Kalipada Chakraborti and Another

Vs

Palani Bala Devi and Others

Civil Appeal No. 19 of 1952

(B.K. Mukherjea, N. Chandrashekar Aiyar, Gulam Hasan JJ)

16.01.1953

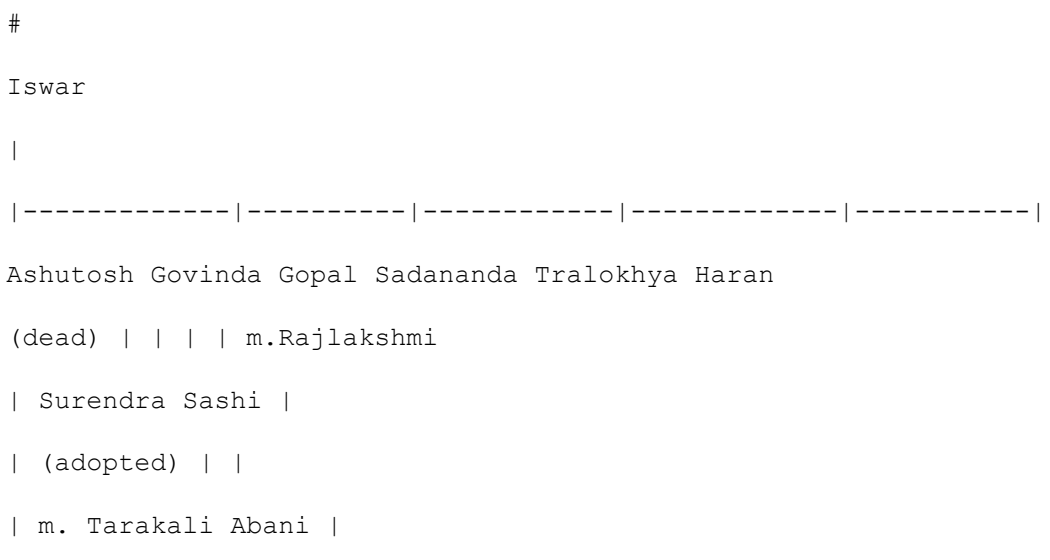
JUDGMENT

MUKHERJEA J. -

This appeal is on behalf of the plaintiffs and is directed against the judgment and decree of a Division Bench of the Calcutta High Court dated June 19, 1950, reversing, on appeal, those of the Subordinate Judge, Third Court, 24-Parganas, passed in Title Suit No. 53 of 1944.

The facts material for our present purpose are not in dispute and the controversy between the parties practically centres round one short point, namely, whether or not the plaintiffs' suit is barred by limitation. The trial court decided this point in favour of the plaintiffs, while the High Court has taken a contrary view in appeal.

The subject-matter of dispute is one-third share of shebaiti right in respect of a private debutter dedicated to an idol known by the name of Dakshineshwar Jew and situated at a village called Dhop Dhopi within the district of 24-Parganas in West Bengal. The deity is an ancient one and its reputed founder and first shebait was one Udhab Chandra Pandit. It is not disputed that by successive devolutions the rights of the shebait came to vest in one Iswar Chandra Chakroborti, who was the common ancestor of the parties to this suit. The following genealogical table will make clear the relationship of the several persons who figure as parties to the present litigation as between themselves and also to their common ancestor.



| (w) (Deft. 4) |

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Kali Nimai |

(Plff. No. I) (Plff. No. 2) |

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Moni Sarat Surendra Nagendra

(dead) | (adopted |

Bidhu by Gopal) Palani

(Deft. 3) Bala (Deft. I)

