Bench consisted of two, and in these circumstances the learned counsel's contention must prevail, and it must be held that the trial was bad as contravening the provisions of section 350-A, Criminal Procedure Code.

I therefore accept this petition and set aside the conviction and the sentences. The District Magistrate will send this case to some Magistrate having jurisdiction, with the direction that it should be disposed of as quickly as possible.

N. F. E.

Revision accepted ;
Case remanded.

APPELLATE CIVIL.

Before Mr. Justice LeRossignol and Mr. Justice Fforde.

1925 SHAM DAS AND ANOTHER (DEFENDANTS), Appellants.

Dec. 23.

versus

Mst. MOOLO BAI AND OTHERS (PLAINTIFFS), NAU NIHAL KISHEN (DEFENDANT) Respondents.

Civil Appeal No. 2487 of 1921.

Custom—Succession—daughters or collaterals—Aroras *of Muzaffargarh—uncontested instances of daughters' exclusion —value of, as proof of custom*—Riwaj-i-am—*entries in—ordinarily refer only to ancestral property.*

In holding that there was no valid custom amongst *Aroras* of Muzaffargarh town under which the daughters of a sonless proprietor of certain houses and of ancestral property consisting of shops and agricultural land would be excluded by collaterals, the trial Court relied upon findings that the main occupation of the family was not agriculture but trade, and that they were not members of a village community; instances of daughters' uncontested exclusion from inheritance by collaterals were disregarded as being of little value. On appeal to the High Court it was found (1) that the family

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had themselves cultivated a portion of the land of which they had been proprietors for some generations, (2) that the district was a rough, wild tract in which it is difficult for females to retain and manage immoveable property, and one in which the compact village community, associated with the central parts of the Punjab, was practically non-existent.

Held, that uncontested cases are very good proof of an alleged custom, and that the substantial accuracy of the custom in question, being one recorded in the *Riwaj-i-am* of the district and dictated by local circumstances, had been proved.

Held further, however, that it is a well recognised rule that unless there are clear indications to the contrary, such an entry in a record of custom refers only to the succession to ancestral property.

First appeal from the decree of Lala *Ganesh Das, Subordinate Judge, 1st class, Muzaffargarh, dated the 19th August 1921, awarding the plaintiffs possession of the property in suit.*

JAGAN NATH AGGARWAL and HARGOPAL, for Appellants.

SHEO NARAIN and BAL KISHEN, for Respondents.

The judgment of the Court was delivered by:—

LEROSSIGNOL J.—The parties to this litigation are *Aroras* of Muzaffargarh town, and the only question for decision in this appeal is whether they are governed by their personal law or by a custom, by which the succession to the property of a sonless man is in favour of his collaterals to the exclusion of his daughters. The property now in suit consists of three houses, three shops and some agricultural land, of which the three shops and the agricultural land are admittedly ancestral property. The suit was brought by the daughters of Gopal Das who died in March 1912, and the defendants are brother, brother's widow and brother's daughter's son of Gopal Das. The Court below has decreed for the plaintiffs, holding that there is an initial presumption that the parties

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are governed by their personal law; that the parties are not agriculturists but are shopkeepers, although they do own agricultural land; that they are not members of a compact village community; that their main occupation is not agriculture; and that although the *riwaj-i-am* of the district is in favour of the contention of the defendants, the *riwaj-i-am* is not reliable and is not supported by instances. A large number of instances were proved by each side, and the Court below finds on scrutiny that the defendants have not been able to prove any case in which a daughter had unsuccessfully asserted her rights against collaterals.

Now, it is true that the parties are not exclusively agriculturists but the land in litigation has been in the family for some generations, and the Kanungo's evidence shows that a portion of it has been cultivated by the proprietors themselves. With regard to the objection that the parties are not members of a compact village community, it is a sufficient reply that in Muzaffargarh where this property is situate the compact village community as met with in the more central parts of the Punjab is non-existent. Muzaffargarh lies in the extreme sonth-west of the Punjab and is a wilder and rougher country than the more central districts. Consequently in such a country the difficulties experienced by women in possessing and retaining and managing immoveable property would be very considerable and on this ground alone their exclusion from succession would excite no surprise as being dictated by local circumstances. The *riwaj-i-am* of the district is distinctly in favour of the defendants and the relevant excerpt is printed at page 115 of the printed book. The first *riwaj-i-am* was prepared in 1880 and in that, Hindus of all castes are recorded as denying the right of daughters to succession in the presence of a collateral of any degree.

