

(1974) 07 CAL CK 0035

Calcutta High Court

Case No: Special Bench Reference in Suit No. 1461 of 1967

Milan Kumar Das

APPELLANT

Vs

Sm. Purnasashi Dassi
and Others

RESPONDENT

Date of Decision: July 17, 1974

Citation: AIR 1974 Cal 380 : (1975) 1 CALLT 204 : (1975) 1 CompLJ 30 : 79 CWN 9 : (1974) 2 ILR (Cal) 173

Hon'ble Judges: Sankar Prasad Mitra, C.J; M.M. Dutt, J; A.K. De, J

Bench: Full Bench

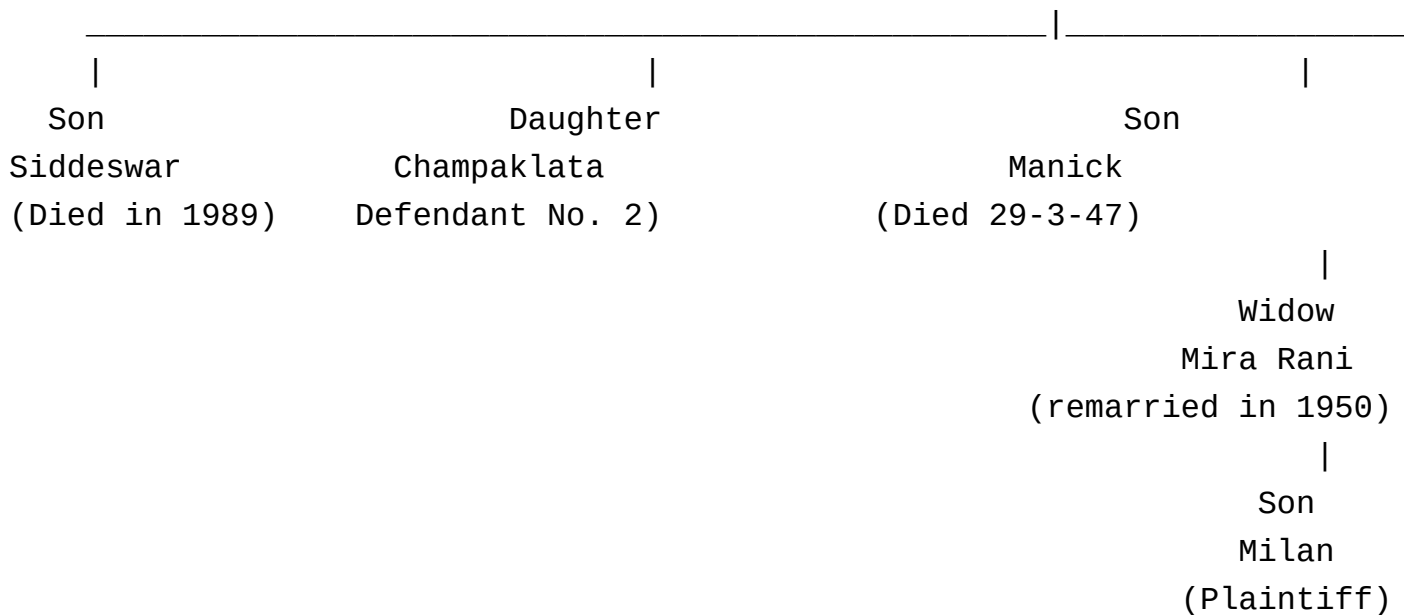
Advocate: H.K. Mitter, for the Appellant; Dipankar Ghosh, (for No. 1) and K.P. Basu and S.K. Saha Ray, (for No. 5), for the Respondent

Judgement

M.M. Dutt, J.

This suit has been referred to the Special Bench by our learned brother B. M. Datta, J., under Chapter V, Rule 2 of the Original Side Rules. The question which arose before the learned Judge and which we are to consider is, whether in the event of a partition between the sons, the mother who has already inherited the share of a deceased son is entitled to a further share under the Hindu Law. In two Single Bench decisions of this Court in Jugomohan Haldar v. Sarodamoyee Dossee (1878) ILR 3 Cal 149 and Poorendra Nath Sen v. Srimati Hemangini Dassi (1909) ILR 36 Cal 75, it has been held that the mother is entitled to a share even though she has already inherited the share of a deceased son. A contrary view has been taken by S.R. Das J, (as he then was) in Indu Bhusan Chatterjee v. Mritunjoy . Before we consider the question, the facts of the case may be stated in brief.

