

(1958) 03 BOM CK 0012
In the Bombay High Court
Case No : Second Appeal No. 175 of 1952

Badrinarayan Gangadhar and Another APPELLANT
Vs
Nagarmal Hanumandas and Others RESPONDENT

Date of Decision : 18-03-1958

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 100
Evidence Act, 1872 — Section 35, 48
Hindu Law of Inheritance (Amendment) Act, 1929 — Section 1(2)

Citation : AIR 1959 Bom 241 : (1958) 60 BOMLR 1022 : (1959) ILR (Bom) 77

Hon'ble Judges : J.R. Mudholkar, J

Bench : Single Bench

Advocate : K.G. Chendke, for the Appellant; R.R. Dandige, for the Respondent

Final Decision : Allowed

Judgement

1. This is a plaintiffs' second appeal from the dismissal of their suit for possession of a house and certain fields. The following genealogical tree will be of assistance in appreciating the contentions of the parties:

LACHIRAM | ----- | | Daulatram Jagram | |
----- | | | | Sitaram Sampatram Bhagwan
Kunanibal Sheobal | | | ----- Nathu Badrinaraya | | | (plff.in)
Hanuman Ramgopal Ramnarayan Baijnath (plff.in C.S. 15.A/47 (deft.2) (deft.3)
(deft.4) C.S. 62-A/47)

The appellants, who were plaintiffs in the Court below instituted two suits for possession of the aforesaid house and fields against Sampatram, the respondent No. 1, and the other four respondents.

2. It is common ground that this property was the separate property of Bhagwan, the brother of the mother of Badrinarayan, appellant no. 1, and of Kunanibai, the grand-mother of the appellant no. 2, Bajinath. After the death of Bhagwan, this property went into the possession of the respondents. According

to the appellant,s they are the preferential heirs of Bhagwan and are thus entitled to this property.

3. It is common ground that the parties to the suits who are Agarwals have migrated to the Yeotmal District from the Hissar District in the Punjab. According to the respondents, females are excluded from inheritance by the customary law of Punjab which is applicable to the parties. Therefore, according to them, the appellants' suit must fail. Several other contentions were taken by the respondents but it is not necessary to refer to them in the view I take about this particular contention.

4. The lower appellate Court has found that the parties are governed by the customary law of Punjab in the matter of inheritance and that under that law female-heirs such as daughters and sisters are excluded from inheritance. This finding is challenged before me on behalf of the appellants by Shri Chendke. The finding however is one of fact and cannot be allowed to be challenged in second appeal. Shri Chendke however argues that the only instances that were established by the evidence of the witnesses examined on behalf of the respondents were of the exclusion of daughters from inheritance and that evidenced cannot be regarded as legally sufficient to establish a custom about the exclusion of sisters from inheritance. As has been rightly pointed out by the learned Judge of the lower appellate Court, where a daughter who is a very much nearer heir than a sister is shown to have been excluded by custom it must follow inferentially that a sister who is remoter heir is also excluded by the custom. A part from the evidence which was adduced in this case, the evidence which was adduced in this case, the learned Judge has also placed reliance on a statement of law on the point in Chapter II of Rustomji's Treatise of Customary Law in Punjab, and on Mr. T.P. Ellis, in his Notes on Punjab customs. Neither of these books is available in the Library. But I may refer to the customary law of Hissar in Punjab, the whole of which has been set out in an Exhibit which has been filed in this case. It is a certified copy of Riwayat-i-aam prepared by the Settlement Officer in the year 1913 and therefore it may be of very high evidentiary value. In this book the Settlement Officer has answered questions with regard to several customs prevailing amongst the various tribes in Hissar District on all matters of importance. At several places he has stated that in all the tribes of the District a daughter never inherits her father's estate. In answer to another question he has stated that sisters and their sons can in no case inherit their brother's or uncles' estates. As has been pointed out by the learned Judge of the lower appellate Court, their Lordships of the Privy Council have attached very high value to such compilations and the learned Judge referred to the decisions in AIR 1935 132 (Privy Council) and Vaishno Datti v. Rameshri, ILR Lah 86: AIR 1928 PC 294 in this connection. In the latter case Sir John Wallis J. who delivered the judgment of the Court has observed:

"It has been held by this Board that the Riwayat-i-aam is a public record, prepared by a public officer in the discharge of his duties and under Government rules;

that it is clearly admissible in evidence to prove the facts entered therein subject to rebuttal and that the statements therein may be accepted even if unsupported by instances. Beg v. Allah Ditta, 44 Ind App 89: AIR 1916 PC 129. Further, Manuals of Customary law in accordance with the Riwaj-i-aam have been issued by authority for each district and in their Lordships' opinion stand on much the same footing as the Riwaj-i-aam itself as evidence of custom."

Reference may be made to the decision of their Lordships in AIR 1941 21 (Privy Council) , where also their Lordships has held that answers in Wilson's Manual on questions of Customary Law in Punjab were clearly admissible u/s 48 of the Evidence Act, being the opinion as to the existence of a general custom or right of persons who would be likely to know of its existence, if it existed. For all there reasons I agree with the learned Judge of the lower appellate Court that the respondents have established the custom pleaded by them.

5. Shri Chendke then argued that since a custom must be in derogation of the general law, it could exclude only that portion of the general law which was in force when the custom was recognised and that as sisters were first included as heirs by the Hindu Law of Inheritance (Amendment) Act of 1929, the provisions of that law are not excluded by the custom. Sub-section (2) of section 1 of that Act runs thus:

"It extends to the whole of India but it applies only to persons who, but for the passing of this Act, would have been subject to the law of Mitakshara in respect of the provisions herein enacted, and it applies to such persons in respect only of the property of males, etc."

Where, as here, it has been held that the parties are governed in the matter of inheritance by the Customary Law, the Mitakshara is excluded and therefore the provisions of the Amending Act would be wholly inapplicable. The point relied by Shri Chendke is thus without substance.

6. Accordingly, I uphold the decree of the lower appellate Court and dismiss the appeal with costs.

7. Appeal dismissed.