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SMT. ASS KAUR (DECEASED) BY L.RS.

v.

KARTAR SINGH (DEAD) BY L.RS. AND ORS.

MAY 18, 2007

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[S.B. SINHA AND MARKANDEY KATJU, JJ.]

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Customary laws—Sidhu Jats governed by Zimindara customs—Widow marrying her first husband's brother who was already married—Inheritance and succession under the 1929 Act and 1937 Act—Applicability of customary laws—Held: Customary law would prevail over the statutory law since its application was not excluded in the statutory law—Property being ancestral, on the death of one of the co-widow the other surviving widow would take the property by survivorship—Act of 1929 being subject to the applicability of customary law, daughter of the deceased widow has no right of succession in preference to her step mother—Widow married her first husband's brother just to safeguard the family property—If daughters who were married were to be excluded by customary law, no exception thereto can be taken—Hindu Women's Right to Property Act, 1937—Hindu Law of Inheritance (Amendment) Act, 1929.

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Practice and Procedure—Plea—Raising of, for the first time before this Court—Held: Not maintainable.

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RS had two wives, S and RK. RK was originally married to HS-brother of RS. On the death of HS, RS married RK under the customary law of the land. RS on his death was succeeded by two wives and sons IS and MS and daughter AS-appellant. IS died in 1926 and MS in 1937. S died in 1950 and RK died fifteen years later. Appellant-daughter of S, claimed half share in the property. Respondents contended that after the death of HS, RK contracted Karewa marriage with RS in accordance with custom and had a son through HS; that under the Punjab customary laws governing inheritance and succession of Sidhu Jats, after the death of RS his two sons and two widows succeeded to his estate; that after death of IS and MS, their properties were mutated in the name of S and RK; that S was a limited owner and on her death in the year 1950, RK succeeded to her by rule of survivorship; and that under the customary law, the appellant had no right of succession in preference to

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the deceased widow. Courts below held that the parties being Sidhu Jats were governed by Zimindara customs in the matter of inheritance and succession in terms whereof RK succeeded to the estate of RS after the death of S and that her estate was enlarged into full ownership after coming into force of the Hindu Succession Act, 1956. High Court held that the Revenue Officers rightly sanctioned the mutation of the estate of S in favour of RK. Hence the present appeal.

Appellant contended that RS having only 1/3rd share in the property; the other co-sharers being MS and IS, on his death his 1/3rd share devolved upon his two wives jointly as also, his two sons IS and MS; that on IS's death his interest in the property devolved upon MS who became the absolute owner in respect thereof and on MS's death the properties devolved upon his mother S and on S's death, in terms of the provisions of the Hindu Law of Inheritance (Amendment) Act, 1929 the appellant succeeded her as heir of RS; that S having life interest in the property, on her death the same devolved upon the appellant as daughter of RS as a reversioner; that a step mother being not an heir or a relation for the purpose of inheritance and succession, she could not inherit the interest of IS and MS; that custom prevailing in the family which had been relied upon being a general custom and not a special or personal custom would be subservient to the 1929 Act and Hindu Women's Right to Property Act, 1937; and that purported reliance upon the customary law by the courts below is misplaced.

Dismissing the appeal, the Court

HELD: 1.1. Custom is one of the three sources of Hindu Law. Custom may override a statute subject, of course, to a clear proof of usage. In absence of any proof of custom, indisputably the Hindu Law would apply. Hindu Law recognizes three types of customs: local custom, class custom and family custom. [Paras 9, 10 and 16] [677-E-F; 680-C]

1.2. As statutory law did not exclude the applicability of the customary law, customary law would prevail over the statutory law. It was so found by courts below. The courts below categorically held that the parties were governed by Zimindara custom and the law to be applicable in the instant case is the customary law having regard to the fact that the parties belonged to the community of Sidhu Jats. Whether the said custom is a general custom, or a

A special custom or a family custom has not been stated. The customary law prevailing in the State of Punjab has received a statutory sanction by reason of the Punjab Law Act, 1872. [Paras 10, 17 and 25] [681-H; 680-D; 677-F]

B 1.3. There cannot be any dispute in law that RK did not inherit the interest of MS in whom the interest of IS had also vested upon his death. His interest under the general law had devolved upon S. [Para 8] [677-D]

1.4. Amongst the Sikhs Jats of Punjab province, there exists a custom, where the widow marries her first husband's brother in the karewa form, remarriage would not cause forfeiture of her own share.

