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another

question then would not arise. This case can now go back to the Division Bench for disposal of the appeal.

Dulat, J.

G. D. Khosla, C.J.

Harbans Singh, J.

G. D. KHOSLA, C. J.—I agree.

HARBANS SINGH, J.—I agree.

K.S.K.

FULL BENCH

Before Mehar Singh, K. L. Gosain and S. B. Capoor, JJ.

CHARAN SINGH,—*Appellant.*

versus

GURDIAL SINGH AND OTHERS,—*Respondents.*

Regular First Appeal No. 137 of 1954.

1960

Dec., 26th

Custom—Jats—Widow remarrying her deceased husband's brother—Whether entitled to collateral succession in the family—Rights of the widow under custom.

Held, by majority (per K. L. Gosain and S. B. Capoor).

That in the case of Jats governed by custom in matters of succession, a widow, by remarrying her deceased husband's brother, does not disentitle herself from collateral succession in the family. A widow who succeeds collaterally in her husband's family, does so only as a representative of her deceased husband by reason of the rule of representation generally prevailing amongst the agriculturists of the Punjab in matters of succession and whatever property she gets by such succession really forms an accretion to her husband's estate and remains a part and parcel of that estate. It would be anomalous, incongrouous and arbitrary to hold that a widow who has remarried her first husband's brother should be allowed to retain her first husband's estate, but should not be allowed to make accretions to the same.

Held, (Per Mehar Singh, J.).

The ordinary rule is that the remarriage of a widow causes forfeiture of her life-interest in her first husband's estate which then reverts to the nearest heirs of the husband, and the exception to it, as the special custom in this respect, being that among Sikh Jats of the Punjab widow does not forfeit her life-estate in her deceased husband's

property by reason of her re-marriage in *karewa* form with her husband's brother, the exception cannot be enlarged beyond its scope and a special custom stated in it extended by logic or analogy. Apparently the scope of an exception is limited and restricted, but in the case of an exception, in the shape of a special custom, it cannot be extended on any consideration, for the settled rule is that even a generally, accepted rule of custom cannot be extended by logic or analogy. Widow's re-marriage leads to forfeiture of the estate inherited by her from her first husband, but the tribe or tribes in which the special custom as an exception to this rule prevails, it has gained ground because of some special social considerations and they may never have intended the extension of such an exception to collateral succession for there is nothing to show in this case that any such conception prevailed among them. It would be a conjecture to say that from this they intended that she will also have a right to succeed collaterally.

Case referred by a Division Bench consisting of Hon'ble Mr. Justice Mehar Singh and Hon'ble Mr. Justice K. L. Gosain on 18th April, 1960 to a larger Bench for decision of an important question of law involved in the case. The Bench consisting of Hon'ble Mr. Justice Mehar Singh, Hon'ble Mr. Justice K. L. Gosain and Hon'ble Mr. Justice S. B. Capoor answered the question of law referred to by majority in the affirmative on 26th December, 1960 and remanded the case to the Division Bench for final decision of the case.

Regular First Appeal from the decree of Shri J. M. Tandon, Sub-Judge, 1st Class, Ambala, dated .19th May, 1954 granting the plaintiffs a preliminary decree for possession of half share in the property specified in the plaint through partition against the defendants and further ordering that the shares of all the four parties to the suit shall be equal, and appointing Sardar Inder Singh, Pleader, as a Local Commissioner to effect the partition of the four properties in dispute.

DALJIT SINGH, ADVOCATE, for the Appellants.

SHAMAIR CHAND AND P. C. JAIN, ADVOCATES for the Respondents.

JUDGMENT

Mehar Singh, J.

MEHAR SINGH, J.—The Question referred to the Full Bench is—

> "Whether in the case of Jats governed by custom in matters of succession, a widow, by remarrying her deceased husband's brother, is entitled to collateral succession in the family ?"

On March 29, 1951, Harnam Singh, a Jat of village Kalewal in Tehsil Kharar of Ambala District, died leaving agricultural land and other immovable property, and was survived by his three sons Charan Singh, Mansa Singh and Gurdial Singh, and a daughter-in-law Mohinder Kaur, being the widow of his predeceased son Gurbaksh Singh. The agricultural land having been mutated by the Revenue authorities in the names of three surviving sons of Harnam Singh, deceased, on April 29, 1953, Mohinder Kaur instituted a suit for possession of one-fourth share of the agricultural land on the ground that as representing her deceased husband she was entitled to succeed to her father-in-law to the share to which her deceased husband would have succeeded if he had been alive on the date of the death of his father.

Subsequently on May 18, 1953, Charan Singh and Mansa Singh, brought a suit against their brother Gurdial Singh, for partition of four properties, other than agricultural land. On her application Mohinder Kaur was made a party-defendant to that suit and she made a claim to one-fourth share of that property also on the same ground as urged by her in her own suit.

It has been found by the Division Bench consisting of myself and Gosain, J., in the judgment of April 18, 1960, given in both the suits, that after

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the death of her husband Gurbakhsh Singh, Mohinder Kaur remarried his brother Gurdial Singh, by *karewa*, and this was before the death of her father-in-law Harnam Singh. The rule of customary law in regard to the question of forfeiture caused by the remarriage of a widow is thus stated in paragraph 32 of Rattigan's Digest of Customary Law, 1938 Edition,—

> "32. In the absence of custom, the remarriage of a widow causes a forfeiture of her life-interest in her first husband's estate which then reverts to the nearest heir of the husband".

To this rule of customary law, which is fairly widely accepted, there is an exception noted by the learned author at page 166 of the same book to the effect that "by custom among Sikh Jats of the Punjab a widow does not forfeit her life-estate in her deceased husband's property by reason of her remarriage in *Karewa* form with her husband's brother." We have found on evidence that Mohinder Kaur is entitled to succeed to the share of her deceased husband as representing him in the agricultural land and other immovable property left by her deceased father-in-law Harnam Singh. In view of the special custom prevailing among Sikh Jats, which has been referred to as an exception above to the rule stated in paragraph 32, we have held that Mohinder Kaur has not forfeited the right to inherit the share of her deceased husband from the property of her deceased father-in-law by reason of her having remarried her husband's brother.

The question referred to the Full Bench has arisen because during the pendency of the appeals Mansa Singh, has died and the question is whether

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Mohinder Kaur, is entitled to succeed to him collaterally in the circumstances of these cases ?

