with the present dispute, and I am certainly not prepared at this stage to order the total exclusion of matters relating to this Company in the present enquiry.

Shama Magazine, Asaf Ali Road, New Delhi
v.
The State of Delhi and others

Falshaw, J.

The result is that I accept the writ petition and set aside the order of the Tribunal, dated the 16th of July, 1956, but at the same time leave most of the matters involved to be reconsidered and decided in accordance with the strict provisions of the Civil Procedure Code. The parties will bear their own costs.

D. K. M.

APPELLATE CIVIL

Before Chopra and Gosain, JJ.

HARNAM SINGH,—*Plaintiff-Appellant*

versus

MST. GURDEV KAUR AND OTHERS,—*Respondents.*

Regular Second Appeal No. 684 of 1949.

1957

Sept., 3rd

Custom (Punjab)—Succession—Sister—Jats of Tehsil Kharar of Ambala District—Whether sister of the last male-holder is prefrential heir to his non-ancestral property as against his 5th degree collaterals—Position of the sister, whether can be assimilated to that of the daughter.

Held, that amongst agriculturist Jats of Ambala District, custom does prevail according to which sisters succeed to non-ancestral property in preference to the collaterals of the fifth degree.

Held also, that for purposes of succession sisters could not be assimilated to the position of daughters. The principle laid down in the Full Bench, 134 P.R. 1907, has been consistently followed and the sisters have never been allowed to succeed as daughters of the father of the last male-holder. Their position *qua* succession has always been taken to be that of sisters of the last male-holder.

Regular Second Appeal from the decree of Shri G. C. Bahl, District Judge, Ambala, dated the 9th day of May,

1949, affirming that of Shri E. F. Barlow, Sub-Judge, 1st Class, Ambala, dated the 13th December, 1948, dismissing the plaintiff's suit with costs.

SHAMAIR CHAND and Y. P. GANDHI, for Appellant.

GANGA PERSHAD, for Respondent.

JUDGMENT.

Gosain, J.

GOSAIN, J.—This second appeal raises an important question of custom whether amongst Jats of Tehsil Kharar of Ambala District the sisters of the last male owner are preferential heirs as against his collaterals of the fifth degree regarding property which is not proved to be ancestral. One Kartar Singh, a Jat of Kharar Tehsil, owned 61 *bighas* 16 *biswas* of land in village Rasanheri and 36 *bighas* 4. *biswas* with share in *shamilat deh* in village Tola Mazra. He died on the 6th of November, 1942, leaving a widow Mst. Kartari, a son Tej Pal and two daughters Mst. Gurdev Kaur, defendent No. 1 and Mst. Tej Kaur, defendant No. 2. Tej Pal died on the 17th of November, 1942, when the mutation proceedings regarding the property of Kartar Singh were still pending. On the 29th of November, 1942, mutation was ultimately sanctioned in favour of Mst. Kartari. On the 7th of August, 1944 Mst. Kartari made a gift of the property in village Tola Mazra to her daughters, Mst. Gurdev Kaur and Mst. Tej Kaur, and later died on the 6th of November, 1945. On the 29th of April, 1946, land in village Rasanheri was mutated in favour of Mst. Gurdev Kaur and Mst. Tej Kaur on the basis that they were the heirs after the death of Tej Pal and Mst Kartari. The present suit was brought on the 11th of January, 1947, by Harnam Singh, who claimed himself to be a collateral of Tej Pal in the fifth degree. The plaintiff claimed that according to custom prevailing

amongst Jats of Kharar Tehsil he was entitled to succeed to the property in both the villages and that the gift in favour of the daughters regarding village Tola Mazra and the mutation in favour of the daughters regarding the other village could not bind him in any way. The defendants Mst. Gurdev Kaur and Mst. Tej Kaur contested the plaintiff's suit mainly on the ground that according to custom prevailing amongst Jats of Ambala District they were the legal heirs. They denied that the plaintiff was a collateral or that the property was ancestral. It was also claimed that defendant No. 2 was not married and that at any rate up to her marriage the defendants could retain possession of the land. The trial Court framed as many as eight issues and ultimately came to the conclusion that Tej Pal was the last male-holder of the land in suit, that he was the son of Kartar Singh, that the plaintiff was a collateral of Kartar Singh in the fifth degree, that the land in suit was not ancestral and that Mst. Gurdev Kaur and Mst. Kartar Kaur were better heirs than the plaintiff. On these findings the plaintiff's suit was dismissed with costs. The plaintiff filed an appeal to the learned District Judge at Ambala which was dismissed on the 9th of May, 1949. Before the learned District Judge, findings, of the trial Court on issues Nos. 1, 2, 3, 4 and 7 were not attacked by any of the parties and he was, therefore, called upon to decide only issues Nos. 5 and 6. The learned District Judge came to the conclusion that after Tej Pal's death without leaving an issue, succession was to be reckoned with reference to Kartar Singh and that, therefore, the two defendants succeeded to the property as daughters of Kartar Singh. He was of the opinion that collaterals of the fifth degree could not be preferred to the daughters of Kartar Singh in respect of succession to non-ancestral property. The plaintiff has come up to this Court in second appeal.

