IN THE SUPREME COURT OF BANGLADESH

APPELLATE DIVISION

PRESENT:

Mr. Justice Md. Nuruzzaman
Mr. Justice Obaidul Hassan
Mr. Justice Borhanuddin
Mr. Justice M. Enayetur Rahim

CIVIL APPEAL NO.55 OF 2003

(From the judgment and order dated 04.07.2000 passed by the High Court Division in Civil Revision No.2049 of 1999).

Shishubar Dhali being dead his hears: 1(a) Mrigangka Mohan Dhali and others. : **...Appellants.**

-Versus-

Chitta Ranjan Mondol and others. : **...Respondents.**

For the Appellants. : Mr. Md. Nurul Amin, Senior Advocate instructed by Mr. Md. Nurul Islam Chowdhury, Advocate-on-Record.

For Respondent Nos.1-4. : Mr. M. Qumrul Haque Siddique, Advocate with Mr. Md. Ashiqul Haque, Advocate instructed by Mr. Bivash Chandra Biswas, Advocate-on-Record.

For Respondent Nos.5-20. : Not represented.

Amicus Curiae. : Mr. Probir Neogi, Senior Advocate.

Date of Hearing. : **The 3rd, 10th, 24th, November, 2022.**

Date of Judgment. : **The 11th December, 2022.**

J U D G M E N T

Borhanuddin,J: This civil appeal by leave is directed against the judgment and order dated 04.07.2000 passed by the High Court Division in Civil Revision No.2049 of 1999

discharging the Rule and thereby affirming the judgment and decree passed by the courts below.

Brief facts for disposal of the appeal are that mother of the present respondent nos.1-4 namely Elokeshi Mondol wife of Binoy Krishna Mondol as plaintiff instituted Title Suit No.171 of 1981 in the 2nd Court of Sub-ordinate Judge, Khulna, impleading petitioners herein alongwith others as defendants for declaration of title; On transfer in the Court of Senior Assistant Judge, Additional Court No.3, Khulna, the suit was renumbered as Title Suit No.15 of 1992; During pendency of the suit, the sole plaintiff Elokeshi Mondol died and in her place present respondent nos.1-4 were substituted as plaintiff nos.1(ka) to (gha); Plaintiff-respondents claimed that the suit land originally belonged to Mohadeb Dhali and others who permanently settled the suit land infavour of Krishna Chandra Mondol by registered patta dated 24.01.1311 B.S; Said Krishna Chandra Mondol died leaving two sons namely Chatra Mondol and Roy Charan Mondol who in their turn transferred the suit land by registered kabala dated 16.05.1913 infavour of Rukkhini Dashi who purchased the

same from her Stridhan fund; During owning and possessing 10.37 acres of land, Rukkhini Dashi settled 2.02 acres land under Korfa interest and the balance 8.35 acres was recorded in C.S. Khatian No.36 in her name; Rukkhini Dashi died leaving only daughter Hazari Sundory Dashi who also died leaving only daughter the plaintiff Elokeshi Mondol; Plaintiff after getting the suit land by way of inheritance used to possess 15 decimals of land by settlement to Boroda Khanta Mondol and Pancharam Mondol and 28 decimals of land to Surendra Nath Bairagee for their residential purpose; During revisional settlement the plaintiff used to live at different village and she entrusted the responsibility to record the land in her name to defendant nos.1-6 who were paternal uncles of the plaintiff but in breach of the trust they managed to get the suit land recorded in their names in the S.A. record; Although the record was prepared in the names of defendant nos.1-6 but they never possessed the suit land; In the month of Falgun, 1348 B.S. for the first time they denied plaintiff’s title; Hence, the suit.

Defendant nos.1-4 and 11-14 contested the suit by filing separate written statement denying material allegations made in the plaint and contending, interalia, that one Darikanath died leaving 4(four) sons namely Banku Behari, Monmatha, Birinchi and Jagadish Chandra and while the aforesaid brothers were living in joint mess they purchased the suit land in the benami of Rukkhini Dashi who is the wife of Monmatha, with their joint money for their joint interest; The said Rukkhini Dashi was benamdar of the aforesaid 4(four) brothers; Banku Behari died leaving 3(three) brothers; Monmatha died leaving wife Rukkhini Dashi as his heir and after her death the suit land was correctly recorded in R.S. Khatian and S.A. Khatian in the names of defendant nos.1-6 and that the suit land is not the Stridhan property of Rukkhini Dashi; Jagadish Dhali died leaving 4(four) sons i.e. defendant nos.1-4 and husband of defendant no.7; Birinchi Dhali died leaving Khogendra and Brindra i.e. defendant nos.5 and 6 and they sold their share measuring 3.96 acres by registered kabala dated 02.07.1996 infavour of the defendant nos.11-13 and delivered possession thereof;

Defendant no.14 also purchased .80 acre of land from the heirs of Nagendra who is the son of Jagadish; The plaintiff has no right, title and possession in the suit land and the contesting defendants have been possessing the suit land on payment of rent to the Government exchequer regularly; Plaintiff never inherited the suit land according to *Hindu Dayabhaga Law of Inheritance* as such the suit is liable to be dismissed.