2. The plaintiff Milan Kumar Das has instituted the suit, for partition of the properties in suit by metes and bounds and allotments of the respective shares of the parties. The relationship of the parties will appear from the following genealogical table as set out in paragraph 1 of the plaint.



3. The properties in suit belonged to one Gour Chandra Das, a Hindu governed by Dayabhaga School of Hindu Law, who died intestate on October 13, 1927, leaving his widow Sm. Purnasashi Dassi and four sons, namely, Siddheswar Das. since deceased, Manicklal Das, since deceased, Jaharlal Das, since deceased and Pasupati Das as his heirs and legal representatives and two daughters, namely, Champklata and Ashalata. Siddheswar having died a bachelor his 1/4th share in the properties was inherited by his mother Purnasashi. The plaintiff Milan Das is the son of Manick. Both the plaintiff and his mother" Mira inherited the share of Manick. On the re-marriage of his mother, the plaintiff Milan has become the full owner of the share of his deceased father in the properties. During the pendency of the suit, Pasupati died unmarried and his share was inherited by Purnasashi under the Hindu Succession Act, 1956. It may be stated here, that by a registered deed of settlement Purnasashi absolutely transferred and conveyed the 1/4th share inherited by her as heiress of Siddheswar in the joint properties in favour of her daughters Champaklata and Ashalata as joint trustees, to hold the same for her benefit during her life time and after her death, to get the same absolutely in equal shares. After the death of Pasupati, the plaint was amended and Lekharani who was the defendant No. 5 was described as defendant No. 4. It is admitted before us on behalf of the parties that only Lekharani is the lawfully wedded wife of Jahar and that Pannalal has no interest in the properties in suit. We are told that Pannalal's name has since been expunged from the suit and he is no longer a party. In

paragraph 13 (b) of the amended plaint, it has been stated that the parties to the suit are entitled to the following shares:

The plaintiff, Milan Kr. Das	1/5th share.
The defendant No. 1 Sm. Purnasashi Dassi	2/5th share.
The defendants Nos. 2 and 3 Sm. Champaklata and Sm. Ashalata as trustees	1/5th share.
The defendant No. 4. Sm. Lekharani Das	1/5th share.

The suit has been contested by the defendant No. 4, Lekharani, the widow of Jahar. The defendants Nos. 1, 2 and 3 have supported the case of the plaintiff. The principal defence of Lekharani is that Purnasashi having inherited an undivided 1/4th share of her deceased son Siddheswar as his sole heiress under the Hindu Law, she is not entitled to any residence or maintenance. She denies that Purnasashi is entitled to a further share in the joint properties on partition thereof. Accordingly, she claims 1/4th share in the properties in suit. The following issues were framed at the trial of the suit:

(1) Is the defendant No. 1 Sm. purnasashi Dassi entitled to a share in respect of the estate of her husband Gour Chandra Das in view of her inheriting her predeceased son's share in the property in suit ?

(2) What would be the respective shares of the parties and to what relief would they be entitled ?

4. We are, therefore, mainly concerned with the question whether Purnasashi is entitled to a further 1/5th share in the properties in suit, for she has already inherited the undivided 1/4th share of Siddheswar long before the institution of the suit. Mr. Dipankar Ghosh, appearing for the defendant No. 1 Sm. Purnasashi Dassi submits that the question should be considered with reference to the texts of Hindu Law. He has placed before us the texts from Setler's Hindu Law on inheritance and has pressed us to consider the same in order to ascertain the true legal position. We

also feel the necessity of referring to the texts of Hindu Law so as to resolve the conflict of judicial opinions on the question.

5. The most relevant and important text of Hindu Law on the point is that of Yajnavalkya, one of the Smiriti writers. He says:

"If he (father) makes the allotments equal, his wives, to whom no separate property has been given by the husband or the father-in-law, must be rendered partakers of like portions. (Yajnavalkya II, 116--Setlur Page 9, Para 8)."

This text of Yajnavalkya has been interpreted by Mitakshara as follows:

"When the father, by his own choice, makes all his sons partakers of equal portions, his wives, to whom peculiar property had not been given by their husband, or by their father-in-law, must be made partakers of shares equal to those of sons. But, if separate property had been given to a woman, the author subsequently directs half a share to be allotted to her: or if any had been given, let him assign the half". (Mitakshara, Chapter 1, Section 2, Para 9 -- Setlur, Page 9)."

