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Court : Allahabad

Decided On : Sep-03-1948

Reported in : AIR1949All663

Appellant : indarpal Singh and anr.

Respondent : Mt. Humangi Devi and ors.

Judgement :

1. This is the defendants' appeal from the decree, dated 17th April 1944, passed by the Civil Judge of Sitapur decreeing the plaintiffs' suit for possession over the properties in suit.

2. The following pedigree will explain the facts:

JIT SINGH|----------| |First wife Second wife| |---------- || | |Putan Singh Fateh Singh || (Issueless) |Parwan Singh = Bhagwan Kuar || |Lalla Singh || |---------- || | |Indrapal Singh Raja Bux Singh |(Defendant 1) (Defendant 2) |----------| |Sudha Singh Pahalwan Singh(Issueless) |----------| |First wife Second wife| (Ram Kuar)| |---------- || | |Drigbijai Singh = Mt. Raj Kuar Daughter = Bibhnath |(Died on 1-11-1906) (Died on 24-12-1931) | |Kunwar Indra Bikram Singh |(Plaintiff 1) |Daughter |---------- |----------| | |Jagannath (Dead). Mahraj Singh (Dead). Sri

Krishna Singh.

3. The property which is the subject-matter of dispute and is entered in lists (a) and (b) attached to the plaint belonged to Drigbijai Singh who died issueless on 1st November 1906, leaving a widow, Mt. Raj Kuar. According to the plaintiffs' case she came into possession of the villages entered in list (a) as a Hindu widow and the villages entered in list (B) as an absolute owner. Drigbijai Singh had a real sister whose name is not known. She had predeceased Raj Kuar. Plaintiff l is her only son. Raj Kuar died on 24th December 1931, and plaintiff l alleged that he succeeded as a sole heir of the entire property left by Drigbijai Singh and Raj Kuar. The defendants got mutation effected in their names and took wrongful possession. Plaintiff l transferred a portion of the property in favour of plaintiffs 2 to 5 who were joined as co-plaintiffs. The plaintiffs accordingly prayed for a decree for possession of property in lists (a) and (b). They also claimed mesne profits.

4. In the written statement, it was pleades that according to the family custom and the custom of Gaur Thakurs daughters and daughters' children, sisters and sisters' children were excluded from inheritance. List (B) was the stridhan property of Mt. Raj Kuar and plaintiff 1 had no right to it nor has he any title to property in list (a). In oral pleadings the plaintiffs denied the custom. Defendants' counsel admitted that Pahalwan Singh had two wives but he could not say what issues he had from one or from the other. It was denied that plain-tiff l's mother was the real sister of Drigbijai Singh, it being alleged that she was the daughter of Pahalwan Singh from his second wife. Thus she was the half-sister of Drigbijai Singh.

5. The following issues were framed:

(1) Is plaintiff 1 the own sisters's eon of Drigbijai Singh? (2) Is he entitled to the property in suit? (3) Are the customs set up by the defendants prevalent in Drigbijai Singh's family? (4) If so, do they govern the property in suit? (5) Are other daughters sons alive of Pahalwan Singh, as alleged? (6) What were the mesne profits of the property in suit? (7) To what relief are plaintiffs entitled? (8) Have plaintiffs 2 to 5 a right to sue

6. On 13th December 1943, Sri Krishna Singh applied to be made a co-plaintiff. The application was opposed by the plaintiffs and the defendants and it was rejected.

7. The plaintiffs' claim was further elaborated on 17th January 1944, when it was stated that Drigbijai Singh gifted the property in list (b) to his wife thus making her the absolute owner of it. Kunwar Indra Bikram Singh upon the death of Raj Kuar became entitled to property in list (a) as a next reversioner of Drighbijai Singh and to property in list (b) as the heir of Raj Kuar.

8. Regarding certain specific plots measuring 38 acres and 36 decimals in village Katiyari the defendants' counsel stated that Pahalwan Singh gave the muafi plots to Putan Singh about 70 years ago. After Putan Singh the plots came in possession of Purwan Singh as muafi plots and on his death his widow, Mt. Bhagwan Kuar, came into possession. She died sometime in 1938 and the defendants took possession of those plots. They denied that Raj Kuar was ever in possession of the plots. Plaintiffs' counsel denied that Bhagwan Kuar held any muafi which was heritable. His case was that the plots were entered muafi in the name of Bhagwan Kuar but on her death the muafi ceased to exist and the plaintiff is entitled to village Katiyari, including this land. Proprietary possession was claimed in respect of these plots. A further issue was framed:

Did Mt. Bhagwan Kuar hold any plots and are these plots in possession of the defendants as her boirs? If so, its effect

9. The trial Court held that Kunwar Indra Bikram Singh is the real sister's son of Drigbijai Singh, that the custom set up by the defendants was not proved and that Kunwar Indra Bikram Singh was entitled to both the properties. Regarding the mesne profits the parties agree that the question should be left to be determined in subsequent proceedings. Plaintiffs 2 to 5 were held entitled to sue. The trial Court gave no finding on issue no. 9 as in its opinion that question also related to the determination of mesne profits and would be considered in subsequent proceedings. In the result the suit was decreed with costs. The defendants have preferred an appeal.

