taken by the lower Courts. The point is no longer of any importance since we hold that the darkhast must be dismissed.

We therefore allow the appeal. The order of the trial Court will be restored. The appellant will get his costs in the Court of first appeal but he must pay his own costs and those of the respondent in this Court in accordance with the order passed on February 4, 1937.

Appeal allowed.

Y. V. D.

APPELLATE CIVIL.

Before Sir John Beaumont, Chief Justice, and Mr. Justice Sen.

TRAVADI CHANDULAL ASHARAM AND OTHERS (ORIGINAL PLAINTIFFS), APPELLANTS *v.* BAI KASHI WIDOW OF VYAS KESHAVLAL MOTIRAM (ORIGINAL DEFENDANT), RESPONDENT.*

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Hindu law—Widow—Widow married in unapproved form—Stridhan property—Failure of heirs of woman's father—Husband's heirs entitled to succeed.

Under Hindu law, the stridhan property of a woman married in unapproved form will, on failure of heirs of the woman's father, pass to her husband's heirs to the exclusion of the Crown.

Janglubai v. *Jetha Appaji*,[1] *Kanakammal* v. *Ananthamathi Ammal*[2] and *Ganpat Rama* v. *Secretary of State for India*,[3] relied on.

SECOND APPEAL against the decision of D. V. Yennemadi, District Judge of Broach and Panch Mahals at Godhra, reversing the decree passed by P. B. Patel, Joint Subordinate Judge at Godhra.

Suit to recover possession.

*Second Appeal No. 159 of 1936.

(1) (1908) 32 Bom. 409. (2) (1912) 37 Mad. 293.

(3) (1920) 45 Bom. 1106.

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The property in suit originally belonged to one Uttamaram. He died about 1887 leaving a widow Bai Moti and two daughters Bai Jivi and Ruxmani.

In 1898 Bai Moti made a gift of the property in favour of her daughter Ruxmani. Jivi died childless in the year 1915. In 1918 Ruxmani passed a deed of gift in respect of the property in suit in favour of her son Manilal. In the year 1921 Manilal executed a deed of gift in favour of Bai Moti. Ruxmani died in the year 1928. Bai Moti enjoyed the property till her death which took place in the year 1929.

In 1932, the plaintiffs as the *Pitrais* of Uttamaram sued to recover possession of suit property alleging that Bai Moti had left no heirs on her father's side to inherit the property.

The defendants resisted the suit on the ground that the marriage of Bai Moti having taken place in an unapproved form, the plaintiffs could not succeed to her *stridhan* property; that the property in suit had become the *stridhan* property of Bai Moti by virtue of the gift passed in her favour; and that she had made an oral will in favour of the defendants.

The Subordinate Judge held that Bai Moti was married in an unapproved form; that the property was her *stridhan* over which she had absolute rights; that on failure of her father's heirs, the plaintiffs as the heirs of her husband were entitled to succeed. He, therefore, decreed the suit observing as follows :—

"*Stridhan* of this kind would go to her father and his heirs but in this case there are none and Moti died intestate. But there are no such heirs of Moti's father and the question is whether the *stridhan* of a woman married in an unapproved form would go to her husband's heirs in failure of the father's heirs. There is no reported case on this point. There is one case in which the *stridhan* of a woman married in the approved form was allowed to devolve on her father's heirs on the failure of her husband's heirs (*vide* 37, Madras 293). Sir G. Bannerji has considered the question

whether paternal kinsmen succeed on failure of husband's relations at pages 445-446 of his treatise on the Hindu Law of Marriage and Stridhan (5th edition) and his opinion is that they are entitled to succeed. The present case is the corollary of the case considered at pages 445 and 446 stated above, and I think there is no reason why husband's heirs should not succeed when father's kinsmen fail to the *stridhan of a woman married in an unapproved form.*"

On appeal the District Judge held that the plaintiffs were not the heirs of deceased Bai Moti and, therefore, not entitled to succeed. He, therefore, dismissed the suit, observing as follows :—

