

she is entitled to do so. I would, therefore, allow the appeal of Mst. Charjo with costs.

In the result the defendant's appeal is dismissed with costs and the plaintiff's appeal is allowed with costs.

HARNAM SINGH, J.—I agree in the order.

Harnam Singh,  
J.

APPELLATE CIVIL

*Before Harnam Singh and Kapur, JJ.*

1952

LAL SINGH AND OTHERS,—*Plaintiffs-Appellants.*

December  
17th

*versus*

ROOR SINGH AND OTHERS,—*Defendants-Respondents.*

Regular First Appeal No. 5 of 1948.

*Custom—Amritsar District—Non-ancestral property—Whether daughters and daughters' sons exclude collaterals—Right of representation amongst females—Whether recognised—Practice—Pleading—Custom not pleaded—Whether can be allowed to be urged in the alternative.*

*Held*, that in Amritsar district daughters and daughters' sons have a preferential claim to the non-ancestral property as against the collaterals. Daughter's son is a preferential heir to the estate of his mother's father if the mother had predeceased the father. The right of representation amongst females under custom is recognised.

*Held further*, that the plaintiffs came into court alleging that the property in dispute was ancestral property and they never alleged that even if the property was non-ancestral they had a preferential right to succeed to the estate of Sant Singh. On the pleadings therefore they are not entitled to turn round and say that even if the property was non-ancestral they had a preferential right.

*Qamar-ud-Din v. Fateh Bano* (1), *Sadhu Singh v. Mst. Harnamon and others* (2), *Bawa Singh and another v. Mst. Taro* (3), *Hashmat Ali and another v. Mst. Kasib-un-Nisa* (4), *Mussamat Kaman v. Ghafoor Ali and others* (5), *Santa and others v. Mst. Sahib Bibi and another* (6), *Kishan Singh and others v. Mst. Santi and others* (7), *Sona Dero's Case* (8), *Karam Dad and others v. Mst. Mohammad Bibi and others* (9), *Subhani's Case* (10), and *Gokal Chand v. Farvin Kumari* (11), relied on.

First appeal from the decree of the Court of Shri J. N. Kapur, Sub-Judge, 1st Class, Amritsar, dated the 3rd day of January 1948, dismissing the plaintiffs' suit with costs.

Y. P. GANDHI, for Appellants.

SHAMAIR CHAND, P. C. JAIN and DALJIT SINGH, for Respondents.

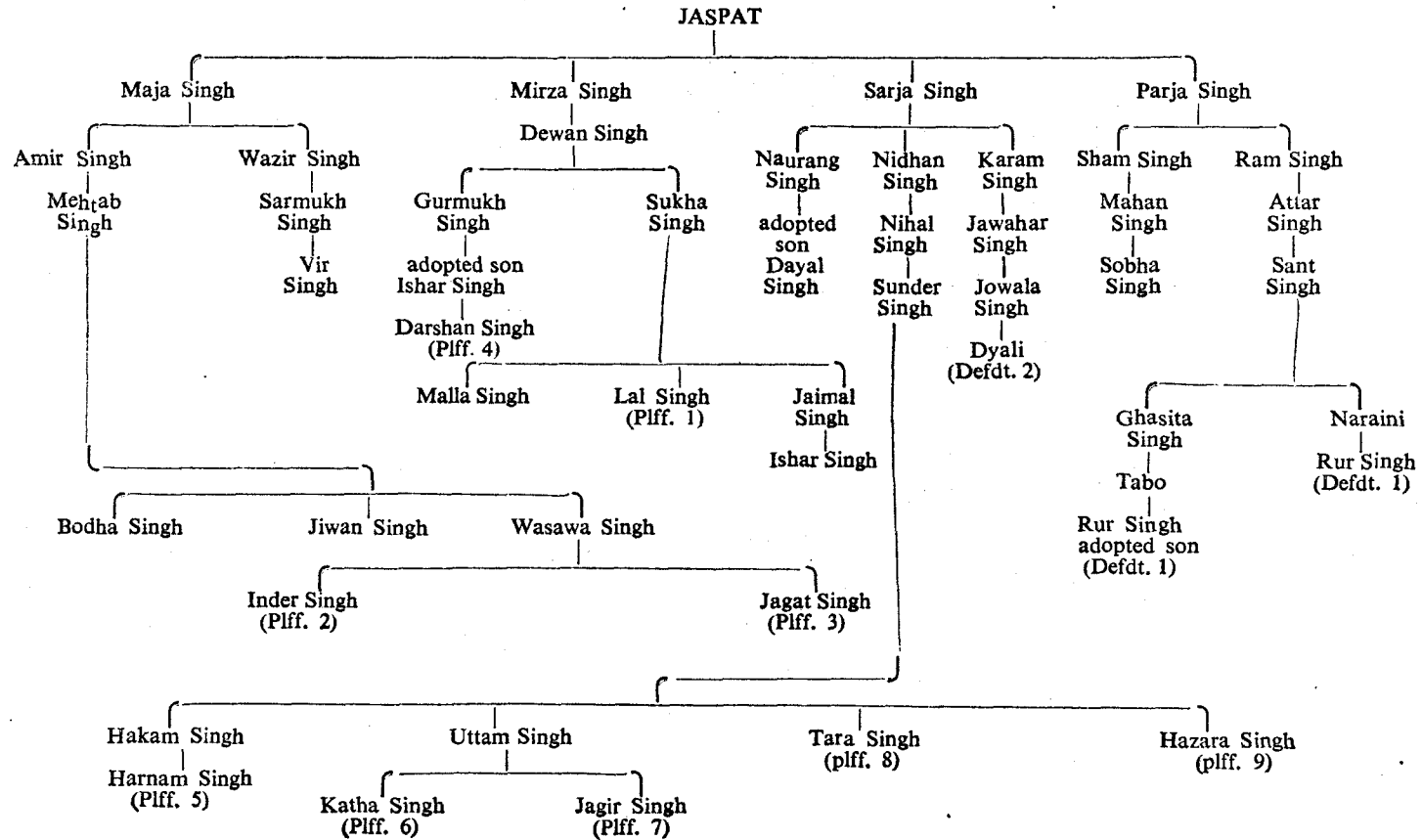
#### JUDGMENT.

