

PUNJAB AND HARYANA HIGH COURT

Charan Singh Harnam Singh

Vs

Gurdial Singh Harnam Singh

(Mehtar Singh, C.J. K Gosain and S Capoor, JJ.)

26.12.1960

ORDER

Mehtar Singh, J.

1. The litigation between the parties concerns the property left by Harnam Singh deceased. The property is both agricultural land and house or other property than agricultural land. He died on March 29, 1951. He had four sons named Charan Singh, Mansa Singh, Gurdial Singh and Gurbakhsh Singh. Gurbakhsh Singh died some six or seven years earlier to his death, leaving his widow Mohinder Kaur. On the death of Harnam Singh the persons claiming his inheritance were his three sons, namely, Charan Singh, Mansa Singh and Gurdial Singh, then living, and Mohinder Kaur as the widow of his predeceased son Gurbakhsh Singh. The agricultural land, however, has been mutated by the authorities in the name of the three surviving sons of Harnam Singh deceased, leaving out Mohinder Kaur, the widow of his predeceased son Gurbakhsh Singh.
2. On April 29, 1953, Mohinder Kaur instituted a suit for possession of one-fourth share of the agricultural land, described by her in detail in her plaint, left by her deceased father-in-law, on the ground that as the widow of the predeceased son she is entitled to that share.
3. The suit was defended by Charan Singh and Mansa Singh On the grounds (a) that Mohinder Kaur has re-married Gurdial Singh, the brother of her deceased husband, by Karewa, and (b) that, in any case, she has been living an unchaste life, so that she has forfeited her right to inherit to her father-in-law as a widow of his predeceased son. Gurdial Singh, the brother of these two respondents, sided with Mohinder Kaur and did not contest the suit.
4. The teamed trial Judge on March 29, 1954, came to the conclusion that, though Karewa by actual ceremony has not been proved, Mohinder Kaur has married by Karewa Gurdial Singh because of long cohabitation between them and she having given birth during that time to two daughters to Gurdial Singh. He found that, in the circumstances, there was no question of

Mohinder Kaur having been unchaste. He, therefore, held that Mohinder Kaur had forfeited her right of Inheritance to the estate from her father-in-law because of her re-marriage by Karewa and so dismissed her suit with costs. Mohinder Kaur filed an appeal against the decree of the trial Judge and the appeal was board by the Subordinate Judge of Ambala on October 27, 1954.

The learned judge also found that karcwa by ceremony between Mohinder Kaur plaintiff and Gurdial Singh defendant has not been proved but he having further come to the conclusion that cohabitation between them for about eight years does not provide long enough period to raise the presumption of marriage between them, has remanded the case to the trial Court for decision on the remaining two questions in the suit, one being whether Mohinder Kaur has been living unchaste life and the second being the effect of her husband having predeceased his father. It is against that order of the learned Judge in appeal that there is second appeal (No. 9 of 1955) by Charan Singh and Mansa Singh, defendants, and to this second appeal the respondents are Mohinder Kaur plaintiff and Gurdial Singh defendant. This will hereinafter be referred to as the first suit

5. On May 18, 1953, Charan Singh and Mansa Singh brought a suit against their brother Gurdial Singh for possession by partition of the four properties detailed in their plaint, claiming obviously two-third share of the same, leaving the remaining one-third share to Gurdial Singh defendant. To the suit Mohinder Kaur was not made a party until she made an application and upon her application she was made a party defendant.

Upon that the two plaintiffs, namely, Charan Singh and Mansa Singh, came forward with the allegation that Mohinder Kaur has no claim, to any share of the properties in dispute because of her having re-married Gurdial Singh defendant by karewa and, in any case, she is living an unchaste life resulting in forfeiture of property, if ever it came to her. The suit has been defended by Gurdial Singh defendant as also by Mohinder Kaur defendant and the ground of defence is that Mohinder Kaur has not re-married Gurdial Singh, defendant, nor is she living an unchaste life. The defendants have of course also denied the co-ownership of the properties.

6. The learned trial Judge has by his decree of May 19, 1954, found that Mohinder Kaur has re-married Gurdial Singh defendant by karewa because of long course of cohabitation between them and not because of actual ceremony of karewa, which the learned trial Judge has found is not proved, that, in the circumstances, there is no question of her living unchaste life, and that, though ordinarily, under Custom, the re-marriage of a widow causes a forfeiture of her life interest in her first husband's estate, but, the parties being Jats, there is a special custom amongst Jats that a re-marriage in karewa form with the brother of the deceased husband does not cause forfeiture of the widow's life estate in the property of her first husband.

He has further found that all the properties in dispute mentioned in the plaint are in the co-ownership of the plaintiffs and the defendants. He has, therefore, decreed the suit of the plaintiffs allowing them one-half share in the properties in suit. leaving the other half share to Gurdial Singh defendant and Mohinder Kaur defendant, widow of the predeceased son of Harnam Singh, each having equal share. The parties have been left to bear their own costs. There is Regular First Appeal No. 137 of 1954 by Charan Singh and Mansa Singh, plaintiffs, against the decree of the learned trial Judge. This is the second suit between the parties.

7. Of the two appellants, Mansa Singh has died during the pendency of these two appeals on May 6, 1954. He does not seem to have left behind a widow or a son. So the claims of the parties to the two suits in regard to his estate also come in for consideration in these two appeals.

8. In the first suit the learned Judge in first appeal is wrong in law when he says that cohabitation over about eight years by Mohinder Kaur with the brother of her deceased husband does not prove, under custom, re-marriage between the two. This period is obviously long enough to prove re-marriage between them because Mohinder Kaur has continued to live in the family and with the brother of her deceased husband and for all practical purposes as his wife for about eight years preceding to the litigation. In *Mst. Indi v. Bhanga Singh* 115 Pun Re 1900, at P. 451, Chatterji J. observes:-

"Among Jats also no ceremonies are essential to a widow's re-marriage, but this is more especially the case where the second husband is the brother of the first. By mere Cohabitation the widow assumes the position of his wife and he of her husband (See remarks in *Hira Singh v. Mt. Rami*, 7 Pun Re 1893 at p. 318). This must be due to the universal opinion held by Jats that in marrying her husband's brother the widow is doing the right and proper thing and what she is expected to do."

The learned Judge in first appeal in the first suit was therefore wrong in reversing the decree of the trial Court on this ground. In the second suit also there is no sufficient evidence to find that there has been ceremony of *karewa* between Mohinder Kaur and Gurdial Singh, but there is ample evidence that she has been living with Gurdial Singh. In one house and she has given birth to two daughters to him. Naurang Singh, Phuman Singh and Surjit Singh for the plaintiff have deposed to these facts.

Undoubtedly Mohinder Kaur has two daughter born to her after the death of her first husband Gurbakhsh Singh. The explanation of Gurdial Singh defendant of those two daughters of her is that they are not her daughters but his daughters from one Nasib Kaur. But that Nasib Kaur is not to be found as she left him some twelve years earlier, and neither he knows where she is nor has he ever tried to locate her. He did not bother when she left him.

The story put forward by him is thus fantastic and the learned trial Judge has disbelieved it and rightly. The two daughters of Mohinder Kaur are therefore from the loins of Gurdial Singh defendant. The exact date Or year since when she has been living in the house of Gurdial Singh defendant is not available, but Naurang Singh, plaintiffs' witness, was examined in Court on March 29, 1954, and stated that then the age of one of the daughters was seven years and of the other five years.

It is apparent that Mohinder Kaur has been living as wife in the house of Gurdial Singh defendant for something more than eight years previous to the present litigation. The learned trial Judge has, in view of what has already been stated above, reached a correct conclusion that Mohinder Kaur has re-married Gurdial Singh defendant by long course of cohabitation and particularly as she has been living as wife in the house of her deceased husband's real brother and has given birth to two daughters to him.