In the trial court, the plaintiff examined 4 PWs and the defendants examined 6 DWs. All the witnesses were cross examined. Some documents were adduced in evidence and marked as exhibits.

Upon hearing the parties and perusing the evidence on record, learned Assistant Judge decreed the suit infavour of the plaintiff vide judgment and decree dated 26.02.1995 holding that *'by amendment of Hindu Law of Inheritance, 1929'* the daughter's daughter are included as heirs and according to that law the plaintiff inherited the property left by Rukkhini Dashi.

Being aggrieved, the contesting defendants preferred Title Appeal being No.92 of 1995 in the Court of learned District Judge, Khulna, and on transfer the appeal was heard by the learned Additional District Judge, Court No.1, Khulna, who after hearing the parties dismissed the appeal by his judgment and decree dated 23.03.1999 affirming the judgment and decree of the trial court.

Having aggrieved, the defendant-appellants filed Civil Revision No.2049 of 1999 under Section 115(1) of the Code of Civil Procedure before the High Court Division. In revision, the learned Single Judge of the High Court Division discharged the Rule vide judgment and order dated 04.07.2000 affirming the judgment and decree of the appellate court below.

Having aggrieved by and dissatisfied with the judgment and order passed by the High Court Division, the defendant-appellants as petitioners preferred Civil Petition for Leave to Appeal No.671 of 2000 before this Division under Article 103 of the Constitution and obtained leave granting order dated 09.04.2002 in the following term:

> *"It is now submitted before us that the trial court wrongly held that the plaintiff Elokeshi as daughter's daughter of Rukkhini although did not inherit the suit land as Stridhan of Rukkhini Dashi according to Sections 154, 155, 156 and 157 of the Hindu Law but she inherited the suit land as per 'The Hindu Law of Inheritance (Amendment) Act, 1929' which is wrong as the above amendment is only applicable to the school of Mitakshara as it appears from said amendment itself. In not taking notice of the above important point of law the impugned judgment and decree is liable to be set-aside.*
>
> *The submission made by the learned counsel for the leave petitioner needs to be examined.*
>
> *Leave is granted."*

Mr. Nurul Amin, learned Senior Advocate for the appellants at the very outset submits that the High Court Division erred in law in not considering that *'The Hindu Law of Inheritance (Amendment) Act, 1929'* is only applicable to the school of 'Mitakashara' and this Amended Act has no relation with the Stridhan property as such the impugned judgment and order is liable to be set-aside. He also submits that the High Court Division failed to appreciate that according to the 'Dayabhaga'

school, property inherited by a woman whether from a male or from a female, does not become her Stridhan and she takes only a limited interest in the property and on her death the property passes not to her heirs but to next heir of the person from whom she inherited it and if the property is inherited from a female, it will pass to the next Stridhan heirs of such female, thus the impugned judgment and order is liable to be set-aside. The learned Advocate referring Section 130 of '*The Principles of Hindu Law*' written by D. F. Mulla and also Sections 162, 168 and 169 of the same submits that the property inherited by Hazari Sundory Dashi from the Stridhan property of her mother Rukkhini Dashi does not become her Stridhan property and she acquires only a limited interest of the property i.e. life estate and after the death of Hazari Sundory Dashi the property passes not to her heirs but to the next Stridhana heir of the person from whom she inherited it i.e. to the next Stridhana heir of Rukkhini Dashi i.e. her husband's younger brother and husband's brother's son as Stridhana heirs who are the defendants of the suit since daughter's daughter is

not a heir to Stridhan under the Bengal Law and accordingly the High Court Division failed to appreciate in the light of the referred Sections of *Hindu Law* that Elokeshi Mondol is not the next Stridhan heir of Rukkhini Dashi as daughter's daughter of Rukkhini Dashi as such the impugned judgment and order is liable to be set-aside. In support of his submissions, learned Advocate referred the case of *Sheo Shankar Lal and another vs. Debi Sahai (1903)*, reported in 30 I.A. 202, as well as *'Tagore Law Lectures-1878'* by Gooroodass Banerjee M.A., D.L., Tagore Law Professor on *'Marriage and Stridhan of the Hindu Law'*.

On the other hand Mr. Qumrul Haque Siddique, learned Advocate appearing on behalf of the respondents submits that the trial court decreed the suit finding that the defendants could not prove the case of 'benami' and plaintiff proved her possession in the suit land, the plaintiff inherited the suit land as per provision of *'The Hindu Law of Inheritance (Amendment) Act, 1929'* and this finding has been affirmed in appeal and civil revision but referring paragraph-5 of the plaint he

