those of the present case. The plaintiff in that case had employed the defendants as bailees for certain furniture of his. The defendants instead of keeping the furniture at the place specified in the contract removed the same to another place and left it there without any arrangements for watch and ward with the result that some of it was stolen. The plaintiff filed a suit for the recovery of the price of the furniture alleging that the defendants had been guilty of negligence in the performance of the contract. Although the claim in negligence was a claim in tort, the claim as a whole arose from the contract of bailment and was, therefore, held covered by the arbitration clause. In the present case, however, no claim is founded on the basis as envisaged by section 7 of the Act, and the plaintiffs' whole case is based on tort and tort alone.

Gosain, J.

For the aforesaid reasons, I find that the learned trial Judge was not justified in staying the suit under the provisions of section 34 of the Indian Arbitration Act. I, accordingly, accept the appeal, set aside the order of stay and remand the case to the trial Court for its decision on merits. The costs in this Court will abide the ultimate event. Parties to appear in the trial Court on the 18th May, 1959.

GROVER, J.—I agree.

Grover, J.

B.R.T.

SUPREME COURT

Before Syed Jafer Imam and J. L. Kapur, JJ.

RANJIT SINGH,—*Appellant.*

versus

THE STATE OF PEPSU (NOW PUNJAB),—*Respondent*

Criminal Appeal No. 19 of 1957

1957

Apr., 21st

Indian Penal Code (XLV of 1860)—Section 191—Person not bound to make an affidavit making one which is

found to be false—Whether guilty of giving false evidence—Constitution of India (1950)—Article 226—Code of Criminal Procedure (V of 1898)—Section 491—Writ of Habeas Corpus—Detaining authority—Whether bound to file affidavit in support of the return.

Held, that the opening words of Section 191 of the Indian Penal Code "Whoeevr being legally bound by an oath or by an express provision of law to state the truth ....." do not suport the submission that a man, who is not bound under the law to make an affiravit, can, if he does make one, deliberately refrain from stating truthfully the facts which are within his knowledge. The meaning of these words is that whenever in a court of law a person binds himself on oath to state the truth he is bound to state the truth and he cannot be heard to say that he should not have gone into the witness-box or should not have made an affidavit and, therefore, the submission that any false statement which he had made after taking the oath is not covered by the words of section 191, Indian Penal Code, is not supportable. Whenever a man makes a statement in court on oath he is bound to state the truth and if he does not, he makes himself liable under the provisions of section 193. It is no defence to say that he was not bound to enter the witness-box. A defendant or even a plaintiff is not bound to go into the witness-box but if either of them chooses to do so, he cannot, after he has taken the oath to make a truthful statement, state anything which is false. Indeed the very sanctity of the oath requires that a person put on oath must state the truth.

Held, that in a writ of Habeas Corpus when there is no question of fact to be examined or determined, no affidavit is needed. As soon as there emerges a fact into which the Court feels it should enquire, the necessity for an affidavit arises. Ordinarily an affidavit may not be necessary in makig the return if the detention is under orders of the detaining authority in exercise of its plenary discretion or a person is detained under the orders of a court. But where the detention is alleged to be unauthorised, it becomes necessary for the detaining authority to justify its action by disclosing facts which would show to the satisfaction of the Court that the custody is not improper. When issues of fact are raised and the actions of the

police officers are expressly challenged and facts are set out which, if unrebutted and unexplained, would be sufficient for the writ to issue, an affidavit becomes necessary.

Appeal by Special Leave from the Judgment and Order, dated the 7th March, 1956, of the former PEPSU High Court in Criminal Revision No. 45 of 1956, arising out of the Judgment and Order, dated the 22nd February, 1956, of the Additional Sessions Judge, Patiala, in Criminal Appeal No. 175/36 of 1955-56.

PRITAM SINGH SAFEER, for Appellant.

N. S. BINDRA with T. M. SEN, for Respondent.

JUDGMENT

The following Judgment of the Court was delivered by—

Kapur,J.—This is an appeal by special leave against the judgment and order of the High Court of PEPSU passed in revision. The appellant was a Sub-Inspector of Police who at the relevant time was the Station House Officer incharge Shehna police station in the erstwhile PEPSU State. He was convicted under section 193, Indian Penal Code, by a First Class Magistrate and his appeal to the Sessions Judge, Patiala, was dismissed except as to sentence. He took a revision to the PEPSU High Court but that was also dismissed. Kapur. J.

This appeal has arisen in the following circumstances: One Surjit Singh, son of Risaldar Waryam Singh was arrested on September 25, 1953, at Barnala in PEPSU State by the Police Inspector Jaswant Singh. He was kept in the lock-up at Baranala and on the following day his custody was handed over to the appellant and he was taken to Shehna and was kept in custody—it is not clear under what section—in the police station lock-up at Shehna. Surjit Singh was there kept in custody

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from September 25, 1953, till October 10, 1953, when at about 10 p.m., he was surreptiously removed to Police Station Dialpur and then to Police Post Hamirgarh and from there was taken to Police Station Baga Purana in Ferozepore District, of the then Punjab. An application under section 491 of the Criminal Procedure Code and under Article 226 of the Constitution was made for a writ of Habeas Corpus and Mandamus in the High Court of PESPU. In that petition it was alleged that Surjit Singh was being kept in unlawful custody without any charge being made and without obtaining a remand by a Magistrate. In reply to this, an affidavit dated October 13, 1953, was filed by the appellant in which he stated that Surjit Singh had association with notorious dacoits; that he, the appellant, had never taken him into custody at any time; that the said Surjit Singh was absconding and had not been arrested in spite of the best efforts of the police; that at the time of the making of the affidavit he was not in the appellant's custody and that it was incorrect that Inspector Jaswant Singh had ever entrusted Surjit Singh to his (appelant's) custody. He also stated that no petition had been brought to him nor had he received any telegrams in connection with the custody of Surjit Singh. This affidavit was affirmed as follows :—

> "I solemnly affirm that the facts stated from para No. 1 to 7 are true to the best of my knowledge and belief and nothing which is relevant to this case has been kept back from this Hon'ble Court".