Kapur, J.

KAPUR, J. This is a plaintiffs' appeal against a judgment and decree of Mr. Jagdish Narain Kapur, Subordinate Judge 1st Class, Amritsar, dated the 3rd January, 1948, dismissing the plaintiffs' suit for possession of land and two vacant sites.

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- (1) I.L.R. 1945 Lah. 110
  - (2) A.I.R. 1946 Lah. 444
  - (3) A.I.R. 1951 Simla 239
  - (4) I.L.R. 6 Lah. 117, 123 (P.C.)
  - (5) I.L.R. 9 Lah. 496
  - (6) A.I.R. 1941 Lah. 94
  - (7) A.I.R. 1938 Lah. 299, 301 (F.B.)
  - (8) I.L.R. 45 Cal. 450
  - (9) I.L.R. 1942 Lah. 59
  - (10) I.L.R. 1941 Lah. 154
  - (11) A.I.R. 1952 S.C. 231.

The following pedigree-table will show the relationship of the parties:—



Lal Singh and others v. Roor Singh and others

Ghasita Singh died in 1922 leaving a widow Mst. Tabo. Rur Singh who is the son of the sister of Ghasita Singh claims to have been adopted by Ghasita Singh in 1911 when he (Rur Singh) was only four years old.

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On the death of Sant Singh mutation was effected in favour of the plaintiffs and Dyali defendant No. 2, but Rur Singh, it is alleged, took possession of the property claiming to be the adopted son of Tabo which the plaintiffs alleged according to law and custom was not allowed. It was also alleged that the property in dispute is ancestral.

Rur Singh denied the plaintiffs' claim and pleaded that he was in possession since the time of the death of Sant Singh, being the adopted son of Ghasita Singh, son of Sant Singh, and was not adopted by Mst. Tabo, that a will was made in his favour by Mst. Tabo on the 15th June 1937 and that the suit was not within time. In paragraph No. 7 he pleaded that he was the son of Mst. Naraini, the daughter of Sant Singh, and was adopted by Ghasita Singh, that this adoption was admitted in the will made by Mst. Tabo and even if the adoption was not proved and the will was held to be invalid the property in dispute was not ancestral and as a daughter's son he was a preferential heir according to the custom of Amritsar.

The Court stated the following issues :—

- (1) Are the plaintiffs reversioners of Sant Singh deceased and in what degree?
- (2) Is the property in suit ancestral *qua* the plaintiffs and Sant Singh deceased? If not, what is the effect?
- (3) Was Rur Singh defendant validly adopted by Ghasita Singh and when? What is the effect?
- (4) Is the suit within limitation if the adoption was effected more than six years before this suit?

