957, in which also relevant case law has been reviewed. In this case the contestants were collaterals of 5th degree and there are also some instances placed on the record in favour of sisters.

The learned counsel for the respondents has in addition to the cases discussed above relied on an unreported Full Bench decision of the Lahore High Court (R.S.A: 345 of 1945, decided on 3rd March,

(1) 1948 P.L.R. 220
(2) A.I.R. 1950 E.P. 289
(3) 1947 P.L.R, 366
(4) R.S.A. 878 of 1945
(5) 1957 P.L.R. 609

1947), holding in favour of the existence of the general custom to the effect that sisters and their issues are excluded from inheritance with respect to acquired property by collaterals of the last male holder, however, remote. This was a case of Muslim Rajputs of Batala Tehsil of Gurdaspur District. It appears from the judgment of the Full Bench that all the relevant and important cases dealing with the question of custom relating to the right of sisters or their issues in acquired or non-ancestral property were not brought to the notice of the Bench. Mainly the following cases were referred to. *Mst. Hussain Bibi* v. *Nigahia* (1), (a case of Muhammadan Rajputs of Jullundur District), *Mst. Jiwi* v. *Sandhi* (2), (a case of Mussalman Rajput agriculturist of Jullundur District), *Mst. Fatima Bibi* v. *Shah Nawaz* (3) (a case of Bodlas of Ferozepore District), *Mst. Begum, etc.* v. *Ali Gohar, etc*: (5) (a case of Mohammadan Gujjars from Lahore District), *Abdul Hayat* v. *Ahmu and others* (5), (a case of Mohammadans from district Jhelum. In this case it is noticeable that the property was ancestral and reliance was chiefly placed on the Riwaj-i-am), and *Kame Shah* v. *Mohammed Sharif* (6), (a case of Mohammadan Bodlas of Ferozepore District). In this case it is noteworthy that *Bholi's case* (7), which was relied upon by the counsel appearing on behalf of the sisters was distinguished on the ground that there were instances cited of sisters excluding collaterals; with this remark *Bholi's case* (7), was not followed. It is obvious that the conclusions of the Full Bench in R.S.A. 345 of 1945 were arrived at without a full consideration of the case-law on the

(1) I.L.R. 1 Lah. 1
(2) I.L.R, 1 Lah, 433
(3) I.L.R. 2 Lah. 98
(4) I.L.R, 16 Lah, 4
(5) A.I.R. 1924 Lah. 321
(6) 63 I.C. 544
(7) 35 P.R. 1909

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subject. A review of these decisions, along with the entries in Questions 16 and 17 of the relevant Riwaj-i-am of Gurdaspur District and para 24 of Rattigan's Digest was the basis of the judgment of the Full Bench which was written by Abdur Rashid, C. J. The learned Chief Justice was apparently influenced by the entries in the relevant Riwaj-i-am and observed that custom in support of sisters appeared to be the same both in respect of ancestral and self-acquired property. On a consideration of the material placed on the record of that case and without considering the entire case-law on the subject it was observed that there was a general custom whereby sister is excluded by collaterals, however, remote.

In my opinion para 24 of Rattigan's Digest does not lay down a correct rule of custom of universal application that sisters cannot succeed to acquired property in the presence of collaterals, however remote. In order to determine as to how for para 24 of Rattigan's Digest of Customary Law lays down a universally recognised rule of custom with regard to the right of sisters to succeed to their brother's non-ancestral estate it would not be out of place to consider the nature and scope of this compilation. This Digest was prepared by Sir W. H. Rattigan Kt. in 1880. In the preface to the first edition, dated 5th September, 1880, the author has stated that his main object, when he undertook to compile a treatise on the Customary Law of the Punjab, was to collect together and systematize the numerous decisions of the Punjab Chief Court, some reported, but the greater number not so, on questions of succession, alienation, marriage, tenures of land, adoption and the like. Again when dealing with the result sought to be achieved by compiling this digest the learned author made it clear that he believed that this digest would be found

to embrace the leading principles of Customary Law, so far as they had been judicially ascertained. This preface thus clearly shows that the various paragraphs contained in this digest embodied the conclusions arrived at by the author mainly, if not, only, from the decided cases, whether reported or unreported. Paragraph 24, as its very language shows, is very broadly and generally worded. It does not specify whether it relates to ancestral or acquired property, nor does it show whether collaterals alone are excluded, and if so, up to what degree and whether the tribe to which the last male holder belongs or to members of the proprietary body, are also intended to have preference over sisters and whether escheat to the Crown is also sought to be given a priority over sisters. In this background I will now deal with the decided cases for discovering the scope of this broad and general statement of law contained in this para.