10. The principal question which arises for determination in the appeal is whether Kunwar Indra Bikram Singh as a sister's son of Drigbijai Singh is entitled to both classes of property entered in lists (a) and (b) as against the defendants who are the nearest agnates of Drigbijai Singh. There are three subsidiary questions, whether Indra Bikram Singh is the son of Drigbijai Singh's real sister, whether there is any custom of exclusion of the sister and her sons- and whether the muafi plots should have been decreed to Kunwar Indra Bikram Singh.

11. We take up the principal question first. It is important to remember that so far as list (a) is concerned Drigbijai Singh died intestate with respect to this property and his widow, Mt. Raj Kuar, inherited it as a Hindu widow. So far as list (b) is concerned, he made a gift in her favour and, therefore, she held that property in absolute right.

12. Upon the question whether the sister's son is entitled to succeed to list (b) as against the agnates of the husband there is conflict of judicial opinion. The Lahore High Court in two cases and the Bombay High Court have held in favour of the sister's son : See Mt, Gharjo and Anr. v. Dina Nath and Ors. A.I.R. (24) 1937 Lah. 196, Kehar Singh v. Attar Singh and Ors. A.I.R. (31) 1944 Lah. 442 and Baghunandan N. Koihare v. Keshavrao B. Kirtikar and Anr. A.I.R. (26) 1939 Bom. 194. The contrary view was held in Mahalakshmamma v. Mantravadi Suryanarayana Sastri and Ors. A.I.R. (33) 1946 Mad. 294, Talukraj Kuar v. Bacha Kuar A.I.R. (35) 1948 Pat. 264 and Shakuntalabai and Anr. v. The Court of Wards and Ors. A.I.R. (29) 1942 Nag. 57.

13. The appeal has been argued at consider-able length before us. After the parties had finished their arguments on the main appeal and the appellants had opened arguments in the connected execution of decree appeal a certified copy of an, unreported judgment of the Allahabad High Court was produced before us by Mr. Hiamatullah for the respondents. He stated that he was not aware of this decision and it was supplied to him by the courtesy of a counsel who happened to possess it. Mr. Ram Bharosey Lal was given an opportunity to make his comments on this decision which he did.

14. It appears that upon the precise question before us, there was a difference of opinion between Hamilton and Mathur JJ. and on the question being referred to Muhammad Ismail J., the decision was given in accordance with the view of Mathur J. In the ultimate analysis, therefore, there is a decision of the Full Bench, Hamilton, J. dissenting, which supports the plaintiffs' case. Mr. Ram Bharosey Lal who has argued the case for the appellants with great emphasis suggested that, in view of the conflict of opinion the matter may be placed before a Full Bench of five Judges. Having considered the matter fully we have arrived at the conclusion that no useful purpose will be served by referring the matter to a Full Bench as our own view is in lull accord with the view of the majority of the Full Bench. Had we felt any doubt about the soundness of the view expressed by the learned Judges of the Allahabad High Court which is in conformity with the view of the Lahore and Bombay High Courts we should have had no hesitation in referring the question to the Full Bench, but having heard lengthy arguments in the appeal and having given our best consideration to the question arising before us we have no doubt whatever that the decree in favour of the plaintiffs must be maintained.

15. We propose to deal with the cases referred-to us on both sides in some detail before we sum up our final conclusion upon this interesting question.

16. Mt. Charjo and Anr. v. Dina Nath and Ors. A.I.R. (24) 1937 Lah. 196. The question in this case arose in proceedings for grant of a succession certificate to realise certain debts. One Nawahu had two wives. Prom the first wife he had a son, Thakur, whose daughter Mt. Charjo was the claimant on one side. From his second wife, Mt. Melo, he had a son Labha whose widow, Partap Kaur, was the disputant on the other side. Mt. Melo died leaving a certain debt due to her by one Amir Chand. Partap Kaur and Mt. Charjo jointly brought a suit against Amir Chand for recovery of the amount. Amir Chand objected that the suit was not maintainable in the absence of a succession certificate. Accordingly, the plain-tiff a were directed to obtain a succession certificate. Certain collaterals of the husband of Mt. Melo were made parties in the application and they objected to the rights of Mt. charjo and Partap Kaur to obtain the certificate. The implication was dismissed and the order of dismissal was upheld by the District Judge. A revision against the order came up before Tek Chand J. The debt was considered to be the absolute

property of Melo and the question was whether Charjo was an heir to her stridhan at the time of her death. The learned Judge, referring to Mulla's Hindu Law, para. 147 which deals with the succession to stridhana according to the Mitakshara, went on to say that in the absence of her issue (who are enumerated as 1 to 7) a female's stridhana goes to her husband, and after him to her husband's heirs in order of their succession to him; and on failure of the husband's heirs it goes to her blood relations in preference to the Crown. The learned Judge held that before 1929 a son's daughter was not in the line of heirs but by Section 2 of Act II [2] of 1929, which introduced important modifications in the Hindu law of succession with respect to the property of males not held in coparcenary and not disposed of by will, certain persons, including the son's daughter, were recognised as heirs. Accordingly he observed that if Nawahu had died intestate after 1929, his sons's daughter, Mt. Charjo, would have been in the line of his heirs. The fact that he had died long before 1929 was immaterial as he had left a widow. Mt. Melo, who had succeeded to his estate and she died in 1935 when the Act was in force. It was urged before the learned Judge that Act II [2] of 1929 was inapplicable as it applies 'only to the property of males not held in coparcenary and not disposed of by will.' He repelled the contention by the following observation:

It is quite true that the Act is very limited in its scope. It, in terms, regulates succession only to the separate property of a Hindu male dying in intestacy. It does not purport to alter the law in respect of the devolution of other property of a Hindu male or the property of a female. But in referring to the Act for the purpose of deciding the question involved to this case, we are not going beyond its proper scope. As already stated, the rule of succession to stridhana, as laid down in Mitakshara is that, in the absence of the issue of the female holder, it devolves on her husband, and if he is dead, it descends in the same way as if it had belonged to the husband himself. To ascertain as to who the heirs of the husband are we must, ex necessitate rei refer to the law governing succession to the property of the husband in force at the time when succession opened out. In the present case, therefore, the heir to Mt. Melo's property is the person who would have inherited it if it had been Nawahu'a property in 1933 and this as shown above is his son's daughter, Mt. Charjo.

17. Kehar Singh v. Attar Singh and Ors. A.I.R. (31) 1944 Lah. 442. In this case a Bench of the Lahore High Court without referring to Mt. Charjo and Anr. v. Dina Nath and Ors. A.I.R. (24) Lah. 196 arrived at the same conclusion independently. Their Lordships observed at p. 144 as follows:

The rule of Hindu law on this is clear. If the owner of the stridhana property left no issue, her stridhana, if she was married in an approved form, would go to her husband and after him to the husband's heirs in order of their succession to him. The rule is stated in Section 147 of Mulla's Hindu law, Edn. 9, at p. 138, and the correctness of this proposition is not challenged by the respondents.

18. Baghunandan N. Kothare v. Keshavrao R. Kirtihar and Anr. A.I.R. (26) 1939 Bom. 194. The question arose in proceedings for letters of administration to the estate of one Bai Champubai. The two rival claimants to the estate were the son of the sister of the father of the deceased, the son of the sister of the mother of the deceased and a distant paternal relative of Bai Champubai, that is to say, the father's father's brother's son's son. The lady died in 1937 and the property left by her was admittedly stridhan. The question was who are the heirs of the father of Bai Chainpubai in order of propinquity. It was held that the heirs must be those persons who would be entitled to succeed to the estate of her father at the time when succession opened, namely, on her death. It was contended before the learned Judge that under Act II [2] of 1929 the heirs of the father of Bai Champubai are those mentioned in Mulla's Hindu Law incorporating the new heirs introduced by Act II [2] of 1929. The contrary contention was that the Act had no application as it applies

only to persona who, but for the passing of this Act, would have been subject to the law of the Mitakshara in respect of the provisions herein enacted and it applies to such persona in respect only of the property of males not held in coparcenary and not disposed of by will.

The learned Judge observed:

The Act is not sought to be applied to determine the succession to the stridhan of a Hindu maiden but it is sought to be used by the petitioner to ascertain the fourth

class of heirs to the stridhan of a Hindu maiden mentioned at p. 139, of Mulla's Hindu Law. It is admitted by Sir Chimanlal that the heirs of the father must be found as on the date of the death of Bai Champubai, Therefore, it the father of Bai Champubai had died on 3rd August 1937, his heirs would certainly be those under the Hindu Law as amended by Act. II [2] of 1929.... The heirs of the father at the time of her death have to be ascertained in accordance with the Hindu Law as it existed at the time of the death of Bai Champubai. Thus, the Act comes into operation for ascertaining the order in which the heirs of her father would be entitled to succeed to his estate because the heirs of the father in the order of propinquity who would be entitled to succeed to him if he had died on 3rd August 1937, would be the heirs of Bai Champubai in the absence of the uterine brother, the mother and the father. Thus the contention of Sir Chimanlal Setalvad that the heirs of the father should not be determined by reference to the provisions of Act II [2] of .1929 is Unfounded.

Precisely the same contention was advanced before us on behalf of the appellants.

