

RSA-904-2014(O&M)

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IN THE PUNJAB & HARYANA HIGH COURT AT CHANDIGARH

RSA-904-2014(O&M)

Date of decision : 08.02.2016

Shahbudeen and others

... Appellants

Versus

Smt. Saroj and others

... Respondents

CORAM: HON'BLE MRS. JUSTICE REKHA MITTAL

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

Mr. C.B. Goel, Advocate
for respondent No.1.

REKHA MITTAL. J.

The present regular second appeal has been directed against judgment and decree dated 30.01.2014 passed by the Additional District Judge, Gurgaon whereby the appeal preferred by respondent No.1 against the judgment and decree dated 12.12.2011 passed by the Civil Judge (Junior Division), Gurgaon has been allowed and the suit filed by the plaintiffs/appellants is ordered to be dismissed.

The facts relevant for disposal of the present appeal are that the plaintiffs/appellants filed a suit for declaration with consequential relief of permanent injunction on the premise that they are owners of suit land being the nearest collaterals of Smt. Kapuri (since deceased). Smt.

Kapuri, the erstwhile owner had no son and was having one daughter

namely Bisso. After death of Smt.Kapuri, Smt.Bisso (since deceased) now represented by respondents No.2 to 5 wrongly and illegally got mutation No.1312 sanctioned on 31.05.1999. It is further averred that as per muslim Meo law as well as custom, the daughter is not entitled to inherit to property of her father or mother.

Smt.Bisso, the defendant filed the written statement, raised preliminary objections that the appellants have no locus standi or cause of action to file the suit; the suit is not maintainable; the appellants are estopped by their act and conduct to file the suit; the suit is barred by doctrine of res judicata; the Civil Court has no jurisdiction to try and decide the suit; the suit is barred by limitation and the same is bad for misjoinder and non-joinder of parties. On merits, all material averments of the plaint have been denied with the contention that earlier mother of the answering defendant was owner in possession of the suit property and after her death, she has become owner in possession of the suit property and mutation has rightly been sanctioned in her favour.

The controversy between the parties led to framing of following issues by the learned trial Court:-

- 1. Whether the mother of the defendant Kapuri was the owner of agricultural land bearing Khewat No.136, Khatoni No.150, Rect.No.10, Killa No.20(8-0) situated within the revenue estate of village Dhunela, Tehsil and Distrit Gurgaon?OPP*
- 2. Whether the mutation sanctioned in favour of the defendant is illegal and void?OPP*

3. *Whether the plaintiffs became owner of the suit property after the death of Smt.Kapuri?OPP*
4. *Whether the plaintiffs have no locus-standi to file the present suit?OPD*
5. *Whether the suit of the plaintiffs is not maintainable?OPD*
6. *Whether the plaintiffs are estopped from filing the present suit by their own act and conduct?OPD*
7. *Whether the suit is barred by doctrine of res-judicata?OPD*
8. *Whether the Civil Court has no jurisdiction to try the present suit?OPD*
9. *Whether the suit is not within limitation?OPD*
10. *Relief.*

The parties were permitted to adduce evidence in support of their respective claims. After having heard counsel for the parties in the light of materials on record, the learned trial Court determined all the issues in favour of the appellants/plaintiffs, as a result, the suit was decreed with costs.

Feeling aggrieved against the judgment and decree passed by the learned trial Court, Smt.Saroj respondent No.1 having stepped into the shoes of Smt. Bisso, original defendant on the basis of alienation of the suit property in her favour, after seeking necessary permission of the Court, preferred an appeal to assail the judgment and decree dated 12.12.2011 passed by the trial Court.

The Court in appeal reversed the findings recorded by the

trial Court, the judgment and decree passed by the trial Court was set aside and the suit of the appellants/plaintiffs was ordered to be dismissed without any order as to costs.

Feeling aggrieved against the judgment and decree passed by the Court in appeal, the present appeal has been preferred by Shahbudeen and others.

Counsel for the appellants has submitted that there is no dispute that Subdal was owner of the suit property and it was self acquired property in the hands of Subdal. On death of Subdal, suit property was inherited by Smt.Kapuri to the exclusion of Smt.Bisso, their daughter as per the custom prevalent amongst the Meo of District Gurgaon. He has also not disputed that property in the hands of Smt.Kapuri was the self acquired property.

The sole submission made by counsel for the appellants is that as Smt. Kapuri inherited the property from her husband as a limited estate, Smt. Bisso was not entitled to inherit the suit property from her mother and the same is liable to be reverted to the collaterals of Subdal namely Shahbudeen and others. It is further argued that the appellate Court committed a gross error by holding that Smt. Bisso being the daughter of Smt. Kapuri is entitled to inherit the suit property and mutation No.1312 was rightly sanctioned in favour of daughter of Smt. Kapuri.

