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On these facts, which are based on legal evidence on the record and as such are binding on us, the inference cannot possibly arise that Piare Lal had acted without reasonable and probable cause in making the report to the police which resulted in the prosecution of the plaintiff. The suit was, therefore, rightly dismissed.

The appeal fails and I would dismiss it with costs.

DALIP SINGH J.—I agree.

DALIP SINGH J

A. N. C.

Appeal dismissed.

APPELLATE CIVIL.

Before Tek Chand and Skemp JJ.

MUSSAMMAT SANTI (PLAINTIFF) Appellant

versus

DHARM SINGH AND OTHERS (DEFENDANTS) Respondents.

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April 1.

Civil Appeal No. 475 of 1932.

Custom — Succession — Non-ancestral property — Sainis *of village Gelar* — Tahsil *Jullundur* — *Daughter or collaterals* — Riwaj-i-ams.

Held, that among *Sainis* of village Gelar, *Tahsil* Jullundur, the plaintiff, daughter of a sonless proprietor, on whom the *onus* rested, had succeeded in proving that she has the right to succeed to the *non-ancestral* property of her father in preference to the defendants, collaterals of the 5th degree.

Riwaj-i-ams of 1885 and 1917, Jullundur District, discussed.

Second Appeal from the decree of Khan *Zaka-ud-Din, District Judge, Jullundur, dated 13th February, 1932, affirming that of* Lala *Ishar Das, Subordinate Judge, 3rd Class, Jullundur, dated 6th March, 1931, dismissing the plaintiff's suit.*

ACHHRU RAM, for Appellant.

CHIRANJIVA LAL AGGARWAL, for FAQIR CHAND, for Respondents.

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TEK CHAND J.—The dispute in this case relates to succession to the property of one Ram Chand *Saini* of *Mauza* Gelar, *Tahsil* Jullundur. On Ram Chand dying sonless in 1929, his property, which consisted of agricultural land and a house, was taken by the defendants, who claimed to be his collaterals in the 5th degree. The plaintiff *Mussammat* Santi, who is the married daughter of Ram Chand, brought a suit against the collaterals for possession of the land and the house. She denied the relationship of the defendants with Ram Chand, and further pleaded that the property was non-ancestral and that even if the defendants were related to him as alleged, she was a preferential heir according to the custom prevailing among the parties.

The trial Court held the relationship of the defendants proved. It also held the land to be ancestral *qua* the defendants and dismissed the suit. On appeal by the plaintiff, the learned District Judge disagreed with the finding of the trial Court as to the nature of the agricultural land and held that it had not been proved to be ancestral of the defendants. He, however, found that the house was ancestral. On the question of custom, following the Answers to Questions 45 (A) and 45 (B) of the *Riwaj-i-am* of the Jullundur District prepared by *Bhai* Hotu Singh in the course of the settlement of 1913-1917, he held that the plaintiff had no right to succeed to the property of her father, whether ancestral or non-ancestral, as against collaterals of the 5th degree. He, however, granted a certificate to the plaintiff for a second appeal to this Court on the question of the custom involved.

At the commencement of the hearing, counsel for the respondents challenged the finality of the finding

of the learned District Judge that the agricultural land in dispute was non-ancestral *qua* the respondents. He contended that the learned Judge had misread the revenue entries and had omitted to consider important documentary evidence bearing on the point. After hearing him at length, I am of opinion that there is no force in this contention. The finding of the learned Judge was arrived at after a consideration of the evidence on the record and we have not been referred to any material evidence which he had ignored. I would, therefore, overrule this objection and hold that the land has been rightly held to be non-ancestral *qua* the defendants.

With regard to the house, however, it is clear that the finding is based on no evidence whatever, and it is admitted by respondents' counsel that the learned Judge was in error in supposing that the extract from the *khana shumari* papers of 1851 related to the house in dispute. The learned Judge observed that Ram Chand, deceased, was recorded as having been in possession of house No.23. A reference to the extract shows, however, that Ram Chand's name does not appear among the persons who owned, or were in possession of, that house. Further, even if Ram Chand owned or occupied the house in 1851, this fact by itself would not be sufficient to prove that it had descended to him from his 5th degree ancestor. Mr. Charanjiva Lal very fairly and properly admitted that on the materials on the record he could not support the finding of the learned District Judge on this point. It must, therefore, be held that the agricultural land and the house in dispute are both non-ancestral *qua* the defendants.