[Para 11] [678-D]

C *Chunnilal v. Mst. Attar Kaur*, AIR (1933) Lah 69, referred to.

D 1.5. In respect of Jats belonging to Ferozepur district, it has been held that a widow who remarried her first husband's brother succeeds to a co-widow in preference to collaterals. But the widow's right only accrues on husband's death, and if it does not accrue then, it cannot accrue later by the death of subsequent heir. Even a woman who had contracted such marriage may not forfeit her life estate, if any, in her deceased husband's property despite the provisions of the Hindu Widows Remarriage Act, 1856. However, the said principle would not apply where a re-marriage is not with the brother of her deceased but with some other relative. [Para 12] [678-E-G]

F *Mst. Dakho v. Mst. Gano*, 22 P.R. 889; *Shrimonai Gurdwara Prabandhak Committee and Ors. v. Harcharan Singh*, AIR (1934) Lahore 1; *Diwan Singh and Anr. v. Natha Singh and Ors.*, AIR (1937) Lahore 468; *Ujagar Singh v. Mst. Jeo*, AIR (1959) SC 1041; *R.B.S.S. Munnalal and Ors. v. S.S. Rajkumar and Ors.*, AIR (1962) SC 1493 and *Harcharan Singh v. Mohinder Kaur* AIR (1987) P & H 138, referred to.

G 1.6. The court can take judicial notice of such customs in terms of section 57 of the Evidence Act, 1872. As and when custom has repeatedly been recognized by the courts, the same need not be proved.

[Para 19] [680-G]

Ujagar Singh v. Mst. Jeo, AIR (1959) SC 1041 and *Bawa v. Taro*, AIR (1951) Punjab 239, referred to.

H 1.7. If the 1929 Act applies, the appellant would succeed to the interest

of her brother after her mother's death; but the said Act of 1929 is also subject to the applicability of customary law. (Para 24) [681-G] A

Daya Singh (Dead) through L.Rs. and Anr. v. Dhan Kaur, AIR (1974) SC 665, referred to.

1.8. A submission was raised that the validity of customs must be judged on the touchstone of justice, equity and good conscience. No such submission had been raised before trial court or High Court. It is one thing to say that customary law had no application or the custom had not been proved; but it is another thing to say despite its acceptance and proof the same should not be applied on the ground of equity, justice and good conscience. Therefore, such submission cannot go into. [Para 26] [682-A-B] B C

1.9. No submission had also been raised before the courts below that the custom in question is not a special or local custom, but merely a general custom. Such a contention again cannot be allowed to be raised for the first time before this Court particularly in view of the fact that they have categorically held that the Jats are governed by customary law; the principle being 'keeping of the property within the family'. [Para 19] [682-C] D

1.10. RK, who was a widow of HS was married to another brother just to safeguard the family property. She succeeded under the customary laws to her husband after the death of her co-widow. In that view of the matter, if the daughters who were married were to be excluded by customary law, no exception thereto can be taken. [Para 28] [682-D] E

1.11. The customary law has been specifically been excluded in terms of section 4 of the Hindu Succession Act, 1956. If the intention of the makers of the statute in the 1929 was to completely exclude the applicability of the customary law, it would have been said so explicitly. [Para 31] [683-B] F

Dharma Shamrao Agalawe v. Pandurang Miragu Agalawe and Ors., [1988] 2 SCC 126 and *Sheela Devi and Ors. v. Lal Chand and Anr.*, [2006] 10 SCALE 75, distinguished.

Smt. Dipo v. Wassan Singh and Ors., [1983] 3 SCC 376, referred to. G

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 12395 of 1996.