submits that the case of the plaintiff made out in paragraph-5 *"নালিশী সম্পত্তি রুক্ষিনী দাসীর স্ত্রীধন সম্পত্তি বিধায় হিন্দু দায়ভাগ Law of succession অনুযায়ী বাদিনী উক্ত সম্পত্তি ওয়ারিশ সূত্রে প্রাপ্ত হইয়া---------"* has not been examined or decided and as such decision/fate of this case depends on examination and decision of the question *"Does the plaintiff inherit the suit land according to 'The Dayabhaga' law of Hindu succession?"* After drawing our attention to paragraph nos.154-157 under chapter X(V) and paragraph nos.161, 162 under chapter X(VI) and paragraph no.169 under chapter XI(I) of the book *'The Principles of the Hindu Law'* (15th Edition) by D. F. Mulla and the case of *Sheo Shankar Lal and another vs. Debi Sahai (1903)*, reported in 30 I.A.202 as well as the decision in the case of *Huri Doyal Singh Sarmana and others vs. Girish Chunder Mukerjee and others* [Ind. L.R. 17 Cal, 911] alongwith Sections I and II under chapter IV of 'The Dayabhaga' by Jimuta Vahana, learned Advocate submits that the case of *Huri Doyal Singh Sarmana and others vs. Girish Chunder Mukerjee and others* [Ind. L.R. 17 Cal, 911] was a judgment *Per Incuriam* and does not have a binding effect and for the same reason the

decision in the case of *Sheo Shankar Lal and another vs. Debi Sahai (1903)*, reported in 30 I.A. 202 cannot be treated as binding precedent. By referring different Sections of chapter IV of 'The Dayabhaga' by Jimuta Vahana, learned Advocate submits that if all the paragraphs of Sections I and II of chapter IV are read together, it strongly suggests that when a daughter inherits Stridhan of her mother, she takes it absolutely like a son because son and daughter inherit "EQUALLY" and not even a single line 'The Dayabhaga' suggest it to become her "widow's estate" or anything like that from which it is clear that Jimuta Vahana said that daughter inherits her mother's Stridhana absolutely and thereafter did not say anything whether it would rank her Stridhana again or something else. Referring opinion of different Hindu jurists and scholars, (who had access to both Shanskrit and English) namely Gooroodass Banerjee, Golap Sastri, Jogendra Cunder Ghose and Mohamahopadhyayam Pandurang Vaman Kane, M.A, LL.M, learned Advocate submits that the women acquires all the rights to dispose of the Stridhana property at her will and there is no express

text restricting women's heritable right inasmuch as equality is the Rule where no distinction is expressed as such Elukeshi Mondol is entitled to get the property of her grandmother Rukkhini Dashi after the death of her mother Hazari Sundory Dashi.

Mr. Probir Neogi, learned Senior Advocate engaged as Amicus Curie by filing a writing submits that the contention of the appellants whether the suit property is Stridhana or not and whether Rukkhini was a mere benamder for the joint family are questions of fact decided by the courts below upon concurrent findings and the High Court Division upheld this concurrent findings of fact and now the question is '*if the suit property is Stridhan of Rukkhini, whether it could lawfully devolve upon the plaintiff Elokeshi, Rukkhini's daughter's daughter*'. Referring Sections 160, 161, 162 and 168 of Mulla's '*The Principles of Hindu Law*' (20th Edition), Volume 1, P.P. 264-272, learned Advocate submits that *Bengal School of Hindu Law* i.e. '*Dayabhaga Law of Inheritance*' which is applicable in the instant case is not subscribed by identical view of different experts of *Hindu Law* rather

it is clear that there is no consistent, uniform and firm Rule of *Hindu Law* imposing absolute/unqualified bar to succeed Stridhana by daughter's daughter as such plaintiff Elokeshi Mondol being the Stridhana heir in the second generation is not excluded from inheriting Stridhana of her grandmother. He also referred relevant portion of '*Tagore Law Lectures, 1878*' by Sir Gooroodass Banerjee on the '*Hindu Law of Marriage and Stridhana*' and submits that diversity of opinion of the authors/experts of customary law is an ambiguity in law and to clear that ambiguity in order to bring uniformity into the law required interpretation of this court. He next submits that judgment of the Privy Council in the case of *Sheo Shankar Lal and another vs. Debi Sahai (1903)*, reported in 30 I.A. 202 is no bar for rendering necessary interpretation by this court to answer the question raised in this appeal i.e. whether the suit property could lawfully devolve upon the plaintiff Elokeshi, Rukkhini's daughter's daughter. He further submits that while interpreting a particular question of law in order to clear ambiguity, this court should be guided by spirit

and objective of the supreme law of the land, namely the Constitution, which prohibits discrimination on the ground of sex. On this point he also referred the enactment of the Hindu Succession Act, 1956 by which harmony, uniformity and fundamental reforms have been brought in *Hindu Law* in India and thus giving equal right of inheritance to man and women. He lastly submits that the decision of the courts below challenged in this appeal merits to be upheld expunging the trial courts view on '*The Hindu Law of Inheritance (Amendment) Act, 1929'*.

Heard the learned Advocates for the parties as well as learned Amicus Curiae engaged by the court. Leave has been granted at the instance of the defendant-appellants to consider the following grounds:

> *"Elokeshi as daughter's daughter of Rukkhini although did not inherit the suit land as 'Stridhan' of Rukkhini Dashi according to Sections 154, 155, 156 and 157 of the Hindu Law but she inherited the suit land as per 'The Hindu Law of Inheritance (Amendment) Act, 1929' which is wrong as the above amendment is applicable only to Mitakshara school as it appears from said amendment*

itself. In not taking notice of the above important point of law the impugned judgment and decree is liable to be set-aside."

