of the suit which must include a notice of the names of the persons who have been permitted to represent others, so that the persons interested may have an opportunity of knowing who have been selected to represent them. Now in the present case no such thing was done. In the first place the Court did not give permission to any definitely named persons among those interested to represent the rest; and in the second place the notice issued by the Court did not show who the persons were that had been selected to represent the remaining persons interested. That being so, we think that the persons interested in the result of the suit who are necessary parties have not been properly made parties to it, and that the suit must fail by reason of defect of parties. In this view of the case, it is not necessary to consider the remaining points raised in the case. The result is that the decrees of the Courts below will be reversed, and the suit dismissed for defect of parties, with costs in all the Courts.

1890

KALI KANTA SURMA v. GOURI PROSAD SURMA BARDEURI.

A. A. C.

Appeal allowed and suit dismissed.

Before Mr. Justice Macpherson and Mr. Justice Banerjee.

HURI DOYAL SINGH SARMANA AND OTHERS (PLAINTIFFS) *v.* GRISH CHUNDER MUKERJEE AND OTHERS (DEFENDANTS).*

1890 *June* 27.

Hindu law—Stridhan—Stridhan inherited by daughter from mother—Preferential heirs on death of daughter.

Stridhan inherited by a daughter from her mother passes on the daughter's death to the person who would be the next heir to the mother's *stridhan*. Where *B* inherited *stridhan* from *A*, her mother, it was held to pass on the death of *B* to the sons of *A* in preference to the children of *B*.

THE only question material to this report was as to the succession on the death of a daughter to *stridhan* property which had been inherited by the daughter from her mother. For this question the facts and arguments are sufficiently stated in the judgment.

* Appeal from appellate decree No. 1622 of 1889, against the decree of J. Whitmore, Esq., Judge of Beerbhoom, dated the 10th of June 1889, reversing the decree of Babu Rajendro Kumar Bose, Subordinate Judge of Beerbhoom, dated the 7th of December 1888.

1890

HURI DOYAL SINGH SARMANA v. GRISH CHUNDER MUKERJEE.

Baboo *Mohini Mohun Roy* and Baboo *Baikant Nath Das* for the appellants.

Baboo *Golap Chunder Sirkar*, Baboo *Chunder Kanto Sen*, and Baboo *Akshaya Kumar Banerjee* for the respondents.

The judgment of the Court (MACPHERSON and BANERJEE, JJ.) was as follows:—

This was a suit for money due on a bond. The plaintiffs alleged that money lent really belonged to them, but the bond was taken in the name of their mother: and they further alleged that they were the only heirs to their mother. The defendants denied having borrowed any money on the bond, and they also urged that as the bond, on the face of it, showed that the money belonged to the plaintiffs' mother, and as she left a daughter who had male issue, the plaintiffs were not entitled to the money, and that their claim was further untenable by reason of their not having obtained any certificate under Act XXVII of 1860.

The first Court found that the plaintiffs' allegations were proved, and it gave the plaintiffs a decree; but the lower Appellate Court, whilst affirming the first Court's finding that the loan was proved, held that the money was not shown to have belonged to the plaintiffs; and as the plaintiffs had a sister who died in 1292, leaving male issue, the plaintiffs were not entitled to claim the money (which might have been obtained by their mother at the time of her marriage) as heirs to their mother; and it accordingly dismissed their suit. In second appeal it was contended before us that the Court of Appeal below was wrong in throwing on the plaintiffs the burden of proving that the money in question had not been received by their mother at her marriage, when it ought to have held that it was for the defendants to make out that the money was that particular description of *stridhan* to which the daughter is the heir in preference to sons. The point was also raised, though not taken in the grounds of appeal, that upon the facts found, the plaintiffs were entitled to claim the money by right of inheritance, to whatever class of *stridhan* it might belong. As this is a pure question of law, and the facts found are sufficient for its disposal, we allowed it to be raised and argued.

There is no force in the first contention of the appellants. It being found that the money was their mother's property, and the

only right upon which they sought to recover it in that view of the case being their right by inheritance, it was clearly for the plaintiffs to make out that the property was that description of *stridhan* to which they were entitled in preference to other heirs.