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|---|---|
| (5) Did Mst. Tabo make any valid will regarding the suit property in 1937 in favour of Rur Singh and had she the right to do so ? | Lal Singh and<br>others<br>v.<br>Roor Singh<br>and others |
| (6) Is the suit barred by time if the will is proved ?  | —<br>Kapur, J.  |
| (7) Are the plaintiffs entitled to a decree for possession in excess of their own share in the suit property ?                    |   |

There is no dispute before us that the plaintiffs are the reversioners of Sant Singh. It was disputed that the property is non-ancestral. But in spite of the arguments of counsel for the appellants we cannot hold that the admission made by the plaintiffs' Advocate in the Court of the subordinate Judge that the land was non-ancestral was in any way erroneous. We must, therefore, hold that the land was non-ancestral.

The trial Court held that Rur Singh had been validly adopted by Ghasita Singh and as the adoption took place more than 30 years before the institution of the suit the suit was barred by time. The trial Court also held that Mst. Tabo had no power to make the will.

The controversy was firstly confined to the decision of issue No. 2 as to the right of the plaintiff to exclude Rur Singh as the daughter's son of Sant Singh from succeeding to the non-ancestral property of Sant Singh. The appellants' counsel relied on the *Riwaj-i-am* of the Amritsar District of the Settlement of 1940, Exh. P. 10 at page 103 of the paper book, where the question of the right of daughters and their issues had been considered. Question No. 55 and answer thereto are as follows:—

*Right of daughters and their issues:—*

Q. No. 55—Under what circumstances are daughters entitled to inherit ?

- (a) In case of ancestral property.
- (b) In case of acquired property.

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Answer:—*All tribes.*

- (1) In the presence of son or sons of the deceased daughters do not inherit.
- (2) In the presence of a widow daughters do not succeed to property.
- (3) In the absence of sons or a widow unmarried daughters inherit till marriage.
- (4) if there be no collaterals up to the fifth degree, married daughters inherit as full owners with unrestricted powers. There is a custom obtaining among Sindhu-Jats that property devolves upon married daughters in the absence of collaterals up to the seventh degree.

This custom is applicable in both the cases (a) and (b). For relevant mutations see Schedule I. For Civil Judgments see Schedule II.

The plaintiffs came into Court alleging that the property in dispute was ancestral property and they never alleged that even if the property was non-ancestral they had a preferential right to succeed to the estate of Sant Singh. On the pleadings, therefore, they are not entitled to turn round and say that even if the property was non-ancestral they had a preferential right. In *Kishan Singh and others v. Mt. Santi and others*, (1) it was held, as indeed it was held by their Lordships of the Privy Council in *Sona Dero's case* (2) that custom must be alleged in precise terms and must by evidence be established as pleaded. Young, C. J., said—

“The appellants in their grounds of appeal in this Court again relied on their original averment that the land in suit was ancestral but no attempt was made to support this averment and indeed, as the question is one of fact, this Court is precluded by the finding of the learned District Judge from considering it. The

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(1) A.I.R. 1938 Lah. 299, 301 (F.B.)

(2) I.L.R. 45 Cal. 450 (P.C.)

position is that the custom which it was necessary for the plaintiffs to allege and prove, was not pleaded nor put in issue: the first issue having been found in favour of the defendants, the suit ought to have been dismissed.”

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Again in *Karam Dad and others v. Mst. Mohmmad Bibi and others*, (1), a case which was referred to a Full Bench and was after their decision decided by a Division Bench, the High Court did not allow the question of rights of parties in regard to the ancestral property to be agitated when in the plaint the plaintiff had already come on the basis that the property in dispute was non-ancestral (page 71 of the reports in the judgment of Tek Chand, J.). But even if this could be allowed after the decision of their Lordships of the Privy Council in *Subhani's case*, (2) the approach to the question of rights of females is now different and the rule in *Subbani's case* (2), has been approved of by the Supreme Court in *Gokal Chand v. Parvin Kumari* (3).

In Regular Second Appeal No. 181 of 1948 a case from Amritsar a Bench of this Court examined the rights of daughters to succeed and after referring to several judgments including *Qamar-ud-Din v. Fateh Bano*, (4), *Sadhu Singh v. Mst. Harnamon and others*, (5), it was held that daughters exclude collaterals in succession to the non-ancestral property of their fathers. In Rattigan's Digest of Customary Law as revised in the new edition (13th) at page 367 there are a large number of decided cases where it was held that to the non-ancestral property of their fathers, daughters are better heirs than collaterals.

