

(1976) 10 RAJ CK 0008

In the Rajasthan High Court

Case No : Civil Regular Second Appeal No. 194 of 1968

Chiraguddin

APPELLANT

Vs

Nazir and Others

RESPONDENT

Date of Decision : 21-10-1976

Acts Referred:

Citation : (1976) WLN 577

Hon'ble Judges : S.N. Modi, J

Bench : Single Bench

Final Decision : Allowed

Judgement

S.N. Modi, J.—This is a second appeal by the defendant-appellant Chiraguddin against the judgment and decree of the Senior Civil Judge, Sikar, dated December 22, 1967.

2. The following pedigree table will show the relationship between the parties:

Haji Umar | |-----|-----|
Hussain Allabeh Sandal | | (D-1) | | | Nazir | |-----|-----| (Plaintiff
No. 1) | Abdulla Kasim Lukman Mukhtiar | (D-2) (D-3) (D-4) (Plaintiff No. 2) | | |
| | | |-----| | | Chiraguddin Amin Gulab Nabi (D-5) (D-6) (D-7) 3.
The plaintiffs came with the case that the shop described in paragraph No. 2 of
the plaint was the property of Haji Umar and the plaintiffs have got one-third
share in it. They, therefore, prayed for partition of the shop amongst the
descendants of Haji Umar. It was also pleaded that the disputed shop was let out
to Allabeli on an annual rent of Rs. 20/-. The defendants Sandal, Abdulla, Kasim,
Lukman, Amin and Guiam Nabi admitted the claim of the plaintiffs. The suit was
contested by the defendant-appellant Chiraguddin. He pleaded that the suit shop
along with other properties belonging to Haji Umar was partitioned some 20
years ago amongst the descendants of Haji Umar and further that the disputed
shop fell to Allabeli's share. He further pleaded that he has been in possession of
the disputed shop for last 40 years. It was also pleaded that the daughters of

Hussain, namely Mst Chhoti, Rahiman and, Kariman were necessary parties to the suit and in their absence, the suit, was not maintainable. Some more pleas were raised, which would be clear from the following issues framed by the trial court:

?1? vk;k eqnk;ysge ua0 5 yxk;r 7 nqdku egruktk ij cgSfl;r fdjk;snkjku eqnkb;ku o eqnk;ysge A yxk;r 4 c"kg 20? :0 lykuk dkfct gS \\

?2? vk;k eqnb;ku dk nqdkug egruktk es 1A3 fgLlk gS\\

?3? vk;k 20 lky dOy eqnb;ku ds okfyn gqISu o eqnk;ysge ua0 1 us gosyh dk ys fy;k o nqdku egruktk eqn;ysge ua0 5 yxk;r 7 dks c;s cVokjk ns nh x;h ok D;k enk;ysge ua0 5 yxk;r 7 vjl 20 lky ls blh ij cgSfl;r ekfyd dkfct gS\\

?4?vk;k nkok ggtk vUnj E;kn gS\\

?5? vk;k ekeys ggtk es eqlEekr NksVh] jgheu] djheu] Qjhd t:jh gS\\

?5,? vk;k Qjhdsu [kkuiku ;k fcjknjh es c;s fjokt eqroQh dh et:dk dk lEifRr es cgu csVh dk fgLlk feyus dk gd gkfly ugh gS\\ ;fn gkaW] rks bldk D;k vlj gS\\

?6? vk;k izfroknhx.k ua0 2 yxk;r 4 Qjhd xSj t:jh gS vkSj elyk estk blrheky vkjft gsS\\

?7? vk;k oknhx.k cVokjk djkus es eqlrgd gS\\

?8? vk;k dksVZQhl ukdkQh gS\\

?9? nknjfl D;k gksxh\\

4. The trial court, after considering the evidence led by the parties, recorded the following findings:

(1) That the defendants Nos. 5 to 7 are not in possession of the suit shop as tenants of the plaintiffs and defendants Nos. 1 to 4.

(2) That the plaintiffs and their sisters Mst. Chhoti, Rahiman and Kariman have one-thud share in the suit shop.

(3) That the omission to implead Mst. Chhoti, Rahiman and Kariman is not fatal to the suit as they are only proper parties.

(4) That the defendants Nos. 5 to 7 have failed to prove that the suit shop was allotted to their share at the time of partition amongst the descendants of Haji Umar.

(5) That the suit is clearly within time and the defendant-appellant has failed to prove adverse possession.

(6) That there is no such custom prevalent in the family of the parties which excludes daughters and sisters from inheritance.

(7) That the suit property was properly valued, and the court fee, was sufficiently

paid.

5. On the aforesaid findings, the learned Munsif passed the preliminary decree, the relevant portion of which runs as under:

The plaintiffs' suit for the recovery of Rs. 20/- as rent is dismissed with costs to the defendant No. 5. The plaintiff's suit for partition of the suit shop is decreed preliminarily and it is hereby declared that the plaintiff No. 1 has got 1/9th shares, plaintiff No. 2 has got 1/9th share, the defendant No. 1 has got 1/3rd share, the defendants Nos. 5 to 7 each have 1/9th share in the suit shop. Shti Banwarilal Sharma, Pleader, Sikar is appointed Commissioner to auction the suit shop. Shri Banwarilal will issue a proclamation of sale of the suit shop of not less than one month and fix a date of sale therein and will sell the suit shop by a public auction. He will intimate the parties in the suit about the date of sale fixed by him. Sale will be held at the shop in suit. The coheirs will be at liberty to bid at the auction. Before knocking down the bid, the Commissioner will obtain the permission of the Court. The auction-purchaser will have to pay the Commissioner the purchase price in Jump sum at once. On failure of the auction purchaser to pay purchase price, the Commissioner will immediately re-auction the suit shop....

6. Dissatisfied with the said decree, the defendant-appellant Chiraguddin went in appeal before the Senior Civil Judge, Sikar, who dismissed the appeal. It is against this decree that the defendant Chiraguddin has preferred this second appeal.

7. During the pendency of the appeal in this court. Sandal, defendant No. 1, expired on December 5, 1971. An application was moved for impleading his legal representatives on April 13, 1973. This application was contested on behalf of the respondents on the ground that the application for setting aside the abatement was barred by limitation.

8. The sons of Sandal are already on the record as respondents Nos. 3, 4 and 5. His daughters Mst. Jaitoon and Jamila are not on the record and they have to be impleaded as legal representatives of Sandal. In the circumstances, the question of abatement or limitation does not arise in this appeal as sons of Sandal sufficiently represent Sandal's estate. But in order that the appeal may be properly constituted, I order that Mst. Jaitoon and Jamila be also impleaded as legal representatives of deceased Sandal.

9. I now turn to the merits of the appeal. The judgment of the lower appellate court is not at all satisfactory. The learned Senior Civil Judge, it appears, did not take pains to discuss the evidence and decide the points which are raised before him. There is no discussion of evidence relating to custom excluding daughters and sisters from inheritance. There is also no discussion of the evidence that the suit shop was not let out to Allabeli. It appears that the learned Senior Civil Judge did not go into the evidence at all and he decided the appeal in a summary manner without giving any definite finding on any of the points agitated before

him.

10. In the above circumstances, there is no other alternative but to remand the case back to the learned lower appellate court for fresh decision on merits, after hearing the parties.

11. I, accordingly, allow the appeal, set aside the judgment and decree of the learned Senior Civil Judge dated December 22; 1967 and remand the case back to the court of the Additional District Judge, Sikar, for fresh decision of the appeal on merits after hearing the parties The costs of this appeal shall abide the final result.

12. The parties are directed to appear before the lower appellate court on November 22, 1976.