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to direct a retrial though this is the normal course when a jury trial is set aside on the grounds of misdirection and non-direction. We therefore discharge (not acquit) both the appellants leaving it to Government either to drop the entire matter or to proceed in such manner as it may be advised. We do this because the accused expressly asked that the charge under the Prevention of Corruption Act should be left over for a separate trial. The two convictions are therefore quashed and also the sentences. We are told that the first accused has already served out his sentence. The fine if paid, will be refunded. The bail bond of the second accused will be cancelled.

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January 21

MAHANT SALIG RAM
v.
MUSAMMAT MAYA DEVI.

[S. R. Das, Bhagwati and Syed Jafer Imam JJ.]

Custom-succession—Non-ancestral property—Daughter versus collateral within fourth degree—Saraswat Brahmins of Pathankot in the District of Gurdaspur—Riwaj-i-am—Entries therein—Value of —Riwaj-i-am of Gurdaspur District of the year 1913—Whether a reliable document—Answer to questions 16 and 17—Value of.

It is now well-settled that the general custom of the Punjab being that a daughter *excludes* the *collaterals from succession to the self-acquired property of her father* the initial onus, therefore, must, on principle, be on the collaterals to show that the general custom in favour of the daughter's succession to the self-acquired property of her father has been varied by a special local custom excluding the daughter which is binding on the parties.

It is also well-settled that though the entries in the Riwaj-i-am are entitled to an initial presumption in favour of their correctness irrespective of the question whether or not the custom, as recorded, is in accord with the general custom, the quantum of evidence necessary to rebut that presumption will, however, vary with the facts and circumstances of each case. Where, for instance, the Riwaj-i-am lays down a custom in consonance with the general agricultural custom of the province, very strong proof would be required to displace that presumption; but where, on the other hand, the custom as recorded in the Riwaj-i-am is opposed to the custom generally prevalent, the presumption will be considerably weakened. Likewise,

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where the Riwaj-i-am affects adversely the rights of the females who had no opportunity whatever of appearing before the Revenue authorities, the presumption will be weaker still and only a few instances would be sufficient to rebut it.

If the Riwaj-i-am produced is a reliable and a trustworthy document, has been carefully prepared, and does not contain within its four corners contradictory statements of custom, and in the opinion of the Settlement Officer is not a record of the wishes of the persons appearing before him as to what the custom should be, it would be a presumptive piece of evidence in proof of the special custom set up, which if left unrebutted by the daughters would lead to a result favourable to the collaterals. If, on the other hand, it is not a document of the kind indicated above, then such a Riwaj-i-am will have no value at all as a presumptive piece of evidence.

The Riwaj-i-ams of the Gurdaspur district prepared by Mr. Kennaway in 1913 in so far as they purport to record the local custom as to the right of the daughter to succeed to the self-acquired property of her father are not reliable and trustworthy documents.

The answer to question 16 and the answer to question 17 recorded therein do not contain the correct record of custom.

Held, that the appellant—a collateral within fourth degree—a saraswat Brahmin of Pathankot in the district of Gurdaspur had failed to discharge the onus that initially rested on him that the respondent (the daughter) was excluded by him in respect of the non-ancestral property of her father and that therefore no burden was cast on her of adducing evidence of particular instances.

The general custom laid down in para 23 of Rattigan's Digest of Customary Law that "a daughter is preferred to collaterals in regard to the self-acquired property of her father" was approved by the Supreme Court.

Buta Singh v. *Mt. Harnamon* (A.I.R. 1946 Lah. 306), *Gopal Singh* v. *Ujagar Singh* ([1955] 1 S.C.R. 86), *Mst. Subhani* v. *Nawab* (I.L.R. [1940] Lah. 154), *Beg* v. *Allah Ditta* ([1916] L.R. 44 I.A. 89), *Mt. Vaishno Ditti* v. *Mt. Rameshri* ([1928] I.L.R. 10 Lah. 186; L.R. 55 I.A. 407), *Khan Beg* v. *Mt. Fateh Khatun* ([1931] I.L.R. 13 Lah. 276), *Jagat Singh* v. *Mst. Jiwan* (A.I.R. 1935 Lah. 617), *Qamar-ud-din* v. *Mt. Fathe Bano* ([1943] I.L.R. 26 Lah. 110), *Mohammad Khalil* v. *Mohammad Bakhsh* (A.I.R. 1949 E.P. 252), *Gurdit Singh* v. *Mt. Malan* ([1924] I.L.R. 5 Lah. 364), *Kesar Singh* v. *Achhar Singh* (A.I.R. 1936 Lah. 68), *Bawa Singh* v. *Mt. Partap* (A.I.R. 1935 Lah. 288), *Kesar Singh* v. *Gurnam Singh* (A.I.R. 1935 Lah. 696), *Najju* v. *Mt. Aimna Bibi* (A.I.R. 1936 Lah. 493), *Gurdit Singh* v. *Mt. Man Kaur* (A.I.R. 1937 Lah. 90), *Labh* v. *Mt. Fateh Bibi* (A.I.R. 1940 Lah. 436), *Ramzan Shah* v. *Sohna Shah* ([1889] 24 P.R. 191), *Nanak Chand* v. *Basheshar Nath* ([1908] 43 P.R. 15) and *Mt. Massan* v. *Sawan Mal* (A.I.R. 1935 Lah. 453), referred to.