In *Didar Singh,* v. *Mst. Dharmon* (1), Gara Singh died leaving two *biswas* land and two widows named Dharmon and Jian. Each one of them succeeded to half of the estate or to one *biswa*. Dharmon remarried by *karewa* Dial Singh, younger brother of her deceased husband. On the death of Jian, Dharmon claimed one *biswa* as a surviving co-widow. This claim was resisted by the brothers of Dharmon's first husband. The learned Judges decreed Dharmon's claim giving various grounds in support of their decision and observing "she would succeed by right of survivorship, and not by right of inheritance. The present case differs essentially from a claim to succeed not to her first husband's estate, but to the estate of one of his collaterals." Dharmon was only claiming to succeed to her first husband's estate, and this was not a case of collateral succession, but the learned Judges have made an unequivocal observation, which shows that she could not have claimed by inheritance an estate of one of the collaterals of her first husband in the circumstances because she had remarried her first husband's brother. This observation, though obviously *obiter,* gives a negative answer to the question under consideration.

In *Mst. Jaidevi* v. *Harnam Singh* (2), Nihal Singh died leaving a son named Jiwan and his widow Jaidevi. On the death of Jiwan his three uncles, or their sons, were recorded as proprietors of the land left by him. Two branches of his uncles deprived the third branch of its one-third share in the land. Jaimal Singh representing the third branch obtained a decree for his share of the land

(1) 25 P.R. 1888.
(2) 117 P.R. 1888.

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against the other collaterals of Jiwan. In the meantime and before the death of Jiwan, Jaidevi had remarried her first husband's brother Lehna Singh. She then brought a suit to recover from Jaimal Singh's son the share of Jiwan's estate decreed to Jaimal Singh. This was a case of Sus Jats of Hoshiarpur. The learned Judges held that she was excluded from succession claimed by her as she had contracted a second marriage before her son's death. It is clear that Jaidevi was claiming the estate of her first husband even though she had remarried a brother of her first husband before the death of her son by her first husband. She was not claiming to succeed to a collateral of her first husband. Even so the learned Judges denied her claim.

In *Gaman* v. *Mst. Aman* (1), on the death of Samma, his widow Aman remarried and her second husband belonged to a branch of the same family as her first husband. Subsequently Mubarak, grandson of Samma, died without an issue or without leaving a widow. The estate was then claimed by Gaman, brother of Samma and thus grand-uncle of Mubarak, as against Aman, widow of Samma and grandmother of Mubarak. Frizelle J., dismissed the claim of Gaman on the ground that Aman's right was based on her being the grandmother of Mubarak deceased. But Roe J., concurred in the dismissal of the suit on the ground that Mubarak having left no issue and no widow to succeed him, his line died and under custom it has to be treated as it never existed. The question, therefore, was of Aman claiming as a widow of her first husband in spite of her remarriage before the death of Mubarak not to a brother of her first husband, but to a member in the same family, as

(1) 171 P.R. 1888.

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against the brother of her first husband. The learned Judge observed that " the *wajib-ul-arz appears to me to distinctly sanction such a marriage* to any "*ham kaum,* not merely to the next heir, and the evidence adduced by defendant of widows retaining their husband's estate seems to me quite as strong as the evidence against it". This is not a case of the widow remarrying her first husband's brother and as such it is not directly relevant. But, even so, when the case is considered, it was not a case in which the widow claimed succession to a collateral of her first husband, but what she claimed was to succeed to the estate of her first husband inspite of her having remarried in the same family as against the brother of her first husband.

In *Hardam Singh and another* v. *Mst. Mahan Kaur* (1), the learned Judges set out the facts in this way—

> "A man died leaving widow and a son. The latter succeeded to his estate, and the widow, his mother, married her late husband's brother by *karewa.* Then the son died without issue and the land in suit was mutated in favour of his brothers, including her second husband, whereupon she had sued them on the ground that she takes a life-estate before them".

The learned Judges negatived the claim of the widow following *Mst Jaidevi* v. *Harnam Singh* (2). In *Kanhaya Singh* v. *Mst. Premi* (3), the facts were these. One Ratna had two sons named Arjan Singh and Bura. The defendants were the descendants of Bura. Arjan Singh had two sons named

(1) 64 P.R. 1910.
(2) 117 P.R. 1888.
(3) 322 P.L.R. 1913.

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Sadhu Singh and Bhuda, both of whom died in his lifetime. Bhuda had left his widow Premi, who remarried her first husband's brother Sadhu Singh. On his death Sadhu Singh left behind a son named Mit Singh from his first wife and widow Premi. Thereafter Arjan Singh died. The whole of the land left by Arjan Singh was mutated in the name of Mit Singh, to which Premi took no objection. Subsequently Mit Singh, also died without leaving any issue. The revenue authorities ordered mutation of the land in favour of the defendants, who it will be remembered were the descendants of Bura brother of Arjan Singh as against the claim of Premi. Premi then instituted a suit to recover the whole of the estate from the defendants. The learned Judges treated her claim in two distinct and separate parts one part being her claim to the share of her first husband in the inheritance of her father-in-law as representing her first husband, even though she had remarried his brother, and the second part being her claim to inherit collaterally to Sadhu Singh, brother of her first husband, on the ground that her first husband would, if alive on the date of the death of Sadhu Singh, have succeeded to him. On the evidence in the case the learned Judges came to the conclusion that Premi was entitled to succeed to her father-in-law as a pre-deceased son's widow according to the custom prevailing in the family. On the first part of her claim to the share of the estate of her father-in-law as would have fallen to her first husband, the learned Judges accepted her claim, inspite of her remarriage to her first husband's brother. In regard to this part of the claim, the learned Judges observed—

> "We would clear the ground by stating at once that there is ample authority in the Customary Law for the view that ordinarily a widow, by re-marrying her

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> husband's brother, does not for the purposes of succession, lose her previous status as the widow of her first husband and that Mst. Premi must, therefore, *qua* the estate of Arjan Singh, be regarded as the widow of Budha".

This observation of the learned Judge, I wish to emphasize, is confined only to the claim of Premi to succeed to her father-in-law *qua* the share of her first husband Bhuda, and does not go a jot beyond. This part of her claim was in substance a claim as representing her first husband and to an estate to which, if alive, he would have succeeded when his father died. This part of her claim had nothing to do with the question of her right to collateral succession in the family of her first husband. It is the second part of her claim that brought in the question of her collateral succession on the ground of her claiming the share that would have fallen, on the death of Arjan Singh, to Sadhu Singh, and she claimed this as representing her first husband Bhuda, obviously treating Sadhu Singh, as collateral of her first husband Bhuda. This part of her claim is separately disposed of by the learned Judges and reference to it is made at page 1078 of the report. The learned Judges say—

> "As regards the other half, to which Mit Singh, was entitled on the death of his grand-father, the plaintiff has failed to prove a custom under which a widow succeeds collaterally to the property to which her husband would have succeeded if he had been alive".

