

Barikam and anr. Vs. Charnu and anr.

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Court : Himachal Pradesh

Decided On : Oct-06-1952

Reported in : AIR1953HP63

Judge : Chowdhry, J.C.

Appeal No. : Civil Revn. No. 20 of 1950

Appellant : Barikam and anr.

Respondent : Charnu and anr.

Advocate for Def. : D.N. Vaidya, Adv.

Advocate for Pet/Ap. : Ishwar Das Abrol, Adv.

Judgement :

ORDER

Chowdhry, J.C.

(1) This is a defendants' application in revision, and it arises in the following circumstances.

(2) Niku, brother of the plaintiffs-respondents Lachmu and Charnu, died on 15-9-1993 B. He left property in two villages, Bodhal and Jaidevi, and his one-third share in each of the two villages was mutated in favour of the defendants-petitioners, the mutation in respect of the Jaidevi property having taken place on

31-3-1994 B. and that in respect of property in Bodhal on 11-11-1994 B. It appears that the entire property in Bodhal was in possession of the plaintiffs and the entire property in Jaidevi, in that of Niku. After the mutations the defendants applied to the revenue authorities for partition of their one-third share in Bodhal. Thereupon the plaintiffs filed two Suits on one and the same date, i.e., on 19-11-1948 A.D., one relating to the property in village Jaidevi and the other to that in village Bodhal. As the plaintiffs were in possession of the property in Bodhal, they prayed for merely a declaratory relief in the suit relating to that property, while in the other suit they also prayed for possession.

(3) The pleadings in both the suits were identical. The plaintiffs alleged that the defendants, being only Chukandu sons of Mt'. Durgi, were not entitled to inherit the property left by Niku. The defendants, on the other hand, denied that they were Chukandu sons of Mt. Durgi but pleaded that they were the sons of Niku whose legally wedded wife their mother Mt. Durgi was and that therefore they were entitled to inherit his property as legal heirs. They also pleaded that the plaintiffs' suit was time-barred.

(4) The trial Court framed two issues, one with regard to the legitimacy of the defendants as the sons of Niku and the other with regard to limitation. On both these issues the trial Court recorded findings against the plaintiffs and in the result dismissed both the suits. The District Judge on appeals by the plaintiffs in both the cases came to contrary findings on both the said issues and decreed the two suits.

(5) There is no dispute with regard to the material facts in this revision, namely, that Mt. Durgi was a widow of one Guju of village Hawana, that after the death of Guju she continued to reside in his house in Hawana and that there was no Jhangrara or any other ceremony of remarriage performed between the plaintiffs' late brother Niku and Mt. Durgi but the defendants-petitioners were born of the union between the two at the house of Guju in Hawana. The question for determination is what right, if any, have the defendants-petitioners in the property left by Niku?

(6) The learned counsel for the defendants-petitioners has referred to an entry relating to inheritance in the Majmua Qawaid-i-mal approved by the Darbar of the

former Suket State. The entry runs as follows: 'In this State there is a custom according to which there are three kinds of male issue besides a legitimate son, called Chukandu, Pachhlag and Sartora. A Chukandu son is one whose mother, while residing within the four walls of her house, begets him with the seed of another man and she is unable to name who the father was. When a woman gives up her first husband and takes her abode in the house of another, a son born to her by the first husband whom she takes with her to the house of the other man is called Pachhlag son (presumably a corruption of Puchhlag, or one following like a tail, or an appendage). A Sartora son is one born of a woman other than a married wife. In case of a Chukandu son laying claim by way of inheritance, mutation of such an inheritance should not be sanctioned in favour of such a son but in favour of his mother, but after the death of the mother he will be entitled to the inheritance. A Pachhlag son is not entitled to inheritance except that he is entitled to the property left by his own father; but in case the legal heirs wish to give a share to a Pachhlag son mutation in respect of that share should be sanctioned subject to the approval of the Darbar. A Sartora son cannot be deemed to be entitled equal to a legitimate son, but he is certainly entitled to a share in ancestral property; as compared to a legitimate son a Sartora son will get a lesser share, but any specific share cannot be fixed, the share in case of dispute being liable to be determined by Court in accordance with the custom prevalent in the caste and the family.'

