

(1960) 09 AHC CK 0024
In the Allahabad High Court
Case No : S. Civ. A. No. 340 of 1952

Vikarma Singh and Others

APPELLANT

Vs

Smt. Parbati Kunwar and and Hansraj Singh and Others

RESPONDENT

Date of Decision : 01-09-1960

Acts Referred:

Limitation Act, 1963 — Section 22

Citation : (1960) 30 AWR 656

Hon'ble Judges : Nigam, J;Misra, J

Bench : Division Bench

Advocate : R.N. Shukla and B.N. Shukla, for the Appellant; P.N. Chaudhari, for Respondents Nos. 1 to 3, for the Respondent

Final Decision : Dismissed

Judgement

Misra, J.—This appeal has come before us on reference by a learned Single Judge of this Court, as in his opinion it raises a question of importance and some difficulty, touching which there is no decision and that it should, therefore, be decided by a Bench. The question posed is whether a custom excluding daughters would also exclude daughter's daughter from inheritance when at the time the custom grew, the daughter's daughter was not an heir under the Hindu Law.

2. The appeal has arisen out of a suit instituted by Respondents Hansraj Singh and Vindraban Singh for damages and recovery of possession of cultivatory plots mentioned in annexure "A" and the grove mentioned in annexure "B" to the plaint. The suit was instituted against twelve Defendants. It was alleged in the plaint that one Jagannath Singh who was the owner of the property in suit had three daughters Smt. Ramraj Kunwar, Smt. Mainatha Kunwar and Smt. Bhoga Kunwar. That Hansraj Singh "Plaintiff No. 1 is the son of Smt. Ramraj Kunwar, Vindraban Singh Plaintiff No. 2 and Smt. Parvati Kunwar Defendant No. 12 (now Respondent No. 1) are the son and daughter respectively of Smt. Mainatha Kunwar and Rameshwar Bux Singh Defendant No. 11 (now Respondent No. 4) is

the son of Smt. Bhoga Kunwar. Jagannath Singh died before the 2nd settlement and on his death Smt. Bhagwani Kuer, his widow, succeeded to his property as a Hindu widow for her lifetime and that on the death of Smt. Bhagwani Koer which took place on 28-4-1938, the Plaintiffs and Defendants Nos. 11 and 12 remained as the only heirs of Jagannath Singh and Smt. Bhagwani Koer. Lastly, it was alleged that Defendants Nos. 1 to 10 were in illegal possession over the property in suit, hence the Plaintiffs were entitled to recover possession of it from Defendants Nos. 1 to 10. About Defendants Nos. 11 and 12 it was alleged that they had also right in the property but as they did not join the Plaintiffs in the suit they had been arrayed as Defendants and that, if they so directed, Defendants 11 and 12 could also join as Plaintiffs and Plaintiffs Hansraj Singh and Vindraban Singh would have no objection thereto. According to the Plaintiffs the suit was filed in the interests of Defendants Nos. 11 and 12 also.

3. The suit was contested by Defendants Nos. 1 to 10 alone.

4. On the pleadings of the parties the following issues were framed:

1. Whether Plaintiffs and Defendants 11 and 12 are heirs of Jagannath Singh and Mst. Bhagwani Kunwar? If so they are entitled to inherit the entire property in suit.

2. Is there a local, tribal and family custom for exclusion of daughters, daughter's "son, daughter's daughter from inheritance. If so to what effect?

3. Is the suit barred by limitation?

4. What amount of mesne profits are Plaintiffs entitled to get.

5. What relief, if any, are Plaintiffs or any of them were entitled?

5. On the evidence the trial Court and the lower appellate Court found that the property in suit did not belong to Jagannath Singh exclusively but that it was shared half and half by him and his brother Shiva Mangal Singh. They found that Smt. Bhagwani held the share of Jagannath Singh as a life estate holder but that she had become absolute owner by being in possession of the share of Shiva Mangal Singh adversely for more than twelve years and that therefore it had become her Stridhan and would pass to her personal heirs under the Mitakshra law. They also found that the Plaintiffs and Defendants Nos. 11 and 12 were the grandson and grand-daughter respectively of Jagannath Singh as alleged in the plaint.