From the Final Judgment and Order dated 21.1.1991 of the High Court of Punjab and Haryana, in Civil Regular Second Appeal No. 2166 of 1978. H

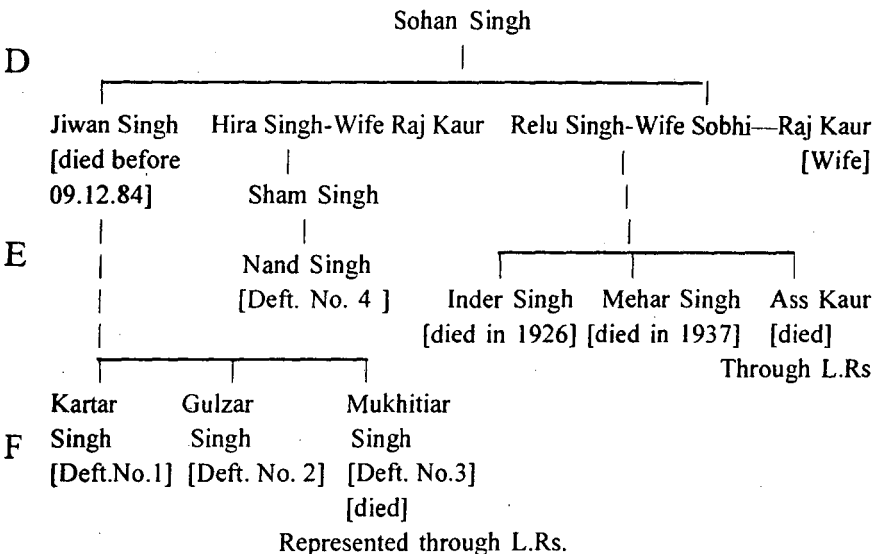
A R. Sundravardan, Sr. Adv., Rekha Palli and Anant Vajai Palli for the Appellants.

Jana Kalyan Das, (NP) for the Respondents.

The Judgment of the Court was delivered by

B **S.B. SINHA, J.** 1. A question of some importance in relation to applicability of custom in the matter of inheritance and succession under the Hindu Women's Right to Property Act, 1937 falls for our consideration in this appeal which arises out of a judgment and order dated 21.01.1991 passed by the High Court of Punjab & Haryana in Civil Regular Second Appeal No. 2166 of 1978.

C 2. The relationship between the parties is not in dispute, which would appear from the following genealogical table :



G 3. We are concerned with the branch of Relu Singh. He had two wives, namely, Sobhi and Raj Kaur. Raj Kaur was originally married to the brother to his brother Hira Singh, who had died in the year 2001. Relu Singh married to Raj Kaur on the death of brother under the customary law of the land. Relu Singh died in the year 1907. He was succeeded by his two wives and two sons Inder Singh and Mehar Singh alias Dalip Singh and daughter, the appellants. Inder Singh died in the year 1926 and Mehar Singh died in the year

H 1937. Sobhi, the first wife of Relu Singh and the mother of Mehar Singh and

Inder Singh, died in the year 1950. Raj Kaur died about five years prior to the institution of the suit i.e. in the year 1970. Ass Kaur, daughter of Sobhi and sister of Mehar Singh and Inder Singh claimed 1/2 share in the property. The defendants-respondents contended that after the death of her husband Hira Singh, Raj Kaur contracted Karewa marriage with Relu Singh in accordance with custom. She had a son through Hira Singh. It was urged that under the Punjab customary laws governing inheritance and succession of Sidhu Jats after the death of Relu Singh, his two sons and two widows succeeded to his estate. After the death of Inder Singh and Mehar Singh, their properties were mutated in the name of their mother Sobhi and their step mother Raj Kaur. Again purported to be in terms of the rule of survivorship in accordance with the local and tribal customs her name was mutated after the death of Sobhi. She remained in exclusive possession of the said property and upon coming into force of the Hindu Succession Act, 1956, she became the absolute owner thereof. It was also contended that Sobhi was a limited owner and on her death in the year 1950, Raj Kaur succeeded to her by rule of survivorship. It was furthermore pleaded that under the customary law, the appellant herein had no right of succession in preference to the widow.

4. The courts below while holding that the appellant herein was daughter of Sobhi, opined that the parties were governed by the customary laws in the matter of inheritance and succession in terms whereof Raj Kaur succeeded to the estate of Relu Singh after the death of Sobhi and that her estate was enlarged into full ownership after coming into force of the Hindu Succession Act. The High Court held :

“.....Smt. Sobhi died on December 3, 1953 and mutation regarding her share was made in favour of Smt. Raj Kaur being the co-widow of her late husband Relu Singh on July 31, 1955 i.e before coming into force of Hindu Succession Act. In para 13 of the Rettigan on Customary Law, on the death of a co-widow the other surviving widow takes the property survivorship. Revenue Officers rightly sanctioned the mutation of the estate of Smt. Sobhi in favour of Smt. Raj Kaur, her co-widow.....”

