

(1975) 09 RAJ CK 0013
In the Rajasthan High Court
Case No : Second Appeal No. 308 of 1967

Smt. Sunderdevi and Another	Vs	APPELLANT
Manakchand and Others		RESPONDENT

Date of Decision : 03-09-1975

Acts Referred:

Hindu Succession Act, 1956 — Section 14
Succession Act, 1925 — Section 90

Citation : AIR 1975 Raj 211 : (1975) RLW 584 : (1975) WLN 418

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

Bench : Single Bench

Advocate : Sumerchand Bhandari and Rajesh Baliya, for the Appellant; M.C. Bhandari and Dalveer Bhandari, for the Respondent

Final Decision : Allowed

Judgement

S.N. Modi, J.—This is a second appeal by the defendants in a suit for declaration under Order 21, Rule 63, C. P. C.

2. The facts giving rise to this appeal are that the plaintiff-respondent Manakchand (decree-holder) obtained a money decree against the defendant No. 3 Moolchand (judgment-debtor) and attached half share in the property described in para No. 1 of the plaint alleging that the judgment-debtor Moolchand owned half-share in it, The defendant-appellant Mst. Sunderdevi, wife of Duli Chand and Mst. Chukabai wife of Moolchand (objector) moved an objection petition under Order 21, Rule 58, C. P. C. and asserted that the judgment-debtor Moolchand was entitled to only one-fourth share in the property in dispute and the rest 3/4th share was owned and possessed by them. The objection petition was allowed by the executing court and 3/4th share in the property was released from attachment. The decree-holder Manakchand then instituted the present suit for declaration that the judgment-debtor Moolchand be declared owner of the half-share in the property. The plaintiff alleged that the property initially belonged to the Joint Hindu Family of two brothers Hanutmal and Mangilal and

after the former's death, the property by rule of survivorship devolved upon Mangilal. The widow of Hanutmal Mst. Phephabai inherited no share in the property. After the death of Mangilal, the plaintiff alleged that the property devolved upon his two sons Moolchand and Dulichand,, each having half-share in the property. The defendant-appellants, that is, the objectors admitted that the property initially belonged to two brothers Hanutmal and Mangilal but they denied that on the death of Hanutmal the property devolved upon Mangilal. According to them, half-share in the property belonging to Hanutmal devolved upon Hanutmal's widow Mst. Pephabai who remained in occupation of her husband's half-share in the property upto the date of her death which look place on Sawan Sudi 15, Smt. year 2019. As regards the remaining half-share the defendant-appellants pleaded that after the death of Mangilal, his half-share was inherited by his two sons Dulichand and Mool Chand in equal shares. The defendant-appellants further pleaded that Mst, Pephabai gave her half-share in the property by a registered will dated 2-9-1953 to the defendant-objectors in equal shares, they further pleaded that Dulichand gifted his one-fourth share in the property to his wife Mst. Sunder Devi, defendant No. 1, by a registered gift-deed dated 5-1-1958. In these circumstances, it was pleaded that the defendant No. 1 Mst. Sunder Devi became the owner of the half-share, defendant No. 2 Chukabai of one-fourth share and defendant No. 3 Moolchand of one-fourth share. The trial court after framing proper issues and after evidence dismissed the plaintiff's suit holding that the defendant No. 3 Moolchand had only one-fourth share in the property. The learned District Judge, Ajmer, on appeal by the plaintiff-decree-holder recorded the following findings:--

1. That there was nothing on the record to show that the property in dispute was a coparcenary property or joint family property of Hanutmal and Mangilal. Both Hanutmal and Mangilal were co-owners as they jointly purchased the property in dispute.
 2. That on the death of Hanutmal half-share in the property was inherited by his widow Mst. Pephabai as limited owner.
 3. That the will Ex. A/4 was executed on 2-9-1953 by Mst. Pephabai in favour of the defendant-objectors Mst. Sunder Devi and Mst. Chukabai.
 4. That the will Ex. A/4 when executed on 2-9-1953 was a nullity, because in the year 1953 Mst. "Pephabai was only a limited owner and she had at that time no authority to execute the will.
3. Dealing with the last finding which resulted in setting aside the judgment of the trial Court, the learned District Judge observed:

