

HIGH COURT OF CHHATTISGARH, BILASPUR**Second Appeal No.311 of 2004**

1. Jumrat @ Lukhri (died and deleted)
2. Basarat Ali s/o Late Dukhan Miyan.
3. Abid Hussain s/o Late Dukhan Miyan.
4. Tahir Hussain s/o Late Dukhan Miyan.
5. Islamani Khatoon d/o Late Dukhan Miyan.
6. Sogra Khatoon (died) through LR's
 - 6a. Jamal Ansari S/o Late Kaial Miyan, aged about 65 years,
 - 6b. Sahbaan D/o Jamal Ansari, aged about 35 years,
 - 6c. Julikha Khatoon W/o Mustak Ansari, aged about 32 years,

All are R/o Ramanujganj, Tahsil-Ramanujganj, District – Balrampur- Ramanujganj (CG)
7. Rokaiya Khatoon d/o Late Dukhan Miyan.

All r/o Village Mahavir Ganj Post Chiniya, P.S. Ramanujganj, Tehsil Pal, Distt. Surguja (CG)

----- Appellants/Defendants**Versus**

1. Mohammad Alam s/o Ismail Miyan, age 45 years.
2. Mohtaj Alam s/o Late Ismail Miyan, age 42 years.
3. Mohammad Roshan Alam s/o Late Ismail Miyan, age 40 years.
4. Mohammad Mokhtar Alam s/o Late Ismail Miyan, age 38 years.
5. Mohammad Firoz Alam s/o Late Ismail Miyan, age 36 years.
6. Mohamad Masiha Alm s/o Late Ismail Miyan, age 34 years.
7. Mohammad Hafiz Alam s/o Late Ismail Miyan, age 32 years.
8. Hushnabano (died and deleted)
9. Safiya Khatoon (died) through LR's

9a. Niyajuddin S/o Niyamat, aged about 55 years,

9b. Aashik Ansari S/o Niyajuddin, aged about 32 years,

9c. Tahir Hussain S/o Niyajuddin, aged about 30 years,

9d. Parvel Ansari S/o Niyajuddin, aged about 28 years,

9e. Ali Hussain, S/o Niyajuddin, aged about 26 years,

9f. Akbar Ansari S/o Niyajuddin, aged about 24 years,

All are R/o village – Mahavir Ganj, P.S. Ramanujganj, District-Balrampur – Ramanujganj (CG)

10. Dost Mohammad (died) through LR's

10a. Mustafa S/o late Dost Mohammad, aged about 55 years.

10b. Murtuja S/o late Dost Mohammad, aged about 45 years.

10c. Sakina D/o late Dost Mohammad, aged about 58 years.

10d. Sabrakhatum S/o late Dost Mohammad, aged about 54 years.

10e. Smt.Akthari Begum D/o late Dost Mohammad, aged about 55 years.

10f. Smt.Kullutun Wd/o late Dost Mohammad, aged about 40 years.

All R/o Village Manavir Ganj, Post-Chiniya, P.S.-Ramanujganj, Tahsil-Pal, District-Balrampur – Ramanujganj (CG)

All by caste Musalman, Occupation Agriculture, r/o Village Mahavirganj Post Chiniya, P.S. Ramanujganj, Distt. Surguja (CG)

----- Plaintiffs

11. The State of Chhattisgarh, through Collector, Surguja, Ambikapur (CG)

----- Respondents

For Appellants/LR's of : Mr.A.K.Prasad, Advocate
 Defendant No.1
 For Res.No.1 to 10/Plaintiffs: Mr.S.A.Ansari, Advocate
 For Respondent No.11 : Mr. Sanjeev Agrawal, P.L.

Hon'ble Shri Justice Sanjay K. Agrawal
Judgment on Board

19.09.2019

1. The substantial question of law involved, formulated and to be answered in this second appeal preferred by legal representatives of defendant No.1 is as under:-

“Whether findings of both the Courts below are perverse regarding declaration of title over the suit land even after holding that there was no partition proved ?”

