

Bench:

Mr. Justice Bhishmadev Chakraborty

Civil Revision No. 2382 of 2005

Bimal Mistri and others

.....defendant-petitioners

-Versus-

Anil Mistri

.....plaintiff-opposite party

Mr. Soumitra Sarder, Advocate

.....for the petitioners

Mr. Md. Mostafa Kamal, Advocate

.....for the opposite party

Judgment on 24.07.2024

In this rule, issued at the instance of the defendant-petitioners, the plaintiff-opposite party was called upon to show cause as to why the judgment and decree of the Joint District Judge, Court No.1, Patuakhali passed on 26.05.2005 in Title Appeal No. 81 of 2004 allowing the appeal reversing the judgment and decree of the Assistant Judge, Mirjaganj, Patuakhali passed on 08.03.2004 in Title Suit No. 8 of 2002 dismissing the suit shall not be set aside and/or such other or further order or orders passed to this Court may seem fit and proper.

The plaint case, in brief, is that Gouranga Mistri, Surendra Mistri and Rajendra Mistri, three full brothers were the recorded owners in equal shares in the land of the *khatians* described in the schedule to the plaint. Gauranga died leaving behind his only son Anil

Chandra Mistri (the plaintiff). Binodini Bala, wife of Rajendra died and he started living with the plaintiff. The plaintiff used to cultivate the land of Rajendra. Subsequently, Rajendra and his son Horibol died at Amtali after eating poisonous puffer fish. But his brother Surendra, the predecessor of the defendants refused to perform their funeral ceremony. The plaintiff being his nephew did all types of religious rituals of late Rajendra and thus he inherited the land left by him. He has been possessing the share left by Rajendra on payment of rent to the concerned and thus acquired title in the suit land. The defendants claimed the suit property and threatened the plaintiff on 01.02.2002 of dispossession which clouded his title in the suit land, hence the suit for declaration of title.

Defendants 1-3 contested the suit by filing written statement. In the written statement they denied the facts of the plaint and further averred that Rajendra and his son Haribol died in the manner as stated in the plaint. The plaintiff did not perform the funeral deeds of Rajendra as claimed by him. After the death of Rajendra the defendants' predecessor Surendra being his brother performed the religious rituals for his deceased brother and inherited the suit land directly. Surendra mutated his name and has been enjoying the suit land by paying rent. After his death the defendants are in possession of it. The plaintiff sold the land left by his father and instituted the instant suit on false statement and as such the suit would be dismissed.

On pleadings the trial Court framed 4(four) issues. In the trial the plaintiff examined 4 witnesses and produced his documents exhibits-1-2(kha). On the other hand the defendants examined 3 and their documents were exhibits-Ka-Gha. However the Assistant Judge dismissed the suit deciding the material issues against the plaintiff. Against it, the plaintiff preferred appeal before the District Judge, Patuakhali. The Joint District Judge (in-charge), 1<sup>st</sup> Court, Patuakhali heard the said appeal on transfer and allowed it decreeing the suit which prompted the defendants to approach this Court with this revision and the Rule was issued.

Mr. Soumitra Sarder, learned Advocate for the petitioners takes me through the judgments passed by the Courts below and submits that the Court of appeal below misdirected and misconstrued in the approach of the matter and thereby committed error of law in holding that the plaintiff as nephew of late Rajendra accrued title in the suit land because he has performed the funeral ceremonies of deceased Rajendra. Mr. Sarder refers to the provisions of Hindu law, particularly chapters III, VII, and IX of Mulla's Principles of Hindu Law (eighth edition, 1936) and submits that the dispute between the parties regarding inheritance of deceased Rajendra will be governed by Dayabhaga school of Hindu law. According to Dayabhaga law of inheritance, the defendants' predecessor Surendra is at serial number 9 where the plaintiff is at serial 10. Therefore, after the death of

Rajendra his only brother Surendra inherited property left by him. He then refers to chapter IX, the doctrine of exclusion from inheritance and submits that there is nothing in this chapter that if a brother does not perform the funeral ceremony of his deceased brother he will be excluded to inherit the deceased's property. The law does not prescribe that Surendra will be excluded to inherit his brother Rajendra's property for not performing his funeral ceremony. Therefore, the findings and decision of the Court of appeal below is beyond the provisions of law and is required to be interfered with by this Court in revision. The Rule, therefore, would be made absolute.

Mr. Md. Mostafa Kamal, learned Advocate for the opposite party on the other hand opposes the Rule. He admits the fact that the property was owned, held and possessed by three brothers in equal shares and that Rajendra and his son died as claimed. He admits that the defendants' predecessor Surendra was the full brother of Rajendra who ought to have inherited the property. But he did not take part in the religious rituals of the deceased brother and as such has been excluded from inheriting the property. He then refers to the evidence of PW2, Sharat Chandra Chakraborty, the priest who did the funeral acts of the deceased at the instance of plaintiff, who proved the case made out in the plaint. The trial Court failed to assess the evidence of the parties in its legal perspective and dismissed the suit but the appellate Court assessed the evidence of the witnesses as required by

the law and decreed the suit holding that the defendants' predecessor Surendra will not inherit the property of Rajendra because he did not do the funeral ceremony of the deceased. Since the judgment and decree passed by the appellate court is based on materials on record, it may not be interfered with by this Court. The Rule, therefore, having no merit would be discharged.