"Though the property *originally* belonged to the husband of Bai Moti she had cleared out of the estate by passing a valid surrender of widow's estate. The property *became* absolute property of her daughter Ruxmani. When it came back under a *deed of gift* passed by Manilal to Bai Moti it became her *stridhan* property. When a marriage of a woman is in an unapproved form her *stridhan* property descends to her father and his heirs. The learned trial Judge considers that the *stridhan* property could descend to the heirs of the husband of a woman in the absence of her paternal relations. He considers that this conclusion is a corollary of the case reported at I.L.R. 37 Mad. 293. In that case Their Lordships approved of the view of Sir Gurudas Bannerji in his Treatise on the Hindu Law of Marriage and Stridhan that paternal kinsmen succeed on failure of husband's relations to *the stridhan of a woman.* This has been followed by the Bombay High Court in the case reported at I.L.R. 45 Bom. 1106. But both these cases were on the question of the succession to the *stridhan* of a woman who was married in an approved form. It is urged by the learned pleader for the appellant that in the present case the marriage of Bai Moti was in an unapproved form and that the ruling in the case of succession to the *stridhan* of a woman married in an approved form cannot apply. He relies on the observations of Chandavarkar J. in the case reported at I.L.R. 32 Bom. 409 at p. 412 and urges that Bai Moti continued to belong to her father's *gotra* according to the Hindu shastras because there is no giving away of the bride by the father to the bridegroom in marriage according to the blamed rites. It is clear from the ruling that the succession to the *stridhan* of a woman who is married according to the blamed rites is governed by the same principles as govern the succession to the Stridhan of a maiden. In default of the enumerated heirs the estate goes to the nearest relations of the parents of the deceased. There is no decided case which is on all fours with the present case. But the observations of Chandavarkar J. in I.L.R. 32 Bom. 409 which I have referred to above show that the agnatic relations of the husband of a woman who was married according to the blamed riets cannot in any event be her heirs."

The plaintiffs preferred a second appeal.

B. G. Thakor, for the appellants.

R. B. Kantawalla, for the respondent.

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BEAUMONT C. J. In this case the plaintiffs sued for possession of certain property which had belonged to a lady named Bai Moti. The defendant is the person in possession of the property. Both the lower Courts held that Bai Moti was married in unapproved form. That finding is challenged in this second appeal on the ground that there is no evidence to support it. The lower Courts relied on exhibits 59 and 60, which purported to be accounts showing that a price had been paid on the marriage of Bai Moti, and that would constitute marriage in unapproved form. The exhibits are not signed, and there is nothing on the face of them to show by whom they were written. The lower Courts both relied on the presumption arising under s. 90 of the Indian Evidence Act, but that section does not apply. It only provides that documents more than thirty years old coming from proper custody prove themselves, but it does not involve any presumption that the contents of the documents are true. I think, however, that the documents may be admitted in evidence under s. 32, sub-s. 2, of the Indian Evidence Act, on the ground that they appear to be accounts written by some clerk in the ordinary course of business, and seeing that they are more than seventy years old, it is obvious that the clerk who wrote them must be dead. I will assume, therefore, that the finding of the lower Courts as to marriage being in unapproved form is correct.

The question then arises who is entitled to Bai Moti's property. The general principle which is stated in Mulla's "Principles of Hindu Law", 8th Edition, page 145, is not disputed, and is in the following terms :—

"Where a woman dies without leaving any issue, her *stridhan* of every description (except *sulka*) goes, if her marriage took place in an approved form to her husband, and failing him, . . . to his heirs. But if the marriage took place in an unapproved form, it goes to her mother, then to her father, and then to her father's heirs."

As I have said, the accuracy of that proposition is not disputed. But the lower Courts have found as a fact that

there are no heirs of Bai Moti's father, and the question, therefore, is whether in that event her property goes to her husband's heirs, who are now represented by the plaintiffs. There seems to be no authority upon the point. Presumably if the husband's heirs do not take, the property must escheat to the Crown, and it certainly seems startling that a married woman's property should escheat to the Crown when she left a husband or heirs of her husband.

In *Kanakammal* v. *Ananthamathi Ammal*,[1] which was dealing with a marriage in approved form, it was held that on failure of the husband's *sapindas* the blood relations of the propositus were entitled to succeed to the exclusion of the Crown, and came in as a sort of second line of inheritance. That case was followed by this Court in *Ganpat Rama* v. *Secretary of State for India*.[2] Mr. Justice Macleod (as he then was) quoted with approval a passage from the judgment of the Madras High Court in which the learned Judges said (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."