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v.
Musammat Maya Devi

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 118 of 1953.

Appeal from the Judgment and Decree dated the 28th July 1949 of the High Court of Judicature for the State of Punjab at Simla in Civil Regular First Appeal No. 365 of 1946 arising out of the Decree dated the 31st day of October 1946 of the Court of the Sub-Judge, 1st Class, Pathankot in Suit No. 110 of 1945.

Rajinder Narain, for the appellant.

K. L. Gosain (*R. S. Narula* and *Naunit Lal,* with him), for the respondent.

1955. January 21. The Judgment of the Court was delivered by

DAS J.—This is an appeal by the plaintiff in a suit for a declaration of his title as collateral within four degrees of Gurdial, who was a Sarswat Brahmin, resident of Pathankot in the district of Gurdaspur and the last male holder of the properties in suit.

Gurdial died many years ago leaving certain lands in villages Bhadroya, Kingarian and Pathankot, Tehsil Pathankot in the district of Gurdaspur, and leaving him surviving his widow Musammat Melo and a daughter Musammat Maya Devi, the respondent before us. Some time in the year 1926, a portion of the land in village Bhadroya was acquired for the Kangra Valley Railway and a sum of Rs. 1,539-7-0 was awarded to Musammat Melo. On an objection by the appellant this amount was deposited in the Court of the Senior Subordinate Judge, Gurdaspur, with a direction to pay the interest on this amount to Musammat Melo.

On the 28th September 1944 Musammat Melo died and the Revenue Courts ordered mutations in respect of the lands in the three villages in favour of the respondent as the daughter of Gurdial.

On the 10th March 1945 the appellant filed the suit out of which this appeal arises against the respondent for a declaration that he was entitled to the lands mentioned in the plaint as well as to the sum of

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Rs. 1,539-7-0 in preference to the respondent under the custom governing the parties whereunder the collaterals of the last male holder excluded the daughter.

The respondent contested the suit mainly on the grounds—

(i) that the suit for a mere declaration was not maintainable,

(ii) that the parties were governed by Hindu Law and not by custom,

(iii) that the appellant was not a collateral of Gurdial at all,

(iv) that the properties in suit were not ancestral, and

(v) that there was no custom whereunder the collaterals of the father who was the last male holder excluded the daughter from succession to the self-acquired property of her father.

The Subordinate Judge in his judgment pronounced on the 31st October 1946 held—

(i) that the lands in suit being in possession of tenants, the suit for a declaration of title thereto was maintainable but the suit for a declaration in respect of the sum of Rs. 1,539-7-0 was not maintainable in view of the provisions of the Indian Succession Act relating to succession certificates,

(ii) that the parties were governed by custom and not by Hindu Law,

(iii) that the appellant was a collateral of Gurdial within four degrees,

(iv) that the land in Khata No. 2 of the village Kingarian was ancestral while the rest of the lands in suit were non-ancestral, and

(v) that there was a custom according to which a daughter was excluded from inheritance by the collaterals up to the fourth degree with respect to ancestral as well as self-acquired property of the last male holder as laid down in the case of *Buta Singh* v. *Mt. Harnamon*(1).

In the result, the Subordinate Judge decreed the suit in respect only of the lands in suit and ordered the parties to bear their own costs.

(1) A.I.R. 1946 Lah. 306.

