

suit, and in both cases there was only one plaintiff. In the present case, there certainly was a valid plaint before the court on behalf at any rate of the plaintiff Girwar. In our opinion, this is a clear case of estoppel against the appellant. If the plea of majority had been taken in the trial court, the plaint might have been amended and the difficulty removed. By taking an active part in the prosecution of the case without raising any objection to the legality of the plaint, the appellant clearly placed the respondents at a disadvantage, and it is not open to him, now that a decree has been passed, to come into court and allege that the decree is a nullity and not binding on him. In our opinion the decree of the court below is correct, and we accordingly dismiss this appeal with costs.

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 BINDA  
 v.  
 MANGALA.
 

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*Appeal dismissed.*

*Before Mr. Justice Daniels and Mr. Justice King.*

MOTI CHAND AND OTHERS (DEFENDANTS) *v.* KUNWAR  
 KALIKA NAND SINGH (PLAINTIFF).\*

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 1926  
 May, 18.
 

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*Hindu law—Stridhan—Succession—Order of devolution of the stridhan property of a childless Hindu female.*

The stridhan property of a childless Hindu female devolves on her death on her husband, and failing the husband, on his sapindas, and on failure of the husband's sapindas, it devolves on the blood relations of the deceased. *Kanakammal v. Ananthamathi Ammal* (1) and *Ganpat Rama Joshi v. The Secretary of State for India in Council* (2), followed.

THE facts of this case are fully stated in the judgement of the Court.

Munshi *Damodar Das* and Pandit *Rama Kant Malaviya*, for the appellants.

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\* Second Appeal No. 1366 of 1923, from a decree of K. G. Harper, District Judge of Benares, dated the 28th of July, 1923, reversing a decree of Kauleshar Nath Rai, Subordinate Judge of Benares, dated the 19th of April, 1923.

(1) (1912) I.L.R., 37 Mad., 293.

(2) (1920) I.L.R., 45 Bom., 1106.

1926

Munshi *Gadadhar Prasad*, for the respondent.

MOTT  
CHAND  
v.  
KUNWAR  
KALKA  
NAND  
SINGH.

DANIELS and KING, JJ. :—This second appeal arises out of a suit for a declaration that the house in suit belongs to the plaintiff Kunwar Kalikanand Singh and that one-third of it is not liable to be sold in execution of a decree obtained by the defendants on the basis of a mortgage executed in their favour by Kunwar Nityanand Singh. The latter was a brother of the plaintiff Kunwar Kalikanand Singh, and there is a third brother named Kunwar Kamlanand Singh.

The plaintiff's case is that the house in dispute belonged to Musammat Badan Dei, his father's sister, who died some time before 1903, and that she transferred the house to him before her death by an oral gift. The defendants denied the alleged gift, and their case is that the three brothers, namely, the plaintiff, Nityanand Singh and Kamlanand Singh, inherited the house as heirs of Musammat Badan Dei, and that Nityanand Singh had a little to transfer the one-third share in the house.

The trial court and the lower appellate court have found that the alleged gift in the plaintiff's favour was not proved. It has also been found by the court below that neither party have proved their title to the property. According to the court below, the plaintiff and his brothers could in no case be heirs of Musammat Badan Dei. The plaintiff has been found to have been in actual exclusive possession of the house in dispute since the death of Musammat Badan Dei, but his possession has not been found to be adverse to his brothers, so the court below held that he could not get a declaration of title. He was, however, granted a declaration that the defendants are not entitled to dispossess him and have one-third of the house sold in execution of their decree.

The court below is wrong, in our opinion, in holding that the plaintiff and his brothers could never come in as heirs of Musammat Badan Dei, their father's sister. We have been referred to *Kanakammal v. Ananthamathi Ammal* (1) and *Ganpat Rama Joshi v. The Secretary of State for India in Council* (2), in which it has been held that the *stridhan* property of a childless Hindu female devolves on her death on her husband, and failing the husband, on his *sapindas*, and on failure of the husband's *sapindas*, it devolves on the blood relations of the deceased. The same view is taken by West and Bühler in their "Hindu law", fourth edition, pages 505 to 508. No authority to the contrary has been shown to us. It therefore seems to be clear that on failure of the husband's heirs the property would pass by inheritance to the blood relations of Musammat Badan Dei and might therefore pass to the plaintiff and his brothers. The court of first instance said that the three brothers were the only relations whom Musammat Badan Dei had left behind. It has not been shown that any *sapindas* of her husband were in existence. So we must at least hold that the claim that Kunwar Nityanand Singh had succeeded to one-third of the house in dispute by inheritance has not been disproved.

On the finding that the property may have devolved upon the three brothers by inheritance the view of the court below cannot be upheld. All three brothers were equally entitled to the property, and the mere fact that the plaintiff has been found to have been in exclusive possession of the property will not extinguish the title of his brothers. It has expressly found that his possession was not adverse to his brothers, so he must be presumed to be holding the property on their behalf.

(1) (1912) I.L.R., 37 Mad., 293.

(2) (1920) I.L.R., 45 Bom., 1106.

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 MOTI  
 CHAND  
 D.  
 KUNWAR  
 KALIKA  
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MOTI  
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KALIA  
NAND  
SINGH.

It is clear that he has not established his claim for a declaration that Nityanand Singh was not entitled to mortgage the one-third share, and the claim was rightly dismissed by the trial court.

The court below was also wrong, in our view, in granting the plaintiff a declaration that the defendants respondents were not entitled to dispossess him, or to have one-third share of the house in dispute sold in execution of their decree. A declaration in these terms could only have been given on the view that Nityanand Singh was proved to have no title to the property. We may note in passing that a decree for a declaration that the defendants were not entitled to dispossess the plaintiff was not asked for in the plaint.

We therefore allow the appeal and dismiss the plaintiff's suit with costs in all courts.

*Appeal allowed.*

*Before Mr. Justice Daniels and Mr. Justice King.*

MAHMUD-UN-NISSA AND OTHERS (PLAINTIFFS) v.

BARKAT-ULLAH AND OTHERS (DEFENDANTS).\*

1926  
May, 21.

Act No. IX of 1872 (*Indian Contract Act*), section 16—*Unconscionable bargain—Burden of proof.*

Where section 16 of the *Indian Contract Act*, 1872, is pleaded in defence to a suit on a bond, before the burden can be laid on the creditor, not one element but two elements must be established. It must first be shown that the creditor was in a position to dominate the will of the borrower. It must also be shown that the transaction appears, either on the face of it or on the evidence adduced, to be unconscionable. *Raghunath Prasad v. Sarju Prasad* (1) and *Balla Mal v. Ahad Shah* (2), referred to.

\* Second Appeal No. 1571 of 1923, from a decree of E. Thurston, District Judge of Budaun, dated the 10th of August, 1923, reversing a decree of Rup Kishan Agha, Subordinate Judge of Budaun, dated the 22nd of December, 1922.

(1) (1923) I.L.R., 3 Pat., 279; L.R., 51 I.A., 101.

(2) (1918) 16 A.L.J., 905.