Privy Council Appeal No. 5 of 1939

Musammat Subhani and others - - - - - *Appellants*

v.

Nawab and others - - - - - - - - - *Respondents*

FROM

THE HIGH COURT OF JUDICATURE AT LAHORE

REASONS FOR JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED 17th AUGUST, 1940

Present at the Hearing :

VISCOUNT MAUGHAM
LORD RUSSELL OF KILLOWEN
LORD WRIGHT
SIR GEORGE RANKIN
MR. M. R. JAYAKAR

[*Delivered by* MR. M. R. JAYAKAR]

The question in this appeal is whether, under the customary law applicable to the members of the Tulla clan resident at mauza Mahmad Tulla in the tahsil and district of Shahpur in the Punjab, collaterals of the tenth degree of a deceased landowner can take precedence over his married daughters in succession to his non-ancestral estate. The question arose as follows: —

One Sahlion, a Mahomedan landowner of the Tulla clan, resident as stated above, died, leaving him surviving a widow and two married daughters (appellants before the Board) and some immovable property. The widow subsequently gave the property to the daughters by a registered deed of gift dated 8th September, 1934. The respondents, claiming to be his collaterals, instituted a suit against the widow (defendant 1) and the daughters (defendants 2 and 3) asserting that Sahlion's property was ancestral as regards the plaintiffs and that the widow had no right to make the gift, which should be declared void and ineffectual as against the plaintiff's rights and invalid after the death or re-marriage of the widow. The widow and daughters denied the claim on the ground that the property was not ancestral and that the plaintiffs had no *locus standi* to sue, because daughters succeeded to the non-ancestral property as against collaterals, " especially when the plaintiffs are collaterals of " the tenth degree."

The Subordinate Judge who tried the suit dismissed it, holding that the plaintiffs were Sahlion's collaterals of the tenth degree, that the lands in the suit were not ancestral and that, according to the general rule of custom prevailing

among the Mahomedan tribes of the district of Shahpur which applied to the parties, the daughters were not ousted by the plaintiffs with regard to succession to the non-ancestral property of their father. In arriving at his decision, the learned Judge relied on the oral and documentary evidence adduced by the parties and upon certain rulings of the Punjab Courts.

The plaintiffs appealed to the High Court at Lahore and that Court, in a judgment remarkable for its brevity, allowed the appeal. The material part of the High Court judgment begins with the statement " that it is common ground that " under the customary law which governs all the Musalman " tribes of the Shahpur district, married daughters do not " inherit their father's estate in any circumstances." Their Lordships have a difficulty in understanding this statement, because the question stated by the High Court as the " common ground " was precisely the issue in controversy in the case. The judgment bears, in several places, indications that the High Court, instead of examining the disputed question on the facts and the evidence in the case carefully considered in the Subordinate Judge's judgment, proceeded entirely on the authority of the questions and answers contained in a Manual compiled by Mr. (afterwards Sir) James Wilson, called a " General Code " of the Tribal Customs in the Shahpur District of the " Punjab," published in 1896. (It may be convenient to refer hereafter to this publication as Wilson's Manual.) Basing their views on certain questions and answers in Wilson's Manual the learned Judges of the High Court held that there was a presumption against inheritance by the daughters and that this presumption had not been rebutted. They therefore allowed the appeal. The judgment contains no detailed criticism of the oral and documentary evidence of custom adduced by the parties, all of which was ignored with the brief observation that in a Full Bench decision of the Punjab High Court (*Bahadur* v. *Mst. Nihal Kaur,* 1937, 18 Lahore 594=39 P.L.R. 349) it had been stated that: " recent judicial decisions are not sufficient to abrogate the " custom so clearly laid down in Wilson's Manual of Cus- " tomary Law." Their Lordships have consequently derived less assistance than they would have expected from the High Court judgment in elucidating the important question in controversy in this appeal.

Before examining the value to be attached to the statements in Wilson's Manual, and the effect of the Full Bench decision, it will be useful to state what the true legal position of the parties was as it emerged from the pleadings. The basis of the plaintiff's claim was that the property in suit was ancestral so far as their rights were concerned. This was denied by the defendants. The onus was therefore on the plaintiffs to prove that the property was ancestral. The Subordinate Judge held that the onus had not been discharged. The learned judges of the High Court did not

consider this question, as the statements in Wilson's Manual on which they relied made no distinction between ancestral and non-ancestral property, and stated generally that married daughters "in no case" inherited their father's estate or "any share in it." Before this Board, the respondents did not appear in support of the High Court judgment. Their Lordships have therefore to decide the question on the evidence which is available in this case, and, on reviewing it, they agree with the finding of the Subordinate Judge that the land was not proved to be ancestral. In more than one decision of the Lahore High Court (see, for instance, *Chanda Singh* v. *Mst. Banto*, 1927, 8 Lahore 584, 589-90, and *Rahmat Ali Khan* v. *Mst. Sadiq-ul-Nisa* 1931, 13 Lahore 404, 406) it has been laid down that to establish the ancestral character of land it is not sufficient to show that the name of the common ancestor from whom the parties are descended was mentioned in the revenue pedigree. It should also be proved that the descendants of that common ancestor held the land in ancestral shares and that the land occupied, at the time of the dispute, by the proprietors thereof had devolved upon them by inheritance. It is now settled law in the Punjab that the mere mention of the name of a person in the pedigree table as the common ancestor is no proof of the fact that every piece of land held by his descendants (howsoever low) was originally held by and descended from him in succession from generation to generation. As is explained by Tek Chand J. in *Chanda Singh* v. *Mst Banto* (1927) 8 Lahore 584, 589, "a genealogical tree of this kind is prepared merely "to indicate the relationship of the proprietors in a particular "village and is in no sense intended to be a record of the "acquisition of every bit of land held by all persons whose "names appear in it. It is no doubt presumptive proof of "their kinship, but not of the nature of the property owned "by them. For that purpose one has to look to the history "of the acquisition of the village." The extracts from the settlement records relating to the land in dispute, which are a part of the evidence in this case, justify the finding of the Subordinate Judge.