I have considered the submissions of both the sides, gone through the materials on record and the provisions of law as referred to by the learned Advocate for the petitioners.

It is an admitted fact that 5.05 acres of landed property originally belonged to 3(three) brothers, Gouranga, Surendra and Rajendra. The parties admitted that Rajendra and his son died and no member was alive in that family. After the death of Rajendra his only brother Surendra was alive and the present defendant-petitioners are the sons of Surendra. Plaintiff, the sole heir of brother Gouranga claimed that after Rajendra's death his brother Surendra refused to perform the funeral acts of the deceased and he (the plaintiff) having been his nephew did all those acts as required by Hindu rituals. In the aforesaid reason Surendra has been excluded from inheriting the property left by Rajendra and as such the plaintiff inherited the property.

I have gone through the provisions of section 88 of chapter VII of Mulla's Principles of Hindu Law (eighth edition, 1936). There, on

the death of a male member under Hindu Dayabhaga system, the order of inheritance of the sapindas prescribed as under:

1. Son,
2. Grandson,
3. Great-grandson,
4. Widow,
5. Daughter,
6. Daughter's son,
7. Father,
8. Mother,
9. Brother,
  - (i) of the whole blood
  - (ii) of the half blood
10. Brother's son,
  - (i) of the whole blood
  - (ii) of the half blood
11. Brother's son's son,
12. Sister's son,
13. Paternal grandfather,
14. Paternal grandmother,
15. Paternal uncle,
16. Paternal uncle's son,
17. Paternal uncle's son's son,
18. Father's sister's son,
19. Paternal great-grandfather,
20. Paternal great-grandmother,

21. Paternal grand uncle,
22. Paternal grand uncle's son,
23. Paternal grand uncle's son's son,
24. Father's father's sister's son,
25. Son's daughter's son,
26. Son's son's daughter's son,
27. Brother's daughter's son,
28. Brother's son's daughter's son,
29. Paternal uncle's daughter's son,
30. Paternal uncle's son's daughter's son,
31. Paternal granduncle's daughter's son,
32. Paternal granduncle's son's daughter's son,
33. Maternal grandfather,
34. Maternal uncle,
35. Maternal uncle's son,
36. Maternal uncle's son's son,
37. Mother's sister son,
38. Maternal great-grandfather, (39) his son, (40) his grandson,  
(41) his great-grandson, and (42) his daughter's son,
43. Maternal great-great grandfather, (44) his son, (45) his  
grandson, (46) his great-grandson, and (47) his daughter's son,
- 48-49. Son's daughter's son and son's son's daughter's son of  
the maternal grandfather. (*emphasis supplied*)

According to the aforesaid order of inheritance, Surendra, *i.e.*, predecessor of the defendants will inherit the property directly before nephew plaintiff Anil Mistri. If Surendra dies or found absent or found disqualified for any other reason, in that case only the plaintiff as nephew of the deceased will inherit it.

Chapter IX of the aforesaid law book prescribes the persons to be excluded from inheritance of the property of a deceased. Sections 96-105 therein precludes the following persons from inheriting the property-(i) unchaste woman at the time of her husband's death, (ii) change of religion and loss of caste, (iii) physical and mental defects, (iv) a murderer and others. Apart from the above position Manusanghita quotes "an impotent person and an outcaste are excluded from a share of the heritage and so are those deaf and dumb from birth, as well as a mad man, idiots, and the dumb and any other that is devoid of an organ of sense or action" would also be excluded from inheritance. In view of the aforesaid provisions of Hindu law, I do not find that for nonperformance of funeral ceremonies of a deceased, a person would be excluded from inheriting the property left by him. It is well settled position of Hindu law that inheritance is never in abeyance. On the death of a hindu, the person who is then the nearest heir becomes entitled at once to the property left by him. The right of succession vests in him immediately on the death of the owner of the property. It cannot under any circumstances remain in abeyance



in exception of the birth of a preferable heir, where such heir was not conceived at the time of owner's death. Once the estate of a hindu has vested in a person who is the nearest heir at the time of his death, it cannot be divested except either by the birth of a preferable heir such as a son or a daughter who was conceived at the time of his death, or by adoption in certain cases of a son to the deceased. But no such case is found here. In this case the inheritance arose just at the moment of death of Rajendra and his son. When Rajendra and his son died, then and there his sole brother Surendra inherited the property, if he is not, otherwise, found disqualified for any of the reasons as has been discussed above.

In view of the aforesaid provisions of law, I do not find that for non performance of the funeral acts of Rajendra and his son as claimed by the plaintiff, his brother Surendra has been excluded from inheriting the property of the deceased. The Court of appeal below most erroneously without going through the provisions of law relied on the evidence of PW2, that he being the priest of the funeral ceremony of Rajendra proved that Surendra did not take part in such acts and as such he is not entitled to inherit the share of Rajendra. The findings and decision taken by the lower appellate Court is found beyond the law and as such it should be interfered with.

Therefore, I find merit in this Rule and accordingly it is made absolute. However, there will be no order as to costs. The judgment

and decree passed by the appellate Court is hereby set aside and those of the trial Court is restored. The suit be dismissed on point of law, not on the point as decided by the trial Court.

Communicate the judgment and send down the lower Courts' record.