Harnam Singh
v.
Mst. Gurdev Kaur and others

Gosain, J.

Mr. Shamair Chand, learned counsel for the plaintiff-appellant, contends that the finding of the learned District Judge that Mst. Kartar Kaur and Mst. Gurdev Kaur could be treated for the purposes of succession as daughters of Kartar Singh and not as sisters of Tej Pal is not correct, and for this purpose he relies on a Full Bench judgment *Hamira and others* v. *Ram Singh and others* (1), and also on *Saidan Bibi and another* v. *Fazal Shah and others* (2), a Division Bench judgment printed at pp. 646 to 650 of the same volume of the Punjab Record 1907 as an appendix to the judgment of the Full Bench referred to above. There is no doubt that according to the Punjab custom when the male line of a descendant has died out, it is treated as never having existed, and the last male-holder who left descendants is regarded as the propositus: vide *Rani widow of Ako* v. *Makka, Taja, Umar Bakhsh and others* (3), *Mamun and others* v. *Mst. Jowai, Mst. Bano and another* (4), *Kanshi Ram and another* v. *Situ and another* (5), etc, etc., Custom is however not logical and for the purposes of succession of sisters it was expressly found by the Full Bench that the rule aforesaid did not exist and that sisters of the last male-holder could not be treated for the purposes of succession as daughters of the father of the last male-holder. In *Saidan Bibi and another* v. *Fazal Shah and others* (2), this point was considered at great length and in *Hamira and others* v. *Ram Singh and others* (6), the Full Bench expressly stated that they agreed with the reasoning and conclusion of that judgment and that the said judgment be published as appendix to the Full Bench judgment. The case of *Saidan Bibi and*

(1) 134 P.R. 1907.
(2) C.A. 599 of 1904.
(3) 146 P.R. 1889.
(4) I.L.R. 8 Lah. 139.
(5) I.L.R. 16 Lah. 214.
(6) 134 P.R. 1907.

another v. *Fazal Shah and others* (1), was consequently published as appendix to Punjab Record 134 of 1907. At page 648 of the report this point is discussed by the Bench in the following terms—

> "In this connection the learned pleader for the plaintiff argues ingeniously enough that plaintiff 1 claims not so much as sister of Haider Shah as in the capacity of daughter of Alaf Shah. Alaf Shah died and was succeeded by his son Haider Shah, who died without issue or widow and was succeeded by his mother *Mst.* Azim Kali. It is contended that upon the death of this lady we should look at Alaf Shah, her deceased husband, and see who his heir is, and that thus contest is between a daugher, plaintiff 1, and the defendants. It is also said that, even if we have to find the heir of Haider Shah, undoubtedly the last male-holder, we should go up to the line to his father and then down to plaintiff 2, his daughter. In support of this argument we are referred to *Ghulam Muhammad* v. *Muhammad Baksh* (2), at page 17, penultimate para, where the right of representation is explained, to the middle para., at page 62 in Sita Ram Raja Ram, 12 P.R. 1892 (F.B.), and especially the words 'a mother succeeds, not as a mother, but as the widow of the father' to pages 256 257 in *Faiz-ud-Din* v. *Mussummat Wajib-un-nisa* (3), last para of page 256, where in a manner the case of succession of a sister is assimilated to that of a daughter by the device of going back

(1) C.A. 599 of 1904.
(2) 4 P.R. 1891 (F.B.).
(3) 71 P.R. 1892.

Harnam Singh
v.
Mst. Gurdev Kaur
and others

Gosain, J.

to the father from the brother and then coming down to the sister; to *Gaman* v. *Mussummat Amam* (1), and especially the words 'the general principle.....is that where a line dies out, it is treated as if it never existed.' Now, if it was the function of this Court, when it had evolved a theory, which explains certain phenomena of custom, to insist upon applying that theory wherever it could logically be applied, regardless of facts, no doubt there would be much to be said in favour of the above argument; but it is rather our function, in matters of disputed custom, to discover what the actual practice is and give effect to our discoveries. There is no binding force or sanctity in the theory itself ; it is merely a convenient method of giving order to our thoughts. In the present instance, as we have already seen, daughters and sisters have not commonly or in practice ever been treated as being on a similar footing. The theory has never been put forward to support the claims, for instance of a paternal aunt against distant collaterals, such a claim has in my experience never been made. We have only to compare section 23 of Rattigan's Digest with section 24 to see how differently the respective claims of daughters and sisters have been treated in the past; perusal of Chief Court ruling of which there are scores, dealing with daughters and sisters bring out the same tale; in no *Wajib-ul-arz* or *Riwaj-i-am,* with which I am acquainted, are sisters treated as the daughters of their brothers' father and not

(1) 171 P.R. 1888.

as sisters; and lastly even in *Faiz-ud-Din* v. *Mussummat Wajib-ul-nissa* (1), cited above, we have only to look at the last two lines of page 255 and the opening lines of the next page to see how purely academic are the abstract remarks on pages 256 and 257 relied on by the plaintiffs' pleader."