19. First Appeal No. 108 of 1940 (from the decision of the Civil Judge of Moradabad, dated 2nd March 1940), disposed of on 12th April 1944. In Re: Lala Lochhmi Narain and Anr. - Plaintiffs - Appellants v. Mt. Daropadi and Ors. Defendants-Respondents. In this case the competition was between the plaintiffs, who claimed as the nearest sapindas of Sahu Sanwal Das whose widow, Mt. Ramdei, died in 1938 possessed of property which was admittedly her stridhan, and three daughter's daughters from Mt. Durgia, his daughter from a Second wife, sons of her brother, husband of Durgia and son of a daughter of the brother of Sanwal Das. Hamilton J., held that the daughter's daughters had no rights. He declined to follow the view taken in Mt. Charjo and Anr. v. Dina Nath and Ors. A.I.R. (24) 1937 Lab. 196 and Raghunandan N. Kothare v. Keshavrao B. Kirtikar and Anr. A.I.R. (26) 1939 Bom. 194 and took the view which may be summarised in the following paragraph:

In my opinion the use of the word 'only' excludes an extension by way of an analogy or implication so as to give a female who previously could not succeed to

the property of another female a right to that property. When a widow possessing stridhan dies childless under Hindu Law one has to find the heirs of the husband, but those heirs are the heirs under the Hindu Law and they do not include a deceased husband's daughter's daughter, Act II [2] of 1929 does introduce persons in Hindu Law for the purposes of inheritance who had never been there before, but one has to see to what extent they are so introduced. The Act does not say that the daughter's daughter shall have the same right in inheritance under Hindu Law that her mother would have had had she been alive. One may say that a daughter's daughter has become an heir to her mother's father but only as regards property which was actually his. The use of the word 'only' in my opinion shows that the existence of other kinds of property besides the property of a male not held in coparcenary and not disposed of by will was before the mind of the legislature and it decided that as regards such other property the provisions of Hindu Law should not be superseded.

20. Mathur J., however, differed. He discussed the question in point No. 3 and his reasoning may be reproduced in his own words. As the judgment contains the relevant reasoning upon the subject and refers to the well-known commentaries on Hindu Law and to the Lahore, Bombay and Nagpur cases we consider it necessary to quote it in full, particularly because it has not been reported:

The law on the point is given in Macnaghten and Colebrooke's translation of Mitakshara, 1870 edition, at p. 382. It runs as follows:

Of a women dying without issue as before stated, and who had become a wife by any of the four modes of marriage denominated Brahma, Daiva, Arsha and Prajapatya, the whole property as before described, belongs in the first place to her husband. On failure of him, it goes to his nearest kinsmen allied by funeral oblations.In this case it is no longer in dispute that Mt. Ram Dei was married to Sanwal Das in an approved form. Defendants i and 5 had raised the issue that he was not married in an approved form but it has been decided against them. There is also a presumption that the marriage was in an approved form unless the contrary is proved. It is also evident that Mt. Ram Dei died without leaving an issue, Mt. Durgia being the daughter of Sanwal Das by another wife. Her (Bam

Dei's) husband having predeceased her the property would go to her husband's sapindas. This has been translated by Colebrooke as 'nearest kinsmen allied by funeral oblations.' It has been held by their Lordships of the Privy Conncil in the case of Ramchandra Martand Waikar v. Vinayak Venkatesh Kothekar, reported in A.I.R. (1) 1914 P.C. 1, that the translation of the word 'sapinda' as nearest kinsmen connected by funeral oblations was not correct. These are the remarks made by their Lordships at p. 405:

'Mr. Colebrooke in his rendering of the Mitakshara has paraphrased sapinda as a relation 'connected by funeral oblations,' which resulted in virtually obliterating one of the main distinctions between the Benares and the Bengal sohools. But it is now recognised that his paraphrase was erroneous, and that the true theory of sapinda-relationship propounded by Vijnaneswara was based in community of blood,'

So the whole question is narrowed down to this as to who are the nearest kinsmen of the husband, whether they are the persons named in the table of succession as it existed before passing of Act II [2] of 1929 or whether it included daughter's daughter who have been inserted in the table at a certain place by Act II [2] of 1929. At least three of the eminent commentators, Dr. Gaur, Sir D. F. Mulla and Mr. Gopal Chandra Sarkar favour the view that the table a9 amended by Act II [2] of 1929 must be adopted. This view has also been taken in the High Courts of Lahore and Bombay : vide Mt. Charjo v. Dina Nath A.I.R. (24) 1937 Lah. 196 and Raghunandan v. Keshavrao A.I.R. (26) 1939 Bom. 194. As against these views reliance is placed on behalf of the plaintiffs on a foot-note at p, 84 of Mayne's Hindu Law (10th Edition.),(while discussing the Lahore decision in Mt. Charjo v. Dina Nath A.I.R. (24) 1937 Lah. 196 which runs as follows:

This decision overlooks the express provision in Sub-section (2) of Section 1 which limits the altered order only to the property of males,and also on a Nagpur decision Shahuntalabai v. Court of Wards reported in A.I.R. (29) 1942 Nag. 57.

