(1941) 12 AHC CK 0002

Allahabad High Court

Case No: First Appeal No. 165 of 1934

Nawab Bahadur Mohammad Abdul Samad Khan		APPELLANT
	Vs	
Girdhari Lal and others		RESPONDENT

Date of Decision: Dec. 23, 1941

Hon'ble Judges: Yorke, J; Verma, J

Bench: Division Bench

Advocate: Mushtaq Ahmad, for the Appellant; P.L. Banerji for Respondent, for the Respondent

Final Decision: Disposed Of

Judgement

Verma and Yorke, JJ.

These are four appeals by the defendant No. 1 (165) the Defendant No. 2 (139) Defendants Hand 19 (399) and the Plaintiffs (173) from the judgment of the Subordinate Judge of Bulandshahr in a suit for recovery of possession over certain property in village Dalelgarhi, pargana Pahasu of that district, The Plaintiffs sued as the reversioners of one Rao Gopinath Khattri, who died prior to the year 1846, and was succeeded in the first instance by his widow Mst. Phul Kunwar, who died about 1867 and thereafter by his daughter Mst. Chandra Kunwar, who died on the 15th September, 1920. After the death of Mst. Chandra Kunwar the Plaintiffs 1 and 6 sold one-half of their share in village Dalelgarhi to Plaintiff No. 7, Sardar Banke Singh Khattri of Bulandshahr, in order to obtain funds to finance this suit. Thereafter they instituted the suit on the 11th October, 1932, that being presumably the date on which the Courts reopened after the vacation and the very last day of limitation for the suit instituted as a suit to which Art. 141 of the Limitation Act was applicable, that Article prescribing a period of 12 years for "Like suit by a Hindu or Muhammedan entitled to the possession of immovable property on the death of a Hindu or Muhammedan female", the period beginning to run from the date when the female dies. The Plaintiffs'' case was that Rao Gopi Nath, son of Raja Madho

Singh, owned the whole villages Dalelgarhi and Golabans and five biswas share in village Ahmadgarh. It was said that on the death of Rao Gopi Nath his widow Mst. Phul Kunwar came into possession of this property with a widow''s estate, but that she came to have an illicit connection with one Harsukh Rai and by this connection a son Ganga Sahai was born. It will be convenient to note here that Ganga Sahai must have been born before the year 1849 since there is evidence to show that he was a major in the year 1867. The Plaintiffs in setting forth their case omitted certain facts which are of importance whether through ignorance or intentionally. It will be as well to mention those facts here, though they did not form part of the Plaintiffs'' case. The connection bet-wee Harsukh Rai, who was subsequently called Rao Harsukh Rai and Mst. Phul Kunwar was a permanent connection which lasted till the death of Harsukh Rai. It is proved that on the 6th September, 1846 Mst. Phul Kunwar usufructuarily mortgaged the entire property of her husband in favour of Harsukh Rai for a sum of Rs. 10,000. In the year 1862 Harsukh Rai executed a will (Ex. 19) dated the 21st November, 1862, devising his property among the persons whom he described as his heirs; that is to say his first wife, his second wife by ''kerao'' Mst. Phul Kunwar, Ganga Sahai, Gopal Rai, his adopted son and Chunnilal, his nephew. By this will he left, among other property, to Mst. Phul Kunwar the mortgagee rights in village Dalelgarhi, of which she was the owner of the mortgagor right that is the equity of redemption, as being the widow of Rao Gopi Nath and having in respect of that property a widow''s estate. He provided that Mst. Phul Kunwar would have no power to transfer her property or the property of the share of the minor Ganga Sahai and that after her death Ganga Sahai would succeed to the entire estate. He left other property to his other heirs.

2. After the death of Harsukh Rai, which must have been not later than 1865, there was a dispute between the heirs named in the will of Harsukh Rai. This dispute was referred to arbitrators, who made an award (Ex. 2C) dated the 20th September 1865. That award to some extent put an end to the life-estate of Mst. Phul Kunwar and allotted certain property exclusively to her "without the partnership of any other person". Among the properties so alloted were the mortgagee rights in 20 biswas of village Dalelgarhi. Among other conditions of this award was one preventing Mst. Phul Kunwar from making a will or a deed of gift in favour of her son Ganga Sahai within a period of eight years and another condition providing that if she died without making a will or a deed of gift, her estate would devolve in equal shares upon her son Ganga Sahai and her daughter, that is Mst. Chandra Kunwar, who was the wife of Gopal Rai, the adoptive son of Harsukh Rai. Nonetheless on the 10th July, 1867, Mst Phul Kunwar did make a will (Ex. 21) by which she left the whole of her property roughly half to her daughter, whom she describes as Mst. Chunia "my legitimate daughter, who is the wife of Munshi Gopal Rai" and to her son Ganga Sahai. Among the properties which she left to her son Ganga Sahai was the 20 biswa share in village Dalelgarhi In this will there is no mention of the mortgagee rights, but the property allotted is the share in the village. Thereafter Ganga Sahai in

pursuance of the will, or, as it may also be supposed, in pursuance of the provision in the arbitration award read with the provision in the will, took possession of the half of the property mentioned in the will, while his sister Mst. Chandra Kunwar it appears took possession of the o her half of the property namely that which was mentioned as being left to her in the same will. At a later date it appears that Ganga Sahai got into difficulties his property was sold up and it was purchased in auction sale on the 21st August, 1882, in execution of the decree obtained by one Chaube Bishambhar Nath, by one Sardar Bahadur Saiyed Mir Khan, vide the sale certificate (Ex. 16) dated the 4th November, 1882. The Defendants to the present suit were persons who were subsequent transferees in one way or another of the heirs of this Mir Khan. The Plaintiffs'' case was that Ganga Sahai and the subsequent transferees from Ganga Sahai were all in possession, of this property without right and their possession, though not assailable during the ife of Mst. Chandra Kunwar, was liable now to be set aside in favour of the Plaintiffs as the reversioners of Rao Gopal Nath.

