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These cases are not applicable to the case where no consent of kinsmen is required and no family council need be called or consulted. Whenever a widow has in herself full and free power to adopt without any person's permission, any inquiry into her motives must be irrelevant, for her action is that of a person who does what she has the right to do. The mere fact that the adoption puts an end to the expectations of the persons who would have succeeded to the property if no adoption had been made is not sufficient to constitute a corrupt or capricious motive, as this result is bound to arise in each case of an adoption. The fact that adoption has in fact been made has not been challenged. We agree with the learned Subordinate Judge and hold that the adoption in question is valid. There is no force in the appeal. It is therefore ordered that the appeal be dismissed with costs.

APPELLATE CIVIL

Before Mr. Justice Young and Mr. Justice Niamat-ullah

1932 *December*, 2

BHOLA UMAR (DEFENDANT) *v.* KAUSILLA AND ANOTHER (PLAINTIFFS)*

1933 *November*, 16

Hindu law—Remarriage of widows—Forfeiture of interest in first husband's estate—Custom of remarriage in a particular caste—No forfeiture where custom existed prior to Act XV of 1856*—Proof of custom—Instances may be referable either to the Act or to ancient custom—Hindu Widows' Remarriage Act* (*XV of* 1856), *section* 2.

In order to escape the operation of section 2 of the Hindu Widows' Remarriage Act, 1856, by which the widow upon remarriage forfeits her interest in her first husband's estate, it must be established that in the community or caste to which she belonged there already existed an ancient custom of remarriage of widows prior to the passing of that Act, as distinguished from a practice which might have come into existence since the passing of that Act. Instances of remarriage of widows in any community after 1856 might well be referable to the

*First Appeal No. 523 of 1928, from a decree of Chatur Behari Lal, First Additional Subordinate Judge of Jaunpur, dated the 13th of August, 1928.

provisions of that Act and would not necessarily be indicative of an ancient custom existing before the passing of that Act. It must be shown that the present practice is in pursuance of such an ancient custom and not one which has grown up under the Act.

Messrs. *B. E. O'Conor* and *Ram Nama Prasad*, for the appellant.

Dr. *K. N. Katju*, Messrs. *P. L. Banerji*, *Rama Kant Malaviya*, *Kedar Nath Sinha* and *Lakshmi Saran*, for the respondents.

YOUNG and NIAMAT-ULLAH, JJ.:—This is a defendant's appeal and arises in the following circumstances. One Lachmi Narain, by caste Umar Banya, was the owner of a number of properties specified at the foot of the plaint. He died leaving a widow Mst. Kausilla, the plaintiff respondent, and his uncle Bhola Umar, the defendant appellant, who obtained mutation of names in respect of the entire property in dispute. Thereupon the plaintiff instituted the present suit for recovery of possession of her deceased husband's property on the ground that she was entitled to it under the Hindu law. The plaintiff's claim was resisted by the defendant on the allegation that she had remarried and, according to the custom of the caste, forfeited all rights in her deceased husband's estate. It should be mentioned at this stage that the plaintiff made no reference in her plaint to her remarriage—a fact which, on being alleged by the defendant, was admitted by her; but she maintained that her remarriage had not the effect of divesting her of the interest which she acquired in her deceased husband's property by the Hindu law of succession. A number of other issues were raised by the pleadings; but it is not necessary to make a mention of them in detail. One of the issues framed by the lower court was: "What is the effect of Kausilla's (plaintiff No. 1) marriage with Mahadev? Does she thereby lose her right of inheritance in her husband's property under law or under any custom?"

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A number of witnesses were examined on both sides on this issue, the defendant attempting to establish that a widow forfeits, on remarriage, all rights in her first husband's estate, and the plaintiff adducing evidence to the contrary. The learned Subordinate Judge, who had laid the onus of proving a custom of forfeiture on the defendant, held that he failed to discharge the onus. Accordingly he found that the plaintiff is entitled to succeed to the property left by her first husband. He also found in favour of the plaintiff on other material issues arising in the case, with the result that her suit was decreed. The defendant appealed to this Court.