Before examining the questions and answers in Wilson's Manual, it will be useful to ascertain the customary rights of daughters against collaterals with reference to ancestral and non-ancestral land as they are stated in Sir W. H. Rattigan's Digest (of Civil law for the Punjab, chiefly based on customary law, 1935 edition), a book of unquestioned authority in the Punjab. In paragraph 23 (p. 79) it is stated that (1) a daughter only succeeds to the ancestral landed property of her father, if an agriculturist, in default (*a*) of heirs mentioned in the preceding paragraph (viz, male lineal descendants, a widow or mother), or (*b*) of near male collaterals, provided that a married daughter sometimes excludes near male relatives, especially amongst Mahomedan tribes, under circumstances specified in the paragraph (not material to the present issue); (2) but in regard to the acquired property of her father

the daughter is preferred to collaterals. It is further stated (p. 92) " that the *general* custom of the pro- " vince (the Punjab) is that a daughter excludes collaterals " in succession to self-acquired property of her father," and " the *initial* onus therefore is 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* custom excluding the daughters." This being the legal position of the parties, the question arises whether, the property being non-ancestral, the plaintiffs have discharged the onus by proving the existence of a special custom excluding daughters. They endeavoured to do this in two ways, (1) by relying on the authority of Wilson's Manual, and (2) by producing oral evidence at the trial.

As the questions and answers in Wilson's Manual formed the main basis of the High Court judgment, it is necessary to examine in detail their value and effect. In the preface of that book, it is stated that the compilation combines the results of several separate enquiries made of village headmen and other leading men of the important tribes in the district, summoned together at different times in November, 1893, and January, 1894, when certain questions of tribal custom were put to them and their answers recorded in the vernacular. The answers were read out to the assembled representatives of the tribe in the presence of the author, and admitted by them to be correct. Notes were taken in English by the author, but vernacular codes were also drawn up in five parts. These codes contained numerous instances of the custom and the author suggests a precaution that the vernacular codes should be consulted when any question regarding custom arises, as they were accepted as a statement of " the opinions of persons having special means of " knowledge " of the usages of the tribe. A table is added, enumerating the tribes consulted and containing details relating to the consultations. One general heading (No. 5) is " Miscellaneous Musalman Tribes," and the tribes included in this category are also specified. The author concludes that " the code thus drawn up represents the tribal custom " of the whole of the landowning and the trading classes in " the Shahpur district." It is to be noted that the Tulla clan, the material tribe in this case, is not mentioned amongst the tribes consulted separately and must therefore be included among the " Miscellaneous Musalman Tribes."

The material portions of question 16 to 18 (in Wilson's Manual) on which the High Court has relied are as follows—

> " *Question* 16 (p. 48)—Under what circumstances are daughters " entitled to inherit? Are they excluded by the sons or by the " widow, or by the near male kindred of the deceased? If they " are excluded by the near male kindred, is there any fixed limit " of relationship within which such near kindred must stand towards " the deceased in order to exclude his daughters? If so, how is " the limit ascertained? If it depends on descent from a common " ancestor, state within how many generations relatively to the " deceased such common ancestor must come.
>
> " *Answer* 16—All Musalmans.

" A married daughter in no case inherits her father's estate " or any share in it. An unmarried daughter succeeds to no share " in presence of agnate descendants of the deceased, or of her own " mother; but if there be no agnate descendants and no sonless " widow, the unmarried daughters succeed in equal shares to the " whole of their father's property, movable and immovable, till their " marriage, when it reverts to the agnate heirs. If there be a " widow and daughters of another wife who has died, the unmarried " daughters of the deceased wife succeed to their mother's share till " their marriage."

" *Question* 17 (p. 49)—Is there any distinction as to the " rights of daughters to inherit (1) the immovable or ancestral, (2) " the movable or acquired, property of their father?

" *Answer* 17—All Musalmans.

" As regards the right of the daughter to inherit, no distinction " is made between the movable and immovable, ancestral and " acquired, property of the father. If she inherits at all she takes " the whole estate."

The material part of answer 18 (p. 49) is as follows:—

" *Answer* 18—All Musalmans.

" A married daughter has no claim upon her father's estate " in any case, whether she be widowed, or have children or not, or " she and her husband live with her father. An unmarried daughter, " if she does not herself inherit her father's estate, is entitled to " proper maintenance out of it until her marriage and to the reason- " able expenses of her marriage."

These answers are clearly admissible under section 48 of the Indian Evidence Act 1872, being the opinion, as to the existence of a general custom or right, of persons who would be likely to know of its existence if it existed. They are also admissible under section 35 of that Act, as entries relating to a relevant fact contained in what may be regarded as a public record, made by a public servant in the discharge of his official duty.

This Board held in the case of *Beg* v. *Allah Ditta* (1916) 44 I.A. 89, 97, in which a similar riwaj-i-am relating to the Mahomedan Jats of the Jhang district in the Punjab was concerned, that the statements contained in the riwaj-i-am formed a strong piece of evidence in support of the custom therein entered, subject to rebuttal. In a later case, *Vaishno Ditti* v. *Rameshri,* (1928) 10 Lahore 86, the Board further held that the statements contained in the riwaj-i-am might be accepted even if unsupported by instances.

On a careful examination of the relevant questions and answers in Wilson's Manual, a few considerations arise *in limine* which cannot be ignored:—

(1) That some of the answers are in conflict with the customs recorded in Rattigan's Digest, notably what is stated in that Digest as the general custom of the province that daughters exclude collaterals with respect to self-acquired property of their father.

(2) It cannot be disputed that, in his lifetime, a Mahomedan proprietor (as, for instance, an Awan in the Shahpur district) possesses unlimited power to give away his property to his daughters and their issue. This is clear from Wilson's Manual, p. 71 where it is recorded: " a father having no son

" or son's son, has full power to give the whole of his immov-
" able property to his daughter, daughter's son, sister, sister's
" son, or son-in-law, or to one of his agnate heirs, without the
" consent of the other agnates. No distinction is made
" between ancestral and acquired property." Again, at p. 73, it is stated as regards Awans and miscellaneous Musalmans (Tullas are included in this category): "a proprietor having " no son or son's son, can, without the consent of the agnate " heirs, make a gift of immovable property, ancestral or " acquired, divided or not, to a person not related to him," and an explanatory note is added that " among the Awans " there is a general feeling that a sonless man is absolute " owner of all his property, including his land, and can " do with it as he likes, as his agnate heirs are generally his " enemies! " If this is the rule, it is difficult to understand why, on the death of such an absolute owner, his married daughters, whom he could have made the objects of his bounty at his will during his lifetime, should be superseded, even with regard to his self-acquired property, by collaterals, irrespective of the degree of remoteness in which they stood. Though Punjab Act II of 1920 (" an Act to restrict the power " of descendants and collaterals to contest an alienation of " immovable property . . . on the ground that such " alienation . . . is contrary to custom ") does not apply to alienations made by a female (as in the present case), section 7 thereof throws light on the absolute right of the proprietor to give away his non-ancestral property. The section applies to the whole of the Punjab, and provides that " no " person shall contest any alienation of non-ancestral im- " movable property . . . on the ground that such " alienation . . . is contrary to custom."