This text of Yajnavalkya and the interpretation of Mitakshara relate to a partition taking place during the lifetime of the father. It is clear that when a partition takes place during the lifetime of the father, his wife, that is, mother of the sons will get a share equal to that of a son provided she had not received from her husband or her father-in-law any property and, in that event, she will only get "arddha" or half. Mitakshara, therefore allows a half share to the wife if she had received any property from her husband or father-in-law. The expression "arddha" or "half has been interpreted in judicial decisions to mean that she takes so much as with such separate property would amount to a share equal to that of one of the sons (See *Jairam Nathu v. Nathu Shamji* (1904) ILR 31 Bom 54; *Jodoonath v. Brojonath* (1910) 12 Bom LR 385; *Kishori Mohun Ghose v. Moni Mohun Ghose* (1886) ILR 12 Cal 165; *Laljeet Singh v. Raj Coomar* (1910) 20 Suth WR 336 (337). Now there is no dispute on the point, and the text of Yajnavalkya as interpreted by Mitakshara comes to this that on a partition during the life time of the father, the mother is entitled to a share equal to that of the sons, minus what she might have received as separate property from her husband or her father-in-law. In other words, at the time of the allotment of the share to her she would be debited with the value of any separate property which she might have received from her husband or father-in-law.

6. As has been already noticed, the text of Yajnavalkya and the interpretation put thereon by Mitakshara relate to the allotment of a share to the mother when partition or distribution of properties takes place during the life time of the father. In the instant case, we are concerned with the question of allotment of a share to the mother after the death of the father. On this point, Yajnavalkya says:

"Of heirs dividing after the death of the father, let the mother also take an equal share" (Yajnavalkya, II, 124 --Setlur, Page 21).

In this text nothing has been stated what would happen when the mother had received separate property from her husband or father-in-law. This text of Yajnavalkya has been interpreted and explained by Mitakshara as follows:

"Of heirs making a partition after the decease of the father, the mother shall take a share equal to that of her sons; provided no stridhana had been given to her. But, if any had been received by her, she is entitled to half a share, as will be explained." (Mitakshara, Chapter 1. Section VII, Paragraph 2 -- Setlur, Page 22).

Mitakshara almost adopts the same interpretation as in the case of partition taking place during the life time of the father, except that the receipt of separate property of Stridhana by the mother has not been limited to her receipt of the same from her husband or her father-in-law. No explanation in this regard has been given by the Mitakshara although it has been stated that it will be explained. Prima facie it may mean that Stridhana which the mother gets from any person, she will be given a share after debiting the, value of such Stridhana. At the same time, the words "as will be explained" are significant and it will not be unreasonable to infer that Mitakshara has intended to put a limitation on stridhana she gets, limiting it to only that stridhana which she receives from persons having particular kinds of relationship with her. In our view, there is no apparent distinction between a partition taking place during the life time of the father and that taking place after his death. In this connection, we may refer to the text of Yajnavalkya relating to the right of a wife when her husband marries for the second time. Yajnavalkya says:

"To a woman, whose husband marries a second wife, let him give an equal sum for the supersession, provided no separate property have been bestowed on her; but, if any have been, let him allot half." (Setlur, Chapter II, Section 11, Page 60. Paragraph 34).

This text has been interpreted by Mitakshara as follows--

"She is said to be superseded, over whom a marriage is contracted. To a wife so superseded, as much should be given on account of the supersession, as is expended for the second marriage: provided separate property had not been previously given to her by her husband, or by her father-in-law. But, if such property had been already bestowed on her, half the sum expended on the second marriage should be given. Here the word "half (araddha) does not intend an exact moiety. So much therefore should be paid, as will make the wealth, already conferred on her equal to the prescribed amount of compensation. Such is the meaning."

If the text of Yajnavalkya is literally construed it means that if the wife had received any separate property from any person, in that case, she will get half. In interpreting the text Mitakshara has limited the gift to one by her husband or her father-in-law. In our view, a similar interpretation has been intended to be put by Mitakshara on the text of Yajnavalkya relating to the right of the mother when a partition takes place after the death of the father. In this connection, it may be pointed out that J.C.

Ghose in his book on the Principles of Hindu Law seems to have taken the same view as we have taken, for after stating the text of Mitakshara (Chapter 1. Section VII, paragraph 2) relating to the right of the mother to a share on partition after the decease of the father, he refers to the explanation of Mitakshara on text of Yainavalkya when the husband marries a second wife. (See J.C. Ghose's the Principles of Hindu Law -- 3rd Ed. --third footnote -- page 116).