On the second point, however, we think the appellants ought to succeed. The facts found by the lower Appellate Court are that the money in question belonged to the plaintiffs' mother as her *stridhan*, but it was not shown of what description it was; that the plaintiffs' mother died leaving two sons (the plaintiffs) and a daughter; and that the daughter died in 1292, that is about two years before the institution of this suit, leaving two sons and two daughters. Upon these facts, it is contended for the appellants that, assuming the money in question to have been their mother's *stridhan* of that description which the daughter inherits in preference to the son, their sister took it not as *stridhan*, but as inherited property, with the same limited interest that a female heir takes in property inherited from a male owner; and that on her death it passed not to her heirs, but to the next heirs to her mother's *stridhan*, that is to the plaintiffs, who thus became entitled to the money when this suit was brought. Let us examine how far these propositions are correct according to the Hindu law of the Bengal school which governs this case.

They are fairly deducible from the Dayabhaga, Chapter IV, Section I, and Chapter XI, Section II, paragraphs 30 and 31. From the discussion in the Dayabhaga, Chapter IV, Section I, as to what constitutes *stridhan*, it is abundantly clear that, though the author does not admit any definite limit as to the number of kinds of *stridhan*, yet the only kinds of property that he has expressly considered to be *stridhan* are those obtained from relations by gift [which has been held to include a testamentary gift as well as one *inter vivos*, see *Judoonath Sircar* v. *Busunt Coomar Roy* (1)], and there is not the slightest indication that inherited property in the author's opinion would rank as *stridhan*. In Chapter XI, Section II, paragraphs 30, 31 of the same treatise, when treating of the daughter's succession to the father's property, the author says that the principle laid down in the case of the widow (Chapter XI, Section I, s. 56), that on her death the inheritance passes to

(1) 11 B. L. R., 286; 19 W. R., 264.

1890

HURI DOYAL SINGH SARMANA v. GRISH CHUNDER MUKERJEE.

the next heir of the last full owner, the husband, 'is applicable generally to the case of a woman's succession by inheritance.' It is true that this is said in a chapter of the work relating to succession to the property of a male, but the language is quite general. The passage runs thus:—" Or the word ' wife ' (in the text above quoted, Section I, s. 56) is employed with a general import; and it implies that the rule must be understood as applicable generally to the case of a woman's succession by inheritance" (paragraph 31). The correct inference from this is that in the author's opinion, whenever a woman succeeds to property by inheritance, the property on her death passes not to her heir, but to the next heir of the last full owner who would have succeeded in the first instance if she had not been in existence.

The Dayatathwa of Raghunandan is not very explicit on the point, but property obtained by gift from relations is all that appears to be considered as *stridhan* (see Golap Chandra Sarkar's Translation, Chapter IX).

The Dayakrama Sangraha of Srikrishna Tarkalankara, which is the next authority in point of time and importance in the Bengal school, is clearly in favor of the appellants' contention. In Chapter II, Section II, paragraph 12, Srikrishna says that heritable wealth does not form a woman's peculiar property, and in Chapter II, Section III, paragraph 6, in dealing with succession to the separate property of a woman when received by her at her nuptials (which is the description of *stridhan* under which the money in dispute comes according to the respondents), he observes:— " Here, however, on the death of a maiden daughter or of one affianced in whom the succession had vested, and who having been subsequently married is ascertained to have been barren, or on the death of a widow who has not given birth to a son, the succession to the property which had passed from the mother to her daughters would devolve next on the sisters having and likely to have male issue, and in their default on the barren and widowed daughters; and not on the husband of such daughter above mentioned in whom the succession had vested, for the right of the husband is in relation to the 'woman's separate property,' and wealth which has in this way passed from one to another can no longer be considered as the ' woman's separate property.' This

1890

HURI DOYAL SINGH SARMANA v. GRISH CHUNDER MUKERJEE.

must be understood." This clearly shows that on the death of a daughter who inherited her mother's *stridhan*, the property passes not to her heirs, but to the next heirs of her mother. The learned vakeel for the respondents argued that the use of the words 'ascertained to have been barren,' and 'who has not given birth to a son,' in the above passage indicates that the other heirs of the mother can come in only if the daughter who succeeded first dies leaving no male issue. We do not consider this argument sound. The author expressly declares that wealth which has passed by inheritance can no longer be considered as *stridhan*, and he clearly indicates that the person entitled to take it on the demise of any female who took it by inheritance is not the heir of such female, but is the next heir of the female whose *stridhan* it was, that is, the next heir of the last full owner; and the respondents' contention is clearly inconsistent with this view. It seems to us most probable that the words in question were used by the author to make it clear that the exclusion of the husband in the example given was due to the fact of the property inherited by the wife from her mother not being ranked as her *stridhan;* for if the wife left a son, the husband would be excluded even if the property devolved as her *stridhan*.

