

Bai Asha Vs. Bai Biban

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Court : Mumbai

Decided On : Nov-27-1956

Reported in : (1957)59BOMLR470

Judge : Vyas, J.

Appeal No. : First Appeal No. 196 of 1952

Appellant : Bai Asha

Respondent : Bai Biban

Disposition : Appeal dismissed

Judgement :

Vyas, J.

1. This appeal raises a point as to the law which is applicable, in matters of succession and inheritance, to the Sunni Bohras of the territory which was formerly known as the Baroda State. Are they governed in such matters (succession and inheritance) by the Hindu law or does the Mahomedan law apply to them? This point has arisen in this way.

2. The plaintiff, who is the appellant in. this appeal, is the sister of. one Gulam Hussein Kasnbhai. Gulam Hussein died on April 19, 1944. This is, therefore, a suit by a sister of a deceased person for the administration of the properties left by him

and for partition and separate possession of what she contends is her share in the said properties. It may be noted that Bai Biban and Bai Urbai, who are defendants Nos. 1 and 2, are the widows of Gulam Hussein. Gulam Hussein died without leaving any issue. His properties with which, we are concerned in this suit are three houses, certain ornaments, lands etc. In these properties the plaintiff claims a three-fourth share and she has asked for separate possession of that share after having the properties partitioned.

3. The suit of the plaintiff is resisted by the defendants upon several contentions, the principal contention being that the parties being Sunni Bohras of Baroda, are governed by the Hindu law in matters of succession and inheritance, that under the Hindu law sisters are not entitled to a share in the properties of their deceased brother so long as the brother's widows are alive and that, therefore, the plaintiff's suit must fail.

4. The learned trial Judge has taken the view that the law applicable to the parties in matters of succession and inheritance is the Hindu law. Consistently with this view of his, he has ordered the dismissal of the plaintiff's suit. It is from that decree that the plaintiff has filed this appeal.

5. It is clear that if the Sunni Bohras of the former Baroda State, to which community the parties belong, are governed in matters of succession and inheritance by the Hindu law, the plaintiff being a sister of the deceased would not be entitled to claim, by right of succession, any share in the estate of the deceased so long as the widows of the deceased are alive. On the other hand, if the Mahomedan law governs matters of succession and inheritance amongst the Sunni Bohras of the former Baroda State, the plaintiff would be entitled to claim a share in the properties of her deceased brother even though his widows are alive. Mr. Thakor for the plaintiff contends that the Sunni Bohras of Baroda are governed not by the Hindu law, but by the Mahomedan law, and that accordingly the plaintiff would be entitled to a three-fourth share in the properties of her deceased brother. On the other hand, Mr. Karlekar for the defendants contends that in matters relating to succession and inheritance, the Sunni Bohras of the former Baroda State are governed by the Hindu law and, therefore, the plaintiff's suit deserved to

fail and was rightly dismissed.

6. Now, in order to determine whether the Sunni Bohras of the former Baroda State are governed by the Hindu Law or the Mahomedan law in matters of succession and inheritance, we might turn to paragraph 26 of Sir Dinshah Mulla's Principles of Mahomedan Law. Paragraph 26 says:

The Sunni Bohra Mahomedans of Gujrat, and the Molesalam Girasias of Broach, are governed by the Hindu Law in matters of succession and inheritance.

Mr. Karlekar for the defendants contends that as the Baroda State was a part; of the territory of Gujrat, the parties who are Sunni Bohras of the Baroda State would be governed by the Hindu law in matters of succession and inheritance. On the other hand, Mr. Thakor for the plaintiff says that the word 'Gujrat' in paragraph 26 of Sir Dinshah Mulla's Principles of Mahomedan Law means those parts of Gujrat which, before the merger of the States, were amenable to the jurisdiction of the Province of Bombay. Mr. Thakor says that the former Baroda State was a progressive State, that it had its own laws and that the learned author of the Principles of Mahomedan Law could not have intended his statement: of law in paragraph 26 of his treatise to affect the administration thereof in any way. Mr. Thakor seems to forget, however, that in the territory of Gujrat there were several States big and small, besides the Baroda State, before the merger of the States, and he does not contend, and indeed could not contend, that all those States had their own Legislatures and their own laws for the Sunni Bohras in matters of succession and inheritance. In assigning a meaning to the word 'Gujrat' in paragraph 26 of Sir Dinshah Mulla's Principles of Mahomedan Law, we would not be justified in discriminating inter se between the former States which were situated in the territory of Gujrat. When a question has arisen as to what law is applicable to the Sunni Bohras of Gujrat in matters, of succession and inheritance, we would not be justified in putting the Sunni Bohras of the Baroda State on one footing and those of the other States of Gujrat on a different, footing. The word 'Gujrat' in paragraph 26 must, therefore, be so construed as to make the application of the Law in matters of succession and inheritance amongst the Sunni Bohras of Gujrat uniform, whether the Sunni Bohras resided in one