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Iswar died leaving six sons as his heirs and they were Ashutosh, Govinda, Gopal, Sadananda, Trailokhya and Haran. These six sons when they divided the properties of their father, divided the shebaiti right also which devolved upon them in six equal shares, and this division was by the method known as palas or turns of worship, which means that to each one of the sons was allotted the right of worshipping the deity for 5 days every month and during these days he alone was to discharge the functions of the shebait and receive the emoluments attached to the office. Gradually, a custom grew up in the family according to which these palas could be bought and sold or otherwise alienated amongst the members of the shebait's family. Govinda, who was the father of the plaintiffs and who got 5 days' pala every month in his share, sold his interest in the shebaiti to Haran, a brother of his, and the result was that Haran acquired 10 days' pala every month or one-third share in the entire shebaiti right. Haran died without any issue leaving him surviving, his widow Rajlakshmi as his sole heir under the Hindu Law and Rajlakshmi continued to hold this one-third share of shebaiti right along with other properties of the deceased. On 17th June, 1920, Rajlakshmi granted an ijara lease to her shebaiti right for a term of two years to one Satish Chandra Dey. On 1st of April, 1921, Satish sold this leasehold interest in respect to the palas to one Ram Rakhal Ghose. Previous to that, on 6th of August, 1920, Ram Rakhal had himself taken a lease from Rajlakshmi of her shebaiti right for a period of 5 years, this lease to commence at the close of the previous lease in favour of Satish. Ram Rakhal admittedly got possession of the office of shebait and began to exercise his rights as such on and from the 1st of April, 1921. By a deed of conveyance dated the 7th of November, 1921, Rajlakshmi made an out and out sale of her shebaiti right in favour of Ram Rakhal and twenty days after this purchase, that is to say, on 27th November, 1921, Ram Rakhal in his turn sold this interest to Nagendra and Surendra, two of the sons of Trailokhya. Surendra died some time afterwards and on 20th of June, 1925, his widow Tarakali sold her husband's share in the shebaiti right to Nagendra, her husband's brother. Thus Nagendra in addition to what he had inherited from his own father come to hold the entirety of a third share in the shebaiti right, represented by 10 days' pala every month, which was previously held by Haran. Rajlakshmi died on 22nd December, 1943, and the two plaintiffs, who are the two surviving sons of Govinda, filed the suit out of which this appeal arises for recovery of possession of this one-third shebaiti right of Haran on the allegation that they were the next heirs of Haran at the time of Rajlakshmi's death.

Nagendra had died in the meantime and the first and the principal defendant in the suit is his

daughter Palani Bala, who is a minor and is represented by her husband as guardian. The second defendant is the receiver, who has been placed in charge of the properties of Palani Bala in a guardianship proceeding pending before the District Judge of 24 Parganas. The defendants 3 and 4 are the surviving descendants of Iswar who hold the remaining interest on the shebaiti right.

The case of the plaintiffs, in substance, is that the one-third share of the shebaiti right, which was held by Haran during his lifetime, devolved upon his widow Rajlakshmi who had only the restricted rights of a Hindu widow in respect to the same. On the death of the widow, the interest vested in the plaintiffs, who were the nearest heirs of Haran at the time of Rajlakshmi's death. They, accordingly, prayed for being put in possession of this one-third share of the shebaiti right represented, as stated aforesaid, by 10 days' pala every month after evicting the defendant No. 1 therefrom. There was a claim also for mesne profits from the date of the widow's death. In the plaint a description has been given of the temple, its appurtenant lands and also of the structures standing thereupon, but there is no prayer for possession in respect of these properties.

The suit was resisted on behalf of defendant No. 1 and the main contention raised was that as the sale of her shebaiti right by Rajlakshmi, the widow of Haran, was a void transaction which did not create any right in the transferee, the possession of Ram Rakhal and after him his vendees, who were the predecessors of defendant No. 1, was adverse against all the shebaits, and the defendant No. 1 consequently acquired an indefeasible title to this third share in the shebaiti right by adverse possession and the plaintiffs' suit was barred by limitation. Several other contentions were raised but they are not material for our present purpose.

The trial Judge by his judgment dated the 22nd December, 1948, overruled the pleas taken by the defendant and give the plaintiffs a decree. On the question of limitation, the Subordinate Judge held that although article 141 of the Indian Limitation Act was not attracted to this case, yet the plaintiffs' suit was not barred by limitation. Two reasons have been assigned for this view. It has been said in first place that Nagendra purported to purchase only the life interest of Rajlakshmi; consequently his position as purchaser was in recognition of the interest of the reversionary heirs of Haran. It is said further that as Rajlakshmi and Nagendra were both co-shebaits of the deity, the possession of the latter could not have been adverse to the former, they being in the position of co-sharers in law and nothing like ouster being alleged or proved in this case.