[For the sake of convenience, parties would be referred hereinafter as per their status shown and ranking given in the suit before the trial Court].

2. The suit property appended with the plaint was the property held by Turab Miyan. He had three sons namely, Ismail Miyan, Dost Mohammad and defendant No.1- Dukhan Miyan. Plaintiffs No.1 to 9 are sons, daughters and widow of Ismail Miyan. The plaintiffs brought a suit against defendant No.1-Dukhan Miyan for declaration of title and permanent injunction stating inter-alia that the suit property was already partitioned during life-time of Turab Miyan.

However, defendant No.1 by sale deeds (Exs.P-6 to P-9) sold his share to the plaintiffs and other persons and also by Exs.P-10 to P-13, 1.17 acres of land was auctioned in favour of plaintiff No.1- Mahamood Alam, as such, out of 20.38 acres of land, defendant No.1 has sold 7.30 acres of land, as such, defendant NO.1 has no right, title and interest over the suit land and decree to this effect be passed in their favour.

3. Defendant No.1 filed his written statement and denied the averments made in the plaint stating inter-alia that he has right and title over the suit land and no partition has taken place between them, as such, the suit deserves to be dismissed.
4. The trial Court after appreciating oral and documentary evidence available on record, by its judgment and decree dated 2.3.2000, held that the plaintiffs are title-holders of the suit land though no partition has taken place between the plaintiffs and defendant No.1, but defendant No.1 has sold 7.30 acres of land vide Exs.P-6 to P-9 and vide Exs.P-10 to P-13 some land was auctioned in his instance. Since he has sold his share/land and therefore, the plaintiffs are entitled for decree of declaration of title and permanent injunction, which the first

appellate Court has also affirmed. Questioning the judgment and decree of the first appellate Court, this second appeal under Section 100 of the CPC has been filed by legal representatives of defendant No.1, in which substantial question of law has been formulated by this Court, which has been set-out in the opening paragraph of this judgment.

5. Mr.A.K.Prasad, learned counsel for the appellants/legal representatives of defendant No.1, would submit that both the Courts below are absolutely unjustified in holding that defendant No.1 has sold 7.30 acres of land vide Exs.P-6 to P-9 and also got auctioned part of suit property vide Exs.P-10 to P-13, as such, both the Courts below have committed legal error as two brothers i.e. Ismail Miyan and Dost Mohammad are tenants-in-common in terms of Paragraph 41 of the principles of Mahomedan Law by Mulla, 20th edition. They have succeeded to the estate of Turab Miyan as tenants-in-common and even if, defendant No.1 has sold his some part of suit, then also he will be entitled for share, as such, both the Courts below are absolutely unjustified in decreeing the suit after having held that there is no partition between Ismail Miyan, Dost Mohammad and defendant No.1-Dukhan Miyan, as

such, the judgment and decree of both the Courts below are liable to be set aside.

6. On the other hand, Mr.S.A.Ansari, learned counsel for respondents No.1 to 10/plaintiffs, would support the impugned judgment and decree and submit that both the Courts below have concurrently granted decree in favour of the plaintiffs, which is strictly in accordance with law.

7. I have heard learned counsel for the parties and considered their rival submissions made hereinabove and also went through the records with utmost circumscription.

8. Admittedly, the suit property was held by Turab Miyan. He had three sons namely, Ismail Miyan, Dost Mohammad and defendant No.1-Dukhan Miyan. Defendant No.1 has sold some part of land vide Exs.P-6 to P-9 and some part of land was auctioned at his instance vide Exs.P-10 to P-13. In that view of the matter, both the Courts below have held that defendant No.1 has already sold his share in the suit property admeasuring 7.30 acres of land.

9. Paragraph 41 of principles of Mohammedan law by Mulla [20th edition], states above devolution of inheritance among Mohammedans as under:-

"41. Devolution of inheritance.-Subject to the provisions of Section 39 and 40, the

whole estate of a deceased Mahomedan if he has died intestate, or so much of it as has not been disposed of by will, if he has left a will (s. 118), devolves on his heirs at the moment of his death, and the devolution is not suspended by reason merely of debts being due from the deceased. The heirs succeed to the estate as tenants-in-common in specific shares.