(3) In answer 17 in Wilson's Manual no distinction is made between ancestral and non-ancestral or between movable and immovable property, and the rule is stated as a wide generalisation (in answer 16) with reference to " all " Musalmans " that a married daughter " in no case " inherits her father's estate or " any share in it." This answer is in conflict with numerous decisions of the Punjab Courts (some of them are noticed in a subsequent part of this judgment) which have laid down in clear terms that, in the earlier records of customs throughout the Punjab, rules stated in such wide and general terms must be taken to govern ancestral property only.

(4) In the province as a whole, numerous decisions of the Punjab Courts show that daughters generally succeed to the self-acquired property of their father, even to the exclusion of the nearest agnatic relations (as, e.g., uncles or nephews), and, even as regards ancestral property, it is now well settled that, more usually, the fifth degree is found to be the remotest customary limit. (See Rattigan's Digest, paragraph 23, clause (1), sub-clause (2), and authorities quoted at p. 84 and following.) This general rule, prevalent in the entire province, appears to have found expression in section 6 of the Punjab Act II of 1920, which lays down the fifth degree as

the limit of collateral relationship able to contest an alienation of ancestral immovable property, on the ground that it is contrary to custom.

(5) It is remarkable that in answer 16 as recorded in the English version of the riwaj-i-am, no limit is mentioned within which the kindred must stand towards the deceased in order to exclude his daughters, though the question clearly contemplated enquiry into this point. It is not possible to say whether the omission to answer this part of the question was due to the fact that the point was lost sight of in the investigation or whether the answer was really intended to lay down that custom permitted collaterals, however remote (even of the tenth, fifteenth, or remoter degrees), to exclude daughters. Tek Chand J., in the course of an examination of answer 16 in *Khan Beg* v. *Mst. Fateh Khatun,* (1931) 13 Lahore 276 at 296, 297, had occasion to consult the vernacular version of the riwaj-i-am. He came to the conclusion that, though the last part of the question was not specifically answered, it was clear from certain expressions—*Chacha* (father's younger brother) and *Taya* (father's elder brother) used in the corresponding vernacular answer, that it was not intended to lay down that collaterals of remote degrees should be preferred to daughters.

This case of *Khan Beg* v. *Mst. Fateh Khatun,* (1931) 13 Lahore 276 (their Lordships have derived considerable assistance from Tek Chand J.'s judgment) deserves to be examined carefully as it related to the Shahpur district and the dispute was also very similar to the one in the present case. The contest there was between married daughters and collaterals of the *sixth* degree, and arose (as in the present case) in connection with a gift of non-ancestral property by the widows to their married daughters. As in the present case, the collaterals relied on the riwaj-i-am in Wilson's Manual, and with reference to it Tek Chand J. made some observations which seem to their Lordships very pertinent. He pointed out that it was significant that not a single instance had been cited in the riwaj-i-am of married daughters being excluded from succession to non-ancestral property. The learned Judge went on to observe, quoting from a judgment of a Division Bench of the Lahore High Court, that though the entries in the riwaj-i-am were entitled to an initial presumption in favour of their correctness, irrespective of the question whether or not the custom as recorded was in accord with the general custom, the quantum of evidence necessary to rebut this presumption would, however, vary with the facts and circumstances of each case; where, for instance, the riwaj-i-am laid down a custom in consonance with the general agricultural custom of the province, very strong proof would be required to displace this presumption, but where, on the other hand, this was not the case and the custom as recorded in the riwaj-i-am was opposed to the rules generally prevalent, the presumption would be considerably weakened. Likewise, where the riwaj-i-am affected adversely the rights of females who had

no opportunity whatever of appearing before the revenue authorities, the presumption would be weaker still, and only a few instances would suffice to rebut it.

Their Lordships are in complete agreement with this view, which is confirmed by a weighty pronouncement of Roe J. in *Harnarain* v. *Mst. Deoki,* 1893, 24 P.R., 124, 131, where that learned Judge, who was regarded as one of the most eminent exponents of the principles of Punjab tribal customs, and had himself compiled an important riwaj-i-am, observed: " there is no doubt a general tendency of the " stronger to over-ride the weak and many instances may " occur of the males of a family depriving females of rights " to which the latter are legally entitled. Such instances may " be followed so generally as to establish a custom, even " though the origin of the custom were usurpation; but the " courts are bound to carefully watch over the rights of the " weaker party and to refuse to hold that they had ceased to " exist unless a custom against them is most clearly estab- " lished." In a later case, *Sayad Rahim Shah* v. *Sayad Hussain Shah,* 1901 102 P.R.—353, 359, a similar caution was uttered by Robertson J., who observed that " the male rela- " tions, in many cases at least, have been clearly more con- " cerned for their own advantage than for the security of the " rights of widows and other female relatives with rights or " alleged rights over family property, and the statements of " the male relatives in such matters have to be taken *cum* " *grano salis* where they tend to minimize the rights of others " and extend their own." These views were endorsed by another high authority—Clark, C.J. (Reid J. concurring), in *Maula Baksh* v. *Muhammad Baksh,* 1906, 54 P.R., 208, 210, and, two years later in the case of *Bholi* v. *Man Singh* 1908, 86 P.R., 402, 404, where the riwaj-i-am under consideration had laid down that daughters were excluded by collaterals, even up to the tenth degree, it was observed " as the land " is rising in value under British rule the land-holders are " becoming more and more anxious to exclude female suc- " cession. They are ready to state the rule against the " daughters as strongly as possible, but if the custom is so " well established, it is strange that they are unable to state a " single instance in point on an occasion like the compilation " of the riwaj-i-am, when detailed enquiries are being made " and when the leading men are supposed to give their " answers with deliberation and care." A more emphatic warning was uttered a year later in *Gunpatrai* v. *Kesho Ram,* 1909, 34 P.R., 97, 99, that where the entries in the riwaj-i-am "seek to support a custom in defeasance of the rights of per- " sons who were no parties to the declarations i.e., the female " relatives of the signatories, it is quite clear that no body of " men can deprive another set of right-holders under per- " sonal law by their mere *ipse dixit.* No doubt, usurpation " successfully carried out for a long time may possibly even- " tually establish a custom, but it is necessary in such a case to " show not merely that certain persons desire that such and " such be the custom to the detriment of the rights of others,

" but that such and such have really become a binding cus-
" tom, fully established and followed."