Against this judgment, the defendants 1 and 2 took an appeal to the Calcutta High Court and the appeal was heard by a Division Bench consisting of Das and Guha JJ. The learned Judges while affirming all the other findings arrived at by the trial judge disagreed with the latter on the question of limitation. It was held by the High Court that the proper article to apply in this case was article 124 of the Limitation Act, and as the defendant No. 1 and her predecessors had been in possession of the hereditary office of the shebait adversely to the plaintiff for more than 12 years prior to the institution of the suit, the plaintiffs' claim was barred by limitation. In this view, the judgment of the trial court was reversed and the plaintiffs' suit dismissed.

The only point canvassed before us in this appeal is that of limitation and the arguments that have been advanced before us on this point by the learned counsel on both sides really raise two questions for our determination. The first is, whether on the facts of the present case the plaintiffs' suit is governed by article 124 or article 141 of the Limitation Act ? If article 141 is the appropriate article, it is not disputed that the plaintiffs' suit is well within time; but if article 124 is applicable, the other point that would require consideration is, when did the defendant or her predecessors take possession of the hereditary office of shebait adversely to the plaintiffs ? Was their possession

adverse from the very date of the transfer by Rajlakshmi or did it become so only at her death ?

The proposition is well established that the alienation of the shebaiti right by a shebait in favour of a stranger is absolutely void in Hindu law and cannot be validated even on the footing of a custom. The alienee of the right is, therefore, a trespasser out and out and his possession as against the transferor is adverse from the very beginning. Mr. Chatterjee appearing for the plaintiffs appellants has not assailed the correctness of this proposition of law; his contention is that the possession of shebaiti right by defendant No. 1 and her predecessors might have been adverse against Rajlakshmi ever since the date of transfer and on the strength of such possession they might have acquired a statutory title against her in respect of the shebaiti interest; but such adverse possession for more than the statutory period though it might bar the widow would not bar the reversioners who do not derive their title from or through her. This, it is said, is the principle underlying the law of limitation in India ever since 1871 and article 141 of the Limitation Act expressly recognises and gives effect to it. It is contended by Mr. Chatterjee that even if article 141 does not apply to the facts of the present case and article 124 is taken to be the appropriate article, the plaintiffs' suit would be quite within time as the defendant or her predecessors must be held to have taken possession of the office of the shebait adversely to the present plaintiffs only when the widow died and not before that.

On the other hand, it has been argued by Mr. Panchanan Ghose that there is nothing like a general principle of law that adverse possession against a Hindu widow could not be reckoned as adverse possession against her reversionary heirs. That, it is said, is only a special rule which rests entirely upon the particular provision of article 141 of the Limitation Act and is confined in its operation to cases which come within the purview of that article. Mr. Ghose's contention is that article 141 has no application to the facts of this case and consequently there is no reason for holding that adverse possession against the widow if it was continued for the statutory period would not bar the reversionary heirs also. This, he says, was the law prior to the introduction of article 141 into the statute book and that is the law which governs all cases even now which do not directly come under that article. According to the learned counsel, article 124 is the proper article which governs this case and the possession of the transferee of the shebaiti interest being admittedly adverse to the holder of the office at the date of the transfer, it would be adverse against the next holder also, no matter whether strictly he derives his title from the previous holder or not. It is urged that in the case of a hereditary office like that of a shebait, the powers of a female shebait are in no way more restricted than those of a male shebait and as the trust estate during the incumbency of a female shebait resides in her completely and effectually as in a male trustee, the male trustee who comes after her cannot claim the benefit of the principle upon which article 141 of the Limitation Act is founded. The points raised are no doubt important and require careful examination.

It may be mentioned at the outset that in the old Limitation Act (Act XXIV of 1859) there was no specific provision relating to suits by reversioners for recovery of possession of property held by a Hindu widow in her restricted right. There were provisions only of a most general character contained in sections 12 and 16 of the Act, under which limitation for suits to recover immovable and movable properties was 12 and 6 years respectively "from the time the cause of action arose". Even before this Act was passed, in a case [Goluckmani v. Digambar, (1852) Macpherson on Mortgage, 2nd ed., 20] decided by the Supreme Court of Calcutta, Peel, C.J. made the following observation :

> "It has been invariably considered for many years that the widow fully represented the estate, and it is also settled law that adverse possession which bars her bars the heir after her, which would not be the case if she were a mere tenant for

life, as known to the English Law".