In *Bawa Singh and another v. Mt. Taro*, (6), Harnam Singh, J., held in a case where the disputants were the daughter and fifth degree collaterals

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- (1) I.L.R. 1942 Lah. 59  
 (2) I.L.R. 1941 Lah. 154  
 (3) A.I.R. 1952 S.C. 231  
 (4) I.L.R. 1945 Lah. 110  
 (5) A.I.R. 1946 Lah. 444  
 (6) A.I.R. 1951 Simla 239

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that the daughters were preferential heirs. It is, in my opinion, too late in the day to hold that to the non-ancestral property collaterals have a preferential claim to the daughters.

Kapur, J.

It was then submitted that the daughter had pre-deceased the father and therefore the dispute was not between a daughter and collaterals but it was between daughter's sons and collaterals. Reliance was placed on Paragraph 23 of Rattigan's Digest where it is stated that a daughter's son is not recognised as an heir of his maternal grandfather, except in succession to his mother, but this statement of custom has nothing to do with non-ancestral property. It occurs in that portion of paragraph 23 which deals with the rights of daughters and their sons to ancestral property of the father. In Regular Second Appeal No. 181 of 1948, to which I have referred above, the claimants were collaterals and the daughter's sons. Besides no case has been cited before us which would show that a daughter's son is not a preferential heir to the estate of his mother's father if the mother had pre-deceased the father. The proposition which was argued by Mr. Gandhi goes against the very first principles of custom which recognise the right of representation. As a matter of fact in *Hashmat Ali and another v. Mst. Kasib-un-Nisa*, (1) their Lordships of the Privy Council held in favour of the right of representation of a daughter of a pre-deceased brother. This right of representation amongst females was recognised in *Mus-sammatt Kaman v. Ghafoor Ali and others*, (2) in *Sanata and another v. Mt. Sahib Bibi and another*, (3) and two unreported judgments of the Lahore High Court—R.F.A.No. 183 of 1942, decided on the 8th of March 1945 by Mahajan and Teja Singh, JJ. and R. S. A. No. 1951 of 1939 decided on the 11th of January 1943 by Dalip Singh and Beckett, JJ. I am therefore of the opinion that even this submission of counsel for the appellants is without any force. I would, therefore, hold that Rur Singh

(1) I.L.R. 6 Lah. 117, 123 (P.C.)

(2) I.L.R. 9 Lah. 496

(3) A.I.R. 1941 Lah. 94



as the daughter's son of Sant Singh is a preferential heir to the property in dispute than the collaterals.

In view of my finding on this point it is not necessary to go into any other question. I would, therefore, dismiss this appeal with costs in this Court and in the Court below.

HARNAM SINGH, J. I agree in dismissing the appeal with costs.

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### REVISIONAL CRIMINAL

*Before Khosla and Falshaw, JJ.*

PADAM PARSHAD AND OTHERS,—*Petitioners.*  
*versus*  
THE STATE,—*Respondent.*  
Criminal Revision No. 869 of 1952.

1952  
December,  
17th

*Criminal Law Amendment Act (No. XLVI of 1952)—Section 8—Cases transferred from the Courts of Magistrates to the Courts of Special Judges—Trial whether to start de novo or should start from the stage at which the cases were in the previous courts—Code of Criminal Procedure (Act V of 1898)—Section 350—Applicability of.*

*Held*, that provisions of Section 350 of the Code of Criminal Procedure apply to those cases only which are transferred from one Court to another court of the same kind whether under section 526 or section 528 of the Code or by reason of the presiding officer of that court ceasing to have jurisdiction because of his transfer or otherwise. This section does not apply to cases which are transferred from a court of one kind to a court of another kind. The court of the Special Judge constituted under Criminal Law Amendment Act (No. XLVI of 1952) is an entirely new kind of court as compared with the court of the magistrate and, therefore, the provisions of section 350 of the Code cannot be applied to cases transferred from the Courts of Magistrates to the new courts of Special Judges created by Act No. XLVI of 1952. The Special Judge must, therefore, try the cases *de novo* and not from the stage at which they were in the court of the Magistrate from which they have been transferred.

*Case reported by Shri J. S. Bedi, District and Sessions Judge, Ambala, with his letter No. 713-H, dated the 29th October, 1952 (under Section 438, Criminal Procedure Code).*