I entirely agree with the contention raised by Mr. Shamair Chand and find that for the purposes of succession sisters could not be assimilated to the position of daughters, and no reported case was pointed out to us where a different view was taken by this Court. In my experience I have always found that the principle laid down in the Full Bench *Hamira and others* v. *Ram Singh and others* (2), has been consistently followed and the sisters have never been allowed to succeed as daughters of the father of the last male-holder. Their position *qua* succession has always been taken to be that of sisters of the last male-holder.

I am, however, of the opinion that even as sisters of the last male-holder, they are preferential heirs to the non-ancestral property in suit. In support of the contention that the collaterals of fifth degree are better heir than the sisters in respect of the non-ancestral property in Ambala District, the plaintiff produced some oral evidence and only one document, i.e., Exhibit P. 9. The witnesses who gave oral evidence were not able to cite any instance where collaterals of the fifth degree were allowed to succeed as against the sisters in respect of non-ancestral property and their evidence is of very meagre character. Exhibit P. 9 is a copy of the *riwaj-i-am* relating to succession of daughters and says nothing with

(1) 71 P.R. 1892.
(2) 134 P.R. 1907.

Harnam Singh
v.
Mst. Gurdev Kaur and others

Gosain, J.

regard to the right of sisters in the matter of mutations, Exhibits D. 6, D. 9 and D. 10 and three copies of the judgements of the District Judge, Ambala, Exhibits D. 2, D. 3 and D. 4. The three mutations are not of much value. Exhibit D. 6 was no doubt a case where the right of succession of sister versus collaterals of the fifth degree had to be determined. The persons alleging themselves to be collaterals, however, could not prove their relationship and were held not to be collaterals. Moreover, there was a will in favour of the sister and she was allowed to succeed on the basis of the said will and not on the basis of any adjudication as to her right of succession against the collaterals. Exhibit D. 9 does not show that there was any collateral in existence or that there was any contest between the sisters and the collaterals. It merely shows that the sisters were allowed to succeed. Exhibit D. 10 also does not show that there was any collateral in existence or that there was any contest between the sister and the collaterals.

Out of three judicial instances produced by the defendants, Exhibit D. 2 deals with a case where there was a contest between sisters and third degree collaterals. It was held by the District Judge in that case that sisters were better heirs than the collaterals of the third degree in respect of non-ancestral property. This judgement was appealed against in the High Court, and in *Jagat Singh* v. *Puran Singh and others* (1), Mahajan, J., (as he then was) upheld the judgement of the District Judge. I shall later refer to this judgment in full details. Exhibit D. 3 is also a judgment of the District Judge, Ambala, deciding a contest between

(1) 1947 P.L.R. 366.

sister's sons and collaterals of the fourth degree. This case was decided in favour of the sister's sons, but this judgment was set aside by a Division Bench consisting of Harries, C.J., and Mahajan, J., in *Kirpo and others* v. *Bakhshi Singh and others* (1), Exhibit D. 4, is also a judgment of the District Judge, Ambala, deciding a contest between collaterals of the fifth degree and sisters *qua* non-ancestral property. In this case it was held that in Ambala District sisters were better heirs than the collaterals of fifth degree in respect of non-ancestral property. It appears that this judgment was not appealed against. Some cases of succession of sisters versus collaterals have come to this Court from Ambala District, and I shall now discuss the said cases in some details. I have already referred to two of them, i.e., *Jagat Singh* versus *Puran Singh and others* (2), and *Kirpa and others* v. *Bakhshi Singh and others* (1). These two cases lay down conflicting views about the custom in question. In *Jagat Singh* v. *Puran Singh and others* (2), Mahajan, J., relied upon three judicial instances, one reported in *Bishan Singh and others* v. *Bhagwan Singh and others* (3), second reported in *Gurdit Singh and ithers* v. *Baru and others* (4), and the third given in Exhibits P. 9, to P. 11 of that record, and said :—

> "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.

(1) 1947 P.L.R. 366.
(2) 1948 P.L.R. 220.
(3) A.I.R. 1933 Lah. 1005 (1).
(4) 28 P.R. 1904.

Harnam Singh
v.
Mst. Gurdev Kaur
and others

Gosain, J.

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 collaterals 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."