Plaint case in brief is that the suit land belonged to Rukkhini Dashi which she acquired by registered patta dated 24 Baishakh, 1311 B.S. and it was her 'Stridhana' property. Said Rukkhini died leaving only daughter Hazari Sundory Dashi who also died leaving only daughter the plaintiff Elokeshi Mondol who is in possession of the suit land.

The defendant-appellant's line of contention is broadly divided into two branches:

(i) *The suit property was not 'Stridhana' of Rukkhini, rather it was a joint family property purchased from joint family funds and Rukkhini was a mere benamder for the family;*

(ii) *Even if, the suit property is held to be 'Stridhana' of Rukkhini it cannot devolve upon the plaintiff Elokeshi who happens to be Rukkhini's daughter's daughter.*

Whether the suit property is 'Stridhana' or not, and whether Rukkhini was a mere benamder for the joint family property, are questions of fact and both the Trial Court and the Appellate Court below having arrived at the same

conclusion on this questions on concurrent findings of fact and the High Court Division in revision having upheld this concurrent findings of fact, this question cannot be reopened at this stage. The trial court also arrived at a finding that the plaintiff has inherited the suit land as per provision of '*The Hindu Law of Inheritance (Amendment) Act, 1929*' and this finding has also been affirmed in appeal and civil revision. The submission made on behalf of the defendant-appellants to the effect that '*The Hindu Law of Inheritance (Amendment) Act, 1929*' [Act II of 1929] is only applicable to the school of Mitakshara, is correct inasmuch as Section 1(2) of the said Act provides:

> *"1(1) ----------*
>
> *(2) It extends to the whole of Bangladesh, but it applies only to persons who, but for the passing of this Act, would have been subject to the law of Mitakshara in respect of the provision herein enacted, and it applies to such persons in respect only of the property of males not held in coparcenary and not disposed of by will."*

So, finding of the courts below based on '*The Hindu Law of Inheritance (Amendment) Act, 1929*' is wrong. The

learned Counsel for the plaintiff-respondents also admitted the same. But he submits that the plaintiff in paragraph-5 of the plaint stated that *"নালিশী সম্পত্তি রুক্ষিনী দাসীর স্ত্রীধন সম্পত্তি বিধায় হিন্দু দায়ভাগ Law of succession অনুযায়ী বাদিনী উক্ত সম্পত্তি ওয়ারিশ সূত্রে প্রাপ্ত হইয়া---------"* has not been examined or decided as such decision of this case depends on examination and determination of the question *"Does the plaintiff inherit the suit land according to 'The Dayabhaga' law of Hindu succession?"*

The guiding *'Principle of Law of Inheritance'* under the Dayabhaga School of Law, which prevails in Bangladesh, is the doctrine of religious efficacy. Religious efficacy means capacity to confer special benefit upon the deceased person. Succession is the mode of devolution of property under the Dayabhaga system. The general Rule of inheritance is that once a property is vested upon any one, it will not be divested. But in case of Hindu woman, getting limited ownership in the property is contradictory to this general Rule as the property will revert back to the heir of the owner. Only in case of Stridhan property, it reverts back to the nearest heir

of the female who is the owner of that property. It is to be noted that succession of the '*Stridhan property*' is held absolutely by a female. The word Stridhan is derived from the term 'Stri' which means woman and 'Dhan' which means property. A Hindu woman may acquire property from various sources. She may acquire property through gifts, inheritance as well as her own skill and labor.

"*The Principles of Hindu Law*" by D. F. Mulla is one of the most frequently consulted book on the point at issue. The 15th Edition of the book with supplement of 1986 by Sundarlal T. Desai contain the commentaries as written before 1956 divided into Chapters and Paragraph numbers. Paragraph Nos.154 to 157 of Chapter X(V), Paragraph Nos.161, 162 of Chapter X(VI), and Paragraph No.169 of Chapter XI(I) are relevant for the present case.

It appears that *Bengal School of Hindu Law* i.e. *Dayabhaga Law of Inheritance* which is applicable in the instant case is not subscribed by identical view of different experts of *Hindu Law*. Some of the very

important divergent views on this point are mentioned below:

> *In Mulla's 'The Principles of Hindu Law' (20th Edition, Vol.1, pp.264-272), while describing Rules common to all the Schools, these have been contemplated:*
>
> *§ 160. Stridhana heirs take per stripes*
>
> *Stridhana heirs in the second generation, i.e., son's son's, daughter's sons, and daughter's daughters, take per stripes and not per capita.*
>
> *(emphasis added)*
>
> *§ 161. Where stridhana heir is a male*
>
> *A male inheriting stridhana takes it absolutely, and on his death, it passes to his heirs.*
>
> *Stridhana heirs are either males, such as sons, daughter's sons, son's sons, etc., or they are females, such as daughter, daughter's daughters, etc.*
>
> *(emphasis added)*
>
> *$162. Where stridhana heir is a female*
>
> *According to the Bombay School, a female inheriting stridhana takes it absolutely, and on her death, it passes to her heirs. According to all other schools, a female inheriting stridhana takes a limited interest in it, and on her death, it passes not to her heirs, but to the next stridhana*

heir of the female from whom she inherited it.