As both the parties admitted before the High Court that Surjit Singh was not in the custody of the appellant the petition was dismissed. On November 9, 1953, the brother of Surjit Singh made an application under section 476, Criminal Procedure

Code, for the prosecution of Inspector Jaswant Singh and the appellant for perjury under section 193, Indian Penal Code, in that they had filed false affidavits. This matter was heard by another learned Judge of that Court who ordered the prosecution of the appellant and directed the Registrar of the High Court to file a complaint which was filed.

The complaint was taken cognisance of by the First Class Magistrate at Patiala who convicted the appellant and sentenced him to nine months' imprisonment and a fine of Rs. 300 and in default to undergo simple imprisonment for two months. The appellant took an appeal to the Sessions Judge, Patiala, who confirmed the order of conviction but reduced the sentence to one of three months' simple imprisonment and a fine of Rs. 50 and in default one month's simple imprisonment, a revision against this order was dismissed in limine by the Chief Justice although he gave reasons for dismissing it. The appellant then obtained special leave from this Court.

On behalf of the appellant the first contention raised was that the appellant was not bound to file an affidavit and, therefore, he could not be convicted under section 193, Indian Penal Code, because his case did not fall under section 191, Indian Penal Code. In support of hisc contention he relied upon the Rules of the PEPSU High Court framed for the purpose of proceedings under Article 226 and section 491(2), Criminal Procedure Code, for the issuing of writs of Habeas Corpus. He also referred to the Rules made by that Court for the issuing of writs of Mandamus, Prohibition, Quo Warranto and Certiorari under Article 226 and submitted that there was no Rule in the former i.e., for writ of Habeas Corpus requiring a return

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to be made on behalf of the respondent—to be supported by an affidavit whereas in the latter i.e., issuing of writs of Mandamus etc., an affidavit was necessary and, therefore, it was submitted that section 191 was inapplicable. Rule 2 of the Rules of the Court required that when a Judge was of the opinion that prima facie case had been made out for granting the application a rule nisi was to issue calling upon the person or persons against whom the order was sought, to appear before the Court, and to show cause why such an order should not be made. As has been pointed out in *Green* v. *Home Secretary* (1), which was a case under Reg. 15-B of the Defence of the Realm Act the whole object of proceedings for a writ of Habeas Corpus is to make them expeditious, to keep them as free from technicality as possible and to keep them as simple as possible. "The incalculable value of Habeas Corpus is that it enables the immediate determination of the right to the appellant's freedom" (Lord Wright). When there is no question of fact to be examined or determined no affidavit is needed. As soon as there emerges a fact into which the Court feels it should enquire the necessity for an affidavit arises. Ordinarily an affidavit may not be necessary in making the return if the detention is under orders of the detaining authority in exercise of its plenary discretion as in *Liversidge* v. *Anderson* (2), and in *Green's case* (1), (supra) or a person is detained under the orders of a Court. But where the detention is as it was in the present case, it becomes necessary for the detaining authority to justify its action by disclosing facts which would show to the satisfaction of the Court that the custody is not improper. Where the prisoner says "I do not know why I have been detained, I have done no wrong, it is

(1) [1942] A.C. 284, 321
(2) [1942] A.C. 206

for the detaining authority to justify the custody. When issues of fact are raised and the actions of the police officers, as in the present case, are expressly challenged and facts are set out which if unrebuted and unexplained would be sufficient for the writ to issue, an affidavit becomes necessary. It cannot be said therefore that in the present case the appellant was not legally bound to place facts and circumstances before the Court to justify the detention of Surjit Singh and this could be done by an affidavit.

Section 4 of the Oaths Act lays down the authority to administer oaths and affirmations and it prescribes the courts and persons authorised to administer by themselves or by their officers empowered in that behalf oaths and affirmations in discharge of the duties or in exercise of the powers imposed upon them and they are, all courts and persons having by law the authority to receive evidence. Section 5 prescribes the persons by whom oaths or affirmations must be made and they include all witnesses i.e., all persons who may lawfully be required to give evidence by or before any court. These two sections show that the High Court or its officers were authorised to administer the oath and as the appellant was stating facts as evidence before the High Court he had to make the oath or affirmation and was bound to state the truth. Section 14 of that Act is in the following words:—

> Section 14. "Every person giving evidence on any subject before any Court or person hereby authorised to administer oaths and affirmations shall be bound to state the truth on such subject".

As the appellant was giving evidence on his own behalf in that he was denying the allegation made in

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the affidavit of the brother of Surjit Singh he was bound to state the truth on the subject on which he was making the statement. The contention, therefore, that under section 191 of the Indian Penal Code the relevant portion of which is:—

> Section 191. "Whoever being legally bound by an oath or by an express provision of law to state the truth..... makes any statement which is false and which he either knows or believes to be false or does not believe to be true, is said to give false evidence".

the appellant was not legally bound by oath to state the truth cannot be supported. On the other hand at the stage of the proceedings in the High Court where it was being alleged that Surjit Singh was being detained by the appellant illegally it was necessary for the appellant to make an affidavit in making a return and, therefore, if the statement is false, as it has been bound to be, then he has committed an offence under section 193.

