

Nagar and ors. Vs. Khase and ors.

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Court : Allahabad

Decided On : Nov-25-1924

Reported in : AIR1925All440

Appellant : Nagar and ors.

Respondent : Khase and ors.

Judgement :

Sulaiman, J.

1. This is a defendants' appeal arising out of a suit for recovery of possession filed by the plaintiffs who alleged themselves to be the reversioners of the last male owner.

2. The facts found by the Court below are that the property belonged half and half to two brothers Gopal and Dewan. Mt. Nanhi was first the wife of Gopal. Gopal died some 30 or 32 years ago. On his death Mt. Nanhi became the karao wife of his brother Dewan. The judgments do not exactly say when Dewan died but the oral evidence is that he died one or two years after the death of Gopal. It therefore seems that the death of Dewan must have taken place not later than 1889 when certain compromise was arrived at between the reversioners. Mt. Nanhi made two mortgages in 1890 which the present plaintiffs now seek to avoid on the ground that they were not binding on thorn for want of any legal necessity.

3. The Court below appears to have believed that among Jats to which caste the parties belong there is a prevailing custom under which karao marriages are allowed, that is to say under which widows are allowed to re-marry. If this practice prevails then a re-marriage is not invalid and it is not necessary to invoke the aid of Act No. 15 of 1856 to validate such a marriage. In the view which has prevailed in the Allahabad High Court the Act would then be inapplicable so far that the widow on her re-marriage would not forfeit her rights in the estate of her former husband, vide *Mula v. Partab* (1910) 32 All. 489 and several other previous cases. It is also clear that under Section 5 of the Act she would be entitled to inherit the estate of her second husband as if no marriage had taken place. Thus Mt. Nanhi would enter into the possession of both the half shares of Gopal and Dewan as their widow, legally entitled to remain in possession for her life. Her death took place on the 5th of February, 1909, within 12 years of the suit. It is, therefore, apparent that the plaintiffs' claim can in no sense be held to be barred by time, the cause of action arising in their favour on her death when only the succession opened to both the estates.

4. The next point urged on behalf of the appellants is that the compromise, arrived at between the reversioners is binding on the plaintiffs. This contention has no force. In the first place it is not shown that the widow was any party to the compromise, then again as the lower Appellate Court has remarked the exact nature of the compromise is not very clear. At any rate it is clear that it was not a partition of the estate between the reversioners during the lifetime of the widow with her consent but it was a mere agreement to divide part of that property which was the subject-matter of three suits pending in case those suits were actually decreed. As matters stand those suits were dismissed. It is not suggested that the present plaintiffs were themselves parties to the compromise and therefore also it is difficult to say how they can be in any way bound by what their predecessors, who then had only a *spes successionis* had done.

5. The defendants are only holding the property by virtue of certain mortgage-deeds. The learned vakil for the defendants has urged that the lower Appellate Court should have found as to whether these had been executed for valid necessity or not. In the first place no specific ground as to this was taken in the

numerous pleas raised in the memorandum of appeal before the lower Appellate Court. In the next place the learned Judge has remarked that it is difficult to see what necessity there was for these mortgage-deeds in 1890. Apparently none was shown to him. When the point was not taken expressly before the lower Appellate Court it cannot now be taken in second appeal. I accordingly dismiss this appeal with costs.

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