

**IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH**

RSA No. 1889 of 2014 (O&M)

Date of decision: 13.08.2015

Khusmud Ali @ Nudda and another ... Appellants

versus

Smt. Jamila and others Respondent

CORAM: HON'BLE MR. JUSTICE K. KANNAN

Present: Mr. Rakesh Gupta, Advocate for the appellants.

K.Kannan, J.

1. The plaintiffs filed a suit for declaration and injunction claiming to be the full owners of the property as inherited by them from their father Ajjudin. The suit was contested by the plaintiff's sister Jamila and children of another sister who had died after the death of the father. While the plaintiff's contention was that after the death of the father they had become the owners of the whole of the property, the defendant's plea was that they are heirs at law and their names had also been included in the *jamabandi*. The Court found that as per Mohammedan Law, on the death of the Muslim male $1/8^{\text{th}}$ share will devolve on his wife and the remaining $7/8^{\text{th}}$ share will be distributed in such a way that the sons take twice as much as the daughters. The Court, however, found that the sons are entitled to $2/3^{\text{rd}}$ share and the daughters are entitled to $1/3^{\text{rd}}$ share of the total property. The plaintiffs claim that the mother has executed a Will in the year 1998 and the Court found that the Will had not been

established. The plaintiff preferred an appeal against the said judgment, the appeal was also dismissed. Against the judgments, the second appeal is filed.

Any argument denying the right of the defendant as daughters and persons claiming through the daughters could only be seen to be untenable and cannot be legally countenanced. The suit was for declaration that the plaintiffs are the owners of the property exclusively and have injunction. The Court has found the plaintiffs to be entitled to $\frac{2}{3}$ rd share. On the death of the father, the rights amongst the widow and sons would be distributed in such a way that each of the sons had $\frac{14}{48}$ th share, the widow had $\frac{6}{48}$ th share and each daughter had $\frac{7}{48}$ th share. If the mother's $\frac{6}{48}$ th share was to devolve on her death and the plaintiffs had set up a case of Will, if the Will was true it could have operated to create a devolution to $\frac{1}{3}$ rd share only because under Mohammedan Law the Will can operate for valid transmission of rights only for the $\frac{3}{4}$ th share without the concurrence of heirs and it can operate upto $\frac{2}{3}$ rd with the concurrence of other heirs. If the Will was itself not true or not found to be valid, then $\frac{6}{48}$ th share of what the mother had would fall to be divided in such a way that the sons would take twice as much as the daughters. This would mean each son had $\frac{1}{3}$ rd share while the daughters had each $\frac{1}{6}$ th share. Consequently, the extent of shares amongst the sons and daughters could be as $\frac{2}{3}$ rd and $\frac{1}{3}$ rd as found by the Court below.

If the plaintiffs were seeking for injunction, whether they proved the possession or not, they still cannot maintain an action for injunction against the defendants who were the co-heirs. The rights of co-

owner to maintain action for injunction shall be limited by judicial practice and precedent only to certain situations, such as, when the other co-owners have allowed for exclusive possession by their concurrence and such a concurrence was withdrawn otherwise than by the terms of the mutual consent. In such an event, a person in possession can maintain an action for injunction, admitting the right of the other co-owner. If the co-owner in possession, however, denies the right of the co-owner, he loses the privilege and even if he is in exclusive possession of any particular share, right of action for injunction is not competent. The Courts have found that the plaintiffs are not in exclusive possession and correctly so, going by the revenue entries.

If the relief of declaration and injunction as sought for were to be declined, the only remedy will be to sue for partition and secure what fraction of share they have in the whole of the property in the manner known to law.

The appeal is disposed of with the above observations. There is no error in the decision of the Courts below. The regular second appeal is dismissed.

13.08.2015

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(K.KANNAN)
JUDGE