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adduce any positive evidence. The trial Court has also observed that in the jama bandi for the year 1941-42 Smt. Gangi, widow of Kanshi Ram has been shown as owner of 2/3rd share in the property and the jama bandi relates to the year 1945-46 and 1949-50. Shri Bala Ram, Mast Ram and sons of Luru Ram and Krishan Dutt (plaintiff) son of Mansa Ram are shown as owner of the land and jama bandi for the year 1957-58 and Ram Swarup and Jai Dutt (defendants/appellants) are shown as owner of 2/3rd share of the land. The lower Court, therefore, came to the conclusion that on the death of Kanshi Ram, Smt. Gangi had remarried Shri Bala Ram and as such all the properties of Kanshi Ram with the consent of all his brothers came to her possession on the basis of a written proof on the record of the Court. In conclusion, the lower Court came to the conclusion that the appellants have fully established by their evidence that late Shri Bala Ram was exclusively in possession of the properties left behind by Shri Kanshi Ram. The trial Court also came to the conclusion that the plaintiffs/respondents have failed to discharge their onus on the plea raised in the plaint by letting sufficient evidence on record.

Against the order of dismissal of the suit, the plaintiffs/respondents preferred an appeal before the High Court of Himachal Pradesh. The said appeal was ultimately assigned to the Court of District Judge, Solan and the learned District Judge vide order dated 20.12.1986 accepted the appeal of the respondents/plaintiffs and set aside the judgment of the senior sub-judge and passed a decree in favour of the plaintiffs/respondents and against the appellants/defendants. The learned District Judge, in his order, observed that it stood established that Smt. Gangi remarried Bala Ram and there is no dispute to the marriage of Smt. Gangi with Shri Bala Ram by any of the parties and the factum of remarriage and the transfer of properties has been stated in one document. However, the learned District Judge observed that Smt. Gangi on her remarriage forfeits her rights over the properties of her first husband Kanshi Ram which she inherited from him. Therefore, the learned District Judge held that on remarriage of Smt. Gangi the estate inherited by her from her husband devolved in favour of Mast Ram, Bala Ram and sons of Luru Ram, namely, Mansa Ram, father of the plaintiff and Krishan Dutt (plaintiff) in equal shares and accordingly the plaintiffs/respondents came to occupy 1/3rd share in joint properties. As regards partition, the District Judge held that it was not acted upon and the parties considered themselves to be the joint owners of the land in dispute and, therefore, the question of the appellants being in the adverse possession in the joint properties will not arise at all

and accordingly set aside the judgment and order of the trial Court and allowed the appeal of the plaintiffs/respondents. Against the order of the learned District Judge, the appellants/defendants filed a regular second appeal before the High Court of Himachal Pradesh at Shimla and contended in the appeal that the learned District Judge has committed a grave irregularity by not adverting to the entire claim of the appellants and erroneously allowed the appeal in favour of the respondents herein. It was further contended by the appellants that the lower appellate Court has totally misconstrued the pleadings of the parties especially the plea set-up in the written statement. Likewise, it was submitted that the first appellate Court has failed to appreciate the plea that on the death of Kanshi Ram, his properties were inherited by Smt. Gangi as after about one year of the death of her husband Smt. Gangi in accordance with the customs of the illaqua became the wife of Bala Ram and all her rights and interests in the properties which she had inherited from her husband with the consent of all the brothers in a panchayat vested in Bala Ram and ever since Bala Ram has occupied the properties as exclusive owner.

The High Court of Himachal Pradesh, ignoring the submissions made by the appellants, by interpreting the provisions of the Hindu Widow Remarriage Act, 1856 came to a conclusion that on remarriage Smt. Gangi lost all her rights, title in the estate of her deceased husband and, therefore, she could not have transferred such rights, title and interest in favour of Bala Ram and Exhibit PX which is a writing relating to the marriage and transfer of the title would not confer any right, title or interest on Bala Ram. The High Court also observed that the document relating to the transfer of the estate of Kanshi Ram in favour of Bala Ram does not appear to have been given effect to and the fact that the document was not given effect and mutation of the inheritance was accepted can be inferred from the evidence that the parties are enjoying the properties jointly.

