

(2011) 05 MP CK 0066
In the Madhya Pradesh High Court
Case No : S.A. No. 27 of 2004

Santosh Kumar Diwan and others

APPELLANT

Vs

Sitabai (dead) through LR Vinod Pandey and others

RESPONDENT

Date of Decision : 06-05-2011

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 22 Rule 1, Order 22 Rule 2, Order 22 Rule 3, Order 22 Rule 4, 15(1)
Hindu Succession Act, 1956 — Section 14(2), 15, 15(1)
Hindu Womens Right to Property Act, 1937 — Section 3(1)

Citation : AIR 2011 MP 161 : (2011) 4 MPLJ 155

Hon'ble Judges : A.K.Shrivastava, J

Bench : Single Bench

Final Decision : Allowed

Judgement

A.K. Shrivastava, J.

This second appeal has been filed by plaintiffs/ appellants who have lost from both the Courts below.

The plaintiffs filed a suit for declaration of half share in the suit property having possession on it and the defendants No. 1 to 4 are not having any title, right and interest to interfere in their half portion of the suit property. A decree of injunction has also been sought that defendants be restrained from interfering in their possession.

The defendants 1 to 4 resisted the suit by filing joint written statement. The defendant No. 5 State of M. P. has been impleaded as formal party.

The case of the plaintiffs and defendants is not being re-written here in detail because they belong to one family and the family tree is not in dispute and has been admitted by both the parties even during the course of arguments before this Court. The family tree of the parties is as under :

The plaintiffs are the son and daughters of Gayatribai who died on 3-1-1997 and

this suit has been filed after her death. Ramdayal who died in the year 1930 left his widow Saraswatibai, son Shivshankar and daughter Gayatribai. Ramdayal, Ramprasad, Kaluram and Narayanprasad were the sons of Biharilal and Rampibai was the widow of Kaluram. Ram Prasad died unmarried in the year 1949 while Kaluram and Narayanprasad died in the year 1928 and 1919 respectively. Kaluram's widow was Rampibai who died issueless and Narayan Prasad had also died issueless.

Thus, the only male member who inherited the co-parcenary suit property was Shivshankar who had also died in the year 1950 leaving behind his widow Sitabai who was defendant No. 1 and his mother Saraswatibai who died in the year 1976.

The plaintiffs mother Smt. Gayatribai and deceased respondent Sitabai (defendant No. 1) were recorded as owner of suit property, the description whereof has been mentioned in the plaint. Rampibai died issueless about 10 years ago prior to date of filing of the suit (around 1988) and thereafter the mother of the plaintiffs Gayatribai and Sitabai were recorded as bhumiswami.

Learned Trial Court dismissed the suit of plaintiffs and the first appeal which was filed by them has also been dismissed by the impugned judgment and decree.

In this manner this second appeal has been filed.

This Court on 18-7-2005 admitted the second appeal on the following substantial questions of law :

1. Whether after the death of Shiv Shankar in 1950, his widow Smt. Sitabai succeeded to the suit property under the Hindu Women's Rights to Property Act, 1937?

Whether Smt. Saraswati Bai, widow of Ram Dayal, became the full owner of the suit property being in possession of the same, after coming into force of the Hindu Succession Act in the year 1956 u/s 14(2) of the Act?

Whether after the death of Saraswati Bai in 1997, Smt. Gayatribai and Smt. Sitabai are entitled to half and half share in the suit property under the Hindu Succession Act, 1956?

It would be relevant to mention here that in substantial question of law No. 3 it has been incorrectly typed that Saraswatibai died in the year 1997, indeed she died in the year 1976.