(emphasis added)

Illustration (a) of § 168 of the Mulla's Hindu Law states-

(a) A, a Hindu male governed by the Bengal School of Hindu Law, dies leaving a widow and a brother. On A's death, the widow succeeds as his heir. The widow then dies leaving a daughter's daughter. The widow's stridhana will pass to the daughter's daughter as her stridhana heir, but the property inherited by her from her husband A will pass to the next heir of her husband, namely his brother.

(emphasis added)

In the said commentaries of Mulla, even it has been stated-

"A Hindu widow may by custom, be entitled to her husband's property absolutely. [Krishna Bai vs. Secretary of State, (1920) 42 All 555, 57 IC 520, AIR 1920 All 101 (Bikaner)]"

From the above principles quoted from Mulla, it is clear that there is no consistent, uniform and firm rule of *Hindu Law* imposing absolute/unqualified bar to succeed Stridhana by daughter's daughters. Moreover, § 160 makes it clear that Stridhana heirs in the second generation

may be daughter's daughter. In the instant case, plaintiff Elokeshi is daughter's daughter of Rukkhini, the original Stridhana owner, and, for that matter, she is a Stridhana heir in the second generation, and obviously not excluded from inheriting Stridhana of her grandmother, as it is evident from § 160.

Further, the contemplations of sections 159, 160 and 161 make it absolutely clear that daughter's daughters are not excluded from inheriting Stridhana. But § 162 contemplates that where a female inherits Stridhana, on her death, it passes not to her heirs but to the next Stridhana heirs of the female from whom she inherited it. In the instant case Hazari Sundori Dashi inherited Stridhana of her mother Rukkhini Sundori Dashi, and on the death of Hazari, it passed to Elokeshi who is the next Stridhana heir of Rukkhini as it appears from both the plaint and the written statement.

Sir Gooroodass Banerjee, in his '*Tagore Law Lectures, 1878 on the Hindu Law of Marriage and Stridhana*' said:

> "*It remains now to consider the definition of Stridhana according to the Bengal school.*

That school is represented by its founder Jimuta Vahana and his followers Raghunandana and Srikrishna. The Dayabhaga of Jimuta Vahana, which is the leading authority of that school, gives, like the Mitakshara, a general definition of Stridhana; but, unlike the work of Vijnaneshwara, from which it differs on many important points, it restricts the application of the term to certain descriptions of property belonging to a woman. Generally speaking, woman's property has two peculiarities attaching to it:-

> *Firstly, she has absolute power of disposal over it, notwithstanding her general want of independence; and,*
>
> *Secondly, it follows a special order of succession.*

Now, the former of these peculiarities does not, according to certain texts of Katyayana cited above, attach to every sort of property belonging to a woman and accordingly, to reconcile their unlimited literal interpretation of the term Stridhana with these texts, the Viramitradaya and the Mayukha expressly affirmed that a woman's power of disposal is absolute, not with regard to every kind of her Stridhana, but with only certain kinds of it. Jimuta Vahana, on the contrary, maintains, that property belonging to a woman in order that it may properly be called Stridhana, must possess the quality of being alienable by

> *her at pleasure." (p.297, 3rd Edition-Revised)*

Sir Gooroodass Banerjee in the said lecture also stated-

> *"The doctrine that the Stridhana which has once passed by inheritance ceases to rank as such, is not easily deducible from Jimuta Vahana's definition of Stridhana. That definition, as you have seen, restricts the term to property which woman has power to dispose of independently of her husband's control." (p.303-304, ibid)*

Diversity of opinion of the authors/experts of customary law is an ambiguity in law. It is submitted that where there is an ambiguity in law, both statute and non-statute law (customary law), this Court can and is required to clear the ambiguity in order to bring uniformity into the law by way of interpretation. Such interpretations are more required for non-statute/ customary laws like personal laws, as in the instant case, which stem from different sources very ancient, which were reduced into written form over centuries after they actually came into being, which took their present shape through widely divergent opinion of various

religious legal experts, and which are still composed of divergent views.

Thus, the judgment of the Privy Council in the case of *Sheo Shankar Lal and another Vs. Debi Sahai (1930)*, 30 I.A. 202, is no bar for rendering necessary interpretation by this Court to answer the question raised in this appeal. The learned counsel for the plaintiff-respondents has submitted that the said decision of the Privy Council is a judgment per incurium, and on that score it is not binding. The word 'per incurium', is a Latin expression. It means, 'through inadvertence' *(BADC vs. Abdul Barek Dewan*, 4 BLC (AD) 85, para 18). In Black's Law Dictionary per incurium has been meant as follows:

> *Per incurium (of a judicial decision): wrongly decided, usually because the judge or judges were ill-informed about the applicable law.*

In Paragraph 169 under chapter XI(I) of '*The Principles of Hindu Law*' by D.F. Mulla, referring to a decision of Privy Council in the case of *Sheo Shankar Lal*

and another vs. Debi Sahai (1903), reported in 30 I.A. 202, it has been stated that:

> *"---- a female inheriting property [Stridhana] from a female takes only a limited estate in such property, and at her death the property passes not to her heirs, but to the next Stridhana heir of the female from whom she inherited it".*