9. The consequence in both the suits is that Mohinder Kaur has re-married Gurdial Singh, the real brother of her first husband. At the hearing of the cases, for a moment, a question seems to arise whether she has re-married Gurdial Singh before or after the death of her father-in-law, but that is not a matter that is material in view of the statement of Charan Singh plaintiff in the second suit as P. W. 6 that "had Mohinder Kaur not married by karewa, she would have succeeded to Harnam Singh".

10. The question is whether her re-marriage with the real brother of her first husband causes forfeiture of the estate inherited by her from her deceased father-in-law Harnam Singh? In paragraph No. 32 of Rattigan's Digest of Customary Law, 1938 Edition, at page 165, the learned author says:-

"In the absence of custom, the re-marriage of a widow causes a forfeiture of her life interest in her first husband's estate which then reverts to the nearest heir of the husband."

To this there is an exception noted at page 166 of the same, and it is accepted by the learned counsel for both parties that that exception, as a special custom prevails among Jats. The exception or the special custom is that a re-marriage in the karewa form with the brother of the deceased husband does not cause a forfeiture of the widow's life estate in the property of her first husband. This special custom is not disputed by anybody in these cases. So the learned Judge in the second suit is correct when he concludes that by re-marriage with Gurdial Singh, Mohinder Kaur has not forfeited the estate that she has inherited from her deceased father-in-law, Harnam Singh as the widow of his predeceased son Gurbakhsh Singh.

If the matter stood here, the appeal in the second suit must fail and in the second appeal in the

first suit the position should be in favour of Mohinder Kaur. Another question has arisen for consideration because of the death of Mansa Singh appellant during the pendency of these appeals. The question that arises on this account is whether Mohinder Kaur is entitled to inheritance in the estate of Mansa Singh deceased on the ground that he was the collateral of her first deceased husband Gurbakhsh Singh?

11. There is conflict of judicial opinion on the question. The cases that are going to be referred to are direct cases dealing with the question where a widow has re-married her first husband's brother & whether in such circumstances she is entitled to collateral succession in the family. The first case is Mt. Jaidevi v. Harnam Singh, 117 Pun Re 1888, in which it has been held that she is excluded from such collateral succession. The second case is Hardam Singh v. Mt. Mahan Kaur, 64 Pun Re 1910 in which also the same view has prevailed. These two cases support one view. In addition in support of the same view may be referred to the observations of Plowden, J., in the Full Bench case, Mt. Desi v. Lehna Singh, 46 Pun Re 1891, at pages 257 and 258, where the learned Judge says :-

"After this general view of custom, I pass on to consider the bearing of cases decided by this Court upon the question before us. I will start with the simplest state of facts, and always with reference to ancestral land left by a sonless man dying unmarried without issue.

A man dies leaving a widow and two sons by her, of whom one dies unmarried. I cannot recall or find a single instance of an assertion that the mother is entitled to possession of the share of the deceased. Before his death she was entitled to maintenance as widow: after his death she continues similarly entitled, and the share of the deceased passes to his brother as son of the father, the common ancestor, subject to the widow's right to be maintained out of the whole estate as before.

Next take the case of a father dying, leaving two widows, and one son by each. The estate passes to them in equal shares, subject to the maintenance of the two widows. The son of one dies. Is the widow, his mother, entitled to take possession of his half share? This point arises in case No. 638 of 1880, among Moghuls of the Rawalpindi district; and the mother failed to establish her right to anything beyond maintenance which was admitted. It would not have been surprising if the right of the bereaved widow to possession of her son's share, in lieu of maintenance as father's widow, had been established, not on the ground that she was mother, but AS a matter of usage, if there were two separate households.

Next, suppose a case, which I have met with but cannot trace a record. A man leaves two widows, one with a son, the other without issue, and the son dies. Here both widows take the estate jointly Instead of the mother taking it and maintaining the other widow. Here, obviously

they are entitled jointly as co-widows of the father of the deceased.

Then there is a significant class namely, those in which the claim of the mother has been contested, sometimes with success, on the ground of her re-marriage. If her title to possession is really founded on her relation to her deceased son, the objection of re-marriage is irrelevant, for she does not cease upon re-marriage to be his mother. But if it is founded on her relation to her husband, the objection is weighty, for upon re-marriage she ceases to be regarded by custom as his widow of as a member of his family, and is regarded as a member of the family of her new husband."

The only direct case for the opposite view is *Mst. Basanti v. Partappa*, 51 Pun Re 1911, in which Shah Din, J., has held that, in such circumstances, a widow does not forfeit her life estate in her first deceased husband's property. But there is the Division Bench case of *Kanhya Singh v. Mst. Premi*, 322 Pun LR 1913, to which Shadi Lal. J. was a party, and in that case, though not a direct case, the following observation, at page 1077, is pertinent to the present consideration:-

"We would dear the ground by stating at once that there is ample authority in the Customary Law for the view that ordinarily a widow, by re-marrying her husband's brother, does not for the purpose of succession lose her previous status as the widow of her first husband..... "

The learned counsel for the parties, however, have not been able to refer to a single reported case which supports this proposition that even after re-marriage to her first husband's brother, a widow, tinder custom, maintains the status for purposes of succession. The Case of *Mohinder Kaur* has been argued in both the appeals by Mr. Shamair Chand, who I understand has been in practice for well-nigh half a century, and when we asked him, he has not been able to refer to any unreported decision of the Punjab Chief Court or the Lahore High Court or of this Court that supports this proposition.

It may be that in thus stating the proposition what the learned Judges had in mind was the special custom among Jats that a widow re-marrying her first husband's brother does not forfeit her life estate in her first deceased" husband's property. But that is because of a special custom and custom cannot" be extended either by analogy or by logic. There is thus difficulty with the observation of the learned Judges. These two conflicting views came for consideration of my learned brother Gosain, J., in *Gurdialo v. Mst. Dhan Kaur*, 1959-61 Pun LR 163, and he has preferred the second of the two views because of the reason that she (widow) continues to remain in the same family and this reason equally applies to her future rights of succession.

This is the reason which has been adopted by Chatterji, J., in 115 Pun Re 1900 in upholding the special custom that among Jats a widow mar-trying her husband's brother does not forfeit, by

custom, her life estate in her former husband's, property. The learned Judge does not extend that special custom to future rights of succession or collateral succession in favour of such a widow. There is thus only one case which supports this view and that is the observations in 322 Pun LR 1913 at page 1077.

12. We have considered the matter and it appears that my learned brother Gosain, J., is still of the same opinion as expressed by him in 1959-61 Pun LR 163. I have had considerable doubt whether special custom whereby a widow does not forfeit her first deceased husband's property on her re-marrying his brother can be extended by logic or analogy and for the while I am of the opinion that it cannot be.

Custom is not logical and Special consideration with community may lead to the development of a particular benefit in favour of a particular class of persons, but the extension of such benefit by logic or analogy would not be justified. We have, therefore, considered it appropriate that this question should be heard by a larger Bench. The question referred to the larger Bench is:

"Whether in the case of Jats governed by custom in matters of succession a widow, by re-marrying her deceased husband's brother, is entitled to collateral succession in the family?"

The case will now be placed before the Hon'ble the Chief Justice for orders.

GOSAIN J.:

13. I agree that the question formulated by my learned brother Mehar Singh, J., should be referred to a larger bench.

(The reference was placed before a Full Bench Consisting of Mehar Singh, Capoor and Gosain, JJ.) OPINION Mehar Singh, J.

14. The question referred to the Full Bench is:-

"Whether in the case of Jats governed by custom in matters of succession, a widow, by re-marrying her deceased husband's brother, is entitled to collateral succession in the family?"

