APPELLATE CIVIL.

Before Addison, A. C. J. and Din Mohammad J.

KESAR SINGH AND ANOTHER (PLAINTIFFS)
Appellants

versus

ACHHAR SINGH AND OTHERS (DEFENDANTS)
Respondents.

1935

June 25.

Civil Appeal No. 2026 of 1931.

Custom — Succession — Self-acquired land — Randhawa Jats *of village Ghanike Bangar* — Tahsil *Batala* — *District Gurdaspur — Collaterals of fifth degree — whether exclude daughters* — Riwaj-i-Am.

Held, that according to custom amongst *Randhawa Jats* of village Ghanike Bangar, in the Batala *Tahsil*, of the Gurdaspur District, daughters succeed to the non-ancestral property of their father in preference to collaterals of the fifth degree.

Answer to question No. 16 of the 1893 *Riwaj-i-Am* of Gurdaspur District and *Ramzan Shah* v. *Sohna Shah* (1), relied upon.

Entry in *Riwaj-i-Am* of 1913, not followed.

Held also, that an entry in the *Riwaj-i-Am* about the existence of a custom is a strong piece of evidence in support of that custom which cannot be subtracted from by general considerations, such as that daughters succeed in this Province amongst the majority of tribes to the self-acquired property of their father.

And, that the term 'General custom of the Province' is a misnomer.

Beg v. *Allah Ditta* (2), and *Labh Singh* v. *Mst. Mango* (3), relied upon.

Gurdit Singh v. *Mst. Malan* (4), dissented from.

Second Appeal from the decree of R. S. Lala *Shibbu Mal, District Judge, Gurdaspur, dated the 5th August, 1931, affirming that of* Pandit *Indar Kishen Wali, Subordinate Judge, second class,*

(1) 60 P. R. 1889.
(2) 45 P. R. 1917 (P. C.).
(3) (1927) I. L. R. 8 Lah. 281.
(4) (1924) I. L. R. 5 Lah. 364.

1935

KESAR SINGH
v.
CHHAR SINGH.

Gurdaspur, dated the 7th November, 1930, dismissing the plaintiffs' suit.

DEVI DAYAL and HARBHAJAN DAS, for Appellants.

ACHHRU RAM and HAR DAYAL, for Respondents.

The judgment of the Court was delivered by—

ADDISON A. C. J.—The land in dispute belonged to Attar Singh, a *Randhawa Jat* of village Ghanike Bangar, in the Batala *Tahsil* of the Gurdaspur District. He died some forty years ago and was succeeded by his widow, *Mussammat* Tabo. She gifted the land in April, 1924, in favour of their two married daughters, *Mussammat* Harkaur and *Mussammat* Dai. After the death of *Mussammat* Tabo, one set of reversioners sued the daughters for possession of their two-thirds share of Attar Singh's land on the ground that they were entitled to succeed upon the death of the widow who had no power to make a gift of it in favour of the daughters. Another set of reversioners brought a separate suit for their one-third share. During the pendency of the first suit, Mit Singh, one of the plaintiffs, died and that suit abated to the extent of his one-third share of the land in dispute. Thus only one-third share of the land in dispute is now in suit in each case. The Courts below have concurred in finding that the land is not ancestral and that the daughters succeed to their father's self-acquired land in preference to collaterals of the fifth degree. On these findings, the two suits were dismissed by the trial Court and the appeals were dismissed. Against these decisions these two second appeals have been admitted to a hearing on certificates granted by the District Judge under section 41 (3) of the Punjab Courts Act.

In the Customary Law of the Gurdaspur District, prepared in 1913, the answers to questions 16 and 17, as recorded at pages 30 and 31, are in favour of the appellants. It is stated that the general rule is that

daughters are excluded by the widow and male kindred of the deceased, however remote, with certain exceptions which do not apply in the present case. It is also clearly stated that no distinction is made between immovable and movable, ancestral and self-acquired, property of the father. In Appendix C, at page 73, however, a fairly large number of mutations are set out in which daughters inherited.

A Customary Law had been compiled in the 1893 Settlement. In it are the same questions 16 and 17 at pages 18 and 19. The answer is the same as regards question 17, namely, that there is no distinction between the immovable and movable, ancestral and self-acquired, property of the father; and as this Customary Law was prepared at a time when the villagers were less sophisticated, there seems *primâ facie* no reason to doubt the statement of custom contained in both of the *Riwaj-i-Ams* in this respect. The answer to question 16 is, however, different. It was stated in 1893 that if there were near male kindred, daughters and their descendants did not inherit, though they were entitled to maintenance until their marriage. A note was added that the exact limit of relationship within which near male kindred excluded daughters and their descendants was not fixed, though probably all male descendants of a common great-grandfather would, it was said, exclude daughters, as the latter's right of inheritance as such was very weak in this district. Reference was also made to *Ramzan Shah* v. *Sohna Shah* (1).