Aggrieved by the judgment of the High Court, the unsuccessful defendants

preferred the Special Leave Petition. Leave was granted on 09.07.1997 and the operation of the impugned judgment was stayed during the pendency of the appeal and it was directed that no third party interest be created in the meanwhile by either party.

We heard Mr. Ashok Grover, learned senior counsel for the appellants and Mr. E.C. Agrawala, learned counsel for the respondents. We have perused the plaint, written statement, replication and the orders passed by all the Courts and also the evidence tendered both oral and documentary. Though several contentions were raised before the Courts below by both the parties, the learned counsel for the appellants confined his argument in regard to the right of the widow to inherit the property as per the customs prevailing in the area and as to whether the provisions of the Hindu Widow Remarriage Act, 1856 were applicable to the area in question. It was also argued by learned counsel for the appellants that Smt. Gangi (widow) on remarriage does not lose all her rights in the property and elaborated this argument with reference to the specific pleadings and also on oral and documentary evidence.

Mr. E.C. Agrawala, learned counsel appearing for the respondents submitted that Smt. Gangi on her remarriage with Bala Ram loses all her rights in the property even though there is no dispute to the marriage of Smt. Gangi with Shri Bala Ram by any of the parties. In this regard, he invited our attention to the provisions of the Hindu

Widow Remarriage Act, 1856 and certain provisions of the Himachal Pradesh Land Code. It was further submitted by him that after the marriage of Smt. Gangi with Bala Ram (father of the appellants herein), Smt. Gangi lost all rights in the properties inherited by Smt. Gangi from her husband. He would further argue that the High Court by properly interpreting the provisions of the Hindu Widow Remarriage Act, 1856 came to a correct conclusion that on remarriage Smt. Gangi lost all her rights, title in the estate of her deceased husband and, therefore, she could not have transferred such rights, title and interest in favour of Bala Ram. It was also his contention that Exhibit P X would not confer any right title or interest on Bala Ram and that the said document was not given effect to and acted upon.

On the above pleadings and arguments, the following important questions of law would arise for consideration:-

- a) Whether the subsequent applicability of the Hindu Widow Remarriage Act, 1856 which came to be enforced in the area in question w.e.f. 01.01.1950 vide the Merged States (Laws) Act, 1949 can retrospectively take away the rights of Smt. Gangi who got the property under family custom of illaqua by a deed of the year 1932 to which document the father of the plaintiff Mansa Ram was a party who died in 1942;
- b) Can the plaintiff Krishan Dutt who was born on 07.10.1938 and attained majority in 1956 maintain a suit as framed on 17.10.1968 and whether the said suit is barred by limitation;
- c) Whether the parties were governed by the custom of the illaqua.

We have perused the plaint. In the plaint, a very short one, the respondent has alleged that he has got 1/3rd share in the entire property and as such he is entitled to 1/3rd share by partition, the parties being in joint possession of the properties. In para 3 of the plaint, the respondent has stated that he filed an application for partition of land

before the Assistant Collector, Mahasu but the Department raised a question of title and the Assistant Collector directed him to get the declaration in respect of the title from a competent Civil Court and hence the suit. In para 4 it is averred that the defendant no.1 is realising the rentals of the shop and has not rendered accounts to the plaintiff and hence he is liable to render accounts and that the plaintiff is entitled to have the shops partitioned and to have separate possession of the same to the extent of 1/3rd share.

A detailed written statement was filed on behalf of the appellants/defendants raising the following objections:

1. The suit is not within time;
2. The plaintiff is estopped from filing the suit due to his own acts, deeds, acquiescence, admission and conduct of his father (Mansa Ram) and mother in the written statement.

In the written statement a specific plea has been raised in regard to the family custom of the illaqua and the inheritance of the suit properties.

