**PATNA HIGH COURT**

Ganesh Mahto

Vs

Shib Charan Mahata

(Jwala Prasad and Kulwant sahay, JJ.)

05.06.1931

**JUDGMENT**

**Kulwant sahay, JJ.**

1. The question involved in this appeal is, what is the law of succession governing the parties to the suit. The parties are Kurmi Mahtons of Chota Nagpur. The property in dispute originally belonged to one Lochan Mahton, who died leaving a widow, a daughter and two brothers. After the death of Lochan Mahton the widow remained in possession till her death in 1330 B.S. The dispute has arisen after the death of the widow between the surviving brother and the deceased brother's sons on the one part and the daughter, the daughter's husband and their son on the other part as regards the law of succession. The plaintiffs, who are surviving brother and the deceased brother's sons allege a special custom under which the daughters and their sons are excluded. The defendants, on the other hand, rely on the ordinary Hindu law of succession under which the daughters would take their father's property after the death of the widow. It was the case of the plaintiffs that the parties were aboriginals and not Hindus. The defendants admitted in the trial Court that they were aboriginals as distinguished from the Aryan race, being the primitive and indigenous inhabitants of the country, but their case was that the family had become Hindus, had adopted the Hindu religion and were governed by the Hindu law of succession and inheritance. The learned Subordinate Judge framed various issues of which the important issue was issue 3, namely, whether the custom mentioned in para. 2 of the plaint was prevalent among the people or the caste to which the parties belonged. The learned Subordinate Judge placed the onus of proof upon the defendants to prove that they were governed by the ordinary law of succession and inheritance under the Hindu law and not by any special custom prevailing among the aboriginals. He found that they had failed to prove that they were not governed by the special custom and accordingly made a decree in favor of the plaintiffs. It may be noted that the learned Subordinate Judge was of opinion that although the parties had adopted some of the Hindu customs and ceremonies they had not become Hindus and had not adopted the Hindu religion as a whole.

2. On appeal the learned District Judge seems to have been of the opinion that the parties

belonged to the Aryan race, but he felt himself constrained to give effect to the admission made by the defendants that they were aboriginals, and not Aryans. As regards the question whether the Kurmi Mahtons were Hindus or not he referred to a number of reports and authorities and to the evidence in the case and came to the conclusion that the Kurmi Mahtons though aboriginals by origin have accepted the Hindu religion and Hindu social usages and in fact the learned advocate for the plaintiffs conceded before him that they had "adopted the Hindu religion and are now Hindus." We have therefore the admission that they were originally aboriginals. We have also the admission on behalf of the plaintiffs that the parties have now become Hindus and have adopted the Hindu religion.

3. The question then is, what is the law of succession governing the parties. Reference has been made to a number of authorities to the effect that once it is shown that a party is a Hindu it will be presumed that he is governed by the Hindu law of succession and the party, who alleges a special custom, has to prove the same. In this particular case we have the admission on the part of the plaintiffs that the parties have now become Hindus and have adopted the Hindu religion. The presumption therefore would follow that ordinarily they would be governed by the Hindu law of succession. In *Mokka Kone v. Ammakutti*[1] the question was considered by a Full Bench of the Madras Court in relation to a community who were originally non-Hindus but bad subsequently adopted the Hindu religion. It was held in that case that in the case of persons professing the Hindu religion, the Hindu law as expounded in the Smritis and commentaries prevalent in the province in which the dispute arises should prima facie govern the parties though it is open to show that the Hindu law has been either modified by custom or that particular rules have not been adopted by the community who retained in that respect their original customs; and it must be presumed that the parties are governed by the Hindu law except in so far as they prove any custom which is at variance with it. These observations apply to the facts of the present case and in the absence of evidence it must be presumed that the parties are governed by the ordinary Hindu law of succession.

4. The question whether they are governed by the Mitakshara School of Hindu law or the Dayabhag School of Hindu law is not of importance in the present case as in either system the defendants would be entitled to succeed if they are governed by the Hindu law. The difficulty however arises in the fact that the learned District Judge has not dealt with the evidence in the case satisfactorily. He has correctly placed the onus of proof upon the plaintiffs, but when he comes to consider the evidence there appears to be the confusion in his mind as regards the proof of custom set up by the plaintiffs and as regards the fact as to whether there has been a variance of the Hindu law in the particular tribe with which we are now concerned. The learned Subordinate Judge no doubt considered the evidence in the case, but the dealing of the evidence by the District Judge does not appear to be satisfactory and the case has to go back to the District Judge for a reconsideration of the evidence. He must accept it as a fact that the parties are now Hindus and have adopted the Hindu religion. He must presume that the parties will be governed by the ordinary law of inheritance and succession under the Hindu law and it will be for the

plaintiffs to establish before him whether there is a special custom or special rule of succession prevailing amongst the Kurmi Mahtons in Chota Nagpur. In the first place, the custom alleged by the plaintiffs has to be established, namely the custom of excluding daughters and daughter's sons. In the second place, if that custom is established then the further question would arise whether the law of succession prevailing amongst the Kurmi Mahtons is the ordinary Hindu law or the primitive custom prevailing among the aboriginals as alleged by the plaintiffs; in other words, whether the parties still retain the original custom of succession whereby daughters and daughter's sons are excluded. The decision must be come to upon the evidence already on the record and the parties will not be at liberty to adduce fresh evidence. The District Judge will dispose of the appeal in accordance with his finding upon the aforesaid point in the light of the observations made above. The costs of this appeal will abide the result.

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Cases Referred.

[1] A.I.R. 1928 Mad. 299