On March 29, 1951, Harnam Singh, a Jat of village Kalewal in Tehsil Kharar of Ambala District, died leaving agricultural land and other immovable property, and was survived by his three sons Charan Singh, Mansa Singh and Gurdial Singh, and a daughter-in-law Mohinder Kaur, being the widow of his predeceased son Gurbakhsh Singh. The agricultural land having been mutated by the Revenue authorities in the names of three surviving sons of Harnam Singh deceased, on April 29, 1953, Mohinder Kaur instituted a suit for possession of one-

fourth share of the agricultural land on the ground that as representing her deceased husband she was entitled to succeed to her father-in-law to the share to which her deceased husband would have succeeded if he had been alive on the date of the death of his father.

15. Subsequently on May 18, 1953, Charan Singh and Mansa Singh brought a suit against their brother Gurdial Singh for partition of four properties, other than agricultural land. On her application Mohinder Kaur was made a party-defendant to that suit and she made a claim to one-fourth share of that property also on the same ground as urged by her in her own suit.

16. It has been found by the Division Bench consisting of myself and Gosain, J., in the judgment of April 18, 1960, given in both the suits, that after the death of her husband Gurbakhsh Singh, Mohinder Kaur re-married his brother Gurdial Singh by karewa, and this was before the death of her father-in-law Harnam Singh. The rule of customary law in regard to the question of forfeiture caused by the re-marriage of a widow is thus stated in paragraph 32 of Rattigan's Digest of Customary Law, 1938 Edition:-

"32. In the absence of custom, the re-marriage of a widow causes a forfeiture of her life-interest in her first husband's estate which then reverts to the nearest heir of the husband."

To this rule of customary law, which is fairly widely accepted, there is an exception noted by the learned author at page 186 of the same book to the effect that "by custom among Sikh Jats of the Punjab a widow does not forfeit her life-estate in her deceased husband's property by reason of her re-marriage in karewa form with her husband's brother."

We have found on evidence that Mohinder Kaur is entitled to succeed to the share of her deceased husband as representing him in the agricultural land and other immovable property left by her deceased father-in-law Harnam Singh. In view of the special custom prevailing among Sikh Jats, which has been referred to as an exception above to the rule stated in paragraph 32, we have held that Mohinder Kaur has not forfeited the right to inherit the share of her deceased husband from the property of her deceased father-in-law by reason of her having re-married her husband's brother.

17. The question referred to the Full Bench has arisen because during the pendency of the appeals Mansa Singh has died and the question is whether Mohinder Kaur is entitled to succeed to him Collaterally in the circumstances of these cases?

18. In *Didar Singh v. Mt. Dharmon*, 25 Pun Re 1888, Gara Singh died leaving two biswas land and two widows named Dharmon and Jian. Each one of them succeeded to half of the estate or to one biswa. Dharmon re-married by karewa Dial Singh, younger brother of her deceased husband. On the death of Jian, Dharmon claimed one biswa as a surviving co-widow. This claim was

resisted by the brothers of Dharmon's first husband. The learned Judges decreed Dharmon's claim giving various grounds in support of their decision and observing "she would succeed by right of survivorship, and not by right of inheritance. The present case differs essentially from a claim to succeed not to her first husband's estate, but to the estate of one of his collaterals."

Dharmon was only claiming to succeed to her first husband's estate, & this was not a case of collateral succession, but the learned Judges have made an unequivocal observation, which shows that she could not have claimed by inheritance an estate of one of the collaterals of her first husband in the circumstances because she had re-married her first husband's brother. This observation, though obviously obiter, gives a negative answer to the question under consideration.

19. In *Mt. Jaidevi v. Harnam Singh*. 117 Pun Ho 1888, Nihal Singh died leaving a son named Jiwan and his widow Jaidevi. On the death of Jiwan his three uncles, or their sons, were recorded as proprietors of the land left by him. Two branches of his uncles deprived the third branch of its one-third share in the land. Jaimal Singh representing the third branch obtained a decree for his share of the land against the other collaterals of Jiwan. In the meantime and before the death of Jiwan, Jaidevi had re-married her first husband's brother Lehna Singh.

She then brought a suit to recover from Jaimal Singh's son the share of Jiwan's estate decreed to Jaimal Singh. This was a case of *Sus Jats of Hoshiarpur*. The Teamed Judges held that she was excluded from succession claimed by her as she had contracted a second marriage before her son's death. It is clear that Jaidevi was claiming the estate of her first husband even though she had re-married a brother of her first husband before the death of her son by her first husband. She was not claiming to succeed to a collateral of her first husband. Even so the learned Judges denied her claim.

20. In *Gaman v. Mt. Aman*, 171 Pun Re 1888, on the death of Samma, his widow Aman re-married and her second husband belonged to a branch, of the same family as her first husband. Subsequently Mubarak, grandson of Samma, died without an issue or without leaving a widow. The estate was then claimed by Gaman, brother of Samma and thus grand-uncle of Mubarak, as against Aman, widow of Samma and grandmother of Mubarak. *Firzelle, J.*, dismissed the claim of Gaman on the ground that Aman's right was based on her being the grandmother of Mubarak deceased.

But *Roe, J.*, concurred in the dismissal of the suit on the ground that Mubarak having left no issue and no widow to succeed him, his line died and under custom it has to be treated as it never existed. The question therefore was of Aman claiming as a widow of her first husband in spite of her re-marriage before the death of Mubarak not to a brother of her first husband but to a

member in the same family, as against the brother of her first husband.

The learned Judge observed that "the wajib-ul-arz appears to me to distinctly sanction such a marriage to any "ham kaum," not merely to the next heir, and the evidence adduced by defendant of widows retaining their husband's estate seems to me quite as strong as the evidence against it.

This is not a case of the widow re-marrying her first husband's brother and as such it is not directly relevant. But, even so, when the case is "considered, it was not a case in which the widow claimed succession to a collateral of her first husband, but what she claimed was to succeed to the estate of her first husband in spite of her having re-married in the same family as against the brother of her first husband.

21. In 64 Pun Re 1910 the learned Judges set out the facts in this way:

"A man died leaving widow and a son. The latter succeeded to his estate, and the widow, his mother, married her late husband's brother by karewa. Then the son died without issue and the land in suit was mutated in favour of his brothers including her second husband, whereupon she had sued them on the ground that she takes a life-estate before them."

The learned Judges negatived the claim of the widow following 117 Pun Re 1888.

22. In 322 Pun LR 1913 the facts were these. One Ratna had two sons named Arjan Singh and Rura. The defendants were the descendants of Bura. Arjan Singh had two sons named Sadhu Singh and Bhuda, both of whom died in his lifetime. Bhuda had left his widow Premi who re-married her first husband's brother Sadhu Singh. On his death. Sadhu Singh left behind a son named Mit Singh from his first wife and widow Premi-Thereafter Arjan Singh died.

The whole of the land left by Arjan Singh was mutated in the name of Mit Singh, to which Premi took no objection. Subsequently Mit Singh also died without leaving any issue. The revenue authorities ordered mutation of the land in favour of the defendants, who it will be remembered were the descendants of Bura, brother of Arjan Singh, as against the claim of Premi. Premi then instituted a suit to recover the whole of the estate from the defendants.

The learned Judges treated her claim in two distinct and separate parts, one part being her claim to the share of her first husband in the inheritance of her father-in-law as representing her first husband, even though she had re-married his brother, and the second part being her claim to inherit collaterally to Sadhu Singh, brother of her first husband, on the ground that her first husband would, if alive on the date of the death of Sadhu Singh, have succeeded to him.