As early as 2nd of December, 1908. William Clark, Chief Judge of the Punjab Chief Court, in *Bholi* v. *Kahna and others* (1), while dealing with inheritance to acquired property in Amritsar District in a dispute between sister and collaterals of the 6th degree observed that the rule stated in para 24 of Rattigan's Digest seemed rather broadly stated and hardly warranted by the authorities quoted for and against. The learned Judge while dealing with this aspect observed as follows:—

> "In the case of daughter, section 23, Rattigan's Digest, gives the preference to daughters over collaterals as regards acquired property. Section 24 says that sisters are usually excluded. This seems rather broadly stated and hardly warranted by the authorities quoted for

(1) 35 P.R. 1909

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and against. No distinction is referred to between ancestral and acquired property such as is made in the case of daughters.

The instances quoted where sisters were excluded were all instances, where the collaterals excluding was nearer than the sixth degree. On the other hand there are many instances quoted where the sisters excluded collaterals within the sixth degree."

It would thus be obvious that up to December 2, 1908, this paragraph was not considered by the Punjab Chief Court to lay down any precise and universally recognised rule of custom based on instances whereby sisters could be considered to be excluded from inheriting their brothers' non-ancestral estate. *Bholi's case* (1), was referred to with approval by a Division Bench of the Punjab Chief Court (Shadi Lal and Wilberforce JJ.) in *Mst. Bhari* v. *Khunun etc.* (2), in which sister was held to be a preferential heir as against 9th degree collaterals with respect to acquired property. This was undoubtedly a case of Jats from Gujrat District but that fact would not detract from its value in so far as it approved the observations in *Bholi's case*, (1). In *Mst. Fatima Bibi and another* v. *Shah Nawaz, etc.*, (3), a Division Bench of the Lahore High Court deciding the case in December 1920 again observed as follows:—

"As for the general rules laid down in paragraph 24 of Rattigan's Digest of Customary Law, it is open to the same criticism, namely, that it is based

(1) 35 P.R. 1909
(2) 20 P.R. 1919
(3) I.L.R. 2 Lah. 98

mainly on authorities regarding ancestral property and on the generally accepted principles of agnatic succession which do not apply in the case of acquired property."

In this case also, as in the earlier case of *Bholi* (1), the Court was dealing with a dispute between sisters and collaterals with respect to acquired property. The learned Judges further observed:—

"There is, it is true, one reported decision cited by the learned author in which sisters were excluded by collaterals of the 10th degree in the case of acquired property. This is a case of the Lahore District and is based on the special custom thought to be prevailing there. (The judgment in question is *Mst. Harnaman* v. *Santa Singh* (2). (There are also other decisions of the same district, namely *Mst. Attar Kaur* v. *Atma Singh* (3), and *Ali Mohammad* v. *Suraj-ud-Din* (4). In the latter case the land was ancestral and in the former it appears to have been so. There are also other decisions affecting various tribes of the Punjab, many of which have been noticed by the lower appellate Court. We do not consider that any general rule can be deduced from these judgments. We hold, therefore, that no special custom was proved in the present case and that there is no general rule so widely accepted among the agricultural tribes of Punjab, that

(1) 35 P.R. 1909
(2) 98 P.W.R. 1912
(3) 47 P.R. 1870
(4) 13 P.R. 1912

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would justify us in coming to any definite conclusion based on custom."