In 1863 the case of Katama Natchier v. Rajah of Shivagunga [(1861-63) 9 Moo. I.A. 539] was decided by the Judicial Committee of the Privy Council and the proposition was laid down, which has not been questioned since then, that "when the estate of a deceased Hindu has vested in a female heir, a decree fairly and properly obtained against her in regard to her estate is in the absence of fraud or collusion binding on the reversionary heir". Turner L.J., who delivered the judgment of the Board, observed in course of his judgment :

> "The whole estate would for the time be vested in her, absolutely for some purposes, though, in some respects, for a qualified interest; and until her death it could not be ascertained who would be entitled to succeed. The same principle which has prevailed in the courts in this country as to tenants-in-tail representing the inheritance, would seem to apply to the case of a Hindu widow; and it is obvious that there would be the greatest possible inconvenience in holding that the succeeding heirs were not bound by a decree fairly and properly obtained against the widow".

The case proceeded entirely on the footing that although the widow for some purposes has only a partial interest in her husband's estate, for other purposes the whole estate vests in her, and that her interest is somewhat akin to that of a tenant-in-tail under the English law. If the suit was not in respect of a personal claim against the widow but in respect of the estate which, in law, she fully represents, a decree fairly and properly obtained would bind the reversionary interest [Vide in this connection Jugal Kishore v. Jotendro, 11 I.A. 66, 73]. There was absolutely no question of adverse possession raised in this but the rule enunciated in it was relied upon in deciding several cases under the Limitation Act of 1859, where the question arose as to whether adverse possession for more than the statutory period, which bars the widow, would bar her reversionary heirs also. The leading pronouncement on this point is to be found in Nobin Chunder v. Issur Chunder [9 W.R. 505] upon which Mr. Ghosh has laid very great stress. In that case a trespasser had taken possession of the estate against the widow and it was held that such adverse possession was effective against the reversioners as well. The cause of action, it was said, accrued to the widow and a suit by her or by her reversioner must be brought within 12 years from the date of dispossession as laid down in section 12 of the Limitation Act of 1859. The decision can certainly be justified on the law of limitation as it then stood. The Act of 1859 did not provide a separate rule as regards reversioners and all suits for recovery of possession of immoveable property had to be brought within 12 years from the date of the accrual of the cause of action. If there was a trespass against the widow, the commencement of the trespass would constitute the cause of action for the suit and a suit against the trespasser would have to be brought within 12 years, no matter whether it was brought by the widow or by the reversioner. The learned Judges could not overlook the fact that it was not possible for the reversionary heirs to institute a suit for possession during the lifetime of the widow. The difficulty, however, was got over by invoking the principle of "representation of the estate by the widow" enunciated by the Shivagunga case. Sir Barnes Peacock, C.J., observed as follows :

> "It is said that the reversionary heirs could not sue for possession during the lifetime of the widow, and that therefore they ought not to be barred by any adverse holding against the widow at a time when they could not sue. But when we look at the widow as a representative and see that the reversionary heirs are bound by decrees relating to her husband's estate which are obtained against her without fraud or collusion, we are of opinion that they are also bound by limitation by which she, without fraud or collusion, is barred".

Since an adverse decision against a widow was held binding upon a reversioner on the principle of representation of the estate, a similar result was held to follow in the case of adverse possession against her so as to put an end to the reversionary interest. This principle was affirmed by the Privy Council in Aumirtolall v. Rajonee Kant [(1874-75) 2 I.A. 113] and Sir Barnes Peacock, who delivered the judgment, expressly affirmed the decision in Nobin Chunder v. Issur Chunder [9 W.R. 505]. It may be noted here that though the Privy Council judgment in this case was passed in the year 1875 it was a decision under the old Limitation Act of 1859.