5. Keeping in view the importance of the question involved, as also the fact that nobody appeared on behalf of the respondents, we requested Mr. R. Sundravardan, the learned Senior Counsel, to assist us in the matter.

6. Contentions of Mr. Sundravardan and Mrs. Palli are as under :

- A (i) Relu Singh having only 1/3rd share in the property; the other co-sharers thereof being Inder Singh and Mehar Singh, on his death his 1/3rd share devolved upon his two wives jointly as also, his two sons Inder Singh and Mehar Singh.
- B (ii) On Inder Singh's death his interest in the property devolved upon Mehar Singh who became the absolute owner in respect thereof. On Mehar Singh's death which took place on 05.06.1937, the properties devolved upon his mother Sobhi. On Sobhi's death, in terms of the provisions of the Hindu Law of Inheritance (Amendment) Act, 1929, (1929 Act) the appellant herein succeeded her as heir of Relu Singh.
- C (iii) Sobhi having life interest in the property, on her death the same devolved upon the appellant herein as daughter of Relu Singh, as a reversioner.
- D (iv) A step mother being not an heir or a relation for the purpose of inheritance and succession; she could not inherit the interest of Inder Singh and Mehar Singh.
- E (v) Custom prevailing in the family which had been relied upon being a general custom and not a special or personal custom would be subservient to the 1929 Act and Hindu Women's Right to Property Act, 1937 being Act XVIII of 1937.
- (vi) Purported reliance upon the customary law by the courts below is misplaced.

7. Before embarking on the contentions of the learned counsel, we may notice the following findings of the courts below, wherein it is stated that Sidhu Jats were governed by Zimindara custom :

"There is no dispute that the defendants are Sidhu Jats who are predominantly agricultural tribe and were governed by agricultural custom in matters of marriage succession alienation etc. Necessary evidence on the point has been supplied by all the witnesses of the defendant who were pushed in to prove relationship of Sham Singh, Raj Kaur and Hira Singh as their son. It may also be observed that though the defendants denied in the written statement that the suit property was allotted during consolidation of holding in lieu of the land held by Relu the learned counsel for the defendants made their statements on 26.3.1977 admitting this fact. The copies of the revenue

record Exhibits D3 to D30, however establish beyond doubt that the suit land was held by Sohna Singh father of Relu Singh and Hira Singh and after his death it was inherited by them. It is therefore the common case of the parties that the suit land was ancestral in the hands of Relu Singh. Now at the time of the death of Relu Singh about 60 years back these Sidhu Jats of Muktsar Tehsil who were obviously governed by Zimindara custom, the daughter was in the presence of sons. No share was to be given to the plaintiff at the time of the death of her father Relu Singh and this estate was mutated correctly in the names of Inder Singh and Mehar Singh alias Dalip Singh. Similarly after the death of Inder Singh the estate was mutated in the name of his other brother Mehar Singh. However, when Mehar Singh died issueless, the estate reverted back to his father and Sobha and Raj Kaur succeeded to her not as her mother or step mother but as widows of his father”

8. There cannot be any dispute in law that Raj Kaur did not inherit the interest of Mehar Singh in whom the interest of Inder Singh had also vested upon his death. His interest under the general law had devolved upon Sobhi. The question, however, which remains as to whether in a case of this nature the customary law would prevail in regard to the question as to whether Appellant or the said Raj Kaur inherited the interest of Sobhi.

9. Custom is one of the three sources of Hindu Law. Custom may override a statute subject, of course, to a clear proof of usage.

10. Hindu law recognizes three types of customs : local custom, class custom and family custom. The courts below have held that the parties were governed by Zimindara custom. Whether the said custom is a general custom, or a special custom or for that matter a family custom has not been stated. The customary law prevailing in the State of Punjab has received a statutory sanction by reason of the Punjab Laws Act, 1872, Sections 5 and 7 whereof read as under :

“5. Decisions in certain cases to be according to Native law.- In questions regarding succession, special property of females, betrothal, marriage divorce, dower, adoption, guardianship, minority, bastardy, family relations, wills, legacies, gifts, partitions, or any religious usage or institution the rule of decision shall be

(a) any custom applicable to the parties concerned, which is not

A contrary to justice, equity or good conscience, and has not been by this or any other enactment altered or abolished, and has not been declared to be void by any competent authority.

