APPELLATE CIVIL.

Before Mr. Justice Scott-Smith and Mr. Justice Leslie Jones.

1920

June 1.

TANI AND OTHERS (DEFENDANTS)—*Appellants,*

versus

RIKHI RAM AND ANOTHER (PLAINTIFFS)—*Respondents.*

Civil Appeal No. 1176 of 1916.

Hindu Law—Mitakshara—*Succession*—*Brahmans of Tahsil Kharar, District Ambala*—*father's sistsr's sons or village proprietors*—*Limitation*—*presumption in favour of continuance of life*—onus *of proving death.*

Plaintiffs, the father's sister's sons of one Sardha, deceased, sued for possession of the latter's land which had been taken possession of by the village proprietors on the death of *Mussammat* Atri, the widow of Mula, father of Sardha. The deceased was a Brahman and the village proprietors (defendants) are Rajputs. The suit was instituted on the 5th May 1914 and the only evidence as to the date of *Mussammat* Atri's death was a report of the *Patwari* in September 1902 to the effect that she died in May 1902. The Lower Appellate Court held that the plaintiffs were heirs by Hindu Law and that the claim was within time. The defendants appealed to the High Court.

Held, that by the *Mitakshara* system of Hindu Law the father's sister's sons are heirs.

Tahaldai Kumari v. *Gaya Pershad* (1), and Mayne's Hindu Law, 8th Edition, Chapter XVI, page 704, and Trevelyan's Hindu Law, 2nd Edition, page 402, referred to.

Held also, that there is a presumption in favour of continuance of life and that in the absence of proof by the defendants that *Mussammat* Atri died before the 4th of May 1902 she must be presumed to have died after that date and the suit was consequently within time.

Ameer Ali and Woodroffe's Law of Evidence, 5th Ed., page 682, referred to.

The facts of the case are given in the judgment.

Second appeal from the decree of Lieutenant-Colonel B. O. Roe, District Judge, Ambala, dated the 7th March 1916, *reversing that of* Lala *Kashmiri Lal,*

(1) (1909) I. L. R. 37 Cal. 214.

1920

TANI
v.
RIKHI RAM.

Munsif, 1st Class, Ambala, dated the 20th November 1915, dismissing the plaintiff's claim.

DURGA DAS, for Appellants.

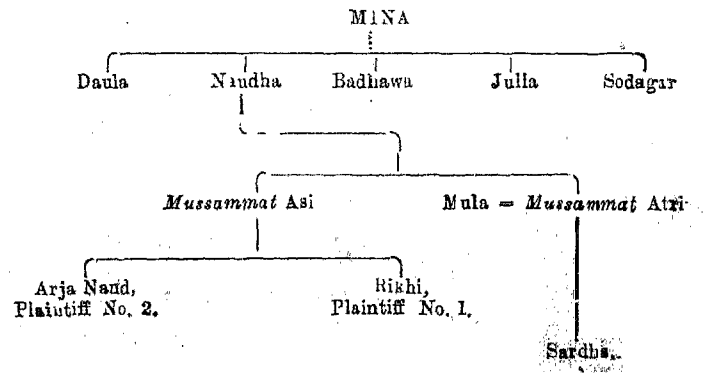
DEVI DIAL, for Respondents.

The judgment of the Court was delivered by—

SCOTT-SMITH, J.—In the suit out of which the present second appeal arises the plaintiffs-respondents claimed possession of certain land of which their maternal uncle's son Sardha was the last male owner. Upon Sardha's death the land was held by his mother, *Mussammat* Atri (see pedigree-table on page 7 of the paper book*), and on her death in May 1902 the village proprietors, represented by defendants-respondents, took possession thereof. The plaintiffs are Brahmans of Tahsil Kharar, District Ambala, and the Lower Appellate Court held that they were governed by Hindu Law under which the plaintiffs as *bandhus* of the last male owner were heirs in preference to the village proprietors.

*Printed below.