Counsel for respondent No.1 has supported the judgment

passed by the appellate Court with the submissions that entries in *Riwaj-i-am* (statement of custom prevalent in the District) are always in respect of ancestral property and do not apply to non ancestral property unless there is a clear intention to the contrary. It is further argued that this Court in ***Mohammad Yunis Vs. Malooki and others 2004(1)RCR (Civil) 476*** has laid down that restricting rights of a woman existing in pre-constitution era cannot be recognised by the Court unless it meets the approval of equality clause of the constitution. It is further argued that a Division Bench of this Court in regular second appeal No.45 of 1973 ***Smt. Jaituni and another Vs. Rahim Khan*** after taking into consideration a number of instances wherein alienation made by a mother in favour of her daughter by way of gift has been upheld with observations that gift of non ancestral property by a mother to her daughter is valid. It is further argued that if a Muslim mother can alienate non ancestral property by way of gift in favour of a daughter, it falsifies and belies contention of the appellants that Smt.Kapuri had only life interest in the suit property and thus the same would not be inherited by her daughter on the basis of natural succession.

In reply, counsel for the appellants has submitted that judgment in ***Smt. Jaituni and another's case (supra)*** has got no bearing on the facts of the case in hand as in that case, the property was inherited by Smt. Makina from her son and not from her husband and for that reason, the custom embodied in the customary law of Gurgaon District

compiled by Wilson, noticed by this Court on page 4 of judgment was held to be non applicable to the property in dispute.

I have heard counsel for the parties and perused the records.

Indisputably, the suit property was inherited by Smt.Kapuri on the demise of her husband Subdal. Counsel for the appellants has fairly conceded that the suit property was self acquired property in the hands of Subdal and so also in the hands of Smt. Kapuri. This Court in ***Smt. Jaituni and another's case (supra)*** has taken note of various instances where a gift made by a mother in favour of her daughter was challenged but upheld since it was with regard to non ancestral property. One of the instances noticed by the Court was a decision of the Court in RSA No.66 of 1973 ***Smt.Zenab and another Vs. Yusaf Khan and another, decided on 24.08.1982*** which also pertains to Meos of Gurgaon District. It was further noticed that against the decision in RSA No.66 of 1973, Special Leave Petition was filed in the Apex Court which was also dismissed.

Counsel for the appellants is not in a position to contend that in 4/5 instances taken note by this Court in ***Smt. Jaituni and another's case(supra)***, the property was inherited by the mother from a relative other than the husband. A plain reading of the observations made by this Court negates plea of the appellants that a female Meo is not entitled to deal with self acquired property as an absolute estate or in other words, she would have the right limited to her life.

In ***Umar Khan Vs. Sheodan and others, 2010(3) RCR***

(Civil) 226 and *Kanwar Khan and others Vs. Khatoni and others, 2005*

(3) *RCR (Civil) 243* it has been consistently held by this Court that entries in *Riwaj-i-am* are in respect of ancestral property only unless there is a clear indication to the contrary. In *Kanwar Khan and others' case (supra)*, this Court after taking into consideration, the various judgments referred to in para 4 to 6 has held quoted thus:-

“7. Keeping in view the principles of law enunciated by judgments referred to above, it is apparent that entries in Riwaj-i-am are in respect of ancestral property only. Therefore, the presumption sought to be raised by the appellants in terms of Riwaj-i-am contained in Appendix VII of Rattigan's Digest of Customary Law, Fifteen Edition (1995 reprint) in respect of custom of Gurgaon district would be only in respect of ancestral property. Such Riwaj-i-am adversely affects the rights of the female, who had no opportunity whatever appearing before the Revenue Authorities, the presumption even in respect of ancestral land is weak. But in the absence of any instance of respective right of female in respect of non-ancestral land, the presumption of general custom cannot be deemed to have been rebutted.”

In *Smt. Jaituni and another' case (supra)*, it has been held that it is well established that custom can never be extended by logic, reasoning or analogy. No doubt, in *Smt.Jaituni and another' case (supra)*, the property in question was inherited by Smt. Makina from her son but as has been noticed hereinbefore, counsel for the appellants is not in a position to show that instances taken note of by the Court also related

to property either inherited by mother from a relative other than the husband or it was otherwise acquired by a female Meo. Keeping in view the fact that right of female Meo to alienate the property by way of gift in favour of a daughter is accepted by the Division Bench of this Court irrespective of the source of acquisition by the mother, it is difficult to accept contention of the appellants that Smt. Kapuri had only limited estate in the property inherited by her from her husband, therefore, the same would revert back to the appellants being the nearest collaterals of her husband. Counsel for the appellants has not disputed that if the suit property in the hands of Smt.Kapuri is taken as her absolute property, Smt. Bisso being the daughter of Kapuri shall be entitled to inherit to the property in question. In this view of the matter, there is no error much less illegality in the findings recorded by the Court in appeal as would call for intervention. No question of law much less a substantial one arises in the present scenario.

For the foregoing reasons, the appeal fails and is ordered to be dismissed with costs.

(REKHA MITTAL)
JUDGE

February 08, 2016.
Davinder Kumar