

1901
July 17.

Before Mr. Justice Banerji and Mr. Justice Aikman.

SRI PAL RAI AND OTHERS (DEPENDANTS) v. SURAJBALI AND ANOTHER (PLAINTIFFS) AND RAGHUNATH RAI AND ANOTHER (DEPENDANTS).

Hindu Law—Mitakshara—Joint Hindu family—Partition—Share of mother on partition—Stridhan.

The share which is taken by the mother in a joint Hindu family upon partition of the family property being her *stridhan*, she is capable of alienating it at her pleasure.

In this case one Kanhaiya Rai died leaving three sons and a widow, the stepmother of the three sons. After his death a separation was effected between the sons and stepmother in virtue of which the stepmother received a one quarter share of the property of Kanhaiya Lal. The widow then made a gift of her share to Raghunath Rai, one of her stepsons. This gift was challenged by the sons of one of the other stepsons, who came into Court claiming one-third of the property.

The Court of first instance (Subordinate Judge of Gorakhpur) found that the stepmother had been in adverse possession of the property claimed for more than twelve years, and dismissed the suit upon that ground.

The plaintiffs appealed. The lower appellate Court (District Judge of Gorakhpur) found in their favour and decreed the claim.

The defendants appealed to the High Court, and in this appeal two issues were remitted to the lower appellate Court, *viz.*, whether the property in suit was given to Musammatt Phuljari (the stepmother) as her share upon a partition being effected with the sons of Kanhaiya Rai, and, if so, was it given to her on the express understanding that she was to hold it only in lieu of maintenance? The lower appellate Court found as to the first of these issues in the affirmative and as to the second in the negative.

The arguments in this case were heard immediately after the arguments in the preceding case—*Ohkiddu v. Naubat, supra*, p. 67.

Pandit *Sundar Lal* for the appellants, amongst additional authorities, referred to Stokes' Hindu Law Books, p. 394, H. H. Wilson's works, Vol. V, pp. 27 and 29, and K. K. Bhattacharya, Joint Hindu Family, pp. 617 and 627.

If a share is allotted to the mother only in lieu of maintenance, then how is it that no share is allotted to other people who are also legally entitled to maintenance, e.g. the grandmother?

The reason why shares on partition have been provided for the parents seems to be to discourage partition in their lifetime.

If the share obtained by a mother on partition is not to be deemed her *stridhan*, then the word 'partition' had better be struck out from the Mitakshara (II, 11, 2). Because if only partition between co-owners has been contemplated, the property is already vested in the co-owners, and nothing new is acquired by partition. If two ladies are co-owners, before they partition the property is already their *stridhan*.

Sambibhaga is the same as *bibhaga* and means partition. See Wilson's Sanskrit-English Dictionary, s. v. The Bengal Judges who have decided that the mother obtains a share in lieu of maintenance had the special provisions of the Dayabhaga in mind. All the commentators on the Mitakshara support Vijnaneshvara in the wide interpretation that he has placed upon the word *stridhan*.

Dr. S. C. Banerji replied on behalf of the Respondents :

Even conceding that the share obtained on partition is *stridhan* in the mother's hands, there is no authority for the proposition that she may alienate it at pleasure. If the Mitakshara is silent as to the right of absolute disposal (see *per* West, J., 8 Bom., H. C. R., O. C. J., at p. 265), the Viramitrodaya makes it quite clear that *stridhan* other than *saudayika* cannot be alienated, *vide* Sarkar's translation, pp. 223-4. But Dr. Jolly has shown that the Mitakshara is really an authority negating the alleged power of alienation. Tagore Law Lectures, 1883, p. 252, G. D. Banerjee, Tagore Law Lectures, 1878, p. 331, J. N. Bhattacharjee, Commentaries on Hindu Law, p. 573, and Mayne, Hindu Law and Usage, pp. 796 and 816, are all authorities in my favour. West and Bühler (Hindu Law, p. 781) refer to a Bombay case in which it was ruled that the lady held only as a tenant for life.

As to the grandmother's right to a share the authorities are conflicting, see J. N. Bhattacharji, *op. cit.*, p. 340.

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Partition under the Mitakshara always takes place by virtue of a pre-existent right (I., 1, 23); it is only an adjustment of rights and not the source of a new right. We cannot put our own gloss where Vijnaneshvara has explicitly told us what he understands a particular word to mean. Besides, partition by two or more joint female heirs is expressly laid down by the commentators (G. Sarkar, Hindu Law, p. 271).

There is nothing peculiar in the provision regarding the allotment of a share to the mother on partition contained in the Dayabhaga (III., 2, 29). In deciding a question like this the whole of the Hindu law regarding the rights and obligations of widows in a joint family should be considered, and not only the special words used in a particular text or *placitum*.

The following judgment was delivered:—

BANERJI and AIKMAN, JJ.:—In this appeal the same question arises which arose in Letters Patent Appeal No. 24 of 1900, which we have just decided, namely, whether the share which a mother gets at a partition between her sons is her *stridhan*. We have held in that case that such a share must be deemed to be a woman's *stridhan*. That being so, Musammât Phuljhari was competent to make the alienation which has been impeached in this case. It is conceded that the decree for possession which was made by the lower appellate court could not in any event be sustained. There is another reason why the suit must fail. Raghunath is a nearer reversioner than the plaintiffs, and as it has not been found that he is in collusion with the widow, the plaintiffs are not entitled to maintain the suit. On both these grounds the suit must fail. The result is that we allow the appeal, set aside the decree of the lower appellate court with costs, and restore that of the court of first instance. The appellants will get their costs of this appeal.

Appeal allowed.