(7) The learned counsel for the defendants-petitioners contended that his clients fell in the category of Sartora sons of Niku. He further contended that as Niku left no legitimate son, and as therefore the dispute in this case is not between a legitimate and Sartora sons but between the latter and the brothers of the deceased, there was no question of determination of the reduced share to which the petitioners may be held to be entitled by Court according to the aforesaid entry in the Qawaid. According to the learned counsel, the defendants-petitioners were entitled to the full share left by Niku in the two villages.

(8) The learned counsel for the plaintiffs-respondents challenged both the aforesaid contentions. With regard to the first he argued that no such plea had been specifically taken by the defendants at any time before but only in the course

of arguments in this Court. He complained that if such a plea had been taken by the defendants in their written-statement an issue would have been framed on that plea, but as this was not done the plaintiffs' interests will be prejudicially affected if the plea is allowed to be taken for the first time in this revision. I am afraid this contention of the learned counsel' for the plaintiffs-respondents is unsustainable. As adverted to above, the plaintiffs described the defendants as Chukandu sons of Mt. Durgi.

Now, the Hindu Law does not recognise a Chukandu son, but a son of that category appears to be peculiar under the custom as prevalent in the former State, of Suket and recorded in the said Majmua Qawaid-i-mal. It is manifest therefore that in describing the defendants as Chakandu sons of Mt. Durgi the plaintiffs were referring impliedly,, though not in so many words, to the aforesaid recorded custom. The. defendants also referred to custom in their written-statement when making the said allegations entitling them to succeed to the property of Niku as his legitimate heirs. It was, therefore, common ground between the parties that the status of the defendants was to be determined in accordance with the custom prevalent in the former State of Suket, and this custom could be none other than the one recorded in the Mujmua & cited in detail above. The necessary facts being common ground between the parties, it would, therefore, serve no useful purpose to remit an issue with regard to custom to any of the Courts below. All that is necessary to determine is whether, on the undisputed facts, the defendants-petitioners come under the one or the other of the aforesaid categories of sons.

(9) Now, as the paternity of the defendants was known they could not possibly be merely Chukandu sons of Mt. Durgi. They are also obviously not Pachhlag sons. But they do clearly fall under the category of Sartora sons of Niku since they were the sons of Mt. Durgi by Niku without any sort of marriage having taken place between Mt. Durgi and Niku. The learned counsel for the plaintiffs-respondents argued that in case of a Sartora son he should be born of a woman who, though not legally married to the man in question, was yet in his regular keeping, and that the status of a Sartora son cannot be claimed by one whose mother was a prostitute or had only a casual connection with the man in question. It is not necessary to express any opinion with regard to the proposition put forward by the

learned counsel for the plaintiffs-respondents, and that for the simple reason that the condition which he puts forward is satisfied in the present case. It is admitted that there was an intimacy between Niku and Mt. Durgi, and that the former used to visit the latter at her residence in village Hawana. That being so, it is clear that Mt. Durgi was in the regular keeping of Niku. The defendants-petitioners were, therefore, clearly the Sartora sons of Niku.

(10) The next question that arises is as to the share in Niku's property to which the defendants are entitled. I find myself unable to agree with the argument of the learned counsel for the defendants-petitioners that a reduction of the share of a Sartora son takes place only in the event of dispute arising between him, and a legitimate son. The wordings of the aforesaid custom as recorded in the Majmua do not lend support to the argument. The provision commences with the enunciation that although A Sartora son is certainly entitled to as share in the ancestral, property, he cannot be deemed to be entitled in equal measure with a legitimate son, but his share shall be less than that of a legitimate son. That only means that the status of a Sartora son is not the same as that of a legitimate son, and that therefore his share must in all cases be less than that of a legitimate son. There is nothing in the citation justifying the conclusion that this reduction is to take place only where there is a dispute between a Sartora son and a legitimate son. On the contrary, the words 'tanaza ki surat men', or in the event of dispute, are general in nature and therefore signify any dispute and not necessarily a dispute between a Sartora son and a legitimate son. I, therefore, hold that according to the said recorded custom of the former State of Suket, in every case of dispute, whether the dispute of the Sartora son be with a legitimate son or with any other person laying claim to the property in question by right of inheritance, the share of a Sartora son will always be less than that to which a legitimate son would have been entitled. It may be stated here in passing that admittedly the plaintiffs' mother was also not a wedded wife of their father. It hardly lies in their mouth, therefore, to question the right of inheritance of the defendants on a ground which was applicable in their own case when the right of succession opened on the death of their father.

