

(1956) 04 PAT CK 0006
In the Patna High Court
Case No : A.F.A.D. No. 1283 of 1951

Rafail Uraon and Another

APPELLANT

Vs

Baiha Uraon and Another

RESPONDENT

Date of Decision : 12-04-1956

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 100
Evidence Act, 1872 — Section 101, 102, 103, 104

Citation : (1956) 04 PAT CK 0006

Hon'ble Judges : Sinha, J

Bench : Single Bench

Advocate : R.S. Chatterji and Syed Hasan, for the Appellant; L.K. Choudhary, for the Respondent

Final Decision : Dismissed

Judgement

Sinha, J.—The plaintiffs, who had brought a suit for recovery of possession of certain land, are the appellants. Their case was that the lands in suit belonged to one Mangra Uraon, who died leaving a widow, Pandro, and two daughters, who were married to defendant No. 1 one after the other. When Mangra died, he was succeeded by his widow, Pandro and the latter died leaving the two daughters aforesaid and the son-in-law. It appears that Pandro had executed a deed of sale in respect of the properties in question in favour of the son-in-law, defendant No. 1.

The plaintiffs, along with defendant No. 2, claimed agnatic relations of Mangra, and their case was that the parties are governed by the tribal custom inasmuch as they are not Hindus, and, as such, the plaintiffs and defendant No. 2 are the heirs of Mangra and not the daughters.

2. The defence, with which we are concerned, was that defendant No. 1 had taken the properties on transfer on behalf of his son and his wife; that there is no custom entitling the agnatic relations to get possession of the properties as heirs of the deceased in presence of the daughters and the daughter's son; that

the plaintiffs and defendant No. 2 are not the heirs of Mangra, and that Mangra was governed by the Hindu law of inheritance.

3. The trial Court held that the plaintiffs and defendant No. 2, being the nearest agnates after the death of Mangra's widow, were the rightful heirs of Mangra; and in that view of the matter, the suit was decreed.

4. On appeal, the Court below has dismissed the suit on the finding that, although the parties are Uraon, a tribal race, they have become sufficiently Hinduised, and, therefore, the Hindu law of inheritance will prevail; in other words, the daughters, and not the agnatic relations, the plaintiffs and defendant No. 2, were entitled to succeed to the properties.

5. Mr. Chatterji, on behalf of the appellants, has submitted that the Court below has wrongly thrown the onus of proof on the plaintiffs, and that it would be held by this court that the materials on record are not sufficient to hold that Mangra Uraon had become Hinduised and the Hindu law of inheritance will prevail; in other words, it is submitted that the finding of the Court below that Mangra had become Hindu is not a question of fact, but a mixed- question of fact and law, and, therefore, open to review by this Court in second appeal.

6. I shall take up these questions together. The plaintiffs, in order to enable them to get the reliefs sought for in the plaint, must establish the necessary materials on which the reliefs could be given; in other words, it is for the plaintiffs to prove that Mangra or the family of Mangra Uraon, was governed by the tribal custom. But in this case the question of onus is of no importance in view of the fact that the evidence of both the parties has been considered by the Court below; and, even upon the evidence of the plaintiffs' witnesses themselves, the Court has found that the parties had become sufficiently Hinduised.

The finding comes to this that the daughters of Mangra put on vermilion on their heads at the time of their marriages; that the male members of the family used to keep teek (cluster of hair on the centre of the head); that when Mangra was dead, his body was buried first and, thereafter his putla was burnt; that the heads of all relations present at the cremation were shaved; that the funeral ceremony including feasting, was done; and that Lakshmi Puja is done on Kartik Amawas; that they also worship Debi, take part in Rath-jatra, perform Mahabir Puja, put teeka on their foreheads, and celebrate "Holi festival.

The Court below, upon these materials, found that the family had been Hinduised so as to attract the application of Hindu Law in matters of inheritance; and in that view of the matters, the plaintiffs were bound to fail and the suit was liable to dismissal, and was dismissed.

7. The earliest case of this Court brought to my notice is that of *Kritibash Mahton and Others Vs. Budhan Mahtani and Others*, . There, the case was of Kurmi Mahtons of Chota Nagpur. The only question which was argued before this Court was whether the parties were governed by the Dayabhag school of Hindu

law. Both the Courts below had found that the parties were so governed.

It was contended in this Court that the Court Below was not justified in coming to the conclusion that "even if the parties were undoubtedly governed by Hindu Law, they were still governed by the Dayabhag School of Hindu Law". It was conceded by the learned counsel appearing on behalf of the defendants that if the parties were Hindu, It was unnecessary to go into the question whether the Dayabhag or the Mitakshara school of Hindu Law applied.

In that connection, his Lordship Dwarka Mitter C. J.; said that, in the circumstances, it was futile to send back the case "to determine the very question of fact which was conceded by the learned Vakil who appeared on behalf of the defendants, ...", and the appeal was dismissed. Mac-pherson, J. had agreed and given his own judgment. In dealing with the matter at page 610 (of Pat. LT) : (at p. 737 of AIR) of the report, Mac-pherson, j. said as follows :

"In cases relating to inheritance among aborigines in Manbhum it is always necessary to enquire whether even if Hinduised (slightly, partially, or completely) they have abandoned the tribal custom as to inheritance (usually they have not, even where, as is unusual, Hinduisation is complete) and then if they have abandoned the tribal custom what particular school of Hindu Law they have adhered to."