It is thus clear that up to December, 1920, the view held in the Punjab Chief Court and the Lahore High Court was that paragraph 24 of Rattigan's Digest of Customary Law did not lay down any general rule so widely accepted among the agricultural tribes of Punjab that would justify the Court in coming to any definite conclusion based on custom. *Ahmad Khan and others* v. *Mst. Channi Bibi* (1), is a case of Khattar Muslims of District Attock. In that case the dispute related to acquired property and it was held that under custom sisters or daughters were entitled to succeed to acquired property as against collaterals. *Mohammad Alam and others* v. *Mst. Hafizon and others* (2), is a case from Gujrat District in which also it has been held that sisters are entitled as against collaterals to succeed to non-ancestral property of their deceased brother. It is true that they were held to succeed for their life or till their marriage but they were certainly not excluded from inheritance as is envisaged by para 24 of Rattigan's Digest. Reliance in this judgment was placed on *Ahmad Khan and others* v. *Mst. Channi Bibi* (1). In the course of the judgment Addison, J., made the following pertinent observations:—

"In the second place, it was argued that the finding of the learned District Judge that the unmarried sister was entitled to succeed to the self-acquired property of her brother was wrong. As held in *Rahmat Ali* v. *Mst. Sadiq-ul-Nisa* (3), entries in the Customary Law of a

(1) I.L.R. 6 Lah. 502 (P.C.)
(2) I.L.R. 15 Lah. 791
(3) I.L.R. 13 Lah. 404

District must be taken as referring only to ancestral property when no mention of self-acquired property is made. As regards self-acquired property, the same considerations do not apply as in the case of ancestral property. Custom on the whole is concerned with the conservation of ancestral holdings, though of course in some cases there is a customary rule placing self-acquired property in a similar category to ancestral property; but mainly Customary Law looks to ancestral property. That is the reason why it has always been held that entries in Riwaj-i-ams and Customary Laws of districts refer only to ancestral property unless there is specific mention of self-acquired property, and the reason is obvious."

Then we come to the year 1944, when Mahajan, J., made similar observations in *Jagat Singh's case* (1). This and the subsequent cases have already been noticed by me in the earlier part of this judgment. I am also aware of some other unreported cases decided by the Lahore High Court in which paragraph 24 of Rattigan's Digest has been held to be too widely stated, but those cases related to the territory now included in Pakistan and since the records of those decisions are not here, I should not like to refer to them in support of my view. There is still another case recently decided by Falshaw, J., and myself from Amritsar in favour of sister (*Shrimati Bui* v. *Ganga Singh, etc.*) (2).

It is true that while dealing with disputes between daughters and collaterals and considering

(1) 1947 P.L.R. 366
(2) R.S.A. 247 of 1950

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para 23 of Rattigan's Digest, this book has been described by the Privy Council as a book of undoubted authority but several decided cases have doubted the correctness of certain other paragraphs contained in Rattigan's Digest holding them as not laying down the law correctly. For example in *Ahmad* v. *Mohammad and others* (1), Tek Chand and Dalip Singh, JJ., observed that "remarks in para 23(1) of Rattigan's Digest that 'a person cannot succeed to his maternal grandfather except in succession to his mother is not a correct statement of the custom as actually existing in the Punjab Province'. For this dictum the learned Judges relied on a number of decisions digested at page 813, column 2, of the report. Similarly in *Gurdial Singh and others* v. *Mst. Bhagwan Devi and others* (2), Campbell and Tek Chand, JJ., refused to follow the rule laid down in para 271 of Rattigan's Digest of Customary Law and they held that under the general Punjab custom the special property of a married woman does not devolve on her husband's heirs in preference to her own relations. The learned Judges refused to follow para 271 of Rattigan's Digest and while dealing with this para Tek Chand, J., observed as follows:—

> "The learned author of the Digest does not base his remark on any entry in the Riwaj-i-am of any district in the Punjab or on any decided case, reported or unreported."

It is unfortunate that after 1918 for nearly 40 years no enquiry should have been made into the custom with respect to sisters' right of succession. Indeed custom with regard to inheritance of sister

