
(1971) 01 AHC CK 0001
In the Allahabad High Court
Case No : Sp. A. No. 507 of 1964

Lurkhur

APPELLANT

Vs

Jhuri and Others

RESPONDENT

Date of Decision : 20-01-1971

Acts Referred:

Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950 — Section 172(2), 174

Citation : (1972) 42 AWR 315

Hon'ble Judges : S.N. Singh, J; R.B. Misra, J

Bench : Division Bench

Advocate : V.K.S. Chaudhary, for the Appellant; R.P. Singh, for the Respondent

Final Decision : Allowed

Judgement

R.B. Misra, J.—This special appeal is directed against a decision of a learned Single Judge dismissing the Appellants petition Under Article 226 of the Constitution.

2. The dispute relates to agricultural plots Nos. 227 and 33. In the basic year these plots were entered in the names of Smt. Mahadeiya wife of Ghura and of Lurkhur son of Sawab and in the remarks column there was a note appended that Mst. Mahadeiya had died and the names of her heirs were to be entered. Ram Adhar and Jhuri (Respondents Nos. 2 and 1 respectively) filed objections alleging that they were the heirs of Smt. Mahadeiya, being the sons of Ghura. They also set up a will alleged to have been executed by Ghura on 15th March, 1917. Lurkhur, the Appellant, on the other hand claimed himself to be the heir and alleged that Jhuri and Ram Adhar were not the sons of Ghura. He alleged that Ghura in fact died issueless and in his life time his wife Smt. Mahadeiya had married one Ram Ratan Lohar of Rasoolpur; that after Ram Ratan's death Smt. Mahadeiya remarried Deo Lohar of Chaura; and that Jhuri and Ram Adhar are the sons of Smt. Mahadeiya not from Ghura but from her other husbands. The Consolidation Officer dismissed the objections of Jhuri and Ram Adhar, who went up in appeal but the appeal was also dismissed by the Asstt. Settlement Officer

(Consolidation). Jhuri and Ram Adhar, therefore, went up in revision before the Dy. Director of Consolidation, who allowed the revision application and set aside the order passed by the Asstt. Settlement Officer (Consolidation) on the finding that Smt. Mahadeiya could not succeed Ghura on account of her re-marriage but she became a tenant in her own right by estoppel and acquiescence. Lurkhur Appellant thereupon filed a petition Under Article 226 of the Constitution, which was dismissed by a learned Single Judge of this Court on 30th April, 1964, giving rise to the present special appeal.

3. Sri V.K.S. Chaudhary, appearing for the Appellant, has raised a number of contentions. His first contention is that the plots in question are admittedly fixed rate tenancy so, after the death of Ghura, the devolution would be governed not by the UP Tenancy Act but by personal law, which in this case would be the Hindu Law.

4. It is the common case of the parties that Ghura died long before the date of vesting and therefore, on Ghura's death his widow Smt. Mahadeiya inherited the widow's estate. After the death of Mahadeiya subsequent to the date of vesting the succession would be governed by the provisions of Section 172(2) of the UP ZA and LR Act. Section 172(2), so far as is material for our purpose, reads thus:

Where a bhumidhar or sirdar who has before the date of vesting inherited an interest in any holding as widow, widow of a male lineal descendant in the male line of descent, mother, daughter, father's mother, son's daughter, sister or half-sister being the daughter of the same father as the deceased--

(a) dies and such bhumidhar or sirdar was on the date immediately before the said date an intermediary of the land comprised in the holding, or held the holding as fixed rate tenant, or an ex-proprietary or occupancy tenant in Avadh, or as a tenant on special terms in Avadh, and

(i) she was in accordance with the personal law applicable to her entitled to a life estate only in the holding, the holding shall devolve upon the nearest surviving heir, such heir being ascertained in accordance with the provisions of Section 171 of the last male intermediary or tenant aforesaid; and if

(ii)... ..

As said above, Smt. Mahadeiya had inherited the property from her husband Ghura long before the date of vesting and as a widow she had only a limited estate, usually called the widow's estate. So both the conditions contemplated by Sub-section (2) of Section 172, UP ZA and LR Act are satisfied and the succession in this case would be governed by Section 171 and not by Section 174 of the UP ZA and LR Act. Section 174 could be attracted only if Smt. Mahadeiya had held the property of her husband absolutely. That, however, is not the position. Under the Hindu Law Smt. Mahadeiya was entitled only to a widow's estate and as such, she had only a life estate. Now, if Section 171 governs the succession, as it should, in this case, Jhuri and Ram Adhar could not

be the heirs.

5. Sri R.P. Singh, appearing for the contesting Respondents, however, relied on a judgment of the Civil Judge dated 8th September, 1958 passed in an appeal preferred by Smt. Mahadeiya against Lurkhur, where the learned Civil Judge had held that Smt. Mahadeiya was not the wife of Ghura Lohar and as such, was not entitled to succeed him. That judgment, however, is of no avail in view of the clear and categorical admission of Lurkhur in proceedings before the Consolidation Authorities that Smt. Mahadeiya was the widow of Ghura. His only contention was that after the death of Ghura Smt. Mahadeiya had re-married. The judgment of the learned Civil Judge is only evidence; but no amount of evidence can be looked into in the absence of any pleading to that effect. We have to decide the case on the basis of the pleadings of the parties and Sri R.P. Singh cannot be allowed to argue contrary to his pleadings.