That *riwaj-i-am* was revised in 1903 and the reply of all Hindus again was to the same effect except that the rights of collateral heirs beyond the 7th degree were postponed to those of daughters and their descendants. The value of this *riwaj-i-am* has been challenged on the ground that the replies of the different castes of Hindus were not separately recorded and that a consolidated answer referring to all the castes of Hindus cannot be an accurate representation of the customs of such a diversity of castes. It is quite sufficient to say in this connection that the *riwaj-i-am* does not inspire as much confidence as it would have done had it been prepared with greater attention to detail, but after hearing counsel on both sides and making a careful scrutiny of the instances of the exclusion and admission of daughter's claims to succession, we hold that the custom recorded in the *riwaj-i-am* is borne out by practice. In the supplementary paper book will be found printed in a tabular form a list of the instances of the exclusion of daughters by collaterals, proved by the defendants. They number 95, but before us no reliance was placed on instances, Nos. 83 to 95 inclusive. Of these instances, in 19 the daughters raised no contest and acquiesced in the succession of the collaterals, and the learned Judge of the Court below appears to think that uncontested cases of succession of collaterals in preference to daughters have little value as proof of the custom. But it must be obvious that uncontested cases are very good proof of any alleged custom, for the greater the strength of the custom the less probability is there of anybody attempting to controvert it. In short, the defendants have proved a very large number of instances in which among *Aróras* daughters were excluded by collaterals. On the other hand, the plaintiffs, whose list of instances is printed at page

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70 and following of the paper book, have succeeded in proving less than half a dozen instances in which daughters succeeded to the prejudice of the collaterals. In their tabular list, starting from page 70, the first instance—that of Bahawal Bai—is a case of succession by a daughter, but what derogates from the value of this case is the circumstance that the collateral Jesa Ram was a sonless person who himself had made a gift in favour of his daughter's sons. Instance No. 4 was a case in which the daughters succeeded after a judicial contest but the judgment in the case, which is printed at page 5 of the paper book, shows that the daughters succeeded because the collaterals failed to support the *riwaj-i-am* by instances of the succession of collaterals. In the case printed at page 19 Hindu Law was followed for the same reason—the *riwaj-i-am* was supported by no instances. The case printed at page 40 was a case of gift, not of succession. Similarly, in the case at page 43 no instances were cited in support of the *riwaj-i-am* and the daughters succeeded on the strength of a will; in that, at page 67, the *riwaj-i-am* was again discredited. Moreover, this case was determined by a compromise and any remarks on custom found therein are *obiter*.

From the foregoing it will be seen that the balance of the weight of evidence is very much in favour of the defendants, collaterals. In addition, we have the admission of many of plaintiffs' witnesses (*cf.* P. Ws. 5, 6, 7 and 9) that daughters do not succeed in the absence of some instrument devising the property to them. For these reasons we hold that the defendants have proved the substantial accuracy of the custom recorded in the *riwaj-i-am*. All the property now in appeal with the exception of the three houses is ancestral property. It is true that in the *riwaj-i-am* no distinction is drawn between ancestral and

acquired property, but it is a well recognised rule that unless there are clear indications to the contrary, such an entry in a record of custom refers only to the succession to ancestral property. In this case the main contest centres round the ancestral land and shops and the defendants are willing to forego in favour of the plaintiffs the houses which were the self-acquired property of their father.

For these reasons we accept the appeal and dismiss the plaintiffs' suit except in respect of the three houses. In view of the relationship existing between the parties we direct that they shall bear their own costs throughout.

N. F. E.

Appeal accepted in part.

APPELLATE CIVIL.

Before Mr. Justice LeRossignol and Mr. Justice Fforde.

LABH SINGH (DEFENDANT) *Appellant* 1925

versus

Dec. 14.

SHAHBAN MIR (PLAINTIFF)—
LACHHMAN SINGH AND OTHERS (DEFENDANTS) } Respondents.

Civil Appeal No. 2343 of 1921.

Guardian and minor—Alienation of land by guardian—authorised in part—Suit by guardian for recovery of the excess portion—Failure to plead that the sale was unauthorised pro tanto—Subsequent suit by minor—whether estopped.

The mother appointed by the Court guardian of the plaintiff received permission to sell 600 square yards of the minor's land for payment of his father's debts, but in a deed executed by her the areas described as sold exceeded 600 square yards. In a suit on behalf of herself and the minor for recovery of possession of the land sold in excess she pleaded that only 600 square yards had in fact been sold, and lodged no appeal against the decision of the Munsif, who