(1) A.I.R. 1936 Lah. 809
(2) I.L.R, 8 Lah, 366

to acquired property has at no time been enquired into. As observed by the Privy Council in *Subhani's case* (1), the custom which adversely affects the right of females who normally do not have any say in this matter does not raise any strong presumption against women. This dictum has also been approved by the Supreme Court in *Gokal Chand* v. *Parsin Kumari* (2). "Custom" as has been observed by Chatterji, J., in *Daya Ram* v. *Sohel Singh and others* (3), "like other law, is a branch of sociology and must be in a fluid state and take cognizance of progress of ethical and legal notions in the community in which it is in force". This observation by one of the most eminent Judges of the Punjab Chief Court was quoted by J. L. Kapur, J:, with approval in *Mst: Jeo* v: *Ujagar Singh* (4), where while dealing with a case from Amritsar District involving dispute between sister and collaterals of 9th degree with respect to non-ancestral property, it was observed that the proposition laid down in para 24 of Rattigan's Digest has not been approved by the High Court of Punjab. In this judgment it was observed that opinion in this State was undergoing a change in favour of the inheritance of females. That rules of custom are liable to change and have been undergoing change with the progress of society has also been recognised by the various compilers of Customary Law in British India. Most of the compilers of the Customary Law have observed this tendency to change and even the Privy Council has observed that Hindu Law and Custom have not stood still. (*Vide Nagin Das Bhagwan Dass* v. *Bacho Harkissandas* (5). Mr. R. Humphreys who compiled

(1) I.L.R. 22 Lah. 154 (P.C.)
(2) A.I.R. 1952 S.C. 231 at p. 235
(3) 110 P.R. 1906
(4) 1953 P.L.R. 1
(5) I.L.R. 40 Bom. 270 at p. 287

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the Customary Law of Hoshiarpur District in 1914 observed thus in his introduction:—

> "Custom is in its essence subject to change. Custom is the general practice on a given point actually prevalent among the community; and precisely as the community itself is liable to change, its practices vary also.....The value of custom is in proportion to the universality of its recognition in practice, much more than to its antiquity or the sanctity of its origin; and (as has been remarked) the one great beauty of customary law is its flexibility, its adaptability to the varying circumstances of the community."

Similarly Mr. Whitehead has in his introduction to the Customary Law of Ambala District (Edition 1921), observed:—

> "As regards changes in the last thirty years there has been a general relaxation in old restrictions especially in the direction of greater rights and liberty for females, and there is now less tribal isolation. Custom is largely moving with the Courts."

Having examined the observations contained in the judicial decision in 1908 and in 1944, it is difficult for me to understand how paragraph 24 could be considered as laying down a universally recognised general rule of custom. There have been quite a number of judicial instances where sisters' claims have been upheld even with respect to ancestral property. Indeed, even in the instant case it is not disputed that in Ambala District with respect to ancestral property sisters are not excluded from inheritance.

In *Sawan and others* v. *Sahib Khatun and others* (1), Sir William Clark, Chief Judge and Mr. Justice Reid, held in favour of a sister even in respect of ancestral property of a deceased proprietor in preference to his collaterals in the fifth degree. To the same effect is the decision in *Ahmed Yar Khan and others* v. *Mst. Fateh Bibi* (2), a case of Tiwanas from Khushab Tehsil, where a Division Bench of the Lahore High Court consisting of Addison and Bhide, JJ., held that by custom among the parties unmarried sister of the last male holder excludes his collaterals till marriage or death. It is true that the judgment in the reported case does not make it clear whether the property was ancestral or non-ancestral, but in my opinion the case would be all the stronger in favour of sisters *qua* acquired property if they were held entitled to succeed even to ancestral property.

But then it is argued that custom is neither logical nor consistent and, therefore, in adjudicating upon custom logic and reason need not be utilised. It is true that in some cases it has been held that custom cannot be extended by logical process (see *Moharram Ali and others* v. *Barkath Ali and othres* (3), approved in *Mohammad Jan and another* c. *Rafi-ud-Din and others* (4). But as against this I find that in *Hashmat Ali and another* v. *Mst. Nasib-un-Nisa* (5), their Lordships of the Privy Council while dealing with the question of succession observed as follows:—

> "But then it is said that no instance is proved of an actual succession by a brother's daughter, and, therefore, it is

(1) 44 P.R. 1909
(2) I.L.R. 14 Lah. 606
(3) I.L.R. 12 Lah. 286
(4) A.I.R. 1949 P.C. 70
(5) I.L.R. 6 Lah. 117

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argued; the necessary custom that precisely covers this case has not been proved. But, if there be a rule that entitles an uncle's daughter to be her father's representative for the purpose of inheritance, it would be anomalous and arbitrary to withhold from a brother's daughter the same right, and their Lordships hold that the High Court rightly decided in Nasib-un-Nisa's favour."