3. The Plaintiffs had as I have noted above, whether intentionally or not, omitted all mention in this plaint of the mortgage of 1846. A plea was taken in the written statements of a number of Defendants that the mortgage of 1846, which was recorded in the settlement robkar (Ex. 7) dated the 7th May, 1862, as subsisting at that date was executed by Mst. Phul Kunwar in lieu of the debts due by her husband amounting to Rs. 10,000. It was further said by other Defendants that this mortgage had never been redeemed and thus the mortgagee Harsukh Rai (meaning presumably the successors-in-interest of Harsukh Rai) became the absolute owners of the property in question. On the Plaintiffs being asked what they had to say in regard to this mortgage, Learned Counsel for the Plaintiffs on the 21st March, 1933, made a statement under Order 10, r. 2 of the CPC as follows:

The Plaintiffs admit that Mst. Phul Kunwar mortgaged the property in suit with possession for a sum of Rs. 10,000 along with other property to Harsukh Rai in 1848" (which seems to be a mistake'' for 1848), "but the mortgage became extinct, for the mortgagee rights were transferred to Mst. Phul Kunwar mortgagor under the will of Harsukh Rai and the arbitration award made in 1826 and 1865.

4. This pleading is important in the light of the pleading in the written statement of Defendant No. 1 that the mortgage had been executed in lieu of debts due by the deceased Rao Gopi Nath. It was open to the Plaintiffs to plead that the mortgage was fictitious or that it was not for legal necessity Presumably it was because they knew that there would be evidence forthcoming to show that it was for legal necessity and for good consideration that the only plea they took was that the mortgage had become extinct because the mortgagee rights were transferred to Mst. Phul Kunwar, the mortgagor, indicating that upon this transfer the mortgagee rights were merged with the equity of redemption and thus the mortgage was extinguished:

5. A large number of defenses were taken. The Defendants first of all challenged the pedigree and alleged that the Plaintiffs were not the next reversioners of Rao Gopi Nath. This issue has been found against them and this plea is no longer urged before us. The Defendants Nos. 28 to 36 contended that the Plaintiffs had no right of suit in respect of khewat No. 2 and that point was conceded in the arguments and the suit in respect of khewat No. 2 of village Dalelgarhi was dismissed and that point is also no longer before us The Defendants other than Defendants 28 to 36 put forward a number of contentions in regard to adverse possession. They alleged that Mst. Phul Kunwar was lawfully remarried to Harsukh Rai, that she thereby incurred a forfeiture of her rights in the property of her first husband Rao Gopi Nath and therefore her possession over that property was adverse to the reversioners, more particularly I suppose to her own daughter Mst. Chandra Kunwar. They also pleaded that the possession of Ganga Sahai after the death of Mst. Phul Kunwar was proprietary and adverse to the reversioners and that his adverse title matured into a full title at the end of 12 years. The Defendants further said that the Plaintiffs had no right to maintain a suit for possession because the mortgage in favour of Harsukh Rai still subsisted and had become irredeemable by the expiry of the full period of 60 years beginning from the year 1846. They stated this in the form which I have already quoted namely that Harsukh Rai became full owner of the property, but as Harsukh Rai died only about 16 years after the mortgage, it is obvious that they must be conceived to have been including with Harsukh Rai his successors-in-interest. A further line of defence was that the Defendants were bona fide transferees for valuable consideration and that the suit was barred by Section 41 of the Transfer of Property Act and it was also said that the suit was barred by the principles of estoppel and acquiescence.

6. The learned Subordinate Judge framed a number of issues. On issue 1 he held that among khattris there is no custom of remarriage of widows. It follows that even if the relationship between Mst. Phul Kunwar and Harsukh Rai was given a colour of respectability by being called a Karao marriage, it was not a marriage at all but only an illicit relationship to which a respectable name was given. Hs remarked that the unchastely of a widow after the death of her husband cannot divest her of her husband''s property and therefore Mst. Phul Kunwar remained all along in possession of a widow''s estate and could not have become absolute owner by adverse possession or otherwise. On this issue therefore he held that Mst. Phul Kunwar was the owner and in possession of the property in dispute, that is the equity of redemption in respect of the property in village Dalelgarhi, as a Hindu widow.

7. As regards issue No. 2 he held that Mst. Phul Kunwar''s will was a fact but that it conferred no rights on her son Ganga Sahai. In this connection he lost sight of the distinction between the rights of mortgagor and the mortgagee rights, probably because, as mentioned by him under issue 10, he considered that there had been a merger. If that was the case then clearly Mst. Phul Kunwar had no absolute title to

the property but only the estate of a Hindu female and she had no power to make a disposition of the property by will in favour of Ganga Sahai.

On issue 3:

Whether Ganga Sahai was in adverse possession for more than 12 years or any of his successors-in-interest contesting the suit had been in such possession and how does it affect the suit?

8. He held that doubtless Ganga Sahai was in possession as a trespasser, but he pointed out that in view of the decisions in this Court in Bankey Lal v. Raghunath Sahai (1928) 51 All. 188 : 26 ALJ 1049 : AIR 192 8 All. 561 (FB) and Shambhu Prasad v. Mahadeo Prasad (1933) 2 A.W.R. 758 : 55 All. 554, limitation under Article 141 of the Limitation Act did not begin to run against the reversioners as long as that possession was adverse to a female owner. The Plaintiffs were entitled to wait until the death of the last female owner before instituting a suit.

9. The next important issue which the learned Subordinate Judge had to decide was issue 10:

Whether the usufructuary mortgage made by Mst. Phul Kunwar in favour of Harsukh Rai subsists and is effective and how does it affect the suit?

10. In dealing with this issue the learned Judge had to consider the mortgage of 1846. He held that there was nothing to show that it was fictitious, but he held that there had been a merger of the mortgagor and mortgagee rights and this he held to be proved from a perusal of the will made by Mst. Phul Kunwar on the 10th July, 1867, in which she described herself as full owner of village Dalelgarhi and not as a mortgagor only (so far as the will was concerned she should really have described herself as a mortgagee only) and conferred (that is purported to confer) these ownership rights on Ganga Sahai. He regarded the question of the subsistence of the mortgagee rights, that is to say the question whether there was or there was not a merger, from the point of view of intention and took the view that the statements in the will were an indication of an intention not to keep the two rights separate but to allow them to merge. That is of course one possible point of view. After recording a finding that the usufructuary mortgage of 1846 no longer subsisted he went on to remark:

Moreover there is no evidence to show that the mortgage deed was executed for any legal necessity so as to bind the reversioners.