Relevant portions of the said judgment are as follows:-

> *"The precise question, therefore, arising for decision is whether, under the Hindu Law of Benares school, property which a woman has taken by inheritance from a female is her Stridhan in such a sense that on her death it passes to her Stridhan heirs in the female line to the exclusion of males.*
>
> *Their Lordships regret that they are called upon to decide this question upon an appeal heard ex-parte --- --- ---*
>
> *---- In Bengal it is well-settled law that property inherited from a woman by a woman does not on the death of the latter passes as her Stridhan. The Rule has often been expressed by saying that what has once descended as Stridhan does not so descend again. The authorities have been collected and reviewed in Huri Doyal Singh Sarmana vs. Girish Chundar Mukerjee (Ind. L. R. 17 Cal. 911). ---"*

Examining the decision in the case of *Huri Doyal Singh Sarmana vs. Girish Chundar Mukerjee* [Ind. L.R. 17 Cal, 911] the following relevant observation are found:

> *"--- --- from the Dayabhaga, Chapter IV, Section I --- --- and there is not the slightest indication that inherited property in the author's opinion would rank as Stridhan. In Chapter XI, Section II, Paragraphs 30 and 31 of the same treatise, when treating of the daughter's succession to the father's property, the author says that the principle laid down in the case of widow (Chapter XI, Section I, Section 56), that on her death the inheritance passes to the next heir of the last full owner, the husband, 'is applicable generally to the case of succession of a woman's succession by inheritance'. It is true that this is said in a Chapter of the work relating to succession to the property of a male, but the language is quiet general.----*
>
> *--- --- whenever a woman succeeds to property by inheritance, the property on her death passes not to her heir, but to the next heir of the last full owner who would have succeeded in the first instance if she had not been in existence ----"*

The 17 Ind. L. R. Cal 911 case was decided relying on Chapter XI Section II of the Dayabhaga. But title of Chapter XI of the Dayabhaga by Jimuta Vahana is *"On*

succession to the estate of one who leaves no male issue”, title of Section I of this Chapter is *“On the widow’s right of succession”* and that of Section II of this Chapter is *“On the right of Daughter and Daughter’s Son.”*

On the other hand, title of Chapter IV of the Dayabhaga by Jimuta Vahana is *“Succession to Women’s Property”*.

Title of Section I of this Chapter is *“Separate property of a Woman defined and explained”*.

Title of Section II of this Chapter is *“Succession of a woman’s children to her separate property.”*

From a plain reading of the “Dayabhaga” we find:

(a) *Section I of Chapter IV of “The Dayabhaga” defined and explained separate property of a woman in paragraphs 1 to 26. An examination of the said paragraphs shows that at least 6 kinds of properties have been enumerated in this section, which materially differs from what has been discussed in the book written by D. F. Mulla.*

(b) *At the end of paragraph 17 of section I it has been stated* ***“---- and after her death, descends to her offspring.”***

(c) *Section II of Chapter IV deals with succession to STRIDHANA named separate property of woman and there are 29 paragraphs in this Section.*

(d) *Paragraph I of this Section quotes Manu to have said,* ***"When the mother is dead, let all the uterine brothers and the uterine sisters equally divide the maternal estate."***

(e) *Paragraph 2 says "--- --- Meaning of this passage must be this:* ***"Let sisters and brothers of the whole blood share the estate."***

(f) *Paragraph 8 says the term "Equal" is unquestionably pertinent, as it obviates the supposition, that deductions of a twentieth and the like shall be allowed in the instance of the estate of the mother's estate, as in that of the father's. Therefore, the half-learned person who argues, that the declaration of equality is impertinent, must be disregarded by the wise, as unacquainted with the letter of the law, and with the reasoning which has been set forth."*

(emphasis added)

(g) *Paragraph 12 of Section II says, "on failure of all these above-mentioned, including the daughter's son and the son's grandson, the barren and the widowed daughters both succeed to their mother's property; For they also are her offspring; and the right of others to inherit is declared to be on failure of issue."*

If all the paragraphs of sections I and II of Chapter IV are read together, it strongly suggests beyond all shadow of doubts that when a daughter inherits Stridhan of her mother, she takes it absolutely like a son because son and daughter inherit “EQUALLY” and not even a single line of “The Dayabhaga” suggests it to become her “widow’s estate” or anything like that. Consequences of widow’s estate are depicted in Chapter XI of “The Dayabhaga”.

Thus it is clear that, Jimuta Vahana said that daughter inherits her mother’s Stridhana absolutely, and thereafter did not say anything whether it would rank her Stridhana again or something else,

> it would be totally beyond jurisdiction, competence, and authority of
> (1) all governed by “The Dayabhaga”,
> (2) the lawyers, and
> (3) even the Judges, how high so ever,
> to add something in the Dayabhaga to deprive the daughter’s daughter from her mother’s or maternal grandmother’s “separate property” or “absolute property”.

In this connection it would be wise to examine the opinion of the famous Hindu jurists and scholars (who had

access to both Sanskrit and English), expressed in their laborious works on '*Hindu Law*' both before and after the judgment of the Privy Council in Sheo Shankar Lal's case (30 I.A. 202).