With reference to answers in the riwaj-i-am (like answer 17 in Wilson's Manual) which state that no distinction is made in the matter of the daughter's right of inheritance between self-acquired and ancestral property of the father, or between movable and immovable property, Shadi Lal C.J., in the case of *Sultan* v. *Mst. Sharfan,* (1929) 10 Lahore, 249, 251, remarked that though the entry in the riwaj-i-am raised a presumption in favour of the custom recorded therein, it was clear that " the general custom of the province favours the " succession of the daughter to the acquired property of her " father in preference to collaterals vide Rattigan's Digest, " paragraph 23, sub-paragraph (2), and that the custom " invoked by the plaintiffs (in that case) must be treated as " an exception to the general rule," and for that reason the onus placed upon the daughter was a light one and did not require much evidence to repel it.

Their Lordships have thought it desirable to refer, in some detail, to these observations of the Judges of the Punjab Court, because they held eminent positions and some of them had experience of the preparation of official codes of tribal custom. But none of these considerations appear to have been kept in view by the learned Judges of the High Court in this case, who, in arriving at their decision have not only ignored (as will be shown below) the entire body of evidence adduced in the suit, but also a long course of judicial decisions of their own province, extending over nearly thirty years, in which similar questions arose with reference to the tribes in the Shahpur and neighbouring districts and which were uniformly decided against the collaterals of much nearer degree than in the present suit, except in two cases of exceptional character where there was no rebutting evidence at all. (See *Jawaya Shah* v. *Mst. Fatima,* 1925, 6 Lahore 356, and *Gulab* v. *Umar Bibi,* A.I.R. 1936, 403.) As the question at issue affects large classes of the Muslim community, it is, in their Lordships' opinion, of sufficient importance to justify their briefly reviewing a few of these important decisions.

To begin with, there is Exhibit D. 7 in the case, the judgment of the Chief Court of the Punjab, C.A. No. 665 of 1905 (Judges Rattigan and Lal Chand) in *Samand* v. *Mst. Jind Waddi,* dated 5th May, 1906. It related to the Muslim tribe of Majoks of the Shahpur district. The dispute concerned a gift (as in the present case) by the widow of the original owner, and arose between his collaterals (the exact degree of relationship is not stated) as plaintiffs, and his widow, sister, and married daughters, as defendants. The land was the acquired property of the owner. The collaterals relied on a wajib-ul-arz of 1865 (similar to answer 16 in Wilson's Manual) stating that the daughters of a sonless proprietor succeeded to his landed property and retained possession merely till marriage, when the land reverted to the male

agnates. The Divisional Judge and the Chief Court both held that though the wajib-ul-arz was stated in general terms, its operation, on a proper construction, must be restricted to ancestral property, and that in the case of non-ancestral property the daughter's estate was not limited till marriage, nor was it one for life, but would remain in their line after their death for such time as there existed a male lineal descendant. The suit was accordingly dismissed. This ruling is referred to with approval in *Ghulam Muhammad* v. *Gauhar Bibi,* (1919) 1 Lahore 284 at 291, and also in *Khan Beg* v. *Mst. Fateh Khatun,* (1931) 13 Lahore 276 at 282.

The first of these two cases (Broadway and Bevan-Petman JJ.) related to the Sipras of Miana Hazara tahsil Bhera of Shahpur district (the tribe is included in miscellaneous Musalmans in Wilson's Manual). Here too, the dispute was about a gift made by the widow of her husband's land in favour of her daughter and her deceased daughter's son. Plaintiffs, nephews of the owner, sued for a declaration that the gift did not affect their reversionary right after the death or re-marriage of the widow. Some property was found to be ancestral and some not. The nephews relied on entries in the riwaj-i-am in Wilson's Manual pp. 46, 48, 49 (the same as in the present case), against married daughters succeeding to the father's property. The High Court disallowed the collaterals' claim as regards non-ancestral property, holding that (1) as regards the riwaj-i-am the entries carried with them certain presumptions of correctness, but, when positive instances were given, the riwaj-i-am could not be regarded as over-riding them; (2) as regards ancestral property, the general custom was against the daughter succeeding; (3) in the case of self-acquired property, however, the general custom is that daughters are preferred to collaterals. Reference was made to Rattigan's Customary Law, article 23, clause (2), and to the decision Exhibit D.7, cited above, and it was held that there was no reason to doubt the correctness of the dictum in that ruling that similar general entries about custom should be read as referring to ancestral property only. This case is an instance where answer 17 in Wilson's Manual, stating that no distinction exists between ancestral and acquired property of the father and married daughters are excluded from both, was not given effect to, even in favour of such near kindred as nephews. This ruling was followed in 1933 in the decision noted below as Exhibit D.6.