On the evidence in the case the learned Judges came to the conclusion that Premi was entitled to

succeed to her father-in-law as a pre-deceased son's widow according to the custom prevailing in the family. On the first part of her claim to the share of the estate of her father-in-law as would have fallen to her first husband, the learned Judges accepted her claim, in spite of her re-marriage to her first husband's brother. In regard to this part of the claim, the learned Judges observed:

"We would clear the ground by stating at once that there is ample authority in the Customary Law for the view that ordinarily a widow, by re-marrying her husband's brother, does not for the purposes of succession, lose her previous status as the widow of her first husband and that Mst. Premi must, therefore, qua the estate of Arjan Singh, be regarded as the widow of Budha".

This observation of the learned Judge, I wish to emphasize, is confined only to the claim of Premi to succeed to her father-in-law qua the share of her first husband Bhuda, and does not go a jot beyond. This part of her claim was in substance a claim as representing her first husband and to an estate to which, if alive, he would have succeeded when his father died. This part of her claim had nothing to do with the question of her right to collateral succession in the family of her first husband.

It is the second part of her claim that brought in the question of her collateral succession on the ground of her claiming the share that would have fallen, on the death of Arjan Singh, to Sadhu Singh, and she claimed this as representing her first husband Bhuda, obviously treating Sadhu Singh as collateral of her first husband Bhuda. This part of her claim is separately disposed of by the learned Judges and reference to it is made at page 1078 of the report. The learned Judges say:

"As regards the other half, to which Mit Singh was entitled on the death of his grandfather, the plaintiff has failed to prove a custom under which a widow succeeds collaterally to the property to which her husband would have succeeded if he had been alive".

This second claim of Premi to succeed collaterally to Sadhu Singh was disallowed by the learned Judges. This case, to my mind, therefore, answers the question under consideration in the negative. The learned counsel for Mohinder Kaur has strongly relied upon this case to support his contention that Mohinder Kaur is entitled to succeed collaterally to a share in the estate of Mansa Singh deceased, but this very case is opposed to his argument. It is fallacious to rely in support of such a claim on the observations of the learned Judges in regard to the first part of the claim of Premi in that case which is, as shown, separately and distinctly dealt with by the learned Judges.

23. In 1959-61 Pun LR 163 Kura and Nand Singh were two brothers, and on the death of Kura his widow Dhan Kaur re-married Nand Singh, but Kura had left behind a son named Karam Singh, who inherited his property. On the death of Karam Singh the property passed to his sister Jas Kaur, the daughter of Kura. On the death of Jas Kaur the property was mutated in the names

of Dhan Kaur and Gurdialo, probably the first wife of Nand Singh, who was dead by that time.

Dhan Kaur then claimed the whole of the property on the ground that one-half of it was wrongly given by the mutation to Gurdialo and she was entitled to the entire property left by her first husband Kura. The defence on behalf of Gurdialo was that re-marriage of Dhan Kaur disentitled her to the claim made by her. The learned Judge found in favour of Dhan Kaur on the ground that custom provides that a karewa with the brother of the husband does not entail the forfeiture of the widow's right in her husband's property, at the same time pointing out that there is no reason to limit this rule of custom to the property which she has already inherited and the rule is equally applicable to the property to which she would have succeeded but for her karewa marriage with the brother of her deceased husband.

In this case also Dhan Kaur was not claiming succession to a collateral of her first husband but she was claiming the property of her first husband. The learned Judge negatived the objection on the side of Gurdialo based on the re-marriage of Dhan Kaur. The observation of the learned Judge must in the nature of things be confined to the facts of the case and no more can be read into them for no more was for decision in that case.

24. At the time of making the reference was under the impression that there is a conflict of judicial opinion on the question under consideration, but on reconsideration of the cases I find that the conflict is not on this questions but on another question. The conflict is on the question whether a widow having re-married a brother of her first husband and after the death of her son by the first husband can or cannot lay claim to the estate of her first husband. In 117 Pun Re. 1888 and 64 Pun Re. 1910 the answer given to this question was in the negative, but in 1959-61 Pun LR 163 the answer given is in the affirmative. This question, however, does not arise for consideration in the present case, which is clearly a case of collateral succession, and it will have to be resolved in future when it arises in an appropriate case.

25. On review of the cases referred to find that there is no conflict of opinion on the question under consideration. The dictum of the learned Judges in 25 Fun Re 1888 answers the question in the negative and so also the decision of the learned Judges in 322 Pun LR 1913 in which they negatived the claim to collateral succession on facts exactly similar to the present case.

26. The learned counsel for Mohinder Kaur relies upon para 33 of Rattigan's Digest of Customary Law, 1938 Edition, which para says:

"But, in the absence of a custom to the contrary, her re-marriage, even with a stranger, will not deprive the widow of any future rights of inheritance to which she would have been entitled but for such re-marriage.

As I understand the statement of custom in this para it only means this, that if in spite of re-marriage a widow can show that she is entitled to future rights of inheritance arising, re-marriage even with a stranger is not a bar to such rights. But she has to show the existence of such a right for the ordinary rule is that on re-marriage she forfeits her deceased husband's estate, and it follows she cannot claim any future inheritance on his account.

Such cases as are cited as authorities under the para from Hindu Law are not admittedly relevant, and the cases cited under custom are 117 Pun Re 1888 and 64 Pun Re 1910. It has already been shown that in these two cases the widow, after re-marriage to her first husband's brother laid a claim to the inheritance opening upon the death of her son by her first husband and the learned Judges did not accept her claim, this supports the view of this para which I have just expressed.

In the present case at the hearing an opportunity was given to the learned counsel for Charan Singh to make an application in regard to any custom, special or otherwise, on the question now under consideration and applicable to the parties in the case. The learned counsel did not take advantage of the opportunity and made no such application. The opposite side has not asked for an opportunity to produce any evidence to establish a custom in support of the claim by Mohinder Kaur to succeed collaterally to Mansa Singh. It is clear that on the record of the present case there is no material that supports such a claim by Mohinder Kaur.

27. The dicta in 25 Pun Re 1888 and 322 Pun LR 1913 proceed, if I may say so with respect, on sound basis, because ordinary rule being that the re-marriage of a widow causes forfeiture of her life-interest in her first husband's estate which then reverts to the nearest heirs of the husband, and the exception to it, as the special custom in this respect, being that among Sikh Jats of the Punjab widow does not forfeit her life-estate in her deceased husband's property by reason of her re-marriage in karewa form with her husband's brother, the exception cannot be enlarged beyond its scope and a special custom stated in it extended by logic or analogy.

Apparently the scope of an exception! is limited and restricted, but in the case of an exception, in the shape of a special custom, it cannot be extended on any consideration, for the settled rule is that even a generally accepted rule of custom cannot be extended by logic or analogy. Widow's re-marriage leads to forfeiture of the estate inherited by her from her first husband, but the tribe or tribes in which the special custom as an exception to this rule, as referred to above, prevails, it has gained ground because of some special social considerations and they may never have intended the extension of such an exception to collateral succession for there is nothing to show in this case that any such conception prevailed among them. It is, in my opinion, to be taken that they made the exception to meet a particular social situation of a widow re-marrying her first husband's brother and then to provide that on account of such re-marriage she will not lose her first husband's property but it would be a conjecture to say that from this they intended that she

will also have a right to succeed collaterally. In the circumstances I would, therefore, answer the question referred to the Bench in the negative.

Gosain, J.

28. I have had the advantage of reading the judgment which my learned brother Mehar Singh, J. proposes to deliver in this case, but I regret I cannot agree with the same. In the reference order the Division Bench has clearly found that the re-marriage of Mst. Mohindar Kaur with Gurdial Singh, the younger brother of her deceased husband, does not entail the consequences of forfeiture of her husband's estate and that she continues to hold the said estate. In fact this proposition was conceded at the Bar before the said Bench. The only dispute now left is with regard to the rights of Mohindar Kaur in the matter of succession to the property of Mansa Singh, who has died during the pendency of this appeal, and the only question referred to the Full Bench is:

"Whether in the case of Jats governed by custom in matters of succession, a widow, by re-marrying her deceased husband's brother, is entitled to collateral succession in the family?"