Words somewhat similar to those referred to above, used by the same author in his commentary on a passage of the Dayabhaga relating to the daughter's succession to her father's property, were relied upon in the case of *Tinumani Dasi* v. *Nibaran Chandra Gupta* (1) as warranting an inference similar to the one sought to be drawn by the respondents' vakil, but the Full Bench overruled that contention, and held that the proper import of those words was such as we have indicated above. The Court observed :—" It is exceedingly probable that the annotator suggested the addition of the words 'without leaving issue,' thinking that the language of the author without these words would be open to the objection of want of precision. Because, on the death of a maiden daughter (in whom succession has vested, and who had been afterwards married) leaving issue, the estate would 'not become the property of her husband or other heirs,' even if the law regulating the

(1) I. L. R., 9 Calc., 154.

1890

HURI DOYAL SINGH SARMANA v. GRISH CHUNDER MUKERJEE.

succession to a woman's peculiar property were applicable, because the husband would succeed only in default of issue."

Great reliance was placed on the side of the respondents upon the following passage in Colebrooke's Digest:—"A daughter may at pleasure give away to any person whomsoever the exclusive property of her mother which has devolved on her; after her death, the daughter's son-in-law and the rest shall obtain that which has not been aliened. It should not be argued that a daughter is only permitted to enjoy for life the peculiar property of a woman which she has inherited like the estate left by a man to which she has succeeded. That has not been asserted by Jimutavahana: and no reasoning supports it." (Coleb. Dig., V, 515; Commentary, Mad. Ed., Vol. II, p. 628). No authority is cited in support of this proposition, and it rests entirely on the authority of Jagannath. Now speaking of him, his translator, Colebrooke, says:—"We have not here the same veneration for him when he speaks in his own name or steps beyond the strict limits of a compiler's duty" (Vyavastha Darpana, 2nd Ed., Pref. XXVI, note). Jagannath's opinion, though no doubt entitled to great weight as that of a learned lawyer of vast and noted erudition, would not in itself be sufficient authority for any proposition of law, especially when, as in the present instance, it is opposed to the doctrine expressly laid down by Srikrishna in the Dayakrama Sangraha, and evidently deducible from the Dayabhaga.

Of later text writers, Macnaghten is in favour of the appellants' contention so far as it asserts that *stridhan* inherited by a female ceases to be ranked as such (Principles of Hindu Law, p. 38). As regards the rule of succession applicable to such property, he seems to have fallen into an error which has been pointed out by Mitter, J., in the case of *Bhoobun Mohun Banerjee* v. *Muddon Mohun Singh* (1), to which we shall presently refer. The opinion of Shama Charan is clearly in favor of the appellants—see Vyavastha Darpana, Vyavastha 487, 2nd Ed., p. 730.

The appellants' position seems to us to be equally clear upon the authority of the decided cases bearing on the point. In *Pran Kissen Singh* v. *Bhagwatee* (2), it was decided that a daughter who

(1) 1 Shome's Rep., 3.

(2) 1 Sel. Rep., 4.

1890

HURI DOYAL SINGH SARMANA *v.* GRISH CHUNDER MUKERJEE.

takes by inheritance from her mother takes a qualified estate, and on the daughter's death the heir of the mother succeeds.

In the case of *Bhoobun Mohun Banerjee* v. *Muddon Mohun Singh* (1), Mitter, J., observed :—" That *stridhan* inherited by a woman does not become her *stridhan* is clear—see Dayakrama Sangraha, Chapter II, Section II, paragraph 12, and Section III, paragraph 6; Macnaghten's Hindu Law, p. 38; *Pran Kissen Singh* v. *Bhugwatee* (2), *Srinath Gangopadhya* v. *Sarbamangala Debi* (3), and *Sengamalathammal* v. *Valyudamudali* (4). But it has been remarked by Mr. Macnaghten in the passage referred to above that upon the death of the woman who inherits to a *stridhan* property, it passes to her heirs, meaning evidently to persons who would inherit to her properties other than *stridhan*. With the greatest deference to that learned author it seems to me that this remark is founded upon some misconception of the provisions of the Hindu law upon the subject. According to Hindu law a woman can have only two kinds of properties, *viz*., (1) *stridhan*, and (2) inherited properties. As to the first class, there is an exhaustive enumeration of the heirs, and as regards properties inherited from a man, it goes after her death to the heirs of the last owner, and it seems to me that the same rule holds good also as regards *stridhan* property inherited by a woman, *i.e.*, upon her death it goes to the heirs of the last owner. Dayakrama Sangraha, Chapter II, Section III, paragraph 6, already referred to, clearly establishes this proposition.