The case of *Jawaya Shah* v. *Mst. Fatima,* (1925) 6 Lahore 356 (LeRossignol and Fforde JJ.) related to the Sayyads (included in Wilson's Manual in miscellaneous Musalman tribes) of the Shahpur district. The contest was between married daughters and collaterals (the exact degree of relationship is not stated). The property belonged to a Mahomedan who died twenty-two years before the suit and was succeeded by his widow. On her death, mutation was effected in favour of his two daughters. In 1919, on the marriage of one of the daughters, mutation of her share was

effected in favour of her unmarried sister. The married daughter subsequently brought a suit against the unmarried daughter for a declaration that, in spite of her marriage, she was entitled to her half share. This claim was decreed on the confession of the unmarried sister. The suit was then brought by the collaterals on the ground that the unmarried sister was entitled to the estate only until her marriage. The Trial Court dismissed the plaintiff's claim, holding that the land in suit was non-ancestral, and consequently they had no right to the property in the presence of the daughters. The collaterals preferred an appeal to the Lahore High Court. After the institution of the appeal, the unmarried daughter was married and compromised with the plaintiffs, and the first married daughter remained the only defendant to resist the appeal. It was held by the High Court (1) that, on the evidence, the land in suit was not ancestral *qua* the plaintiffs; (2) that it was uncompromisingly stated in the answers in Wilson's Manual that daughters did not succeed to their father's estate " in any case " if they were married, and that when an unmarried daughter took the succession, it lapsed on her marriage; (3) that this statement of custom in Wilson's Manual was open to rebuttal, but that the defendants had failed to prove a single instance in which married daughters succeeded to or retained their father's estate; (4) that it was significant that on the marriage of the first-married daughter the mutation of her share was sanctioned in favour of her unmarried sister. On these grounds the collaterals' claim was decreed.

This ruling has been treated by subsequent decisions of the Lahore High Court as an exceptional case decided on the ground that not a single instance had been proved by the defendants to rebut the presumption arising from the answers in Wilson's Manual. Likewise, the exact degree of the collaterals' relationship does not appear on the record. See the comments on this ruling in *Khan Beg* v. *Mst. Fateh Khatun*, (1931) 13 Lahore 276 at 307, 308, and in the decision Exhibit D.6 (cited below).

This case *Khan Beg* v. *Mst. Fateh Khatun*, (1931) 13 Lahore 276 (Tek Chand and Coldstream JJ.), related to Awans (first tribe mentioned in preface to Wilson's Manual) in mauza Mardwal in Khushab tahsil of Shahpur district. A reference has been made to this case in an earlier part of this judgment. A Mohamedan land-owner died sonless, leaving two widows and daughters from each. After his death, the widows partitioned the property among themselves. Subsequently, each of the two widows gifted her share to her married daughter at different dates. Plaintiffs, collaterals of the sixth degree, instituted two separate suits at different dates impugning the two gifts. The Trial Court dismissed both the suits. The collaterals appealed to the High Court. The two appeals were heard together. In the first suit, no oral evidence had been led by the parties. In the second suit, the collaterals produced sixteen witnesses, who made bald statements about the custom, which were rejected by

the Subordinate Judge as worthless, as none of them was able to cite a single instance in which the collaterals had succeeded in preference to daughters in respect of non-ancestral property. The collaterals, however, relied on answers to questions 16 and 17 in Wilson's Manual. The High Court held (1) that the land was not ancestral; (2) that though the riwaj-i-am was entitled to an initial presumption in favour of its entries dealing with this question, on the facts of the case it was of limited value. Referring to questions and answers 16 and 17 in Wilson's Manual and the general answer as governing all Musalman tribes, it was observed that not a single instance where married daughters had been excluded from succession to non-ancestral property had been cited, either in the riwaj-i-am or proved at the trial. The judgment then refers (p. 282) to three rulings—one of 1905 (the same as exhibit D.7 above) and two of 1920, where the answers in Wilson's Manual were not followed. It is further stated (p. 310) that there were " more than twenty cases in which daughters were proved to have excluded collaterals from succession to the property of their fathers, while there is not a single well-ascertained instance of collaterals as distantly related as the plaintiffs (sixth degree) succeeding to non-ancestral property in preference to daughters of the last male holder. The plaintiffs had succeeded in proving only three instances of succession of collaterals to non-ancestral property, but in all these cases the plaintiffs were 'near kindred'." The suit was accordingly dismissed. The remarks at the end of the judgment (p. 310) are valuable as showing that on the authority of Wilson's Manual (answers 16 and 17) and the admission of both Counsel in that appeal, the custom discussed in the judgment was the same among all the Musalman tribes of the Shahpur district.

Mst. Bhag Bhari v. *Mohammad,* (1933) 15 Lahore 73 (Dalip Singh J.), also related to the Awans of tahsil Khushab, Shahpur district. The contest there was between the daughters (defendants) and collaterals of the fifth degree (plaintiffs). The case followed the decision in *Khan Beg* v. *Fateh Khatun,* (1931) 13 Lahore 276. The judgment goes on to add that the twenty instances relied on in the judgment in that case were of such a character that they would apply to the fifth-degree collaterals as much as to the sixth-degree, and that out of the three contrary instances in that case only one was helpful to the plaintiffs. It was held that the presumption in the riwaj-i-am had been rebutted and that the daughters succeeded.

Mst. Jallo v. *Mst. Sajjadan,* (1933) (Exhibit D.6 in the present case), related to the tribe of Khokhars (fourth tribe mentioned in preface to Wilson's Manual) of Kalas, tahsil Bhalwal, Shahpur district. This is a judgment of the District Judge at Sargodha, Shahpur district. The contest was between a daughter and the sons of another daughter as plaintiffs and collaterals of the fifth degree as defendants. In addition to the usual defences, the collaterals pleaded a

local custom of the Shahpur district under which daughters and their sons were excluded even if the land was not ancestral. The first court held that the land was not ancestral, that defendants were collaterals of the fifth degree and daughters were preferential heirs, and their suit was decreed. On appeal, the District Judge confirmed the findings, and stated, as regards the custom of the Shahpur district, that the evidence for the collaterals consisted (1) of entries in the revenue record; and (2) of oral evidence of nine witnesses, but that not one single instance had been cited to prove the preference of collaterals over daughters. He held that if the property was ancestral, the collaterals would succeed, but that if the property was not ancestral, the general custom of the province was in favour of the daughters, and that the local custom, contrary to the general custom, had not been established, as no instance of daughters' exclusion was proved. As for the record of the custom which stated (like the relevant answers in Wilson's Manual) that daughters did not obtain any share of the father's property, the learned Judge remarked that no distinction was made in it between ancestral and non-ancestral property and, therefore, following the case in 1 Lahore 284 (cited above), he held that the operation of the statement must be confined to ancestral property. Turning to the facts of the case before him, the learned Judge held that, on account of the various instances proved in the case, the presumption raised by the riwaj-i-am in favour of collaterals, so far as succession to non-ancestral property was concerned, had been rebutted. The suit was accordingly decreed. The Judge relied on the case in 13 Lahore 276 as being " most important."