"To take the best of the defendants" case, Smt. Phephabai succeeded her husband Hanutmal. The exact year of the death of Hanutmal has not come on record but it is an admitted fact that Hanutmal expired before his brother Mangilal and defendant Mool Chand when examined on 7-12-1965 deposed that Mangilal had expired about 25 years back. So this can safely be said that Smt.

Phephabai succeeded her husband as a limited owner only. Now before the passing of the Hindu Succession Act, 1956, a widow or other limited heir had no power to alienate the estate inherited by her from the deceased owner except for religious or charitable purposes or other purposes amounting to legal necessity. Not only this, the widow or other limited heir could not in any case dispose of by will the property inherited by her or any portion thereof whether the property be movable or immovable vide Section 180 of the Hindu Law by Mulla (13th Edition), Will Ex. A/4 shows that it was executed on 2-9-1953. Apparently, at that time, Smt. Phephabai had no legal authority to execute the same or to dispose of the property in dispute in the manner mentioned in the will. In this connection, it was urged by the learned counsel for the respondents that the will was to take effect after the death of Smt. Phephabai and as she expired after the coming into force of the Hindu Succession Act, it should be held that defendants Nos. 1 and 2 Smt. Sunderdevi and Smt. Chukabai have got half-share in the house in dispute through that will. I am afraid I am not in agreement with this proposition. If the will when executed in the year 1953 was a nullity, as it really was, it cannot be said that due to change of law thereafter, it became effective as Smt. Phephabai died after the coming into force of the Hindu Succession Act. The simple reason for this is that in the year 1953 when this will was executed, it was nothing but a waste paper and the document was a nullity. The matter would have been different, of course, if Smt. Phephabai after the coming into force of the Hindu Succession Act executed fresh will in anybody's favour but that was apparently not done. In this view of the matter, I am of the opinion that the will Ex. A/4 was executed at the time when its executant Smt. Phephabai had no authority to execute it and it being a nullity the property mentioned in it did not pass on to defendants Nos. 1 and 2. In other words, after the death of Smt. Phephabai, both the brothers Moolchand and Dulichand came to be the owners of the other half portion of the house also and, as such, Moolchand has got half-share in the property."

In view of the above finding, the learned District Judge allowed the appeal, decreed the suit and declared that Moolehand judgment-debtor has got half-share in the property in dispute. Aggrieved by the said decree, the objectors, namely, the defendant No. 1 Mst. Sunderdevi and defendant No. 2 Mst. Chukabai had preferred this second appeal.

4. There is no doubt that Mst. Phephabai had inherited half-share in the property after the death of her husband as a limited owner and she had no authority to will away her half-share on 2-9-1953, It is proved from the evidence on the record and it was also admitted before the trial court that Mst. Phephabai was in possession of her husband's half-share till her death which took place after the coming into force of the Hindu Succession Act, 1956. Section 14 of the Hindu Succession Act, 1956 made her absolute owner in respect of the half-share of the property inherited by her from her husband. Mst. Phephabai therefore at the time of her death had full authority to will away her husband's property. The appellants' learned advocate contends that although the will was executed at a

time when Mst." Phephabai had no authority to dispose of her widow's estate but since the will was to take effect after her death, and admittedly at that time she had unfettered capacity to dispose of the said property, the will was perfectly valid.

5. The important point which arises for consideration in this appeal is therefore whether the validity of the will like the one in the present case should be judged from the time it is executed or from the time it is to take effect.

5A. Section 90 of the Indian Succession Act, 1925, runs as under:

"Section 90.-- The description contained in a will of property, the subject of gift, shall, unless a contrary intention appears by the will, be deemed to refer to and comprise the property answering that description at the death of the testator."