This opinion of his Lordship was, to say the least with great respect, an obiter in view of the argument in the case to which reference was made in the judgment of the learned Chief Justice.

8. Another case in point of time is an un-reported decision in *Srimatya Bidhu Mukhi Dasi*, First Appeal No. 68 of 1925, D/- 8-6-1928 (Pat) (B) by Ross. J and Fazl Ali, J. (as he then was). Fazl Ali, J. had given a separate judgment, though agreeing with the conclusion arrived at by Ross, J., and while dealing with the matter, his Lordship made the following observation :--

"There are three classes of cases in which the question as to the burden of proving custom generally arises... There may be a third class of cases in which a person, who is admittedly not governed by Hindu Law but by customary law, sets up the existence of a custom tribal or appertaining to the particular family and it is only upon proof of the existence of this custom that he can succeed.

The onus in such a case will be clearly on the person who relies on such custom. As was pointed out by Lord Buchmaster in the case of *Abdul Hussain Khan v. Bibi Sona Bero* ILR 45 Cal 450 : AIR 1917 PC 181 (C) when either party to a suit sets up a custom as a rule of decision it lies upon him to prove the custom, which he seeks to apply." In the case of *Doman Sahu Vs. Buka and Others*, , it has been said as follows :--

"The question whether a Mundari woman is or is not a Hindu is not very easy to decide. But the authorities are to the effect that the term "Hindu" can safely- be applied to all those who claim to be Hindus and are regarded by the society sur-

rounding them to be Hindus.... It is in evidence that the defendants, the issues of Mangri, were treated as Hindus and this could not have been the case if Mangri was treated as a non-Hindu."

This observation was made by Mohammed Noor," J., and Courteney Terrell, C.J., who was a party to the decision, entirely agreed, although he had added a short paragraph of his own. in Harakhanth Ohdar and Others Vs. Ganpat Rai and Others, the following passage occurs :

"A review of the cases considered above satisfies me that the remarks to those decisions, are of no help whatsoever in deciding as to the effect and construction of the grant of October, 1906; those cases only lay down that on the facts of each particular case It must be decided by the courts of fact whether the parties, who belong to the aboriginal tribe In the district of Ranchi or Manbhum, are governed by their own custom (to be proved) or by the Hindu Law, that is to say in each case the court of fact must find out whether the rule of primogeniture or the rule of agnatic succession, of the rule of Hindu law applies."

This case further observed in regard to the observations of Macpherson, J. in 6 Pat LT 694 : (AIR 1925 Pat 733 (A)), mentioned above, that those observations of his Lordship were expressly obiter.

9. The last case to which reference has been made is the case of Chunku Manjhi and Others Vs. Bhabani Majhan and Others, , re-lie upon by the Court below. In that case it was said by Ray J., who gave the leading judgment, as follows :

"The question, therefore, in every case whenever it arises, is whether the family or clan has been sufficiently Hinduised. If this question is decided in affirmative, the presumption will be that the parties are governed by Hindu Law. Any custom at variance with Hindu law has to be proved by the party invoking the same."

His Lordship summed up the position at page 737 (of ILR) : (at p.. 223 of AIR) of the report in the following words;--

"To sum up, the position is that it is possible in law that aborigines of non-Hindu origin can become sufficiently Hinduised so that in matters of inheritance and succession they are prima facie governed by the Hindu law except so far as any custom at variance with such law is proved; that for the purpose of Hinduisation any formal ceremony of conversion is not necessary; that the test as to whether people of non-Hindu origin have become Hindus out and out consists not in their following the religious rules of Srutis and Smritis or their completely giving themselves up to Brah-manical rules and rituals but in their acknowledging themselves to be Hindus and in adopting Hindu social usages, the retention of a few relics of their ante-Hinduism period notwithstanding.

In cases where complete Hinduisation is proved, the parties are to be prima facie governed by the rules of the Hindu Law, and the burden of proving that any special custom obtained in the community either as a relic of their non-Hindu period or otherwise is upon the party who sets it up."

10. In my Judgment therefore, if a person calls himself a Hindu and is acknowledged as such by the society in which he lives, he is a Hindu and that it is not necessary for the parties becoming Hindus to follow the religious rules of the Shrutis or the rules of the Smritis or to follow any rules or rituals, and that if a custom is relied upon by a party, the onus is upon that party to prove the custom. In my opinion, whether a person is Hinduised completely or otherwise is a question of fact.

11. Mr. Chatterji drew my attention to certain observations in the judgment of Bay. J. in the case of Chunku Manjhi and Others Vs. Bhabani Majhan and Others, to the effect that the question whether a person is Hinduised, either completely or partially, is a mixed question of law and fact, and, therefore, this Court, in second appeal, should go into that question itself. In that case the other learned Judge, namely, Fazl Ali, J., had said that, in view of the pleadings and the findings arrived at by the Courts below, which were based on evidence, he agreed that the view taken by the Courts below was correct; in other words, he did not treat the question as a mixed question of law and fact.

I am fortified in my view by the observations made in the case of 6 Pat LT 604 : Krittibash Mahton and Others Vs. Budhan Mahtani and Others, & that of (Harakhanth Ohdar and Others Vs. Ganpat Rai and Others, , already mentioned, that this is a question of fact and, in my opinion, it cannot be gone into over again by the Court of second appeal.

12. In the result, I would hold that the appeal is without merit, and it must be dismissed with costs to respondent No. 1 who was defendant No. 1 in the case.