The main question for decision in the case is whether, according to the custom prevailing in the

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tribe of the parties, the daughter of a sonless proprietor has the right to succeed to his non-ancestral property as against collaterals of the 5th degree. It is conceded that, according to the Privy Council decisions, the initial *onus* was rightly placed on the daughter in view of the Answer to Question 45 (A) and (B) of Hotu Singh's *Customary Law of the Jullundur District* published in 1918. Ex. P.9 contains extracts from the more detailed vernacular *Riwaj-i-am* prepared in the course of *Bhai* Hotu Singh's settlement (1913-1917) and in it the *Sainis* are recorded as having stated that their custom was the same as that of *Sikh Jats*. In the same document the Answer of the *Sikh Jats*, to two very comprehensive and confusing questions relating to a daughter's right to succeed, is stated to have been that under no circumstances were daughters entitled to inherit in the presence of sons, widow or male kindred in the fifth degree, and that there was no distinction in regard to succession to the (1) immovable or ancestral and (2) movable or acquired property of her father. In the vernacular *Riwaj-i-am* it is specifically recorded that among *Sainis* there was *no* instance, either oral or supported by mutation or judicial decision, in support of the custom as recorded. Mention is made, however, of an instance to the contrary in which the land of one Pira (*alias* Hira) *Saini* of *Mauza* Saroya. *Tahsil* Jullundur, was inherited by his daughter's son, Beli Ram, under a decision of the Chief Court. It will thus be seen that while the Answer of the *Sainis* was stated to be in favour of the collaterals, the only instance is in favour of the daughter. In this *Riwaj-i-am* some instances of succession among *Sikh* and *Hindu Jats* are given, but none of them relates to the exclusion of daughters by collaterals from inheritance to *non-ancestral* property. In some of the cases mentioned

daughters excluded collaterals beyond the fifth degree, in one case unmarried daughters were allowed to succeed till marriage only, but it is specifically stated that in that case the land was ancestral.

Extracts from the earlier *Riwaj-i-am* compiled by Mr. Purser, Settlement Officer, in 1885, are given in Ex. P.8, but neither in the Question nor in the Answer is reference expressly made to non-ancestral property. It is admitted that the entry in this *Riwaj-i-am* has been interpreted uniformly by the Courts as applying to ancestral property only, and counsel expressed his inability to refer us to any case decided between 1885 and 1913 in which daughters were excluded from sucession to non-ancestral property of their sonless father as against collaterals among *Sainis* or *Sikh* or *Hindu Jats*.

The position, therefore, is that while the *Riwaj-i-am* of 1885 did not exclude daughters from succession to non-ancestral property as against collaterals of any degree, the *Riwaj-i-am* of 1917 recorded the custom to be that collaterals within five degrees were preferential heirs even with regard to non-ancestral property. No instance of such preferential succession is noted in this *Riwaj-i-am*, but there is one instance mentioned which is definitely in favour of the daughters.

Of the decided cases, the most important is Ex. P.13 *Kura* v. *Mussammat Gabo*, decided by *Lala* Udai Ram, *Munsiff*, Jullundur, on the 30th April, 1918, the parties to which were *Sainis* of *Mauza* Gelar, the village to which Ram Chand, deceased, belonged. In that case a widow in possession of the estate of her deceased husband had gifted it to her daughter. The brother of the deceased claimed the property, alleging

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it to be ancestral. The Court held that the land was non-ancestral and the gift by the widow in favour of the daughter was in the nature of acceleration of succession, as under custom she was a preferential heir with regard to such property.

It will thus be seen that among *Sainis* of Jullundur *Tahsil* there are two instances of succession of daughters to non-ancestral property, (1) that of Hira mentioned in the *Riwaj-i-am* and (2) the judicial instance, *Kura* v. *Mussammat Gabo* (Ex. P.17). As against this the defendants were not able to prove any instance of daughters' exclusion in this tribe. They relied on the oral testimony of a number of witnesses. These witnesses, however, did not depose to the *Saini* custom in general, but stated that among *Sainis* of the *Baling Got*, to which Ram Chand, deceased, belonged, daughters were excluded by collaterals in succession to non-ancestral property. It appears that they attempted to prove a special custom prevailing in this particular *Got*, but none of them could give an instance in support of the alleged custom. This evidence, therefore, is not of much value and was not seriously relied on by the defendants' learned counsel.

