

(1972) 07 AHC CK 0016**Allahabad High Court****Case No:** Civil Miscellaneous Writ No. 2854 of 1970

Smt. Ram Piari

APPELLANT

Vs

Board of Revenue, U.P.,
Allahabad and Others

RESPONDENT

Date of Decision: July 18, 1972**Acts Referred:**

- Civil Procedure Code, 1908 (CPC) - Section 100
- Hindu Widows Remarriage Act, 1856 - Section 2
- Uttar Pradesh Tenancy Act, 1939 - Section 36
- Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950 - Section 333

Citation: AIR 1972 All 492 : (1972) 42 AWR 595 : (1972) RD 232**Hon'ble Judges:** R.L. Gulati, J**Bench:** Single Bench**Advocate:** S.B. Chaudhari and Ratnakar Chaudhary, for the Appellant; Standing Counsel, for the Respondent**Final Decision:** Allowed**Judgement**

@JUDGMENTTAG-ORDER

R.L. Gulati, J.

This is a petition under Article 226 of the Constitution.

2. The petitioner was married to one Ram Adhin, who had 1/7th share in village Charapur Kauriya, District Unnao. Ram Adhin died on September 14, 1944, leaving behind the petitioner as his widow and his mother Smt. Poona. The petitioner was a minor then. Smt. Poona got her name entered over half the estate of Ram Adhin. She is alleged to have executed a will of her half share on October 28, 1947, in favour of respondent Nos. 6 to 8, (hereinafter referred to as the "contesting respondents"), who are the sons of her daughter. She died sometime in 1947 and

after her death the contesting respondents got their names mutated over the land in dispute on the basis of the will of Smt. Poona. After the death of her mother-in-law the petitioner married one Beni Lodh.

3. After her remarriage the petitioner filed a civil suit in the Court of Munsif, Unnao, on 18th July, 1949, for possession of the half share of Ram Adhin which was mutated in the name of her mother-in-law, Smt. Poona. The suit was contested by Hira Lal, father of the contesting respondents, who were minors at that time. The pleas that Smt. Poona had executed a will in their favour in respect of her half share and that the petitioner after her remarriage had forfeited all the rights in the estate of her first husband were taken. The Munsif decreed the suit holding that after the death of Ram Adhin, the petitioner succeeded to his estate to the exclusion of the deceased's mother and further that her remarriage was according to the custom prevailing in that community and as such she did not forfeit her rights in the estate of her deceased husband u/s 2 of the Hindu Widows' Remarriage Act, 1856. There was an appeal by the respondents against the decree of the Munsif, but the same was dismissed by the Civil Judge, Unnao. There was no second appeal.

4. The petitioner alleges that although she was in possession of the estate of her late husband, the names of the contesting respondents continued to be recorded in the village papers along with the petitioner. She accordingly made an application for correction of the record, which was rejected. Thereupon she filed a suit u/s 229-B of the U. P. Zamindari Abolition and Land Reforms Act. The land in dispute is comprised of bhumidhari and sirdari plots. The Trial Court decreed the plaintiff's suit with respect to bhumidhari plots, but dismissed it with respect to sirdari plots on the ground that although the plaintiff succeeded to the bhumidhari plots as the widow of her late husband, she could not so succeed in respect of sirdari plots, because of the provisions contained in Section 36 of the U. P. Tenancy Act. There were two appeals. One by the plaintiff and the other by the defendants. The two appeals were consolidated and disposed of by a common order of the Additional Commissioner, Lucknow. The plaintiff's suit was decreed in toto and the defendants' appeal was dismissed. Thereupon a second appeal was filed before the Board of Revenue. The Board of Revenue has allowed the appeal and has dismissed the suit of the plaintiff by an order dated February 4, 1970. This petition is directed against that order of the Board of Revenue.

5. So far as bhumidari plots are concerned, there can be no manner of doubt that the plaintiff became their owner on the death in 1944 of her first husband. Admittedly these plots belonged to him. On his death, the plaintiff became the sole heir of his estate. His mother Smt. Poona had no share in it as under the law the entire estate of the deceased devolved upon the widow to the exclusion of his mother. The mutation of the name of Smt. Poona over this property was, therefore, wrong and consequently the will executed by her in favour of the contesting respondents was wholly ineffective.