Gooroodass Banerjee: In Tagore Law Lectures-1878, Lectures XI and XII on *Hindu Law of Marriage and Stridhan* delivered by Gooroodass Banerjee, M.A., D.L., Tagore Law Professor said (at page 411)-

> *"the Bengal lawyers divide Stridhan into the following three classes with reference to the relative rights of sons and daughters:-*
> *I. The Yautuka.*
> *II. Property given by the father.*
> *III. All other description of Stridhana.*
>
> *With reference to class III, which is the main class, Jimuta Vahana cites the following texts:-*
>
> ***Manu: When the mother is dead, let all the uterine brothers and the uterine sisters equally divide the maternal estate.***
>
> *---- on turning to the Dayabhaga Chapter IV, Section 2, On the succession of a women's children to her separate property, in the third sloke, the law is thus laid down-**'A woman's property goes to her children, and the daughter is a sharer with them, provided she be unaffianced.'***

> *----- after the daughter's son, Jimuta Vahana admits the barren and the widowed daughters, though they are unfit to confer spiritual benefit, on the ground that* ***'they also are her offspring'*** *and that* ***'the right of others to inherit is declared to be on failure of issue'****, that is in other words, on the ground of natural love and affection. Thus, Jimuta Vahana so far allows the doctrine of spiritual benefit to be subordinated to other considerations."*

Golap Sastri, in his precious investigative work '*Hindu Law*' 4th Edition, 1910 dealt with the point in Chapter XII. Quoting from the original texts the author drew his conclusions. He observed at Page No.638 as follows:

> *"---- and certain women are declared heirs to Stridhana property. According to the codes, the property inherited by women became their Stridhana; because the very fact of one's becoming heir to another's estate, means, that the former acquires all the rights of the deceased over his property, and because there is no express text restricting women's heritable right."*

At page 639 he observed:

> *"And thus the Bengal women's position with curtailed heritable right is superior to that of Mitakshara women-----"*

At page 659 he said:

"If any Bengali be asked as to the law by which he is governed, the answer will be invariably received that he is governed by the Dayabhaga; nobody will name either Srikrishna or Dayakarma-Shangraha.

Now not only there is nothing in the Dayabhaga in support of the above view on the contrary, a perusal of Chapter IV of the Dayabhaga wherein Stridhana and its devolution are discussed, will convince the reader that the daughter takes the same interest in their mother's Stridhana as sons.

Because it is a peculiar doctrine of the founder of the Bengal school, that sons and daughters equally inherit their mother's non-jautuka Stridhana, and in arguing out this position, he refers to the well-known maxim that, ***"Equality is the Rule where no distinction is expressed."*** *It is difficult to understand how in the face of what the founder maintains, namely, that the heritable right of the son and the daughter is equal, can it be contended that they take different estates. This would be over-ruling Jimuta Vahana by Srikrishna.*

Besides in nine hundred and ninety-nine cases out of every thousand, Stridhana consists of movables only; and the heir male or female takes it absolutely, according to the popular belief and usage. That the female heir takes only a limited interest, and is not absolutely entitled, is an idea

> *which is not known to the people, nor even to the persons likely to become reversioners. If that were the law, how is it that there is no provision made by Hindu Law for the protection of the future interest of the reversioners?"*

Jogendra Cunder Ghose, in his '*The Principles of Hindu Law*' Volume-1, first published in 1917 at page 352 had observed:

> *"The Privy Council has held that the descent to such property is not governed by the rules of succession to Stridhana but goes to the heirs of her other property. The Smritis as well as the commentaries, except the Mayukha, contained no provisions, regarding succession to a female's property other than her Stridhana and the family property inherited from the husband and son. We are thus placed in a very difficult position and when a female leaves no son but a daughter's daughter, who would be the heir of her Stridhana, such daughter will not take; and indeed, any special rules of succession to such property that may be laid down will have no texts or commentaries to support them. Indeed, there is no authority in the Smritis for this position."*

Mohamahopadhyayam Panduang Vaman Kane, M.A, LL. M, Advocate in his esteemed book "*The History of Dharmasastra*" Volume III published by Bhandarkar Oriental

Research Institute, Poona, 1946 at page 789 stated 'Manu (IX.192-193) provides:

> *"When the mother dies all the full brothers and full sisters should equally divide the mother's estate. Even to the daughters of those daughters something should be given (that is) as much as would be seemly out of the estate of their grandmother on the ground of affection."*

All the above-mentioned scholars in the field of law were also members of the Hindu Community of Bengal. It must be presumed that they were aware and acquainted with the faith, customs, and usages of the Hindus of Bengal as to *'partition of Stridhan'*. What they have opined in their reputed works are now the best available aid to construction of the text of "The Dayabhaga".

From the discussions made above, it can be said that the decision passed in *Huri Doyal Singh Sarmana and others vs. Girish Chunder Mukerjee and others* [Ind. L.R. 17 Cal, 911] and the decision in the case of *Sheo Shankar Lal and another vs. Debi Sahai (1903)*, reported in 30 I.A. 202 does not have a binding effect and cannot be treated as a binding precedent.

