
(2017) 09 RAJ CK 0019
In the Rajasthan High Court
Case No : 40 of 2001

Heeralal S/o Bhanwarlal Mali

APPELLANT

Vs

Legal representatives of Bhanwarlal

RESPONDENT

Date of Decision : 08-09-2017

Acts Referred:

[Hindu Succession Act, 1956](#), [Section 15](#) -
General rules of succession in the case of female Hindus

Citation : (2017) 09 RAJ CK 0019

Hon'ble Judges : Virendra Kumar Mathur

Bench : SINGLE BENCH

Advocate : J.P. Chhangani, Vijay Kumar, Anil Vyas, S.D. Vyas, N.S. Rathore, H.S. Shrimali

Final Decision : Dismissed

Judgement

1. This Civil First Appeal has filed under Section 96 of the CPC against the judgment and decree passed by the Addl. District Judge No.2, Bikaner in Civil Original Suit No.142/1996.

2. Briefly stated respondent-defendants No.1 and 2 are parents of appellant-plaintiff and respondent-defendant No.3. Disputed property is situated in Purani Ginani mohalla, Bikaner. This was owned joint property of respondent-defendant Bhanwarlal and his uncle late Mohanlal in proportion is 50:50. Mohanlal died in the year 1956 and after the death of Mohanlal, Bhanwarlal and widow of Mohanlal Dhudi Devi became joint owner. Dhudi Devi have some affection for plaintiff-appellant and, therefore, she wanted to

gift some portion to appellant-plaintiff No.1. The house was owned jointly by Dhudi Devi and Bhanwarlal, therefore, after obtaining consent of Bhanwarlal. Dhudi Devi executed gift-deed in favour of appellant-plaintiff No.1 on dated 23.01.1981. Dhudi Devi continued to reside with Bhanwarlal, after executing gift deed till death. The appellant-plaintiff No.1 and respondent-defendant No.3 were residing separately. Dudi Devi died after few months of executing gift deed. The appellant-plaintiff No.1 and respondent-defendant No.3 and respondent-defendant No.1 were living separately. Appellant-plaintiff No.1 and defendant-respondent No.3 resided separately with respondent-defendant No.1 but appellant-plaintiff No.2 resided with them. Therefore, joint family continued. Bhanwarlal has submitted his house in joint possession of his three sons including him and from that time the house continued to be in the possession of the Joint Hindu Family. The respondent-defendant No.3 let out some portion of this property and started taking rent when appellant-plaintiff asked for his portion of rent then he started quarreling and also filed false litigation and, therefore, appellant-plaintiff wants to get 2/5th portion of the property separately after partitioned for which the suit was filed. During pendency of the suit the respondent-defendant No.1 Bhanwarlal died and his LR's were brought on record and, therefore, the prayer was made for partition of the property and 2/5th share of the rent received by respondent-appellant No.3. Defendant No.1/1 to 1/4 filed the written statement and denying the 2/5th share of the plaintiffs and contended that they have only 2/8th share in the property. Property if divided then only 1/8th share can be given. The respondent-defendant No.3 vide separate reply and opposed the suit.

3. On the basis of the pleadings of the parties 13 issues were framed and after recording evidence suit of the plaintiff was rejected. By way of the judgment and decree passed by 19.10.2000 whereby the learned court, despite decision of all substantial issues in favour of the plaintiffs, has yet proceeded to dismiss the suit largely on the consideration that the learned court formed the opinion that the appellants were not entitled to maintain the suit in the life time of their father Bhanwarlal. The learned trial court has also proceeded to assume the property in question to be self acquired property of Bhanwarlal without any basis and contrary to the evidence on record. It is also contended that the trial court has failed to consider pleadings of the parties and the evidence led and produced by the parties The property in question was established to be an ancestral joint family property with the appellants having birth right in the same and being entitled to claim partition of their separate share. The core question involved in the suit has not been considered by the trial court in its right perspective and the same has resulted in serious injustice.

4. It was also contended that the trial court has failed to consider the status of the parties qua property in question which has been pointed out and established to be the property having been received by Bhanwarlal, defendant No.1 and his uncle Mohanlal. The share of Mohanlal has been inherited by his surviving heir Dhudi Devi. It has also been stated that Dudhi Devi had gifted southern part of 264.25 yards of the house to the appellant no.1 Heeralal. The Joint family of Bhanwarlal had continued and the house in question with all the incidents of title was placed in the common hotch potch of the joint family of Bhanwarlal. The defendant No.3 has to utilise a usufruct of a

portion of the property by letting out the same and denying the share of the appellants and hence suit claiming partition became necessary.