44. Distribution of estate.—Since the estate devolves on the heirs at the moment of the death of the deceased, they are at liberty to divide it at any time after the death of the deceased. The distribution is not liable to be suspended until payment of the debts.

49. Alienation by co-sharer before partition.—Where one of two or more co-sharers mortgages his undivided share in some of the properties held jointly by them, the mortgagee takes the security subject to the right of the other co-shares to enforce a partition and thereby to convert what was an undivided share of the whole into a defined portion held in severalty. If the mortgage, therefore, is followed by a partition, and the mortgaged properties are allotted to the other co-sharers, they take those properties in the absence of fraud, free from the mortgage, and the mortgagee can proceed only against the properties allotted to the mortgagor in substitution of his undivided share."

10. A careful perusal of the aforesaid provision would show that unlike Hindu law, estate of a deceased Mahomedan if he has died intestate, devolves on his heirs at the moment of his death. Under the Mahomedan Law, birth right is not recognised. There is no joint tenancy in Mahomedan law and the heirs are only tenants-in-common.

Therefore, a heir can claim partition in respect of one of the properties held in common without seeking partition of all the properties.

11. It is well settled that on the death of a mohammedan his property immediately devolves on his heirs separately to the extent of the share they are entitled under the personal law and immediately on the death of a mohammedan, his each heir become absolute owner of the property proportionate to his share. Thus under the mohammedan law, there is no concept of jointness of ownership of the properties of deceased mohammedan.

12. Paragraph 43 of Principles of Mohammedan law by Mulla states that:-

"Extent of liability of heirs of debts-Each heir is liable for the debts of the deceased to the extent only of a share of the debts proportionate to his share of the estate."

13. From the aforesaid provision, it is quite vivid that mohammedan heirs are independent owners of their specific shares and their liability is also proportionate to the extent of their share in the estate. Under the said circumstance, one share holder has no right, title and interest to alienate

property of another share holder.

14. Their Lordships of the Supreme Court in the matter of N.K. Mohammad Sulaiman v. N.C. Mohamad Ismail¹ laid down the principle of law with regard to administration of the estate of muslim dying intestate devolves under the Islamic law upon his heirs at the moment of his death i.e. the estate vests immediately in each heir in proportion to the share ordained by the personal law and the interest of each heir is separate and distinct. Each heir is under the personal law liable to satisfy the debts of the deceased only to the extent of the share of the debt proportionate to his share in the estate.

15. Reverting to the facts of the present case in the light of aforesaid legal analysis, it appears that defendant No.1 without there being any partition sold part of suit land and also got some part of the suit property auctioned, total to the extent of 7.30 acres, whereas total suit land held by them was 20.38 acres, as such, he (defendant No.1) has already sold his 1/3rd share in the suit property being mohammedan heir. He was never owner of his specific share as on the death of a mohammedan his property immediately devolves upon his heirs separately to the extent of the share they

¹ AIR 1966 SC 792

are entitled under the personal law and each heir become absolute owner of the property proportionate to his share. Since defendant No.1 had already sold his share in the suit property being absolute/individual owner to the extent of 1/3rd, total 7.30 acres out of 20.38 acres of land held by original owner, both the Courts below are absolutely justified in decreeing the suit which cannot be held to be contrary to law, as such, under the mohammedan law, such an alienation is permissible and decree has rightly been granted by two Courts below in favour of the plaintiffs. I do not find any illegality or perversity in the said finding. The substantial question of law is answered in favour of the plaintiffs and against defendant No.1

16. Accordingly, the second appeal being devoid of merit is liable to be and is hereby dismissed leaving the parties to bear their own cost(s).

17. Decree be drawn-up accordingly.

Sd/-

(Sanjay K.Agrawal)

Judge

B/-