This second claim of Premi to succeed collaterally to Sadhu Singh, was disallowed by the learned Judges. This case, to my mind, therefore, answers the question under consideration in the negative.

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The learned counsel for Mohinder Kaur has strongly relied upon this case to support his contention that Mohinder Kaur is entitled to succeed collaterally to a share in the estate of Mansa Singh deceased, but this very case is opposed to his argument. It is fallacious to rely in support of such a claim on the observations of he learned Judges in regard to the first part of the claim of Premi in that case which is, as shown, separately and distinctly dealt with by the learned Judges.

In *Gurdialo* v. *Mst Dhan Kaur* (1), Kura and Nand Singh, were two brothers, and on the death of Kura his widow Dhan Kaur remarried Nand Singh, but Kura had left behind a son named Karam Singh, who inherited his property. On the death of Karam Singh the property passed to his sister Jas Kaur, the daughter of Kura. On the death of Jas Kaur the property was mutated in the names of Dhan Kaur and Gurdialo, probably the first wife of Nand Singh, who was dead by that time. Dhan Kaur then claimed the whole of the property on the ground that one-half of it was wrongly given by the mutation to Gurdialo and she was entitled to the entire property left by her first husband Kura. The defence on behalf of Gurdialo was that remarriage of Dhan Kaur disentitled her to the claim made by her. The learned Judge found in favour of Dhan Kaur on the ground that custom provides that a *karewa* with the brother of the husband does not entail the forfeiture of the widow's right in her husband's property, at the same time pointing out that, there is no reason to limit this rule of custom to the property which she has already inherited and the rule is equally applicable to the property to which she would have succeeded, but for her *karewa* marriage with

(1) (1959) 61 P.L.R. 163.

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the brother of her deceased husband. In this case also Dhan Kaur was not claiming succession to a collateral of her first husband, but she was claiming the property of her first husband. The learned Judge negatived the objection on the side of Gurdialo based on the remarriage of Dhan Kaur. The observations of the learned Judge must in the nature of things be confined to the facts of the case and no more can be read into them for no more was necessary for decision in that case.

At the time of making the reference I was under the impression that there is a conflict of judicial opinion on the question under consideration, but, on reconsideration of the cases I find that the conflict is not on this quesion, but on another question. The conflict is on the question whether a widow having remarried a brother of her first husband and after the death of her son by the first husband can or cannot claim to the estate of her first husband. *Mst. Jaidevi* v. *Harnam Singh* (1), and *Hardam Singh and another* v. *Mts. Mahan Kaur* (2), the answer given to this question was in the negative, but in *Gurdialo* v. *Mst. Dhan Kaur* (3), the answer given is in the affirmative. This question, however, does not arise for consideration in the present case, which is clearly a case of collateral succession, and it will have to be resolved in future when it arises in an appropriate case.

On review of the cases referred to I find that there is no conflict of opinion on the question under consideration. The dictum of the learned Judges in *Didar Singh* v. *Mst. Dharmon* (4), answers the question in the negative and so also the decision of the learned Jugdes in *Kanhaya Singh* v. *Mst. Premi* (5), in which they negatived the claim to colla-

(1) 117 P.R. 1888.
(2) 64 P.R. 1910.
(3) 1959 P.L.R. 163.
(4) 25 P.R. 1888.
(5) 322 P.L.R. 1913.

teral succession on facts exactly simialr to the present case.

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The learned counsel for Mohinder Kaur relies upon para 33 of Rattigan's Digest of Customary Law, 1938 Edition, which para says :—

> "But, in the absence of a custom to the contrary, her remarriage, even with a stranger, will not deprive the widow of any future rights of inheritance to which she would have been entitled, but for such re-marriage".

As I understand the statement of custom in this para it only means this, that if in spite of re-marriage a widow can show that she is entitled to future rights of inheritance arising, remarriage even with a stranger is not a bar to such rights. But she has to show the existence of such a right for the ordinary rule is that on re-marriage she forfeits her deceased husband's estate, and it follows she cannot claim any future inheritance on his account. Such cases as are cited as authorities under the para from Hindu Law are not admittedly relevant, and the cases cited under custom are *Mst. Jaidevi* v. *Harnam Singh* (1), and *Hardam Singh and another* v. *Mst. Mahan Kaur* (2). It has already been shown that in these two cases the widow, after remarriage to her first husband's brother laid a claim to the inheritance opening upon the death of her son by her first husband and the learned Judges did not accept her claim. This supports the view of this para which I have just expressed. In the present case at the hearing an opportunity was given to the learned counsel for Charan Singh to make an application in regard to any custom, special or otherwise, on

(1) 117 P.R. 1888.
(2) 64 P.R. 1910.

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the question now under consideration and applicable to the parties in the case. The learned counsel did not take advantage of the opportunity and made no such application. The opposite side has not asked for an opportunity to produce any evidence to establish a custom in support of the claim by Mohinder Kaur to succeed collaterally to Mansa Singh. It is clear that on the record of the present case there is no material that supports such a claim by Mohinder Kaur.

The dicta *Didar Singh* v. *Mst. Dharmon* (1), and *Kanhaya Singh* v. *Mst. Premi* (2), proceed, if I may say so with respect, on sound basis, because ordinary rule being that the re-marriage of a widow causes forfeiture of her life-interest in her first husband's estate which then reverts to the nearest heirs of the husband, and the exception to it, as the special custom in this respect, being that among Sikh Jats of the Punjab widow does not forfeit her life-estate in her deceased husband's property by reason of her re-marriage in *karewa* form with her husband's brother, the exception cannot be enlarged beyond its scope and a special custom stated in it extended by logic or analogy. Apparently the scope of an exception is limited and restricted, but in the case of an exception, in the shape of a special custom, it cannot be extended on any con-consideration, for the settled rule is that even a generally accepted rule of custom cannot be extended by logic or analogy. Widow's re-marriage leads to forfeiture of the estate inherited by her from her first husband, but the tribe or tribes in which the special custom as an exception to this rule, as referred to above, prevails, it has gained ground because of some special social considerations and they may never have intended the extension of such an exception to collateral succession

(1) 25 P.R. 1888.
(2) 322 P.L.R. 1913.

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for there is nothing to show in this case that any such conception prevailed among them. It is, in my opinion, to be taken that they made the exception to meet a particular social situation of a widow re-marrying her first husband's brother and then to provide that on account of such re-marriage she will not lose her first husband's property, but it would be a conjecture to say that from this they intended that she will also have a right to succeed collaterally. In the circumstances I would, therefore, answer the question referred to the Bench in the negative.

Gosain, J.

