
(1963) 08 GAU CK 0009
In the Gauhati High Court
Case No : Second Appeal No. 182 of 1961

Mt. Chabu Priya Dasya and others	Vs	APPELLANT
Roma Kanta Rai and others		RESPONDENT

Date of Decision : 31-08-1963

Acts Referred:

Hindu Succession Act, 1956 — Section 14, 2

Citation : AIR 1964 Guw 106

Hon'ble Judges : C. Sanjeevarao Naidu, J

Bench : Single Bench

Advocate : S.C. Bordoloi, for the Appellant; D.K. Sarma, for the Respondent

Final Decision : Allowed

Judgement

C.S. Nayudu, J.—The defendants 1 and 2 are the appellants in this second appeal which is directed against the judgment and decree of the Additional District Judge. Nowgong, confirming on appeal the decree and Judgment of the Additional Subordinate Judge, Gauhati, who decreed the plaintiffs' suit as prayed for.

2. The plaintiffs claimed in the suit a declaration of their title to the suit property which comprised of the land, described in the schedule of the plaint, and for possession of the same.

3. The facts of the case leading to the filing of this appeal may be briefly noticed. One Biram, who was the owner of the plaint schedule and other properties, died in or about the year 1924. He had six sons--Bhogiram, Ratheram, Dhanaram, Bangshiram, Roma and Arun. Of these, Dhanaram predeceased Biram, so that there were only five sons left at the time of Biram's death in whom the property vested. Thereafter Bhogiram died in 1931 leaving a widow, the first defendant, and a son Umesh, who died unmarried in or about the year 1950. Ratheram the second son. died in or about the year 1934 leaving a widow, who figures as the second defendant, and a daughter jamuna, who subsequently died. Bangshiram,

the fourth of the sons of Biram, died without issue, and his share, according to the Dayabhaga law of succession applicable to the case, devolved on his surviving brothers Roma and Arun, who figure as plaintiffs 1 and 2 in these proceedings. The second plaintiff Arun died subsequent to the institution of the present suit leaving a widow Sukani and a son Debendra, who had been impleaded as parties, and who figure as plaintiffs 2 (Kha) and 2 (Ka), respectively. The dispute in these proceedings relate to the properties that fell to the share of Bhogiram and Ratheram. It is not disputed that the share of Bhogiram vested in Umesh, his son, and that on his death it devolved upon and became vested in the first defendant, his mother. It is also not disputed that Ratheram's property on his death devolved upon the second defendant as his widow.

4. The main plea of the plaintiffs is that the first defendant, the widow of Bhogiram and the mother of Umesh, forfeited her rights of succession to the property of Umesh, her son, by reason of her unchastity, and that the share of Ratheram, which vested in the second defendant, was also forfeited by reason of her having remarried. On these allegations the plaintiffs claimed that they, as the uncles of Umesh, the last male holder in regard to the property that vested in the first defendant, and as the brothers of Ratheram in regard to the property that vested in the widow of Ratheram, the second defendant, were entitled to the property. There were allegations in the plaint of dispossession by defendants 1 and 2 on the ground that the plaintiffs were in possession previously, and that they had been dispossessed by these defendants.

5. The suit was contested by the defendants 1 and 2, who disputed the allegations in the plaint. The first defendant claimed that she was never unchaste and the second defendant claiming that she was not remarried. They also claimed that as the properties vested in them lawfully as the legal heirs of Umesh and Ratheram, respectively, they could not be dispossessed by the present plaintiffs who had no claim to the same. They also claimed that they had been in possession ever since the properties vested in them and that the suit was not maintainable.

6. The trial court decreed the suit holding that the first defendant became unchaste and, therefore, forfeited her right to the property of her son Umesh, and that the second defendant had taken a second husband and was also, therefore, divested of the property of her former husband, and hence, he decreed the suit. This decision was confirmed by the learned Additional District Judge on appeal on the same grounds, and hence the present second appeal.

7. Two points arise for determination in this second appeal. Firstly, whether the defendant did in fact become unchaste, and if so, whether she in consequence, forfeited the estate that vested in her as the heir of her son Umesh on the latter's death in or about 1950. Secondly, whether the second defendant entered into a second marriage after the death of her husband Ratheram, and whether in consequence thereof she had forfeited her rights to her husband's estate by

reason of such re-marriage.

8. On the first point, I have been taken through the evidence in the case and I am not satisfied that there is any definite proof of unchastity at all in the case. It is conceded by the learned Counsel for the Respondents that there is no direct evidence. Even the trial Judge felt that the evidence was more or less balanced and yet he made a finding that the first defendant had become unchaste. A charge of unchastity is a very serious one and casts a slur on the character of the woman concerned, and such a charge requires close and careful scrutiny and must be established by unambiguous and clear evidence, of which there is none in this case. Such charges are easily made but difficult to prove, and in this case, as already pointed out, the same had not been proved. I am convinced that the finding reached by the trial Judge, which has been without much discussion, confirmed by the lower appellate court, cannot stand the test of scrutiny, applying the correct standards of proof in such cases. In my opinion, if it could be regarded as a finding of unchastity at all, which itself is doubtful, it must be regarded as perverse, and calls for interference in the interests of justice.