In 1871 a new Limitation Act was passed which repealed the earlier Act of 1859. Article 142 of the Act (which corresponds to article 141 of the present Act) expressly prescribed a period of limitation of 12 years for a suit by a Hindu entitled to possession of immovable property on the death of a Hindu female heir, the limitation to run from the time when the female heir died. This provision, extended further so as to include a suit by a Mohammedan, was reproduced in the Act of 1866 and again in article 141 of the present Act. It seems to us to be a correct view to take that this was a change deliberately made by the legislature in the existing law. Article 141 speaks of a "like suit and this means that it is a suit for possession of immovable property which is provided for in the previous article. The earlier Article relates to a suit by a remainderman or a reversioner in the technical sense of the English lawyers and lest there be confusion if the expression "reversioner" is used with reference to the estate of a Hindu or Mahommedan female heir, the legislature deliberately used the words "a Hindu or Mahommedan entitled to possession of property on the death of a female heir". The estate of a Hindu female heir, as is well known, is extremely anomalous in its character; it cannot be described either as an estate of inheritance or one for life, though it partakes of the nature of both. The intention of the legislature in introducing this provision was obviously to do away with these anomalies for the purpose of applying the law of limitation and for this purpose the Hindu widow's estate was completely assimilated to that of a tenant for life. This was the view taken, and in our opinion quite rightly, by a Full Bench of the Calcutta High Court in Srinath Kur v. Prosunno Kumar [(1883) 9 Cal. 934] and by the Bombay High Court in Vundravandas v. Cursondas [(1897) 21 Bom. 646], the decision in the latter case being affirmed by the Privy Council in Ranchordas v. Parvati [(1899) 26 I.A. 71]. The decision in Ranchordas's case has all along been treated as an authority for the proposition that the statute of limitation does not being to run against the reversioner when there is dispossession of a Hindu female holding a limited estate; and in such cases the reversioner has a right to institute suit within 12 years from the death of the female heir when the estate actually falls into possession. It is to be noticed that the Judicial Committee in Ranchordas's case expressly laid down that even in respect of movables to which article 141 does not apply, the reversioner's right to property accrues on the death of the widow and not before that. Opinion was expressed in some cases [Vide Aurobinda v. Monorama (1928) 55 Cal. 903] that the view taken in Ranchordas's case was shaken to a considerable extent by the later pronouncement of the Judicial Committee in Vaithialinga v. Srirangath [(1925) 52 I.A. 322], and that the principle of representation of the estate by the widow upon which the rule of Shivagungs's case rested, could be applied to a case of adverse possession against the widow. But all doubts on this point were set at rest by the decision of the Privy Council itself in Jaggo v. Utsava [(1929) 56 I.A. 267] and the law can now be taken to be perfectly well settled that except where a decree has been obtained fairly and properly and without fraud and collusion against the Hindu female heir in respect to a property held by her as a limited owner, the cause of action for a suit to be instituted by a reversioner to recover such property either against an alienee from the female heir or a trespasser who held adversely to her accrues only on the death of the female heir. This principle, which has been recognised in the law of limitation in this country ever since 1871 seems to us to be quite in accordance with the acknowledged principles of Hindu law. The right of reversionary heirs is in the

nature of spes successionis, and as the reversioners do not trace their title through or from the widow, it would be manifestly unjust if they are to lose their rights simply because the widow has suffered the property to be destroyed by the adverse possession of a stranger. The contention raised by Mr. Ghose as regards the general principle to be applied in such cases cannot, therefore, be regarded as sound.

Coming now to the specific points raised in the case, the first thing that requires consideration is, whether the present suit is governed by article 124 of article 141 of the Limitation Act ? The learned Judges of the High Court have held and quite properly that the benefit of article 141 could be claimed only if there was a qualified estate in the female heir after whose death the plaintiff was entitled to the property as the heir of the last male holder. According to the learned Judges, however, this condition was not fulfilled in the present case, inasmuch as the subject matter of dispute was the right of shebaitship and the rights of a female shebait, it is said, are not in any way more restricted or qualified than those of a male shebait, although she cannot transmit this office to her own heirs. Reliance has been placed in this connection upon a decision of the Madras High Court in Pydigantan v. Rama Dass [(1905) 28 Mad. 197], which was followed by a Division Bench of the Calcutta High Court in Lilabati v. Bishen [(1997) 6 C.L.J. 621]. This method of approach seems to us to be open to doubt. Whatever might be said about the office of a trustee, which carries no beneficial interest with it, a shebaitship, as is now settled combines in it both the elements of office and property. As the shebaiti interest is heritable and follows the line of inheritance from the founder, obviously when the heir is a female, she must be deemed to have, what is know, as widow's estate in the shebaiti interest. Ordinarily there are two limitations upon a widow's estate. In the first place, her rights of alienation are restricted and in the second place, after her death the property goes not to her heirs but to the heirs of the last male owner. It is admitted that the second element is present in the case of succession to the rights of a female shebait. As regards the first, it is quite true that regarding the powers of alienation, a female shebait is restricted in the same manner as the male shebait, but that is because there are certain limitations and restrictions attached to and inherent in the shebaiti right itself which exist irrespective of the fact whether the shebaitship vests in a male or a female heir [Vide Angurbala v. Debabrata, [1951] S.C.R. 1125, 1136].