Against this judgment and decree the respondent preferred an appeal to the Lahore High Court. The appellant preferred cross-objections against the order as to costs and against the finding that the lands in the three villages except the land in Khata No. 2 of village Kingarian were non-ancestral. After the partition of India the appeal was transferred to the High Court of East Punjab.

By its judgment dated the 28th July 1949 the East Punjab High Court allowed the appeal and dismissed the cross-objections on the following findings:—

(i) that the suit for declaration of title to the lands was maintainable as all the lands in suit were in the possession of tenants,

(ii) that the lands in suit except the land in Khata No. 2 of village Kingarian were non-ancestral, and

(iii) that according to the custom prevailing in the Gurdaspur district a daughter was entitled to succeed to non-ancestral property in preference to collaterals even though they were within the fourth degree.

The High Court accordingly modified the decree of the Subordinate Judge to the extent that the declaration in the appellant's favour was made to relate only to the land in Khata No. 2 of village Kingarian which was held to be ancestral. On an application made by the appellant on the 26th August 1949 the High Court, by its order dated the 5th June 1950, granted him a certificate of fitness to appeal to the Federal Court. After the commencement of the Constitution of India the appeal has come before this Court for final disposal.

The first question raised before us but not very seriously pressed is as to whether the lands in suit other than those in Khata No. 2 in village Kingarian were ancestral or self-acquired. Our attention has not been drawn to any material on the record which induces us to take a view different from the view concurrently taken by the Courts below. We, therefore, see no force or substance in this contention.

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The main fight before us has been on the question as to whether there is a custom in the Gurdaspur district governing the parties under which a collateral within the fourth degree excludes the daughter of the last male holder from succession to the self-acquired property of her father. The customary rights of succession of daughters as against the collaterals of the father with reference to ancestral and non-ancestral lands are stated in paragraph 23 of Rattigan's Digest of Customary Law. It is categorically stated in sub-paragraph (2) of that paragraph that the daughter succeeds to the self-acquired property of the father in preference to the collaterals even though they are within the fourth degree. Rattigan's work has been accepted by the Privy Council as "a book of unquestioned authority in the Punjab". Indeed, the correctness of this paragraph was not disputed before this Court in *Gopal Singh* v. *Ujagar Singh*(1). The general custom of the Punjab being that a daughter excludes the collaterals from succession to the self-acquired property of her father the initial onus, therefore, must, on principle, be on the collaterals to show that the general custom in favour of the daughter's succession to the self-acquired property of her father has been varied by a special local custom excluding the daughter which is binding on the parties. Indeed, it has been so held by the Judicial Committee in *Mst. Subhani* v. *Nawab*(2) and the matter is now well-settled.

The appellant claims to have discharged this initial onus in two ways, namely (1) by producing the Riwaj-i-am of the Gurdaspur district prepared by Mr. Kennaway in 1913 and (2) by adducing evidence showing that the collaterals of one Harnam Singh, who was also a Sarswat Brahmin of the Gurdaspur district and indeed a member of this very family of Gurdial succeeded in preference to his daughter. It is pointed out that no instance has been proved on the part of the respondent showing that the daughter ever excluded the collaterals from succession to the self-acquired property of the father. The trial Court

(1) [1955] 1 S.C.R. 86. (2) I.L.R. [1940] Lah. 154.

as well as the High Court took the view that the evidence as to the succession to the property of Harnam Singh was of no assistance to the appellant for the reason that the evidence was extremely sketchy, that it did not appear whether the properties left by Harnam Singh were ancestral or self-acquired or whether the properties left by him were of any substantial value at all as would have made it worth while for the daughter to claim the same in addition to the properties gifted to her by her father during his lifetime. Further, the fact that the daughter did not contest the succession of the collaterals to the properties left by Harnam Singh, even if they were self-acquired, might well have been the result, as held by the High Court, of some family arrangement. We find ourselves in agreement with the Courts below that the instance relied upon by the appellant is wholly insufficient to discharge the onus that was on him to displace the general custom recorded in paragraph 23(2) of Rattigan's Digest of Customary Law.