It is useful to reproduce the said paragraphs;
"That out of the land in suit, land measuring 63 Bighas 6 Biswas was previously owned by Shri Kanshi Ram to the extent of 2/3 share and Shri Bala Ram. Shri Mansha Ram and Mathu alias Mast Ram 1/3 share. Shri Kanshi Ram was in occupation of land separately and Sarvashri Bala Ram, Mansha Ram and Mathu were holding the land separately due to private partition. Shri Kanshi Ram died about 32 years ago. Shrimati Gangi, his widow inherited his properties. After about one year of the death of her husband, Shrimati Gangi, in accordance with the custom of the illaqua, became the wife of Shri Bala Ram, father of the defendants and gave up all her rights and interest in the properties, which she had inherited from her husband, with the consent of Shri Mansha Ram, father of the plaintiff and Shri Mathu alias Mast Ram, in a Panchayat, in favour of Shri Bala Ram and since then, Shri Bala Ram occupied, as exclusive owner, the property including the lands, held by Shri Kanshi Ram during his life time. After the death of Shri Bala Ram, the defendants are the sole owner and are in occupation of the lands, delivered by Mst. Gangi, as stated above. The plaintiff has no right, title or interest in the said 2/3rd share of Shri Kanshi Ram.

(e) That the Revenue entries, showing the plaintiff and defendants as joint owners and showing the defendants to be owners to the extent of 2/3 and the plaintiff to the extent of 1/3, are totally wrong, against facts, illegal and without jurisdiction and are in-operative against the rights of the defendants. The parties are not in joint possession of the lands in suit and the allegations of the plaintiff are false to his knowledge. The Revenue authorities had also wrongly entered mutation No. 303 relating to Ikhranj Nam of Mst. Gangi, which was attested on 17.1.1949. The orders of Revenue authorities on the said mutation are also illegal, unauthorised and without jurisdiction and are in-operative against the rights of the defendants.

3. Para 4 is totally denied. The defendants are sole and exclusive owners and are in possession of the shops in question. The plaintiff has no right, title or interest therein and has no locus standi to claim partition of the shops or rendition of account of income of the said property to which the defendants are exclusively entitled."

In the replication statement filed by the plaintiffs/respondents herein the averments made in para 1A as above has been simply denied. Mr. Ashok Grover, also invited our attention to the evidence tendered by the defendants and in particular D.W. 8 (Smt. Gangi) It is beneficial to reproduce here the evidence in Chief examination of D.W. 8:

"Translation of the statement of Smt. Gangi widow of Bala Ram r/o Solan village age 56 years, occupation House-holds. ...On S.A.

Shri Kanshi Ram deceased was my husband. Shri Kanshi Ram used to live separately from S/Shri Bala Ram, Mathu Ram and Mansha Ram. Shri Kanshi Ram died 38/39 years back. He was in possession of an area of 60 bighas of land at the time of his death. On the death of Kanshi Ram I got his entire property in succession. I remarried Shri Bala Ram after one year from the death of Shri Kanshi Ram. The decision about this remarriage was taken in the Panchayat. S/Shri Devi Singh, Dhani Ram, Paras Ram contractor Bhoval and Ram Nath r/o village Solan, Mathu, Mansha Ram, Bala Ram, Ram Singh and Ram Nath my brothers were present in that Panchayat. This Panchayat's meeting was held in my house. I was 18 years old when Kanshi Ram expired. My brothers arranged the meeting of this Panchayat in order to make necessary arrangements about my maintenance. Shri Bala Ram had accepted me as his wife with the consent of S/Shri Mathu and Mansha Ram. The property belonging to Kanshi Ram was given to Bala Ram (objected to qua the document the copy of which is marked 'K' already on record). I have heard the contents of the original writing marked 'K'. It is the same writing which was scribed at that time. Its contents were read over and I had appended my signatures on it. All had appended their signatures or thumb-

impressions on it. There is a custom in our illaqua that on remarrying another person that is to say that on the death of a brother his widow is remarried by the other brother and the property belonging to the former is succeeded by the latter, whom the widow remarries. Mansha Ram and Mathu were called because their consent was to be obtained. They had consented to these proceedings:-

From that day onwards, Shri Bala Ram became the owner of the moveable and immoveable property of my first husband. He had taken over the possession also of that property. Thereafter Bala Ram lived with me".

