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It is well settled that there is no such obligation in the case of a voluntary payment by A of B's debt. Still less will the action lie when the money has been paid ..... against the will of the party for whose use it is supposed to have been paid."

On the whole I am of opinion that it would be unjust and contrary to the scheme and scope of Rule 89 to admit a claim for the refund of the payment made under that Rule after the person making the payment has had the benefit of the Rule. It is a matter for him to consider before making an application under Rule 89 whether under the circumstances it is to his benefit to have the sale set aside. But if he chooses to apply under that Rule, I do not see why the payment should not be treated as having been voluntarily made.

I concur in the order proposed by my Lord the Chief Justice.

Decree reversed.

J. G. R.

APPELLATE CIVIL.

Before Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Shah.

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GANPAT RAMA JOSHI, HAVIK, RAYAT, AND OTHERS (ORIGINAL DEFENDANTS 5 TO 7), APPELLANTS *v.* THE SECRETARY OF STATE FOR INDIA IN COUNCIL (ORIGINAL PLAINTIFF), RESPONDENT*.

Hindu Law—Widow—Failure of husband's heirs on death of widow—Escheat—Burden of proof—Crown to prove that property vested in the husband—Stridhan.

When the Secretary of State for India in Council seeks to recover possession of property as having escheated to the Crown on the death of a Hindu widow by reason of the failure of the deceased husband's heirs, it lies upon him to show that the property in suit had vested in the husband.

*First Appeal No. 104 of 1919.

Diwan Ran Bijai Bahadur Singh v. *Indurpal Singh*[1], relied on.

On the failure of her husband's heirs, the Stridhan of a widow would go ner blood relations in preference to the Crown.

Kanakammal v. *Ananthamathi Ammal*[2], approved of.

FIRST appeal against the decision of. V. M. Ferrers, District Judge of Kanara, in Suit No. 2 of 1918.

Suit to recover possession.

The plaintiff, the Secretary of State for India in Council, sued to recover possession of the houses in suit, alleging that they belonged to one Lobhi kom Ishwarappa, a Hindu widow, who built the houses with the aid of property left by her husband; that Lobhi died in 1907 leaving no relations on her husband's side; that defendant No. 2 (her brother) and defendants Nos. 3 and 4 (her sisters) passed a sale deed relating to the property to the deceased husband of defendant No. 1, who filed Suit No. 62 of 1913 in the Subordinate Judge's Court at Sirsi for possession and mesne profits against the defendants Nos. 2 to 7, which suit however was dismissed, the Subordinate Judge holding that neither party was entitled to the property but that the deceased having died intestate, the property ought to revert to Government by the law of escheat; that this decision was confirmed by the District Judge and an appeal to the High Court abated for want of prosecution; that in 1916 notice was issued through the Mamlatdar of Sirsi to the defendants calling upon them to give up possession to Government and that the defendants had not replied.

The District Judge held it proved on the evidence that the houses were built by the widow out of the money inherited from her husband and therefore belonged to the estate of her husband, and, the latter having died without leaving any heirs, the property

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must escheat to the Crown. He therefore allowed the plaintiff's claim.

The defendants Nos. 5 to 7 appealed to the High Court.

G. P. Murdeshwar, for the appellants :—I submit that the lower Court is wrong in holding that the houses built by Lobhi formed part of her husband's estate. The houses were built by Lobhi long after her husband's death. The site was given by her brother and the funds from which she built the houses were probably self-acquired. The evidence shows that her husband left some moveable property, but until it was affirmatively proved that the houses were built entirely out of the husband's property, the presumption is that they were her Stridhan : see *Diwan Ran Bijai Bahadur Singh* v. *Indarpal Singh*[1]. The plaintiff has not proved that Lobhi employed her husband's money. The defendants have led some evidence that the moneys employed by Lobhi were self-acquired.

My second submission is that the Stridhan property of a widow passes to her own blood relations in default of her husband's heirs : see West & Buhler's Digest, p. 540. This view has been accepted by the Madras High Court in *Kanakammal* v. *Ananthamathi Ammal*[2]. The defendants are in possession and can be ousted only by a person having a superior title. The Secretary of State has not proved his title. He was not a party to the previous litigation between Lobhi's brother's assignee and the present defendants and the matter is not *res judicata*.