Exhibit D.8 (referred to in the trial Court's judgment in this case) is a decision of the Lahore High Court relating to the Mekans (tribe included in miscellaneous Musalmans) of the Shahpur district. Plaintiffs there were collaterals of the seventh degree as against married daughters. It was held that, according to the custom prevailing amongst the Mekans, and the Mahomedan land-holders of the Shahpur district generally, collaterals were excluded by married daughters in succession to the non-ancestral property of a sonless proprietor. It was also pointed out that, according to answers 16 and 17 in Wilson's Manual, the same custom existed amongst all the Musalman tribes of the district (except the Tiwanas and Sayads, in whose cases there were minor variations). It was held that the plaintiffs (seventh-degree collaterals) were excluded by the daughters. The judgment followed *Ghulam Muhammad* v. *Mst. Gauhar Bibi,* (1919) 1 Lahore 284; *Khan Beg* v. *Mst. Fateh Khatun,* (1931) 13 Lahore 276; and *Mst. Bhag Bhari* v. *Mohammad,* (1933) 15 Lahore 73.

The decisions cited above have been referred to in some detail because they were all from the Shahpur district and related to the Musalman tribes mentioned in Wilson's Manual. But the Lahore High Court have, in some of their decisions relating to the Shahpur district, referred also to

rulings from the other districts of the Punjab, where, owing to the contiguity of the district or analogous circumstances, a similarity of customs was found to have existed, tending to prove that, with regard to non-ancestral property, the custom was more or less general in the whole province of the Punjab that daughters, married or unmarried, excluded collaterals beyond the fifth degree. A few of these decisions which relate to the material period of 1905-1936 may be usefully noticed here.

Chanda Singh v. *Mst. Banto,* (1927) 8 Lahore 584 (Campbell and Tek Chand JJ.), was a case of a Kanj Jat of mauza Burewal in the Amritsar district. The contest was between collaterals of the sixth degree (plaintiffs) and the daughters (defendants) of a daughter's son appointed by the widow of the owner, under his directions, as a son to her husband. The Subordinate Judge held (and the High Court confirmed) that the land was not ancestral and the appointee took it as his absolute property with a complete power of disposal over it, and that consequently, on the latter's death, it would descend to his daughters, and plaintiffs had no right to it; that the rule of reversion mentioned in the riwaj-i-am of the Amritsar district, prepared in 1913-14, stating (like the answers in Wilson's Manual) that the collaterals excluded the daughters even with regard to non-ancestral property, had no application where the property was non-ancestral in the hands of the appointee and his power of disposal over it was absolute. In support of this view, reference was made to paragraph 55 of Rattigan's Digest.

Sultan v. *Mst. Sharfan,* (1928) 10 Lahore 249 (Shadi Lal C.J. and Johnstone J.), related to Awans of the village Khardar in the district of Jhelum. The owner was succeeded by his widow, who made a gift of a plot of the land to her daughter. Plaintiffs, brothers and a nephew of the owner, brought the suit, impugning the alienation. The property was admittedly self-acquired. Plaintiffs relied on an entry in the riwaj-i-am of the district (similar to answer 16 in Wilson's Manual), limiting the unmarried daughter's interest until her marriage, without distinction between self-acquired and ancestral property or movable or immovable property. The Subordinate Judge decided in favour of the daughters (the High Court confirmed the decision), holding that it was clear that the general custom of the province favoured the succession of the daughter to acquired property of her father in preference to collaterals. (Reference was made to Rattigan's Digest, paragraph 23, sub-paragraph (2).) The Subordinate Judge thought that a declaration in the riwaj-i-am that a married daughter cannot inherit even the self-acquired property of her father " verges " on an absurdity "; no instances were mentioned in support of it. He added that the author of the riwaj-i-am had himself stated in the preface that his code " must not in " all cases be regarded as a correct record of the customs " actually existing and that the more intelligent tribesmen

" who usually act as spokesmen on an occasion of this kind " sometimes allow their opinion as to what customs are ex- " pedient to over-ride their knowledge of the customs as they " really are." The daughter produced evidence of at least four instances in her favour, as against one contrary instance proved by the collaterals, but the latter related to property which was jointly acquired by the deceased owner and his brother and went to the collaterals without any contest by the daughters. It may be noted that this case was treated by Tek Chand J. in *Khan Beg* v. *Mst. Fateh Khatun,* (1931) 13 Lahore 276 at 287 (case of Awans of Shahpur) as of particular importance, as the question for decision in this ruling was precisely the same as before him and related to the neighbouring district of Jhelum.

Shahamad v. *Mst. Muhammad Bibi,* (1928) 10 Lahore 485 (Shadi Lal C.J. and Agha Haidar J.), was a case of Jats of the Sialkot district. The suit was brought by the daughter for a declaration that after the death of her mother she would inherit the property. Her claim was opposed by the nephew. The land was non-ancestral. The trial Judge, upon examination of the evidence, came to the conclusion that among the Jats of the Sialkot district, from where the original owner had migrated, the daughter is by custom entitled to succeed to the self-acquired property of her father in preference to his nephew. This finding was not challenged before the High Court.

Said v. *Mst. Said Bibi,* (1929) 10 Lahore 489 (Broadway and Harrison JJ.), was also a case of a Jat in the Sialkot district. The contest was between a married daughter and her father's brothers. On a reference by the Collector, the daughter filed the suit for the usual declaration. The trial Court and the High Court both admitted her claim, holding that by the custom of the Jats of the Sialkot district a married daughter succeeds to the self-acquired property of her father in preference to collaterals. The uncles had relied on a riwaj-i-am of the Sialkot district (similar to answer 16 in Wilson's Manual) stating that married daughters did not inherit in the presence of collaterals. The High Court observed that a presumption of correctness attached to such an entry, but in the case before it the entry was qualified by the following remarks: " this is the general rule, but, under the influence of judicial " decisions, some people assert that daughters succeed in " preference to collaterals of the fifth or more remote degree. " Mughals assert that agnates of the fourth degree are " excluded by the daughters." The Judges gave effect to this qualification on finding that eight instances were cited in the riwaj-i-am in which daughters inherited to the exclusion of collaterals of varying degrees, and that in the case itself two more contested instances were proved in the daughter's favour. The case *Shahamad* v. *Muhammad Bibi,* (1928) 10 Lahore 485, was relied upon as affording strong

evidence in support of the qualification of the custom set out in the riwaj-i-am.

