

(2004) 03 MP CK 0036
In the Madhya Pradesh High Court
Case No : F.A. No. 315 of 1996

Sunderlal Chourasiya

APPELLANT

Vs

Tejila Chourasiya and Others

RESPONDENT

Date of Decision : 17-03-2004

Acts Referred:

Hindu Succession Act, 1956 — Section 8
Succession Act, 1925 — Section 107, 109

Citation : AIR 2004 MP 138 : (2006) 1 MPJR 170 : (2004) 2 MPLJ 193

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

Bench : Single Bench

Advocate : Ravish Agarwal, for the Appellant; Pranay Verma and Ajay Ojha, for the Respondent

Final Decision : Allowed

Judgement

A.K. Shrivastava, J.

This appeal has been filed by plaintiff against the judgment and decree dated 22-4-1996 passed in Civil Suit No. 5-A/95 by First Additional District Judge, Seoni.

The suit of plaintiff is for declaration that he is having 1/2 share in the suit house and defendants No. 2 to 8 have no right, title or interest therein; the plaintiff further prayed that he is entitled for partition, separate possession and compensation for use of the suit property by defendants 2 to 8. The family tree of plaintiff and defendants is as under :

Kariya Barai _____
_____ | | | Hukam Chand Kapoor
Chand Mool Chand (Died 1956-57 (Died 11-4-88 issueless (Died 1934) | Smt.
Budhha bai (wife) | | | | (Died 21-12-81 Ex. P/8) | | | |
_____ | | | _____ Sunder
lal Teji lal | Chhiddilal (Died 9-11-1987) (Plaintiff) (Deft. 1) |

								Krishna Bai Raj
Kumari Bai	(1st wife)	(2nd wife)	Died-1969	(Deft. 4.)				
Anita	Arti	Ku.	Jyoti		(Deft.6.)	(Deft.7.)	(Deft.8.)	
								Mukesh Rakesh Anjna

bai (Deft.2) (Deft.3) (Deft.5) The suit house is constructed on plot No. 95/2 and Plot No. 96/3, a map thereof is annexed to the plaint. On the ground-floor of this house defendants 2 to 8 are residing, on first floor the plaintiff and on the second floor defendant No. 1 resides. Kapoor Chand Chaurasiya purchased this house from one Babulal Lakhera on 19-11-1951. Kapoor Chand died issueless on 11-4-1988. Plaintiff Sunderlal and defendant No. 1 Tejilal are the nephews of Kapoor Chand, his third nephew was Chhiddilal who had since died. Defendants No. 2, 3, 5 to 8 are the sons and daughters of chhiddilal and defendant No. 4 is his widow. One Hukum Chand was the elder brother of Kapoor Chand who died in the year 1956-57. Chhiddilal is son of Hukum Chand. Mool Chand was younger brother of Kapoor Chand who died in the year 1934 whose sons are plaintiff Sunder Lal and defendant No. 1 Teji Lal. Name of wife of Kapoor Chand is Smt. Budhha Bai who died on 21-12-1981. Earlier to the death of Kapoor Chand, on 9-11-1987 Chhiddilal died. All these facts are undisputed. Similarly it is also not disputed that on 5-9-1980 late Kapoor Chand executed a Will which was registered on 6-9-1980.

On the death of Kapoor Chand defendant Nos. 2 and 3 namely Mukesh Kumar Chaurasiya and Rakesh Kumar Chaurasiya instituted proceedings for mutation in Nazul Office in which the present plaintiff on 8-8-1988 filed objections and challenged their right, title and interest in the suit house. Plaintiff himself on 6-8-1988 submitted an application in Nazul Office for his mutation in which objections were filed by defendants Nos. 2 and 3. The Nazul Officer, after examining both the applications vide its order dated 13-3-1991 directed to mutate the names of plaintiff and defendants. An appeal which was preferred before the collector was pending till the suit was decided.

According to plaintiff, Kapoor Chand was the sole and exclusive owner of the suit property, his three nephews whose names are described hereinabove lived with him. As mentioned hereinabove, a Will was executed by Kapoor Chand on 5-9-1980 by which he bequeathed the suit house in three equal shares to his three nephews namely plaintiff-Sunderlal, defendant No. 1 Teji Lal and deceased Chhiddilal. On 9-11-1987 Chhiddilal passed away and after his death, Kapoor Chand breathed his last on 11-4-1988. The wife of Kapoor Chand Budhha Bai died during the lifetime of Kapoor Chand on 21-12-1981. According to plaintiff, as Chhiddi Lal died during the lifetime of Kapoor Chand, his share which was bequeathed to him by Kapoor Chand in his Will lapsed and that share formed a part of the residue of Kapoor Chand's estate to be inherited by his heirs on his death. Thus, according to the plaintiff, defendant No. 1 and he succeeded to 1/3rd share each of the suit house as per the Will and remaining 1/3rd portion which was bequeathed to Chhiddilal was also devolved on plaintiff and defendant

No. 1 because Chhiddilal died during the lifetime of Kapoor Chand and therefore no right would devolve on defendants 2 to 8.