As already stated, the *Sainis* are recorded in *Bhai* Hotu Singh's *Riwaj-i-am* as having stated that their custom was the same as that of *Sikh Jats*. It is, therefore, necessary to refer to the instances among the *Jats* which have been proved by the parties on the present record. The plaintiff has produced copies of judgments in three cases, all decided after the publication of *Bhai* Hotu Singh's *Customary Law*, in which the Courts held in favour of the daughters :—

(1) Ex. P.10—*Bhagat Singh* v. *Mussammat Chandi* decided by *Mirza* Zahur-ud-Din, Subordinate

Judge, Jullundur, on the 25th November, 1926. The parties were *Jats* of *Mauza* Chitti, *Tahsil* Jullundur and the dispute was between the daughter and collaterals of the 4th degree. The property was found to be non-ancestral and the daughter was held to be preferential heir. This decision was confirmed on appeal by the District Judge (Ex. P.12).

(2) Ex. P.11—*Kartar Singh* v. *Shiv Singh*, decided by the District Judge, Jullundur, on the 23rd June, 1927. In this case a *Jat* widow in possession of her husband's self-acquired property had sold it to a stranger. His collaterals of the 3rd degree brought a suit to contest the alienation, and the vendees pleaded that in the presence of daughters and their sons the plaintiffs had no *locus standi* to question the alienation. It was decided that the daughters were preferential heirs to the self-acquired property of their father, and the suit of the collaterals was dismissed.

(3) Ex. P.17—*Bhulla* v. *Mussammat Rali*, decided by *Lala* Ram Rang, Subordinate Judge, Jullundur, on the 6th June, 1929. In that case a widow had gifted her husband's self-acquired property to her daughter and a collateral of the third degree contested the gift. The land was found to be non-ancestral, and the suit dismissed on the ground that he had no right to succeed in the presence of the daughter.

In addition to these three proved instances on the record, reference may be made to Civil Appeal No.1449 of 1931 (*Narain Singh* v. *Mussammat Chand Kaur*) decided by a Division Bench of this Court on the 28th November, 1934, the parties to which were *Jats* of Phillaur *Tahsil* who had migrated to the Chenab Canal Colony. There the dispute related to squares of land acquired in the Colony, but was decided according to the custom of the *Jats* of Jullundur

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District. After enquiry the daughters were held to be preferential heirs as against the brother of the deceased colonist.

As against this, the defendants rely on the judgment of *Lala* Brij Lal, Subordinate Judge, in a case decided on the 17th July, 1930 (Ex. D.12), the parties to which were *Jats* of Nawanshahr *Tahsil*. In that case the dispute mainly centered on the question whether the property was ancestral or not. The learned Subordinate Judge found on the evidence that most of the property in dispute was ancestral and, therefore, the daughter had no right to succeed as against collaterals of the 3rd degree. Two small fields, measuring about 5 *kanals* only, however, were found to be non-ancestral and with regard to them also the learned Subordinate Judge decided in favour of the collaterals. A perusal of the judgment shows that the parties had confined themselves mainly to proof of their respective contentions as to the character of the property, and had led no evidence whatever relating to the custom of succession to non-ancestral property. The Subordinate Judge, having found a very small part of the property to be non-ancestral, held that succession should be regulated according to the presumption arising from the entry in Hotu Singh's *Customary Law*. This is certainly an instance in favour of the defendants, but its value is largely discounted by the considerations set out above.

In *Mussammat Naraini* v. *Bhag Singh* (1), a Division Bench of this Court held that among *Kambohs* of Nakodar *Tahsil* it had not been proved that daughters excluded collaterals of the third degree in regard to self-acquired property of their father. In that case,

(1) (1934) I. L. R. 15 Lah. 58

the learned Judges observed that "in the case of women's rights slight evidence might be sufficient to shift the *onus*, but in this case not even the slightest evidence was really forthcoming to rebut the presumption arising from the entries in the *Riwaj-i-am*," which was followed.

It will thus be seen that there are two proved instances in favour of the plaintiff against none among the *Sainis* and four against one among the *Jats* who are recorded in the *Riwaj-i-am* as having the same custom. The question for decision is whether this evidence is sufficient to rebut the initial presumption arising in favour of the defendants from the entry in the *Riwaj-i-am*. In considering this question it must be borne in mind that the *Customary Law of the Jullundur District* contains intrinsic evidence of being an imperfectly compiled document; and if I may say so with all respect, it records several patently erroneous, inconsistent and unintelligible entries. It seems that either the questions were not clearly explained to the persons questioned or the answers were given without a proper appreciation of the implications of the phraseology used. I shall illustrate this by references to a few out of numerous such entries in the publised volume:—

