APPELLATE CIVIL.

Before Mr. Justice Broadway and Mr. Justice Abdul Raoof.

1920

July 14.

TIRATH RAM (DEFENDANT)—*Appellant,*

versus

Mussammat KAHAN DEVI (PLAINTIFF)—*Respondent.*

Civil Appeal No. 2928 of 1916.

Hindu Law—Mitakshara—*Succession*—Khatris—*sister or father's faher's son's daughter's son—Adoption not in* Dattaka *form—whether adopted son entitled to collateral succession—Will by widow—validity of—possessory title.*

Plaintiff claimed a house and some moveable property as heir to her deceased brother Harnam Das, son of Jai Ram, Plaintiff alleged also that she had got possession of the property on the death of *Mussammat* Ind Kaur, the widow of Harnam Das, and had been forcibly dispossessed by the defendant. The latter was the daughter's son of Ram Chand, brother of Jai Ram, and was adopted by his maternal grandfather. He also claimed under a will made by *Mussammat* Ind Kaur in his favour. It was found as a fact that the adoption of defendant was not made in the *Dattaka* form; also that the plaintiff never got peaceful and exclusive possession of the property after the death of *Mussammat* Ind Kaur.

Held, that the adoption of the defendant, not being in accordance with the *Dattaka* form, the latter was not entitled under the *Mitakshara* school of Hindu Law to succeed collaterally.

Jiwan Mal v. *Jamna Das* (1), followed.

Held also, that by Hindu Law a widow's powers of alienation are restricted to religious purposes, and the fact that there are no heirs capable of taking at her death does not affect these powers, and consequently the will of *Mussammat* Ind Kaur conferred no title on defendant.

The Collector of Masulipatam v. *Cavali Vencata Narrainapah* (2), and *Pandharinath Vishvanath* v. *Govind Shivram* (3), followed.

Alla Ditta v. *Gauhra* (4), distinguished.

Held further, that by *Mitakshara* law the plaintiff as a sister is not entitled to succeed against the defendant who cannot be said to be a total stranger, being the daughter's son of the deceased's uncle.

(1) 67 P. L. R. 1911.
(2) (1861) 8 Moo. I. A. 529 (551) P. C.
(3) (1907) I. L. R. 32 Bom. 59 (71).
(4) 3 P. R. 1914.

1920

TIRATH RAM
v.
Mst. KAHAN DEVI.

Shambhu Nath v. Mst. *Falli* (1), and Mayne's Hindu Law, 8th Edition, page 744, paragraph 534, followed.

Nanak Gir v. Mst. *Kishen Kaur* (2), distinguished.

Held, moreover, that defendant as a father's father's son's daughter's son is a *bandhu* and has a better title than the plaintiff.

Mulla's Hindu Law, 3rd Edition, pages 58 and 59, referred to, also *Abdul Hamid* v. *Sarbuland Khan* (3).

Held, finally, that the fact that there was a scramble for possession on the death of the widow *Mussammat* Ind Kaur and plaintiff as well as defendant put a lock on the door of the house is not sufficient to establish plaintiff's peaceful and exclusive possession, so as to entitle her to a decree for possession on the basis of her possessory title. In a suit on possessory title a plaintiff must prove more than what is necessary for him to do in a suit under the Specific Relief Act.

Abdul Hamid v. *Sarbuland Khan* (3), referred to.

Second appeal from the decree of Major J. Frizelle, District Judge, Lahore, dated the 23rd of August 1916, *varying that of* Lala *Maya Ram, Sub-Judge, 1st Class, Lahore, dated the 5th August* 1916, *decreeing the claim in part.*

TEK CHAND, for Appellant.

HARBHAJAN DAS, for Respondent.

The facts of the case are given in the judgment of the Court, delivered by—

ABDUL RAOOF, J.—This was a suit by a sister for the possession of the property of her childless brother on the death of the latter's widow. The facts of the case, which are either admitted or found, are as follows :—

One Nanak Chand had two sons, Jai Ram and Ram Chand. Jai Ram had a daughter, *Mussammat* Kahan Devi, plaintiff in the suit, and a son Harnam Das, deceased, whose property is in dispute. Harnam Das' widow was *Mussammat* Ind Kaur. Ram Chand had no son. He, therefore, appointed Tirath Ram, defendant, his daughter's son, as his heir. The parties belong to the caste of *Khatris*. The property in dispute was a house and certain moveables valued at Rs. 1,000. On the death of Harnam Das, *Mussammat* Ind Kaur admittedly got possession of the house and

(1) (1919) 52 Indian Cases 591. (2) 161 P. R. 1919.
(3) 78 P. R. 1902.

