*Before Justice Sir Cecil Walsh and Mr. Justice Ashworth.*

1927
*June, 9.*

HUKUM CHAND AND OTHERS (PLAINTIFFS) *v.* SITAL PRASAD AND OTHERS (DEFENDANTS).*

*Hindu law—Jains—Special custom empowering a widow to deal at will with the property of her late husband.—Stridhan.*

According to the Hindu law of the *Mitakshara* school, there is no distinction between *stridhan* and "property that a widow can deal with at her pleasure."

In the case of a Jain family, subject in other respects to the law of the *Mitakshara*, a custom was found by which the widow of a separated Jain could deal with the property of her late husband in any way she pleased.

*Held* that such property was the widow's *stridhan* and was governed by the rules of descent applicable to *stridhan* property.

*Debi Mangal Prasad Singh* v. *Mahadeo Prasad* (1); *Sheo Shankar Lal* v. *Debi Sahai* (2); *Lakshmi Narain Misir* v. *Musammat Sumarti Kunwar* (3); *Sheo Singh Rai* v. *Dakho* (4), and *Ram Kali* v. *Gopal Dei* (5), referred to.

THESE were two appeals arising out of two suits brought by the plaintiffs appellants against the respondents for possession of certain property. The property belonged to one Amolak Ram, who died in 1879, leaving a widow Musammat Bir Kunwar. She died in 1881, leaving three daughters. Two of these daughters jointly in 1882 alienated a portion of the property in suit. The third daughter in 1885 alienated the rest of the property in suit. All the three daughters having died, the plaintiffs claimed that they were entitled to the property as reversionary heirs of Amolak Ram, and that the alienations mentioned were ineffective against them now that the daughters were dead.

*Second Appeal No. 545 of 1925, from a decree of H. Beatty, Additional Judge of Saharanpur, dated the 21st of January, 1925, reversing a decree of Govind Sarup Mathur, Subordinate Judge of Saharanpur, dated the 19th of March, 1924.

(1) (1912) I.L.R., 34 All., 235.
(2) (1903) I.L.R., 25 All., 468.
(3) (1924) I.L.R., 46 All., 489.
(4) (1878) I.L.R., 1 All., 688.
(5) (1926) I.L.R., 48 All., 648.

Both suits were dismissed by the District Judge in appeal, and the plaintiff appealed to the High Court.

Babu *Piari Lal Banerji*, for the appellants.

Dr. *Kailas Nath Katju*, for the respondents.

The judgement of ASHWORTH, J., after reciting the facts as above, thus continued:

THE appeal No. 546 deals with the original suit No. 164 of 1923. In that suit the District Judge held that the alienation of 1882 by Musammat Lachhmi and Musammat Barfi was for necessity. This was a finding of fact, and the appellants have not been able to show that it was based on any mistake of law. Their suit, therefore, No. 164, must fail, and the appeal fails, in my opinion, on the ground that the question is concluded by a finding of fact. I may mention that it was in this suit that the question of the suit being barred under order II, rule 2, arose. It does not seem to me necessary to decide this point, but if it had been necessary I would have concurred with the view of my learned brother.

As regards the appeal No. 545, which is in respect of suit No. 131, it was necessary for the plaintiffs to prove that, on the death of the last of the three daughters of Musammat Bir Kunwar, they were entitled to the estate of Amolak Ram. One amongst other pleas taken by the defendant was that Amolak Ram having been a Jain, and this property being his self-acquired property, his widow Musammat Bir Kunwar got an absolute estate in that property by Jain custom. Both the lower courts have found that the custom was proved, and the *extent* of the custom as found by the trial court was this. The custom gave the widow absolute right to transfer the property derived from her husband in her life-time, but, on the other hand, if not transferred the property would descend as the estate of her husband and not as