9. It is contended by Mr. Bordoloi, the learned Counsel for the appellants, that apart from the fact that there was no proof of unchastity, even assuming that such a finding could be regarded as established by evidence, that would not disentitle the first defendant from inheriting the property of her son Umesh. In support of this proposition he urged two grounds firstly, that under the text of the Dayabhaga law, unchastity is not a specific bar to inheritance, and, secondly, that even if the text of Katyayana on which reliance is placed, as translated and interpreted by Colebrooke could be regarded as containing a bar, that bar certainly would not apply to the case of all other Hindu females inheriting as heirs to other persons and not to their husbands.

10. As regards the first point, it would be useful to refer to the text of Katyayana as set out by Colebrooke in his book at page 180.

But the wife must only enjoy her husband's estate after his demise. She is not entitled to make a gift, mortgage, or sale of it. Thus Katyayana says, "Let the childless widow, preserving unsullied the bed of her lord and abiding with her venerable protector, enjoy with moderation the property until her death. After her let the heirs take it."

11. The contention of the appellants is that this text merely contains an advice to the widow, when enjoying her husband's property and if she is child-less, to be faithful to her lord and abide with her venerable protector and enjoy with moderation the property, until she dies. If the interpretation sought to be placed on this text by Mr. Sarma, the learned Counsel for the respondents, is to be accepted, then failure to comply with any one of the conditions in the text would disentitle the widow to inherit, namely not only unchastity, but also, not abiding by her venerable protector, and not enjoying the property with moderation. I see no bar in this text to a widow's right to inherit to her husband's property.

However, this text appears to have been interpreted by some decisions of the Calcutta High Court to mean that so far as the unchastity of a Hindu female is concerned, that would disentitle her to inherit. Reference need be made to the cases of *Smt. Rajabala Dasi v. Shyama Charan Banerjee*, 22 Cal W.N. 566 : (A.I.R. 1919 Cal. 1049) and *Trailokyanath v. Radhasundari Debi*, 23 Cal. W.N. 970 : (A.I.R. 1920 Cal. 297).

On the facts the former case has no application to the instant case, as in that case there was a definite finding that the woman who figured as plaintiff became unchaste before the succession opened and the Court refused to grant her a declaration that a previous compromise decree was not binding on her. In the latter case, the plaintiff claiming to be a purchaser from an unchaste widow who was actually in his keeping, sued for possession and it was held that as the Hindu female had become unchaste she could not have inherited the property. The concurrent finding of unchastity of the Courts below was not challenged. This case has also, therefore, no application to the facts of the instant case. But if this decision should be construed as laying down a general proposition of law that under the Dayabhaga School of Hindu Law, a mother guilty of unchastity is precluded from inheriting the property of her son I would respectfully differ from the view taken therein. But whether the subsequent unchastity would have the effect of divesting the property has not been discussed in these decisions, as the question did not arise for decision.

The correct position of the law, in my opinion, is, that once the property vests in the widow, there will be no question of divesting her of the property so vested, by reason of her subsequent unchastity. The reason is obvious. If such should be the case, the reversioner of the widow who was to succeed to the estate of the last male holder on the death of the widow, would find this as a convenient expedient and may, to gain his own ends, place temptations in her way and successfully induce her to become unchaste instead of acting as her protector. Such a situation could not have been in the contemplation of any law which conforms to normal standards. Any doubts on the point have been set at rest by the Privy Council decision in the case of *Moniram Kolita v. Kerry Kolutany*, 7 Ind App 115 (PC), which laid down that

under the Hindu Law as administered in the Bengal School, a widow who has once inherited the estate of her deceased husband, is not liable to forfeit that estate by reason of her unchastity.

12. Here we are not really concerned with the inheritance of a widow to her husband's property. In the case of the first defendant she inherited the property of her son Umesh. In this connection, reference need be made to page 194 of Colebrooke's book, where the following passage occurs.

Of a son dying childless and leaving no widow, the mother shall take the estate; and, the mother also being dead, the father's mother shall take the heritage. Of a deceased son, who leaves neither wife nor male issue, the mother must be

considered as heiress....