The defendants 2, 3, 4, 6 to 8 filed their joint written statement and pleaded that the suit property was not the self-acquired property of Kapoor Chand. It was denied that he was sole and exclusive owner of the suit property. They further denied that they were living on account of implied consent of Kapoor Chand. These defendants, however, admitted the execution of the Will dated 5-9-1980 which was registered on 6-9-1980. The dates of death of Kapoor Chand and Chhiddilal were not disputed by these defendants. However, it has been denied by them that 1/3rd share of Chhiddilal was devolved on by plaintiff and defendant No. 1. According to these defendants, Will of Kapoor Chand was not confined to late Chhiddilal only, but was also in respect to the heirs of late Chhiddilal and, therefore, it cannot be said that merely because Chhiddilal died earlier to Kapoor Chand it would distribute the testamentary succession of late Kapoor Chand's property.

The defendants Nos. 1 and 5 did not file any written statement.

The trial Court framed the issues, thereafter parties led their evidence, in its judgment, trial Court categorically held that the suit property was self-acquired property of Kapoor Chand. In this appeal no cross-objection has been filed against the decision on this issue and thus the finding on this issue has become final. The trial Court by applying Section 109 of the Indian Succession Act, 1925 (in short "the Act") held that the heirs of Chhiddilal (Defendants 2 to 8) would be entitled for their share, and on this ground dismissed the suit. Hence this appeal.

In this appeal respondents were served but they did not appear despite sending S.P.C. to them after notice. I have heard Shri Ravish Agarwal, learned counsel for the appellant. The contention of the learned counsel is that the trial Court erred in law in dismissing the suit of the plaintiff, according to him, learned trial Court by adopting incorrect approach of law applied Section 109 of the Act. Indeed, Section 107 of the Act is applicable in present factual scenario. It has been proposed by him that the share of Chhiddilal lapsed because he died earlier to the testator and therefore his share would go in the residue of the testator's i.e. Kapoor Chand's property as it was not bequeathed and thus, according to him, it would devolve on accordance with the order of succession as envisaged u/s 8 of the Hindu Succession Act, 1956 (hereinafter referred to as the Act of 1956).

Before I deal with the submission of the learned counsel and the relevant law. I feel it necessary to re-write the relevant provision of the Act, which reads as under :

"Section 105 In what case legacy lapses.-- (1) If the legatee does not survive the testator, the legacy can not take effect, but shall lapse and form part of the residue of the testator's property, unless it appears by the Will that the testator intended that it should go to some other person.

(2) In order to entitle the representatives of the legatee to receive the legacy, it must be proved that he survived the testator."

"Section 107. Effect of words showing testator's intention to give distinct share.-- If a legacy is given to legatees in words which show that the testator intended to give them distinct shares of it, then, if any legatee dies before the testator, so much of the legacy as was intended for him shall fall into the residue of the testator's property."

"Section 109 When bequest to testator's child or lineal descendant does not lapse on his death in testator's lifetime.-- Where a bequest has been made to any child or other lineal descendant of the testator and the legatee dies in the lifetime of the testator, but any lineal descendant of his survives the testator, the bequest shall not lapse, but shall take effect as if the death of the legatee had happened immediately after the death of the testator, unless a contrary intention appears by the Will."

Section 8 of the Act of 1956 speaks about general rules of Succession in case of Male dying intestate. Admittedly, defendants Nos. 2, 3, 5 to 8 are sons and daughters and defendant No. 4 is the wife of Chhiddi Lal who was the nephew of deceased Kapoor Chand. This fact is also not disputed that Chhiddilal had two wives: his first wife Krishna Bai died in the year 1969, and thereafter, he was married to defendant No. 4 Raj Kumari. Thus, defendants Nos. 2 to 8 would not come in any of the item of Class II to Section 8 of the Act of 1956. Under this Class, at item number IV(1) brother's son is included, but brother's son's son is not included.

The trial Court in sub-para 3 of para 13 has held that because in the Will it has been so mentioned that Chhiddilal Chaurasiya was brought up as child by Kapoor Chand and he solemnized his marriage and other ceremony etc. and further Chhiddilal was residing as his family member along with plaintiff Sunder Lal and defendant No. 1 Teji Lal, therefore, all three nephews were being treated like his children. The trial Court further held that because in the Will the description of Children of nephews of testator has come therefore Section 109 of the Act is applicable.