It is argued that we should apply the analogy of that case to the case of an unapproved marriage and should hold that on failure of the heirs of a woman's father her husband's heirs should be taken as a second line of inheritance. In my opinion, that is the right view. As was pointed out by Mr. Justice Chandavarkar in *Janglubai* v. *Jetha Appaji*,[3] in a marriage in unapproved form the husband and wife become one and the husband, therefore, becomes the *sapinda* of the wife. It seems to follow logically that if the wife dies and no regular heirs to her estate can be found, the husband, as her *sapinda*, must

[1] (1912) 37 Mad. 293. [2] (1920) 45 Bom. 1106.

[3] (1908) 32 Bom. 409.

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be entitled to succeed by himself or his heirs. That was the view taken by the trial Judge, but in appeal the learned District Judge took the view that the plaintiffs could not succeed as this was a case of unapproved marriage. I think the decision of the trial Court is right. The appeal is, therefore, allowed and the plaintiffs' claim is decreed with costs throughout.

SEN J. I agree. The lower appellate Court, following *Janglubai* v. *Jetha Appaji*,[1] held that succession to the *stridhan* of a woman who is married according to the unapproved rites is governed by the same principles as govern succession to the *stridhan* of a maiden. This conclusion was apparently based on the fact that in the case of a marriage in an unapproved form the *gotra* of the bride is not changed, a fact to which Mr. Justice Chandavarkar has referred in the above decision. It seems to me that arguments based on the fact that the bride's *gotra* does not change in such marriage cannot carry much weight, for in the case of the marriage of a woman in an approved form there is a change of *gotra* and yet it is conceded that in certain contingencies, viz., on failure of her husband's heirs, her *stridhan* properties go to her blood relations, who must be persons of a different *gotra*. Therefore, succession in the case of *stridhan* property cannot always be confined to persons of the same *gotra*, and on that ground it cannot be said, as the appellate Judge has said, that the husband's heirs are not entitled to succeed "in any event". In *Janglubai* v. *Jetha Appaji*,[1] it is pointed out by Chandavarkar J. that whatever the form of marriage, the same *sapindaship* is shared by both the husband and the wife. That being so, the position of a woman married according to unapproved rites with regard to her *stridhan* property need not be assumed to be the same as that of a maiden, though the commentator of the original text in the Mitakshara, Mitramisra, has

[1] (1908) 32 Bom. 409.

named the same heirs after those enumerated in such text as having the right to inherit in the case of both a maiden and a woman married according to an unapproved form. The text and the commentary in my opinion do not contemplate the case in which there is a failure of the heirs described therein. In the Mitakshara the list of the enumerated heirs was certainly not exhaustive, as the commentary of Mitramisra shows. It is difficult to say, therefore, that the heirs named by Mitramisra were intended to constitute an exhaustive list. There is, therefore, in my opinion, considerable force in the line of reasoning adopted by the learned trial Judge. The present is a case of *asura* marriage, which is one of the recognised forms of marriage, and on principles of natural justice there does not seem to be any reason for excluding, in the case of the *stridhan* of a woman married by unapproved rites, the heirs of her husband, who are her *sapindas* by marriage, where there is a failure of the heirs enumerated in the text and those named in the commentary. There is no presumption, in my opinion, in such cases, that such persons are excluded from the heirship. There is no text specifically excluding all heirs who are not mentioned, and there does not appear to be any intention that on failure of the heirs that are mentioned, the property is to escheat to the Crown. In *Kanakammal* v. *Ananthamathi Ammal*[1] also there was an absence of text on the point which their Lordships had to decide, and the decision was actually based on observations to be found in Dr. Banerjee's book "Hindu Law of Marriage and Stridhan" and in West and Buhler. On the same principle, I think, we are entitled to hold that the view taken by the trial Court is correct and that the husband's heirs are entitled to succeed in the present case.

Appeal allowed.

J. G. R.

[1] (1912) 37 Mad. 293.