11. Presumably ha was using this as an argument to bolster up the finding in regard to merger. If that was the intention I am clear that it was not justifiable in the light of the pleadings, but I shall deal with this matter at greater length at a later stage.

12. The learned Judge then proceeded to deal with issues 6 and 7, Issue 6 is:

Whether any of the contesting Defendants are bona-fide transferees for valuable consideration and Section 41 of the Transfer of Property Act bars the suit against them.

Issue 7 is

Whether the suit is barred by estoppel and acquiescence u/s 115 of the Evidence Act against any of the contesting Defendants?

13. These issues he discussed at great length with reference to the cases of the individual Defendants. He held, following the view of this Court, that it is not open to Defendants who are auction purchasers to take the plea that the suit against them is barred by Section 41 of the Transfer of Property Act or by estoppel and acquiescence. On this view he held that the suit must succeed in respect of all those properties which passed directly to the Defendants concerned by auction purchase from the heirs of Sardar Mir Khan. The defence of those Defendants who were subsequent transferees other than by auction purchase from the heirs of Sardar Mir Khan he examined on the mreits and on this footing he ultimately decreed the Plaintiffs'' suit against contesting Defendants Nos. 1, Nawab Bahadur Muhammad Abdul Samad Khan, 2 Uttam Singh and 11 and 19, Mst. Razia Sultan Begam, who did not put in an appearance in the trial Court and Mazhar Ali Shah, who had purchased in auction sale in 1912 as also against Nos. 3 to 10, 12, 13 to 18 and 20 who have not appealed. He dismissed the suit against the Defendants 7 and 21 to 27. He held that the Plaintiffs were entitled to possession and also to mesne profits as against the Defendants Nos. 1 to 6 and 8 to 20 and decreed the suit accordingly.

14. In the light of the arguments which have been put before us it is not necessary for the purposes of this appeal to trace the history of the different purchases. That has been done by the learned Subordinate Judge and the history of these purchases was put before us by Learned Counsel for the various Appellants, but I shall not repeat the account of those purchases given in the judgment of the trial Court because, as I shall show later, I am clear that Section 41 of the Transfer of Property Act cannot be successfully relied upon on behalf of the Defendants to this suit. The same principle is clearly applicable in the case of the pleas of estoppel and acquiescence. The questions which we have to consider in this appeal are, first, the questions of adverse possession and limitation; secondly, the question of merger and thirdly, the question of the applicability of Section 41 of the Transfer of Property Act. I shall deal first with the question of limitation.

15. There can be no doubt whatever that the Article of the Limitation Act which is applicable to the present suit is Article 141. Article 140 prescribes for a suit by a remainder man, a reversioner (other than a landlord) (sic) a devisee, for possession of immovable property, a period of limitation of 12 years which begins to run from the date when his estate falls into possession. Article 141 prescribes for "like suit by Hindu or Muhammedan entitled to the possession of immovable property on the

death of a Hindu or Muhammedan female", a period of limitation of 12 years, which begins to run from the time the female dies. ''Like suit" evidently means a suit for the possession of immovable property The present suit is a suit by the Plaintiffs as reversioners of Rao Gopi Nath on the plea that they are entitled to the possession of his immovable property on the death of Mst. Chandra Kunwar, the surviving female owner, or the last of those persons who held the estate under the title of a Hindu female. In the light of the wording of this Article it is clear that so far as Article 141 is concerned the suit is within time and the real question is one of adverse possession.

16. Before dealing with adverse possession I may, however, first dispose of a contention that it was not open to the Plaintiffs to institute this suit relying on Article 141, on the view that limitation having once begun to run, the enactment of a new Article cannot operate to stop it from running. There is no room for doubt in the light of the cases quoted before us that prior to the enactment of Act IX of 1871 the period of limitation for a suit to recover possession of immovable property was only 12 years from the date of the cause of action. The matter was originally covered by Bengal Regulation II of 1805 and subsequently by clause 12 of Section 1 of Act XIV of 1859, which provided for

suits for the recovery of immovable property or of any interest in immovable property to which no other provision of this Act applies--the period of 12 years from the tine the cause of action arose.

17. Applying the provisions of this clause it was held by the Calcutta High Court that the cause of action, whether for the widow or a reversioner, in the case of the widow''s dispossession by a trespasser arose at the time of dispossession, but that if the case was one of a transfer made by the widow herself the cause of action would arise at her death. This view was taken in the Full Bench case of Nobin Chunder Chuckerbutty v. Issur Chunder Chuckerbutty (1868) 9 WR 505, where it was said that

When alienations of her husband''s estate are improperly made by the widow, they are good as against her for her life; and the reversionary heir''s cause of action does not accrue until her death. But when property belonging to the husband''s estate is held adversely to the widow and never reaches her hands, the cause of action accrues to her and a suit, whether by her or by the reversionary heir, must be brought within the usual period, counting from the commencement of the adverse possession.

18. That view was quoted by Their Lordships of the Privy Council in Aumirtolall Bose v. Rajoneekant Mitter (1875) 23 WR 214, where their Lordships remarked about this view:

That ruling has been acted upon in other cases and it appears to their Lordships that the principle of that decision is correct.

19. The next stage in the history of the law of Limitation was the enactment of Act IX of 187 which for the first time introduced Article 142 which prescribed for a suit for possession of immovable property by a Hindu entitled to the possession of immovable property on the death of a Hindu widow a period of 12 years'' limitation, which period begins to run from the time when the widow dies. This enactment would not have been helpful in the present case because during the lifetime of Mst. Chandra Kunwar the limitation would have continued to run under the former law which was not affected except where the person by whose death the reversioner acquired Vat right to sue was a Hindu widow. The law was brought into its present state by the enactment of Act XV of 1877 which modified the old Article (sic) and substituted Article 141 which provides for

Like suit by a Hindu or Mohammadan entitled to the possession of immovable property on the death of a Hindu or Mohammadan female--a period of 12 years which begins to run when the female dies.