The contention of learned Senior Counsel for appellants/plaintiffs is that after the death of Ramdayal in the year 1930 the succession opened and the surviving members of the family were widow Saraswatibai, daughter Gayatribai, son Shivshankar and brother Ramprasad. Ramprasad also died in the year 1949. Thus, Shivshankar being the only male member of the family would inherit the property of Ramdayal and Smt. Saraswatibai being widow of Ramdayal would have right of maintenance in the property u/s 3(1) of Hindu Women's Right to Property Act 1937. According to learned Senior Counsel on account of death of

Shivshankar, his widow Sitabai would succeed to the share of Shivshankar and mother Savitribai and Smt. Sitabai will jointly have right of maintenance in the property and after coming into force of Hindu Succession Act, 1956 (for brevity "Succession Act") both of them will become absolute owner of suit property in respect of their share on account of their pre-existing right of maintenance. Since Smt. Saraswatibai died leaving behind daughter Gayatribai and widow of her son Smt. Sitabai and Gayatribai being her daughter would succeed to her share to the exclusion of Sitabai u/s 15(1)(a) of the Succession Act and because Gayatribai died in the year 1997, the plaintiffs being her (Gayatribai's) son and daughters would inherit the property possessed by Gayatribai. Hence, it has been submitted that learned two Courts below incorrectly interpreted the law that Saraswatibai was having only right to maintenance and was not having any right in the co-parcenary property by dismissing the suit, which may be decreed.

On the other hand Shri Amit Singh, learned counsel for LR's of Sitabai (defendant No. 1) argued in support of the impugned judgment and submitted that Shivshankar being the only male member of the family the entire coparcenary property devolved in him and his mother Saraswatibai was not having any right in the suit property though she was having limited right of maintenance and after the death of Shivshankar the property would devolve upon his widow Sitabai and therefore rightly the two Courts below have dismissed the suit of the plaintiffs and hence this appeal be also dismissed.

Having heard learned counsel for the parties, I am of the view that this appeal deserves to be allowed.

Before answering the substantial questions of law, I would like to mention here that during the pendency of Second Appeal original defendant No. 1 Sitabai had died and her legal representative Vinod Pandey has been brought on record on account of Will. However, he has been brought on record only as legal representative for the purpose of this appeal on account of alleged Will of Sitabai in his favour. This Court specifically held on 30-3-2011 while deciding the application of bringing LR's on record that plaintiff shall be free to change the Will of Sitabai in favour of Vinod Pandey and Vinod Pandey shall also be free to obtain probate certificate. It would be apt to quote the entire order of this Court dated 30-3-2011 allowing the application under Order XXII Rule 4 CPC (LA. No. 12678/2009) which reads thus;

30-3-2011

Shri V. S. Shrotri, learned senior counsel for Shri Amit Nagpal for appellants

Shri Amit Singh, learned counsel for legal representatives of respondent No. 1

An application LA. No. 12678/2009 has been filed under Order XXII Rule 4 CPC praying that respondent No. 1 Sita Bai had died issueless and therefore her name be deleted from the cause title of the appeal. However, one application has been filed by Vinod Pandey stating therein that he is legal representative of Smt Sita

Bai, since Sita Bai has bequeathed the suit property in his favour. This Court directed to hold an inquiry and the matter was sent for limited purpose in the Court below. The report has been received and it has been held by learned Court below that Sita Bai has executed a Will in favour of Vinod Pandey.

Without entering into the controversy, for the purposes of this appeal said Vinod Pandey is brought on record as legal representative of Sita Bai. However, the plaintiffs shall be free to challenge the Will or Vinod Pandey shall also be free to obtain probate certificate. For clarification it is hereby mentioned that this Court has not expressed any view about the legality of the Will in view of the decision of Supreme Court in Suresh Kumar Bansal Vs. Krishna Bansal and Another, and Than Singh Vs. Majboot Singh and Others,

Regarding substantial questions of law No. 1 to 3 framed.

Since all these questions are interlinked to each other, they are being decided and answered jointly.