The opening words of section 191 "whoever being legally bound by an oath or by an express provision of law to state the truth....." do not support the submission that a man, who is not bound under the law to make an affidavit, can, if he does make one, deliberately refrain from stating truthfully the facts which are within his knowledge. The meaning of these words is that whenever in a court of law a person binds himself on oath to state the truth he is bound to state the truth and he cannot be heard to say that he should not have gone into the witness box or should not have made an affidavit and, therefore; the submission that any false statement which he had made after taking the oath is not covered by the words of

section 191 Indian Penal Code is not supportable. Whenever a man makes a statement in court on oath he is bound to state the truth and if he does not; he makes himself liable under the provisions of section 193. It is no defence to say that he was not bound to enter the witness box. A defendant or even a plaintiff is not bound to go into the witness box but if either of them chooses to do so he cannot; after he has taken the oath to make a truthful statement; state anything which is false. Indeed the very sanctity of the oath requires that a person put on oath must state the truth. In our opinion this contention is wholly devoid of force and must be repelled.

It was then contended that the officer before whom the appellant swore the affidavit; i.e., the Deputy Registrar of the High Court of PEPSU was not authorised to administer oaths. That officer as a witness for the prosecution has stated that he could administer an oath and, therefore, this contention of the appellant is also without any force and must be repelled.

It was also argued that the affidavit filed by the appellant was affirmed as being true to the best of knowledge and belief and, therefore it could not be said as to which part was true to the appellant's knowledge and which to his belief. We have read the affidavit which consists of 7 paragraphs and each paragraph relates to affirmation of a fact which, if true, could only be so to the appellant's knowledge. But even belief would fall under Explanation 2 to section 191 which is as under:—

> Explanation 2 to section 191. "A false statement as to the belief of the person attesting is within the meaning of this section, and a person may be guilty of giving false evidence by stating that he

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believes a thing which he does not believe, as well as by stating that he knows a thing which he does not know".

The appellant relied upon a judgment of the Allahabad High Court in *Emperor* v. *Lachmi Narain* (1). But unless there was something peculiar in the facts of that case it cannot be considered to be good law. It does not even take into consideration Explanation 2 of section 191.

Lastly it was urged that the procedure adopted by the Magistrate was erroneous in that he did not hold an enquiry as required under sections 200 and 202. Criminal Procedure Code, the former of which is expressly mentioned in sub-section 2 of section 476, Criminal Procedure Code. That contention is equally untenable because under section 200 proviso (aa) it is not necessary for a Magistrate when a complaint is made by a Court to examine the complainant and neither section 200 nor section 202 requires a preliminary enquiry before the Magistrate can assume jurisdiction to issue process against the person complained against.

In our opinion the appellant has been rightly convicted and we would, therefore, dismiss this appeal.

B. R. T.

SUPREME COURT

Before Bhuvaneshwar Prasad Sinha, J. L. Kapur and M. Hidayatullah, JJ.

RAM DIAL,—*Appellant*

versus

SANT LAL AND OTHERS,—*Respondents.*

Civil Appeal No. 108 of 1959

1959

Apr., 23rd

Representation of the People Act (XLIII of 1951)—Section 123(2)—Undue influence—What amounts to—Threat

(1) I.L.R. 1947 All. 155

of divine displeasure or spiritual censure—Whether amounts to undue influence—Right of religious leader to canvass for a candidate—Extent of.

Held, that section 123(2) of the Representation of the People Act, 1951 does not emphasize the individual aspect of the exercise of undue influence but pays regard to the use of such influence as has the tendency to bring about the result contemplated in the clause. What is material is not the actual effect produced, but the doing of such acts as are calculated to interfere with the free exercise of any electoral right. Thus where a poster is issued in the name of a spiritual leader couched in such language that it conveys the distinct impression to his followers, who are voters in the Constituency and amongst whom he wields great local influence, that it was their bounden duty, under the strict order of their religious leader, not only to cast their own votes in favour of the particular candidate, but also to exert their influence amongst their friends and acquaintances in favour of that candidate, and that any infringement of that mandate has implicit in it divine displeasure or spiritual censure, it amounts to corrupt practice of undue influence.

Held, that a religious leader has the right freely to express his opinion on the compartive merits of the contesting candidates and to convass for such of them as he considers worthy of the confidence of the electors. In other words, the religious leaders has a right to exercise his influence in favour of any particular candidate by voting for him and by canvassing votes of others for him. He has a right to express his opinion on the individual merits of the candidates. Such a course of conduct on his part will only be a use of his great influence amongst a particular section of the voters in the constituency; but it will amount to an abuse of his great influence if the words he uses in a document, or utters in his speeches, leave no choice to the persons addressed by him, in the exercise of their electoral rights. If the religious head had said that he preferred the appellant to the other candidate, because, in his opinion, he was more worthy of the confidence of the electors for certain reasons good, bad or indifferent, and addressed words to that effect to persons who were amenable to his influence, he would be within his rights, and his influence, however, great, could not be said to have

been misused. But where the religious leader practically leaves no free choice to his followers, not only by issuing the *hukam* or *farman*, but also by his speeches, to the effect that they must vote for a particular candidate, implying that disobedience of his mandate would carry divine displeasure or spiritual censure, the case is clearly brought within the purview of the second paragraph of the proviso to Section 123(2) of the Representation of the People Act, 1951.