B (b) the Muhammadan law, in cases where the parties are Muhammadans and the Hindu law, in cases where the parties are Hindus, except in so far as such law has been altered or abolished by legislative enactment, or is opposed to the provisions of this Act, or has been modified by any such customs as is above referred to.”

C “7. Local customs and mercantile usages when valid.-All local customs and mercantile usages shall be regarded as valid, unless they are contrary to justice, equity or good conscience, or have, before the passing of this Act, been declared to be void by any competent authority.”

D 11. Amongst the Sikh Jats of Punjab province, there exists a custom, where the widow marries her first husband's brother in the Karewa form, remarriage would not cause forfeiture of her own share. [See *Chunnilal v. Mst. Attar Kaur*, AIR 1933 Lah. 69].

E 12. In respect of Jats belonging to Ferozepur district, it has been held that a widow who remarried her first husband's brother succeeds to a co-widow in preference to collaterals. But the widow's right only accrues on husband's death, and if it does not accrue then, it cannot accrue later by the death of subsequent heir. The fact, if the widow is a Karewa widow it would not affect her right in a suit the parties to which were the two widows of a Manhas Rajput resident in the Shakargarh Tehsil of Gurudaspur District, had that the plaintiff (upon whom under the circumstances the onus lay) had failed to prove a custom in her favour, excluding the defendant, who was a co-widow by a Karewa marriage, from succeeding to a share in the deceased husband's estate (*Mst. Dakho v. Mst. Gano* 22 P.R. 889]. Even a woman who had contracted such marriage may not forfeit her life estate, if any, in her deceased husband's property despite the provisions of the Hindu widows Remarriage Act, 1856. However, the said principle would not apply where a remarriage is not with the brother of her deceased but with some other relative.

G 13. In *Shrimonai Gurdwara Parbandhak Committee and Ors. v. Harcharan Singh*, AIR (1934) Lahore 1, a Division Bench of the Lahore High Court held :

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“First of all, it was objected that Harcharan Singh was not the legal representative of his deceased brother Gurcharan Singh, but that his mother Mr. Uttam Kaur, was his legal representative. Counsel for Harcharan Singh stated before the Tribunal that he had no objection to the mother also being impleaded as the legal representative of the deceased Gurcharan Singh, if it was held that she was one. It was denied however that she was the legal representative of the deceased Gurcharan Singh, and this contention was upheld by the Tribunal on the un rebutted testimony of the witness examined. There is no question that this decision is right. *A mother as a rule in the Punjab, where custom is the rule of decision, only succeeds when there are no sons and she succeeds not as the mother of the sons but as the widow of her deceased husband.* See in this connection the replies to questions 35, 41 and 53 of Currie’s Customary Law of the Ferozepore District. In reply to the last question there is a note to the effect that the mother succeeds really as the widow of her husband and not as the mother of the last owner. There are numerous decisions to this effect as well. It follows that, where there are sons they exclude the mother and if a son dies he is succeeded by his brother but when the last surviving son dies without issue then the mother succeeds in her capacity as widow of her deceased husband. I may here refer to one authority that of a Full Bench, reported as *Mt. Desi v. Lehna Singh*. It is clear from this case that there were two sons who both died without issue and it was not till the death of the second that their mother set up a claim as against the collaterals. She was however non-suited on the ground that she had remarried and could not therefore be looked upon as the widow of her first husband.”

[Emphasis supplied]

14. Yet again in *Diwan Singh and Anr. v. Natha Singh and Ors.*, AIR (1937) Lahore 468, it was held :

“...The case of a mother inheriting property on the death of her son obviously stands on a different footing and cannot, I think, be considered to be analogous to the present case. In the present instance, it seems clear that when the widow Mt. Utmi succeeded collaterally on the death of Jowala Singh and Mihan Singh, she succeeded to the estate as the representative of her husband and not of Jowala Singh or Mihan Singh. Consequently on her death the

A estate must, I think, be treated as though Prem Singh himself had succeeded to it....”