1920

TIRATH RAM v. *Mst.* KAHAN DEVI.

is said to have taken possession also of some moveable property valued as above mentioned. In her lifetime *Mussammat* Ind Kaur executed a will in favour of the defendant Tirath Ram. On the death of *Mussammat* Ind Kaur, the plaintiff, *Mussammat* Kahan Devi, according to the finding of the Lower Appellate Court, took possession of the house from which she was subsequently dispossessed by Tirath Ram, defendant. This gave rise to the present suit. The defendant claimed title to succeed as collateral on the ground of his being the adopted son of Ram Chand, the uncle of Harnam Das, as well under the will of *Mussammat* Ind Kaur, the widow. The plaintiff contested the validity of the adoption and the will both on facts and in law, and claimed to succeed to the property of Harnam Das on the ground of her being his sister and lawful heir. She also claimed right to recover possession of the property in dispute from the defendant on the ground of her possessory title of which she had been recently deprived by Tirath Ram. The adoption of Tirath Ram is found to have been made out by evidence, and its validity has also been found to be established according to custom. The authorities quoted by the Courts below fully support the decision on the question of the validity of the adoption. It has, however, been held that inasmuch as the adoption was not in the *Dattaka* form Tirath Ram was not entitled to succeed collaterally. The rule on the subject is thus stated in Rattigan's Digest of Customary Law, 8th Edition, page 73, paragraph 49 :—

"Nor, on the other hand, does the heir acquire a right to succeed to the collateral relatives of the person, who appoints him, where no formal adoption has taken place, inasmuch as relationship established between him and the appointer is a purely personal one."

The will by Ind Kaur has been found to confer no title on the defendant, as the widow had no power to make such a will. As to the plaintiff's right to succeed as the sister of Harnam Das in the absence of any other heir the Court held that according to law it was not established. On this last finding the suit was bound to fail, but the Lower Appellate Court held as follows :—

"But plaintiff's suit is based not merely on her claim to succeed as an heir but on the ground of possession, P. R. 78 of 1909, page 309

is cited as an authority to show that she is entitled to possession of the property as she was in possession of the property before she was dispossessed, unless defendant proves his better title. Defendant's own witnesses admit that plaintiff was in possession before she was forcibly dispossessed, and she is, I think, therefore entitled to possession of the house as decreed by the Lower Court, defendant not having proved his better title."

Her allegation that *Mussammat* Ind Kaur, widow of deceased Harnam Das, had left moveable property of the value of Rs. 1,000 was held not to have been established by evidence. She was, therefore, given a decree for possession of the house only. The defendant, Tirath Ram, has come up in second appeal to this Court, and the respondent, Kahan Devi, has filed cross-objections against the order of the Lower Appellate Court as to costs.

Mr. Tek Chand, the learned *Vakil*, for the appellant has contested the decision of the Lower Appellate Court both on the questions of law and fact. He has argued that his client was entitled to succeed collaterally as the parties belonged to the high caste of *Khatris*. He has also contended that *Mussammat* Ind Kaur had full right according to law to make a valid will in favour of the defendant-appellant. In order to make the ground clear for the decision of various questions argued before us it may be mentioned that whatever might have been the position taken up in the Courts below it has been frankly admitted in this Court by the learned *Vakils*, who have argued the case before us that the parties are governed by their personal law of the *Mitakshara* School. According to that law it cannot be said that the adoption of the defendant not being in accordance with the *Dattaka* form he is entitled to succeed collaterally as the adopted son of Ram Chand. *Jiwan Mal* v. *Jamna Das* (1) fully supports the decision of the Lower Appellate Court on this point. The decision of the Lower Appellate Court as to the power of *Mussammat* Ind Kaur to execute the will is also correct. An attempt was made to argue that inasmuch as there was no reversionary heir *Mussammat* Ind Kaur had acquired an absolute right for the property of Harnam Das and as such was entitled to make the will in favour of Tirath Ram, *Alla Ditta* v. *Gauhra* (2) is relied upon

(1) 67 P. L. R. 1911. (2) 3 P. R. 1914.