The appeal came on for hearing before a Division Bench of this Court on the 13th of June, 1932. The learned advocate for the appellant referred to a series of rulings of this Court in which it was held that if a Hindu widow could contract a valid marriage after the death of her first husband in accordance with the custom of her caste such remarriage would not entail a forfeiture under section 2 of the Hindu Widows' Remarriage Act (Act XV of 1856), and to those of other High Courts which took a contrary view, viz., that section 2 of that Act which provides for forfeiture applies in any case. It was represented to the Bench that in view of the conflict of judicial opinions on an important question like this, reference should be made to a Full Bench for a decision. Accordingly the following question of law was referred to a Full Bench: "Does a Hindu widow, who remarries in accordance with a custom of her caste, forfeit thereby her rights in the estate of her first husband?"

It should be observed that it was assumed in the reference that the remarriage was in accordance with the custom of the caste to which the widow belonged. The Division Bench did not decide the question of custom, indeed, any other question of fact, because if the Full Bench took the view which had been taken by other High Courts the plaintiff would forfeit her

rights as an heir of her first husband even though by the custom of her caste, as distinguished from the statutory provision contained in Act XV of 1856, she could remarry. After a consideration of all the authorities bearing on the subject, the reply of the Full Bench was in the following terms; see *Bhola Umar* v. *Kausilla* (1): "In our opinion section 2 of Act XV of 1856 does not apply to the case of those widows who are entitled under the custom of their caste to remarry and are not bound to take advantage of the provisions of the Act. Accordingly there is no forfeiture under the Act of the Hindu widow's estate on remarriage in such a case. We are further of opinion that the proof of mere custom of remarriage would not be sufficient to involve forfeiture under the Hindu law, and that it would be necessary for the party claiming that the estate has been forfeited on account of remarriage to prove that there is a custom of such forfeiture in such a contingency."

The case has now been laid before this Bench for disposal in the light of the pronouncement of the Full Bench on the important question of law which arose and which was referred to it. It will be seen from the reply given by the Full Bench that if a Hindu widow remarries in accordance with the custom of her caste, and not because such marriage has been declared to be valid by the Hindu Widows' Remarriage Act (Act XV of 1856), she does not forfeit her first husband's estate, unless it is established that in spite of the validity of the marriage a forfeiture does occur under a custom of the caste. We have, therefore, to determine two important questions of fact; first, whether Mst. Kausilla was entitled to remarry after the death of her husband under a custom prevailing in the community of Umar Banyas, and secondly, if the first question is answered in the affirmative, whether, as pleaded by the defendant, in spite of the remarriage being valid she forfeited the

(1) (1932) I.L.R., 55 All., 24(60).

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estate of her first husband under a custom prevailing in her caste.

The question whether Mst. Kausilla could remarry according to the custom of her caste was not properly raised, nor decided. As already stated, the plaintiff made no reference in her plaint to her second marriage after the death of Lachhmi Narain. The written statement made no mention of the non-existence of the custom allowing remarriage of a widow in that caste. It merely averred that a widow who remarries forfeits the estate of her first husband. When the case was in its initial stages, it was admitted on behalf of the defendant that the remarriage of a widow was permissible in the community to which the parties belonged. Now, in view of the provisions of the Hindu Widows' Remarriage Act (Act XV of 1856), remarriage of a widow is permissible in the entire Hindu community, but it affects the right of the widow in her first husband's property. The statement made on behalf of the defendant above referred to goes no farther than to admit that a widow's remarriage is valid. It is silent on the further question whether the validity arises from the provisions of the Hindu Widows' Remarriage Act (Act XV of 1856) or from an ancient custom prevailing in that community wholly apart from the Act.

The practice of widow remarriage after 1856 in this community or in any other section of the Hindus may well be referable to the provisions of the Hindu Widows' Remarriage Act and would not necessarily be indicative of an ancient custom existing before the passing of that Act. Unless, therefore, it is shown that the present practice is in pursuance of an ancient custom and not under the Act, the marriage of a widow cannot be held to be under the custom of the caste. The earliest case of this Court, which has been followed in all later cases, laid down that "A widow belonging to a caste in which there is

not, and in 1856 was not, any obstacle, by law or custom, against the remarriage of widows, did not, by marrying again, forfeit her interest in the property left by her first husband, in consequence of the passing of Act XV of 1856." See *Har Saran Das* v. *Nandi* (1). It should be noted that the existence of the custom in 1856 has been stressed, in this case and in other cases, because the practice of Hindu widows remarrying after 1856 would not necessarily be in pursuance of a custom of the caste. Having regard to the pronouncement of the Full Bench, which has merely affirmed the view taken in the case quoted above, it is necessary to determine whether the validity of remarriage of a Hindu widow, where a question of forfeiture of the estate of her first husband is involved, arises from a pre-existing custom under which such remarriage is valid. The decision of the question whether forfeiture of her first husband's estate occurred by the operation of section 2 of Act XV of 1856 depends upon the answer to the question whether the marriage had the sanction of the custom of the caste as it was before that Act. If it had, then according to the Full Bench view section 2 does not apply and no forfeiture would occur on that ground. If it had not, then the marriage itself is valid in view of the provisions of Act XV of 1856, but forfeiture would occur under section 2 thereof.