On this point there is obviously a divergence of opinion which I pointed out in my judgment in 1959-61 Pun LR 163, and which is also pointed out in the order of reference in the present case.

29. The learned counsel for the appellants relies on 25 Pun Re 1888, 117 Pun Re 1888, 64 Pun Re 1910 and 46 Pun Be 1891 (FB), and according to him these authorities lay down the proposition that amongst Jats governed by custom in the matters of succession a widow by re-marrying her deceased husband's brother ceases to have any future right to collateral succession in the family.

The learned counsel for the respondents, on the other hand, relies on 322 Pun LR 1913, 171 Pun Re 1888 and 1959-61 Pun LR 163, and urges that these rulings lay down a contrary proposition, namely, that amongst Jats governed by custom in matters of succession a widow by re-marrying her deceased husband's brother does not in any way lose her future right to collateral succession in the family. He also places his reliance for this proposition on paragraph 33 of the Digest of Customary Law by Rattigan which he contends has been held to be a book of unquestioned authority by their Lordships of the Privy Council in *Mst. Subhani v. Nawab*. ILR (1941) 22 Lah 154: (AIR 1941 PC 21).

30. Before considering the various rulings cited by the learned counsel for the parties, it is necessary first to consider what rights a widow governed by custom in matters of succession possesses in respect of collateral succession in her husband's family. At one time a view prevailed in the Chief Court of Punjab that the custom permitting collateral succession of a

widow in her husband's family did not generally exist in most of the agricultural tribes of Punjab and that it was an exceptional one. In *Mst. Aso v. Mst. Tabi*, 77 Pun Re 1893, which related to Jats of Ferozepore District, it was observed by Plowden, J. that:

"There are some instances in Hoshiarpur and Jullundur of Hindu and Muhammadan widows who have succeeded collaterally to the exclusion of persons outside the immediate family. * * But the custom set up is unquestionably exceptional, and I do not look upon any of these cases as of the slightest value in a question among Hindu Jats in the Ferozepore District."

The evidence in that case was found to be meagre and as the onus was placed on the widow to establish a custom in favour of her right to succeed collaterally, she was held to have no such right. In *Mst. Khem Bai v. Bhowani Das*, 69 Pun Re 1896, which related to Dhal Khattris of Jhang District, a similar view was taken. Mr. Justice Roe took a similar view in another unpublished case which was Civil Appeal No. 89 of 1893. However, in some of the cases relating to some other agricultural tribes of Punjab a custom entitling the widow to succeed collaterally in her husband's family was found to exist.

The general custom was all the same understood to be one against the right of a widow to succeed collaterally, and wherever a widow alleged that she had such a right, the onus was placed on her to prove the same. In *Saddan v. Khemi*, 15 Pun Re 1906, and *Gurdial Singh v. Arur Singh*, 51 Pun Re 1909, such an onus was placed upon the widow, but she was held to have discharged the same. In 64 Pun Re 1910, and in 322 Pun LR 1913, the widow was held not to have been able to discharge the said onus.

In *Mst. Sultan Bibi v. Ghulam Haidar Khan*, 32 Pun Re 1915 : (AIR 1914 Lah 473), a Division Bench of the Punjab Chief Court consisting of Mr. Justice Johnstone and Mr. Justice Rattigan, considered at considerable length the various rulings relating to the rights of widows in respect of collateral succession and ultimately came to the conclusion that the custom generally prevailing amongst the agricultural tribes of Punjab allowed the widows to succeed collaterally and that the said custom was not in any way exceptional. It was found there that the ruling of Plowden J. in 77 Pun Re 1893 had been expressly dissented from in 15 Pun. Re 1906 and 51 Pun Re 1909, and had been ignored in several other cases e.g. *Mt. Chand Kaur v. Ram Singh*, 20 Pun. Re 1895 etc. The general custom of the Punjab was found to be in favour of collateral succession of widows rather than against it. In *Khadim Hussain v. Sher Muhammad*, 121 Pun Re 1916: (AIR 1916 Lah 96), the matter was once again considered by another Division Bench of the Punjab Chief Court consisting of Johnstone C. J. and Shadi Lal J. and they approved of the view taken in 32 Pun Re 1915: (AIR 1914 Lah 473). Shadi Lal J., who wrote the main judgment, observed that:

"Having regard to this exposition of the Customary Law, with which we are in full accord we

think it would be an act of supererogation to deal with the previous rulings of this Court afresh. Suffice it to say that the onus is on the appellant to prove that the widow is not entitled to succeed collaterally and that the evidence in this case is wholly insufficient to discharge this onus."

From the aforesaid observations it is clear that the general custom in the Province was taken to be one in favour of widow's right of collateral succession and the onus was thrown upon the party denying such a right to prove that the right did not exist. As far as I have been able to see, in all subsequent cases a consistent view has been taken that a widow governed by custom in the matter of succession has got a right to succeed collaterally in her husband's family as the representative of her deceased husband.

In *Mst. Nasib-un-Nissa v. Mst. Ahmadi-un-Nisa*, ILR (1921) 2 Lah 383 : (AIR 1921 Lah 85); a Division Bench of the Lahore High Court held that sex was no bar to the right of representations. This view was upheld by their Lordships of the Privy Council in *Hashmat Ali v. Mst. Nasib-un-Nissa*, ILR 6 Lah 117 : (AIR 1925 PC 99) . The same view has been taken in a large number of other cases some of which are *Mst. Mel Kaur v. Daulat Ram*, ILR 16 Lah 476: (AIR 1933 Lah 312), *Mst. Sardaran Bi. v. Mst. Mirzan*, AIR 1935 Lah. 954, *Akhtar Abbas v. Nazar Abbas*, AIR 1946 Lah. 10, and *Surain Singh v. Ujjagar Singh*, AIR 1946 Lah. 394 (FB). In the 1938 Edition of the Digest of Customary Law by Rattigan as revised by Mr. Rustomji, a large number of rulings where widow's right to collateral succession was recognised are mentioned, and in brackets it is mentioned by the author as under:

"(This view is in accord with the general custom of the Punjab)".

In the latest edition of this book as revised by Mr. Om Prakash Aggarwala, the general custom of the province as stated to be that a widow has got a right of collateral succession in her husband's family.

31. It was held by a Full Bench of the Lahore High Court in AIR 1946 Lah 394, that:

"Whenever a widow acquires property in the family of her husband by means of succession, she acquires it for the benefit of her husband's estate and not on her own behalf. She is carrying on the work of consolidation of the estate which her husband would have Carried out had he been alive. The widow cannot form a fresh stock of descent as it is realised that she is merely a representative of her husband So far as property belonging to her husband's family is concerned. Consequently, when the widow of a collateral is allowed by Custom to succeed she is to be treated as having done so as a representative of her husband and not in her own right as heir to the last male owner when the next heir after her death has to be traced."

Precisely the same view was taken in AIR 1946 Lah .10.

32. It is, therefore, clear from the above discussion that a widow governed by custom in matters of succession generally possesses a right to succeed collaterally in her husband's family and that she exercises this right in no other capacity except as representative of her husband, and the property acquired by her by such succession becomes an accretion to her husband's estate and on her death it goes to her husband's reversioners along with the estate itself. It is also clear that the custom generally recognises a right of representation in matters of succession and that sex is no bar to the said right.

33. The matter which we have next to consider is whether the marriage of a widow with her husband's brother in any way affects the aforesaid right. In paragraph 32 of Rattigan's Digest of Customary Law it is slated that:

"In the absence of custom, the re-marriage of a widow causes a forfeiture of her life-interest in her first husband's estate, which then reverts to the nearest heir of the husband."

