

(2011) 08 CHH CK 0035
In the Chhattisgarh High Court
Case No : Second Appeal No. 421 of 1991

Mst. Phulbasia and Another	Vs	APPELLANT
Ramsingh (Since Deceased) Through his L.Rs. and Another		RESPONDENT

Date of Decision : 02-08-2011

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 100
Hindu Succession Act, 1956 — Section 30

Citation : (2011) 3 CG.L.R.W. 126 : (2012) 1 CGLJ 81

Hon'ble Judges : Prashant Kumar Mishra, J

Bench : Division Bench

Advocate : Anil Pandey, for the Appellant; A.K. Prasad, Advocate, for LR's of Respondent No. 1 and Shri G.D. Waswani, Govt. Advocate for the Respondent No. 2, for the Respondent

Final Decision : Dismissed

Judgement

Hon'ble Shri Prashant Kumar Mishra, J.—This second appeal u/s 100 of the CPC has been preferred by the defendants. The suit was filed by original plaintiff Ram Singh, who died during the pendency of the appeal and is now represented by his legal heirs respondents No. 1 (a) to 1 (d). The original plaintiff's suit for declaration and partition was decreed by the trial Court and the same has been affirmed by the first Appellate Court. The relationship between the parties can be appreciated by the following genealogical tree:-

2. It was stated by the plaintiff that the parties are Gond tribals and have adopted traditional Hindu Law with regard to succession. The plaintiff's father Bahadur Gond died leaving 3 sons namely, the plaintiff Ram Singh, defendant No. 1 Patraj and Amar Sai, whose widow Mst. Phoolbasiya was arrayed as defendant No. 2. Defendant -No. 3 Devraj is the son of defendant No. 1 Patraj. All the three sons of Bahadur Gond succeeded the property and their names were recorded jointly in the revenue records concerning 11.194 hectares of agricultural land. The eldest son Amar Sai died in 1982 and defendant No.2 is his

widow. After the death of Amar Sai, the widow is also entitled to and has a right of maintenance during her life time and otherwise, the plaintiff and defendant No. 1 Patraj Gond, remaining two brothers, are entitled to succeed the property in equal share. However, defendant No. 3 Devraj, son of defendant No. 1 Patraj, illegally got recorded his name by an order of Naib Tehsildar passed on 31-7-1982 and has started claiming 1/3rd share in the suit property. According to the plaintiff, the name of defendant No. 3 Devraj was recorded in connivance with defendants No. 1 and 2. The suit was thus filed seeking a declaration that defendant No. 3 Devraj has no right, title or interest to succeed the property on the share belonging to said Amar Sai and that the plaintiff and defendant No. 1 Patraj have one half share each in the suit land and partition to this effect be effected between the parties.

3. The defendants filed common written statement and stated that Phoolbasiya was not married with Amar Sai and she was living with Amar Sai as his concubine, thus, Phoolbasiya has no right, title or interest in the suit property. It was specifically pleaded by the defendants that Amar Sai executed a will in favour of Devraj with respect to his 1/3rd undivided share and on this basis, his name has been recorded in the revenue records. It was thus stated by the defendants that Phoolbasiya has no right and Devraj is entitled to 1/3rd share on the strength of will executed by Amar Sai in his favour.

4. The trial Court held that the parties are governed by the Hindu Law and that Phoolbasiya was not married to Amar Sai and thus, she has no right, title or interest in the suit property. While deciding issue NO.6-A, the trial Court held that the defendants have proved that Amar Sai executed a will in favour of Devraj, however, while answering issue NO. 6-C, it was held that Amar Sai was not entitled to execute a will and on this basis, the trial Court passed a decree declaring one half share each in favour of the plaintiff and defendant No. 1 Patraj and directed for partition of the suit land accordingly. The first Appellate Court also affirmed the finding of the trial Court and dismissed the first appeal.

5. The following substantial question of law has been framed for determination in this second appeal:-

Whether the will executed by Amar Sai in favour of the appellant Deoaj is legal and valid so as to pass on title in favour of Deoraj?