Anomaly and arbitrariness were sought to be eliminated in the reported case by the Judicial Committee of the Privy Council in dealing with the question of custom. In the following decided cases also sisters have been held entitled to succeed:—

Mst. Channi Bibi v. *Ahmad Khan and others* (1), a case from Rohtak District, where a sister was held entitled to succeed to the non-ancestral property of her childless brother in preference to the collaterals of her father.

Ladha v. *Mst. Sadar Bibi and others* (2), in which Shadi Lal, C. J. and Jai Lal, J., held that among Khokhar Rajputs of village Khanpur, Tehsil and District Lahore, a sister excludes collaterals in seventh degree in matters of succession to self-acquired property. The question of custom in this case was considered on a certificate granted under the old section 41(3) of the Punjab Courts Act.

There is one other case to which a reference may usefully be made. In *Rahman* v. *Karim*

(1) (1922) 69 I.C. 331
(2) I.L.R. 11 Lah. 298

Bakhsh (1), a case from Ludhiana District, it was observed that the general principle of Customary Law is that in the absence of all agnates of a childless proprietor any cognate, however, distantly related to him, is entitled to succeed to his property in preference to the proprietary body of the village. This case, though it was concerned with contest between father's sister's sons and the proprietary body, also clearly establishes the rights of cognates to succeed in the absence of agnates.

Before concluding I may also observe that even with respect to ancestral property, according to general custom, it is usually the 5th degree of collateral relationship which is considered as the customary limit for purposes of succession and the seventh degree is rare. Where the collaterals are more than seven degrees removed from the last holder, the onus generally rests on the collaterals to establish their preferential right (see *Amar Devi* v. *Sant Ram* (2), *Dhan Kaur* v. *Sundar* (3), and *Khan Beg* v. *Fateh Khatoon* (4)). It would not be out of place also to make a passing reference to section 5 of the Punjab Laws Act according to which in deciding the question of custom it is relevant to bear in mind the principles of justice and equity. In this connection, in my opinion, it can legitimately be contended on behalf of the appellant that if a sister is, as conceded, treated an heir with respect to ancestral property in Ambala, it would be anomalous, incongruous and arbitrary to hold that she should be disentitled to succeed to acquired property in which collaterals can by no stretch claim any interest on the basis of agnatic theory. I would also be inclined to take the view, that, even if it be held that there was some

(1) 28 P.R. 1917
(2) A.I.R. 1952 Punj. 242
(3) I.L.R. 3 Lah. 184
(4) I.L.R. 13 Lah. 276

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basis justifying the exclusion of sisters from inheritance in the last decade of the nineteenth century when Rattigan's Digest of Customary Law was compiled, the rule of custom with respect to sisters' rights to succeed to acquired property has recently undergone a change as is apparent from a large number of judicial decisions quoted above as also from the amendment of Hindu Law.

To sum up the result of the above discussion on the question of sister's right to succeed to her brother's non-ancestral property, we have the following judicial instances in favour of sisters from Ambala District:—

1 *Munshi's case* (1).

2 *Jagat Singh's case* (2). This is a very well considered decision which relied upon three judicial instances including one decision of the Punjab Chief Court and another from the Lahore High Court, viz., *Bishan Singh* v. *Bhagwan Singh* (3), and *Gurdit Singh and others* v. *Baru* (4).

Maulu v. *Mst. Ishro, etc.* (5). In this case a Division Bench on Letters Patent Appeal affirmed the decision of Mahajan, J., holding sister to be preferential heir as against collaterals of remoter than fifth degree collaterals.

4 *Sukhwant Kaur's case* (6). containing discussion on almost the whole law on

(1) A.I.R. 1937 Lah. 701
(2) 1947 P.L.R. 366
(3) 28 P.R. 1904
(4) A.I.R. 1933 Lah. 1005
(5) A.I.R. 1950 E.P. 289
(6) A.I.R. 1951 Simla 242

the right of sisters to succeed to acquired property under the general custom.

5. *Sawan Singh, etc.* v. *Ude Singh, etc.* (1).

6. *Kali Ram* v. *Bishna* (2).

7. *Harkesh* v. *Surjan, etc.* (3).

8. *Hans Raj* v. *Ganga Ram* (4). In this case Dulat, J., has in a very well-reasoned judgment considered almost all the cases for and against up to that time.