It is an elementary principle of law that what devolve upon the successor from the predecessor are all rights and liabilities of the predecessor attached to and arising of a certain property. In that view of the matter, the Stridhana being absolute ownership of a woman, on her death, absolute ownership devolve upon her heir, no matter whether it is called Stridhana or not. Even in the judgment of *Sheo Shankar Lal and another vs. Debi Sahai*, it has been observed by the Privy Council:

> *"During the voluminous discussions, ancient and moderned which have arisen with regard to the separate property of woman under Hindu Law, its qualities, its kinds, and its lines of descents, the question has constantly been found in the forefront, What is Stridhana? The Bengal School of the lawyers have always limited the use of the term narrowly, applying it exclusively or nearly exclusively to the kinds of woman's property enumerated in the primitive sacred texts. The author of the Mitakshara and some other authors seem to apply the term broadly to every kind of property which a woman can possess, from whatever source it may be derived. Their Lordships do not propose to dwell upon this particular question. It may perhaps be regarded as one mainly of phraseology, not necessarily involving, however it be answered, much distinction in*

> *the substance of the law; for most of the old commentators recognize with regard to the property of a woman, whether called Stridhana or by any other name, that there may be room for differences in its line of descent according to the mode of its acquisition."*

In Chapter IV, Sub-section 8 of Section II, relating to succession of a woman's children to her separate property described by Jimuta Vahana in 'Dayabhaga' is as follows:

> *But if one should propose this solution: 'the ordaining of equal participation is fit, if the brother and sister have alike a right of succession to their mother's property; but, if sisters only inherit equally, or, on failure of them, brothers only, the declared equality would be impertinent, since it might be deduced, without such declaration, from reasoning, because no exception to it has been specified:' he might be thus answered [by an obstinate antagonist:‡] It is no less impertinent to declare equality, on the assumption, that brother and sister inherit: since their parity may be in like manner deduced from reasoning.' [The antagonist might proceed to say†]. Besides, how is it impertinent? Since, in the case of brothers inheriting alone, [upon failure of sister,‡] the term "equal" is unquestionably pertinent, as it obviates the supposition, that deductions of a twentieth and the like shall*

> *be allowed in the instance of the mother's estate, as in that of the father's. Therefore, the half learned person [who argues, that the declaration of equality would be impertinent,¶] must be disregarded by the wise, as unacquainted with the letter of the law, and with the reasoning [which has been here set forth.¶]*
>
> *(emphasis added)*

To ensure 'equality' between male and female, Indian Parliament by amending section 14 of the Hindu Succession Act, 1956 declared **property of a female Hindu to be her absolute property** in the following manner:

> *(1) any property possessed by a Female Hindu, whether acquired before or after the commencement of this Act, shall be held by her as full owner thereof and not as a limited owner.*
>
> *Explanation.-In this sub-section, "property" includes both movable and immovable property acquired by a female Hindu by inheritance or devise, or at a partition, or in lieu arrears of maintenance, or by gift from any person, whether a relative or not, before, at or after her marriage, or by her own skill or exertion, or by purchase or by prescription, or in any other manner whatsoever, and also any such property held by her as Stridhana immediately before the commencement of this Act.*
>
> *(emphasis added)*

Again, Section 15 under the caption **General rules of succession in the case of female Hindus** runs as follows:

> (1) The property of female Hindu dying intestate shall devolve according to the Rules set out in section 16.-
>
> *(a) firstly, upon the sons and daughters (including the children of any pre-deceased son or daughter) and the husband;*
>
> *(b) secondly, upon the heirs of the husband;*
>
> *(c) thirdly, upon the mother and father;*
>
> *(d) fourthly, upon the heirs of the father; and*
>
> *(e) lastly, upon the heirs of the mother.*

Furthermore, the Constitution of the People's Republic of Bangladesh is the solemn expression of the will of the people and the supreme law of the land. The principles of 'equality' before the law and 'equal protection' of the law are also incorporated in the Constitution as Fundamental Rights. It has been stated in Article 27 of the Constitution that:

> *'All citizens are equal before law and are entitled to equal protection of law.'*

One of the Fundamental Principles of State Policy of the Constitution of Bangladesh as provided in Article 19(2) is that:

> *'The State shall adopt effective measures to remove social and economic inequality between man and man and to ensure the equitable distribution of wealth among citizens, and of opportunities in order to attain a uniform level of economic development throughout the Republic.'*

Again, Article 19(3) of the Constitution further declare that:

> *'The State shall endeavor to ensure equality of opportunity and participation of women in all spheres of national life.'*

Formal equality is explicitly enshrined in the Constitution of Bangladesh and various Articles reiterate the principle of non-discrimination based on sex, caste, race and other motives. It has been stipulated in Article 28(1) of the Constitution that:

> *'The state shall not discriminate against any citizen on grounds only of religion, race, caste, sex or place of birth.'*

Again, Article 28(2) further provided that:

> *'Women shall have equal rights with men in all the spheres of the State and of public life.'*

Under the facts and circumstances of the case and the discussions made above, we are of the view that the suit

property being Stridhana of Rukkhini Dashi will lawfully devolve upon the plaintiff Elokeshi, Rukkhini's daughter's daughter according to her faith law 'The Dayabhaga'. However, the trial court's view on '*The Hindu Law of Inheritance (Amendment) Act, 1929*', affirmed by the court of appeal and revision is hereby expunged.

Accordingly, the civil appeal is dismissed with the observations made above.

No order as to costs.

J.

J.

J.

J.

The 11th December, 2022
Jamal/B.R./Words-*7508*