Appeal from the Judgment and Order, dated the 25th November, 1958 of the Punjab High Court in F. A. O. No. 173 of 1958.

A. V. VISWANATHA SASTRI with NAUNIT LAL, for Appellant.

M. C. SETALVAD with V. A. SYED MOHAMMUD, M. K. RAMAMURTHI and R. H. DHEBAR, for Respondents.

JUDGMENT

Sinha, J. Sinha, J.—When the hearing of the appeal had been concluded on March 18, 1959, we had informed the parties, as also the counsel for the Election Commission of India, that the appeal is dismissed with costs, and that the reasons would follow. We now proceed to give our reasons.

This is an appeal on a certificate of fitness granted by the High Court of Judicature for the State of Punjab at Chandigarh, against the judgment and order dated November 25, 1958, of that Court, dismissing an apeapl against the order of the Election Tribunal, Hissar, dated September 14, 1958, setting aside the appellant's election to the Punjab Legislative Assembly. The appellant was the successful candidate from the general seat which was a double-member constituency of Sirsa, the other successful candidate being a Harijan candidate—respondent No. 2 in this Court. The first respondent contested the general seat. The

Election Commission of India was added as the third respondent by an order of this Court, dated February 27, 1959, when this Court was moved in the stay matter. This Court directed the case itself to be heard before the date fixed for the fresh election as a result of the order of the Election Tribunal.

It appears that for the double-member constituency of Sirsa, there were a large number of candidates. One of the two seats was reserved for members of the scheduled castes. After the usual withdrawals, sixteen candidates were left in the field to contest the two seats, eight candidates being for the general seat, and the other eight, for the reserved seat. We are not here concerned with the seat reserved for members of the scheduled castes. In respect of the general constituency, the appellant secured 27,272 votes, whereas the first respondent secured 23,329, as a result of the election which took place on March 12 and 14, 1957. The result of the election was declared on March 17, 1957.

The first respondent filed an election petition on April 28, 1957, challenging the election of the appellant. The election was challenged on a large number of grounds—practically exhausting all available grounds under the election law—but as a result of the findings of the Election Tribunal and of the High Court, we are only concerned with the allegations relating to "corrupt practices", contained in sub-paras. 1 to 3 of para. 13-B of the election petition, which formed the basis for issue No. 4. The relevant allegations may be stated in extenso in the words of the election petition, as under:—

> "(B): That respondent No. 1 himself, his agents and other persons with the consent of the respondent No. 1 and his

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agents have committed the corrupt practice of undue influence by interfering directly or indirectly with the free exercise of the electoral rights of the electors of this constituency. The known details of these corrupt practices are given in the various clauses under the sub-para:—

(i) Sat Guru Maharaj Pratap Singh of Jiwan Nagar, the religious head of Namdharis sect of the Sikhs had some personal grievance aginst Shri Devi Lal of Chautala a prominent Congress Leader of the constituency, and the Chief supporter of the petitioner at this election. Respondent No. 1 fully knowing of this grievance of the Sat Guru approached him and through him also approached Maharaj Charan Singh of Sikanderpur the religious head of the Radha Swami Samaj and got issued Farmans (orders) by both these religious heads to their followers in this constituency to the effect that their Dharma required them to wholeheartedly support respondent No. 1 and to oppose the candidature of the petitioner and that if any of the followers dared to act against their Farmans, the wrath of the aforementioned Gurus would fall upon him and he would be the object of Divine displeasure. These Farmans of the two Gurus were orally conveyed, through the 'Subas' of Namdharis, Shri Bir Singh the son of Sat

Guru Pratap Singh and Naginder Singh and Shri Parshotam Singh followers of Guru Charan Singh, throughout the Constituency wherever the followers of these two sects resided from the day of withdrawal till the polling began, during their canvassing tours for respondent No. 1, Shri Bir Singh, Parshotam Singh and Naginder Singh aforesaid and Sant Teja Singh M.L.C., in Diwans held in the various villages and towns of the Constituency during their canvassing tour, besides repeating these 'Farmans' of the two Gurus also threatened the followers with explusion from the sect and Samaj if they went against the wish of the Gurus in this matter.

(ii) That Sat Guru Pratap Singh himself in the presence of respondent No. 1 in the Big-Diwan of his followers held on the 26th of February, 1957 at Sirsa in Radha Sawmi Sat-Sangh Hall, preached and commanded all those present that it was the primary Dharma of all his followers to help the candidature of respondent No. 1 and to oppose the petitioner with all their might by giving their own votes and by canvassing among their area of influence in the constituency. The Sat Guru himself held Diwans at villages Tharaj on the 6th of March, 1957 at village Bhiwan on the 5th March, 1957, at village Rori on the 6th March, 1957 and at

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Phaggu on the 6th March, 1957. In these Diwans he besides repeating his Farmans aforesaid also relied upon the strong appeal of his relationship, he being the son of the daughter of village Tharaj. A very big diwan of his followers also held at Khairpur on the 26th February, 1957 for the same purpose where the Sat Guru himself commanded his followers in the like tune.

(iii) That respondent No. 1 got issued posters in thousands printed on both the sides in Hindi and Gurmukhi scripts on the 26th of February, 1957 containing the orders 'Farmans' of Satguru Partap Singh under the signature of Shri Maharaj Bir Singh son of Satguru Partap Singh. These posters were got published at the instance of respondent No. 1 at Bansal Press, Hissaria Bazar, Sirsa. These posters contained in verbatim the orders 'Farmans' of the Satguru to the effect that it was the primary Dharma of every Namdhari of this constituency to give his own vote as well as to canvass votes of their all acquaintances for Shri Ram Dayal candidate respondent No. 1. A copy of the poster in original together with its English translation is attached with the petition and may be read as to form its part. These posters were distributed throughout the constituency after the same were got printed till the polling day in all the villages where Nawdhari reside."