The trial Court held that the plaintiffs had not proved any special custom in their favour and that they were not heirs according to Hindu Law and accordingly dismissed their suit. The questions of limitation and *res judicata* were also raised by the defendants and decided adversely against them by both the lower Courts. The point of *res judicata* is not now raised but that of limitation is, and we shall deal with it later.



1920

TANI
v.
RIKHI RAM.

The first point urged by *Lala* Durga Das on behalf of the appellants is that there should be a remand for further enquiry as to whether the plaintiffs are governed by Hindu Law or by custom. He urges that, though Brahmans, they are agriculturists living in a village, and the initial presumption is that they follow the general custom applicable to agriculturists. No certificate for second appeal has been granted by the Lower Appellate Court and in the absence of such a certificate we do not think it is open to the appellants to urge that they are governed by custom. They are high caste Hindus living in Ambala and we do not think there is any initial presumption that they are governed by agricultural custom. No special custom had been proved, and the Lower Appellate Court was therefore correct in applying the Hindu Law. What *Lala* Durga Das wants us to do is to remand the case in order that his clients may have further opportunity of proving the existence of a custom governing the parties. In the absence of a certificate we hold that the question of custom cannot now he raised.

The next point raised by *Lala* Durga Das is that the plaintiffs, who are the father's sister's sons of the last male owner, are not heirs according to Hindu Law. There is, however, ample authority for holding that in places where the *Mitakshara* system of Hindu Law prevails the father's sister's sons are heirs. It is only necessary to refer in this connection to Mayne's Hindu Law, 8th Edition, Chapter XVI, where at page 704 is given a table which shows the *bandhus ex parte paterna*. Amongst these is the father's sister's son who is specially mentioned both in the *Daya Bhaga* and the *Mitakshara*. See also Hindu Law by Trevelyan, 2nd Edition, page 402, where the father's father's daughter's son, *i.e.*, father's sister's son, is shown as an heir. In the case reported as *Tahaldai Kumari* v. *Gaya Pershad* (1) it was held that in the Bengal Presidency under the interpretation of the *Mitakshara* Law a step-mother is not entitled to succeed to the estate of her step-son in preference to the father's sister's sons. We accordingly agree with the Lower Appellate Court that plaintiffs are heirs

(1) (1909) I. L. R. 37 Cal. 214.

1920

TANI
v.
RIKHI RAM.

and therefore entitled to the land in preference to the defendants proprietors in the village. It is not contended before us that the defendants are entitled to keep the land in accordance with the doctrine of reversion because, as is alleged, the land was gifted to Mina, the ancestor of Sardha, the last male owner, by the village proprietors. There remains the question of limitation which only affects Rikhi Ram, plaintiff, Arja Nand, his brother, being still a minor. After the death of Sardha the land was held by *Mussammat* Atri, his mother, who had the usual woman's life estate, and the plaintiffs had 12 years from the date of her death within which to bring the present suit. The suit was instituted on the 5th May 1914 and *Mussammat* Atri is said to have died in the month of May 1902. There is nothing to show on what date in May 1902 she died. If she died at any time after the 4th of May, the suit is obviously within time. The only evidence that she died in May 1902 is a report of the *Patwari* to that effect in the mutation proceedings, dated the 11th September 1902. Both parties rely upon this, the trial Court held that there was no presumption that she died before the 5th May 1902, and after carefully considering the point we are in agreement with this view. In the law of evidence by Ameer Ali and Woodroffe, 5th Edition, at page 682, in the commentary on section 108 the learned authors say : —

"These sections and the following section deal with certain instances of the presumption which exists in favour of continuance of immutability. It is on the principle of this presumption that a person shown to have been once living is, in the absence of proof that he has not been heard of within the last seven years, presumed to be still alive. * * * * * * The presumption is in favour of the continuance of life and the *onus* of proving the death lies on the party who asserts it."

In accordance with this principle we are of opinion that the *onus* of proving that *Mussammat* Atri died before the 5th of May 1902 lies upon the defendants who assert it. There is no proof of the exact date of death, and we therefore hold that the suit is within time.

The appeal fails and is dismissed with costs.

Appeal dismissed.