Rahmat Ali Khan v. *Mst. Sadiq-ul-Nisa,* (1931) 13 Lahore 404 (Addison and Hilton JJ.), related to Muhammadan Rajputs of Panipat, Karnal district. The contest was between collaterals of the sixth degree (plaintiffs) and a daughter (defendant 1) and widow (defendant 2). There was a will by the owner in favour of the daughter. The suit was for a declaration that the will was of no effect against reversionary rights, as the property was ancestral and there was a general custom excluding daughters and also a special custom of the Rajputs of Panipat that daughters married outside Panipat did not inherit. The Subordinate Judge dismissed the suit, holding that the will was genuine and valid, the property was non-ancestral and there was a general custom preferring daughters to collaterals, and that the special custom pleaded was neither ancient nor reasonable. The High Court held that the property was not ancestral and that plaintiffs had not proved that the general custom favoured sixth-degree collaterals even if the property was ancestral. The plaintiffs had relied upon a riwaj-i-am of Panipat of 1880, stating that "daughters "succeed provided they be married in Panipat proper and "are alive." This riwaj-i-am was supported by one instance proved in the case. Notwithstanding this, the High Court, following its previous decisions in *Ghulam Muhammad* v. *Mst. Gauhar Bibi,* (1919) 1 Lahore 284 (cited above) and *Sham Das* v. *Mst. Moolo Bai,* (1926) 7 Lahore 124, limited the operation of the riwaj-i-am to ancestral property as no mention of self-acquired property was made in it. The High Court proceeded to observe that assuming that the property was ancestral, the daughter was unmarried at her father's death when succession opened out and the property having vested in her, her subsequent marriage would not divest it. It is interesting to compare the last-mentioned principle with answer 16 in Wilson's Manual, which states that unmarried daughters succeed to their father's estate but that on their marriage it reverts to the agnates.

Mahi v. *Mst. Barkate,* (1936) A.I.R. Lahore 339 (Tek Chand and Skemp JJ.), related to Kalon Jats of the Sialkot district. The contest was between brother's son's sons (plaintiffs) and daughter (defendant). After the death of the owner and his widow, the Collector ordered mutation in favour of the daughter. The brother's son's sons brought the usual suit against the daughter, claiming, *inter alia,* that according to the custom prevailing in the tribe, collaterals succeeded to self-acquired property to the exclusion of daughters. The Subordinate Judge found against plaintiffs on all points and dismissed the suit. The High Court held that the daughter was legitimate and therefore had a right to succeed in preference to the brother's son's sons. The collaterals had relied upon a riwaj-i-am of the Sialkot district of 1916, with reference to which the High Court observed that, though the initial presumption must be in favour of its

correctness, the lower court had rightly held, after careful examination of the evidence on the record and also the previous decisions, that the daughters had succeeded in displacing the presumption. It is significant that the High Court proceeded to add that Counsel appearing for the collaterals "conceded that there were several instances of "daughters excluding collaterals in succession to non-ances- "tral property of their sonless fathers, while there was not "even one instance in support of the answers as recorded. "This entry in the riwaj-i-am has been examined in several "cases by this court and in every one of them it has been "found that it was not in accord with the actual prevailing "custom." Reliance was placed, among other rulings, on *Shahamad* v. *Muhammad Bibi,* (1928) 10 Lahore 485 and *Said* v. *Mst. Said Bibi,* (1929) 10 Lahore 489 (cited above).

It is interesting to compare the last ruling with another case reported in the same volume—*Gulab* v. *Umar Bibi,* A.I.R. (1936) Lahore 403 (Addison and Abdul Rashid JJ.). This case related to a Dillu Jat of the village of Godha in the Sialkot district. The contest was between collaterals of the eleventh degree (far remoter than any collaterals concerned in any of the previous decisions) as plaintiffs and a married daughter (donee from the widow) and her husband (donee from her) as defendants. The Trial Court dismissed the suit, holding that the plaintiffs were very remote collaterals, that the land was not ancestral and that under the custom the daughter was entitled to succeed. It is to be noted that no evidence was produced by either party on the question of custom and the Subordinate Judge decided the issue on the basis of the general custom of the province as made out in the previous decisions of the Lahore High Court (cited above) dealing with the different tribes in the Sialkot and other districts. The High Court reversed the decision and decided in favour of the plaintiffs, relying entirely on the riwaj-i-ams of 1865, 1895 and 1916, holding that these riwaj-i-ams had remained unchanged during all these years and were clearly to the effect that married daughters did not inherit in the presence of collaterals "in any case," and, as they were not rebutted by the contrary evidence in the case, the riwaj-i-ams must be given effect to. It is clear that this case is an extreme instance where collaterals of the eleventh degree succeeded. It ignores the previous decisions, and some of them (cited above) from the same district of Sialkot, where collaterals of a much nearer degree, like nephews, were excluded by the daughters with reference to self-acquired property. The decision likewise fails to take note of the interpretation adopted in several of the previous decisions that where a riwaj-i-am makes no distinction between ancestral and self-acquired property and states, as a wide generalisation, that daughters do not succeed in any case, it must be limited to ancestral property. It is to be noted that in this case, as in *Jawaya Shah* v. *Mst. Fatima,* (1925) 6 Lahore 356 (cited above), there was not a single instance adduced to rebut the

presumption created in favour of the collaterals by the riwaj-i-am. It is on this ground that Bhide J. in his differing judgment in 18 Lahore 594 at 605 (cited below) rightly describes this case as of an exceptional character.