In support of all his allegations quoted above, the first respondent adduced a large volume of oral evidence, besides some documentary evidence as well. The Tribunal came to the conclusion that Maharaj Partap Singh had issued *farmans* to his *satsanghis* that he, who will not vote for the appellant, would suffer not only in this world but in the next also, but it found it not proved that the *farmans* or orders of the two religious heads of the Namdharis and Radhaswamis, were orally conveyed through Maharaj Bir Singh, son of Maharaj Partap Singh, Naginder Singh and Shri Purshotam Singh, to the followers of the two *Gurus* in the constiuency, or that they, while conveying the *farmans* of the *Gurus*, threatened the followers with expulsion from the sect, if they went against the wishes of the *Gurus* except what Naginder Singh had said in the *Diwan* at Sirsa and at other places. It also recorded the findings that the *Diwans* were held for the purpose of canvassing in favour of the appellant at the time and place mentioned in the petition, and that those *Diwans* were addressed by Maharaj Partap Singh and others. It was also found that Maharaj Partap Singh actively supported the candidature of the appellant, and addressed his followers on the basis of religion and asked them to vote for the appellant, and that all this was done at the instance and in the presence of the appellant. It was further found that posters, like Exhibit P. 1, were issued by the appellant under the authority of Maharaj Bir Singh and his father, Maharaj Partap Singh, and widely distributed throughout the constituency. The Tribunal also discussed the question as to whether, on those findings, the provisions of section 123(2) of the Representation of the People Act, 1951 (which will hereinafter be referred to as 'the Act'), relating to "undue influence", could be said to have been satisfied;

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and alternatively, whether those findings would bring the case within the provisions of clause (3) of section 123 of the Act, relating to systematic appeal on grounds of caste, race, community or religion, etc. The Tribunal appeared to be inclined to the view that a command ih terms of exhibit P. 1, emanating from a religious head, like the Sat Guru, to his followers—mostly illerate and ignorant persons—may well be construed as "undue influence". But alternatively, it also held that even if the provisions of clause (2) of section 123 of the Act, had not been satisfied, the case had been brought well within the purview of clause (3) of section 123. Other issues were either not pressed or were decided against the petitioner in that court. The Tribunal, therefore, declared the appellant's election void under section 100(1)(b) of the Act. In view of the fact that the petitioner had failed to substantiate many of his allegations, the Tribunal directed the parties to bear their own costs.

The appellant preferred an appeal which was heard by a Division Bench (Falshaw and Dua, JJ.) of the High Court of Judicature for the State of Punjab at Chandigarh. The High Court substantrialy affirmed the findings of the Election Tribunal on issue No. 4 aforesaid. The High Court also accepted the oral evidence adduced on behalf of the respondent, with particular reference to the publication and wide distribution of the poster, Exhibit P. 1. In the course of its judgment, the High Court observed:

> "The language of the mandate and the general background and circumstances of this case including the obvious consciousness of Maharaj Pratap Singh and Ram Dial of the probable and likely effect of

such commands on the illiterate, ignorant and credulous followers of the Maharaj can lead but to one conclusion that it was intended to convey to them the threat of divine displeasure and spiritual censure if they dared to disobey the *farman* of their supreme spiritual and religious head."

In answer to the contention that the *farman* had been motivated not by religious considerations but by a personal grievance, the High Court did not attach any importance to the alleged difference in the motive, and observed:—

"If the influence exercised by the religious and spiritual head has the effect of creating in the minds of the voters a feeling of divine displeasure or spiritual censure then whatever the motive, the influence would amount to undue influence. The contents of the poster reproduced earlier unequivocally establish the mandatory nature of the command. Religious sanction is, in my opinion, implicit in it and I think, on a reasonable construction of its contents, it must be held that Maharaj Partap Singh intended to convey to his followers who are mostly illetrate, ignorant, credulous and unsophisticated villagers, having blind and implicit faith in their religious head that if they did not vote for Ram Dial, they would incur divine displeasure and spiritual censure. With this class of villagers the displeasure of the religious heads is usually associated with divine displeasure."

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Dealing with the scope of section 123(2), it held that the language of the poster, Exhibit P. 1, construed in the light of the oral evidence, left the Court in no doubt that Maharaj Partap Singh's *farman* did necessarily imply divine displeasure and spiritual censure for those who chose to disobey the *farman*. In its view, therefore, the facts, as found, attracted the provisions of section 123(2) of the Act. It also held that the evidence led in the case, established that the meetings addressed by Maharaj Partap Singh and others, in support of the election of the appellant, induced the belief that the voters would incur divine displeasure or spiritual censure if they did not vote in accordance with the mandate issued by the Maharaj, thus, clearly establishing the commission of corrupt practice of "undue influence". The High Court also examined the question whether the corrupt practice falling under clause (3) of section 123 of the Act, had been established, and decided the question in the negative, though not without some hesitation. It further held that the publication of the poster, Exhibit P. 2, did not bring the case within the purview of section 123(4) of the Act. In the result, the High Court agreed with the conclusion of the Tribunal, declaring the election void, and dismissed the appeal with costs. The appellant applied to the High Court, praying for the necessary certificate that the case was a fit one for appeal to this Court, and that Court granted the certificate. Hence, this appeal.