After giving my full consideration to all these authorities I have no doubt in my mind that the altered table shall apply. It has been vigorously argued that it is clear from the preamble of Act II [2] of 1929 which lays down 'whereas it is expedient to

alter the order in which certain heirs of a Hindu male dying intestate are entitled to succeed to his estate' and Section 1, Clause (2) which lays down 'it applies to such persons in respect only of the property of males not held in coparcenary and not disposed of by will' that the Act has not altered the general Hindu law of Inheritance and that it only applies to a particular kind of property, namely, the property of a male not disposed of by will. There can be no doubt that this is the object of the Act as it appears on its face. But with regard to inheritance of a Hindu widow (wife?) dying without issue it has been laid down that in the first instance the property which was her stridhan would go to her husband and in the absence of her husband it shall go to his heirs. In the case of Tukaram v. Narayan Ramchandra, reported in 36 Bom. 339 at p. 359, which is a Full Bench case, it has been laid down in unmistakable terms that in the case of a woman marrying in an approved form and dying childless she sinks to her original position and merges as being dependent upon her husband for the purposes of succession to her estate. In the case of Dwarka Nath Bay v. Sarat Chandra Singh Ray reported in 11 I.C. 872, the following passage occurs at p. 879:

It thus appears that in cases governed by the Mitakshara the authorities are in favour of the view that succession to the stridhan of a childless woman after the husband or the father, according as the marriage was in the approved or disapproved form, is regulated in the same order in which succession takes place to the husband or the father, as the case may be i.e., it descends in the same way as if it had belonged to the husband or the father himself.At p. 426 of the Hindu Law of Marriage and Stridhana by Sir Gooroodass Banerjee (5th Edition), the following passage occurs:

'This opinion' observe Messrs. West and Buhler, 'seems to be based on the consideration that, as the sapindas inherit only through the husband, they virtually succeed to property coming from him, and that consequently they must inherit in the order prescribed for the succession to a male's estate.It will appear from these extracts that in a case like the present the property must be treated as if it had really belonged to the husband, and so his heirs would be the heirs of the woman who left the property.

21. The case was referred to Muhammad Ismail, J., who agreed with the opinion of Mathur J. The learned Judge held after referring to the provisions of Act II [2] of 1929 that in order to ascertain the heirs of the husband we must look to the law in force at the time the succession opened out. After referring to the observations of their Lordships of the Privy Council in Sahodra v. Ram Babu in respect of Act II [2] of 1929 the learned Judge went on to say that

if Act II [2] of 1929 is a part of the general Hindu law we cannot ignore daughter's daughter as one of the heirs recognised by the Act. We cannot have two sets of heirs to Sanwal Das, one for the succession to his personal property and the other for succession to Mt. Ramdei's estate. If Sanwal Das were alive he would undoubtedly succeed. Now that he is dead his heirs must succeed.

22. It now remains to notice the decisions relied upon for the appellants.

23. Shakuntalabai and Anr. v. The Court of Wards and Ors. A.I.R (29) 1942 Nag. 57. In this case it was held that under the Bombay School of Hindu law a father's sister of full blood inherits a maiden's property in preference to the father's sister of half blood. The case has really no bearing upon the present dispute. It was argued before the learned Judges that under Act II [2] of 1929, sisters being introduced in the order of heirs, a half-sister must be treated on a par with full sister and the two must rank equally. The answer given was that under the Bombay School sister had an absolute estate in the property. In order to ascertain the heirs they must be traced from her and not from her father. Act II [2] of 1929 was, therefore irrelevant for this purpose.

24. Manda Mahalakshmamma v. Mantravadi Suryanarayana Sastri and Ors. A.I.R. (33) 1946 Mad. 294. In this case the husband of a lady died leaving her and her son. The son died thereafter and on his death the property left by the father devolved upon the mother. She claimed it under a will left by her husband and although this claim was contested in a suit a decree was passed in her favour in absolute right for half of the properties left by her husband. This property was undoubtedly her stridhan. When the lady died the property devolved upon her husband's mother. She also died. Upon her death the heir was a cousin of her husband. The son of this cousin then brought a suit in respect of the property

decreed to the widow under the compromise as the nearest agnate. This defendant to the suit was the sister of the widow's husband. It was held that the ordinary rule of succession to stridhan applied and Act II [2] of 1229 had no application to it. The case of Mt. Charjo and Anr. v. Dina Nath and Ors. A.I.R. (24) 1937 Lah. 196, and Raghunandan Nanu Kothare and Anr. v. Keshavrao A.I.R. (26) 1939 Bom. 194, were referred to. The learned Judges disagreed with the view token in those two cases observing:

here, as there, it is not a question of deciding who are the heirs of a Hindu male. The question is who are the heirs in respect of properties belonging to a Hindu woman in her own right.

They then relied upon the foot-note at page 84 of Mayne's Hindu Law, 10th Edition, to the effect that the decision in Mt. Charjo's case A.I.R. (24) 1937 Lah. 196, overlooks the express provision in Sub-section (2) of Section 1 of the Act which limits the altered order only to the property of males. We shall refer to this foot-note to show its unsoundness and the mischief created by it. Then the learned Judges observed that the correct view of the law was expressed in Shahuntalabai and Anr. v. The Court of Wards A.I.R. (29) 1942 Nag. 57. This case, therefore, does not attempt to meet the reasoning put forward in the Lahore case and proceeds only on the foot-note in Mayne's Hindu Law and the Nagpur case. 80 far as the latter case is concerned we have already stated that it has no bearing.