6. The only question that required consideration was with regard to the effect of remarriage of the petitioner. u/s 2 of the Hindu Widows" Remarriage Act, 1856, a widow when she remarries forfeits her rights in the estate of her first husband. But that provision does not apply to a marriage which is sanctioned by a custom. The Trial Court as well as the first Appellate Court have held that such a custom did exist in the community of the plaintiff. A similar finding had been recorded by the Civil Court in the earlier litigation between the parties and that decision being inter partes was binding upon the contesting respondents, even though it may not operate as res judicata. The Board of Revenue has also not doubted the existence of the custom. But it refused to give effect to the custom on the ground that the same had not been proved to have been in existence prior to the coming into force of the Hindu Widows" Remarriage Act, 1856. This is not correct. The custom has been found to be ancient and immemorial. There is no assertion or proof of the fact that the custom came into being after the coming into force of Act of 1856.

7. Now, when a marriage is sanctioned by such a custom, the widow who remarries does not forfeit her right in the estate of her first husband; unless there is a custom to the contrary. The onus of proof of such a custom lies upon the person who asserts the existence of such a custom of forfeiture. This proposition is well settled by a series of decisions of this Court, see Bhola Umar and Another Vs. Mt. Kausilla and Others and Bhola Umar Vs. Mt. Kausilla and Another , Nawab Bahadur Mohd. Abdul Samad Khan v. Lala Girdhari Lal AIR 1942 All 175 and Mohan Lal and Others Vs. Mst. Bhudevi and Others .

8. The Member of the Board of Revenue, who decided the second appeal, was not happy with the decision of this Court with regard to the onus of proof. In his opinion the onus should lie upon the widow who remarries to prove that she did not forfeit her right over the property of her deceased husband. He has expressed his dissatisfaction with the view taken by this Court in a language which is far from polite. In my opinion the learned Member was not justified in doing so. He was clearly bound by the law laid down by this Court and he should have accepted it with grace.

9. Moreover, it is plain common sense that when a person acquires a right over a property that right remains intact whether the person remains single or gets married, unless there is a specific legal provision to the contrary or a custom having the force of law. Obviously there is no such legal provision except Section 2 of the Hindu Widows" Remarriage Act, 1856, which does not apply in the present case. She can be divested of her right under a valid custom. Clearly such a valid custom has to be proved by the party who asserts it. In the instant case it was not for the petitioner to prove such a custom, but for the respondents. They never asserted any such custom.

10. Coming now to the sirdari plots, there seems to be some confusion. From a reading of the plaint, one does get the, impression that the sirdari plots also be

longed to the plaintiff's first husband and she inherited them after his death. But that does not appear to be the position. It is in evidence that the sirdari plots were never in the tenancy of the plaintiff's first husband. Obviously she could not have inherited those plots from him. In the statement recorded under Order 10, Rule 2, CPC the plaintiff's counsel clarified the position as under:

"The plaintiff claims bhumidhari plots as her Sir and Khudkasht inherited from Ramadhin, her husband on his death in 1944, and sirdari plots are alleged to be the tenancy of the plaintiff herself, which she acquired herself either by contract or in the alternative by adverse possession. It is admitted that Smt. Ram Pyari plaintiff, married with Beni after the death of Smt. Poona, the mother of Ram Adhin. Ram Adhin had a sister who is alive and is the mother of defendants 1 to 3."

In this statement the plaintiff has clearly taken the stand that the sir plots at no time belonged to her late husband, Ram Adhin. As such she could not have inherited them from him. Curiously enough, the Trial Court did not attach any importance to this statement recorded under Order 10, Rule 2, CPC and proceeded to decide the case as if the sirdari plots had also come down to the plaintiff from her husband. The Additional Commissioner found that in the Khatauni of 1353 fasli one Mohan was recorded as tenure-holder of the sirdari plots and the plaintiff was recorded as Bilatasfia with a period of one year. In 1354F her period of possession was shown as two years. Then he proceeded to examine the oral evidence and came to the conclusion that the plaintiff acquired sirdari rights in these plots by prescription. This is a finding of fact and supported as it was by evidence on the record, it was not open to the Board of Revenue to have disregarded that finding. The Board of Revenue came to the conclusion that the plaintiff had changed her case as set out in the plaint and as such she could not succeed without having her plaint amended. Technically that may be right. But as there was evidence to prove the real source of these plots, the Additional Commissioner proceeded to record a finding thereon. No prejudice has been caused to the contesting respondents by such a procedure. Justice having been done between the parties, it was not proper for the Board of Revenue to have interfered with the finding of the Additional Commissioner, on a ground which is merely technical. In the circumstances, I am of opinion that the order of the Board of Revenue is manifestly erroneous.

11. The petition is accordingly allowed. The order of Mr. Y. N. Verma, Judicial Member, Board of Revenue dated 4th February, 1970 is quashed. The petitioner is entitled to the costs of this petition.