20. The contention which is put forward is that as the law stood in 1867, when Ganga Sahai took possession of part of the property to which Mst. Chandra Kunwar was entitled, time for the institution of a suit to recover that property at once began to run. Act IX of 1871 would not have created any change in favour of the reversioners since time would have continued to run, running as it did from the time of the death of Mst. Phul Kunwar. It is contended that although by Act XV of 1877 a fresh period of limitation was enacted, the effect of which was that rime would not begin to run until such time as Mst. Chandra Kunwar should die yet, in as much as time had once begun to run, it could not be stopped, in mid career as it were, by the new Act. I feel no doubt that this view is not correct. This question was considered in a Full Bench case of in his Court as far back as the year 1892 in Ram Kali v. Kedar Nath (1892) 14 All 156 (F.B.). That was a case covering almost exactly the same period as the present case. One Ram Sahai had died in 1862 leaving a widow and a daughter who was the Plaintiff in the subsequent suit. After the death of Ram Sahai his nephew and the nephew''s son, who was the Defendant in the suit, entered into possession adversely to the widow. In the light of the cases to which I have referred above time under the Act of 1859 clearly began to run from the year 1862, but the title by adverse possession had not yet matured into absolute title when Act IX of 1871 came on the statute book. That Act gave a new period of limitation and made the death of the widow the starting point for the suit by the Plaintiff of that suit. The Full Bench held that possession of the estate of a deceased separated Hindu held adversely to his widow entitled to its possession did not operate for the purpose of constituting adverse possession to the reversioner or reversioners entitled to succeed upon her death to that estate. Certain aspects of the matter were considered particularly carefully by Mahmood, J. whose conclusion is that the suit could not be held barred if was not barred under the Limitation Act in force at the date of suit, unless the right of the Plaintiff had already been extinguished and he held by reference to Section 28 of the Act that the right is extinguished only on the

expiry of the period provided by the Article of the Limitation Act which is actually in force at he date when limitation would expire and the right would be extinguished. That is to say, the effect of Article 142 of the Act of 1871 and Article 14 of the Act of 187 was to create a fresh rule in regard to limitation in all cases in which the prospective right arising oat of adverse possession had not already ripened into an absolute title. Learned Counsel has had to admit that he is unable to distinguish the decision in Ram Kali''s case. The matter has been considered subsequently, but there is no doubt that there is no subsequent decision which in any way detracts from the force of the decision in Ram Kali''s case on this particular point.

21. This question being disposed of, the first question for decision is whether the possession of Mst. Phul Kunwar herself could at any time have been adverse to the estate of her deceased husband Rao Gopi Nath. Mst. Phul Kunwar was admittedly a Khattri widow and it is not open to dispute in the present case that there is no ancient custom (and indeed no modern custom) of widow remarriage among Khattris That point has not been disputed before us except by a very feeble reliance upon a statement in cross examination of the Plaintiff Girdhari Lal. Girdhari Lal stated in Examination in Chief

Karao marriage is not permitted in our caste. We are Khattris by caste.

22. He went on to say in cross-examination:

Whether the Khattri caste to which I belong is a branch of Kshttriyas or not, I do not know. I belong to a twice-born class. If a widow of my caste enters a karao marriage, she would be divested of the property inherited by her from her husband.

23. It was argued that this was an implied admission that a Khattri widow could enter into a karao marriage. The questions which arise are really two: (1) Could there by custom be such a re-marriage of a widow among Khattris, that is, is such remarriage recognised by the caste? and (2) was there in fact such a marriage? Of course if remarriage of widows is not recognised among Khattris it is practically impossible that there could in fact have been a marriage. Now as regards the existence of a custom of remarriage here is no evidence whatever to support it and at the date in question, namely somewhere about 1846, this remarriage if there was to be a remarriage could only be in virtue of a custom since the Hindu Widows Remarriage Act did not come en the statute book until the year 1856. Bearing in mind the approximate date of Ganga Sahai''s birth, which I have mentioned above, this marrige must be presumed to have taken place not later thin the year 1847 or 1848. In these circumstances the question what is meant by a Karao marriage and what ceremonies, if any, are essential for a Karao marriage is really irrelevant. If at the time of this marriage it could be contracted only in virtue of a custom and there was no such custom, then an irregular union could not be turned into a marriage by any amount of ceremonies or by any subsequent enactment. The mere fact that Harsukh Rai in 1862 spoke in his will of his wedded wife and his karao wife does not

go in the circumstances at all to prove that Mst. Phul Kunwar was his wife other than in name, the name being given because the connection was a permanent one and one to which the members of the brotherhood had become accustomed and to which they did not, perhaps in deference to the position of Harsukh Rai, like to make any serious objection. The lady herself in her own will speaks of her legitimate daughter and her son and thus clearly distinguishes between the relationship between herself and her first husband Gopi Nath and that between here self and Harsukh Rai. It may be that there are cases where a presumption of a legal marriage hiving taken place may arise from the fact of two persons living together over a long period and being regarded by their neighbours and friends as husband and wife, but such a presumption has no application to the circumstances of the present case. As regards the reliance which has been placed on the statement of Girdhari Lal that "if a widow of my caste enters into a karao marriage, she would be divested of the property inherited by her from her husband" it is sufficient to say that Girdhari Lal is speaking about the situation at the present moment. It is undoubtedly open to a Khattri widow at the present date and has been open to a Khattri widow at any date since 1856, to remarry under the Hindu Widows Remarriage Act and if she chooses to do so, she will by virtue of Section 2 of the Hindu Widows Remarriage Act be divested of her right and interest in her deceased husband''s property, whether they are by way of maintenance or by inheritance or by virtue of any will or testamentary disposition conferring upon her, without express permission to remarry, only a limited interest in such property, with no power of alienating the same. Under that section
upon her re-marriage the next heirs of her deceased husband or other persons entitled to the property on her death shall thereupon succeed to the same.