25. In para. 147 under the heading 'Husband and his heirs' D. F. Mulla in his Commentary on Hindu Law says:

where the marriage the marriage is In an approved form, the stridhana goes, in default of issue, to the husband and his heirs, that is to say, it descends in the same way as if it had belonged to the husband himself.

26. In chap. 12, Section 4 of Golapchandra Sarkar-Sastri's Hindu Law, 1940 Edition, at page 373 the following paragraph appears:

It may be noticed in this connection, that according to the Mitakshara, the heirs to the stridhana of a woman married in the approved form, and dying without leaving

any heir of her body, are the same persona who are her husband's heirs and they take in the same order. So the succession of the husband's heirs to his estate inherited by his widow after, her death might have contributed to the false idea that such property is not her stridhana, although they succeed as her heirs and not as the husband's.

27. When we come to the order of succession amongst sapindas given by Mulla in para. 43 we find that sister is introduced as an heir at no. 130 and sister's son at No. 13D and reference is made under both of them that position as heir is assigned to them by Act II [2] of 1929.

28. Talukraj Kuer v. Bacha Kuer A.I.R. (35) 1948 Pat. 264. This case held that Act II [2] of 1929 has no application to the succession of stridhan property held by a female. In dissenting from Mt. Charjo's case A.I.R. (24) 1937 Lah. 196, Manohar Lall J., observed:

The learned Judge held that succession to the stridhan property of Mt. Nawahu which devolved upon her death on her husband would be governed by Act II [2] of 1929, In my view, this decision is incorrect. I cannot understand how the : succession to the property of a female could be governed by Act [2] II of 1929 which distinctly states that it shall only apply to the succession to the property left by a male.

The first part of the observation is obviously incorrect. Nawahu was the husband whose widow, Mt. Melo's property was the subject-matter of dispute. The second part of the observation ignores the fact that in tracing the heirs to the woman, in default of an issue and her husband, the husband's heirs must be determined according to the law as it exists when the succession opens. There is no question of applying the Act to the property of a female. Reliance is placed upon the Madras case which relies upon the Nagpur case and Mayne's foot-note.

29. Lata Duni Chand and Ors. v. Mt. Anar Kali and Ors . In this case their Lordships merely decided that

where a Hindu male died intestate before Act II [2] of 1929 came into operation and was succeeded by a female heir who died after the Act came into operation, the succession to the estate opens out on the death of the female heir and hence the Act will apply to the case and an heir under the Act will be entitled to succeed.

In referring to the Act their Lordships observed that:

the description and preamble of the Act make it clear that the object of the Act is to alter the order of succession of certain persons therein mentioned, namely, a Bon's daughter daughter's daughter, sister and sister's son and to rank them as heirs in the specified order of succession next after a father's father and before a father's brother.

They also held that:

the Act amends the old order of succession in Hindu law by introducing certain persons as heirs, who had no such place according to the ordinary interpretation of Mitakshara Law.

30. Mt. Sahodra v. Ram Babu . The question in this case was whether the words 'sister's son' in Section 2 of Act II [2] of 1929 included a half-sister's son and it was held that it did. Their Lordships observed:

In their Lordships' opinion, the Act should be read as a part of the general Hindu Law of Inheritance, and when so read it should be held, as already explained, that the word 'sister' used in it would include a half-sister.

31. It seems to us that the fundamental principle which governs the case is that the law applicable is the law prevailing on the date when the succession opens. In the light of this principle we must hold that the Hindu Law of Mitakshara as modified by Act II [2] of 1929 must be deemed to be the law applicable to the case.

32. In so far as the note in para. 147 of Mulla's Hindu Law is concerned, we may note in passing that it appears to have been approved in the following cases : B. Bajrangi Lal v. Ram Barak A.I.R. (16) 1929 Oudh 294 and Dwarka Nath Bay and Ors. v. Sarat Chandra Singh Bay and Ors. 15 C.W.N. 1036 at p. 1046.

33. Reference was made for the appellants to Bai Kesserbai v. Hunsraj Morarji and Anr. 33 I.A. 176, in particular to the texts of the Mitakshara placitas. 8, 9 and 11, reproduced on pp. 187 and 188 of the report, and it was contended on the strength of these passages that if the woman dies without issue leaving her stridhan property, her kinsmen would take it. But the same passages take care to point out that her kinsmen are no other than her husband and the rest. If these kinsmen are to be ascertained we shall have to refer to the heirs of the husband on the date when the question of succession is disputed. After the default in issue the woman's heirs must be determined. These heirs are no doubt the heirs of the husband for they (the husband and the wife) are sapindas of each other but these heirs are no other than the heirs to her husband which in other words means heirs to his property. As such we shall have to take into consideration the heirs under the existing law of Mitakshara as modified by Act II [2] of 1929. We do not think that these texts advance the case of the appellants. Act II [2] of 1929 does not, in our opinion, apply proprio vigore but only for a limited and specific purpose of determining succession to the male in certain circumstances.