B 15. Our attention has, however, been drawn to a decision of this Court in *Ujagar Singh v. Mst. Jeo*, AIR (1959) SC 1041, wherein this Court upon noticing a large number of conflicting decisions, came to the conclusion that existence of a general custom entitling the collaterals to succeed in preference to sister had not been proved. It, therefore, seemed to Their Lordships that in the interest of justice the respondent therein (sister) should succeed in the suit as her brother's heir under the Hindu law.

C 16. In absence of any proof of custom, indisputably the Hindu Law would apply. A' fortiori Hindu Law of Inheritance (Amendment) Act, 1929 in terms whereof a sister becomes an heir in preference to the collaterals would be applicable in regard to devolution of property.

D 17. We may, however, notice that customary law has been recorded in Rattigan's Digest of Customary Laws. The courts below have categorically held the law to be applicable in the instant case is the customary law having regard to the fact that the parties belonged to the community of Sidhu Jats.

E 18. In *R.B.S.S. Munnalal and Ors. v. S.S. Rajkumar and Ors.*, AIR (1962) SC 1493, this Court was considering the question as to whether a Jain widow could adopt a son to her husband without his express authority, being governed by the custom which had by long acceptance become part of the law applicable to them. Therein, it was observed :

F “...It is well-settled that where a custom is repeatedly brought to the notice of the Courts of a country, the courts may hold that custom introduced into the law without the necessity of proof in each individual case...”

G 19. The court can also take judicial notice of such customs in terms of Section 57 of the Evidence Act, 1872. As and when custom has repeatedly been recognized by the courts, the same need not be proved. Reference in regard to the Punjab 'general custom' may be made to *Ujagar Singh* (supra), and *Bawa v. Taro*, AIR (1951) Punjab 239.

H 20. In *Harcharan Singh v. Mohinder Kaur*, AIR (1987) P&H 138. Paragraph 22 of the Rattigan's Digest was noticed, holding that in terms thereof there is a custom in Punjab to the effect that in default of male lineal

descendants and of a widow the mother of the deceased succeeds to a life interest, provided she had not remarried. It reads as under : A

“22. In default of male lineal descendants and of a widow the mother of the deceased succeeds to a life interest, provided she has not remarried.”

21. In *Chunnilal* (supra), Lahore High Court observed : B

“Where a person dies leaving two widows and one of them remarries the whole estate of the deceased passes to the other widow and the mere retention of the re-married widow’s name in the revenue records would not place her in adverse possession of her share qua the co-widows and owing to her intervening between the estate and the reversioner the latter’s rights would not be affected.” C

22. The learned trial Judge categorically held that Relu Singh belonged to Sidhu Jats of Muktsar Tehsil, who were governed by Zimindara custom, stating : D

“...Since the property was ancestral according to para 13 of the Digest of customary law on the death of one of the two co-widows the survivor took the entire estate by survivorship. Raj Kaur was therefore entitled to succeed to the estate of Sobhi by the rule of survivorship to the exclusion of the plaintiff” E

23. Para 13 of the said Digest reads as under :

“13 On the death of one of two co-widows the survivor takes by survivorship, even if she has remarried by Karewa, provided such remarriage has not caused a forfeiture of her own share.” F

24. Rattigan’s Digest was also referred to by this Court in *Daya Singh (Dead) through L.Rs. and Anr. v. Dhan Kaur* .AIR (1974) SC 665 : [1974] 1 SCC 700, but therein again existence of such a custom had not been proved. It is no doubt true that if the 1929 Act applies, the appellant would succeed to the interest of her brother after her mother’s death; but the said Act of 1929 is also subject to applicability of customary law. G

25. As statutory law did not exclude the applicability of the customary law, customary law would prevail over the statutory law. It was so found by the courts below. H

A 26. A serious contention was raised that the validity of customs must be judged on the touchstone of justice, equity and good conscience. No such contention had been raised before the learned Trial Judge or before the High Court. It is one thing to say that customary law had no application or the custom had not been proved; but it is another thing to say despite its acceptance and proof the same should not be applied on the ground of equity, justice and good conscience. We, therefore, cannot go into such a contention.

C 27. No contention had also been raised before the courts below that the custom in question is not a special or local custom, but merely a general custom. Such a contention again cannot be allowed to be raised for the first time before this Court particularly in view of the fact that they have categorically held that the Jats are governed by customary law; the principle being 'keeping of the property within the family'.