The learned Judge then said:—

> "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 the Rattigan's Digest it has been stated that sister and their sons are in general not heirs but has been said 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 third or fifth degree and the property is self-acquired. It is true, that so far as ancestral property is concerned collaterals up to the fifth degree have preference both over the daughter and sister but the daughter is situated in a very favourable position * * * * * * *".

Ultimately, the learned Judge found that no rule of special custom or general custom being available,

the case had to be decided with reference to Hindu Law and that sister was a better heir according to that law.

In Kirpa and others v. *Bakhshi Singh and others* (1), Mahajan, J., was also a member of the Bench. This case was decided on the 21st of December, 1944, but, it is curious that the previous case reported in 1947 P.L.R. 366, which had been decided less than two months previous to the decision of *Kirpa and others* v. *Bakhshi Singh and others* (1), was not brought to the notice of the Bench. The subsequent case was decided mainly on the ground that paragraph 24 of the Rattigan's Digest laid down a general rule of custom according to which sisters could not succeed either to the ancestral or to be self-acquired property as against collaterals of any degree. The remarks about this paragraph made in the first judgment and the judicial instances referred to in the first judgment were not brought to the notice of the Division Bench deciding the subsequent case.

In *Sawai Singh and others* v. *Ude Singh and others* (2), a point arose with regard to the right of succession of the sisters against collaterals amongst agriculturists of Ambala District, and it was held that sisters were better heirs.

In *Maulu* v. *Mst. Ishro and others* (3), the parties were agriculturist Jats of Thanesar Tehsil now forming part of Karnal District and the contest was about succession to non-ancestral property between sisters on the one hand and sixth degree collaterals on the other. Thanesar was previously part of the Ambala District and the case was, therefore, decided

(1) 1948 P.L.R. 220.
(2) 1951 P.L.R. 328.
(3) A.I.R. 1950 E.P. 289.

Harnam Singh
v.
Mst. Gurdev Kaur and others

Gosain, J.

on the basis of the *riwaj-i-am* of Ambala District and it was found that sisters were better heirs than the collaterals of sixth degree in respect of non-ancestral property.

In another case *Harkesh Nihala and others* v. *Surjan Hamela* (1), mentioned in the contest was between sisters and seventh degree collaterals. This case also related to agriculturists of Thansar Tehsil, but in view of the fact that the territory was previously a part of the Ambala District, the case was decided on the basis of custom prevailing in the Ambala District. It was held by a Division Bench of this Court that sisters succeed to the non-ancestral property in preference to the collaterals of the seventh degree.

In *Sukhwant Kaur* v. *Balwant Singh and others* (2), and in *Mst. Jeo* v. *Ujagar Singh* (3), it was found that general custom as given in paragraph 24 of the Rattigan's Digest of Customary Law had been stated too widely and that the statement of custom made in this paragraph was not supported by the rulings which the author had cited below the said paragraph and on the basis of which the learned author has arrived at the said statement. It has been clearly found in the last two mentioned rulings that there is no such general custom as is given in paragraph 24 of the Rattigan's Digest of Customary Law and that it is for the collaterals in each case to allege and prove custom according to which sisters can be deprived from succession to non-ancestral property.

As a result of the above discussion it is clear that there are at least six judicial instances which are clearly in favour of succession of sisters as against

(1) 1955 N.U.C. 4961.
(2) A.I.R. 1951 Simla 242.
(3) A.I.R. 1953 Punj. 177.

collaterals of the fifth degree in respect of non-ancestral property of the last male-holder. The only instance against them is the one furnished by *Kirpa and others* v. *Bakhshi Singh and others* (1). As pointed out above, this case was decided mainly on the basis of general custom given in paragraph 24 of the Rattigan's Digest of Customary Law. This statement of general custom has been found to be too widely stated. I am, therefore, of the opinion that it is satisfactorily proved that amongst agriculturist Jats of Ambala District custom does prevail according to which sisters succeed to non-ancestral property in preference to the collaterals of the fifth degree. I would accordingly dismiss this appeal with costs.

CHOPRA, J.—I agree.

D. K. M.

APPELLATE CIVIL

Befor Tek Chand, J.

SHIV SINGH,—*Appellant.*

versus

JIWAN DAS AND OTHERS,—*Respondents.*

Regular Second Appeal No. 628 of 1956

1957

Sept. 4th

Punjab Tenancy Act (XVI of 1887)—Section 59(1)(d) proviso—Courts, whether can ignore the rule of succession prescribed in section 59—Expression, "Common ancestor occupied the land", meaning of—Whether land must also be occupied by the successors of the common ancestor—Words and Phrases—"Descend" meaning of.

Held, that the rule of succession to the right of occupancy is prescribed in section 59 of the Punjab Tenancy Act and it is not open to the Courts to have recourse either to the customary rule of succession or to rule of logic.

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(2) 1948 P.L.R. 220.