GOSAIN, J.—I have had the advantage of reading the judgment which my learned brother Mehar Singh J., proposes to deliver in this case, but I regret I cannot agree with the same. In the reference order the Division Bench has clearly found that the re-marriage of Mst. Mohinder Kaur with Gurdial Singh, the younger brother of her deceased husband, does not entail the consequences of forfeiture of her husband's estate and that she continues to hold the said estate. In fact this proposition was conceded at the Bar before the said Bench. The only dispute now left is with regard to the rights of Mohindar Kaur in the matter of succession to the property of Mansa Singh, who has died during the pendency of this appeal, and the only question referred to the Full Bench is—

> "Whether in the case of Jats governed by custom in matters of succession, a widow, by remarrying her deceased husband's brother, is entitled to collateral succession in the family ?"

On this point, there is obviously a divergence of opinion which I pointed out in my judgment in *Gurdialo* v. *Mst. Dhan Kaur* (1), and which is also pointed out in the order of reference in the present case.

(1) (1959) 61 P.L.R. 163.

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The learned counsel for the appellants relies on *Didar Singh* v. *Mst. Dharmon* (1), *Mst. Jaidevi* v. *Harnam Singh* (2), *Hardam Singh and another* v. *Mst. Mahan Kaur* (3), and *Mst. Desi* v. *Lehna Singh* (4), and according to him these authorities lay down the proposition that amongst Jats governed by custom in the matters of succession a widow by remarrying her deceased husband's brother ceases to have any future right to colleteral succession in the family. The learned counsel for the respondents, on the other hand, relies on *Kanhaya Singh* v. *Mst. Premi* (5), *Gaman* v. *Mst. Aman* (6), and *Mst. Gurdialo* v. *Mst. Dhan Kaur* (7), and urges that these rulings lay down a contrary proposition, namely, that amongst Jats governed by custom in matters of succession a widow by re-marrying her deceased husband's brother does not in any way lose her future right to collateral succession in the family. He also places his reliance for this proposition on paragraph 33 of the Digest of Customary Law by Rattigan which he contends has been held to be a book of unquestioned authority by their Lordships of the Privy Council in *Mst. Subhani* v. *Nawab etc.* (8).

Before considering the various rulings cited by the learned counsel for the parties, it is necessary first to consider what rights a widow governed by custom in matters of succession possesses in respect of collateral succession in her husband's family. At one time a view prevailed in the Chief Court of Punjab that the custom permitting collateral succession of a widow in her husband's family did

(1) 25 P.R. 1888.
(2) 117 P.R. 1888.
(3) 64 P.R. 1910.
(4) 46 P.R. 1891.
(5) 322 P.L.R. 1913.
(6) 171 P.R. 1888.
(7) (1959) 6 P.L.R. 163.
(8) I.L.R. (1941) 22 Lah, 154 (P.C.).

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not generally exist in most of the agricultural tribes of Punjab and that it was an exceptional one. In *Mst. Aso, etc.* v. *Mst. Tabi, etc.* (1), which related to Jats of Ferozepore District, it was observed by Plowden J. that—

> "There are some instances in Hoshiarpur and Jullundur of Hindu and Muhammadan widows, who have succeeded collaterally to the exclusion of persons outside the immediate family. * * *. But the custom set up is unquestionably exceptional, and I do not look upon any of these cases as of the slightest value in a question among Hindu Jats in the Ferozepore District".

The evidence in that case was found to be meagre and as the onus was placed on the widow to establish a custom in favour of her right to succeed collaterally, she was held to have no such right. In *Mst. Khem Bai* v. *Bhowani Das* (2), which related to Dhal Khatris of Jhang District, a similar view was taken. Mr. Justice Roe took a similar view in another unpublished case which was Civil Appeal No. 89 of 1893. However, in some of the cases relating to some other agricultural tribes of Punjab a custom entitling the widow to succeed collaterally in her husband's family was found to exist. The general custom was all the same understood to be one against the right of a widow to succeed collaterally, and wherever a widow alleged that she had such a right, the onus was placed on her to prove the same. In *Saddan* v. *Khemi* (3), and *Gurdial Singh, etc.* v. *Arur Singh,*

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(1) 77 P.R. 1893.
(2) 69 P.R. 1896.
(3) 15 P.R. 1906.

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etc. (1), such an onus was placed upon the widow, but she was held to have discharged the same. In *Hardam Singh* v. *Mst. Mahan Kaur* (2), and in *Kanhaya Singh* v. *Mst. Premi* (3), the widow was held not to have been able to discharge the said onus. In *Mst. Sultan Bibi, etc.*, v. *Ghulam Haidar Khan, etc.* (4), a Division Bench of the Punjab Chief Court consisting of Mr. Justice Jhonstone and Mr. Justice Rattigan, considered at considerable length the various rulings relating to the rights of widows in respect of collateral succession and ultimately came to the conclusion that the custom generally prevailing amongst the agricultural tribes of Punjab allowed the widows to succeed collaterally and that the said custom was not in any way exceptional. It was found there that the ruling of Plowden, J., in *Mst. Aso, etc.* v. *Mst. Tuli, etc.* (5) had been expressly dissented from in *Saddan* v. *Khemi* (6), and *Gurdial Singh, etc.* v. *Arur Singh, etc.* (1), and had been ignored in several other cases, e.g., *Chand Kaur* v. *Ram Singh* (7), etc. The general custom of the Punjab was found to be in favour of collateral succession of widows rather than against it. In *Khadim Hussain* v. *Sher Muhammad, etc.* (8), the matter was once again considered by another Division Bench of the Punjab Chief Court consisting of Johnstone, C.J., and Shadi Lal, J., and they approved of the view taken in *Mst. Sultan Bibi, etc.* v. *Ghulam Haidar Khan, etc.* (4), Shadi Lal, J., who wrote the main judgment, observed that—

> "Having regard to this exposition of the Customary Law, with which we are in

(1) 51 P.R. 1909.
(2) 64 P.R. 1910.
(3) 322 P.L.R. 1913.
(4) 32 P.R. 1915.
(5) 77 P.R. 1893.
(6) 15 P.R. 1906.
(7) 20 P.R. 1895.
(8) 121 P.R. 1916.

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full accord, we think it would be an act of supererogation to deal with the previous rulings of this Court afresh. Suffice it to say that the onus is on the appellant to prove that the widow is not entitled to succeed collaterally and that the evidence in this case is wholly insufficient to discharge this onus."