D 28. Raj Kaur, who was a widow of Hira Singh, was married to another brother just to safeguard the family property. She succeeded under the customary laws to her husband after the death of her co-widow. In that view of the matter, if the daughters who were married were to be excluded by customary law, no exception thereto can be taken.

E 29. In *Daya Singh (dead) through L.Rs.* (supra), paragraph 23 of Rattigan's Digest of Customary Law of Punjab has been noticed. It was held:

F "It is on the basis of this Customary Law that the reversioners succeeded in the suit filed by them questioning the gift made by the respondents mother to her. There is no doubt that Rattigans work is an authoritative one on the subject of Customary Law in Punjab. This Court in *Mahant Salig Ram v. Musammat Maya Devi*, said:

G 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 para 23 of Rattigans *Digest of Customary Law*. It is categorically stated in sub-para (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. Rattigans work has been accepted by the Privy Council as a book of unquestioned authority in the Punjab. Indeed, the correctness of this para was not disputed before this Court in *Gopal Singh v.*

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Ujagar Singh “

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30. However, therein the customary law was not applied in view of the application of Section 8 of the Hindu Succession Act, 1956.

31. We may furthermore notice that the customary law has been specifically been excluded in terms of Section 4 of the Hindu Succession Act, 1956. If the intention of the makers of the statute in the 1929 was to completely exclude the applicability of the customary law, it would have been said so explicitly.

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32. Reliance has been placed on *Smt. Dipo v. Wassan Singh and Ors.*, [1983] 3 SCC 376, wherein the sister was held to be a preferential heir as it was found that the entire property was an ancestral property, stating :

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“...We also proceed on the basis that according to the prevailing custom of the area, collaterals and not the sister are preferential heirs to ancestral property in the hands of a propositus, while the sister and not the collateral is a preferential heir in regard to non-ancestral property. We must add here that we are not quite satisfied that the custom has been properly established, but for the purposes of the present case, we proceed on the basis that the custom has been established. But that is not the end of the problem before us. No doubt the properties which have been found by the lower courts to be ancestral properties in the hands of Bua Singh are properties which originally belonged to Bua Singhs ancestors. But Bua Singh was the last male holder of the property and he had no male issue. There was no surviving member of a joint family, be it a descendant or otherwise, who could take the property by survivorship. Property inherited from paternal ancestors is, of course, ancestral property as regards the male issue of the propositus, but it is his absolute property and not ancestral property as regards other relations. In *Mullas Principles of Hindu Law* (15th Edn.), it is stated at p. 289:

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... if A inherits property, whether movable or immovable, from his father or fathers father, or fathers fathers father, it is ancestral property *as regards his male issue*. If A has no son, sons son, or sons sons son in existence at the time when he inherits the property, he holds the property as absolute owner thereof, and he can deal with it as he pleases. . . .

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A A person inheriting property from his three immediate paternal ancestors holds it, and must hold it, in coparcenary with his sons, sons sons and sons sons sons, but as regards other relations he holds it, and is entitled to hold it, as his absolute property. Again at p. 291, it is stated:

B The share which a coparcener obtains on partition of ancestral property is ancestral property *as regards his male issue*. They take an interest in it by birth, whether they are in existence at the time of partition or are born subsequently. Such share, however, is ancestral property only as regards his male issue. *As regards other relations*, it is separate property, and if the coparcener dies without leaving male issue, it passes to his heirs by succession.

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3. We are, therefore, of the view that the lower courts were wrong in refusing to grant a decree in favour of the plaintiff as regards property described by them as ancestral property. The defendants were collaterals of Bua Singh and as regards them the property was not ancestral property and hence the plaintiff was the preferential heir. The plaintiff was entitled to a decree in respect of all the plaint properties....”

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33. There is no dispute in regard to the aforementioned proposition of law. To the same effect is the decision of this Court in *Dharma Shamrao Agalawe v. Pandurang Miragu Agalawe and Ors.*, [1988] 2 SCC 126 and *Sheela Devi and Ors. v. Lal Chand & Anr.*, (2006) 10 SCALE 75. The said decisions, however, for the reasons stated hereinbefore, have no application in the fact of the present case.

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34. For the reasons aforementioned, the appeal being devoid of any merit is dismissed. However, in the facts and circumstances of the case, there shall be no order as to costs.

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N.J.

Appeal dismissed.