After the decision of the Tribunal and of the High Court, the only question for determination in this appeal, is whether, on the findings of fact recorded, as stated above, the corrupt practice of "undue influence", as defined in section 123(2), has been made out. It has been argued on behalf of

the appellant that the main clause (2) of section 123, is out of the way of the parties in this case, because it applies only to threats of injury to person or property and not to what may be termed "spiritual undue influence", which is specifically covered by sub-clause (ii) of *proviso* (a) to clause (2) of section 123. It was further argued that the word "deemed" would show that the *proviso* is by way of an addition to the main provision of clause (2) of section 123; that is to say, what was not actually covered by the main clause (2), has been added to the ambit of the definition by the *proviso* It has further been argued that clause (2) is directed against unduly influencing individual voters, and reliance was placed upon the cases of *Cheltenham* (1), *Nottingham* (2), and *North Durham* (3). Reference was also made to the observations in "*Rogers on Elections*" (4), and it was argued that an electoral right, as defined in section 79(d) of the Act, is a personal individual right, including the right to vote or to refrain from voting at an election. Hence, there should have been pleading by the petitioner and finding by the Court on evidence that certain named individuals had been subjected to the corrupt practice of undue influence. Secondly, in the absence of any such pleading or finding a general allegation of the corrupt practice of undue influence, without reference to individuals, is not enough in law to vitiate as election.

The corrupt practice of undue influence has been defined in clause (2) of section 123 of the Act, in these terms:—

> "(2) Undue influence, that is to say, any direct or indirect interference or attempt

(1) (1869) 1 O'M. & H. 62, 64
(2) (1869) 1 O'M. & H. 245, 246
(3) (1874) 2 O'M. & H. 152, 156
(4) Vol. II, 20th Ed., p. 329

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to interfere on the part of the candidate or his agent, or of any other person, with the consent of a candidate or his election agent, with the free exercise of any electoral right:

Provided that—

(a) without prejudice to the generality of the provisions of this clause any such person as is referred to therein who—

(i) threatens any candidate, or any elector, or any person in whom a candidate or an elector is interested, with injury of any kind including social ostracism and excommunication or expulsion from any caste or community; or

(ii) induces or attempts to induce a candidate or an elector to believe that he, or any person in whom he is interested, will become or will be rendered an object of divine displeasure or spiritual censure,

shall be deemed to interfere with the free exercise of the electoral right of such candidate or elector within the meaning of this clause;

(b) a declaration of public policy, or a promise of public action, or the mere exercise of a legal right without intent to interfere with an electoral right, shall not be deemed to be interference within the meaning of this clause."

It should be observed, at the outset, that the law in England, relating to undue influence at elections,

is not the same as the law in India, as will appear from the following definition of "undue influence" contained in section 2 of 46 and 47 Vict. clause 51, which substantially re-enacted the former section 5 of 17 and 18 Vict. clause 102:—

> "Every person who shall directly or indirectly, by himself or by any other person on his behalf, make use of or threaten to make use of any force, violence, or restraint, or inflict or threaten to inflict, by himself or by any other person, any temporal or spiritual injury, damage, harm, or loss upon or against any person in order to induce or compel such person to vote or refrain from voting, or on account of such person having voted or refrained from voting at any election, or who shall by abduction, duress, or any fraudulent device or contrivance, impede or prevent the free exercise of the franchise of any elector, or shall thereby compel, induce, or prevail upon any elector either to give or to refrain from giving his vote at any election, shall be guilty of undue influence."

The words of the English statute, quoted above, lay emphasis upon the individual aspect of the exercise of undue influence. It was with reference to the words of that statute, that Bramwell, B.; made the following observations in *North Durham* (supra) (3):—

> "When the language of the Act is examined it will be found that intimidation to be within the statute must be intimidation practised upon an individual."

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The Indian law, on the other hand, does not emphasize the individual aspect of the exercise of such influence, but pays regard to the use of such influence as has the tendency to bring about the result contemplated in the clause. What is material under the Indian law, is not the actual effect produced, but the doing of such acts as are calculated to interfere with the free exercise of any electoral right. Decisions of the English Courts, based on the words of the English statute, which are not strictly *in pari materia* with the words of the Indian Statute, cannot, therefore, be used as precedents in this country.

In the present case, we are not concerned with the threat of temporal injury, damage or harm. On the pleadings and on the findings of the Tribunal and of the High Court, we are concerned with the undue exercise of spiritual influence which has been found by the High Court to have been such a potent influence as to induce in the electors the belief that they will be rendered objects of divine displeasure or spiritual censure if they did not carry out the command of their spiritual head. It was argued that Exhibit P. 1, on which so much stress was laid by the Tribunal and by the High Court, did not contain any such direct threat as would bring the case within the second paragraph of *proviso* (a) to section 123(2). Exhibit P. 1, as officially translated, is in these terms:—

> "A command from Shri Sat Guru Sacha Padshah to the Namdharies of Halqa—Sirsa."
>
> "Every Namdhari of this Halqa is commanded by Shri Sat Guru that he should make every effort for the success of Shri Ram Dayal Vaid, a candidate for the Punjab Vidhan Sabha, by giving his

own vote and those of his friends and acquaintances, it being our primary duty to make him successful in the election. The election symbol of Shri Vaid is a riding horseman.

Sd. Maharaj Bir Singh,

S/o Sat Guru Maharaj Partap Singh,
Jiwan Nagar (Hissar)."