The appellant contends that in any case he has fully discharged the onus that was on him by producing in evidence the Riwaj-i-am recording the custom of the district of Gurdaspur which was compiled by Mr. Kennaway in 1913. Reference is also made to the earlier Riwaj-i-ams of the Gurdaspur District prepared in 1865 and 1893. Answer to question 16 as recorded in the Riwaj-i-am of 1913 shows that subject to certain exceptions, which are not material for our purpose, the general rule is that the daughters are excluded by the widow and male kindred of the deceased, however remote. This answer goes much beyond the answers to the same question as recorded in the Riwaj-i-ams of 1865 and 1893 for those answers limit the exclusion in favour of the male kindred up to certain specified degrees. The answer to question 17 of the 1913 Riwaj-i-am like those to question 17 of the 1865 and 1893 Riwaj-i-ams clearly indicates that except amongst the Gujjars of the Shakargarh tehsil all the remaining tribes consulted by the Revenue authorities recognised no distinction as to the rights of the daughters to inherit (i) the immovable or

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ancestral and (ii) the movable or self acquired property of their respective fathers. It is claimed that these answers quite adequately displace the general custom and shift the onus to the respondent to disprove the presumption arising on these Riwaj-i-ams by citing instances of succession contrary to these answers. In support of this contention reference is made to the observations of the Privy Council in *Beg* v. *Allah Ditta*(1) that the statements contained in a Riwaj-i-am form a strong piece of evidence in support of the custom therein entered subject to rebuttal. Reliance is also placed on the observations of the Privy Council in *Mt. Vaishno Ditti* v. *Mt. Rameshri*(2) to the effect that the statements in the Riwaj-i-am might be accepted even if unsupported by instances. The contention is that on production by the appellant of the Riwaj-i-am of the Gurdaspur district the onus shifted to the respondent to prove instances rebutting the statements contained therein. This, it is urged, the respondent has failed to do.

There is no doubt or dispute as to the value of the entries in the Riwaj-i-am. It is well-settled that though they are entitled to an initial presumption in favour of their correctness irrespective of the question whether or not the custom, as recorded, is in accord with the general custom, the quantum of evidence necessary to rebut that presumption will, however, vary with the facts and circumstances of each case. Where, for instance, the Riwaj-i-am lays down a custom in consonance with the general agricultural custom of the province, very strong proof would be required to displace that presumption; but where, on the other hand, the custom as recorded in the Riwaj-i-am is opposed to the custom generally prevalent, the presumption will be considerably weakened. Likewise, where the Riwaj-i-am affects adversely the rights of the females who had no opportunity whatever of appearing before the Revenue authorities, the presumption will be weaker still and only a few instances would be sufficient to rebut it. [See *Khan Beg* v. *Mt.*

(1) [1916] L.R. 44 I. A. 89.

(2) [1928] I.L.R. 10 Lah. 186; L.R. 55 I.A. 407.

Fateh Khatun(1), *Jagat Singh* v. *Mst. Jiwan*(2)]. The principles laid down in these cases were approved of by the Judicial Committee in *Mst. Subhani's* case *supra.*

Learned counsel appearing for the appellant contends that even if the presumption as to the correctness of the Riwaj-i-am be weak, the respondent has not cited a single instance of a daughter having excluded the collaterals from succession to the self-acquired property of her father and has, therefore, failed to discharge the onus that was thrown on her as a result of the production–by the appellant of the Riwaj-i-am of 1913 and, consequently, the appellant must succeed. This argument overlooks the fact that in order to enable the appellant to displace the general custom recorded in Rattigan's work and to shift the onus to the respondent the appellant must produce a Riwaj-i-am which is a reliable and trustworthy document. It has been held in *Qamar-ud-Din* v. *Mt. Fateh Bano*(3) that if the Riwaj-i-am produced is a reliable and a trustworthy document, has been carefully prepared and does not contain within its four corners contradictory statements of custom and in the opinion of the Settlement Officer is not a record of the wishes of the presons appearing before him as to what the custom should be, it would be a presumptive piece of evidence in proof of the special custom set up, which if left unrebutted by the daughters would lead to a result favourable to the collaterals. If, on the other hand, it is not a document of the kind indicated above then such a Riwaj-i-am will have no value at all as a presumptive piece of evidence. This principle has been followed by the East Punjab High Court in the later case of *Mohammad Khalil* v. *Mohammad Bakhsh*(4), This being the position in law, we have to scrutinise and ascertain whether the Riwaj-i-ams of the Gurdaspur district in so far as they purport to record the local custom as to the right of succession of daughters to the self acquired properties of their respective father are reliable and trustworthy documents.

(1) [1931] I.L.R. 13 Lah. 276, 296, 297. (2) A.I.R. 1935 Lah. 617.
(3) [1943] I.L.R. 26 Lah. 110. (4) A.I.R. 1949 E.P. 252.