(1) In the Answer to Question 2 dealing with the system of reckoning the degree of relationship, it is recorded *inter alia*, that a brother and an uncle's son are both related to the proprietor in the first degree, while a brother's grandson is related in the 3rd degree. It is hardly necessary to say that this is contrary to the method of counting degrees which has been well-established in the Punjab, including the Jullundur District, since the Annexation. I am not aware of a single case in which an attempt has been

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made to apply this peculiar method of reckoning degrees of relationship, and counsel for the respondents frankly admitted that it was wrongly recorded. It will be of interest to note that in the case before us the defendants themselves did not count their relationship with Ram Chand, deceased, according to this method, but followed the established rule as set out in para. 23 of Rattigan's Digest.

(2) At page 29 will be found the curious question No.31(A) "Are females, whether minors or adults, always under guardianship?" In the Answer all tribes are recorded as having replied that "a woman *whether of age or minor*, is always under guardianship; if unmarried, under the guardianship of her parents: if married, under the guardianship of her husband; and if the husband is minor, of her father-in-law." It is not explained if the word 'guardianship' in the Question and Answer has any special meaning, and in the absence of any such explanation, it is difficult to say, what the Question and Answer really mean.

(3) At page 40 in Answer to Question 47, it is stated that "a daughter who succeeds by inheritance has a *free right to alienate it by mortgage or sale* but is not entitled to alienate it by will or gift to anyone but to her male issues." If the words "free right to alienate" mean the power to mortgage or sell without necessity, the reply is obviously incorrect. It is not only in direct conflict with numerous decided cases, but is destructive of the rights of daughter's issue as also those of the reversioners of the father to whom the property would revert on the extinction of the line of the daughter. It is noteworthy that according to the Answers to Questions 45 (A) and (B), a daughter succeeds to the ancestral property of a

sonless proprietor in preference to collaterals beyond the 5th degree in certain tribes and beyond the 7th degree in some other tribes. This, read with the Answer to Question 47, would lead to the startling result that while the father himself (or his son, if he had succeeded him) was incompetent to sell or mortgage such ancestral property without valid necessity, his daughter, who had succeeded him on his dying sonless, possesses " a free right to mortgage or sell " it.

(4) Questions 75 (A) and (B) at page 54, relating to legitimacy, contains replies which are very confusing and which, if literally construed, are in conflict with the provisions of section 112 of the Indian Evidence Act.

The volume contains several other instances of similar entries, but it does not seem necessary to discuss them in this judgment. At the foot of each Answer, reference is made to the " instances " in the bulky Appendix, but on examination it will be found that a very large number of them are described as " oral " and most of the others do not contain the necessary particulars from which it may be possible to ascertain as to what the custom followed in each case was. In *Sultan Bibi* v. *Ismail* (1), Chevis J. declared that the " instances cited in this Appendix are very unsatisfactory as merely names and dates are given and it cannot be said whether in any of these cases " there was a contest between the rival claimants. Reference may be made to *Chiragh Din* v. *Dilawar Khan* (2), where a Division Bench of this Court found that the custom on another point recorded in this *Riwaj-i-am* was in conflict with the actually existing custom.

(1) (1922) 69 I. C. 136, 137. (2) 1934 A. I. R. (Lah.) 465.

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After careful consideration, I am driven to the conclusion that the "*Customary Law of Jullundur district*" does not appear to be carefully prepared and the presumption of correctness attaching to entries, like the one under discussion, can be rebutted by a few instances. As observed by Campbell J. in the well-known case of *Labh Singh* v. *Mussammat Mango* (1), "while a *Riwaj-i-am*, whether supported by instances or not, has a presumption of correctness attaching to it, one of the numerous methods of rebuttal is to convince the Court from an examination of any portion of the *Riwaj-i-am* that it had not been compiled in a careful manner and that otherwise it was not a reliable record."

On a careful review of the evidence and having regard to the circumstances set out above, I am of opinion that the plaintiff has succeeded in proving that she has a preferential right to succeed to the property of her sonless father as against the defendants, who are his collaterals of the 5th degree, I would accordingly accept this appeal, set aside the judgment and decree of the Court below, and pass a decree in favour of the plaintiff for possession of the land and house in dispute. Having regard to all the circumstances, I would leave the parties to bear their own costs throughout.

SKEMP J.

SKEMP J.—I agree.

A. N. C.

Appeal accepted.

(1) (1927) I. L. R. 8 Lah. 281, 300.