9 *Harnam Singh* v. *Mst. Gurdev Kaur, etc,* (5).

Cases in favour of sisters from other districts:—

1. *Mst. Bholi's case* (6).

2. *Mst. Bhari's case* (7).

3. *Mst. Fatima Bibi's case* (8).

4. *Mst. Hussaini Bibi's case* (9).

5. *Mst. Rabizan's case* (10).

6. *Mst. Jio* v. *Ujagar Singh* (11).

7. *Shrimati Bui* v. *Ganga Singh, etc.* (12).

In the first three cases and the last case paragraph

(1) 1951 P.L.R. 328
(2) R.S.A. 420 of 1949
(3) R.F.A. 207 of 1947
(4) R.S.A. 878 of 1945
(5) 1947 P.L.R. 609
(6) 35 P.R. 1909
(7) 20 P.R. 1919
(8) I.L.R. 2 Lah, 98
(9) I.L.R. 1 Lah. 1
(10) I.L.R. 15 Lah. 791
(11) 1953 P.L.R. 1
(12) R.S.A. 247 of 1950

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24 of Rattigan's Digest was expressly disapproved and in the remaining four cases, in spite of the entry in the relevant *riwaj-i-am* being against the sisters, the decision was given in their favour.

Cases against sisters:—

(1) *Kirpa's case* (1), relping almost exclusively on paragraph 24 of Rattigan's Digest.

(2) Letters Patent Appeal No. 3 of 1948, and Letters Patent Appeal No. 15 of 1949, decided by means of one judgment. This decision followed *Kirpa's case* (1), which means that paragraph 24 of Rattigan's Digest alone was the basis of this decision.

(3) *Sawan Singh's case* (2), which was also based on *Kirpa's case* (1).

In this view of things, if paragraph 24 of Rattigan's Digest is held not to lay down any precise and universally recognised rule of custom with respect to sisters' right to succeed to acquired property, then, it is submitted by the learned counsel for the appellant that it would be legitimate to fall back on personal law, and, according to the Hindu Law as in force since 1929, sister is entitled to exclude collaterals of the sixth degree. There are undoubtedly a large number of decided cases where the Punjab Chief Court and the Lahore High Court as well as this Court have in the absence of any rule of custom fallen back on the personal law of the parties in matters of inheritance (see for example *Daya Ram* v. *Sohel Singh and others* (3), *Inayat* v. *Mst. Bharai and others* (4), *Kehar Singh* v. *Attar Singh and others* (5),

(1) 1948 P.L.R. 220
(2) 1953 P.L.R. 328
(3) 110 P.R. 1906
(4) I.L.R. 9 Lah, 180
(5) A.I.R. 1944 Lah. 422

Rabidat v. *Mst. Jawali and others* (1), *Maulu* v. *Mst. Ishro, etc.* (2), and *Kali Ram* v. *Bishna, etc.* (3), decided by J. L. Kapur, J., on 8th December, 1953):

From the above discussion my conclusion, therefore, are:—

(1) paragraph 24 of Rattigan's Digest is too broadly worded and is too unprecise to lay down any general and universally recognised rule of law excluding sisters from inheritance *qua* acquired property;

(2) even on the assumption that it does lay down any such rule of law, the judicial instances in the present case more than amply rebut any presumption, weak as it must be, that may possibly arise against sisters;

(3) custom is generally concerned with the conservation of ancestral holdings, and, unless as a result of proper and specific inquiry a rule of succession *qua* acquired property is found to exist, the effect of the rule contained in paragraph 24 of Rattigan's Digest must also be confined to ancestral property alone;

(4) that, if under custom as prevailing in Ambala, sister is an heir with respect to ancestral property, it is legitimate to hold that she would also be an heir with respect to acquired property; anomalies and arbitrariness can and should be excluded by Courts when deciding the existence of custom; and

(1) 1946 P.L.R. 350 (F.B.)
(2) 1950 E.P. 289
(3) R.S.A. 420 of 1949

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(5) that, when there is no rule or custom applicable to a particular case, personal law of the parties should be resorted to.

Dua, J.

On the basis of these conclusions I think sister in the present case must be held entitled to succeed in preference to collaterals of 6th degree.