I have perused the entire Will Ex. P/6. On going through it, it is luminously clear that the property mentioned in the will was bequeathed equally to Sunderlal-Plaintiff, Tejilal defendant No. 1 and Chhiddilal. Thereafter it has been mentioned in clause-9 that till the life time of testator and after his death, during the life time of his wife, his nephews would live and enjoy the property in the same manner in which it is being enjoyed by them on the date of execution of the Will; Thereafter in Clause-10 it has been stated that all the three nephews are residing in the suit house and in future also they shall also reside on certain conditions. These conditions are that all the three nephews and their heirs would take care of the property which is being bequeathed to them, they would keep their respective portion in habitable condition and they would not interfere in the

enjoyment of the share of other. If any nephew fails to carry out repair of his share as a result of which the bequeathed house is damaged in that case the other nephew who would face the difficulty in the enjoyment of his share, may carry out the repairs and the costs of which shall be recovered from the defaulting nephew. One of the condition emphasized in para 10 of the Will is that his nephews would not alienate their share, however, in any case, for some reason it becomes necessary for any of the nephew or their heirs to sell the share, then first of all the other brother would have right to purchase it. One more condition which has been made in the Will is that in future if all the three nephews feel that the entire property is to be sold then all the three nephews or their heirs by consent with each other would be authorized to sell the house and the consideration which shall be received, would be distributed equally amongst them. Thereafter, a clause was also made in the Will that in case testator dies prior to the death of his wife, these three nephews shall take care of her and in default she would be entitled to initiate legal proceedings against them for her maintenance. In the concluding para 13, again it has been mentioned that the Will is being executed in favour of three nephews i.e. Sunderlal, Tejilal and Chhiddilal and they would be the owners of the property which has been mentioned in paras 6 to 12 after his death.

It appears that the trial Court misdirected itself on the pretext that in the Will at certain places word "heirs" of each nephew has been mentioned and, therefore, it came to the conclusion that defendant Nos. 2 to 8 are also legatees and are also benefited with the property by the Will. The approach of the trial Court, according to me, is factually in correct. On going through the Will in its entirety, one can safely say that there are only three legatees namely Sunderlal-plaintiff, Tejilal-defendant No. 1 and Chhiddilal (deceased). At so many places the testator mentioned in the Will that after his death these three persons would be the legatees. Indeed at its threshold the Will starts as such "likh dene wala" (author of the Will) BAHAK (in favour of) "JINKE HAK ME VASIYAT KEE GAI" (PERSONS IN WHOSE FAVOUR THE WILL IS EXECUTED). Thereafter names of Sunderlal-plaintiff, Tejilal -defendant No. 1 and Chhiddilal (deceased) have been mentioned. Nowhere the heirs of these persons have been mentioned which goes to show that Will was executed only in favour of these three persons and none-else. Merely because in certain conditions embodied in the Will like alienation by the nephews or using toilet by the family members of nephews, if word "Varisan" (heirs) has been mentioned, would not mean that Will was executed in their favour. Similarly, if in one of the conditions it has been so mentioned that Tejilal and his children who are residing on third floor may construct a separate toilet and till then they may use the present toilet by constructing a separate staircase on the rear side of his share or the authorization has been given by the testator to purchase the share of by another legatee or his heirs, would not mean that the Will is also executed in favour of the heirs of Chhiddilal. On going through the entire Will, the singular inference which can be drawn is that the Will was executed only in favour of the aforesaid three persons and not in favour of

their heirs. The word "heirs" has been used by keeping in mind that in future if any of the legatees dies or after the death of all the legatees their heirs would be authorized to alienate their respective shares, but this would not mean that heirs of Chhiddilal i.e. defendant Nos. 2 to 8 are benefited by the Will or the Will has been executed in their favour or they are also the legatees.

The trial Court by applying Section 109 of the Act held that defendant Nos. 2 to 8 are having 1 /3rd share because predecessor Chhiddilal was having 1/3rd share in the Will. According to me. Section 109 of the Act is misconstrued by the trial Court. Admittedly, Sunderlal, Tejilal and Chhiddilal are not the children of Kapoor Chand. Similarly, their heirs are also not the children of Kapoor Chand. Section 109 of the Act would be applicable only when a bequest has been made to any "child" or other "lineal descendant" of a testator and the legatee dies in the lifetime of the testator. In that situation, the bequest would not be lapsed but would take its effect as if death of the legatee has happened immediately after the death of the testator unless a contrary intention appears in the Will. Thus, the interpretation of this Section is to be given effect to by interpreting words "child" or "lineal descendant" of the testator.