To this rule of customary law there is a well recognised exception mentioned by Rattigan himself which reads that "By custom among the Sikh Jats of the Punjab a widow does not forfeit her life-estate in her deceased husband's property by reason of her re-marriage in Karewa form with her husband's brother."

In 115 Pun Re 1900, Chatterji J. who delivered the judgment of the Division Bench observed at page 451 of the report as under:

"Among Jats also no ceremonies are essential to a widow's re-marriage, but this is more specially the case where the second husband is the brother of the first. By mere cohabitation the widow assumes the position of his wife and he of her husband, This must be due to the universal opinion held by Jats that in marrying her husband's brother the widow is doing the right and proper thing and what she is expected to do. It is allowable, then, to infer that as regards forfeiture there would be some differentiation between the consequences of an act of this nature and those of a Karewa out of the family. The estate of the widow is only for life, and is primarily given to her by way of maintenance. She gets this as a member of the family and loses it if she leaves the family for another. Would she be subjected to the same penalty if she continues a member of the family as before in spite of her re-marriage? Probably custom which is founded on the good sense of the people and the notions of natural justice and equity prevalent among them would prevent the second husband if he is the sole brother of the deceased from saying to his brother's widow 'You have done what is regarded as the proper thing amongst us by marrying me. I now call upon you to surrender your first husband's property as the penal consequence of that act'. If there are more brothers than one the case of those who do not marry the widow is but little stronger than that of him who does marry her. I should be prepared from these considerations to prefer the evidence in

support of the contention that such a marriage does not involve loss of the first husband's estate."

Sir Charles Roe in his book on Tribal Law, page 60, has clearly stated that "marriage with a brother or next agnate is treated as a thing apart from a marriage with a stranger". The basis of the exception to the general rule given in paragraph 32 of the Rattigan's Digest of Customary Law clearly appears to be that according to the notions generally prevailing amongst Jats of Punjab a widow by marrying the brother of her first husband does a thing which is regarded by custom to be a proper one and adopts a course which is regarded to be the only right course.

By virtue of such marriage she does not cease to be the member of her husband's family and does not in any way lose the status of being her first husband's widow. A Division Bench of the Punjab Chief Court consisting of Mr. Justice Agnew and Mr. Justice Shadi Lal, in 322 Pun LR 1913, observed at page 1077 of the report as under:

"We would clear the ground by stating at once that there is ample authority in the Customary Law for the view that ordinarily a widow, by re-marrying her husband's brother, does not for the purpose of succession, lose her previous status as the widow of her first husband and that Mussammat Premi must, therefore, qua the estate of Arjan Singh, be regarded as the widow of Budha."

34. The various rulings cited by the parties in the present case have to be considered now in the light of the above observations.

35. Rulings cited by the learned counsel for the appellants: (i) 25 Pun Re 1888. This ruling has hardly any bearing on the facts of the present case. There one Gara Singh died leaving two widows Mst. Dharmon and Mst. Jian. The total property that he left was two Biswas of land. Mst. Dharmon entered into a Karewa marriage with the younger brother of her first husband, but in spite of it she was allowed to retain one-half of the land, the other half having gone to Mst. Jian.

The other brothers of Gara Singh filed a suit for a declaration that by virtue of re-marriage with one of the brothers of her first husband, Mst. Dharmon had forfeited her husband's estate, and this suit" appears to have been dismissed. After the death of Mst. Jian, the plaintiff (Mst. Dharmon) claimed to succeed as a surviving co-widow to the one Biswa of land which had originally gone to Mst. Jian but which had in the meantime been taken over by the brothers of her husband. The two Courts below allowed her succession and the brothers of her deceased husband then came to the Chief Court in second appeal.

The argument urged on their behalf was that her re-marriage did not cause a forfeiture of her own share, yet on it she ceased to be Gara Singh's widow and became the wife of Dial Singh and

could not, therefore, succeed to a share to which her only claim was that of a surviving co-widow. This argument was repelled by the Division Bench of the Punjab Chief Court consisting of Rattigan and Roe JJ., and in the body of the judgment, at page 69 of the report, it was observed as under:

"We can, therefore only decide the point before us by considering what is the natural consequence of the previous decisions as to the effect of the Karewa marriage on plaintiffs rights as a whole. Now it is clear from these decisions that Mst. Dharmon was allowed to retain her own one Biswa on the express ground that she continued to all intents and purposes to be one of Gara Singh's widows, and when the brothers sued for a declaration that on her death her one Biswa would revert to them as next heirs, and not to Mst. Jian as surviving co-widow, their suit was dismissed."

It is true that towards the end of the penultimate paragraph of the judgment an obiter remark was made saying that "The present case differs essentially from a claim to succeed not to her first husband's estate, but to the estate of one of his collaterals."

This remark, however, does not particularly pertain to the rights of a widow who has married a second husband, but is a general remark about the rights of all widows in the matter of collateral succession. I have already shown above that at the time when this judgment was delivered, a view prevailed in the Punjab Chief Court that a widow generally (irrespective of the fact whether she had re-married anyone or not) did not possess a right of collateral succession because the females as such according to the view then prevailing were not entitled to avail of the right of representation.

The aforesaid remarks, therefore, have no bearing in the present case and the ruling as a whole helps the respondents inasmuch as Mst.

Dharmon was allowed to succeed to her co-widow in spite of the fact that previous to that she had entered into a Karewa marriage with Dial Singh, the younger brother of her first husband. The future rights of succession of a widow re-marrying the brother of the previous husband were upheld rather than negated in that case,

(ii) 117 Pun Re 1888: The question involved in this case was whether amongst the Sus Jats of Hoshiarpur, a mother, who had contracted a second marriage before her son's death, was

excluded from the succession to her son's estate when he had left uncles and cousins. The Divisional Judge had held that she was so excluded and the Division Bench of the Chief Court of Punjab agreed with the said decision. It was observed at page 326 of the report as under:

"In the present case, the issue framed by the Divisional Judge was, 'if a son dies, and his mother before his death has taken a second husband such as a dewar (younger brother of her first husband), will his estate pass to his mother or to his collaterals? On this, plaintiff produced in Court three witnesses who stated generally that the estate would pass to the mother, whilst defendant produced five who said it would pass to the collaterals. Neither side could produce any instances. A commission was then issued to Chaudhri Badar Bakhsh, Zaildar, an old Jat himself, whose memory goes back to Sikh times. He examined sixteen Jats of this and neighbouring village, and the Patwari who has held office himself for 9 years, and whose father was Patwari before him. It is true that the witnesses could not quote instances, but they declared unanimously that, in the case named, the estate passed to the collaterals. This was also the finding, both of the local Commissioner himself and the Tahsildar, and it receives the very strongest corroboration from the conduct of the parties themselves. As a matter of fact, the collaterals did succeed to Jiwan's estate on his death; in their dispute over it, no one ever mentioned plaintiff or dreamed that she had a right to succeed, and it is only when her second husband, Lehna Singh, failed to secure the estate for himself and Majja Singh that he bethought himself of a possible right of his wife to succeed as mother of Jiwan and so put her up to bring the present suit."

From the observations quoted above, it is quite clear that the case was decided on its own facts and that the dispute there was whether a mother who had re-married a second husband was entitled to succeed as against the collaterals. The case as such is no doubt of some help to the appellants, but cannot be regarded as a direct authority for the proposition now before the Full Bench,

(iii) 64 Pun Re 1910 : In this case a man died leaving a widow and a son. The latter succeeded to his estate and the widow, his mother, married her late husband's brother by Karewa. Then the son died without issue and the land in suit was mutated in favour of his brother including her second husband, whereupon she sued that she was entitled to a life estate before them. This was again a case where a mother, who had married a second husband, claimed to succeed as against the brothers of the last mate owner.