It now remains to consider the Full Bench case of *Bahadur* v. *Mst. Nihal Kaur,* (1937) 18 Lahore 594 (differing judgments of Coldstream and Bhide JJ. and Full Bench decision of Young C.J., Monroe and Din Mohammad JJ.). As the High Court in the present case has treated this ruling as an authority for ignoring the previous judicial decisions, it is necessary to examine closely the facts and effect of this ruling. The case related to the Jats of Daska tahsil in Sialkot district. The contest was between a married daughter (plaintiff) and collaterals of the fourth degree (defendants). The land was non-ancestral. The trial Court decreed the suit, holding that the land being non-ancestral the custom favoured the daughter's preferential right. This decision was upheld on appeal by the District Judge. The collaterals appealed to the High Court, and that court dismissed the suit. It is to be noted that neither party had proved any specific instances in the case, so there was no rebutting evidence against the presumption raised in favour of the collaterals by the answers in the riwaj-i-am relating to the district. The only material question was whether previous decisions of the Lahore High Court of a character contrary to the custom recorded in the riwaj-i-am would be sufficient evidence to rebut the presumption. None of the earlier decisions, for instance those cited above, nor even those relating to the Jats in the Sialkot district, were noticed in the Full Bench judgment, which referred only to two previous decisions: one of 1922, which Young C.J. (who delivered the judgment of the Full Bench) thought was based on a wrong view of the law; and the other of 1928, which was held to be too recent to prove a custom. The riwaj-i-am relevant to the suit, which was noticed and commented on in some of the earlier decisions cited above, was clear so far as it went, but its qualifications were not given effect to as was done in some of the earlier decisions. There was a difference of opinion between Coldstream J. and Bhide J., and on a reference to the Full Bench, the reasoning adopted by the former Judge was virtually approved, but several vital considerations urged by Bhide J. in his differing judgment do not appear to have received adequate consideration in the Full Bench judgment.

If the Full Bench decision is intended to lay down the rule that a riwaj-i-am, being presumptive evidence, cannot be over-ridden by *recent* instances, either in the form of specific cases proved at the trial or the decisions of the law courts, their Lordships have little comment to make on it. The case cannot, however, be treated as an authority for the view that judicial decisions, even if they are not of recent date, cannot be treated as evidence against the statements in the riwaj-i-am. A judicial decision, though of comparatively recent date, may contain, on its records, evidence of specific instances, which are of sufficient antiquity to be of value in

rebutting the presumption. In such a case, the value of the decision arises from the fact not that it is relevant under sections 13 and 42 of the Indian Evidence Act as forming in itself a " transaction by which the custom in question was " recognised, etc., etc.," but that it contains, on its records, a number of specific instances relating to the relevant custom. To ignore such judicial decisions merely on the basis of the riwaj-i-am would add greatly to the perplexities and difficulties of proving a custom.

Their Lordships are not convinced that Young C.J.'s reference to the English rule, stated in Blackstone's Commentaries, that " a custom, in order that it may be legal and bind- " ing, must have been used so long that the memory of man " runneth not to the contrary " was either apposite or useful, when applied to Indian conditions. It is undoubted that a custom observed in a particular district derives its force from the fact that it has, from long usage, obtained in that district, the force of law. It must be ancient; but it is not of the essence of this rule that its antiquity must in every case be carried back to a period beyond the memory of man—still less that it is ancient in the English technical sense. It will depend upon the circumstances of each case what antiquity must be established before the custom can be accepted. What is necessary to be proved is that the usage has been acted upon in practice for such a long period and with such invariability as to show that it has, by common consent, been submitted to as the established governing rule of the particular district. Having regard to the circumstances under which local customs have arisen and do arise in India, both with reference to Muslims and Hindus, and the ease and frequency with which people migrate from one district or province to another, it would, in their Lordships' opinion, create great perplexity in the already uncertain character of customary law to require that, in every case, the antiquity of a custom must be carried back to a period which is beyond the memory of man. Insistence upon such proof would also involve a complete ignoring of the caution, which was uttered in a judgment of this Board in the case of *Abdul Hussein Khan* v. *Bibi Sona Dero,* (1917) 45 I.A. 10 at 14, where their Lordships adverted to the difficulty of applying " the strict " rules that govern the establishment of custom in this " country to circumstances which find no analogy here." Likewise, their Lordships do not find themselves in agreement with the view of the Full Bench that the effect of the statements in the riwaj-i-am was not weakened by the fact that women had no opportunity of being consulted by the officer compiling the customary law or by the fact that the custom recorded was not in conformity with the general customary law. The presumption enjoyed by the riwaj-i-am was, in their Lordships' opinion, weakened to the extent of both these considerations, though the degree of the weakening would depend upon the facts of each case. Their Lordships prefer, in this behalf, the observations of the Punjab Judges, cited in a previous part of this judgment, which are of a contrary character.

Whatever value the Full Bench decision might have with reference to the customs of the Sialkot district, the High Court in the present case was in error in accepting it as an authority for excluding from consideration the several instances, both judicial and otherwise, which were proved in this case with reference to the customs of the Shahpur district. By no straining of language could these decisions be described as recent. They commence from 1905-6 and range over a period of nearly thirty years. In many of these decisions the claimants in the position of the daughters proved specific instances of their superseding collaterals of varying degrees of remoteness, sometimes even nephews, with reference to non-ancestral property. The case of *Gulab* v. *Umar Bibi* (A.I.R. 1936, Lahore 403), on which the Full Bench judgment relied, was as shown above, of an exceptional character and could hardly be regarded as indicating any rule of custom of general application as against numerous instances of a contrary character. Besides, both parties had led, in the present case, evidence of specific instances which had received careful consideration in the judgment of the Subordinate Judge. The High Court virtually ignored all this evidence on the basis of the Full Bench judgment. Their Lordships have examined this evidence and they agree with the view of the Subordinate Judge that the evidence produced by the daughters was of a more convincing character.

For the reasons indicated in this judgment, their Lordships are of opinion that the true legal position was that, the property being non-ancestral, the initial onus lay on the plaintiffs to prove that the general custom in favour of the daughters' succession had been varied by a special custom enabling the plaintiffs to exclude the daughters and that the plaintiffs have not discharged this onus. Their Lordships would add that even if it be held that the answers in Wilson's Manual raised an initial presumption against the daughters, having regard to the considerations mentioned in this judgment, it was a weak presumption, which has been sufficiently discharged by the evidence adduced in the case.

Their Lordships will accordingly humbly advise His Majesty that the appeal be allowed, that the decree of the High Court be reversed and that of the Subordinate Judge restored. The respondents will pay the appellants' costs in the High Court and before this Board.

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In the Privy Council

MUSAMMAT SUBHANI AND OTHERS

v.

NAWAB AND OTHERS

DELIVERED BY MR. M. R. JAYAKAR

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