1886

SITLA BAKHSH v. LALTA PRASAD.

The appeal must be, and is, decreed. The plaintiff's suit will stand dismissed with reference to the interests of Sitla Bakhsh and Musammat Sonidha Kuar with costs in proportion in this Court and in the lower Court.

TYRRELL, J.—I entirely concur.

Appeal allowed.

1886
June 16.

Before Mr. Justice Oldfield and Mr. Justice Mahmood.

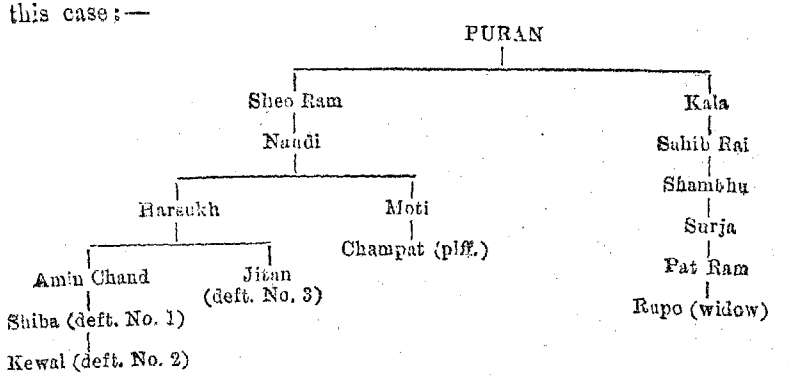
CHAMPAT (PLAINTIFF) *v.* SHIBA AND ANOTHER (DEFENDANTS).*

Hindu Law—Stridhan—Succession.

Upon the death of a childless Hindu widow who had been married in one of the four approved forms of marriage, *S*, one of the collateral relatives of her husband, stating that his minor son had been adopted by her, obtained possession of certain property which had formed her *stridhan*, and mutation of names was effected in the minor's favour in the revenue records. A suit was instituted against *S* and his son by *C*, on the allegation that he and *J*, who were collateral relatives of the widow's husband, were entitled, under the Hindu Law, to succeed in moieties to the properties left by her as her *stridhan*, and claiming recovery of possession of half her property. In defence, the adoption was pleaded, and another plea was that the widow had left a brother, who in the absence of the adoption, would succeed to the property to the exclusion of the plaintiff. The Court of first instance held that the alleged adoption had not been proved. In the lower appellate Court the plea as to adoption was given up.

Held that, upon the facts found, the plaintiff was the heir of the deceased widow, and as such entitled to succeed to her *stridhan* under the Hindu Law. *Thakoor Deyhee* v. *Baluk Ram* (1) followed. *Munia* v. *Puran* (2) distinguished.

The following table shows the relationship of the parties to this case:—



* Second Appeal No. 1442 of 1885, from a decree of C. W. P. Watts, Esq., District Judge of Saháranpur, dated the 16th July, 1885, reversing a decree of Maulvi Syed Tajammul Husain, Munsif of Shamli, dated the 8th December, 1884.

(1) 11 Moo. I. A. 135. (2) I. L. R., 5 All. 310.

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section have to be strictly observed in order to entitle a mortgagee to come into Court, and upon the basis of the observance of the requirements of that section to assert an absolute title to the property of the mortgagor. In this case there is no evidence that the requirements of the 8th clause of the Regulation have been complied with. First, there is nothing to show, except a recital in the application itself, that any "demand" was ever made upon the mortgagors for payment of the mortgage-debt. As to the necessity of this preliminary demand, there are rulings of this Court to be found in *Behari Lal* v. *Beni Lal* (1) and *Karan Singh* v. *Mohan Lal* (2), and an unreported ruling of the late Chief Justice and Mr. Justice Duthoit in First Appeal No. 50 of 1884. Next, there is no proof of the "notice" itself having been served upon the mortgagors, which it lay upon the plaintiff to establish. Further, there is nothing to show that the notice which was issued was signed by the Judge to whom the application was made. Indeed, it would seem not to have been, nor is it proved that a copy of the application was forwarded along with the notice to the mortgagors, or that its terms were ever brought to their knowledge. Without referring in detail or dealing at length with the reasons given by their Lordships in the two rulings of the Lords of the Privy Council to which I have referred, it seems to me that, applying the principles of these rulings to the facts before us, we have no alternative but to hold that the provisions of the Regulation have not been satisfied, and that the plaintiff has not fulfilled his obligation, namely, to prove affirmatively that those provisions were strictly followed. These observations are sufficient for the purpose of dealing with this appeal.