6. Learned counsel for the appellant argued that the Courts below have committed serious illegality by decreeing the suit even after finding that the will executed by Amar Sai in favour of Devraj has been proved to be genuine. He would submit that even though the parties are tribal, one member of the joint tribal family can dispose of his undivided share in the joint property by executing a will and, therefore, a declaration that plaintiff Ram Singh and defendant Patraj have one half share each is wholly illegal. According to learned counsel for the appellant, the trial Court should have declared that the plaintiff, defendant No. 1 Patraj and defendant No. 3 Devraj have 1/3rd share each in the suit property.

7. On the other hand, learned counsel for respondents No. 1(a) to 1(d) would argue that in the matter of succession amongst tribals the provision of the Hindu Succession Act has no application and since the provision of old Hindu Law applies to the parties, one member of joint tribal family has no right to execute a will and that the judgment and decree passed by the Courts below concurrently needs no interference.

8. In the present case, both the Courts below have concurrently recorded a finding of fact that defendant No. 2 Phoolbasiya was not married with Amar Sai, one of the three sons of Bahadur Gond. Similarly, while deciding issue NO. 6-A, the trial Court found that the will in favour of Devraj has been proved to be validly executed by Amar Sai. The said finding has been affirmed by the first Appellate Court in para-19 of the impugned judgment.

9. To determine as to whether Amar Sai was competent to dispose of his undivided share in the joint tribal family property, it is necessary to examine the pleadings made by the parties with regard to the provisions in relation to succession which governs them.

10. In para-2 of the plaint, the plaintiff has stated that the parties are Gond tribals and have adopted old Hindu Law as practiced under Mitakshara principle. In reply to this pleading, the defendants have admitted in para-2 of their written statement that the parties are governed by Mitakshara principle of old Hindu Law. In para-6A & 6B of the written statement, the defendants have stated that Amar Sai executed a will of his undivided 1/3rd share in favour of Devraj. However, by amending the plaint, the plaintiff specifically pleaded in para-6C of the plaint that under the traditional Hindu Law, a coparcener was not entitled to dispose of and execute a will with respect to his undivided share and that the provisions of the Hindu Succession Act, 1956 are not applicable to the parties who are Gond tribals. It was thus pleaded by the plaintiff that even if it is found that Amar Sai has executed a will in favour of Devraj, the same is illegal and void and it does not confer any title on Devraj.

11. In the matter of Madhu Kishwar and others Vs. State of Bihar and others, it has been held by the Hon'ble Supreme Court that the provisions of the Hindu Succession Act or Indian Succession Act are not applicable to the custom governed tribals. It is settled law that under the old Hindu Law, a coparcener of joint Hindu family belonging to Mitakshara school was not entitled to dispose of the whole or part of his interest in the joint family property. (See Seth Lakhmi Chand Vs. Mt. Anandi and Others AIR 1926 PC 54, Valliammai Achi Vs. Nagappa Chettiar and Others, M.N. Aryamurthy and Another Vs. M.D. Subbaraya Setty (Dead) through L. R. and Others, It is only after coming into force of the Hindu Succession Act, 1956, a provision was made in Section 30 therein that a Hindu coparcener is entitled to dispose of his undivided share in the coparcener property. Thus, any disposition by a member of coparcenary under the old Mitakshara law either by will or gift would be void.

12. Since in the present case, the parties have admitted that they are governed by Mitakshara principles of the traditional Hindu Law and in view of the judgment in the matter of Madhu Kishwar and others Vs. State of Bihar and others, Section 30 of the Hindu Succession Act, 1956 has no application to the parties who are tribals, this Court would answer the substantial question of law in negative to hold that the will executed by Amar Sai with respect to his undivided share in favour of appellant Devraj is not legal and is thus invalid and does not have the effect of passing on any title in favour of appellant Devraj in view of the law laid down by the Privy Council in Seth Lakhmi Chand AIR 1926 PC 54 (Supra) and the Hon"ble Supreme Court in M.N. Aryamurthy and Another Vs. M.D. Subbaraya Setty (Dead) through L. R. and Others, and Valliammai Achi Vs. Nagappa Chettiar and Others, In the result, the second appeal fails and is hereby dismissed.