State of Gnjerat or the other State or whether they resided in those parts of Gnjerat which were under the jurisdiction of the Province of Bombay. The limitation which Mr. Thakor puts upon the word 'Gnjerat' in paragraph 26 of Sir Dinshah Mulla's Principles of Mahomedan. Law, namely, that it should be construed to mean only these parts of Gujerat which were amenable to the jurisdiction of the Province of Bombay, is artificial and cannot be accepted. If the word 'Gujerat' had occurred in a Bombay statute enacted, before the merger of the States, then perhaps it might have meant only those parts of Gnjerat which were amenable to the jurisdiction of the Bombay Province, since, until the merger took place, the Bombay Legislature could competently make laws only in respect of those territories to which its jurisdiction could extend. It is to be noted, however, that Sir Dinshah Mulla's Principles of Mahomedan Law is not a statute and paragraph 26 of this treatise does not embody statutory law. The word 'Gujerat' which is used in this paragraph is a territorial term and it is used in its territorial sense. It means the territory which is geographically known as Gujerat. Now, there could not possibly be any controversy that the Baroda State was a part of what is geographically called the territory of Gujarat. The Bombay Province, as it was then known, consisted of three principal divisions, Gujarat, Maharashtra and Karnataka, and each of these divisions comprised of areas some of which were amenable to the jurisdiction of the Bombay Province and others to the jurisdiction of the rulers who were a sovereign power in their States. Baroda was one of the States in Gujarat. Surely, before its merger, it existed in some part of India. If it did not lie in the territory of Gujarat, where was it situated? To say that Baroda was not a part of Gujarat is to say that Kolhapur, for instance, was not a part of Maharashtra. The contention is on the face of it untenable. Before independence, India itself was divided into a, territory which was under British administration, territory known as British India, and States which were under the rulers who were sovereign powers in their own jurisdictions. Could it be possibly contended with any sense that the States were not parts of India? If it could not be so contended, could it be validly contended that the Baroda State was not a part of Gujarat? The contention of Mr. Thakor has no substance. The fact that before the merger the Baroda State was a sovereign State not amenable to the jurisdiction of the Bombay Province is irrelevant for construing the word 'Gujarat' in paragraph 26 of Sir Dinshah Mulla's

Principles of Mahomedan Law. That word, as I have said, is used in its territorial sense and its construction should have nothing to do with the executive or judicial administration, legislative structure, political attachment etc. of the particular States, such as Baroda, Lunawada, Idar, Cambay and others situated in that area (Gujarat). It would thus appear from what the learned author (Sir Dinshah Mulla) of the Principles of Mahomedan Law has stated in paragraph 26 of his treatise that the parties to this suit, who are Sunni Bohras of the former Baroda State, would be governed in matters of succession and inheritance by the Hindu law.

7. Apart from paragraph 26 of Sir Dinshah Mulla's Principles of Mahomedan Law if we turn to a decision of the Baroda Privy Council in *Chhotatal v. Bai Sakar* (1939) 49 B.L.R. 415, it would appear that there was no codified law in the Baroda State governing matters of succession and inheritance amongst the Sunni Bohras, and that in the absence of codified law upon those subjects the Sunni Bohras were governed by Hindu law insofar as they had adopted it in matters of succession and inheritance as their personal law. To quote the learned Judges of the Baroda Privy Council in this context, they said (p. 418) :

There is no codified law in Baroda governing the succession to Sunni Boharas. The general principles prevailing in the State recognise the personal law of the parties as modified by custom. The statutes of Hindu Law apply to Hindus of the State and communities like Sunni Boharas are governed by it so far as they have adopted it in matters of succession and inheritance as their personal law.

We have, therefore, to see whether the Sunni Bohras of the former Baroda State had, in matters of succession and inheritance, adopted Hindu law as their personal law. Now upon the evidence in this case the learned Judge has concluded, and rightly in my view, that the Sunni Bohras of the Baroda State had adopted the Hindu law in matters of succession and inheritance as their personal law. Noorbhai, a cousin of defendant No. 1, has deposed in his evidence that amongst the community of the Sunni Bohras (of the former Baroda State), if a person dies childless, his widow succeeds to his property and enjoys the property till her death. In support of this statement, the witness has cited four instances. Upon the death of one Abhram Kasam Kantulla, Killi, the widow of Abhram. inherited the entire