It only remains to ascertain, therefore, what the share of the defendants in the present case would be according to the custom prevalent in the caste to which the parties belong or in their family. This latter question cannot certainly be determined in this revision since no issue on that point was framed and the parties were, therefore, not called upon to produce the relevant evidence. In making this omission the Courts below will no doubt be deemed to have acted with material irregularity in the exercise of their jurisdiction, although I must say, at the same time, that the parties themselves appear to have been responsible for the omission because the aforesaid recorded custom does not seem to have been cited before any of the Courts below. A remand of this case for determination of the relevant issue with regard to the defendants' share will, therefore, be necessary.

(11) Before I conclude this point it is necessary to dispose of a contention put forward by the learned counsel for the plaintiffs-respondents. He argued that to accept the aforesaid custom relied upon by the defendants-petitioners would be to put a premium on immorality. It is a moot point whether mere absence of the marriage ceremony could be dubbed as immoral even though the woman in question may have been in the regular keeping of the man and the Sartora son was born of such a union. An illegitimate son born of a concubine is not wholly deprived of his rights even under the Hindu Law, for though not entitled to a share of the inheritance he is entitled to maintenance even in the three regenerate castes. And in the case of a Sudra, an illegitimate son is entitled to a share of the inheritance under the Hindu Law provided the concubine was in the continuous and exclusive keeping of his father. The only difference is that what is true of an illegitimate son amongst Sudras under the Hindu Law has been applied in the case of all castes without any distinction under the aforesaid customary law of the former State of Suket. It cannot, in the circumstance, be said that the custom in question can be totally disregarded on the ground of immorality or of public policy. The learned counsel for the plaintiffs-respondents cited -- 'S.K. Wodeyar v. Ganapathi Madhuling', AIR-1935 Bom 371 (A). All that has been laid down in that ruling is that before any custom is recognised it must be proved to be definite, ancient, uniform and not illegal in itself or unreasonable. In the present case the custom is a recognised one since it has been recorded in the Majmua Qawaid-i-mal of the former State of Suket. That being so, it must be presumed that it has

been so recognised because it satisfies all the said conditions. As regards the conditions of illegality and unreasonableness in particular, the contention of the learned counsel as regards the immorality of the custom has already been disposed of. The ruling in question does not, therefore, stand in the way of the enforcement of the custom propounded on behalf of the defendants-petitioners.

(12) The learned counsel for the defendants-petitioners pressed the point of limitation also but only with regard to the property in village Bodhal. His contention was that the mutation dated 11-11-1994 B. in favour of the petitioners in respect of that property took place in the presence and with the consent of the plaintiff-respondent Charnu, and that, therefore, limitation for the suit in respect of that property began to run under Article 120, Limitation Act from the date of that mutation, and not, as held by the lower appellate Court, from the date on which the defendants applied for partition of that property. And in support of this argument he cited the ruling reported as -- 'Mahabir Pattak v. Jageshar Pattak', AIR 1927 Oudh 21 (B). It is questionable whether the mutation in question was effected at the instance of Charnu plaintiff. Even if it be held for arguments sake that it was so effected, it was not shown how the said conduct of Charnu would also bind the other plaintiff Lachmu. So far at least as Lachmu plaintiff is concerned, therefore, the aforesaid ruling has no application, and the view of the lower appellate Court that the property in Bodhal being in possession of the plaintiffs, time began to run only from the date when the defendants applied for partition of that property is correct.

(13) The revision is allowed, the judgment and decrees of the District Judge of Mandi in both the suits are set aside and the case is remanded to that Court for recording a finding on the following issue after giving an opportunity to the parties to lead evidence on that issue:

'To what share in the property left by Niku are the defendants entitled as his Sartora sons in accordance with the custom prevalent in their caste or family?'

(14) The lower appellate Court will submit the finding on the said issue along with the reasons therefor and the evidence, if any, produced by the parties to this Court within three months of the receipt of this record. On receipt of the finding parties will

be given time to file objections, if any, against the same, and thereafter a date will be fixed for the disposal of the objections and the revision.

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