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the *stridhan* of the widow. The lower appellate court accepted this view. It went on, however, to hold that the widow had made a will conferring an absolute estate on her three daughters. I concur with my learned brother that there was no evidence by which the making of an oral will by Musammat Bir Kunwar or the terms of such oral will, if one was made, could be held proved. The document relied upon was the award of an arbitrator, who was appointed by the three daughters of Musammat Bir Kunwar to settle their *inter se* claims on the assumption of a will. The arbitrator said in his award that he had ascertained by inquiry the terms of the will. Now if the arbitrator had been alive and had come into court, it appears to me that his evidence would have been inadmissible as mere hearsay evidence. I cannot think that, because this hearsay evidence has been expressed by him in an old document it ceases to have to be regarded as mere hearsay evidence. There are only two questions with which I consider it now necessary to deal in this appeal. One is whether under Jain custom Musammat Bir Kunwar inherited this property as her *stridhan* or whether, for the purposes of succession to her, she must be regarded as only having had a widow's estate, notwithstanding that according to the Jain custom she could before her death have disposed of it as she liked.

The contention of the appellants is that the *Mitakshara* makes no distinction between property of which a woman can dispose as she likes and *stridhan* property. It considers the two expressions synonymous. For the respondents it is maintained that it is possible for a widow to have a widow's estate in her husband's property and yet, by reason of a custom such as the one now set up, to have a right of absolute disposal during her life-time. It is pointed out that, according to the Bombay school, property inherited by a woman from a

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male may be, if inherited in one way, her *stridhan* and if in another way, not her *stridhan*. Reference is made to Mulla's Hindu Law, 5th edition, page 134. The following decisions have been invoked in favour of each contention, *e.g.*, *Debi Mangal Prasad Singh* v. *Mahadeo Prasad* (1), *Sheo Shankar Lal* v. *Debi Sahai* (2) and *Lakshmi Narain Misir* v. *Musammat Sumarti Kunwar* (3).

It appears to me that the matter has to be looked at in the following way. The family in question, though a Jain family, was governed by the *Mitakshara* law except so far as that law was varied by custom. In order to find out the custom set up we must refer to the Privy Council decision in *Sheo Singh Rai* v. *Dakho* (4). In this decision is set forth at length the evidence on which their Lordships came to the conclusion that the custom now set up was established. On page 700 a representative body of the leading members of the Jain community expressed the opinion that, in the absence of any son, a Jain widow succeeds to the estate of her husband, movable and immovable, in absolute right, (ii) that she can deal with it at pleasure and without restriction, and (iii) that she can adopt her daughter's son without the authority of her husband, and that such adopted son would succeed to her deceased husband's estate. The last five words "to her deceased husband's estate" appear to me to be merely descriptive and cannot be invoked to mean that the investigators of the custom considered that the widow would hold the property as her husband's estate. Even if they could be construed as having this meaning, they would merely represent an incidental and not authoritative view, it being no duty of the investigators to determine the implication of the facts they ascertained. On the other hand, in this statement of the custom, a distinction was made between the

(1) (1912) I.L.R., 34 All., 235. (2) (1903) I.L.R., 25 All., 468.
(3) (1924) I.L.R., 46 All., 439. (4) (1878) I.L.R., 1 All., 688.

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finding that the widow succeeded in absolute right and the finding that she could deal with the estate at pleasure and without restriction. I should deem the first finding as meaning that the property was taken by her as her *stridhan*. Apart from this, whatever distinction other schools may make between property with which the widow can deal at her will and property which is her *stridhan*, because the property comes to her in various ways, I am not able to hold, after considering the various decisions brought to my notice, that according to the *Mitakshara* school any distinction is made between the word *stridhan* and the expression "property that the widow can deal with at pleasure". The fact that other schools make such a distinction will not affect a consideration of the law according to the *Mitakshara* school. The *dictum* in various text-books and decisions as to *Mitakshara* law "that inherited property is never *stridhan*" is inapplicable to that law when overlaid by a Jain custom such as the one in question, no such custom being in contemplation of these authorities when expressing the *dictum*. Consequently when a custom is proved as affecting persons otherwise subject to the *Mitakshara* school and that custom is said to confer on the widow a right to deal with property at her will, I consider that this must mean that the property is her *stridhan* and will devolve as her *stridhan*. In this view of the case, it is admitted that the plaintiffs can have no present right in the property. On the death of Musammat Bir Kunwar the property passed to her daughters, and on the death of the last of them it would pass to her grand-daughters and not to her grandsons.