7. In the instant case, the parties are governed by the Dayabhaga School of Hindu Law. We are, therefore, more concerned with the position under the Dayabhaga Law than that under the Mitakshara. We are now to consider what according to Dayabhaga (is) the right of a mother to a share on partition. Brihaspati, another Smriti writer says:

"But on his death the mother shall take a son's share. The mother shall share equally with the sons; the maiden shall take fourth part of the shares" (Brihaspati XXV. 64).

Jimutavahana of Dayabhaga follows Brihaspati and also the text of Yainavalkya referred to above and says:

"When partition is made by brothers of the whole blood after the death of the father, an equal share must be given to the mother. For the text states: "The mother should be made an equal sharer". (Dayabhaga. Chapter III, Section 2, Para 29 -- Setlur Page 26)"

He also says:

"The equal participation of the mother with the brothers takes effect, if no separate property had been given to the woman. But, if any have been given, she has a half."

So Yainavalkya declares--

"If he make the allotments equal, his wives, to whom no separate property has been given by their husband, or their father-in-law, must be rendered partakers of like portions". (Dayabhaga, Chapter III, Section 2, Para 31 -- Setlur Page 27).

It thus appears that according to Dayabhaga only the separate property which the mother might have received from her husband or her father-in-law will be taken into account in the allotment of a share to her on a partition taking place between her sons after the death of their father. There is, therefore, no ambiguity whatsoever so far as the interpretation which has been made by Dayabhaga as to the nature of Stridhana which has to be considered at the time of partition between the sons after the death of their father. The law has been clearly stated in Mulla's Hindu Law, 13th Edition, Article 353 (1), Page 396 as follows:

"As under the Mitakshara Law, so under the Dayabhaga Law, a mother cannot herself demand a partition; but if a partition takes place between her sons she is

entitled to a share equal to that of a son after deducting the value of the Stridhana, if any, which she may have received from her husband or father-in-law. "

According to Mulla, therefore, there is no distinction between the Mitakshara Law and the Dayabhaga Law and we are also of the same view. We have referred to the texts of Smriti writers and the interpretations put on them by the Mitakshara and the Dayabhaga for the purpose of ascertaining as to the type of Stridhana or separate property which may be taken into consideration at the time of allotment of a share to a mother or a wife when a partition takes place between the sons during or after the life time of the father. So far as the texts and the Mitakshara and the Dayabhaga Law are concerned, it appears to be well established that the type of Stridhana, the value of which will be taken into consideration, is limited to the stridhana received by her from her husband or her father-in-law. The Hindu Law, therefore, does not recognise any other Stridhana for the purpose of allotment of a share to the wife or mother. The law appears to be very clear in this respect.

8. Coming back to the instant case, the question we are to answer is whether Purnayashi Dassi is entitled to a further share when she had already received by inheritance, the share of Siddheswar in the properties in suit. If we are to answer this question on the basis of the texts of Hindu Law, then our answer must be in the affirmative, for it has been already noticed that under the Hindu Law the separate property which a mother or a wife had received from her husband or her father-in-law can only be taken into consideration in the matter of allotment of a share to her. It does not lay down that from whichever source the property comes to the woman, the value of it will be deducted from the share that will be given to her. In the two Single Bench decisions of this Court in (1878) ILR 3 Cal 149 and (1909) ILR 36 Cal 75 referred to above, it has been held that the mother is entitled to a share in her own right upon partition between her surviving sons even though she has received the share of a deceased son as heiress. S. R. Das, J., has taken a contrary view in *Indu Bhusan Chattel's* case ILR (1946) 1 Cal 128 referred to above. It has been held by Das J. that when the mother had already inherited the share of a deceased son which was sufficient for her maintenance, she was not entitled to any further share on partition. The reasons which have been given by his Lordship in taking this view may be stated in brief as follows:

9. According to notion of ancient Hindu Law-givers, a wife acquired from the moment of her marriage, a co-ownership in her husband's property by reason of her being the lawfully wedded wife. This co-ownership was regarded as a subordinate right, for the wife or the mother was not entitled to sever her share against the will of the husband or after his death against that of her sons. On a partition between the husband and the sons or on a partition after the death of the husband amongst the sons a share equal to that of a son was given to her. This was the basis why a share was given to her on partition between the sons. This basis of co-ownership has been shaken and altered by judicial decisions and it is now taken

for granted and firmly established that the share allotted to the wife or the mother on partition is so allotted to her for purposes of her maintenance. The old theory of co-ownership of the wife in the husband's property, on which the texts of the Hindu Law-givers enjoining the allotment of a share to a wife or mother were presumably based, no longer holds good and the right of the wife or the mother to a share on partition is now based on her right to maintenance. If maintenance be the basis of her right to a share on partition, then her wants and necessities must be one of the important factors to be taken into consideration and if her separate properties are to be taken into consideration to judge of her wants and necessities then all productive separate properties derived from all sources should be so taken into consideration. In this view of the matter, there can be no reason why the share inherited by the mother from a son should not be taken into consideration in arriving at the quantum of share to be allotted to her on a partition amongst her surviving sons. This share she inherits would have been liable for her maintenance had the son who was the owner thereof been alive. It follows, therefore, that at least so much of this share as would have been liable for her maintenance in the hands of her son had he been alive must be taken into consideration in assessing her maintenance. As her right to maintenance is the basis of her right to a share and as her wants are the basis of the quantum of maintenance, if the share inherited by her is sufficient for her maintenance, having regard to the other circumstances which must be considered, namely, the extent of the family properties and her status and station in life, then she is not entitled to any more share out of family properties, just as a wife or a mother, who had already received stridhana from her husband or her father-in-law in excess of her share would not be entitled to receive anything more on partition.

10. It thus appears that the only reason which has commended to S.R. Das, J., is the shifting of the basis of the rule of Hindu Law as to the mother's right to a share on partition, from co-ownership to maintenance. According to him, if the object of giving her a share is to provide for her maintenance, then when she is already in possession of property which is sufficient for her maintenance, it will be against the said object and consequently, against the rule of Hindu Law to give her a further share on partition in lieu of her maintenance, no matter from whichever source she has received the property.

11. We must frankly confess that the view which has been taken by Das, J., is a quite reasonable and logical view. There is considerable force in the reasons which have been given by his Lordship in support of the said view. Mr. Ghosh, however, submits that a Court of law is concerned with the application of the law to the facts of the case before it and that while it has jurisdiction to interpret the law where the law is ambiguous or not clear, it has no jurisdiction to add to the law. It is contended by him that the Hindu Law on this point based on the texts which have been already referred to, is well established and under the Hindu Law the only type of Stridhana or separate property which can be taken into consideration in allotting a share to

the wife or the mother is that which she had received from her husband or her father-in-law. He submits that the Hindu Law not having recognised any other kind of Stridhana or any other source from which the wife or the mother receives a stridhana or separate property, the property which she has got by inheritance from her deceased son cannot be taken into consideration in fixing the quantum of property that may be allotted to her on partition. It is further contended by him that the law on this point may be unreasonable and illogical and that the view which has been expressed by Das. J., may be quite logical, but that will be no ground for substituting this logical view for the well-established law on the point to make it sensible and logical. It is said that only Parliament can amend the law and that in the absence of any enactment by Parliament the law which is in force and adopted and followed in judicial decisions since a long time past cannot be ignored on the ground that it is unreasonable and illogical.

12. In our view, there is considerable force in the contentions of Mr. Ghosh. It is true that the theory of co-ownership no longer holds good and it is now substituted by the theory of maintenance as the basis or the underlying principle for allotting a share to a wife or mother on partition. It has been held in a long series of decisions including those of the Privy Council that when a share is given to a wife or a mother when a partition takes place between her husband and the sons or between the sons after the death of her husband, it is given to her in lieu of her maintenance (See *Sheo Dyal Tewaree v. Judoonath Tewaree* (1868) 9 Suth WR 61; *Smt Hemangini Dasi v. Kedar Nath Kudu Chowdhury* (1889) 16 Ind APP 115 (PC); *Sorolah Dossee v. Bhoobun Mohun Neoghv.* (1888) ILR 15 Cal 292; *Hridoy Kant Bhattacharjee v. Behari Lal Mooker-jee* (1907) 11 CWN 239; [Shashi Bhusan Shaw Vs. Hari Narain Shaw](#), ; [Hira Lal Mandal Vs. Shankar Lal Mandal and Others](#), ; AIR 1936 20 (Privy Council) . We are not, however, concerned with the basis or the underlying principle but we are concerned with the law on the point. In *Jugomohan Halder's* case (1878) ILR 3 Cal 149 and *Poorendra Nath's* case (1909) ILR 36 Cal 75, the principal reason which weighed with the learned Judges was that as the property which was inherited by the mother from her deceased son could not be considered as her stridhana, the same would not affect her right to get a share on partition equal to that of a son. Das. J., could not agree with the view expressed in those two decisions as also the statement of law by Mulla referred to above, on the ground that they have proceeded on a literal interpretation of the texts and do not discuss the principle underlying the same. We have already expressed the view that whatever may be the underlying principle, whether it is co-ownership or maintenance, it cannot affect the clear statement of the law on the point. In this connection, we may point out that a Division Bench of this Court consisting of Sir Asutosh Mookerjee and Buckland, J., in *Jogobondhu Pal v. Rajendra Nath Chatteriee* 34 Cal LJ 29 : (AIR 1921 Cal 3511 has held that if the mother has received stridhana from her husband or father-in-law, its value should be deducted from the share received on partition; but the stridhana received from the father of the lady should not be deducted. Sir Asutosh Mookerjee,