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Twenty-two tribes including Brahmins were consulted by Mr. Kennaway who prepared the Riwaj-i-am of 1913. In paragraph 4 of the Preface Mr. Kennaway himself states that many of the questions related to matters on which there really existed no custom and the people had merely stated what the custom should be and not what it actually was. In Appendix 'C' are collected 56 instances of mutuations in which the daughter inherited. In these there are four instances relating to Brahmins. Answer to question 16, as recorded in this Riwaj-i-am, has been discredited and shown to be incorrect in at least three cases, namely, *Gurdit Singh* v. *Mt. Malan*(1), *Kesar Singh* v. *Achhar Singh*(2) and *Buta Singh* v. *Mt. Harnamon*(3). The answer to question 16 as recorded in the 1913 Riwaj-i-am, it was pointed out, went much beyond the answer given to the same question in the Riwaj-i-ams of 1865 and 1893. The answer to question 17 of the 1913 Riwaj-i-am that no distinction is to be made between ancestral and self-acquired property has not been accepted as correct in not less than six cases, namely, *Bawa Singh* v. *Mt. Partap*(4), *Jagat Singh* v. *Mt. Jiwan*(5), *Kesar Singh* v. *Gurnam Singh*(6), *Najju* v. *Mt. Aimma Bibi*(7), *Gurdit Singh* v. *Mt. Man Kaur*(8), and *Labh* v. *Mt. Fateh Bibi*(9). The statements in a Riwaj-i-am the truth of which is doubted by the compiler himself in the preface and which stand contradicted by the instances collected and set out in Appendix 'C' of the same Riwaj-i-am and which have been discredited in judicial proceedings and held to be incorrect cannot, in our opinion, be regarded as a reliable or trustworthy document and cannot displace the initial presumption of the general custom recorded in Rattigan's book so as to shift the onus to the daughter who is the respondent.

The appellant relies on the cases of *Ramzan Shah* v. *Sohna Shah*(10), *Nanak Chand* v. *Basheshar Nath*(11), *Mt. Massan* v. *Sawan Mal* (12) and *Kesar Singh* v.

(1) [1924] I.L.R. 5 Lah. 364.
(2) A.I.R. 1936 Lah. 68.
(3) A.I.R. 1946. Lah. 306.
(4) A.I.R. 1935 Lah. 288.
(5) Ibid. 617.
(6) Ibid. 696.
(7) A.I.R. 1936 Lah. 493.
(8) A.I.R. 1937 Lah. 90.
(9) A.I.R. 1940 Lah. 436.
(10) [1889] 24 P.R. 191.
(11) 1908] 43 P.R. 15.
(12) A.I.R. 1935 Lah. 453.

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Achhar Singh(1), The first three cases are of no assistance to him although the second and third relate to Brahmins of Gurdaspur, for the properties in dispute in those cases were ancestral and the respondent does not now dispute the appellant's right to succeed to her father's ancestral properties. These cases, therefore, do not throw any light on the present case which is concerned with the question of succession to self-acquired property. Further, in the last case, the collaterals were beyond the fourth degree and it was enough for the Court to say that irrespective of whether the properties in dispute were ancestral or self-acquired the collaterals in that case could not succeed. It is also to be noted that the earlier decisions were not cited or considered in that case.

In our opinion the appellant has failed to discharge the onus that was initially on him and that being the position no burden was cast on the respondent which she need have discharged by adducing evidence of particular instances. In these circumstances, the general custom recorded in Rattigan's book must prevail and the decision of the High Court must be upheld. We accordingly dismiss this appeal with costs.

Appeal dismissed.

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January 25

NANAK CHAND
v.
THE STATE OF PUNJAB.

[S. R. DAS, BHAGWATI and SYED JAFER IMAM JJ.]

Indian Penal Code (Act XLV of 1860), s. 34—Merely explanatory—No offence created thereby—Ss. 34 and 149 of the Indian Penal Code—Distinction between the two—Code of Criminal Procedure (Act V of 1898), s. 233—Charge under s. 302 read with s. 149, Indian Penal Code—No specific charge under s. 302, Indian Penal Code as required by s. 233 of the Code of Criminal Procedure—Conviction under s. 302—Legality thereof.

Section 34 of the Indian Penal Code is merely explanatory. It does not create any specific offence. Under this section several persons must be actuated by a common intention and when in further-

(1) A.I.R. 1936 Lah. 68.