In the case before us it is not admitted by the defendant that remarriage of widows belonging to the community of Umar Banyas is sanctioned by a custom which is ancient and has not come into existence since 1856. The plaintiff must establish the existence of such custom, if she is to escape the operation of section 2 of Act XV of 1856. It is possible for us to take the view that the plaintiff should have alleged and established such a custom; and she having omitted to do so, her suit should be dismissed. In view, however, of the imperfect pleadings which were laid before the lower

(1) (1889) I.L.R., 11 All., 330.

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court for which both parties were responsible, we are of opinion that an opportunity should be given to the plaintiff to establish the existence of the custom referred to. As already stated, if the plaintiff succeeds in establishing such a custom, the further question which has been raised by the defendant falls to be considered, namely whether one of the incidents of the custom of remarriage prevailing before 1856 is that a widow remarrying after the death of her first husband forfeits all rights in the estate of her first husband. Though the case went to trial on this issue, the evidence bearing on it is so meagre and vague that it is not desirable to base our decision on it. In ordinary circumstances we would not have ordered a retrial of this issue; but as an opportunity is being given to the plaintiff to establish the custom which she has to prove, it is more satisfactory that the defendant should also be allowed a fresh opportunity to establish the custom of forfeiture as alleged by him. Accordingly we remit the following issues, under order XLI, rule 25 of the Code of Civil Procedure, for trial by the lower court:

(1) Whether, according to ancient custom, a widow belonging to the community of Umar Banyas could contract a valid remarriage before the passing of the Hindu Widows' Remarriage Act (Act XV of 1856); and

(2) If the first issue is found in the affirmative, does such widow forfeit her right in the property of her first husband according to the custom prevailing in the said community before 1856?

The findings shall be returned in four months. Parties shall be at liberty to adduce evidence on both the above issues. On receipt of findings ten days shall be allowed for objections.

YOUNG and NIAMAT-ULLAH, JJ.:—By our order dated the 2nd of December, 1932, we remitted two issues to the lower court for findings before we could dispose of the appeal finally. The parties have filed a compromise in the court below, which sets out the

terms on which the parties have agreed to settle their differences. The compromise was duly verified before the learned Subordinate Judge. No objection has been taken to its validity by any of the parties concerned. Accordingly we pass a decree in terms of the compromise.

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FULL BENCH

Before Sir Shah Muhammad Sulaiman, Chief Justice, Mr. Justice Bennet and Mr. Justice Bajpai

RAJPALI KUNWAR (PLAINTIFF) *v.* SARJU RAI AND OTHERS (DEFENDANTS)*

1936

April, 15

Hindu Law of Inheritance (Amendment) Act (II of 1929), section 2—Applicability where the Hindu male died before passing of the Act—Sister's succession—Hindu law—Compromise between a Hindu widow and next reversioner under which he takes a part of the property absolutely for himself and his heirs—Family settlement—Interpretation of statutes —Preamble.

An agreement or compromise was entered into between a Hindu widow in possession of her husband's estate and three nearest reversioners who had brought a suit impugning a deed of gift executed by her; she was also claiming an absolute title under an alleged will. Under this agreement the donee gave up his rights under the deed of gift, and a part of the estate was put in immediate possession of the three reversioners as belonging to them and their heirs absolutely, and it was provided that the rest of the property would, after the widow's death, also belong to them absolutely:

Held that the agreement was not binding, either as a compromise or as a family arrangement, on the person who became entitled to succeed, as the actual next reversioner, on the death of the widow. If the two parties, namely the widow on the one side and the collaterals on the other, had both been claiming title to the estate and a right to immediate possession, it could then have been said that there was a *bona fide* dispute between the parties which could be settled under a family arrangement. As the reversioners were merely challenging the validity of the deed of gift and not claiming any imme-

*First Appeal No. 432 of 1931, from a decree of C. Deb Banerji, Subordinate Judge of Azamgarh, dated the 19th of June, 1931.