24. It may be noted further in this connection that it is the accepted view of this Court that if a Hindu widow entitled to remarry under a custom of the caste doss not even subsequently to the enactment of the Act of 1856, she does not come within the mischief of that Act and will therefore not upon re-marriage be divested of his widow''s estate unless it be found upon the evidence that in addition to there being a custom of re-marriage of widows there is also in existence a custom of forfeiture of the first husband''s estate upon such re-marriage. In the present case, quite apart from it being clearly proved that there was no custom of re-marriage of Khattri widows in existence, it is further clear that the statement made in cross-examination by Girdhari Lal does not go so far as to establish that there was a custom that Khattri widows who remarried would forfeit their husband''s estate. Learned Counsel for the Respondents has further pointed out that, even if there were such evidence to prove a custom of forfeiture, such a forfeiture is not automatic a unless it is enforced, the nature of the possession of the widow would not be changed. It has in fact been held in a very well known case that a Hindu widow, as often pointed out, is not a life renter but has a widow''s estate, that is a widow''s estate in her deceased husband''s property. If possessing as widow she possesses adversely to

anyone as to certain parcels she does not acquire the parcels as stridhan but she makes them good to her husband''s estate. The effect of this is that even if there could have been, or there ought to have been, or there was in theory, a forfeiture under the custom of the caste, yet by continuing in possession of her deceased husband''s estate Ms. Phul Kunwar could not change her capacity and therefore her so called adverse possession would only enure for the benefit of the estate, that is for the benefit of the ultimate reversioners. The passage which I have quoted is from the decision of their Lordships of the Privy Council in Lajwanti v. Safa Chand (1924) 51 Ind. App. 171 at p. 176 : AIR 1921 PC 121. The principle of the decision is stated in the first paragraph of the headnote which runs as follows:

A title acquired u/s 28 of the Indian Limitation Act of 1908 through adverse possession by a widow who claims and holds a widow''s estate enures to the estate of her deceased husband and descends upon her death accordingly.

25. This case which is also reported in 22 A.L.J.R. 304 has been followed in Umrao Singh and Another Vs. Pirthi and Others, in which it was held that here after re-marriage a Hindu widow mains in possession of her (first) husband''s lands for 12 years, but (sic) not claim to do so in her own (sic) but only as her first husband''s widow, she acquires the property for (sic) first husband and on her death his pensioners succeed to the estate. That exactly the position in the present case, it I must with respect confess to (sic) some doubt about the soundness the proviso which suggests that it is possible for a Hindu widow to claim to in possession of her husband''s land in her own right, that is to say to claim at by some act of her own she has the answer to change the capacity in which he is in possession of her deceased first husband''s property.

26. I am quite clear on a consideration all the facts that there was not and could not have been any re-marriage by Mst. Phul Kunwar and there was not id could not have been any forfeiture of Hindu widow''s estate by her. It follows that she was never in adverse possession of her husband''s property and (sic) never acquired an absolute title in herself which she could transmit by any means to her son Ganga Sahai, not being e son of her husband Gopi Nath.

27. Coming next to the position of Ganga Sahai, he came into possession of the state, whatever that estate was, which Mst. Phul Kunwar had in or about the year 1867. He succeeded to this property there by virtue of the will of Mst. Phul Kunwar--I leave out of discussion for (sic) moment her competency to execute which a will and the question how far it (sic) have been valid--or presumably by virtue of the provision in the arbitration ward that in case Mst. Phul Kunwar could die without making a will or a (sic) of gift, her estate would devolve equal shares upon her son Ganga Sahai ad her daughter. Failing either of lese methods he came into possession diversely to his step (sic) Mst. Chandra Kunwar. At that date limitation for instituting a suit to recover possession f the property at once began to run, but lat period of limitation had not expired then by the Act of 1877 a new law as enacted

creating a new rule for the institution of a suit for recovery of possession of this property. No doubt the possession of Ganga Sahai could be and must have been in some respects, that is in respect of such rights as subsisted in the estate of Rao Gopi Nath, adverse to Mst. Chandra Kunwar because Ganga Sahai was a stranger to the family of Gopi Nath, but there is no room for doubt that such adverse possession has no effect against the reversioners in view of the decision in Mt. Ram Kali''s (1892) 14 All 156 (F.B.) case and the Plaintiffs were fully entitled to institute the present suit at any time within 12 years from the date of the death of Mst. Chandra Kunwar.

28. Some argument has been addressed to us suggesting that however correct from the point of view of limitation pure and simple, the decision in Ram Kali''s (1892) 14 All 156 (F.B.) case does not now hold good on the question whether possession adverse to the female limited owner binds the estate and is therefore fatal to the case of a reversioner claiming the support of Article 141. I think there is no force in this contention. The whole argument rests on the foundation that. Their Lordships of the Privy Council have held in the Shivagunga case (1863) 9 MIA 539 that the estate vests in a Hindu widow and that a decree against her, if fairly obtained, binds the reversioners. Whether the same principle was applicable to cases of adverse possession against the widow, was considered by a Full Bench of this Court in Bankey Lal and Others Vs. Raghunath Sahai and Others . The headnote runs as follows:

A Hindu widow, who had succeeded to the estate of her husband, died in 1894, leaving a daughter as the heir. The daughter, however, never got possession, as her father''s collaterals took possession of the estate adversely to her. She did not sue them to recover possession and died in 1920. Her sons, who inherited the estate, sued these collaterals for possession in 1923. The Defendants pleaded limitation by reason of their adverse possession for over 12 years and the question arose as to what extent and under what circumstances adverse possession, as against a Hindu female heir would bind the reversioners. Held (Sulaiman, A. C.J. and Mukerji, J.) that Article 141 and not Article 144, of the Limitation Act applied to the suit, which, having been brought within 12 years of the death of the daughter, was not barred by limitation. No question of adverse possession arose in the Shivagunga case and the rule in that case was not a rule of limitation or adverse possession, but a rule of Hindu law that the estate vested in a Hindu widow and that a decree against her, if fairly obtained, was binding on the reversioners. Even assuming that a rule of limitation had been laid down by that case, it must be deemed to have been superseded by the enactment of Article 141 in the Limitation Act of 1877. The case of Vaithialinga Mudaliar v. Srirangath Anni did not lay down that Article 141 of the Limitation Act was inapplicable to a suit like the present, or that the rule laid down in Runehordas'' case was no longer good law.

Adverse possession against a Hindu female heir will not be effective against and binding on the reversioners. (Mukerji, J.).

29. Boys, J. differed to some extent from the other two Judges and thought that

The question whether a reversioner is barred by adverse possession against the widow on the basis that she represented the estate, thus coming within the main rule of Shivagunga''s case, would probably have to be decided, as in the case of decrees, on the facts of the particular case.