6. The learned Counsel also contended that Section 172(2) contemplates that Smt. Mahadeiya should have also remained a widow of Ghura on the date of her death and without it the section could not be attracted. We are afraid this contention cannot be accepted for a moment. What Section 172(2) contemplates is that Smt. Mahadeiya should have inherited as a widow and not that she should have died as a widow. If she inherited as a widow of Ghura before the date of vesting and had only a life estate under the personal law applicable to her, the requirements of Section 172(2) are fully satisfied. Even assuming for the sake of argument that Smt. Mahadeiya should be a widow on the date of her death also, she was in fact a widow of Ghura. She might be the wife of Ram Ratan Lohar or of Deo Lohar, but so far as Ghura was concerned, Smt. Mahadeiya would still be his widow. There is, therefore, no escape from the conclusion that after the death of Smt. Mahadeiya, it is Section 171 and not Section 174, of the UP ZA and LR Act which will govern the succession.

7. Sri V.K.S. Chaudhary next contended that even if Smt. Mahadeiya had re-married after Ghura's death, she would not lose her right in the property because there is a custom of re-marriage in the community of Lohars and she would not lose her right as a result of re-marriage unless it was proved by the other side that there was a custom of forfeiture also on remarriage, to support of his contention the learned Counsel placed reliance on Mt. Jileba Vs. Mt. Parmesra, and Bhola Umar v. Mst. Kausilla AIR 1932 All. 617 wherein it was held that a custom of remarriage does not carry with it, as a legal incident thereof, a further custom of forfeiture upon remarriage. If anybody claims that a widow on remarrying under the custom forfeits her previous husband's estate, it must be proved as a matter of custom.

8. The contention of Sri Chaudhry that there was a custom of re-marriage had not been pleaded by him and in the absence of any such pleading it would not be possible for us to allow him to argue this point. He further sought to argue that it has been held in various decisions of the various Courts in India that as a custom of re-marriage is prevalent in the community of Lohars, therefore, the Court can

take judicial notice of this custom. We find ourselves unable to accept this contention. Custom cannot be presumed in a particular community in a particular region. It has to be specifically pleaded and proved by cogent evidence. In the absence of any such pleading, the learned Counsel cannot be permitted to urge this point.

9. Sri Chaudhry next contended that the Dy. Director of Consolidation had assumed that the possession of Smt. Mahadeiya being without any right would be taken to be the possession as a trespasser and she prescribed her title by prescription on account of her continuous possession without any title and on that assumption the Deputy Director held that Section 174 of the UP ZA and LR Act would govern the succession and the same reasoning has been accepted by the learned Single Judge. According to him this is not warranted by law.

10. We find considerable force in this contention. To start with, Smt. Mahadeiya came in possession as a widow of Ghura and she had only a widow's estate. Sometime thereafter she re-married but her possession continued. It is true that after re-marriage she was not entitled to remain in possession, but she did continue. But such continuous possession could not clothe Smt. Mahadeiya with a higher right than that of a widow's estate.

11. Sri Chaudhry cited AIR 1933 92 (Oudh) , where a Division Bench of the Oudh Chief Court laid down thus:

A title acquired u/s 28 through adverse possession by a widow, who claims and holds a widow's estate, inures to the estate of her deceased husband and it descends upon her death accordingly.

Where, therefore, a Hindu widow remains in possession of her first husband's property even after her remarriage for more than 12 years, the mere fact of re-marriage in the absence of any assertion of absolute ownership or change in the manner of her possession cannot enlarge her estate into an absolute one. She thereby acquires title only to a widow's estate which inures to the estate of her deceased husband and would, on her death, descend to his reversioner.

To the same effect is the decision in Mt. Lajwanti v. Safa Chand AIR 1924 SC 121. Sri R.P. Singh was, however, not able to cite any case to the contrary.

12. Lastly, Sri Chaudhry contended that the DDC as well as the learned Single Judge have erred in holding that Smt. Mahadeiya acquired absolute right by estoppel and acquiescence. No plea of estoppel and acquiescence had been taken and the Deputy Director had carved out a new case for the contesting Respondents which was never taken by them. Even on merits we find that this plea is not tenable. Merely because the name of Smt. Mahadeiya was entered in the papers for some time, it will not create estoppel. In order to make out a case for estoppel, something more was required to be proved. That has not been done and this finding cannot, therefore, stand.

13. From what has been said above it is obvious that the learned Single Judge

has erred in applying Section 174 of the UP ZA and LR Act to the facts of the present case. We also do not agree with the finding of the DDC, as confirmed by the learned Single Judge, that Smt. Mahadeiya acquired rights by estoppel and acquiescence.

14. For the reasons given above the Special Appeal must succeed. Accordingly we allow the appeal, set aside the order of [he learned Single Judge and quash the order of the DDG dated 26-11-1963. In the circumstances of the case, however, the parties shall bear their own costs.