The word "child", would mean "offspring of parentage". There may be illegitimate or legitimate child. Illegitimate child is the child who has been born out of lawful wedlock and legitimate child means a child born in lawful wedlock. (See Black's Law Dictionary, 6th Edition, page 239). Accordingly, defendants 2 to 8 would not in any manner can be said to be the child of testator Kapoor Chand; Defendant Nos. 2 to 8 would also not come under the ambit of "lineal descendent" of the testator. Shri Ravish Agrawal, learned Sr. Advocate, has contended that Section 109 of the Act is required to be interpreted sine qua non, according to him, the term "lineal descendant" has not been defined in the Act as such it has become necessary to interpret this word from the dictionary. In this context, the learned counsel has invited my attention to Black's Law Dictionary, Sixth Edition, page 929 in which the meaning of "lineal descendant" has been given and which would mean a person in the direct line of descent such as a child or grandchild as contrasted with a collateral descendent such as a niece. The meaning of the word "descendant" has been given in the same edition at page 445, which means those persons who are in the blood stream of the ancestor and further it means those descended from another, persons who proceed from a body of another such as a child or grandchild, to the remotest degree. Thereafter on the same page classification of descents has been mentioned thus : "Descents are of two sorts, lineal and collateral. Lineal descent is descent in a direct or right line, as from father or grandfather to son or grandson. Collateral descent is descent in a collateral or oblique line, that is, up to the common ancestor and then down from him, as from brother to brother, or between cousins."

According to me, lineal descendant would mean the offspring of lawful marriage and not offspring of union which is not that of husband and wife. The plain meaning of lineal descendant is one who is in the bloodstream of the ancestral

such as child or grandchild of the remotest degree. There cannot be any other meaning of this word.

In this view of the matter, if we analyse Section 109 of the Act, one could safely say that defendant Nos. 2 to 8 are neither "child" nor would come under the sphere of "lineal descendent" of the testator namely Kapoor Chand and the applicability of Section 109 to defendant Nos. 2 to 8 who are heirs of deceased Chhiddilal is altogether foreign. From any angle, these persons would not come under the ambit of Section 109 as they are the heirs of Chhiddilal who was the nephew of Kapoor Chand. It has been rightly contended that Section 107 of the Act would be applicable in the present case, because the legatee Chhiddilal had died during the life time of testator, and, therefore, his share would fall into the residue of the testator's property i.e. Kapoorchand's property and would be intestate property of Kapoorchand and thus it would devolve in accordance to Section 8 of the Act of 1956. Class II of Schedule to Section 8 of the Act of 1956 would indicate that under item IV (1) brother's son is included but brother's son's son is not included and for this simple reason the sons of Chhiddilal cannot be included in Class II of the Schedule to Section 8 of the Act of 1956. They may be agnates but in the order of succession in presence of persons of heirs as shown in Class II item IV(1) like plaintiff and defendant No. 1 the property would not devolve on defendants 2 to 8 on the death of Chhiddilal.

In the present factual scenario, according to Section 107 of the act 1/3 share of Chhiddilal which was bequeathed to him, on his death, would fall into the residue of the testator's property and as there is no residuary legatee under the Will, this share would be devolved on the heirs who are described as heirs under the Act of 1956 and they would be entitled to succeed the property of the testator and they are plaintiff and defendant No. 1, being brother's son of Kapoor Chand.

According to me, in the present case, Section 107 is to be read conjointly with Section 105 of the Act and, therefore, if these two provisions are kept in juxtaposition with Section 8 and Schedule to it of the Act of 1956, it would become crystal clear that share of Chhiddilal would devolve in plaintiff and defendant No. 1 equally, as he (Chhiddilal) died during the lifetime of the testator. The trial Court, according to me, by applying incorrect law, dismissed the suit of the plaintiff.

Ex-consequenti, this appeal is allowed, the impugned judgment and decree of the trial Court dismissing the suit of the plaintiff is hereby set aside and the suit of the plaintiff is decreed. He is declared to be the owner of 1/2 portion of the disputed property and is also entitled to get the suit property partitioned accordingly. The trial Court is hereby directed to proceed further for drawing up a final decree. Respondents Nos. 2 to 8 have no right, title and interest in the suit property and they are liable to be evicted. As there is no convincing evidence of plaintiff in respect to compensation, hence that part of relief sought by the plaintiff in his plaint is not being allowed to him and the suit in regard to compensation is dismissed. Looking to the entire facts and circumstances the

parties are directed to bear their own costs throughout. Counsel fee according to schedule, if pre-certified.