6. Both the Courts repelled the contention that the suit was not within time. They found on the evidence of record that Smt. Bhagwani Koer died on 28-4-1938 and not on 5-4-1938, as alleged by the Defendants. As the suit was instituted on 24-4-1950, they held that it was within time.

7. The trial Court had dismissed-the suit of the Plaintiffs on the ground that according to the Rewaj-i-am prevalent amongst Amethia clan of Thakurs to which Jagannath Singh belonged daughters and their issues were excluded from

inheritance, hence the Plaintiffs were not entitled to a decree. While holding that Smt. Parvati Kunwar was under the Mitakshara law the nearest heir to the Stridhan property (half the share in property in suit appertaining to Mangal Singh's share) of Smt. Bhagwani Koer, no decree could be passed in her favour as she had not joined as a Plaintiff. It may be mentioned at this stage that Smt. Parvati Kunwar had applied before the trial Court on 28-8-1950 to be transposed as a Plaintiff but her prayer was rejected on 30-10-1950. She, therefore, remained in the array of the Defendants.

8. Dissatisfied with the judgment and the decree passed by the trial Court Civ. A. No. 76 of 1951 was filed by Hansraj Singh and Vindraban Singh and Smt. Parvati Kunwar filed a separate appeal civil appeal No. 75 of 1951.

9. In civil appeal No. 76 of 1951 Smt. Parvati Kunwar was arrayed as Respondent No. 12. In that appeal she filed an application praying that the order passed by the trial Court rejecting her application to be transposed as a Plaintiff was incorrect, that she be transposed as an Appellant in that appeal under Order XLI, Rules 3 and 4 Code of Criminal Procedure and that a decree be passed in her favour. This prayer was accepted on 17-5-1952 and she was allowed to be transposed as an Appellant in civil appeal nor 76 of 1951 also.

10. The learned Civil Judge, Rae Bareilly, disposed of the two appeals together by one judgement.

11. Disagreeing with the opinion of the trial Court the learned Civil Judge held that though the contesting Defendants had succeeded in proving the Rewaj-i-am according to which daughters and their sons were excluded from inheritance amongst the Amethia clan of Thakurs to which Jagannath Singh belonged but, in his view, the said Rewaj-i-am did not affect the right of Smt. Parvati Kunwar to inherit as an heir of Jagannath Singh under the Hindu Law of inheritance (Amendment) Act (Act No. II of 1929). As the learned Civil judge had permitted Smt. Parvati Kunwar to be transposed as a Plaintiff in the trial Court and as an Appellant before him in Civil Appeal No. 76 of 1951 he held that a decree could be passed in her favour. Holding that Smt. Parvati Kunwar being the personal heir to the Stridhan of Smt. Bhagwani and also being entitled to inherit the estate of Jagannath Singh under the aforesaid Act the lower appellate Court decreed Smt. Parvati Kunwar's claim to the entire property in suit with profits at the rate of Rs. 50 per year for three years before the date of the suit and up to the date of possession from the date of the suit, in civil appeal No. 76 of 1951. In the opinion of the lower appellate court, civil appeal No. 75 of 1951 became infructuous, in view of the decision in civil appeal No. 76 of 1951 and he ordered the former to be struck off. In the circumstances of the case the learned Civil Judge ordered the parties to bear their own costs in both the lower Courts.

12. Dissatisfied with the judgment and decree passed by the learned Civil Judge, the contesting Defendants or their legal representatives have come up in second appeal to this Court.

13. This appeal was first heard by a learned Judge of this Court but on account of the circumstances mentioned in the beginning of the judgment it has come before us.

14. Before coming to the main issue whether the Rewaj-i-am pleaded in this case has the effect of excluding a daughter's daughter from inheritance, we may dispose of one other argument which has been raised on behalf of the Appellants. It has been urged that Smt. Parvati Kunwar applied to be transposed as a Plaintiff on 28-8-1950, after the limitation for filing the suit was over and as such even if she now be treated as Plaintiff under the orders of the lower appellate court, her claim to recover possession of the property is barred by time. It has been mentioned above that, according to the Plaintiffs and also as found by both the lower Courts, that Smt. Bhagwani Koer died on 28-4-1938 and as such, the contesting Defendants urge that Smt. Parvati's claim should be deemed to have been instituted on 28-8-1950, beyond twelve years from 28-4-1938. Reliance in this connection is placed by the Appellants on the provisions of Section 22 of the Indian Limitation Act which runs as follows:

(1) where, after the institution of a suit, a new Plaintiff or Defendant is substituted or added, the suit shall, as regards him, be deemed to have been instituted when he was so made a party.