34. Upon a careful consideration of the authorities we are of opinion that the view taken by the learned Civil Judge is right and the plaintiff as sister's son is entitled to succeed in preference to the sapindas. Accordingly, he is entitled to the property in list (b) as the stridhan heir of ML Raj Kuar.

35. The next question is whether sister's son is excluded from inheritance by custom. The custom that was set up in para. 15 of the written statement was a family and tribal custom. Oral and documentary evidence was produced by the parties. The learned Civil Judge after analysing the entire evidence came to the conclusion that it related to the exclusion of daughters and their issues and not to sisters and their issues, He explains the absence of any such custom in the wajib-ul-arz on the ground that a sister and her issues were not heirs before Act II [2] of 1929 and consequently no question arose about their right to the property of brothers or maternal uncles. The evidence has been summarised in the judgment of the learned Civil Judge and we do not think it necessary to reproduce it in this judgment. In Mahabir Singh and Ors. v. Mt. Radha and Ors. A.I.R. (20) 1933 Oudh. 231 it was held that

when a male owner of property dies leaving both a daughter and a sister, the two latter are, according to ordinary principles, on different footing, and it cannot be said that where daughters are excluded by custom there is any necessary implication in the nature of things that sisters also are excluded.

It was also held that the custom that would operate for the purposes of Section 3 (a) of Hindu Law of Inheritance (Amendment) Act, II [2] of 1929, in its legal sense is some established practice at variance with the general law and that a custom that was merely in accordance with the general Hindu law as it was interpreted in these provinces was not a special custom which was contemplated by Section 3 (a) of the Act. Reference was made to a decision in Dildar Husain and Ors. v. Fateh Bahadur and Ors. A.I.R. (9) 1922 Oudh. 105 and the remark made therein that the daughters of one generation were the sisters of the next but this principle was not accepted.

36. A Bench of this Court, of which one of us was a member, in Ram Pheran and Ors. v. Sri Ram alias Sri Nath and Ors. A.I.R. (34) 1947 Oudh. 174 agreed with the view taken in Mt. Bhagwan Dei v. Mt. Badha A.I.R. (20) 1933 Oudh. 231 and differed from the observation in Dildar Husain's case A.I.R. (9) 1922 Oudh. 105. It cannot bar. denied that daughters were excluded by custom before 1929 while sisters were excluded by law. After 1929 both were brought into the category of heirs by Act II [2] of 1929. Although there may be an implication about the exclusion of the daughter's son because of the exclusion of the daughter there can be no such implication about the sister's son because the sister was not an heir at all.

37. It was argued before us that the words 'Dukhtar' and 'Aulad-i-Dukhtari' used in the wajib-ul-arzes must be deemed to embrace sister within its purview. We cannot agree. The word 'Dukhtar' has a definite significance and refers to a daughter only. We are not prepared to stretch the language Of the wajib-ul-arz, which must be construed strictly, and hold that sisters and their sons were also excluded from inheritance nor are we prepared to agree that the custom of exclusion of sisters and their sons is established by necessary implication. The decision in Dildar Husain and Ors. v. Fateh Bahadur and Anr. A.I.R. (9) 1922

Oudh. 105 cannot, in view of the two later decisions of this Court, be accepted as good law.

38. It is also argued that a sister is excluded because in the Mitakshara she is gotraja sapinda and in the Act she has been given the position of gotraja sapinda. It is said that the sister does not claim as an independent person under the Act and in view of the decision in Mt. Sahodra v. Ram Babu she becomes a gotraja sapinda. She thus becomes the daughter of Pahalwan Singh and is excluded as a daughter. We are not prepared to accept this argument. We are not concerned with succession to the property of Pahalwan Singh but to the property of Drigbijoy Singh. The claim put forward by the plaintiff 1 is to the property of Drigbijoy Singh through his mother not as the daughter of Pahalwan Singh but as the sister of Drigbijoy Singh. We are also of opinion that whatever may be the view upon an interpretation of the text of the Mitakshara as to the right of a sister to succeed to her brother, there can be no doubt that this right has now been established under Act II [2] of 1929 and unless an unambiguous custom of exclusion of sisters can be proved the claim of the sister cannot be resisted. We accordingly hold that the custom set up has not been established.

