(2017) 09 RAJ CK 0017

In the Rajasthan High Court

Case No : 11 of 2001

Khadag Singh S/o Shri Bhanwar Lal Mali — APPELLANT

Vs

Heeralal S/o Bhanwarlal Mali — 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 0017

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

Judgement

1. The respondent No.3-Cross-Objector, on receiving notice of the appeal, has preferred this cross-objection and contended that the trial court has not decided the issues in accordance with logical requirement of the case, for the simple reason that issue No.2 is to be decided after the decision of issue No.1 because the start of issue No.2 is to the effect that if the issue No.1 is decided against the present respondent, then the same will be considered and as such the issue No.1 should have been decided first and thereafter the findings could have been given on issue No.2. But in the present case, the same has not been done and as such the finding on issues Nos.1 and 2 deserve to be set aside. It was also contended that the respondents have

categorically come out with a logical case that in terms of the oral decision taken between Dhudi Devi and Bhanwarlal, a gift was made and in the cross-examination the question was raised in as to whether the gift-deed has been seen by the replying respondent, to which he has stated that he has seen in the court, cannot form the basis to say that he was not knowing about it, it was not so because Ex.A/13/1 is the document which has been produced by the respondent cross-objector himself and in that document the reference to gift-deed, which was only in order to save the stamp duty, has been given. No question has been asked in the cross-examination with regard to veracity of the document Ex.A/13/1 and this document has been produced by the respondent himself and as such the finding of the lower court that he was not knowing about the gift-deed is strange because this has been read out of context because this gift-deed was formally executed in terms of the oral decision to partition the property by Bhanwarlal and Dhudi Devi and that property was self acquired land of both of them and as such this fact has been stated in the will and if this is not accepted, then the court should have come to the conclusion that in terms of the will dated 06.03.1996, the property has been distributed in terms of the so called oral partition and that oral partition synchronize with the gift-deed and there is no contradiction between them and this gift-deed was only a formality and also proves the fact of oral partition, otherwise there was no question of making this gift to one son because he was to take loan from the Government for the purpose of construction of house and for this purpose he was in want of registered documents therefore, this registration was made and for others, in order to save stamp duty, the oral partition was made by Bhanwarlal and if the oral partition is not accepted then too by virtue of will, the respective portion has been allotted and in this context written admission of Heera Lal himself vide Ex.A/1/1, wherein he has moved the application to the Collector on 30.07.1991 that the family arrangement is going to be finalized and all the members of the family are being represented the share by partition and in that I want to construct the house and this is the foundation of the gift-deed which is nothing but an act in furtherance of the oral partition and this fact has already been stated by Shri Bhanwar Lal in Ex.A/13/1 and the court has neither considered this Ex.A/1/1 and nor Ex.A/13/1 and without considering these two documents, the decision on issue No.1 is without any justification.

2. It was also contended that decision on issue No.8 is also illegal and finding on issue No.8 is liable to be set aside for the simple reason that the document Ex.A/13/1 has not been taken into consideration in its right perspective for the simple reason that it has stated the history that how he has given the share of his own property and also the property of Dhudi Devi amongst his sons and he has also stated all those facts in Ex.A/13/1 and ultimatley he has stated that the so called oral partition is lile his las twill and as such when this is proved that Shri Bhanwar Lal was the exclusive owner of the property and it was his self acquired property and so was the case with Dhudi Devi and when he has disposed off his property in terms of oral partition, then even if the oral partition is not considered then too this may be considered to be the last will because there is no contradiction between these two. But, this fact of the case has not been looked into by the learned trial court while deciding issue No.8.

3. In the context of cross-objection, pleadings and

evidence on record have been considered.

4. So far as contention of the cross-objector that issue No.2 is to be decided after the decision of issue No.1 is concerned, on perusal of both the issues Nos.1 and 2, it is clear that the trial court preferred to decide the issue No.2 before decision of issue No.1 on the ground that it is important to see that who is the owner of the disputed house and there is no controversy on the basis of plaint as well as in the written statement filed by the defendant No.3 that Bhanwarlal and his uncle Mohanlal were the owners of 1/2 - 1/2 portion of the property and there is no logical requirement of the case that issue No.2 is to be decided after the decision of issue No.1.

5. So far as contention of the cross-objector that the trial court has neither considered Ex.A/1/1 and Ex.A/13/1 and without considering these two documents, the decision on issue No.1 is without justification is concerned, from the perusal of Ex.A/13/1, will, the property was not given to anyone. Only this fact has been mentioned that on 02.10.1981, with the consent of Dhudi Devi, oral partition has been done and according to that his sons were holding the possession. The trial court has rightly observed that Ex.A/13/1 is neither will nor a family arrangement after discussion, while deciding issue No.8.

6. So far as the contention raised in respect of decision of issue No.8 is concerned, admittedly, Bhanwarlal was owner of 1/2 portion and his uncle late Mohanlal was also owner of 1/2 portion of the property. After the death of Mohanlal, his wife Dhudi Devi became the owenr 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 of the Hindu Succession Act, 1956, Bhanwarlal, who was the only near relative and was the son of her husband''s brother, received portion of Dhudi Devi and after the death of Dhudi Devi, he became the owner of the disputed property. Now, so far as the question whether Bhanwarlal put the property in common hotch potch is concerned, 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 at that time, Bhanwralal state to put the property in common hotch potch at the joint faily but it is important to note that Bhanwar Lal died in the month of March, 1996 and thus his statement is found to be incorrect. In the present case, it is established that Bhanwar Lal has got personal property but no witness produced on behalf of the plaintiff stated that there was a joint family property or there was an ancestral property. When, there was no such joint family property, Bhanwarlal put personal property in the joint hotch potch. It was also mentioned in the plaint that plaintiff-appellant No.1 lives separately from his father and defendant-respondent No.3 valso living separately from his father. Dhudi Devi and Bhanwar Lal, defendant No.1 and plaintiff No.2 Purshottam were living together. When according to the plaint the appellant-plaintiff No.1 and defendant-respondent No.3 were living separately from their father and Bhanwar Lal only resided with respondent-defendant No.2, then how joint family can be said to have been existed. It cannot be assumed that while living separately, Joint Hindu Family continued to exist without there being any explanation in evidence. The trial court has, after properly appreciating the evidence on record, rightly observed that the fact of Joint Jindu Family and Joint Hindu Family Property was not established.

7. It is important to note that as per the evidence of DW-1 and DW-2, the oral partition of the property was done by Bhanwar Lal on 02.10.1981 in the lifetime of Dhudi Devi, who expired after 02.10.1981. Thus, Bhanwar Lal was the sole owner of the suit property and he was owner of 1/2 portion. Therefore, he was not having any right to effect oral partition of the suit property. He was not having authority to give effect to the partition of the suit property belonging to Dhudi Devi. It was pleaded in the plaint that on 23.10.1981, Dhudi Devi, with the consent of Bhanwar Lal, executed gift-deed in favour of plaintiff No.1 but on perusal of the gift-deed, it was found that this gift-deed was executed jointly by Dhudi Devi and Bhanwar Lal. The execution of the 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 partitioned her portion of the property. When she was the owner of half of the portion, then how partition of whole property can be effected.

8. The trial court has rightly considered the facts and evidence on record and rightly decided issue No.8 and decided that Ex.A/13/1 was not a will nor it is a family arrangement.

9. In view of the above, I find no merit in the cross-objection and the same is accordingly dismissed.