30. I need not go into the details of the discussion of the question in the judgments of Sulaiman A.C.J. and Mukerji J. interesting though it is in its examination of the leading cases particularly Ranchordas v. Parvatibai (1899) 23 Bom. 725 and Vaithialinga, Mudaliar v. Srirangath Anni, 92 Ind. Cas. 85 . The ultimate result is quite clear and the Full Bench decision was reiterated by a Division Bench recently in Shambhu Pd. v. Mahadeo Prasad (1933) 2 AWR 758 : 55 All. 554.

31. I shall deal next with the question of the applicability of Section 41 of the Transfer of Property Act. Learned Counsel for the Defendants Appellants, particularly Defendants Nos. 1 and 2, addressed certain arguments to us suggesting that these Defendants had been wrongly held not to be entitled to the protection of this section. It was suggested that such enquiry as they could have made would not have led them to suspect any weakness in the title of Mir Khan or even of Ganga Sahai. Learned Counsel for the Respondents, on the other hand, in answer to this contention and in support of his own appeal No. 173 of 1934, has contended that it is not open to the Defendants to rely upon Section 41 as a defence to a suit by reversioners because the effect of allowing them to do so would be to deprive Article 141 of the Limitation Act of all value. It happens and is bound to happen, in a very large number of cases that a widow survives her husband, or a daughter her father, by anything from 40 to 60 years and more. Such widow or daughter may make transfers a quite an early stage of her career and her transferees may hold the property for (sic) years or so before they transfer it to third person and in such cases of possession under a sequence of transfers which have begun 50 or 60 years back it would be al most impossible for the ultimate transferee to trace back the history of the transfers and to come to know that the original transfer or was a Hindu widow or daughter, (sic) of course referring to cases where the ultimate transferee is a stranger and the original transferor is the owner of numerous properties. In many cases the transferees cannot possibly get the benefit of any useful local knowledge. I Section 41 were to be applicable to sue cases, the right which is given to a reversioner to institute his suit within a period of 12 years from the date of the death of the female limited owner would in al most every case be met and successfully met, by the defence the (sic) transferee was a bona fide transferee for value who had made such inquiry as was reasonable. Learned Counsel, however, urges that the very wording of the first part of Section 41 is an answer to such a defence. The section provides that:

Where, with the consent, express or implied of the person interested in immovable property,; person is the ostensible owner of such property, am transfers the same for consideration, the transfer shall not be voidable on the ground that the transferor was not authorised to make it, provided that the transferee, after taking reasonable care to ascertain that the transferor had power to make the transfer, has acted in good faith.

32. Section 41 requires the consent, express or implied, of the person interested in immovable property. It is contended that possession by strangers as against Hindu female limited owner must necessarily be either by adversity or by the con sent of the limited owner. The section is not applicable to cases of adverse possession and the consent of the limited owner can be operative only so far as she is concerned. It cannot bind the reversioners who, so long as the female limited owner is in possession, have no more that (sic) successions and are not person; "interested in" immovable property. A; has also been said, Section 41 is based upon the doctrine of estoppel and operates to create what can only be described as a personal estoppel. The point was considered and discussed in a division bench case of this Court, Shambhu Prasad v. Mahadeo Prasad (1933) 2 AWR 758 : 55 All. 554, ILR 55 All., 554. The headnote runs as follows:

A Hindu daughter succeeded to her father''s estate but she allowed her uncle''s name to be entered in the revenue papers in respect of the estate and the uncle took possession. Subsequently the uncle as ostensible owner transferred a part of the estate to the Defendants. Later on the daughter died and within 12 years of her death her sons sued to recover possession from the Defendants. Held, that the Plaintiffs were not estopped u/s 41 of the Transfer of Property Act from claiming the property. Section 41 of the Transfer of Property Act refers to personal estoppels arising out of the conduct of the real owner and affecting him and persons claiming through him. The Plaintiffs, who were reversioners, did not derive their title from the daughter and therefore Section 41 could not apply to them. The mere fact that the estate was vested in the limited owner for the time being could not create in estoppel against the reversioners by virtue of the conduct of or consent obtained from the limited owner.

Held further, that during the lifetime of the limited owner the possession of the uncle or of his transferees could not be adverse to the reversioners so as to destroy their contingent rights. The Plaintiff''s cause of action which arose on the death of the limited owner was not barred by limitation.

33. In this connection the learned Judges referred to the Full Bench decision in Bankey Lal and Others Vs. Raghunath Sahai and Others to which I have referred above. Learned Counsel for the Defendants Appellants have been unable to find any answer to this contention put forward on behalf of the Respondent Plaintiffs by Mr. Gour and it follows that if the Plaintiffs are entitled to succeeds at all they will by entitled to succeed not only against those Defendants against whom the suit has

already been decreed but also as against those against whom their suit has been dismissed.

34. I come now to the question of merger. As the case stands at this stage, it is clear that if there was a merger of the mortgagor and mortgagee rights in the possession of Mst. Phul Kunwar whereby the mortgage of 1846 was extinguished, then Mst. Phul Kunwar was, after the death of Harsukh Rai and after the award of the arbitrators, in possession of the property of her late husband Rao Gopi Nath unencumbered by any mortgage. In respect of that estate she was not competent to make a will devising it to Ganga Sahai and Ganga Sahai therefore entered into possession as a trespasser. The title of his successors-in-interest can be no better than that of Ganga Sahai and it follows that the Plaintiffs will be entitled to get a decree for possession of the whole property in suit. On the other hand, it is contended that there was never any merger. It is of course obvious that there could have been no merger while the property was in the possession of Ganga Sahai. Ganga Sahai had no title whatever in the property of Rao Gopi Nath and if therefore there was no merger prior to the property as a whole coming into his possession, he was in possession of the equity of redemption, the mortgagor right, as a mere trespasser, while in regard to the mortgagee right he could have been in possession in one of two capacities. If the mortgagee rights were in the possession of Mst. Phul Kunwar as stridhan, then Ganga Sahai was either in possession as a trespasser against his stepsister Mst. Chandra Kunwar whose stridhan they were, or in the alternative he was in possession under the will of his mother or his mother''s will read with the arbitration award. In either case the capacity in which he was in possession of the mortgagee rights was something quite different from the capacity in which he was in possession of the equity of redemption and the mere fact that those two capacities were united in the same physical person could not result in a merger.