(2) Nothing in Sub-section (1) shall apply to a (sic) where a party is added or substituted owing to an assignment or devolution of any interest during the pendency of a suit or where a Plaintiff is made a Defendant or a Defendant is made a Plaintiff. A mere reading of this section indicates that the provisions of Clause (1) of this section are not intended to apply to the case of a person who is already a party to this suit and who is allowed to be transposed from a Defendant to a Plaintiff or vice-versa. Smt. Parvati Kunwar was already Defendant No. 12 to the original suit. In the circumstances, therefore, it cannot be said that by virtue of Clause (1) of Section 22 of the Indian Limitation Act, her claim would be deemed to be instituted when she is transposed as a Plaintiff but that her claim shall be treated to have been instituted on the 24th April, 1938 when the suit was instituted by Hansraj Singh and Vindraban Singh. We, therefore, do not agree with the argument of the learned Counsel for the Appellants that Smt. Parvati Kunwar claim is beyond time.

15. Submitting the case of the Appellants on the main argument about the exclusion of a daughter's daughter from inheritance the learned Counsel has relied on the REWAJ-I-AM as proved by Exts. A-4 and A-5 and oral evidence in that behalf and also on the authority of some decided cases. This REWAJ-I-AM is in the form of questions and answers. Question No. 15 which relates to the relevant matter is as follows:

Agar koi malik bila aulad pisri mar jawe aur sirf dukhtar ya dukhtaran na kat khuda bani rahin, to uska kya haq malik ke milkiyat men hai.

16. The reply to the question in the REWAJ-I-AM is as below:

Agar dukhtar na kat khuda howe to uska kuchh haq wa hissa nahin hai, Sirf gujara pati hain aur shadi uski shur kayan jaddi jo hissa pate hain, karte hain.

17. The words "Dukhtaran Na Kat Khuda mean an unmarried daughter. It will thus appear from the words of the REWAJ-I-AM that it was intended to exclude unmarried daughters from succession. The REWAJ-I-AM is completely silent about the case of married daughters or the issues of daughters. If the custom was to be inferred from the REWAJ-I-AM contained in Exts. A-4 and A-5 alone, it is doubtful whether it was intended to exclude even a daughter's son from inheritance who is a legal heir to the property of his deceased maternal grandfather under the Mitakshra Law. However, in the present case as found by both the lower Courts, on the strength of the oral evidence it has been proved that daughters and their sons could not be heirs to the property of a deceased Amethia Thakur. A custom has the effect of making a variation in the general law prevailing at the time when such custom comes to be recognized. In order, therefore, to deprive a party of its rights, which it has under the general law, the custom must either expressly exclude him from that right or that the intention to exclude must necessarily follow by implication from the words of the proved custom. The daughter's daughter was never recognized as an heir to a deceased male owner under the Hindu Law at least in these parts of the country. It was far the first time in 1929 that by virtue of the provisions of the Hindu Law of Inheritance (Amendment)(Act No. II of 1929) which altered the order of succession in the Hindu Law and permitted a son's daughter daughter's daughter, shier and sister's son to be heirs of a deceased Hindu male owner and to rank them as heirs in the specified order of succession next after a father's father and before a father's brother (that a daughter's daughter was recognised as an heir to a deceased male owner). The Act was enacted in a reformatory spirit with a view to bringing ancient rules of Hindu succession into conformity with what are regarded as the changing, conditions and sentiments of present day Hindu Society. The act selected certain relatives including a daughter's daughter and gave them a preferential place in the order of succession, irrespective of their sex, over more remote relatives, on the ground that, judged by the pure test of blood relationship to the deceased owner, they are nearer heirs than those superseded by the provisions of the Act. Reference may in this connection be made with advantage to an unreported case decided by a Full Bench of the late Oudh Chief Court in First Civil Appeal No. 81 of 1936 Dalsingar Singh and Ors. v. Smt. Jainath Kuer and Others in which it was held:

The Hindu Law of Inheritance (Amendment) Act (II of 1929) applies not only to persons who were heirs under some sub-schools of the Mitakshara but also to son's daughter, daughter's daughter, sister and sister's son, in all the Provinces governed by the Mitakshara and makes them heirs in those Provinces.