In the cross examination nothing has been elicited from D.W. 8 Smt. Gangi to dislodge her case in regard to the custom of illaqua and her remarriage with Shri Bala Ram after the death of Kanshi Ram on the decision about the remarriage in the Panchayat. The evidence tendered by D.W. 8 has been corroborated by D.W. 6 Ram Nath whose occupation is zamindari. He deposed that after one year from the death of Kanshi Ram he called a meeting of Panchayat and enquired from Mansha Ram (father of plaintiff) Matu Ram and Bala Ram who were the near relations of Smt. Gangi about her future maintenance and upon this with the consent of all Smt. Gangi settled with Bala Ram and the property of Kanshi Ram was given to Bala Ram and since then, Bala Ram became the owner of that property. He also deposed about the writing which was executed in the presence of the Panchayat and he also identified the signatures on this writing. He would further depose that this writing was read over to all the witnesses and Mast Ram, Mansa Ram (father of the plaintiff) Bala Ram and Smt. Gangi have appended their signatures and thumb impressions on the document in his presence. D.W.9 Ram Swarup (defendant) has also deposed about the remarriage of Gangi with Shri Bala Ram after the death of Kanshi Ram and the inheritance of the property by Bala Ram etc. and the execution of the documents in the presence of Panchayatdars. He also deposed that on behalf of the plaintiff Krishan Dutt his mother Smt. Kalavathi participated in that partition. P.W.1 is a teacher in Government High School. This evidence will be of no assistance. P.W.2 is Krishan Dutt, plaintiff himself. He did not deny the marriage. On the other hand, he said on the death of Kanshi Ram, Smt. Gangi had remarried Bala Ram according to the custom and that he has simply denied to a suggestion made as to whether he was aware of remarriage of a widow with any of the brothers of earlier husband the property inherited by her from that husband would stand devolved to her newly married husband with the consent of other brothers of her husband. He also simply denied that Smt. Gangi had remarried Bala Ram with the consent of his father Mansha Ram.

We shall now refer to the crucial document, the compromise deed marked as Exhibit PX. The document reads thus:

"COMPROMISE DEED

"Since Pt. Kanshi Ram s/o Pt. Ganga Ram r/o Village Solan had expired issueless on the 18th Manghar, 1967 and his widow is in possession of the property in her capacity as an owner. The aforesaid widow is quite young. Since the death anniversary of Kanshi Ram has been solemnised yesterday i.e. the 8th Posh, 1988 B.K. and now the aforesaid widow and her brothers S/Shri Pt. Ram Nath and Pt. Ram Singh s/o Pt. Ram Saran, r/o Village Dadayog desire that necessary arrangements for her future livelihood be made. Upon this the following Panches were appointed by these people and the meeting of Panchayat has been held today. Mehta Paras Ram contractor r/o Village Chawal, Mehta Dhani Ram r/o Village Mungru Illaqua Patiala and Mehta Devi Singh r/o Village Changar were appointed from the Biradari (Brotherhood) and Ram Nath was appointed from Solan. Since Pt. Bala Ram, Pt. Mansha Ram and Pt. Mast Ram are the successors of Pt. Kanshi Ram who died issueless, so all of them were asked about the future livelihood of the widow as she did not want to leave that house. Pt. Bala Ram replied that we had been helping the widow in all respects for the last one year and similarly we would be helping her in future. Upon this the widow and her brothers expressed the desire that the widow is too young and at the prime of her age and thus she should not be helped in that way. One of the right-holders should live at her house, help her and keep her as his wife in accordance with the local custom. On enquiring Mst. Gangi widow of Kanshi Ram preferred to keep Bala Ram at her house and to remain as his wife. Upon this, the matter was enquired from Mst. Murtu wife of Bala Ram and she also consented to it and agreed to all the points. Other brothers

of Bala Ram have also agreed to this effect. For aforesaid reasons, Mst. Gangi widow of Pt. Kanshi Ram was kept as wife of Pt. Bala Ram in the presence of the Panchayat and it was decided that from today onward Pt. Bala Ram will be the owner and possessor of the moveable and immoveable property of the deceased. The brothers of Pt. Bala Ram viz. S/Shri Pt. Mansha Ram and Pt. Mast Ram have agreed to it happily. Therefore, this compromise deed has been reduced into writing with the consent of all concerned including the brothers of Mst. Gangi, so that it may form a part of record.

9th day of Posh, 1988.