35. The argument has centred almost entirely round the question whether there was a merger of the two rights during the lifetime of Mst. Phul Kunwar. First of all, it is clear that Mst. Phul Kunwar, being in possession of the mortgagor rights as a Hindu widow holding the estate of her husband Rao Gopi Nath, came into possession of the mortgagee rights under the will of Harsukh Rai and under that will she was not given an absolute title in those mortgagee rights. On the contrary she was given nothing more than a life-interest with a vested remainder in favour of her son Ganga Sahai. It seems to me to be quite clear that in these circumstances there could not be any merger of the mortgagee rights with the equity of redemption and so long as this state of affairs continued the mortgage could never have been extinguished. The question becomes more difficult when the previous state of affairs was changed by the arbitration award. The validity of that award and its binding nature has not been questioned in this suit. Its effect purported to be to allot exclusively to Mst. Phul Kunwar "without the partnership of any other person", among other property, the mortgagee rights in 20 biswas of mauza Dalelgarhi,

pargana Pahasu Prima facie by this agreement the provisions of the will were overridden and ceased to be of effect. This was a family settlement to which all the persons affected by the will of Harsukh Rai were parties. On the other hand it has to be remembered that the absolute estate thus given to Mst. Phul Kunwar was limited by certain conditions. Condition 3 limited the rights of Mst. Phul Kunwar and Ganga Sahai. The whole of the management of the property had been given to Gopal Rai, adoptive son of Harsukh Rai and neither Mst. Phul Kunwar nor Ganga Sahai could take the property out of his management; nor could they sell their share to any person other than Gopal Rai and Chunni Lal (the nephew) so long as those two persons were ready to make the purchase. This condition operated for a period of 8 years after which period there was to be a reciprocal condition by which each party should give the other the first option to purchase any property of which it was desired to make a transfer. In this condition 3 the last sentence runs as follows:

If within this period of 8 years Mst. Phul Kunwar would like to make a will or deed of gift in favour of Ganga Sahai or her daughter or son-in-law (Gopal Rai) the said fixed period shall be a bar to it.

36. That is to say she would have no right to execute a will or deed of gift in favour of any of these persons up to the year 1873, whereas in fact she died in about 18 7.

37. Much stress was laid in the two following conditions on this right of pre-emption referred to above. Condition 6 provided that if Mst. Phul Kunwar should the without making a will or a deed of gift, her estate would devolve in equal shares upon her son Ganga Sahai and her daughter. It was presumably because Mst. Phul Kunwar''s will effected such a devolution without involving a division of each item of the property into two equal shares that possession and mutation after her death followed the conditions laid down in Mst. Phul Kunwar will. It seems to me that the whole underlying intention of this award was to bring about ultimately a result, somewhat similar with of course considerable modifications, to that which was provided in the will of Harsukh Rai. The will of Harsukh Rai had of course made no mention of his daughter Mst. Chandra Kunwar, but that does not really affect the question as the idea of Condition 6 and of the provision in Mst. Phul Kunwar''s will was doubtless to benefit Gopal Rai, the husband of Mt. Chandra Kunwar as much as Mst. Chandra Kunwar herself In the light of these considerations it may well be doubted whether Mst. Phul Kunwar had even under the arbitration award a complete title in the mortgagee rights and not rather a title which was in some degree limited. If she was not owner of the mortgagee rights completely there could not I think have been any merger.

38. It is however also necessary to consider whether there could have been or was in fact any merger upon the hypothesis that after the arbitration award Mst. Phul Kunwar had a complete title to those mortgagee rights. On behalf of the vendee Appellants it is contended that Mst. Phul Kunwar held the mortgagee rights in one capacity and the mortgagor rights in another capacity and that even if she

purported not to keep the mortgagee rights separate from the mortgagor rights, there could not in any case have been any merger. It is of course not in dispute that in many cases the question whether there has or has not been a merger of the equity of redemption with the mortgages rights depends on the intention of the person in whose possession both rights were at the same time. In the present case it is contended that, whatever the intention of Mst. Phul Kunwar may have been, the result never could have been an actual merger. I may remark here that the only section of the Transfer of Property Act which might appear to have some application is Section 101 but that section is not in terms applicable and Learned Counsel have not been able to quote any case which was at all comparable to the present case. A reference has been made to Hulsbury''s Laws of England, Second Edition, by Lord Hailsham, Vol. 23 at p. 513 in part 9 of the section relating to mortgages, which deals with the discharge of mortgages. Section 4 of this Chapter deals with the discharge of mortgages by merger and in para. 760 it is said that

Merger may take the form of a merger of estates or of a merger of a charge in the land. Merger of estates takes place when two estates held in the same legal right become united in the same person. The estate which is the smaller in legal valuation is then in law, apart from statutory provisions, swallowed up in the greater. Merger of a charge takes place when the ownership of the charge and the ownership of the land are united in the same person. Prima facie there is no reason for keeping the charge alive and the title to the land is simplified by clearing it of the encumbrance.

39. Para. 751 goes on to deal with what may be considered to be exceptions to the general rule, as for instance the cases where it is not in the interest of the person in whom the two estates are united to allow them to merge or where he shows an intention to keep them separate. It seems to me that the principle stated in the sentence "Merger of estates take place when two estates held in the same legal right become united in the satin person" is clearly applicable and furnishes the ratio for deciding the question whether there has been a merger in the present case It is not open to doubt that the equity of redemption was not held by Mst. Phul Kunwar in the same legal right as the mortgagee rights. She held the equity of redemption in pursuance of her right as widow of Rao Gopi Nath and she held the mortgagee rights in the first instance with a life-estate by virtue of the will of Harsukh Rai and subsequently with what I am assuming to be an absolute right though still as the legatee or devisee of Harsukh Rai. Learned Counsel for the Respondent Girdhiri Lal has contended that it is sufficient that there should be a residing of the two rights even temporarily in the same person. In that case that person might either allow a merger to take place or intend it to take place. He laid much stress upon the fact that it was Mst. Phul Kunwar herself who was the author of the mortgage and he argued that if at any stage the mortgagee right should come to reside and be vested in the author of the mortgage, the mortgage must necessarily be extinguished. I confess that I see no particular force in this argument. Prima facie I can see no reason why a Hindu widow, who is a wealthy woman by virtue of being