From the aforesaid observations it is clear that the general custom in the Province was taken to be one in favour of widows' right of collateral succession and the onus was thrown upon the party denying such a right to prove that the right did not exist. As far as I have been able to see, in all subsequent cases a consistent view has been taken that a widow governed by custom in the matter of succession has got a right to succeed collaterally in her husband's family as the representative of her deceased husband. In *Mst. Nasib-un-Nisa* v. *Mst. Ahmad-un-Nisa* (1), a Division Bench of the Lahore High Court held that sex was no bar to the right of representation. This view was upheld by their Lordships of the Privy Council in *Hashmat Ali* v. *Mst. Nasib-un-Nisa* (2), The same view has been taken in a large number of other cases some of which are—*Mst. Mel Kaur* v. *Daulat Ram* (3), *Mst. Sardaran Bi* v. *Mst. Mirzan* (4), *Akhtar Abbas* v. *Nazar Abbas* (5), and *Surjan Singh* v. *Ujjagar Singh* (6). In the 1938 Edition of the Digest of Customary Law by Rattigan as revised by Mr. Rustomji, a large number of rulings where widow's right to collateral succession was

(1) I.L.R. (1921) 2 Lah. 383.
(2) I.L.R. 6 Lah. 117.
(3) I.L.R. 16 Lah. 476.
(4) A.I.R. 1935 Lah. 954.
(5) A.I.R. 1946 Lah. 10.
(6) A.I.R. 1946 Lah. 394 (F.B.).

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recognised are mentioned, and in brackets it is mentioned by the author as under :—

> "(This view is in accord with the general custom of the Punjab)".

In the latest edition of this book as revised by Mr. Om Parkash Aggarwala, the general custom of the province is stated to be that a widow has got a right of collateral succession in her husband's family.

It was held by a Full Bench of the Lahore High Court in *Surjan Singh* v. *Ujjagar Singh* (1), that—

> "Whenever a widow acquires property in the family of her husband by means of succession, she acquires it for the benefit of her husband's estate and not on her own behalf. She is carrying on the work of consolidation of the estate which her husband would have carried out had he been alive. The widow cannot form a fresh stock of descent as it is realised that she is merely a representative of her husband......so far as property belonging to her husband's family is concerned. Consequently, when the widow of a collateral is allowed by custom to succeed she is to be treated as having done so as a representative of her husband and not in her own right as heir to the last male owner when the next heir after her death has to be traced."

Precisely the same view was taken in *Akhtar Abbas* v. *Nazar Abbas* (2).

(1) A.I.R. 1946 Lah. 394 (F.B.).
(2) A.I.R. 1946 Lah. 10.

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It is, therefore, clear from the above discussion that a widow governed by custom in matters of succession generaly possesses a right to succeed collateraly in her husband's family and that she exercises this right in no other capacity except as representative of her husband, and the property acquired by her by such succession becomes an accretion to her husband's estate and on her death it goes to her husband's reversioners along with the estate itself. It is also clear that the custom generally recognises a right of representation in matters of succession and that sex is no bar to the said right.

The matter which we have next to consider is whether the marriage of a widow with her husband's brother in any way affects the aforesaid right. In paragraph 32 of Rattigan's Digest of Customary Law it is stated that—

> "In the absence of custom, the remarriage of a widow causes a forfeiture of her life-interest in her first husband's estate, which then reverts to the nearest heir of the husband."

To this rule of customary law, there is a well recognised exception mentioned by Rattigan himself which reads that—

> "By custom among the Sikh Jats of the Punjab a widow does not forfeit her life-estate in her deceased husband's property by reason of her remarriage in Karewa form with her husband's brother."

In *Mst. Indi* v. *Bhanga Singh and others* (1), Chatterji J., who delivered the judgment of the

(1) 115 P.R. 1900.

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Division Bench observed at page 451 of the report as under :—

> "Among Jats also no ceremonies are essential to a widow's remarriage, but this is more specially the case where the second husband is the brother of the first. By mere cohabitation the widow assumes the position of his wife and he of her husband. This must be due to the universal opinion held by Jats that in marrying her husband's brother the widow is doing the right and proper thing and what she is expected to do. It is allowable, then, to infer that as regards forfeiture there would be some differentiation between the consequences of an act of this nature and those of a Karewa out of the family. The estate of the widow is only for life, and is primarily given to her by way of maintenance. She gets this as a member of the family and loses it if she leaves the family for another. Would she be subjected to the same penalty if she continues a member of the family as before in spite of her remarriage ? Probably custom which is founded on the good sense of the people and the notions of natural justice and equity prevalent among them would prevent the second husband if he is the sole brother of the deceased from saying to his brother's widow 'You have done what is regarded as the proper thing amongst us by marrying me. I now call upon you to surrender your first husband's property as the penal consequence of that act'. If there are more brothers than one the case of

those, who do not marry the widow is, but little stronger than that of him, who does marry her. I should be prepared from these considerations to prefer the evidence in support of the contention that such a marriage does not involve loss of the first husband's estate."

Sir Charles Roe in his book on Tribal Law, page 60, has clearly stated that "marriage with a brother or next agnate is treated as a thing apart from a marriage with a stranger". The basis of the exception to the general rule given in paragraph 32 of the Rattigan's Digest of Customary Law clearly appears to be that according to the notions generally prevailing amongst Jats of Punjab a widow by marrying the brother of her first husband does a thing which is regarded by custom to be a proper one and adopts a course which is regarded to be the only right course. By virtue of such marriage she does not cease to be the member of her husband's family and does not in any way lose the status of being her first husband's widow. A Division Bench of the Punjab Chief Court consisting of Mr. Justice Agnew and Mr. Justice Shadi Lal, in *Kanhaya Singh*, v. *Mst. Premi* (1), observed at page 1077 of the report as under :—

"We would clear the ground by stating at once that there is ample authority in the Customary Law for the view that ordinarily a widow, by remarrying her husband's brother, does not for the purpose of succession, lose her previous status as the widow of her first husband and that Mussammat Premi must, therefore, *qua*

(1) 322 P.L.R. 1913.

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the estate of Arjan Singh, be regarded as the widow of Budha."

The various rulings cited by the parties in the present case have to be considered now in the light of the above observations.