There is nothing in this text which lays down that the mother's right to inherit her son's property is in any way affected on grounds of her chastity nor that it is dependant on her good behaviour. The objection to a wife, who becomes unchaste during the life time of the husband, inheriting her husband's property on his death, arises out of the circumstance that a wife should be allowed to succeed to her husband only if she had been true and faithful to his memory and had kept his bed unsullied. Such considerations are out of place in considering a woman's right of succession to other heirs, such as sons. I am, therefore, clearly of opinion that apart from any question of the finding of proof of unchastity, assuming that there was some such proof, or that it could be held that the first defendant had in fact become unchaste she cannot be held to have been disentitled to inherit to the property of her son.

13. To summarise:

(1) An unchaste wife may be disentitled to inherit her husband's property.

(2) Once a widow inherits her husband's property and the property is vested in her, there can be no question of her being divested of the property on grounds of subsequent unchastity.

(3) The principle in (1) above has no application to the right of a Hindu female heir to inherit the estate of persons other than her husband which right is in no way affected by reason of her proved unchastity.

14. In this connection reference would have to be made to S. 14 of the Hindu Succession Act, which lays down as follows :

14. (1) Any property possessed by a female Hindu, whether acquired before or after the commencement of this Act, shall, be held by her as full owner thereof and not as a limited owner.* * * * *

It is clear from this section that two conditions would require to be established, namely, (1) that a female Hindu should have acquired the property either before or after the commencement of the Act and (2) that she should be in possession of the property, at least on the date the Act came into force. In this connection reference may be made to the Supreme Court decision in the case of Gummalapura Taggina Matada Kotturuswami Vs. Setra Veeravva and Others, .

In the case before us, the essential question for consideration is as to how the words "any property possessed by a female Hindu, whether acquired before or after the commencement of this Act" in S. 14 of the Act should be interpreted. Section 14 refers to property which was either acquired before or after the commencement of the Act and that such property should be possessed by a female Hindu. Reference to property acquired before the commencement of the Act certainly makes the provisions of the section retrospective, but even in such a case the property must be possessed by a female Hindu at the time the Act

came into force, in order to make the provisions of the section applicable.

In the instant case, the property claimed by the two widows, defendants 1 and 2, had been acquired by them before the commencement of the Act, and they were certainly in possession of the property, there being no proof to the contrary, ever since they became entitled to the same. In other words, they were possessed of the property at the time the Act came into force. Such being the case, the limited estate which they had in the property prior to the coming into force of the Act, developed into a full estate and they must be deemed to have become full owners thereof, and this provision in the Act in my opinion, is a complete answer to the claim of the plaintiffs in this case.

15. As regards the specific plea put forward in regard to the second defendant, namely that she got re-married and, therefore, lost her rights in her husband's property, the evidence does not disclose that any re-marriage had, in fact, been gone through. Both the courts below seem to observe that she had taken a second husband. Before a plea of re marriage could be regarded as established, there must be legal proof that a valid second marriage had taken place and that the second defendant had, in fact and in law, got married to another person Such proof is totally lacking in this case, and both the courts below surprisingly enough, contended themselves with observing that the second defendant took a second husband, without any proof of a valid marriage having taken place. This finding again on the facts is totally perverse and receives no support whatsoever on the evidence in the case, and must, therefore, be set aside in the interests of justice.

16 The point raised by Mr. Bordoloi in this connection is that having regard to the Hindu Women's Rights to Property Act (Act 18 of 193), the property became vested in defendant 2 on the death of her husband, and the second defendant became entitled to the property by stepping into the shoes of her husband and to the same rights therein as her husband had at the time of his death, and, that in view of S. 2 of the Act, which says that S 3 would take effect notwithstanding any rule of Hindu law or custom to the contrary, even if the finding of the Courts below is to be treated as a Boding of unchastity. that would not" in any way affect her rights in the property. It is farther pointed out that this allegation of unchastity against defendant No. 2 again is that she became unchaste only subsequent to the death of her husband Ratheram and after the property had vested in her. That being the case, there can be no question of any divesting of the property from the second defendant on this ground. But, as I have already pointed out, such a finding of unchastity must be based on strict and rigid proof which is totally lacking in this case even in regard to the second defendant. Hence, it is not necessary to further examine this question.

17. There is another feature which had unfortunately escaped the notice of the courts below and it is this. When a plaintiff comes to Court with a prayer for a declaration of title and for possession, the burden obviously is on him to establish that on the date of the suit he had a subsisting title to the property.

Such a subsisting title could only be established, apart from other proof, by satisfying the Court, not only that the plaintiff in fact had a title but also that that title was in fact subsisting. This he could succeed in doing only if he established that he had possession within 12 years before suit. It is true that no issue had been taken on this point, but the matter, is so obvious that the Courts below were not justified in overlooking the same. However, in view of my findings on the other points, it is not necessary to examine this question any further.

18. In the result, this appeal is allowed, the judgment and decree of the Courts below are set aside, and the suit is directed to be dismissed with costs throughout.