estate of her husband, although the husband had a sister who was alive when he died. The estate of one Kasam Sodagar, upon the death of Kasam, was inherited by his widow, and when the widow died, the property went to the Masjid. The next instance is the instance of one Rajan's property. Upon the death of Eajan, his estate was inherited by his widow Mariam, although Itajan's sister was alive when he died. Upon the record of the case, there is a sale-deed exh. 87 and this document would show that Bai Mariam had disposed of the house, which, she had inherited from her husband, in the year 1922. It is, therefore, clear that upon the death of Rajan, it was his widow, and not his sister, who had succeeded to his property. Then there is the instance of the devolution of the estate of the father of defendant No. 1. It may be remembered that this witness Noorbhai is a nephew of defendant No. 1's father he has stated that upon the death of defendant No. 1's father, his property was inherited by him as his nephew. The same position, in matters of succession and inheritance amongst the Sunni Bohras of the Baroda State, emerges from the evidence of another witness also, namely, witness Ismail Rehman. He too has stated in his deposition, that if a Sunni Bohra dies childless, his estate goes to his nephew and that it is not a custom amongst the community of Sunni Bohras for sisters and daughters of a deceased person to inherit his estate. According to this witness, if a deceased Sunni Bohra leaves a widow, his estate is inherited by her, and upon the death of the widow, it devolves upon a nephew. If there is no nephew in existence, the estate goes to charity. This witness has also fortified his evidence by referring to certain instances, and one of the instances is the instance of his own mother. It is clear, therefore, that the witness' evidence is based upon personal knowledge. He has stated that his mother had a brother of the name of Ibrahim and that upon Ibrahim's death, his estate had devolved upon his nephew and was not inherited by his sister (i.e. the witness' mother). Then there is the evidence of Dhulubhai. He has deposed that he is a leader of the community of Sunni Bohras. According to his evidence, if a Sunni Bohra dies childless, his widow succeeds to his property and in no case would his property devolve upon his sister or daughter. Upon the death of the widow, the estate would be inherited by a nephew of the deceased, and if there is no nephew in existence, the property would go to the caste. In support of his evidence, the witness has given an instance of the estate of one Asmal's mother's

brother. Upon the death of Asmal's mother's brother, his estate was inherited by his widow. It did not devolve upon Asmal's mother, which would have been the case if the Sunni Bohras were governed, in matters of succession and inheritance, by Mahomedan law. In addition to all this oral evidence, there are certain documents upon the record of this case which also would show that upon a Sunni Bohra of the former Baroda State dying without a widow or a nephew, his property would go to charity. For instance, exh. 90 is a wakf document of 1932. Exhibit 80 is a wakf document, of 1934. These documents would show that Vora Isap Fateh had given away his estate to the Masjid and that Kasam Sultan Sodagar had also given away his house to the Masjid, because their wives had died during their lifetime and they had no nephews living. Then there is a document exh. 94 which is also a wakf document of the year 1946. It would show that Sultan Abhram gave away his house to the Masjid. This documentary evidence would also show that upon the non-existence of a widow or a nephew of a deceased Sunni Bohra of the former Baroda State, his estate went to charity, but not to his sister or daughter which would have been the case if the Sunni Bohras of the former Baroda State were governed in matters of succession and inheritance by the Mahomedan law. Before parting with this point, namely, the point of adoption of Hindu law by the Sunni Bohras of the former Baroda State in matters of succession and inheritance, I would point out that there are certain admissions even in the evidence led by the plaintiff, which would show that in matters of succession and inheritance, the Sunni Bohras of the Baroda State are governed not by the Mahomedan law, but by the Hindu law. For instance, the plaintiff's son Hassanbhai has deposed in one part of his evidence:

There was a custom amongst us about the observance of the Hindu law in the matter of inheritance.

It is true that in another part of his deposition the witness has stated:

Amongst us the Mahomedan law of inheritance prevails and the Hindu law is not applicable to us.

It is true that these two contradictory statements would destroy the value of both the statements. Nevertheless, it is significant to remember that the plaintiff's son,

who obviously stepped into the witness box to support the plaintiff's case that in matters of succession and inheritance the Sunni Bohras of the former Baroda State were governed by the Mahomedan law and not by the Hindu law, did say, perhaps without realising the consequence of that statement, that amongst the Sunni Bohras there was a custom and that the custom was that in matters of inheritance, the community was governed by the Hindu law. Then there is another witness of the plaintiff, namely, witness Yakub, and he too has deposed that in the community of the Sunni Bohras of Baroda, so long as there were other heirs of a deceased Sunni Bohra in existence, his sister would not inherit. Such evidence, coming as it does from the plaintiff's own witness, must lend strong support to the evidence led by the defendants that in matters of succession and inheritance, the Sunni Bohras of the former Baroda State are governed by the Hindu law and not by the Mahomedan law. It is scarcely necessary to pursue the point any further. From what has been stated above, I am of the view that there is ample oral and documentary evidence on the record of the case which would show, in the words of the decision of the Baroda Privy Council in *Ghntalal v. Bai Sakar*, that in matters of succession and inheritance, the Sunni Bohras of the Baroda State have adopted Hindu law as their personal law. The plaintiff being a sister of the deceased Gulam Hussein Kasubhai would not, therefore, be entitled to claim any share in the properties of her deceased brother. The suit was, therefore, rightly dismissed by the learned trial Judge and the appeal must also fail and be dismissed.

8. The appeal is dismissed with costs.

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