18. The REWAJ-I-AM proved in this case dates back to a time long before the year 1929. It, therefore, could not have been intended to adversely affect the right of succession of a daughter's daughter which, as mentioned above, was

recognised for the first time in 1929. The exclusion of a daughter's daughter from inheritance cannot be inferred even by necessary implication from the words of the REWAJ-I-AM quoted above. To us it appears that in the present case, but for the oral evidence which has been accepted, the REWAJ-I-AM would not exclude even a daughter's son from inheritance amongst the Amethia clan of Thakurs. We, therefore, do not see any force in the argument of the learned Counsel for the Appellants that the custom proved in this case would exclude Smt. Parvati Kunwar, a daughter's daughter of Jagannath Singh from (sic) to his estate.

19. A number of cases have been cited to support the argument that even before the passing of Act II of 1929, a daughter's daughter was recognized as an heir to a deceased male owner under the Mitakshara law and hence the custom proved in the case would be deemed to exclude a daughter's daughter also from inheritance by implication. Amongst the cases cited by the learned Counsel for the Appellants, reliance has been mainly placed on a case reported in Bansidhar and Anr. v. Ganesi and Anr. ILR 22 All. 338. On the circumstances of the case, a Bench of this Court held that in the absence of preferential male heirs a daughter's daughter is heir to her maternal grandfather. In that case one Rai Singh had sold some land stipulating that if the vendee wanted to sell the property at any time he would sell it back only to Rai Singh himself for the price he had purchased it from Rai Singh and that the vendee could sell it to an outsider if Rai Singh refused to purchase the same. The vendee in contravention of this stipulation sold 1/6th of the property to a stranger. On the death of Rai Singh his daughter's daughter and the latter's son sued the vendee for the recovery of the share of the property which the vendee had sold to an outsider. In the appeal before the High Court it appears, the Counsel for the vendee conceded that in the absence of preferential male heirs the Appellant Smt. Ganeshi was heir to her maternal grandfather Rai Singh. The decision noted above came for discussion in a later case reported in Jagan Nath v. Champa and Kishen Dei ILR 28 All. 307 where the view taken in that case was dissented from. In the latter case it was held that in the case of Hindus governed by the Mitakshara Law no females except those expressly named in the Mitakshara Law as heirs can inherit. A grand-daughter therefore, cannot succeed to the estate of her grand-father. This latter view was in conformity with the opinion expressed in an earlier case decided by a Bench of this Court in Gauri Sahai and Anr. v. Rukko ILR 3 All. 45. The decision in this case was affirmed by a Full Bench of the Court in the case of Jagat Narain v. Sheo Das and Anr. ILR 5 All. 311 holding that according to the law of the Mitakshara none but females expressly named can inherit. The case related to the claim of a sister to succeed to the estate of a Hindu deceased and their Lordships held that as sister was not named in the list of heirs to a deceased Hindu under the Mitakshara Law, she was not entitled to succeed to the estate of the deceased. The observations made regarding the right of a sister to succeed to the estate of a brother under the Mitakshara Law equally applied to a daughter's daughter because she too was not mentioned as

an heir to her maternal grandfather prior to 1929. The pronouncement given in the case reported in *Banshidhar v. Ganeshi* ILR 22 All. 338 besides being given on the admission of the parties, contains no reasons for the view that a daughter's daughter was an heir to her maternal grandfather in the absence of preferential male heirs. As pointed out in *Jagan Nath v. Champa and Kishen Dei* ILR 28 All. 307 the two earlier cases that is *Gauri Sahai and Anr. v. Rukko* ILR 3 All. 45 and *Jagat Narain v. Sheo das and Anr.* ILR 5 All. 311 were not brought to the notice of their Lordships when they decided the case of *Banshidhar and Anr. v. Ganeshi and Anr.* ILR 5 All. 311. In this view of the matter we hold that a daughter's daughter was not an heir to the estate of the deceased maternal grandfather under the Mitakshara Law as administered in this State prior to the passing of the Hindu Law of Inheritance (Amendment) Act (Act No. 11 of 1929) and as such a custom which originated long before she came to be recognized as an heir will not exclude her from succession.