Before leaving the matter, however, I must refer to the suggestion made by the learned Pandit for the respondent that we should treat this suit as one instituted under the Transfer of Property Act, and that we should allow his client to obtain such relief as he would be entitled to by that Act.

I cannot adopt this suggestion. To do so would be to countenance an entire change in the nature and character of the suit from the shape in which it was originally instituted, and this I do not think is a course sanctioned by law.

(1) I. L. R., 3 All. 408. (2) I. L. R., 5 All. 9.

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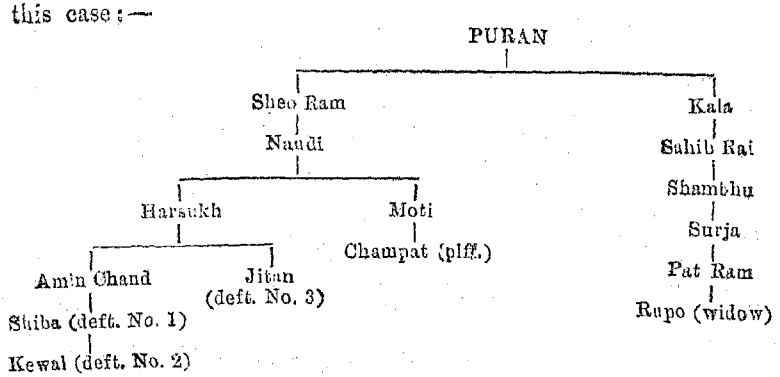
The following table shows the relationship of the parties to this case:—



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(1) 11 Moo. I. A. 135. (2) I. L. R., 5 All. 310.

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CHAMPAT v. SHIBA.

Under a deed of gift dated the 27th April, 1875, Surja, who owned the zamindari property in suit, conveyed it to his son's widow Rupo, who died on the 1st February, 1884. Thereupon Shiba, defendant No. 1, stating that his minor son Kewal, defendant No. 2, had been adopted by the deceased widow, obtained possession of the property and mutation of names in his favour in the revenue records on the 3rd April, 1884. The present suit was instituted by Champat on the allegation that he and Jitan, defendant No. 3, were entitled, under the Hindu Law, to succeed in moieties to the properties left by Musammat Rupo as her *stridhan*, she having died without issue. The object of the suit was recovery of possession of half of the property left by the widow.

The suit was resisted by Shiba, defendant No. 1, on behalf of himself and his minor son Kewal, defendant No. 2, on the ground that the latter had been adopted by the widow and was therefore entitled to succeed to the whole of her property. Another plea in defence was, that the widow had left a brother of the name of Kurali, who, in the absence of the adoption, would succeed to the property to the exclusion of the plaintiff.

Jitan, defendant No. 3, did not appear to defend the suit.

The Court of first instance (Munsif of Shamli) held that the alleged adoption of Kewal by the widow was not proved; that she having been lawfully married to Pat Ram, the plaintiff was a *sapinda* and near relative of her husband, and could therefore maintain the suit, notwithstanding the existence of Kurali, the brother of the deceased widow. Upon these grounds the Munsif decreed the claim.

Upon appeal the District Judge of Saharanpur reversed this decree. The question of adoption was not insisted upon before him; but he held that the property, being *stridhan* of the widow, would devolve upon her death on her brother Kurali to the exclusion of the plaintiff.

From this decree the plaintiff appealed to the High Court. It was contended on his behalf that upon the facts found by the lower Courts, he was the heir of the deceased widow, and as such entitled to succeed to her *stridhan* under the Hindu law.

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CHAMPAT v. SHIBA.

Mr. *Habibullah*, Pandit *Ajudhia Nath*, and Pandit *Sundar Lal*, for the appellant.