But although we may not approve of this line of reasoning adopted by the High Court, we are in agreement with the learned Judges that the proper article to be applied in this case is article 124 and not article 141. There could be no doubt that there is an element in the shebaiti right which has the legal characteristics of property; but shebaitship is property of a peculiar and anomalous character, and it is difficult to say that it comes under the category of immovable property as it is known in law. Article 141 refers expressly to immovable property and not to property in the general sense of the word. On the other hand, it is quite settled that a shebaiti right is a hereditary office and as such comes within the express language of article 124 of the Limitation Act. We think that when there is a specific article in the Limitation act which covers a particular case, it is not proper to apply another article, the application of which is not free from doubt. We hold, therefore, that article 124 is the proper article to be applied, and the question now arises as to whether the plaintiffs' suit is barred by limitation under this article, as has been held by the learned Judges of the High Court ?

Article 124 relates to a suit for possession of a hereditary office and the period of limitation prescribed for such suit is 12 years from the date when the defendant takes possession of the office adversely to the plaintiff. The intention of the legislature is obviously to treat hereditary office like land for the purpose of barring suits for possession of such office and extinguishing the right to the possession thereof after a certain period. The question is, when did the defendant or her predecessor take possession of the office of shebait adversely to the plaintiffs ? It is conceded that the possession

was adverse to Rajlakshmi, the holder of shebaiti at that time; but the contention of Mr. Chatterjee is that as the plaintiffs did not claim through or from Rajlakshmi, the defendant could not be regarded as taking possession of the office adversely to the plaintiffs. He refers in this connection to the definition of "plaintiff" in section 2(8) of the Limitation Act, where it is stated that plaintiff includes any person from or through whom a plaintiff derives his right to sue. In answer to this, it is argued by Mr. Ghose that a shebait like a trustee represents the entire trust estate and the next trustee, even though he may not strictly claim through or from the previous holder of the office, must be deemed to be bound by acts or omissions of the latter; and in support of this contention be relies upon the judgment of the Judicial Committee in Gnanasambanda v. Velu [(1900) 27 I.A. 69]. We do not think that this contention is right. Article 124 relates to a hereditary office and this means that the office goes from one person to another solely by the reason of the latter being a heir to the former. Under the Hindu Law of Inheritance, when a female heir intervenes, she holds during her lifetime a limited interest in the estate and after her death succession opens out not to her heirs but to the heirs of the last male holder. It has not been and cannot be disputed that the same rule applies in the case of succession to shebaitship. Reading article 124 of the Limitation Act along with section 2(8), the conclusion is irresistible that to defeat the title of the plaintiff under article 124 it is necessary to establish that the defendant had taken possession of the office adversely to the plaintiff or somebody from or through whom the plaintiff derives his title, more than 12 years prior to the institution of the suit. This is exactly what is laid down in Gnanasambanda v. Velu [(1900) 27 I.A. 69]. In this case two persons, who were hereditary trustees of a religious endowment, sold their right of management and transferred the entire endowed property to the defendant appellant. The sales were null and void and the possession taken by the purchaser was adverse to the vendors from the very beginning. The plaintiff Velu was the son and heir of one of the hereditary trustees and he instituted the suit more than 12 years after the date of the transaction claiming possession of the office along with the heir of the other trustee who was joined as a defendant in the suit. It was held by the Judicial Committee that the plaintiff's suit was barred and the reason given is that 'the respondent Velu could only be entitled as heir to his father Nataraja, and from him and through him, and consequently his suit was barred by article 114." This portion of the judgment, it seems, was overlooked by the learned Judges of the Calcutta High Court and also by the Madras High Court in the case referred to above. The fact that under the ordinary law of inheritance the plaintiffs would come as the heirs of the husband of Rajlakshmi is immaterial. That would not be deriving their right to sue through and from the widow, and in this view of the case the plaintiffs' suit cannot be held to be barred. The result, therefore, is that we allow the appeal, set aside the judgment and decree of the High Court and restore those of the trial judge with costs to the appellants in all courts.

Appeal allowed.

Agent for the appellants : Sukumar Ghose.

Agent for respondent No. 1 : R. R. Biswas.

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