Sd/- (In Hindi) Mst. Gangi. Sd/- (In Hindi) Bala Ram
Sd/- (In Hindi) Mansha Ram Mansia. Sd/- (In Urdu) Mast Ram
Thumb Impression of Mst. Murtu & Sd/- (In Urdu) Ram Singh Village Dadyog.
Signatures of Panches.
Encircled] Sd/- (In Hindi) Ram Nath Solan
In red and] Sd/- (In Hindi) Mehta Paras Ram Chawal
Marked as] Sd/- (In Hindi) Dhani Ram Mangru
K/1] Sd/- (In Hindi) Devi Changar.
Seals of copying Agency"

The above document was signed by Smt. Gangi in Hindi Bala Ram, Mansha Ram (father of the plaintiff) and Mansia in Hindi one Mast Ram who is the brother of Bala Ram has signed in Urdu. One Murtu affixed his thumb impression on the document, one Ram Singh Village Dadyog has also signed in Urdu. The document was attested by 4 persons in Hindi who are near relations.

A reading of the above documents coupled with the specific averment made in the written statement and of the oral evidence of Smt. Gangi and others clearly establish the custom pleaded by the defendants in the written statement. It is a settled law by a catena of decisions of this Court and also of the other High Courts that a custom must be pleaded and proved. In the instant case, the defendants have specifically pleaded the custom prevalent in the community in the area in question and also proved beyond any reasonable doubt in regard to the said custom and the inheritance of the property by Bala Ram and the enjoyment of the same by him till his death and thereafter, the defendants/appellants right to inherit the said property.

The evidence available in this case clearly proves the case of the defendants that on remarriage Smt. Gangi would not forfeit her right to the suit properties which she got from her husband earlier. It was also proved that marriage with Bala Ram does not divest her of her right in the properties. The plaintiffs/respondents herein have miserably failed to prove otherwise on the custom pleaded, proved and established by the defendants.

In our opinion, both the lower Courts have failed to appreciate the fact that the partition took place with the consent of the parties including the father of the respondents and as such the respondents are estopped from filing this suit.

The High Court, in our opinion, by misinterpreting the provisions of the Hindu Widows Remarriage Act came to a wrong conclusion that on remarriage Smt. Gangi lost all her rights, title in the estate of her deceased husband. The main question which was raised before the High Court was that after the marriage of Smt. Gangi with Bala Ram (father of the appellant) all rights of the properties inherited by Smt. Gangi from her husband devolved on Shri Bala Ram and Bala Ram has been enjoying all the properties exclusively with the consent and knowledge of the other brothers. This important fact has been overlooked by the High Court. The High Court also wrongly observed that the document relating to the transfer of the Estate of Kanshi Ram in favour of Bala Ram does not appear to have been given effect to. The further observation of the High Court that Smt. Gangi on her marriage loses all her rights in the properties as per the provisions of the Hindu Widows Remarriage Act is baseless and incorrect. It is seen from the records that the Hindu Widows Remarriage Act, 1856 came to be enforced in the area in question w.e.f. 01.01.1950 vide the Merged States (Laws) Act, 1949 whereas the document compromise deed was executed in the year 1932 signed by Smt. Gangi and other Panchas' and the father of the plaintiff and the other witnesses. Therefore, the provisions of the Hindu Widows Remarriage Act, 1856 was not applicable to the area and the provisions of the Act cannot be made applicable

retrospectively. In our opinion, the compromise deed does not debar her from losing all her rights in the properties and she was fully competent and entitled to inherit all the properties.

The High Court, in our opinion, has also miserably failed to appreciate the fact that there was no pleading by the respondents in their plaint and the replication nor they had claimed the forfeiture nor the provisions of the Hindu Widow Remarriage Act were applicable. We have already noticed the consent for compromise was given by the father of the plaintiff who was one of the signatory to the compromise deed and once the consent having been given cannot be challenged by his successors or withdrawn unless the same has been obtained by fraud and/or is contrary to law. There is absolutely no such plea by the respondents in the present proceedings nor it is the case of the respondents that there was any fraud.

Once the rights have been relinquished by the father of the plaintiff, the same, in our view, cannot be challenged and even if the same has to be challenged it has to be done within a period of 12 years and admittedly no such case was filed by the respondents/(plaintiffs \026 Krishan Dutt, who was born on 07.10.1938 and attained majority in October, 1956) and filed the instant suit on 17.10.1968. Therefore, the learned trial Court rightly came to the conclusion that the suit of the respondents was barred by time. However, the appellate Court and the High Court have failed to give any reasoning as to how the suit of the respondents was within time.