For the reasons given above, in my opinion, this appeal should succeed and the decree of the Courts below set aside and the plaintiff's suit decreed. In the circumstances of the case, however, the parties are left to bear their own costs throughout.

Falshaw J.

FALSHAW, J.—I agree and have nothing to add.

Mehar Singh, J.

MEHAR SINGH, J.—The contest is between the sisters and sixth degree collaterals of Sawan, the last male holder, about the non-ancestral land left by him. The parties are Jats of Kharar Tehsil in Ambala District and have litigated their rights under the rule of inheritance according to the custom of the tribe in the particular district.

Custom is proved, (a) by instances either actually brought on the record during the trial of a particular case or already judicially noticed, or, failing that, (b) by the opinion of the tribe concerned about their custom usually to be found recorded in the Riwaj-i-am. I have no doubt in my mind that in a case where no instances supporting custom are available, and the decision is to proceed on the consideration of opinion as to custom, the opinion of the tribe as usually found in a Riwaj-i-am must prevail as against any judicial opinion not supported by instances or tribal opinion. So cases in which finding as regards custom is not based either on instances or on the

opinion of the tribe concerned are cases of no significance whatsoever in the decision of a question as to the existence of a custom.

In the present case at the trial some instances in the shape of copies of mutation entries (Exhibits D. 1 to D. 8), were relied upon by the collaterals to prove that under custom on the question of inheritance sisters are excluded by collaterals in Ambala District, but those instances are not helpful, because it is not shown that they relate to inheritance to non-ancestral land. Actual instances in the case supporting custom alleged by one or the other side are not to be found. In regard to judicially noticed instances Mehr Chand Mahajan, J., in *Jagat Singh* v. *Puran Singh* (1), refers to three of them. The first is *Bishen Singh* v. *Bhagwan Singh* (2), but that was a contest between sisters of the last holder and the village proprietary body. The second instance is *Gurdit Singh* v. *Baru* (3), and in that case the learned Judge merely says that the Riwaj-i-am of Rupar Tehsil shows that sisters inherit in the absence of near collaterals, that is, fifth degree collaterals, it not being clear from the short judgment, as reported, the contest was between what degree of collaterals and the sisters of the last male holder. These two instances, to my mind, are not very satisfactory. The reference to the third instance by the learned Judge is in these words—"Then an instance has been placed on this record. That is the instance which is proved by Exhibits P. 9 to P. 11 of this record (*Hazara Singh* v. *Mst. Nihali*). This case related to non-ancestral property which had been gifted by the mother of the last male holder in favour of the sister of the last male holder. It was held that

(1) 1947 P.L.R. 366
(2) 28 P.R. 1904
(3) A.I.R. 1933 Lah. 1005

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the gift was valid amongst the Jats of Rupar as an acceleration of succession. This is the nearest instance and it supports the custom set up by the sisters of the last male holder in the present case. The collaterals have not been able to refer to any instance to the contrary. There are a few other reported cases in which the same question has been considered but the decision in those cases has not proceeded upon evidence as to the existence of custom and so those cases, to my mind, are not helpful. *Jagat Singh* v. *Puran Singh* (1), is itself an instance to support the case of the sisters here. So that there are two judicially noticed instances in support of the custom set up by the sisters in the present case and none in support of the sixth degree collaterals. This consideration balances the decision in favour of the sisters of the last male holder, who are the plaintiffs, as against his sixth degree collaterals.

In paragraph 24 of his Digest of Punjab Customary Law, Rattigan says:—

> "Sisters are usually excluded, as well as their issue."

But by now the better opinion is that the rule so stated as a general rule of custom is far too widely stated. So cases decided solely relying upon this paragraph are of no assistance. This paragraph does not help the sixth degree collaterals in the present case.

However, paragraph 23(2) of the same book, which has by highest judicial authority now been accepted as laying down a general custom, says:—

> "But in regard to the acquired property of her father, the daughter is preferred to collaterals."