39. The next question which has been raised before us is whether Kunwar Indra Bikram Singh is the son of Drigbijoy Singh's full sister. This point is covered by issue 1. The finding of the trial Court in favour of the plaintiff has been challenged before us on behalf of the defendants-appellants. In the pedigree given in Para. 2 of the plaint, Indra Bikram Singh's mother is shown to be the full sister of Drigbijoy Singh being born of the first wife of Pahalwan Singh. In para. 6, it is definitely stated that Drigbijoy Singh had only one real sister and Kunwar Indra Bikram Singh is her only son. The answer to Para. 2 is that the issues of Pahalwan Singh have not been shown correctly and completely, and the answer to para. 6 is that 'as drawn up it is not admitted.' Nothing is said in the additional pleas. In oral pleadings it is admitted on behalf of the defendants that Pahalwan Singh had two wives but the defendants do not know which children or issue he had from one wife and which issue from the other. A definite case that Kunwar Indra Bikram Singh's mother was not the full sister of Drigbijoy Singh was not put forward until Indra Bikram Singh gave evidence and on being asked in cross-examination he

said that it was false that his mother and the mother of Sri Krishna are real sisters. This was on 18th February 1944. On 6th March 1944, the defendants' counsel stated that Indra Bikram Singh's mother was not the real sister of Drigbijoy Singh but that she was born from the second wife of Pahalwan Singh. Order 8, Rule 1, Civil P.C. requires that where a defendant denies an allegation of fact in the plaint, he must not do so evasively, but answer the point of substance. Rule 5 says that every allegation of fact in the plaint, if not denied specifically or by necessary implication, or stated to be not admitted in the pleading of the defendant, shall be taken to be admitted except as against a person under disability. What is therefore not specifically denied must be taken to relieve the plaintiffs from the obligation of proving it. Sri Krishna Singh, the son of the daughter of Pahalwan Singh from his second wife, made an application on 18th December 1943, for being impleaded as a co-plaintiff. This application was rejected but it is important as showing that Sri Krishna Singh admitted that Drigbijoy Singh and the mother of Kunwar Indra Bikram Singh were the issues of the first wife of Pahalwan Singh.

40. Exhibit 14 is the plaint of Mt. Raj Kuar in a suit for cancellation of a certain sale deed. In para. 2 she stated that the sister Drigbijoy Singh was married to the brother of Kunwar Balwant Singh, defendant l in that suit. She stated that Indra Bikram Singh is their son. Exhibit 16 is the proceedings of Court showing that Indra Bikram Singh is described as Raj Kuar's husband's sister's son, when he identified Raj Kuar before the Commissioner. Exhibit 15 is the statement of Mt. Raj Kuar. She stated therein that Ram Kuar was Drigbijoy Singh's step-mother. Exhibit -17 is the statement of Balwant Singh, defendant l, in that case. He stated that Drigbijoy Singh's sister was married to his brother Rikh Nath and Indra Bikram Singh is the son of that sister. Exhibit 19 is the judgment of the Subordinate Judge of Sitapur. In the statement of the case in the opening, Rikh Nath, the real brother of Balwant Singh, is stated to have been married to the real sister of Drigbijoy Singh. It is true that in the documents the expression 'real sister' or 'full sister' is not used except in the judgment of the Subordinate Judge. The question whether the plaintiff l's mother was the full sister of Drigbijoy Sigh was not in issue in that case but the evidence lends corroboration to the plaintiff's contention upon this point. There was no reason why the Subordinate Judge should have used the expression 'real sister' if it was not a fact. Similar evidence is afforded by

documents, Exs. 21, 23, 25 and 26, the plaint, the two statements of Balwant Singh and the judgment of the Subordinate Judge of Sitapur.

41. The defendants' have produced no rebuttal of this evidence. They put forward the definite case that Kunwar Indra Bikram Singh's mother was not the full sister of Drigbijoy Singh at a very late stage which in our opinion was an afterthought. Some oral evidence consisting of Chandika Singh (D. W. 6), Badri (D. W. 9) and Thakur Meman Singh (D. w. 10) was relied upon for the appellants. This evidence has been carefully analysed by the learned Civil Judge who has come to the conclusion that their evidence is not reliable. We see no reason to differ from that view. Accordingly we hold that the finding arrived at on this point in favour of the plaintiff 1 is correct.

42. Lastly it was argued that the Civil Judge was wrong in not giving a finding upon issue 9 regarding the muafi plots and in postponing the matter to the stage of mesne profits. It is urged that the defendants claimed the muafi plots through Bhagwan Kuar and not through Raj Kuar or Drigbijoy Singh. They definitely put forward the case that these muafi plots had been given by Pahalwan Singh to Putan Singh and that on his death they came into the possession of Bhagwan Kuar and since her death in 1939 the defendants have been in possession of these plots. According to the defendants' case the plots merged into their proprietary rights and Mt. Raj Kuar had nothing whatever to do with it. The learned Counsel for the appellants has referred to certain evidence bearing upon this point but we do not think it necessary to record any finding. The order of the Civil Judge granting a decree for possession to the plaintiffs over the property in suit does not in our opinion injure the interests of the defendants. That order merely grants proprietary possession to the plaintiffs over village Katiara and does not affect any subordinate rights which the defendants may have in the muafi plots which lie within that village. It appears that when the plaintiffs put their decree in execution, an objection was raised by the defendants under Section 47, Civil P.C. objecting to possession being delivered over those plots on the. ground that they were the muafi plots of the defendants. The learned Civil Judge rejected the objection but safeguarded their rights by a rider. That order is the subject-matter of Execution of Decree Appeal No. 36 of 1946, with which we shall deal separately.

43. Accordingly we hold that there is no substance in the appeal, which is dismissed with costs.

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