We have looked into the original document also, and we agree with the High Court that the crucial words, like *hukam* of Shri Sat Guru Sache Padshah, etc., have been printed in very bold letters, conveying the distinct impression to the large number of Namdharis, who are voters in the constituency, that it was a mandate from their spritual *guru* who wielded great local influence amongst them, that it was their bounden duty, under the strict orders of their religious leader, not only to cast their own votes in favour of the particular candidate, but also to exert their influence amongst their friends and acquaintances in favour of that candidate; and that any infringement of that mandate had implicit in it divine displeasure or spiritual censure.

It was contended on behalf of the appellant that a religious leader has as much the right to freedom of speech as any other citizen, and that, therefore, his exhortation in favour of a particular candidate should not have the result of vitiating the election. There cannot be the least doubt that a religious leader has the right freely to express his opinion on the comparative merits of the contesting candidates and to canvass for such of them as he considers worthy of the confidence of the electors. In other words, the religious leader has a right to exercise his influence in favour of any particular candidate by voting for him and by canvassing

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votes of others for him. He has a right to express his opinion on the individual merits of the candidates. Such a course of conduct on his part, will only be a use of his great influence amongst a particular section of the voters in the constituency; but it will amount to an abuse of his great influence if the words he uses in a document, or utters in his speeches, leave no choice to the persons addressed by him, in the exercise of their electoral rights. If the religious head had said that he preferred the appellant to the other candidate, because. in his opinion, he was more worthy of the confidence of the electors for certain reasons goods, bad or indifferent, and addressed words to that effect to persons who were amenable to his influence, he would be within his rights, and his influence, however, great, could not be said to have been misused. But in the instant case, as it appears, according to the findings of the High Court, in agreement with the Tribunal, that the religious leader practically left no free choice to the Namdhari electors, not only by issuing the *hukam* or *farman*, as contained in Exhibit P. 1, quoted above, but also by his speeches, to the effect that they must vote for the appellant, implying that disobedience of his mandate would carry divine displeasure or spiritual censure, the case is clearly brought within the purview of the second paragraph of the *proviso* to section 123(2) of the Act. This aspect of the case has been dealt with at length by the High Court in a well, considered judgment, and we do not think it necessary to repeat all those observations, beyond saying that we agree with them. In that view of the matter, it is not necessary for us to consider the further question whether clause 2 of section 123 of the Act, apart from the *proviso*—para. (ii), discussed above—covers a case, like the present, where the undue influence is of a spiritual character as

distinguished from threats of injury to person or property. As the main ground urged in support of the appeal against the judgment of the High Court, fails, the appeal must be dismissed with costs, to the Respondent No. 1.

B. R. T.

SUPREME COURT

Before Syed Jafer Imam, A. K. Sarkar and K. Subba Rao, JJ.

UJAGAR SINGH,—*Appellant*

versus

MST. JEO,—*Respondent*

Civil Appeal No. 296 of 1955

Custom—Self-acquired property—Sister—Whether entitled to succeed in preference to collaterals—Rattigan's Digest of Customary Law—Para 24—Whether lays down any general custom—Evidence Act (I of 1872)—Section 57—Custom of which courts can take judicial notice—General custom—Meaning of—Riwaj-i-Am—Entries in—Whether relate to ancestral property only—Punjab Laws Act (IV of 1872)—Section 5—Scope of.

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Apr., 23rd

Held, that there is no general custom giving preference to collaterals over sisters in the matter of inheritance to non-ancestral properties. Rattigan's Digest of Customary Law is, no doubt, of the highest authority on questions of the customs of the Punjab, but a court can take judicial notice of a statement of custom therein contained only if it has been well recognised by decisions of courts of law. There has been a serious conflict of judicial decisions in respect of the general custom contained in paragraph 24 of Rattigan's Digest and the decisions for the last ten years are uniformly against the view expressed therein. It cannot, therefore, be held on the authority of paragraph 24 in Rattigan's Digest that a general custom excluding sisters from inheritance as against collaterals exists.

Held, that the ordinary rule is that all customs, general or otherwise, have to be proved. Under section 57 of the Evidence Act, however, nothing need be proved of which the courts can take judicial notice. Thus if there is a custom of which the courts can take judicial notice, it need not be proved. 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 section 57(1) of the Evidence Act. The expression "general custom" has been used in the courts in the Punjab in this sense, namely, that a custom has by repeated recognition by courts, become entitled to judicial notice. The custom as stated in paragraph 24 of Rattigan's Digest cannot be said to have been so well recognised as to have become entitled to judicial notice from courts without further proof.

Held, that *Riwaj-i-Am* entries are to be taken as referring to customs relating to succession to ancestral properties unless it is stated to be otherwise.

Held, 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, 1872, applies and the rule of decision must be the personal law of the parties subject to other provisions of the clause. Under Hindu Law a sister is entitled to succeed her brother in preference to his collaterals.

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

ACHHRU RAM with R. S. NARULA, for Appellant.
GURBACHAN SINGH with MADAN LAL KAPUR, for Respondent.

JUDGMENT

The following Judgment of the Court was deliverd by

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 Kihsen Kaur, as the heir of her father and brother, according to the Zamindara Custom prevalent in Mauza Sultanwind among the people of the Got (Subcaste) Bheniwal and the custom of the family of

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her father". In paragraph 5 it was stated, "According to the aforementioned 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 bother 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 sister is in no way the heir of the property left by (her) brother in presence of the revisionary 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 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

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 inhertance 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

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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 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 commn 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.

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

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 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 Eddition), page 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.

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(1) (1935) 17 Lah. 296, 299

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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 Eddition) Volume II, Article 319 at page 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* (1), Robertson, J. said at page 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 Committee in *Abdul Hussain Khan* v. *Bibi Sona Dero* (2). .....