1920

TIRATH RAM v. *Mst.* KAHAN DEVI.

in support of this contention. The head note of the case runs thus :—

"S., the last male proprietor of the land in suit, died childless leaving a widow, who succeeded to his land. On her death her brother's son (defendant) obtained possession and claimed to hold it under a will in his favour by the widow. Plaintiffs, the proprietors of the *patti*, sued for possession claiming to be entitled to the property in the absence of collaterals of S., and that the will in favour of defendant was invalid. Held, that the *onus* of proving a right of succession by custom lay upon the plaintiffs and they had failed to discharge that *onus*, and that the entry in the village *Wajib-ul-Arz*, restricting a widow's power of alienation, was only inserted in the interests of collaterals and had no effect, where there were none."

At the end of the judgment the learned Judges, who decided the case, made the following pertinent observation :—

"Mr. Pestonji urges that the widow's estate is always a limited one. Quite so, but it is only limited for the benefit of reversioners, where there are none she is to all intents and purposes an absolute owner. Counsel referred us also to 2 P. R. (Rev.) of 1911 (Wazira *v.* Mangal), but we cannot find anything there which assists his contention. The fifth proposition laid down therein by the Financial Commissioner is against him. To sum up, we hold that the *onus* was upon the plaintiffs and they have not discharged it."

That was a case in which the parties relied upon custom and the plaintiffs failed to establish the custom relied upon by them. The decision in that case therefore cannot have any bearing upon the present case.

The rule of Hindu Law as to the powers of a Hindu widow are thus stated by Their Lordships of the Privy Council in the case of *The Collector of Masulipatam* v. *Cavalia Vencata Narrainapah* (1) *at page* 551 :—

"It is not merely for the protection of the material interests of her husband's relations that the fetter on the widow's power is imposed. Numberless authorities, from Manu downwards, may be cited to show that, according to the principles of Hindu Law, the proper state of every woman is one of tutelage ; that they always require protection and are never fit for independence. Sir Thomas Strange (see Strange on Hindu Law, volume I, page 242) cites the authority of Manu for the proposition that, if a woman has no other controller or protector, the King should control or protect her. Again, all the authorities concur in show-

(1) (1868) 8 Moo. I. Ap. 529 (551).

ing that according to the principles of Hindu Law, the life of a widow is to be one of ascetic privation (2 Colebrooke's Digest 459). Hence, probably, it gave her a power of disposition for religious, which it denied to her for other purposes These principles do not seem to be consistent with the doctrine that, on the failure of heirs, a widow becomes completely emancipated ; perfectly uncontrolled in the disposal of her property ; and free to squander her inherited wealth for the purposes of selfish enjoyment .....Their Lordships are of opinion that the restrictions on a Hindu widow's powers of alienation are inseparable from her estate, and that their existence does not depend on that of heirs capable of taking on her death."

In the case of *Pandharinath Vishvanath* v. *Govind Shivram* (1) this passage from the judgment of Their Lordships of the Privy Council is quoted at page 7 of the report and discussed with reference to the facts of that case. In our opinion, having regard to this rule of law it must be held that the will executed by *Mussammat* Ind Kaur conferred no title on Tirath Ram.

The decision of the Lower Appellate Court on the question of the plaintiff's right to succeed as the sister of Harnam Das also, in our opinion, is correct. In Mayne's Hindu Law, 8th Edition, page 744, paragraph 534, the rule is thus stated :—

"As regards the provinces which follow the *Mitakshara* both principle and authority seem also to exclude the sister."

The learned *Vakil* for respondent has, however, relied upon the headnote in the case of *Nanak Gir, Appellant* v. Mussammat *Kishen Kaur, etc., plaintiffs-respondents* (2) and has argued that under Hindu Law sisters can succeed as *bandhus*. A reference to the judgment in the case shows that it was never intended to lay down the rule so broadly as it is stated in the headnote. In that case there was a competition between an alleged *chela* and the sister of the last holder of the property in dispute. It was found as a fact that the defendant Nanak Gir was a total stranger and had failed to prove that he was a *chela* and as such entitled to the possession of the property. Having regard to the special circumstances of that case it was held that sisters had a right to succeed as against a total stranger.

(1) (1907) I. L. R. 32 Bom. 59 (71). (2) 161 P. R. 1919.

1920

TIRATH RAM v. Mst. KAHAN DEVI.

The general rule of law is laid down in the case of *Shambhu Nath* v. Mussammat *Ralli* (1). It was never intended to depart from the general rule as stated by Mayne in the paragraph above referred to. In the decision of this Court in the case of *Shambhu Nath* v. Mussammat *Ralli* (1) the law on the subject is thus stated :—

"The whole subject is ably discussed in Mayne on Hindu Law and Usage, 8th Edition, pages 724-753, where it is pointed out that as regards the provinces which follow the *Mitakshara* school both principle and authority seem to exclude the daughter (*sic* sister)."