" It seems to me that the same rule is laid down in the Dayabhaga, Chapter XI, Section II, paragraph 30. The chapter in question, it is true, mainly deals with rules of succession to properties left by a deceased male owner, but the paragraph referred to above appears to me to lay down a rule applicable generally to succession by women whether to the properties of a man or to *stridhan* of a woman. If it were not so there would be no provision in the Dayabhaga relating to succession to property inherited by a woman from a female ancestress who held it as *stridhan*. I do not think that this is probable. Having regard to this circumstance, and having regard to the language of the paragraph in question which

(1) 1 Shome's Rep., 3.
(2) 1 Sel. Rep., 4.
(3) 2 B. L. R., A. C., 144.
(4) 3 Mad. H. C., 312.

1890

HURI DOYAL SINGH SARMANA v. GRISH CHUNDER MUKERJEE.

is very general, it seems to me that the rule there laid down is also applicable to *stridhan* property inherited by a woman." It is true that the question for decision in that case was whether a daughter inheriting her mother's *stridhan* takes it absolutely or with limited power of alienation; but the texts of the Dayabhaga, which were held applicable to the case, and on the application of which the alienation in question was set aside, are the very texts that contain the rule of succession relied upon by the appellants.

In *Prankissen Laha* v. *Noyanmoney Dassee* (1), Wilson, J., held that what a daughter inherits from a mother does not become her *stridhan*.

Upon a consideration of the foregoing authorities we think it established that *stridhan* inherited by a daughter from a mother passes on the daughter's death to the next heir to the mother's *stridhan*.

There remains now the only question whether on their sister's death the plaintiffs or their sister's children were the nearest heirs to their mother's *stridhan*. On this point there is no room for doubt. Whatever description of *stridhan* of their mother the money in dispute may have been, the plaintiffs as her sons are her heirs in preference to their sister's children, that is, her daughter's children. In fact, in the order of succession to *stridhan*, the position of the sons in the most unfavorable case for them is inferior only to that of the daughters—see Dayabhaga, Chapter IV, Section II. That being so, at the date of the institution of this suit, the plaintiffs were the only persons entitled to the money in question.

We ought to notice here two other points urged for the respondents. It was contended that the plaintiffs were not entitled to maintain this suit as they had not obtained any certificate under Act XXVII of 1860. This objection, though taken in the first Court, does not appear to have been urged before the Court of Appeal below. Moreover, considering the defence of the defendants, which was a denial of the debt altogether, it seems to us that the case comes under the exception in section 2 of Act XXVII of 1860, under which the Court may dispense with the necessity of a

(1) I. L. R., 5 Calc., 222.

certificate. It was also urged that interest ought not to be allowed at the stipulated rate after the due date mentioned in the bond. We do not think this argument is valid. The bond provides that interest should run at the rate stipulated until the money is actually paid off.

1890

HURI DOYAL SINGH SARMANA v. GRISH CHUNDER MUKERJEE.

The result is that this appeal will be decreed, and the decree of the lower Appellate Court will be reversed and that of the first Court restored with costs in this Court and the Court below.

J. V. W. *Appeal allowed.*

ORIGINAL CIVIL.

Before Sir W. Comer Petheram, Knight, Chief Justice, Mr. Justice Prinsep, and Mr. Justice Pigot.

COHEN (DEFENDANT) *v.* SUTHERLAND (PLAINTIFF).*

1890 *July* 1.

Contract—Specific performance—Vendor and purchaser—Approval of title by purchaser's solicitor—Evidence Act (I of 1872), ss. 91, 92.

In a suit for specific performance of a contract for the sale of a house, the entire contract being contained in letters which provided that entry was to be given to the purchaser by a fixed date, and that the title deeds were to be sent to the purchaser's solicitors, and "on approval of the same the purchase money to be paid prompt."—

Held, that the carrying out of the contract was in no way conditional upon the approval of the solicitors, but that their approval was a condition precedent to the prompt payment of the purchase money without waiting for a conveyance, and that the title was to be investigated and approved in the ordinary way.

This case distinguished from *Sreegopal Mullick* v. *Ram Churn Nusker* (1).

THIS was a suit for the specific performance of an agreement for the purchase by the defendant from the plaintiff of a house and premises No. 5, Chowringhee Lane, in the town of Calcutta, and the furniture and effects therein for the sum of Rs. 54,000. The agreement was embodied and contained in certain letters dated the 18th and 19th November 1888, and written respectively by the defendant to one F. Siddons, the plaintiff's agent, and by Messrs.

* Original Civil Appeal No. 7 of 1890, against the decree of Mr. Justice Wilson, dated the 7th of February 1890.

(1) I. L. R., 8 Calc., 856.