It is said, however, that we are bound by the Privy Council decision reported in *Sheo Shankar Lal* v. *Debi Sahai* (1), and that that decision decides that under the ordinary rule of inheritance the grandson of a woman

(1) (1903) I.L.R., 25 All., 468.

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holding property as her *stridhan* will succeed in preference to her grand-daughter. Whether this is so, is the second question with which I have to deal. I consider that for the reasons stated in *Ram Kali* v. *Gopal Dei* (1), the Privy Council decision need not be held to lay down the law on this subject. A reference to the Privy Council decision relied upon will show that their Lordships only considered one question of law. This question they have propounded at pages 468 and 469 in the following words :—

"This involved the question of law whether according to Benares law, by which the family was governed, the property on the death of Jagarnath descended as *stridhan* and went to her daughter, or whether it lost its character of *stridhan* and descended according to the ordinary rule of inheritance to her sons, the plaintiffs".

It is obvious that the legal question arising might have been equally well stated even if the words "to her sons, the plaintiffs" had been omitted. They were added on the obvious assumption that this was the law. The respondents in that case were not represented, and thus had no opportunity of questioning the proposition involved. Nor does it appear that at any stage of the suit was an issue framed on the matter. If it was, there was no appeal on this issue. The assumption of a certain view of law in a judgement of the Privy Council for the purpose of deciding another question cannot, in my opinion, be regarded as a binding decision. It has even less force than an *obiter dictum;* for it is not necessary to prove or decide what is admitted.

For the above reasons, I would concur with my learned brother in dismissing appeal No. 546, but on the other hand I do not concur in allowing appeal No. 545. I would dismiss that appeal also in concurrence with the District Judge but on a different ground.

(1) (1926) I.L.R., 48 All., 648 (652).

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[WALSH, J. concurred, with hesitation, in the order proposed.]

BY THE COURT.—Appeals Nos. 545 and 546 of 1925 are dismissed with costs.

*Appeal dismissed.*

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*Before Mr. Justice Sulaiman and Mr. Justice Banerji.*

1927 *June*, 9.

KANHAIYA LAL AND OTHERS (OBJECTORS) *v.* GENDO (PETITIONER)*

*Costs—Taxation of—Contested application for probate before a District Judge—High Court Rules*, 1898, *chapter XVI, rule* 2—*General Rules (Civil), chapter XXI, rules* 22 *and* 26.

*Held* that the rule applicable to the taxation of costs in a contested application for probate before a District Judge is rule 26 of chapter XXI of the General Rules (Civil) for subordinate civil courts. Such a proceeding is not a "suit" but a "miscellaneous judicial case." *Sundrabai Saheb* v. *The Collector of Belgaum* (1) and *Baijnath Prasad* v. *Sham Sundar Kuar* (2), referred to.

The facts of this case, so far as they are necessary for the purposes of this report, appear from the judgement of the Court.

Pandit *Shiam Krishna Dar*, for the appellants.

Munshi *Narain Prasad Ashthana*, for the respondent.

SULAIMAN and BANERJI, JJ. :—This appeal arises out of a probate proceeding and relates to the costs which have been taxed in the decree of the court below. It raises a question of principle affecting the practice in subordinate courts. An application for probate was made on the 18th of January, 1924, and on the 1st of March a caveat was entered. On the 30th of August

*First Appeal No. 479 of 1924, from a decree of A. G. P. Pullan, District Judge of Agra, dated the 30th of August, 1924.

(1) (1908) I.L.R., 33 Bom., 256. (2) (1913) I.L.R., 41 Calc., 637.