Rulings cited by the learned counsel for the appellants:

(i) *Didar Singh* v. *Mst. Dharmon* (1)—This ruling has hardly any bearing on the facts of the present case. There one Gara Singh died leaving two widows Mst. Dharmon and Mst. Jian. The total property that he left was two Biswas of land. Mst. Dharmon entered into a Karewa marriage with the younger brother of her first husband, but in spite of it she was allowed to retain one-half of the land, the other half having gone to Mst. Jian. The other brothers of Gara Singh filed suit for a declaration that by virtue of remarriage with one of the brothers of her first husband, Mst. Dharmon had forfeited her husband's estate, and this suit appears to have been dismissed. After the death of Mst. Jian, the plaintiff (Mst. Dharmon) claimed to succeed as a surviving co-widow to the one Biswa of land which had originally gone to Mst. Jian, but which had in the meantime been taken over by the brothers of her husband. The two Courts below allowed her succession and the brothers of her deceased husband then came to the Chief Court in second appeal. The argument urged on their behalf was that her remarriage did not cause a forfeiture of her own share, yet on it she ceased to be Gara Singh's widow and became the wife of Dial Singh and could not, therefore, succeed to a share to which her only claim was that of a surviving co-widow. This argument was

(1) 25 P.R. 1888.

repelled by the Division Bench of the Punjab Chief Court consisting of Rattigan and Roe JJ., and in the body of the judgment, at page 69 of the report, it was observed as under :—

> "We can, therefore, only decide the point before us by considering what is the natural consequence of the previous decisions as to the effect of the Karewa marriage on plaintiff's rights as a whole. Now it is clear from these decisions that Mst. Dharmon was allowed to retain her own one Biswa on the express ground that she continued to all intents and purposes to be one of Gara Singh's widows, and when the brothers sued for a declaration that on her death her one Biswa would revert to them as next heirs, and not to Mst. Jian as surviving co-widow, their suit was dismissed."

It is true that towards the end of the penultimate paragraph of the judgment an obiter remark was made saying that—

> "The present case differs essentially from a claim to succeed not to her first husband's estate, but to the estate of one of his collaterals."

This remark, however, does not particularly pertain to the rights of a widow, who has married a second husband, but is a general remark about the rights of all widows in the matter of collateral succession. I have already shown above that at the time when this judgment was delivered, a view prevailed in the Punjab Chief Court that a widow generally (irrespective of the fact whether she had remarried anyone or not) did not possess a right of collateral succession because the females

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as such according to the view then prevailing were not entitled to avail of the right of representation. The aforesaid remarks, therefore, have no bearing in the present case and the ruling as a whole helps the respondents inasmuch as Mst. Dharmon was allowed to succeed to her co-widow in spite of the fact that previous to that she had entered into a Karewa marriage with Dial Singh, the younger brother of her first husband. The future rights of succession of a widow remarrying the brother of the previous husband were upheld rather than negatived in that case.

(ii) *Mst. Jaidevi* v. *Harnam Singh* (1).—The question involved in this case was whether amongst the Sus Jats of Hoshiarpur, a mother, who had contracted a second marriage before her son's death, was excluded from the succession to her son's estate when he had left uncles and cousins. The Divisional Judge had held that she was so excluded and the Division Bench of the Chief Court of Punjab agreed with the said decision. It was observed at page 326 of the report as under :—

> "In the present case, the issue framed by the Divisional Judge was, 'if a son dies, and his mother before his death has taken a second husband such as a *dewar* (younger brother of her first husband), will his estate pass to his mother or to his collaterals? On this, plaintiff produced in Court three witnesses, who stated generally that the estate would pass to the mother, whilst defendant produced five who said it would pass to the collaterals. Neither side could produce any instances. A commission was

(1) 117 P.R. 1888.

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then issued to Chaudhri Badar Bakhsh, Zaildar, an old Jat himself, whose memory goes back to Sikh times. He examined sixteen Jats of this and neighbouring village, and the Patwari, who has held office himself for 9 years, and whose father was Patwari before him. It is true that the witnesses could not quote instances, but they declared unanimously that, in the case named, the estate passed to the collaterals. This was also the finding, both of the local Commissioner himself and the Tahsildar, and it receives the very strongest corroboration from the conduct of the parties themselves. As a matter of fact, the collaterals did succeed to Jiwan's estate on his death; in their dispute over it, no one ever mentioned plaintiff or dreamed that she had a right to succeed, and it is only when her second husband, Lehna Singh, failed to secure the estate for himself and Majja Singh that he be thought himself of a possible right of his wife to succeed as mother of Jiwan and so put her up to bring the present suit."

From the observations quoted above, it is quite clear that the case was decided on its own facts and that the dispute there was whether a mother who had remarried a second husband was entitled to succeed as against the collaterals. The case as such is no doubt of some help the appellants, but cannot be regarded as a direct authority for the proposition now before the Full Bench.

(iii) *Hardam Singh* v. *Mst. Mahan Kaur* (1).—In this case a man died leaving a widow and a son.

(1) 64 P.R. 1910.

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The latter succeeded to his estate and the widow, his mother, married her late husband's brother by Karewa. Then the son died without issue and the land in suit was mutated in favour of his brothers including her second husband, whereupon she sued that she was entitled to a life estate before them. This was again a case where a mother, who had married a second husband, claimed to succeed as against the brothers of the last male owner. The case was decided mainly, if not exclusively, on the basis of the ruling reported in *Mst. Jaidevi* v. *Harnam Singh* (1), and discussed above. No effort was made in this case to ascertain the custom with regard to the right of a widow marrying her first husband's brother and claiming a right of collateral succession. This case does not take us anywhere beyond the one reported in *Mst. Jaidevi* v. *Harnam Singh* (1).

(iv) *Mst. Desi* v. *Lehna Singh* (2).—In this case one R.S. a Sandhu, Jat (Hindu) of the Chunian Tahsil, Lahore District, died 14 years before suit, leaving a large area of agricultural land. The land then devolved on his two sons, who both died without leaving any issue, the second death, that of P.S., who was unmarried, being about a year before suit. The plaintiff D. was the widow of R.S. and mother of P.S. she claimed to be the heir of P.S., son of R.S., her late husband, and herself as his mother: and as such she demanded possession from the defendants. The defendants were the collateral heirs of P.S. distantly related, and their case was that the plaintiff had married a second husband soon after the death of R.S., and this entailed the consequence of forfeiture of her rights. The Full Bench of the

(1) 117 P.R. 1888.
(2) 46 P.R. 1891.

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Punjab Chief Court by a majority judgment upheld the contentions of the defendants and nonsuited the plaintiff. This case is of no use at all to the appellants inasmuch as it was not a case of Karewa marriage by a widow with the brother of her first husband.

Out of the four rulings quoted by the appellants' counsel, therefore, the first and the fourth do not at all help the appellants, and the second and the third can be treated as being of some help to them, but even they are not direct authorities for the point now before us. As already observed by me, the first ruling relied upon by the appellants, viz., *Didar Singh* v. *Mst. Dharmon* (1), to some extent supports the proposition propounded by the respondents.

Rulings cited on behalf of the respondents :

(i) *Kanhaya Singh* v. *Mst. Premi* (2).—In this case one Arjan Singh, a Saini of the Hoshiarpur District, was the owner of the land in dispute. His sons, Budha and Sadhu Singh, both died in his lifetime. After Budha's death, his widow, Mst. Premi, the plaintiff in the said case, married Sadhu Singh, by Karewa. Sadhu Singh, died in 1902 and Arjan Singh, followed him a few days later. The mutation of names in respect of the property of Arjan Singh, was originally sanctioned by the Tahsildar in favour of Mst. Premi as also in favour of Mit Singh, son of Sadhu Singh in equal shares, but on appeal the Deputy Commissioner ordered the mutation of the entire estate to be effected in favour of Mit Singh alone. Mit Singh died later without leaving any issue and the land was mutated by the Tahsildar in favour of Mst.