5. It was also contended that the trial court has failed to consider that even if the defence sought to be put forward by the defendant was taken on its face value, the claim was of an oral partition and then a so called will by Bhanwarlal, the father of the appellants and defendant No.3. The case of so called oral partition stands negated by the trial court and documents sought to be alleged to be a will has been held to be not a will (vide findings on issue No.1 and 8). The suit of the plaintiff deserves to be decreed.

6. It was also contended that while considering the question of relief, that the learned trial Judge has proceeded to observe that in the life time of Bhanwarlal, the appellants were not entitled to claim partition. The learned trial Judge has failed to consider that firstly the property in question has not been established to be a self acquired property of Bhanwarlal and in any case, Bhanwarlal has also expired during the pendency of the suit and his all heirs were either already on record or had been taken on record. The suit ought to have been decreed.

7. It was also contended that the trial court has failed to consider the evidence of the parties and particularly the evidence of defendant No.3 Khadag Singh. A bare look at his statement itself establishes the case of appellants beyond doubt. The trial court has further failed to consider the other evidence of the parties and has further failed to consider the law applicable to the case. In the context of the contentions raised by the appellant, pleadings and evidence of the parties is considered. From the pleadings of the parties it is admitted position that Bhanwarlal was owner of the half portion and his uncle late Mohanlal were also

owner of half portion in the property. After the death of Mohanlal, his wife Dhudi Devi became the owner by way of succession. It was also admitted position that the disputed property was personal property of Bhanwarlal, it was nowhere mentioned that it was Joint Hindu Property of Undivided Family of plaintiff and defendants. It was in the year 1982 when Dhudi Devi died then as per Section 15 Hindu Succession Act 1956. Bhanwarlal was the only near relative, who was the son of her husband brother. This way Bhanwarlal received portion of Dhudi Devi and after the death of Dhudi Devi, Bhanwarlal became the owner of disputed property. Now, so far as the question whether the Bhanwarlal put the property in common hotch potch. The evidence of PW's 1, 2 and 3 was considered and Moolchand in his statement said that in the year 1996 he went to Bhanwarlal on the occasion of Deepawali and from that time Bhanwarlal stated to put the property in common hotch potch at the joint family but it is an important to note that Bhanwarlal died in the month of March, 1996 and thus his statement found to be incorrect. In the present case, it is establish that the Bhanwarlal has got personal property but no witness produced on behalf of plaintiff stated there was a joint family property or there was an ancestral property. When there was no such Joint Hindu Property Bhanwarlal puts personal property in the joint hotch potch. It was also mentioned in the plaint that plaintiff-appellant No.1 live separately from his father and defendant-respondent No.3 also living separately from his father. Dhudi Devi and Bhanwarlal defendant No.1 and plaintiff No.2 Purshhotam were living together. When according to the plaint the appellant-Plaintiff No.1 and defendant-respondent No.3 were living separately from his father and Bhanwarlal only resided with respondent-defendant No.2 then how joint family can be said

to be existed. It cannot be assumed that while living separately Joint Hindu Family continued to exist without their any explanation in evidence. The trial court has after properly appreciating the evidence on record has rightly observed that fact of Joint Hindu Family and Joint Hindu Family Property was not established. So far as the contentions raised in respect of the fact the evidence of defendant No.3 has not been considered perused the record on evidence. In this respect the trial court while deciding issue No.1 has considered the material evidence available on record. As per the evidence of DW-1 and DW-2, the oral partition of the property was done by Bhanwarlal on 02.10.1981 in the lifetime of Dhudi Devi. It is very relevant that Dhudi Devi expired after 02.10.1981. Thus, the Bhanwarlal was not the sole owner of the suit property and he was owner of half portion. Therefore, he was not having any right to affect oral partition of the suit property. He was not having authority to give affect to the partition of the suit property belonging to the Dhudi Devi. It was pleaded in the plaint that on 23.10.1981 Dhudi Devi with the consent of Bhanwarlal executed gift deed in favour of plaintiff No.1. On perusal of the gift deed it was found that this gift deed was executed jointly by the Dhudi Devi and Bhanwarlal.

8. DW-1 Khadag Singh in his statement stated that he was not having knowledge of any gift deed. The execution of gift deed Ex. 1 was proved on the basis of the evidence on record and it is also proved that there was no oral partition on 02.10.1981. There was no statement by the defendant that Dhudi Devi ever partition his portion of the property. When she was the owner of the half portion. Then how partition of whole property can be affected and defendant No.3 would get 513 square meter of land. The trial court has rightly observed that there cannot be partitioned on

02.10.1981. Bhanwarlal was owner on 519 square meter that property was also not coparcener property it was a personal property which cannot be claimed by the sons of Bhanwarlal during his lifetime.

9. There is no ground of interference in the judgment and decree passed by the trial court.

10. Therefore, the appeal stands dismissed.