This section was interpreted by a Division Bench of this Court in Mst. Sirekanwar v. Kanwarlal ILR (1953) Raj 1013. It was laid down that "unless a contrary intention appears by the will itself, the will should be interpreted as speaking at the death of the testator." It was further observed--

"The effect of this section is that a bequest passes not that property which the testator means to leave at the time of executing the will but whatever is in existence at the time of his death.....and on this principle the will would speak as at the death of the testator and not as at the time it is made."

In Sirekanwar's case (supra), it was argued that the will which was originally invalid could not be validated later on because the family stood divided at the time of the testator's death. Repelling this argument, their Lordships observed as under :--

"This argument, though plausible, does not appear to be sound. The analogy of a minor or a person of an unsound mind cannot be justly applied to a member of a joint family who is major and of sound mind. In the case of a person who is a minor or of unsound mind there is an inherent incapacity to make any valid disposition. In the case of a member of a joint family, he is not inherently incapable to make any disposition. If he has any separate property, he can certainly dispose of it in any manner he likes. The restriction which the Hindu Law imposed on him is only with regard to the property which is joint. If such property, therefore becomes separate before his death, his original incapability to dispose of that property is automatically removed and if he has not revoked his previous will, there is no reason why it should not take effect. As regards the principle that a Hindu cannot by will bequeath property which he could not alienate by gift, it may be pointed out that this only means that he cannot will away that property which he could not validly give in gift at the time of his death. If Kishenlal had died as a member of joint family, the will made by him would certainly have been invalid because at the time of his death, the right of Kanwarlal's survivorship as a coparcener would have come in conflict with Mst. Sirekanwar's right by devise. But since the family was divided before his death

and a preliminary decree was passed, the will was perfectly valid at the time of his death and simply because it was made at a time when he was a member of the joint family, it can-not be held to be invalid."

It is thus abundantly clear that the property, which a person does not possess or own or has no power to dispose of at the time of the will, may be bequeathed and such a will would be valid provided the testator happened to be the owner at the time of his death. The analogy of a minor or a person of unsound mind cannot be applied to the case of a widow. In the present case, even in 1953 Mst. Phephabai could alienate the estate inherited by her from her deceased husband for religious or charitable purposes or other purposes amounting to legal necessity. She was also not incapable to dispose of her stridhan by way of will. It, therefore, cannot be said that there was any inherent incapacity in case of Mst. Phepha Bai to make any valid disposition. The restriction which Hindu Law imposed on her right to dispose of widow's estate was not absolute. And whatever incapability was imposed by the Hindu Law on her right to dispose of her widow's estate possessed by her was removed on coming into force of the Hindu Succession Act, 1950. That Act made her absolute owner of all such property which was inherited by her on the death of her husband and was in her possession. If Mst. Phepha Bai had bequeathed widow's estate possessed by her after coming into force of the Hindu Succession Act, 1956, such disposition would have been valid, because at that time she had unfettered right to do so. Now, in the present case, as there was no inherent incapacity to dispose of widow's estate and further whatever incapacity was there in 1953, it was removed before her death by the Hindu Succession Act, 1956, the will cannot be held to be invalid simply because it was made at a time when Mst. Phephabai had no right to bequeath her widow's estate, the reason being that the will speaks at the death of the testator and not at the time of its execution.

6. In Halsbury's Laws of England, Vol. 34 (Hailsham Edition), Para 291 at page 236, it is laid down :--

"A will unless a contrary intention appears therein must be construed, with reference to the real estate and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator and as if the condition of things to which it refers in this respect is that existing immediately before his death."

In this view of the matter, the decision of the learned District Judge cannot be upheld.

7. The appeal is, therefore, allowed, the judgment and decree of the learned District Judge are set aside and those of the trial court are restored. The appellants shall get costs from the plaintiff-respondent of all the three courts.