Lala *Juala Prasad* and Pandit *Nand Lal*, for the respondents.

MAHMOOD, J. (After stating the facts as stated above, continued):—I have no doubt that this contention is perfectly sound and must prevail. It has been found by the Munsif that Musammat Rupo was married to Pat Ram in one of the four approved forms of marriage, and this finding was not disturbed in the lower appellate Court. Indeed, in the Court of first instance, no allegation was made on behalf of the defence to the effect that the marriage of Rupo was in an unapproved form; and this being so, the observations of the Lords of the Privy Council in *Thakoor Deyhee* v. *Baluk Ram* (1) seem to me to dispose of the point raised in this appeal. Their Lordships observed:—"The devolution of *stridhan* from a childless widow is regulated by the nature of the marriage. There is nothing here to show that *Choteh Bebee* was not married according to one of the four approved forms. In that case her *stridhan* would, according to the Mitakshara (chap. ii, s. xi, art. 11), go to the respondents as the collateral heirs of her husband. This view of the law is confirmed by two cases in 2 *Strange's* "Hindu Law," pp. 411 and 412, and the comments of Mr. *Colebrooke* and others thereon (2)."

This passage leaves no doubt upon the question now before us, and indeed the learned pleaders for the respondents have not contested it, nor have they contended that the marriage of Musammat Rupo was in one of the inferior forms which would render her *stridhan* heritable by her parental family. All that the learned pleaders have asked us on behalf of the respondents is, that we should remand the case to the lower appellate Court for a finding as to the adoption of Kewal by Musammat Rupo. But the plea was distinctly given up in the lower appellate Court, and, under the circumstances, I do not think we should make a remand for a finding upon the issue, the Munsif, after a careful consideration of the evidence, having recorded a distinct finding against the alleged adoption.

(1) 11 Moo. I. A. 135. (2) At p. 175.

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I would decree this appeal with costs, and, reversing the decree of the lower appellate Court, restore that of the Court of first instance.

But I wish to add that the Full Bench ruling of this Court in *Munia* v. *Puran* (1) which was referred to at the hearing, is clearly distinguishable from this case, because all that was ruled there was that a woman's *stridhan*, being property over which she had absolute control, her husband's relations have no reversionary interest in such property so as to be entitled to set aside any acts of transfer made by her during her lifetime. There is nothing in that case to warrant the conclusion that upon the death of a widow, when the question of devolution arises, her husband's relations would not be her heirs.

OLDFIELD, J.—I concur.

Appeal allowed.

1886
April 5.

Before Mr. Justice Oldfield and Mr. Justice Brodhurst.

AMIR ZAMA (PLAINTIFF) *v.* NATHU MAL (DEFENDANT) *

Set-off—Res judicata—Civil Procedure Code, ss. 13,111—*Court-fee on set-off.*

In a suit to recover a sum of money due as wages, the plaintiff alleging that the defendant had engaged him to sell cloth on his account at a monthly salary, the defendant claimed a set-off as the price of cloth which he alleged the plaintiff had sold on his account on commission. It appeared that the defendant had previously sued the plaintiff to recover the same amount as was now claimed by way of set-off, as being due for the price of cloth sold and delivered by the defendant to him; and the plaintiff (then defendant) pleaded that there had been no sale to him, but the cloth had been delivered to him on commission-sale. The suit was dismissed on the ground that there was no proof of a sale of cloth, and the question whether any sum was due for cloth sold on commission-sale was not gone into. The cloth now alleged to have been delivered on commission-sale was the same as that alleged in the former suit to have been actually sold to the plaintiff.

Held that the defendant was entitled, under s. 111 of the Civil Procedure Code, to set-off the amount claimed as due for goods sold on commission against the plaintiff's demand; and that the claim for such set-off was not barred under the provisions of s. 13.

Held also that the court-fee payable on the claim for set-off was the same as for a plaint in a suit.

* Reference No. 179 of 1886, under s. 617 of the Code of Civil Procedure, by W. R. Barry, Esq., Judge of the Court of Small Causes at Allahabad.

(1) I. L. R., 5 All. 310.