

(1955) 11 P&H CK 0008
In the Punjab And Haryana At Chandigarh
Case No : Second Appeal No. 398 of 1952

Gur Pershad and Others

APPELLANT

Vs

Mst. Asharfi Devi
 Mst. Asharfi Devi Vs Gur Pershad
and Others

RESPONDENT

Date of Decision : 22-11-1955

Acts Referred:

Evidence Act, 1872 — Section 115

Citation : AIR 1956 P&H 143

Hon'ble Judges : Khosla, J

Bench : Single Bench

Advocate : B.R. Tuli, for the Appellant; H.L. Sibal, for the Respondent

Final Decision : Dismissed

Judgement

Khosla, J.—The dispute in this appeal relates to the property of one Munshi Ram who died in 1932 leaving a widow. Asharfi Devi, who is the plaintiff in the case, and two children both of whom were minors. One of these was a boy Sadhu Ram and the other a girl Lachhmi. The contest now is between Asharfi Devi and third degree collaterals of Munshi Ram.

2. After Munshi Ram's death, his sister Muni was appointed guardian of the minors. The property in suit was inherited by Sadhu Ram but he died on 7-12-1938. The property thereupon went to Lachhmi although, according to Hindu Law, Sadhu Ram's mother Asharfi Devi was the next heir. Lachhmi died in 1945 while she was still a minor and therefore while the property was still in possession of her guardian, who now was Jagan Nath, because Munshi Ram's sister had in the meantime died, the collaterals applied to the Guardianship Court for possession of the property left by Lachhmi. The Court directed them to file a civil suit.

The collaterals thereupon brought a suit against the Punjab Government and also impleadea the guardian. Asharfi Devi applied to be made a party in this case

because she wanted to defend the suit and claim possession of the property herself. Her prayer was rejected and she was therefore not made a party. The suit of the collaterals was decreed on 1-8-1950.

The Asharfi Devi on 23-4-1951 brought the present suit for a declaration that she was the next heir after Sadhu Bam and Lachhmi and was therefore entitled to succeed to the property in preference to the collaterals. The collaterals resisted the suit and pleaded that Asharfi Devi had married after Sadhu Ram's death and further pleaded that she had abandoned her rights to succeed to Sadhu Bam because she had allowed Lachhmi to succeed. The suit was decreed by the trial Court and this decision was upheld on appeal by the learned Senior Subordinate Judge.

3. Two points were raised before me by Mr. Tuli. He contended in the first place, (and this is his more important point), that Asharfi Devi had abandoned her rights because she did not claim the land on Sadhu Ram's death. This abandonment amounted to her virtual death so far as succession to the property in dispute was concerned,

On her abandonment, the next heir Lachhmi succeeded to the property, and now that Lachhmi has died, Asharfi Devi cannot revive her lost claim. Were this a case of abandonment, the argument would certainly hold good and Asharfi Devi would not be entitled to claim the property. But there was no abandonment by Asharfi Devi at any time. Abandonment is a positive voluntary act.

The inactivity or the passive attitude of a person cannot be interpreted as an act of abandonment. The silence or inactivity of a person may in certain cases invoke the doctrine of estoppel but that will arise under wholly different circumstances. In the present case there is no question of estoppel because the failure of Asharfi Devi to claim the land after Sadhu Ram's death did not in any way affect the position of the collaterals. Her silence did not act to their detriment and they were no worse off than before.

Therefore this is clearly not a case of estoppel. Indeed Mr. Tuli conceded that he did not rely on the doctrine of estoppel. He contended only that abandonment may be inferred from the omission or failure of a person to assert his rights. As far as I know the inactivity or the passive attitude of a person has never in law been interpreted as an act of abandonment. Abandonment is a positive act. A man must expressly say that he gives up his right. If he remains quiet, it cannot be said that he is forsaking his title to property or his interest in any other matter.

Mr. Tuli relied upon a decision of the Supreme Court in -- *Natvarlal Punjabhai and Another Vs. Dadubhai Manubhai and Others*, . In that case, however, there was a positive express act of abandonment which took the shape of a deed of surrender executed by a Hindu widow and Mukherjea J. observed that such an act amounted to the complete effacement of the widow's right as heir. He remarked--

"The presumptive reversioner has got no interest in the property during the life-time of the widow. He has a mere chance of succession which may not materialise at all. He can succeed to the property at any particular time only if the widow dies at that very moment. The whole doctrine of surrender is based upon this analogy or legal fiction of the widow's death.

The widow's estate is an interposed limitation or obstruction which prevents or impedes the course of succession in favour of the heirs of her husband. It is open to the widow by a voluntary act of her own to remove this obstruction and efface herself from the husband's estate altogether. If she does that, the consequence is the same as if she died a natural death and the next heirs of her husband then living step in at once under the ordinary law of inheritance."

4. The law is stated quite clearly in this Judgment and it is only a voluntary act of abandonment which amounts to the self-effacement of the widow as heir. In this case there was no voluntary act and no express abandonment by Asharfi Devi. If after the death of Sadhu Ram she allowed Lachhmi to take possession of the property, she cannot be presumed to have given up her own rights.

Lachhmi must be considered to be in possession either as a licensee or at the most as a trespasser and if she had remained in adverse possession for a period of more than twelve years, it might have been considered that Asharfi Devi had lost her rights. As soon as the collaterals brought a suit for possession, she wanted to contest their right and applied to the Court to be made a party. This application was probably made within the period of twelve years.

Learned counsel for the respondent says that he has in his possession a copy of the application made by the Asharfi Devi and this copy shows that it was presented to the Court on 2-12-1949 and this date was less than twelve years after the death of Sadhu Ram when succession opened out.

But I am not prepared to treat Lachhmi as a trespasser and the question of adverse possession was not raised and in my view it does not arise in the case. It is clear that Asharfi Devi succeeded to Sadhu Ram and after Lachhmi's death the property reverts to the last male owner. Who in this case was Sadhu Ram, and from him it goes to Asharfi Devi. Since no abandonment has been proved, Asharfi Devi is entitled to succeed to Sadhu Ram.

5. The second point raised by the learned counsel for the appellants was that Asharfi Devi had married after the death of Sadhu Ram and therefore she was not entitled to succeed to him, The finding of the lower appellate Court on this point is extremely vague and indefinite. An (sic) the defendants that Asharfi Devi had married by karewa twice.

I have been led through the entire evidence in the case and on the face of this evidence it cannot be held that Asharfi Devi's second or third marriage has been proved. Asharfi Devi is now living with a man, Harphul, from whom she has had two children. She denies that she is married to him. Indeed when questioned,

she said that she did not know who was the father of her two younger children who were born after Munshi Ram's death.

The defendants relied upon the evidence of an official of the Rationing Department who stated that Harphul had applied for a ration card and in his application he had mentioned that Asharfi Devi was his wife, but Asharfi Devi was not questioned on this point and she denies that she is Harphul's wife.

In order to deprive a widow of her rights, her second marriage must be proved in clear terms, In this case there is no clear proof of marriage with Harphul and therefore it cannot be held that Asharfi Devi has lost her rights.

6. Asharfi Devi's suit was rightly decreed and I dismiss the appeal with costs.