The case was decided mainly, if not exclusively, on the basis of the ruling reported in 117 Pun Re 1888, and discussed above. No effort was made in this case to ascertain the custom with regard to the right of a widow marrying her first husband's brother and claiming a right of collateral succession. This case does not take us anywhere beyond the one reported in 117 Pun Re 1888.

(iv) 46 Pun Re 1891 : In this case one R. S. a Sandhu Jat (Hindu) of the Chunian Tahsil Lahore District, died 14 years before suit, leaving a large area of agricultural land. The land then devolved on his two sons who both died without leaving any issue, the second death, that of P. S., who was unmarried being about a year before suit. The plaintiff D. was the widow of R. S. and mother of P. S. she claimed to be the heir of P. S. son of R. S., her late husband, and herself as his mother: and as such she demanded possession from the defendants.

The defendants were the collateral heirs of P. S. distantly related, and their case was that the plaintiff had married a second husband soon after the death of R. S., and this entailed the consequence of forfeiture of her rights. The Full Bench of the Punjab Chief Court by a majority; judgment upheld the contentions of the defendants and non-suited the plaintiff. This case is of no use at all to the appellants inasmuch as it was not a case of Karewa marriage by a widow with the brother of her first husband.

36. Out of the four rulings quoted by the appellants' counsel, therefore, the first and the fourth do not at all help the appellants, and the second and the third can be treated as being of some help to them but even they are not direct authorities for the point now before us. As already observed by me, the first ruling relied upon by the appellants, viz. 25 Pun He 1888 to some extent supports the proposition propounded by the respondents.

37. Rulings cited on behalf of the respondents: (i) 322 Pun LR 1913:- In this case one Arjan Singh, a Saini of the Hoshiarpur District, was the owner of the land in dispute. His sons, Budha and Sadhu Singh, both died in his lifetime. After Budha's death, his widow, Mst. Premi, the plaintiff in the said case, married Sadhu Singh by Karewa. Sadhu Singh died in 1902 and Arjan Singh followed him a few days later.

The mutation of names in respect of the property of Arjan Singh was originally Sanctioned by the Tahsildar in favour of Mst. Premi as also in favour of Mit Singh son of Sadhu Singh in equal shares, but on appeal the Deputy Commissioner ordered the mutation of the entire estate to be effected in favour of Mit Singh alone. Mit Singh died later without leaving any issue and the land was mutated by the Tahsildar in favour of Mst. Premi but this order was again set aside by the Deputy Commissioner who ordered mutation to be made in favour of the defendants, who were the descendants of Bura, brother of Arjan Singh. Mst. Premi then filed the suit giving rise to the second appeal, the judgment of which is reported in 322 Pun LR 1913.

One of the claims of Mst. Premi was that as step-mother of Mit Singh, she was entitled to succeed to the entire property, but this claim was negatived because of some entries in the Riwayat-i-Am of the district. The Division Bench of the Chief Court, however, allowed Mst. Premi to succeed to Arjan Singh's property in her capacity as the widow of Budha in spite of the fact that

she had much before that married Sadhu Singh the brother of Budha. The following observations of the Bench consisting of Mr. Justice Agnew and Mr. Justice Shadi Lal at page 1077 of the report are very pertinent:

"But we think that Mussammat Premi is entitled to half the estate on the ground that on the death of Arjan Singh in 1902, both she and Mit Singh were heirs and that her omission to assert her rights against her step-son does not preclude her from putting forward those rights now in opposition to the defendants, the collaterals of Arjan Singh, more especially when we find that the.. present suit is within 12 years even if we take the date of Arjan Singh's death as the terminus a quo for the period of limitation".

Mst. Premi was no doubt non-suited with regard to the other half of the property left by Arjan Singh, but this was due to the fact that the learned Judges came to the conclusion that she had not been able to prove a custom entitling a widow to succeed collaterally in her husband's family. As already observed by me in an earlier part of this judgment a conflict of opinion at that time existed generally with respect to the rights of the widows to succeed collaterally in their husbands' families. At page 1078 of the report the Bench referred to the said conflict and observed as follows:

"As regards the other half to which Mit Singh was entitled on the death of his grandfather the plaintiff has failed to prove a custom under which, a widow succeeds collaterally to the property to which her husband would have succeeded if he would have been alive. There are several published decisions of this Court in which such a custom has been proved but it has been held that the custom is unusual and the onus lies on the person asserting, its existence; (see 15 Pun Re 1906 and the other authorities quoted therein). We find that on the present record there is no evidence of any sort or kind to prove the existence of this custom".

It is clear from the above observations that the claim of Mst. Premi with regard to this half was negated merely because she had failed to prove a custom, entitling her to succeed collaterally in her husband's family. The reference to 15 Pun Re 1906 and other authorities is expressly made in the ruling and there is no doubt at all that while negating the right of Mst. Premi in respect of this one-half, the Bench did not rest its decision on the point that Mst. Premi having re-married after the death of her first husband had lost her rights of collateral succession.

The Bench clearly said that she had failed to prove her right to succeed collaterally and this is one of the instances of the earlier cases in which onus had been placed on the widow to prove that according to the custom she was entitled, to collateral succession. This case is, therefore, a direct authority in favour of the view propounded by the learned counsel for the respondents inasmuch as Mst. Premi was allowed to succeed to Arjan Singh's property as the widow of

Budha in spite of her previous re-marriage with Sadhu Singh, the brother of Budha,-and the observations of the Bench that a widow by re-marrying the brother of her first husband does not lose the status of a widow of her previous husband, are very pertinent.

(ii) 171 Pun Re 1888: The parties in this case were Mohammadan agriculturists (Dogars) of Hissar District. Defendant married again soon after the death of her first husband Samma, the grandfather of Mubarak and brother of plaintiff, and it appears that her second husband belonged to a branch of the same family as her first, and had been living with her in her first husband's house. The plaintiff sought to prove that he had a superior right of inheritance to the defendant and that the defendant had lost her right by her re-marriage. The plaintiff was non-suit-ed, and the Division Bench consisting of Roe and Frizelle JJ. dismissed the appeal filed by the plaintiff, Frizelle J. who wrote the main judgment, observed at page 453 of the report as under:

"I am of opinion that it was for plaintiff to prove that he had superior rights of inheritance to defendant, and that defendant had lost her rights-by her re-marriage. He has not made good his claim on either ground. In fact it is hardly denied that it is only on the ground of defendant's re-marriage that he could contest her right at all, and it is clear that this is really the only ground he has to go upon. I can find no evidence to show that defendant has lost by this re-marriage rights of inheritance which had not accrued to her at the time of the re-marriage. She is not in the same position as if she had succeeded to her husband's estate and then re-married".

(iii) 1939-61 Pun LR 163: In this case the dispute related to property which at one time belonged to Kura. Mst. Dhan Kaur plaintiff was the widow of Kura and Mst. Gurdialo defendant was the widow of Nand Singh, brother of Kura. On Kura's death the property left by him was mutated in the name of his son Karam Singh and on his death it was mutated in the name of Mst. Jas Kaur, daughter of Kura.

On the death of Jas Kaur the property was mutated in the names of Mst. Dhan Kaur and Mst. Gurdialo in equal shares. It may be stated here that Mst. Dhan Kaur had entered into a Karewa marriage with Nand Singh almost immediately after the death of Kura. After the mutation had been entered in the names of Mst. Dhan Kaur and Mst. Gurdialo in equal shares on the death of Mst. Jas Kaur, a suit was brought by Mst. Dhan Kaur for a declaration that the mutation of one-half property of Kura had been wrongly made in the name of Mst. Gurdialo and that she (Mst. Dhan Kaur) alone was entitled to the entire property originally belonging to Kura and later left by Mst Jas Kaur.