20. The learned Counsel for the Appellants has again referred to a case reported in *Sheomangal Singh and Ors. V. Jagpal Singh and Ors.* 12 Oudh Cases 63 and has argued that on the analogy of this case it should be decided that the custom proved in the present case should be taken as intended to exclude a daughter's daughter from inheriting to the estate of her maternal grandfather. In this case a Bench of the Court of the late Judicial Commissioner of Oudh held that the object of the Thakurs of Oudh in excluding daughters from succession being to preserve the inheritance of the land in the tribe and family to which it has belonged, the exclusion of the daughters necessarily implied the exclusion of daughters' sons as well. Their Lordships further held that where the *wajib-ul-arz* prepared at the dictation of Thakur Zamindars of the village in suit related the custom of exclusion of daughters alone, held, that it was intended to express thereby that their sons were likewise excluded with themselves.

21. We have considered this case and we are of opinion that it does not help the argument of the learned Counsel either. A daughter's son was always recognized as an heir to the estate of his deceased maternal grandfather under the Mitakshara Law in the absence of nearer heirs. It may therefore, have been construed that the custom proved in that case was intended to exclude a grandson (daughter's son) also from inheritance because he was an heir under the general law. As observed by us above, a daughter's daughter was never an heir to the estate of her deceased maternal grandfather and that she was recognized as such for the first time after the passing of Act II of 1929. A custom, therefore, could not contemplate the exclusion of a person from inheritance who was not an heir under the law at the time when the custom came to be recognized.

22. For the reasons given above, we are of opinion that a custom excluding daughters from inheritance would not exclude the daughter's daughter from inheriting to the estate of her maternal grandfather when at the time the custom grew the daughter's daughter was not an heir under the Hindu Law that is prior

to the passing of the Hindu Law of Inheritance (Amendment) Act (II of 1929).

23. The same view has been expressed by a Bench of this Court; to which one of us was a party, in an unreported decision in second civil appeal No. 154 of 1949, decided on 27-10-1958, wherein it has been observed:

At the time the custom in the wajib-ul-arz was recorded the Act II of 1929 had not been passed, with the result that under the Hindu Law as prevailing in these parts a daughter's daughter was not an heir. For the first time a daughter's daughter became an heir under the provisions of Act II of 1929. That being so, it can not be said that at the time when the entry in the wajib-ul-arz was made the daughter's daughter was an heir and her exclusion was contemplated by the custom recorded in the wajib-ul-arz. It is necessary, that before a custom can be enforced it must be in derogation of law. Inasmuch as the daughter's daughter was not an heir at the time when the custom in the wajib-ul-arz was recorded, it cannot be held that the entries therein also affected the right of the daughter's daughter to succeed.

24. Lastly, the learned Counsel for the Appellants has urged that even if Smt. Parvati Kunwar be held entitled to succeed to the estate of Smt. Bhagwani Koer, she cannot recover possession of those plots of land entered in annexure, "A" attached to the plaint which were the Sir or Khudkasht of the Defendants and which were in their cultivatory possession in the year 1359 Fasli. It is argued that u/s 3 of the UP Land Reforms (Supplementary) Act 1952 (UP Act No. XXXI of 1952) the Defendants Appellants had acquired permanent Adhivasi or Asami rights in the lands which were in their cultivatory possession in the year 1359F and they cannot be ejected from the same. We think there is force in this argument. In fact the learned Counsel appearing for the Respondents has not challenged this argument and has accepted its correctness. Smt. Parvati Kunwar, therefore, cannot recover possession of those plots which were recorded in the name of the Appellants and were in the cultivatory possession of the Appellants in 1359F.

25. No arguments have been addressed to us (sic) the question of damages awarded to Smt. Parvati Kunwar by the lower appellate Court.

26. In the result, therefore, we modify the decree passed by the lower appellate Court to this extent that Smt. Parvati Kunwar Respondent No. 1 is not entitled to recover possession of those plots entered in annexure "A" attached to the plaint which were in the cultivatory possession of the Appellants or any one of them in the year 1359 Fasli. In all other respects the decree passed by the lower appellate Court is affirmed. With this modification the appeal is dismissed. In the circumstances of the case we make no order as to costs.