It, therefore, appears to us that the ordinary rule is that all customs, general or otherwise, have to be proved. Under section 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* (3), in the following words, "When a custom or usage, whether in regard to a tenure or a contract or a

(1) 110 P.R. 1906
(2) (1917) L.R. 45 I.A. 10, 13
(3) (1918) L.R. 45 I.A. 148, 154, 155

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 section 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* (1), and *Sukhwant Kaur* v. *Balwant Singh* (2).

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 decision on the question and it seem to us that the custom as stated by Rattigan 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

(1) A.I.R. 1951 Simla 239
(2) A.I.R. 1951 Simla 242

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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. *Mussammat 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:

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

"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 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 Mohamedans, the Mohamedan 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 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

(1) 35 P.R. 1909
(2) 20 P.R. 1919
(3) (1920) I.L.R. 2 Lah. 98

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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* (*supra*) (1), 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 custom in certain matters.

In *Jagat Singh* v. *Puran Singh* (2), a case decided in 1944. it was observed at page 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

(1) (1934) I.L.R. 17 Lah. 10, 11
(2) (1944) 49 P.L.R. 366

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* (1), *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 reports. In the later 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 to sisters to succeed rested on them and this was based on paragraph 24 of Rattigan's Digest, an entry in Riwaji-i-am which applied to the parties and certain reported decisions. Obviously, Rattigan was relied upon.

In *Harnamon* v. *Santa Singh* (7), it was said that the burden of proving that the sister was entitled to succeed in preference to a collaterals lay on her. The same view was taken in *Mussammat Nurbhari* v. *Abdul Ghani Khan* (8), *Mussammat Hussein*

(1) A.I.R. 1951 Simla 242
(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
(7) (1912) 13 I.C. 711
(8) 100 P.R. 1916

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Bibi v. *Nigahia* (1), *Jagu* v. *Bhago* (2), *Began* v. *Ali Gohar* (3); *Kirpa* v. *Bakshi Singh* (4), (case decided in 1944), *Santi* v. *Ujagar Singh*, Exhibit D. 6 in the present case (decided in 1944) and *Mussammat Ratni* v. *Harwant Singh* (5). 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 prepered 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* (5), 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 has 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

(1) (1919) 1 Lah. 1
(2) (1926) 96 I.C. 907
(3) A.I.R. 1934 Lah. 554
(4) (1948) 50 P.L.R. 220 312
(5) 71 P.R. 1904

a custom entitling her to succeed and termed it a special custom. We are unable to read the reference to a special custom as amounting to an admission of a general custom or its terms.

That being the position we have to see if either side led by 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. In 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 Exhibit 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 Exhibit P. 4. that Sajja Singh and Majja Singh were the sister's son of Nodh Singh was wrong for, in Exhibit P. 5, the Settlement Records of 1891 and 1892, they were described as the daughter's sons of Nodh Singh and Babhel 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

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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. Exhibit P. 9 which is a settlement record of 1852 of the same village, shows that on Gandhi's death his sister's son succeeded to his properies 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 Riwaj-i-am. We have first the Riwaj-i-am of 1913-14. They entry there is in this form :—

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

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

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

At the foot the case of *Bholi* v. *Kahna* (*supra*) (1), is cited. Now it is well established that Riwaj-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 page 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 i nthe light of their own interest alone and that, as stated above, was confined to the ancestral property 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 Riwaj-i-am of 1913-14 we find nothing in the context to show that

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

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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 Riwaj-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 tribes.—
>
> (1) In the case of an unmarried sister or sisters the property is entered in her on 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 Riwaj-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 Riwaj-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 Riwaj-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 Riwaj-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 Riwaj-i-am

entry that the answers were intended to cover self-acquired property also.

Now of the eight instances given in the Riwaj-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 tribes 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.

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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 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* (*supra*) (1), Robertson, J. said at page 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* (*supra*) (2). In *Fatima Bibi* v. *Shah Nawaz* (*supra*) (3), a case to which we have earlier referred, the Court allowed

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

the plaintiffs, 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 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 Article 136 of the Constitution

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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.

B. R. T.

INCOME-TAX REFERENCE

Before A. N. Bhandari, C.J., and Bishan Narain, J.

THE FAZILKA ELECTRIC SUPPLY CO., LTD., *DELHI*,—
Petitioner
versus
THE COMMISSIONERS OF INCOME-TAX, DELHI,—
Respondent.

Income-tax Reference No. 18 of 1954

1959

Apr., 24th

Income-tax Act (XI of 1922)—Section 10(2)(vii)—Acquisition of undertaking of an Electrict Supply Company by the Government under section 7 of the Indian Electricity Act (IX of 1910)—Whether amounts to sale or compulsory acquisition—Compulsory acquisition—Whether comes within Section 10(2)(vii).

Held, that the exercise of option by the Government to purchose the undertaking of the electric supply company was as a result of a contract between the parties and amounted to a sale. The license granted by the Government under the provisions of the Indian Electricity Act, 1910, amounts to a contract between the parties. When the applicant makes an application for license, he knows that under section 7 option has to be given not exceeding 50 years to the local authority or to the Government to purchase the undertaking. This only means that the license period in any case must not exceed 50 years. It is a matter of bargain when the first option is to be exercised by the local authority or the Government. In the present case it was to be exercised on the expiry of 15 years which means that the license made an irrevocable offer to the local authority and the Government to sell the undertaking on the expiry of 15 years and on the expiry of every