(1) 25 P.R. 1888.
(2) 322 P.L.R. 1913.

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Premi, but this order was again set aside by the Deputy Commissioner, who ordered mutation to be made in favour of the defendants, who were the descendants of Bura, brother of Arjan Singh. Mst. Premi then filed the suit giving rise to the second appeal, the judgment of which is reported in *Kanhaya Singh* v. *Mst. Premi* (1). One of the claims of Mst. Premi was that as step-mother of Mit Singh, she was entitled to succeed to the entire property, but this claim was negatived because of some entries in the Riwaj-i-am of the district. The Division Bench of the Chief Court, however, allowed Mst. Premi to succeed to Arjan Singh's property in her capacity as the widow of Budha in spite of the fact that she had much before that married Sadhu Singh, the brother of Budha. The following observations of the Bench consisting of Mr. Justice Agnew and Mr. Justice Shadi Lal at page 1077 of the report are very pertinent :—

> "But we think that Mussammat Premi is entitled to half the estate on the ground that on the death of Arjan Singh in 1902, both she and Mit Singh were heirs and that her omission to assert her rights against her step-son does not preclude her from putting forward those rights now in opposition to the defendants, the collaterals of Arjan Singh, more especially when we find that the present suit is within 12 years even if we take the date of Arjan Singh's death as the *terminus a quo* for the period of limitation."

Mst. Premi was no doubt non-suited with regard to the other half of the property left by

(1) 322 P.L.R. 1913.

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Arjan Singh, but this was due to the fact that the learned Judges came to the conclusion that she had not been able to prove a custom entitling a widow to succeed collaterally in her husband's family. As already observed by me in an earlier part of this judgment a conflict of opinion at that time existed generally with respect to the righs of the widows to succeed collaterally in their husbands' families. At page 1078 of the report the Bench referred to the said conflict and observed as follows :—

> "As regards the other half to which Mit Singh was entitled on the death of his grandfather the plaintiff has failed to prove a custom under which a widow succeeds collaterally to the property to which her husbahd would have succeeded if he would have been alive. There are several published decisions of this Court in which such a custom has been proved but it has been held that the custom is unusual and the onus lies on the person asserting its existence; (see *Saddan* v. *Khemi* (1), and the other authorities quoted therein). We find that on the present record there is no evidence of any sort or kind to prove the existence of this custom."

It is clear from the above observations that the claim of Mst. Premi with regard to this half was negatived merely because she had failed to prove a custom entitling her to succeed collaterally in her husband's family. The reference to *Saddan* v. *Khemi* (1), and other authorities is expressly made in the ruling and there is no doubt at all

(1) 15 P.R. 1906.

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that while negativing the right of Mst. Premi in respect of this one-half, the Bench did not rest its decision on the point that Mst. Premi having remarried after the death of her first husband had lost her rights of collateral succession. The Bench clearly said that she had failed to prove her right to succeed collaterally and this is one of the instances of the earlier cases in which onus had been placed on the widow to prove that according to the custom she was entitled to collateral succession. This case is, therefore, a direct authority in favour of the view propounded by the learned counsel for the respondents inasmuch as Mst. Premi was allowed to succeed to Arjan Singh's property as the widow of Budha in spite of her previous remarriage with Sadhu Singh, the brother of Budha, and the observations of the Bench that a widow by remarrying the brother of her first husband does not lose the status of a widow of her previous husband are very pertinent.

(ii) *Gaman* v. *Mst. Aman* (1).—The parties in this case were Mohammadan agriculturists (Dogars) of Hissar District. Defendant married again soon after the death of her first husband Samma, the grandfather of Mubarak and brother of plaintiff, and it appears that her second husband belonged to a branch of the same family as her first, and had been living with her in her first husband's house. The plaintiff sought to prove that he had a superior right of inheritance to the defendant and that the defendant had lost her right by her remarriage. The plaintiff was non-suited, and the Division Bench consisting of Roe and Frizelle JJ. dismissed the appeal filed by the plaintiff. Frizzele J., who wrote the main

(2) 171 P.R. 1888.

judgment, observed at page 453 of the report as under :—

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"I am of opinion that it was for plaintiff to prove that he had superior rights of inheritance to defendant, and that defendant had lost her rights by her remarriage. He has not made good his claim on either ground. In fact it is hardly denied that it is only on the ground of defendant's remarriage that he could contest her right at all, and it is clear that this is really the only ground he has to go upon. I can find no evidence to show that defendant has lost by this remarriage *rights of inheritance which had not accrued to her at the time of the remarriage.* She is not in the same position as if she had succeeded to her husband's estate and then remarried."

(iii) *Mst. Gurdialo* v. *Mst. Dhan Kaur.*—In this case the dispute related to property which at one time belonged to Kura. Mst. Dhan Kaur plaintiff was the widow of Kura, and Mst. Gurdialo defendant was the wido of Nand Singh, brother of Kura. On Kura's death the property left by him was mutated in the name of his son Karam Singh, and on his death it was mutated in the name of Mst. Jas Kaur, daughter of Kura. On the death of Jas Kaur the property was mutated in the names of Mst. Dhan Kaur and Mst. Gurdialo in equal shares. It may be stated here that Mst. Dhan Kaur had entered into a Karewa marriage with Nand Singh, almost immediately after the death of Kura. After the mutation had been

(1) 1959 P.L.R. 163.

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entered in the names of Mst. Dhan Kaur and Mst. Gurdialo in equal shares on the death of Mst. Jas Kaur, a suit was brought by Mst. Dhan Kaur for a declaration that the mutation of one-half property of Kura had been wrongly made in the name of Mst. Gurdialo and that she (Mst. Dhan Kaur) alone was entitled to the entire property originally belonging to Kura and later left by Mst. Jas Kaur. The defendant resisted the suit on the ground that Mst. Dhan Kaur had ceased to be the widow of Kura after her Karewa marriage with Nand Singh and that both the parties to that litigation stood on equal footing because both of them were the widows of Nand Singh and were entitled to succeed collaterally to the property left by the line of Karam Singh. I held in that case that the remarriage of Dhan Kaur with Nand Singh, brother of her first husband, did not have the effect of forfeiture of her future rights of succession and that she was entitled to succeed to the property left by Karam Singh. The bases of my decision were that the Karewa marriage with the brother of her first husband did not have the effect of her ceasing to be the member of the family of her first husband or putting an end to her status of being the widow of her first husband.