S. S. Patkar, Government Pleader, for the respondent :—I submit that there is sufficient evidence to show that the houses were built out of funds left by

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Lobhi's husband. In the previous litigation also, the Courts had come to the same conclusion.

[MACLEOD, C. J. :—Then too the finding was based on a wrong presumption and not on evidence. The Privy Council case cited by the appellant here was not adverted to.]

But the Court had held that Lobhi's brother was not the heir. Assuming the property is Lobhi's Stridhan her blood relations cannot succeed as they are not named in the Shastras.

MACLEOD, C. J. :—The plaintiff, the Secretary of State for India in Council, filed this suit to recover possession of the plaint houses with mesne profits on the ground that they were the property of one Ishwarappa who died some twenty-five years ago leaving a widow. If the properties should be treated in the hands of the widow as the property of her husband, then on the death of the widow the properties would revert to her husband's heirs, and if her husband had no heirs, then no doubt the property would escheat to the Crown. But it is admitted that these houses were built by the widow after the husband's death. And it would only be in the event of the Court being able to hold with absolute certainty that these houses represented or were in substitution of a certain part of the husband's estate that they would revert on the widow's death to the husband's heirs.

The trial Judge held that these houses must be treated as belonging to the husband's estate, since on the evidence he came to the conclusion that the houses were built by the widow out of money inherited from her husband. But the evidence with regard to that is of an extremely flimsy character. It may be that Ishwarappa left a small amount of property. At the most it could not have been more than

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one or two buffaloes and Rs. 150 in cash. That is the evidence of Yellappa, the brother of Ishwarappa's widow Lobhi, who said that Ishwarappa left a house and garden which was sold by the widow. But I do not think that we can even rely upon the statement of that witness alone, or the evidence of the other witnesses for the plaintiff, for establishing this fact, that these houses which are now in dispute did represent property left by the husband though altered in form by the widow. It may very well have happened that the widow built these houses out of the income of the property left by her husband or out of money earned by herself, in which case the houses would be her Stridhan. The defendants in the suit are in possession, and the plaintiff suing to recover these houses as having escheated to the Crown on the death of Lobhi was bound to prove his title. I do not think he has proved that these houses were part of her husband's estate. We may refer to the decision of the Privy Council in *Diwan Ran Bijai Bahadur Singh* v. *Indarpal Singh*[1], in which it was held that "where a plaintiff sues as next reversionary heir to a Hindu husband after the death of his widow, it lies upon him to show that the property in suit had vested in the husband. There is no presumption of law to that effect resulting from the husband's estate at his death being shown to be considerable and the widow's title not being shown to have otherwise accrued."

Then it was argued that even if these houses were the widow's Stridhan, still the plaintiff was entitled to succeed. Undoubtedly the marriage being in an approved form, the widow's Stridhan in the first instance would go to the heirs of her husband. The question is whether on the failure of the husband's heirs the Stridhan should go to the blood relations of

[1] (1899) L. R. 26 I. A. 226.

the widow in preference to the Crown. The question was decided in favour of the widow's blood relations in *Kanakammal* v. *Ananthamathi Ammal*[1]. The learned Judges say at p. 295 :—"Passing to the second point, it is argued on behalf of the appellant that on failure of husband's Sapindas qualified to succeed the line of succession is exhausted, and the property escheats to the State. This is a doctrine contrary to the general spirit of Hindu law of inheritance, and one to which we should be loth to give effect. It is unsupported by any text to which our attention has been drawn. No ruling has been quoted on either side, but Dr. Bannerjee in his Hindu Law of Marriage and Stridhanam discusses the point, and comes to the conclusion that the widow's blood relations would, at any rate, succeed to the exclusion of the Crown. The same view is deducible from 'West and Buhler', page 544 : and we concur in it". It seems to me that there could be no valid reason why the widow's blood relations should not succeed on the failure of the husband's heirs. The blood relations would only be a more remote set of heirs who would be entitled to succeed on failure of the first line of succession. I agree, therefore, with the decision to which I have just referred, as no authority has been cited which is in contradiction to it. I think, therefore, that the learned Judge was wrong in coming to the conclusion that the plaintiff was entitled to succeed. I think the plaintiff has failed to prove his title to these houses. Therefore the appeal must succeed and the suit must be dismissed with costs throughout.

SHAH, J. :—I agree.

Appeal allowed.

J. G. R.

[1] (1912) 37 Mad. 293.