The authority just referred to is an interesting one. In that case the collaterals were of the fifth degree, and it was held that they were too remote to

(1) 60 P. R. 1889.

1935

KESESAR SINGH v. CHHHAR SINGH.

exclude daughters. An interesting paragraph from this judgment may be quoted:—

"No doubt it has been held that daughters are generally excluded by nephews (though there are exceptions even to this), but in all cases where the collateral was more distantly related, the question of custom has had to be made the subject of a special inquiry, the result of which has been sometimes for, sometimes against, the exclusion of the daughter; the number of cases where it has been against exclusion naturally increasing, as the relationship of the collateral became more remote. But in each case the custom has been decided by special inquiry, and not on general assumptions."

With great respect, we endorse those remarks. In view of *Ramzan Shah* v. *Sohna Shah* (1) and of the entries in the *Riwaj-i-Am* of 1893, which was compiled shortly after the decision in that case, we think that the reply to question 16 in the new *Riwaj-i-Am* of 1913 goes too far and that it was made out of self-interest, inasmuch as it states that all collaterals, however remote, exclude daughters. It may be the case that, in the Punjab, custom can be regarded as something which does slowly and imperceptibly change and that it need not be absolutely invariable, though the latter is the usual conception of what custom is. But such a change would have to be gradual and a new custom cannot be created by the mere assertion of the various tribes at a subsequent Settlement. With respect to this matter, it has always appeared to us that the earliest *Riwaj-i-Am* serves as a very useful check on subsequent *Riwaj-i-Ams* and may even be regarded as the most important document in which custom has been recorded.

(1) 60 P. R. 1889.

It may here be stated that this affords an explanation to the somewhat large number of instances given in Appendix C in the 1913 document where daughters are shown as inheriting. No inquiry was made as to how remote the collaterals were in these instances. That was probably because in 1913 the various tribes stated that the general rule was that daughters were excluded by collaterals, however remote. The first statement in the 1893 document was not looked at. Had that been done and had the instances, in which daughters inherited, been investigated to see what was the degree of relationship of the collaterals in each case, the 1913 document would have been of much greater use.

Their Lordships of the Privy Council in *Beg* v. *Allah Ditta* (1) held that the entry in the *Riwaj-i-Am* in favour of the succession of a daughter's son, whose father was a *khana damad*, in preference to collaterals was a strong piece of evidence in support of such custom which it lay upon the plaintiff's collaterals to rebut, even assuming that there was a general custom of agnatic or collateral succession in default of male issue to the exclusion of female heirs among the agricultural tribes of the Punjab, about which the decisions of the Punjab Chief Court were by no means uniform. This means that the entries in the 1913 document must be considered in the first instance a strong piece of evidence which cannot be subtracted from by general considerations, such as statements to the effect that daughters could not have taken part in the inquiry and, therefore, any entry against them in the *Riwaj-i-Am* must be held to be of little value. That would be to go against the decision of their Lordships of the Privy Council, and this has already been

(1) 45 P. R. 1917 (P. C.).

1935

KESAR SINGH v. ACHHAR SINGH.

pointed out in *Labh Singh* v. *Mussammat Mango* (1), and many other rulings. Since that time such authorities as *Gurdit Singh* v. *Mussammat Malan* (2) have lost all importance as they proceed on the assumption that a custom opposed to so-called general custom (whatever that may mean) was not sufficient to shift the *onus* of proof on to the other side.

In the present cases the District Judge has practically returned to *Gurdit Singh* v. *Mussammat Malan* (2) and given importance to the consideration that daughters usually succeed in the Province according to general custom (which term is clearly a misnomer) to the self-acquired property of their father. In this respect we are not in agreement with him, though we are of opinion that these appeals must be dismissed. As early as 1889, the proper principle was laid down and this was incorporated in the *Riwaj-i-Am* of 1893. In the present cases, the collaterals are of the fifth degree and according to the 1893 document the usual rule in this district was that daughters were only excluded from inheriting the ancestral and self-acquired property of their father by collaterals within four degrees, while within those degrees there were exceptions, each case demanding a special inquiry as to what the exact degree of relationship was. In the present cases, there is nothing to show, apart from the document of 1913 which is in this respect discredited, that collaterals of the fifth degree are entitled to exclude daughters. The appellants, have, therefore, not proved their case.

It is for these reasons that we dismiss these appeals with costs.

P. S.

Appeals dismissed.

(1) (1927) I. L. R. 8 Lah. 281. (2) (1924) I. L. R. 5 Lah. 364.