The headnote in *Nanak Gir* v. Mst. *Kishen Kaur* (2) being inaccurate cannot, therefore, help the plaintiff. She is, therefore, not entitled to succeed against the defendant who cannot be said to be a total stranger being the daughter's son of Ram Chand, the uncle of Harnam Das.

The only question that now remains to be decided is whether the decision of the Lower Appellate Court granting a decree to the plaintiff on the ground of possession can be maintained. In this connection two questions have been argued on behalf of the defendant-appellant, namely :—

(1) that the plaintiff had never obtained possession of the nature and kind, which according to rulings would entitle her to a decree on the alleged possessory title,

(2) that the defendant has a better title as against the plaintiff being a *bandhu* under the *Mitakshara* law.

As regards the first question we have examined the record and the result of our investigation is that we find that the plaintiff gave no evidence as regards her possession after the death of *Mussammat* Ind Kaur. It appears that on the widow's death there was a scramble for possession. The plaintiff tried to acquire possession by putting her lock, the defendant also put his lock on the door of the house. The learned

(1) (1919) 52 Indian Cases 591 (2) 161 P. R. 1919.

1929

TIRATH RAM
v.
Mst. KAHAN DEVI.

District Judge has based his judgment upon the evidence of two of the defendant's witnesses, namely, Har Dayal and Sher Muhammad. We have scrutinized their evidence carefully and we find that it is not sufficient to establish plaintiff's peaceful and exclusive possession. Nothing beyond the putting of a lock by the plaintiff is proved by this evidence, on the other hand, the evidence of these witnesses goes to show that in spite of the lock of the plaintiff the defendant had succeeded in getting possession. The ruling in *Abdul Hamid* v. *Sarbuland Khan* (1) has been relied upon by the learned District Judge in support of his view that the plaintiff could be given a decree for possession on the basis of her possessory title. This was not a suit under section 9 of the Specific Relief Act. In a suit on possessory title a plaintiff ought to prove more than what is necessary for him to do in his suit under the Specific Relief Act. In the headnote in the case above cited the rule of law on the subject is thus stated :—

"Possession in law being a substantive right or interest which exists and has legal incidents and advantages apart from the true owner's title a person in possession of land without title has an interest in the property which is good against all the world except the true owner. Therefore, where a plaintiff has been forcibly dispossessed of immoveable property by a person having no title, he can sue for possession simply on the strength of the possession which he had before he was dispossessed, provided he sues within the twelve years' period allowed by Article 142 of the Limitation Act. In such a suit, unless defendant proves a title, plaintiff should succeed without being asked to prove his own title to ownership, and even if the defendant proves that he has no such title."

On the facts disclosed in evidence on the record in our opinion, the conclusion drawn by the Lower Appellate Court as to the possession of the plaintiff is not justified.

On the second question Mr. Tek Chand has argued that the defendant independently of his alleged right as the adopted son of Ram Chand or as a legatee under the will of *Mussammat* Ind Kaur has a better title as against the plaintiff as the daughter's son of Ram Chand, inasmuch as he is according to the authorities a

(1) 78 P. R. 1902, p. 309.

1920

TIRATH RAM
v.
Mst. KAHAN DEVI.

bandhu of Harnam Das, deceased. In support of this contention he has relied upon Mulla's Hindu Law, 3rd Edition, pages 58 and 59, where in the order of succession among *bandhus* at No. 7 father's father's son's daughter's son is mentioned as a *bandhu*. Now the defendant comes within this description. Harnam Das' father was Jai Ram, Jai Ram's father was Nanak Chand. Ram Chand was the son of Nanak Chand. The defendant is the daughter's son of Ram Chand. Therefore he comes within the description "father's father's son's daughter's son." Thus the defendant has a better title than the plaintiff. The ruling in *Abdul Hamid* v. *Sarbuland Khan* (1) instead of being against the defendant rather supports his claim, as he has succeeded in showing a better title than the plaintiff within the meaning of the rule laid down in that case.

In our opinion, therefore, the decision of the Lower Appellate Court granting the plaintiff a decree for possession on the ground of her recent possession cannot be supported. We, therefore, allow the appeal, set aside the decree of the Lower Appellate Court, and dismiss the suit of the plaintiff with costs in all Courts. The objection of the plaintiff necessarily fails and is dismissed with costs.

Appeal accepted.

---

(1) 73 P. R. 1902.