The defendant resisted the suit on the ground that Mst. Dhan Kaur had ceased to be the widow of Kura after her Karewa marriage with Nand Singh and that both the parties to that litigation stood on equal footing because both of them were the widows of Nand Singh and were entitled to

succeed collaterally to the property left by the line of Karam Singh.

I held in that case that the re-marriage of Dhan Kaur with Nand Singh, brother of her first husband, did not have the effect of forfeiture of her future rights of succession and that she was entitled to succeed to the property left by Karam Singh. The bases of my decision were that the Karewa marriage with the brother of her first husband did not have the effect of her ceasing to be the member of the family of her first husband or putting an end to her status of being the widow of her first husband.

38. From the above discussion of the various rulings cited on behalf of the respondents it is quite clear that the two rulings reported in 322 Pun LR 1913 and 1950-61 Pun LR 163 are direct authorities in favour of the proposition propounded by the respondents' counsel, while the third one viz. 171 Pun Re 1888, supports the view that a widow by re-marriage does not lose her future rights of succession.

39. Paragraph 33 of Rattigan's Digest of Customary Law lays down the general custom of the Punjab on this point in the following words:

"33. But, in the absence of a custom to the contrary, her re-marriage, even with a stranger, will not deprive the widow of any future rights of inheritance to which she would have been entitled but for such re-marriage".

This paragraph certainly supports the view propounded by the learned counsel for the respondents and is in accord with the provisions of Section 5 of the Hindu Widows Re-marriage Act (XV of 1856). In a case where no contrary custom is alleged or proved, the provisions of the said section would evidently govern the rights of the parties and this is precisely what the aforesaid paragraph 33 means.

It is a well-established proposition of law that Hindus in the Punjab are governed by the Hindu Law and Mohammadans by the Mohammadan Law except of course to the extent of existence of any custom to the contrary, and where any party relies on such a custom the said party is bound to specifically allege and prove the same. This rule was recently recognised by their Lordships of the Supreme Court in Ujagar Singh v. Mst. Jeo, AIR 1959 SC 1041. On page 1048, second column of the report, their Lordships observed as under:

"We think it also right to say that even if it had been held that the respondent was not able to establish a custom entitling her to succeed she would get the properties under the Hindu Law. The parties are Sikhs to whom the Hindu law applies. Since the Hindu Law of Inheritance (Amendment) Act, 1929, a sister is an heir under the Hindu Law in preference to collaterals and that Act would be applicable to the devolution in this case. It is, however, said that as the

respondent had not made any claim in the plaint on the basis of Hindu Law but on the contrary relied on custom, it was not open to her to fall back on the Hindu Law on failing to establish the custom.

We do not think that this is the correct position. Section 5 of the Punjab Laws Act, 1872, provides that in questions regarding succession, the rule of decision shall be (a) any custom applicable to the parties, (b) the personal law of the parties except in so far as modified by custom or legislation. In the Full Bench case of *Daya Ram v. Sohel Singh* 110 Pun Re 1906 Robertson J., said at page 410:

'It, therefore, appears to me clear that when either party to a suit sets up 'custom' as a rule of decision, it lies upon him to prove the custom which he seeks to apply. If he fails to do so Clause (b) of Section 5 of Punjab Laws Act applies and the rule of decision must be the personal law of the parties subject to other provisions of the clause.' As we have earlier said this observation was approved by the Judicial Committee in *Abdul Hussein. Khan v. Mt. Bibi Sona Dero*, 45 Ind App 10: (AIR 1917 PC 181). In *Mst. Fatima Bibi v. Shah Nawaz*, ILR 2 Lah 98: (AIR 1921 Lah 180) a case to which we have earlier referred, the Court allowed the plaintiffs, sisters, who had based their claim on custom and not on the personal law, to fall back on. Mohammedan Law, the personal law of the parties, on their failure to establish the custom, no custom against them having been proved by the collaterals. There are a number of other authorities, to which it is not necessary to refer, in which personal law was resorted to when no custom on either side was established. We agree that that is the correct view to take. We therefore, think that even if the respondent had been unable to prove the custom in her favour she is entitled to succeed in the suit on the basis of the personal law of the parties, namely, the Hindu law".

The same view was taken by a Full Bench of this Court in *Smt. Sukhi v. Baryam Singh*, AIR 1959 Punj 339. Dua J., who wrote the main Judgment in that case found certain propositions to be well established, and in paragraph 24 sub-paragraph 5 of his judgment he mentioned one of them as under:

"that when there is no rule or custom applicable to a particular case, personal law of the parties should be resorted to".

40. The appellants in this case have neither alleged nor proved any custom contrary to the provisions of Section 5 of the Hindu Widows Re-marriage Act and it must, in these circumstances, be held that the rule of Hindu Law as given in S, 5 of the Hindu Widows Re-marriage Act governs the rights of the parties in the present controversy. In fact this rule has been accepted as the general custom of the Punjab by Rattigan and paragraph 33 of his book referred to above clearly states that in the absence of a custom to the contrary re-marriage of a widow

does not entail the consequence of forfeiture of her future rights of succession.

41. From the various rulings referred to above it is quite clear that a widow who succeeds collaterally in her husband's family, does so only as a representative of her deceased husband by reason of the rule of representation generally prevailing amongst the agriculturists of the Punjab in matters of succession and whatever property she gets by such succession really forms an accretion to her husband's estate and remains a part and parcel of that estate.

If the contention of the learned counsel for the appellants be accepted it would evidently mean that the widow re-marrying her first husband's brother remains entitled to the said estate but that the accretions to the said estate go to somebody else or that the widow becomes incapable of making any accretions. It is true that custom cannot be extended by analogy and that it is not always logical.

However, in making an attempt to find whether a particular custom actually exists, it has to be assumed that the persons who follow the said custom do so on some rational basis. It would be anomalous, incongruous and arbitrary to hold that a widow who has re-married her first husband's brother should be allowed to retain her first husband's estate, but should not be allowed to make accretions to the same.

In ILR 6 Lah 117: (AIR 1925 PC 99) their Lordships of the Privy Council had an occasion to consider whether the brother's daughter had the right to represent her father in the matter of collateral succession. There was no direct authority for that proposition, but there were authorities where an uncle's daughter had been "allowed to succeed as the representative of her father and their Lordships of the Privy Council pointed out in the last paragraph of their judgment as under:

"But then it is said that no instance is proved of an actual succession by a brother's daughter, and, therefore, it is argued, the necessary custom that precisely covers this case has not been proved. But, if there be a rule that entitles an uncle's daughter to be her father's representative for the purpose of inheritance, it would be anomalous and arbitrary to withhold from a brother's daughter the same right, and their Lordships hold that the High Court rightly decided in Nasib-un-Nisa's favour".

The observations of their Lordships of the Privy Council quoted above certainly support the view that while considering whether a particular custom exists or does not exist regard has to be paid to the fact that custom has got some rational basis. Taking into consideration the fact that what a widow continued to hold after her re-marriage, with the brother of her first husband is not the property she inherited but what is generally known in custom as the widow's estate, it must be

held as a natural corollary of this that she is entitled to make accretions to the said estate as any other widow could have, and that she is for that purpose entitled to succeed collaterally in her husband's family as representative of her deceased husband.

42. For the reasons given above, I would answer the question referred to the Full Bench in the affirmative and hold that in the case of Jats governed by custom in matters of succession, a widow on re-marrying her deceased husband's brother remains entitled to collateral succession in the family.

Capoor, J.

43. I agree with Gosain J. and for the reasons given by him, which I need not repeat, I would answer the question referred to the Full Bench in the affirmative.

ORDER

44. The question referred to the Full Bench having been answered by the majority in the affirmative the appeals will now be placed before the Division Bench for final decision.