(1) 1947 P.L.R. 366

Answer to question No. 47 of the Customary Law of Ambala District first by Kensington and then by Whitehead is that a sister will succeed in the absence of a daughter or daughter's son. It is true that the Customary Law or Riwaj-i-am of Ambala District, like Riwajat-i-am of other districts, generally relates to ancestral land, but one aspect of the matter is clear beyond question that Riwaj-i-am of Ambala District relates to the rules of inheritance among Jats and that one of those rules is that in the absence of a daughter or a daughter's son succession passes to a sister of the last male holder. This rule of succession when considered along with the statement of general custom in paragraph 23(2) of the Rattigan's Digest of Customary Law leads to this, that in regard to non-ancestral property in Ambala District, where the case has to be decided according to the rules of succession under custom, sister is an heir to such land of the last male holder in the absence of his daughter or daughter's son, either of whom excludes in this matter his collaterals.

In the present case on consideration (a) of the two instances already referred to, and (b) of the rule of inheritance under custom prevailing in the Ambala District among Jats preferring a sister as the next heir after the daughter or daughter's son of the last male holder taken along with the general rule of custom stated in paragraph 23(2) of Rattigan's Digest of Customary Law that in regard to non-ancestral land daughter is preferred to collaterals, the sisters as plaintiffs are entitled to succeed as against the sixth degree collaterals of Sawan Singh, deceased in regard to the non-ancestral land left by him.

My opinion in this case is confined to this particular case from Ambala District and to the two considerations as stated above alone and no other.

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It has been said that recent statutory law has modified or has tended to modify custom in matters of inheritance, but it has been somewhat difficult for me to appreciate this. It appears apparent to me that a statute either directly applies or it does not apply to a particular case. Where it does not apply directly, it cannot be applied indirectly or by a devious approach by saying that it has modified or changed or it has tended to modify or change custom. There is to my mind no such possible effect of a statutory provision on any legitimate or reasonable assumption or presumption. It may be that in the wake of a statutory rule those following custom may in due time themselves proceed to so modify or alter their custom as to substantially bring it in line with the statutory rule, but in such an eventuality change or modification in the custom will be established not based on any assumption or presumption from the statutory rule, but with reference to actual proof of instances showing that custom has undergone change after the enactment of a statutory provision and somewhat in the light or guidance of such a provision. I do not see how in any other manner a provision in a statute, which has not been directly applied, dealing with a matter of law subject to rules of Customary Law, can be read as such as operating to modify or change such custom merely because the Legislature has thought fit to legislate so, for different circumstances and for different sets of citizens. To so apply a statutory provision to substantially abrogate a custom, not directly overriding custom, is for a Judge to take upon himself the function of the Legislature and then to do what the Legislature itself has refrained from doing. To my mind this is no part of the function of a Judge.

In consequence I agree, for the foregoing reasons, that in the present case the appeal of the

plaintiffs should succeed and reversing the decree of the Courts below the suit of the plaintiffs be decreed. Parties to bear their own costs throughout.

Mehar Singh, J.

B. R. T.

LETTER PATENT APPEAL

Before G. D. Khosla, Acting C.J. and S. S. Dulat, J.

THE PUNJAB STATE AND ANOTHER,—*Appellants*

versus

MESSRS SHAMBHU NATH AND SONS, LTD., AMRITSAR,—*Respondents.*

1959

Jan., 14th

Letters Patent Appeal No. 91 of 1958.

Dangerous Drugs Act (II of 1930)—Object of—Section (8)(2)—Rule 27.30 of the Punjab Excise Manual, Volume II, framed under—Whether ultra vires *as violating the right under Article 19(1)(g) of the Constitution—Matter left to the discretion of Licensing Officer—No appeal or revision provided—Whether sufficient to hold the rule to be* ultra vires.

Held, that the object of the Dangerous Drugs Act and of the rules framed thereunder is the professed object of vesting in the Central Government the control of dangerous drugs. It will not be denied by any right-thinking person that it is essential to have some kind of control over dangerous drugs. The question whether any particular impediment or control is or is not reasonable will depend upon the peculiar facts of each case. The kind of restriction which, when applied to, say, the manufacture of opium or some other poisonous drug, would be considered eminently reasonable, would not be reasonable when applied to a commodity of everyday use like cloth. In the same way restrictions may be placed upon the growth and cultivation of opium poppy or hemp. But to place such a restriction upon the growth or cultivation of food, cereals or vegetables would not be considered reasonable. Therefore, the question whether any particular restriction is or is not reasonable must depend upon the facts of each case.

Held, that Rule 27.30 of the Punjab Excise Manual, Volume II, framed under Section 8(2) of the Dangerous