the owner of a large stridhan property, should not, in order to discharge debts due by her late husband, herself lend money to the husband''s estate for the discharge of those debts and become in a different capacity a creditor of the estate. It may be that there has been no case of the kind but on principle I do not see anything to prevent it. Nor do I think that in such a case the principle laid down in Lajwanti''s case 51 Ind. App. 171 at p. 176 : AIR 1921 PC 121 and in the single Judge case of Umrao Singh v. Pirthi (1928) 51 All. 188 : 26 ALJ 1049 : AIR 192 8 All. 561 (FB), quoted earlier, would have any application. To my mind in those cases there was never any question of change of capacity but the widow continued always to be in possession of the property concerned in the same capacity of a Hindu widow, whereas in the present case there can be no doubt that Harsukh Rai and the arbitrator could have had no intention to benefit the estate of Rao Gopi Nath and only intended a personal benefit for Mst. Phul Kunwar in her capacity as the highly respectable and recognised mistress of Harsukh Rai. On this view I reject the argument that by the mere fact that both rights resided at a certain period in the same person there was necessarily any merger.

40. A second line of argument is that Mst. Phul Kunwar intended that these rights should be merged and for this reliance is placed upon the fact that in her will she purported to devise the whole of the properties, in respect of which she had been left the mortgagee rights by Harsukh Rai, to her son Ganga Sahai and her legitimate daughter Mst. Chandra Kunwar without distinguishing the mortgagee rights from the mortgagor rights. I am not much impressed by this argument. At the stage in question Mst. Phul Kunwar seems to have practically forgotten that she had no power to dispose of the estate of Gopi Nath and if under that misapprehension she treated herself as having the right to dispose of the mortgagor rights and the mortgagee rights in one, that would not I think operate to effect a merger. The only result of her action seems to me to be that the will would only have been operative over those rights with which she was competent to deal.

41. Learned Counsel for the Respondent evidently felt that it was difficult to support the case of merger in the lifetime of Mst. Phul Kunwar because he fell back on the argument that whatever might be the case with Mst. Phul Kunwar it was impossible as it were to vivisect Ganga Sahai, but I think that it is impossible to hold that any merger could have taken place while the two properties were in the temporary possession of Ganga Sahai because there is on obvious impossibility in Ganga Sahai fusing certain rights which he had with rights which he had not.

42. In my judgment therefore the argument that there could have been a merger and that there in fact was a merger of the mortgagor rights with the mortgagee rights is without force. The Plaintiffs are the reversioners of Gopi Nath and they have no right whatever in respect of the mortgagee rights. It followed that their suit cannot succeed to any greater extent than this that their right as reversioners of Gopi Nath be declared and it be declared that they are the owners of the equity of

redemption in respect of all the properties in suit. On the other hand, it is obvious that it the mortgage, a usufructuary mortgage of the property in suit, has not been redeemed, (and there is no suggestion that it ever has been redeemed or the mortgage extinguished otherwise then by merger) the Plaintiffs are not in this suit entitled to get a decree for possession against persons in possession who are the successors in interest of the owner of the mortgagee rights. The present suit is not a suit for redemption and I do not think it desirable or necessary in the present suit to go into the question whether or not the mortgage has become irredeemable and whether the Plaintiffs can or cannot succeed in recovering possession of the property in suit by instituting such a suit. What is clear is that they are not entitled to obtain a decree for possession in the present suit. I would accordingly allow appeals Nos. 139, 165 and 399 of the Defendants and direct that the Plaintiffs suit be dismissed with costs of both Courts, as against those Defendants who have appealed and I would dismiss with casts the appeal No. 173 instituted by the Plaintiffs Girdhari Lal and others.

Verma J.

43. I am in agreement with the conclusions--on questions of fact as well as of law--arrived at by my learned brother and have very little to add.

44. On the question of limitation, it seems to me that the Full Bench decision of this Court in Ram Kali v. Kedar Nath (1892) 14 All 156 (F.B.), has not only stood the test of time, but that its authority has been fortified by the pronouncements of their Lordships of the Privy Council. It was, in my opinion, clearly affirmed by the decision of the Judicial Committee in the case of Ranchordas Vandravandas v. Parvatibai (1899) 23 Bom. 725. In my judgment it had been wrongly held in Tika Ram v. Shama Charan (1897) 20 A11. 42, that the decision in Ram Kali''s case had been impliedly overruled by the judgment of their Lordships in Lachhan Kunwar v. Manorath Ram (1894) 22 Cal. 445 (P.C.). I am also of the opinion that the authority of Ram Kali''s case (1892) 14 All 156 (F.B.) was not shaken by the ruling of the Privy Council in Vaithialinga, Mudaliar v. Srirangath Anni, 92 Ind. Cas. 85 . I consider it sufficient to refer to the judgments of Sulaiman, A.C.J. and Mukerji J. in Bankey Lal and Others Vs. Raghunath Sahai and Others . If I may say so with respect, I find myself entirely in agreement with the judgments of those two learned Judges in that case. The same view was re-affirmed by a Division Bench in Shambhu Prasad v. Mahadeo Prasad (1933) 2 AWR 758 : 55 All. 554.

45. On the question of merger, Learned Counsel on either side were agreed that the question, as it arises in this case, is res integra. In my judgment the contention of the Defendants that, when Harsukh Rai bequeathed his mortgagee rights to Mst. Phul Kunwar he intended the bequest to be for the benefit of Mst. Phul Kunwar personally and not in her capacity of Rao Gopinath''s widow and as the holder of his estate for a Hindu widow estate, must be accepted. That being so, I entirely agree with my learned brother that there is no reason in principle for holding that there

was a merger of the two rights--the mortgagor''s rights and the mortgagee rights--and with the reasons given by my learned brother for that conclusion.

Verma and Yorke JJ.--First Appeals Nos. 139, 165 and 399 of 1934 are allowed with costs and first Appeal No. 173 of 1934 is dismissed with costs. The result is that the Plaintiffs'' suit shall stand dismissed with costs in both Courts as against those Defendants who have appealed. The decree of the Court below shall stand as against those Defendants who have submitted to it.