The family tree is admitted to the parties. The question is whether Smt. Gayatribai daughter of Ramdayal was having half share in the suit property. After 1949 when Ramprasad died the sole co-parcener Shivshankar was alive. In the entire family during that time there were only three persons namely Saraswatibai Wd/o. Ramdayal, her son Shivshankar and daughter Gayatribai. On account of death of Shivshankar who died issueless in the year 1950 he left his widowed mother Saraswatibai, his own wife Sitabai and sister Gayatribai. Gayatribai was not having any right in the co-parcenary property prior to coming into force of Succession Act and thus the mother of Shivshankar and his wife Sitabai became absolute owner of the half share each of the co-parcenary suit property on coming into force the Succession Act in terms of section 15(1)(a) of the said Act on account of their pre-existing right of maintenance.

Admittedly, Saraswatibai died in the year 1976 leaving behind her daughter Gayatribai and therefore her half share in the suit property would devolve on her daughter Gayatribai and not to her daughter-in-law Sitabai because u/s 15(1) of the Succession Act the property of female Hindu dying intestate shall devolve according to the rules set out in section 16, firstly, upon the sons and daughters (including the children of any pre-deceased son or daughter) and the husband. In this section order of succession has been mentioned and according to this provision, the order of succession amongst the heirs referred in section 15 shall be and the distribution of the intestated property amongst those heirs shall take place in accordance to the Rules 1, 2 and 3 of this section. According to Rule 1 the property will devolve amongst the heirs specified in sub-section (1) of section 15, those in one entry shall be preferred to those in any succeeding entry and those included in the same entry shall take simultaneously and thus upon the death of Saraswatibai her property would not devolve in any manner to her daughter in law Sitabai but would devolve upon her daughter Gayatribai who died on 3-1-1997 and whose heirs are the plaintiffs.

I do not find any merit in the contention of learned counsel for respondents that Saraswatibai was having limited right of maintenance in the suit property and the property in dispute which is co-parcenary would not devolve on her. According to me, since Savitribai was having pre-existing right of maintenance and similarly Sitabai (defendant No. 1) who was the widow of Shivsnankar who had died in 1950, was also having right of maintenance and after the death of Shivshankar prior to coming into force of Succession Act since both of them were having pre-existing right of maintenance, they would become absolute owner having half share each in the suit property. In this regard the decision of Supreme Court *Vaddeboyina Tulasamona and others vs. Vaddeboyina Sesha Reddi (dead)* by L.Rs., AIR 1977 SC 1944 para 27 may be seen. This decision has also been placed reliance in later decision *Bai Vajia (Dead) by Lrs. Vs. Thakorbhai Chelabhai and Others*,

The judgment and decree passed by two Courts below runs contrary to aforesaid provisions of law and the dictum of the Supreme Court and therefore they have erred in dismissing the suit of plaintiffs on the ground that Saraswati Bai was having limited right of maintenance. According to me, she was entitled to have agreement in her favour with her son Shivshankar and/or was also entitled to obtain a decree to enforce her right of maintenance from the funds of co-parcenary property against her son Shivshankar. Thus, this pre-existing right of her continued till coming into the force of Succession Act and on coming into the force of that Act her pre-existing right to maintenance automatically converted by operation of law into the absolute right of ownership (upto the extent of her right) u/s 15(1) of the Act.

All the substantial questions of law are thus answered that Saraswati bai and Sitabai were having half share each in the suit property and since they were possessing the same on coming into force of Succession Act and after the death of Saraswatibai in the year 1976 her right devolved on her daughter Smt. Gayatribai (plaintiffs' mother) and after the death of Gayatribai the said right devolved on plaintiffs and thus plaintiffs are having 1/2 share in the suit property which was being possessed by Savitribai and after her death by Gayatribai.

This appeal is accordingly allowed. The impugned judgment and decree passed by learned two Courts below are hereby set aside and the suit of plaintiffs is hereby decreed with no order as to costs. The plaintiffs shall be free to challenge the Will of Sitabai and similarly Vinod Pandey shall be free to obtain Probate Certificate.