The cause of action arose to the plaintiff on his attaining majority to repudiate the title of the respondents/defendants which was also made in the year 1955 when the earlier suit was instituted by Bala Ram under Exhibit P8. The admissions made by the father of the respondent admitting the partition through documentary exhibits marked A & J and Compromise Deed which were proved to be signed by Mansa Ram (father of the plaintiff) and Smt. Kalavathy (mother of the plaintiff). Exhibits marked X, DX and DX1 which appears the thumb impression of Smt. Kalavathi (mother of the respondent/plaintiff) shows that the partition was duly acted upon.

The High Court and the first appellate Court have acted with material irregularity and failed to appreciate the fact that the plea of partition/compromise was supported by documentary evidence.

In the instant case, the father of the respondent was a consenting party as such on the execution of the document, properties having been passed on to the father of the appellants, the appellants got a valid title which cannot be challenged by the respondents.

Yet another reason which prompted the High Court to decide against the appellants was that consequent upon the remarriage under Section 2 of the Hindu Widow Remarriage Act, the widow loses all her rights and interest possessed by her in the property by her husband and she would, therefore, be not entitled to claim partition of the share of the deceased husband. In this context, learned counsel for the respondents/plaintiffs invited our attention to the provisions of the Himachal Pradesh Land Code. The Hindu Widow Remarriage Act and the Bhagat State Gazette \026 Part A and a passage in the Simla District Gazette to the effect that a widow if she remarries whether in or out of her husband's family is not entitled to his property. In our opinion, the present case on hand is different from the case mentioned in the gazette. There is no evidence on the record to show that the provisions of the said Act, the passage in the gazette were applicable to the area in question and to the community in particular. Secondly, the property was transferred by virtue of the custom where the respondents/appellants were a consenting party and the property having been passed on to the appellants father cannot be either taken back or challenged on the ground that the properties still continue to be joint. Above all, there is no plea in the plaint to the

said effect and that the Bhagat State Gazette has not been marked as an Exhibit. Therefore, no reliance can be placed on the Gazette. Mr. Agrawala has argued that withdrawal of the earlier suit by the parties and mutation of records in favour of the respondents/plaintiffs jointly cannot now be challenged by the parties. This contention has no force. Late Bala Ram has instituted a suit for declaration. The suit was dismissed on 27.06.1958 by the sub-Court Exhibit P-12. The defendants preferred an appeal in the District Court. In the said Court, the appellants therein preferred an

application under Order XXIII Rule 1 read with Section 157 CPC for permission to withdraw the suit with permission to file a fresh suit as is clear from the perusal of the records. The learned District Judge had allowed the application and granted leave to the appellants therein to withdraw from the suit with liberty to institute a fresh suit in respect of the same subject matter. Thus, it is seen that from the withdrawal of the suit, the parties are relegated to the position in which they were before the institution of the previous suit. The defendants/appellants or their father had not instituted a fresh suit and not instituting the suit does not have any effect on the present suit. In the instant case, numerous documents have been produced on record in the shape of the rent notes, documents from the Municipal Committee regarding payment of taxes showing exclusive ownership and possession of the appellants or their predecessor Shri Bala Ram Shri Krishan Dutt (the plaintiff) or his predecessors never dealt with the said property in any capacity. The exclusive possession of the appellants, construction of additional building in the land in question and ouster of the respondents/plaintiffs was duly established by the above documents.

We, therefore, hold that the appellants/defendants are entitled to succeed in this appeal and the suit filed by the respondents herein is liable to be dismissed.

In the result, we answer question No. (a) in the affirmative and in favour of the appellants; the subsequent applicability of the Hindu Widows Re-marriage Act 1856 can have no retrospective effect and cannot take away the right of the widow who got the property in the year 1932. Question No. (b), this question is also answered in favour of the appellant; the suit is barred by limitation. Question No. (c), on the peculiar facts and circumstances of this case the parties were governed by the custom of the illaqua .

The case of the appellant is fully supported by the pleadings, evidence- oral and documentary and also on law. We, therefore, have no hesitation to set aside the judgment of the High Court which is impugned in this Appeal and dismiss the suit filed by the respondent (plaintiff). However, considering the nearness of the relationship between parties we say no costs.