From the above discussion of the various rulings cited on behalf of the respondents it is quite clear that the two rulings reported in *Kanhaya Singh* v. *Mst. Premi* (1), and *Mst. Gurdialo* v. *Mst. Dhan Kaur* (2), are direct authorities in favour of the proposition propounded by the respondents' counsel, while the third one viz., *Gaman* v. *Mst. Aman* (3), supports the view that a widow by remarriage does not lose her future rights of succession.

(1) 332 P.L.R. 1913.
(2) 1959 PL.R. 163.
(1) 171 P.R. 1888.

Paragraph 33 of Rattigan's Digest of Customary Law lays down the general custom of the Punjab on this point in the following words :—

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> "33. But, in the absence of a custom to the contrary, her remarriage, even with a stranger, will not deprive the widow of any future rights of inheritance to which she would have ben entitled, but for such remarriage."

This paragraph certainly supports the view propounded by the learned counsel for the respondents and is in accord with the provisions of section 5 of the Hindu Widows Re-marriage Act (XV of 1856). In a case, where no contrary custom is alleged or proved, the provisions of the said section would evidently govern the rights of the parties and this is precisely what the aforesaid paragraph 33 means. It is a well established proposition of law that Hindus in the Punjab are governed by the Hindu Law and Mohammadans by the Mohammadan Law except of course to the extent of existence of any custom to the contrary, and where any party relies on such a custom the said party is bound to specifically allege and prove the same. This rule was recently recognised by their Lordships of the Supreme Court in *Ujagar Singh* v. *Mst. Jeo* (1). On page 1048 second column of the report, their Lordships observed as under :—

> "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 Hind Law. The parties are Sikhs to whom the Hindu law applies. Since the Hindu Law of Inheritance (Amendment) Act, 1929, a sister is

(1) A.I.R. 1959 S.C. 1041.

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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. *Sohel Singh* (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 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. *Mt. Bibi Sona Dero* (2). In *Mst. Fatima Bibi* v. *Shah Nawaz* (3), a case to which we have

(1) 110 P.R. 1906.
(2) 45 Ind. App. 10.
(3) I.L.R. 2 Lah. 98.

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earlier referred, the Court allowed 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 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."

The same view was taken by a Full Bench of this Court in *Smt. Sukhi* v. *Baryam Singh* (1), *Dua* J., who wrote the main Judgment in that case found certain propositions to be well established, and in paragraph 24 sub-paragraph 5 of his judgment he mentioned one of them as under :—

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

The appellants in this case have neither alleged nor proved any custom contrary to the provisions of section 5 of the Hindu Widows Remarriage Act and it must, in these circumstances, be held that the rule of Hindu Law as given in section 5 of the Hindu Widows Remarriage Act governs the rights of the parties in the present

(1) A.I.R. 1959 Pun. 339.

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controversy. In fact this rule has been accepted as the general custom of the Punjab by Rattigan and paragraph 33 of his book refered to above clearly states that in the absence of a custom to the contrary remarriage of a widow does not entail the consequence of forfeiture of her future rights of succession.

From the various rulings referred to above it is quite clear that a widow, who succeeds collaterally in her husband's family does so only as a representative of her deceased husband by reason of the rule of representation generally prevailing amongst the agriculturists of the Punjab in matters of succession and whatever property she gets by such succession really forms an accretion to her husband's estate and remains a part and parcel of that estate. If the contention of the learned counsel for the appellants be accepted it would evidently mean that the widow remarrying her first husband's brother remains entitled to the said estate, but that the accretions to the said estate go to somebody else or that the widow becomes incapable of making any accretions. It is true that custom cannot be extended by analogy and that it is not always logical. However, in making an attempt to find whether a particular custom actually exists, it has to be assumed that the persons, who follow the said custom do so on some rational basis. It would be anomalous, incongruous and arbitrary to hold that a widow, who has remarried her first husband's brother should be allowed to retain her first husband's estate, but should not be allowed to make accretions to the same. In *Hashmat Ali* v. *Mst. Nasib-un-Nisa* (1), their Lordships of the Privy Council had an occasion to consider whether the brother's

(1) I.L.R. 6 Lah. 117.

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daughter had the right to represent her father in the matter of collateral succession. There was no direct authority for that proposition, but there were authorities where an uncle's daughter had been allowed to succeed as the representative of her father and their Lordships of the Privy Council pointed out in the last paragraph of their judgment as under :—

> "But then it is said that no instance is proved of an actual succession by a brother's daughter, and, therefore, it is argued, the necessary custom that precisely covers this case has not been proved. But, if there be a rule that entitles an uncle's daughter to be her father's representative for the purpose of inheritance, it would be anomalous and arbitrary to withhold from a brother's daughter the same right, and their Lordships hold that the High Court rightly decided in Nasib-un-Nisa's favour."

The observations of their Lordships of the Privy Council quoted above certainly support the view that while considering whether a particular custom exists or does not exist regard has to be paid to the fact that custom has got some rational basis. Taking into consideration the fact that what a widow continued to hold after her re-marriage with the brother of her first husband is not the proprety she inherited, but what is generally known in custom as the widow's estate, it must be held as a naural corollary of this that she is entitled to make accretions to the said estate as any other widow could have, and that she is for that purpose entitled to succeed collaterally in her husband's family as representative of her deceased husband.

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For the reasons given above, I would answer the question refered to the Full Bench in the affirmative and hold that in the case of Jats governed by custom in matters of succession, a widow on remarrying her deceased husband's brother remains entitled to collateral succession in the family.

Capoor, J.

CAPOOR, J.—I agree with Gosain J., and for the reasons given by him, which I need not repeat, I would answer the question referred to the Full Bench in the affirmative.

OPINION OF THE COURT

The question referred to the Full Bench having been answered by the majority in the affirmative, the appeals will now be placed before the Division Bench for final decision.

B.R.T.

APPELLATE CIVIL

Before Mehar Singh and K. L. Gosain, J.

BADRI DASS,—*Appellant.*

versus

CHUNI LAL AND ANOTHER,—*Respondents.*

Regular Second Appeal No. 723 of 1959.

Transfer of Property Act (IV of 1882)—Section 53—Suit for declaration that sale of property was fictitious, collusive and had been made with the intention of defeating and delaying the claim of the plaintiff and other creditors—Whether to be brought in representative form on behalf of all the creditors in the Punjab where Section 53 is not in force.

1960

Dec., 28th.

Held, that it is true that the last portion of sub-section (1) of section 53 of the Transfer of Property Act, 1882, specifically provides that a suit by a creditor to avoid a