who delivered the judgment of the Bench referred to and approved of the decisions in Jugomohan Haldar's case and Poorendra Nath's case. Further, the decision of Macpherson J, in Jodoonath v. Brojonath (1910) 12 Bom LR 385 was also relied on as an authority for the proposition that if the mother had before the partition received property from their father either by gift or will, amounting to more than a son's share, she was entitled to nothing more on partition; if, on the other hand, she had received less, she was entitled on partition to so much as would make what she had received equal to a son's share.

13. It is true that prior to the decision in Indu Bhusan Chatterjee's case ILR (1946) 1 Cal 128 in no other decisions the question has been considered from the point of view of the underlying principle on which the texts of Hindu law are based. The view of Das J, is founded on logical grounds but we have already stated that the same cannot give jurisdictions to the Courts to change the law, however illogical that may be. In a Full Bench case of the Madras High Court in Pudiaya Nadar v. Pavanasa Nadar ILK 45 Mad 949 : (AIR 1923 Mad 215) (FB). the question was whether a congenitally blind person was excluded from succession. In that context. Trotter, J., observed that it must be regarded as an unabrogated rule of Hindu Law that a congenitally blind person was excluded from succession and that it could not be described as absolute in any other sense than that of being repugnant to more modern and more enlightened ideas than there which prevailed at the time of the smritis and commentators. It was further observed that it could of course be replaced by the legislature but until that step was taken and a law was passed, the Courts of this country had no option but to enforce the rule with whatever reluctance and with whatever consciousness of its repugnance to the present sentiments of the Hindu people. In [Kamalammal and Others Vs. Venkatalakshmi Ammal and Another](#), . it has been observed by the Supreme Court that the Hindu Law has not always been logical. In a Bench decision of this Court in Surendra Narain Sarba-dhikari v. Bholanath Roy Choudhuri 47 Cal WN 899 : (ATR 1943 Cal 613), it has been held that a person who is congenitally and incurably deaf and dumb, though not an idiot, cannot be validly adopted under the Hindu Law, whether of the Mitakshara School or the Davabhaga School. Further, it has been held that the above rule of Hindu Law cannot be departed from by the Courts on the ground that at the present day deaf-mutes are teachable. These decisions fully support the contentions of Mr. Ghosh. With great respect to S. R. Das, J. we are unable to deviate and depart from the well-established rule of Hindu Law that when a partition takes place between the sons, the mother is entitled to a share equal to that of a son after deducting the value of stridhana. which she may have received from her husband or father-in-law. For the same reason, we are unable to subscribe to the view of S.R. Das. J., as expressed in Indu Bhusan Chattel's case ILR (1946) 1 Cal 128 that when the mother had already inherited the share of a deceased son which was sufficient for her maintenance, she was not entitled to any further share on partition. We hold that except in the case of a stridhana which the mother might

have received from her husband or father-in-law, no other stridhana or property received by her from any other Person or from any other source can be taken into consideration for the purpose of determining whether any share can be allotted to her when a partition taken place between the father and the sons or between the sons after the death of their father.

14. The Issue No. 1 is, accordingly, answered in the affirmative. So far as Issue No 2 is concerned we declare that the shares of the parties in the properties in suit shall be as stated in paragraph 13 (b) of the amended plaint referred to above. The suit is decreed in a preliminary form on the basis of the shares as declared. Mr. Dipak Kumar Basil, Barrister-at-Law is appointed the Commissioner of partition on usual terms. The parties to the suit will bear their own costs upto this day. They will, however, bear the usual costs of partition in future

Sankar Prasad Mitra, C.J.

15. I agree,

A.K. De, J.

16. I agree.