

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR**SA No.17 of 2010**

- Khurshida Bano, W/o Aashik Ali, aged about 52 years, R/o Tarkapara, Raigarh (C.G.)

----- Appellant/Plaintiff**Versus**

1. Mu.Imtiyaz Bee, Widow of Hazi Nazar Mohammad, aged about 73 years, R/o Turkapara, Raigarh
2. Jabbar Mohammad, S/o Nazar Mohammad, aged 43 years, R/o Turkapara, Raigarh
3. Abbas Mohammad, S/o Nazar Mohammad, aged 46 years, R/o Turkapara, Raigarh
4. (a) Akbari, widow of Gaffar Mohammad, aged 34 years
4. (b) Siraz, S/o Late Gaffar Mohammad, aged 19 years
4. (c) Raj, S/o Late Gaffar Mohammad, aged 18 years

All R/o Turkapara, Raigarh, Tehsil and District Raigarh (C.G.)

5. Mohammad Rajjak, S/o Nazar, aged 40 years, R/o Turkapara, Raigarh, Tehsil and District Raigarh (C.G.)

----- Respondents/Defendants

For Appellant	Mr. S. N. Nande, Advocate with Mr. Priyanshu Gupta, Advocate
For Respondents	Mr. Ashish Shrivastava, Advocate

Hon'ble Justice Shri Sanjay K. Agrawal

Order On Board

04/01/2021

1. This second appeal preferred by the appellant/plaintiff was admitted for hearing on 26.08.2020 on the following substantial question of law :-

"Whether the first appellate Court is justified in partially reversing the judgment of the trial Court by granting only 1/3rd part of the suit property, by recording a finding which is perverse and contrary to the record?"

(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 bearing Sheet No.56, Plot No.129/1 admeasuring area 420 sq. feet was originally held by one Noor Khan. He had two wives namely Chhote Bee and Begum Bee. After his death, the suit property was divided between his two wives. Each of them got equal share of the property. Chhote Bee got 210 sq feet of land bearing Khasra No.129/1, whereas Begum Bee got 210 sq feet of land bearing

Khasra No.129/3.

3. The dispute in the suit property relates to 210 sq feet of land bearing Khasra No.129/1 held by Chhote Bee, which she gave on licence to the original defendant No.1 Bahadur Mohammad, who died during the pendency of the suit and his legal representatives have been arrayed as party respondents, for running betel shop. When she (Chhote Bee) demanded possession of the suit land, the defendant No.1 refused to give the vacant possession of the suit land, therefore, she instituted a suit for possession of the suit land stating interalia that she being the title holder, it was given to the original defendant No.1 Bahadur Mohammad on licence, but now he is not vacating the suit land despite requests. In the meanwhile, Chhote Bee died on 31.08.2002. On 21.07.1993, she had executed a WILL vide Ex-P/1 in favour of the present substituted appellant/plaintiff Khurshida Bano and 210 sq feet of land bearing Khasra No.129/1 was bequeathed in favour of Khurshida Bano. The appellant/plaintiff was

substituted as legal representative of Chhote Bee in the civil suit on the strength of the said WILL and thereafter she prosecuted the suit. The defendants have disputed the averments in the plaint by filing written statement. By way of amendment, the defendant No.1 also pleaded that on the basis of WILL, no title has been conferred to the present appellant/ plaintiff. According to the defendants, in the WILL dated 21.07.1993 (Ex-P/1), the suit land is not included and therefore the substituted plaintiff herein has no right/title over the suit land and the suit be dismissed.

4. The trial Court by its judgment and decree dated 29.09.2006 in Civil Suit No.192A/2006 after appreciating oral and documentary evidence available on record held that the plaintiff is the title holder of the suit land on the basis of WILL and she is entitled for decree of possession, which was challenged by the defendant No.1 before the First Appellate Court. The First Appellate Court by its impugned judgment and decree

dated 07.11.2009 in First Civil Appeal No.1A/2008 partly modified the judgment and decree passed by the trial Court and held that the appellant/plaintiff is only entitled for 1/3rd share of the suit land of 210 sq feet bearing Khasra No.129/1. Feeling aggrieved by the impugned judgment and decree of the First Appellate Court, the present second appeal has been filed, in which the substantial question of law has already been formulated and set out in the opening paragraph of this judgment.

5. Mr. S. N. Nande, learned counsel for the substituted plaintiff/appellant, would submit that the defendant No.1 did not raise any plea that the plaintiff/appellant is only entitled for 1/3rd share of the suit land on the basis of WILL dated 21.07.1993 (Ex-P/1) by pleading that as per Muslim Law, a mahomeden can not make WILL by executing WILL more than 1/3rd share of his/her property, but this issue was not raised by the defendant No.1 before the trial Court, therefore, the plaintiff did not have an

opportunity to meet out the said plea. Therefore, the judgment and decree of the First Appellate Court modifying the decree of the trial Court deserves to be set aside.

6. Mr. Ashish Shrivastava, learned counsel for the legal representatives of the defendant Bahadur Mohammad (since dead), would submit that a mahomedan cannot bequeath more than 1/3rd share of his/her property by way of WILL. As such, the First Appellate Court has rightly modified the judgment and decree passed by the trial Court and the appeal preferred by the appellant/plaintiff deserves to be dismissed.
7. I have heard learned counsel for the parties, considered their submissions made hereinabove and also went through the records with utmost circumspection.
8. It is not in dispute that 210 sq feet of the suit land bearing Khasra No.129/1 was held by Chhote Bee. She filed suit for recovery of possession of the said property, but during the pendency of the suit, she died and by

strength of the said WILL, the present appellant/plaintiff herein was substituted. After substitution of the appellant/plaintiff, the defendants also amended their written statement taking plea that the suit property is not at all included in the WILL dated 21.07.1993 (Ex-P/1) and the plaintiff has no right/title over the suit land.

9. It is well settled proposition of law that legal representatives brought on record under Order 22 Rule 3 and 4 of the Code of Civil Procedure are for limited purpose of conducting the litigation. Mere fact of substitution of such claimant does not in any manner finally make him the heir to the deceased litigant or fetter the other party to the litigation from questioning his claim in an appropriate proceeding. (See: **Raghunath Singh Anar Singh vs Gangabai (deceased) through LR Bhuwan Singh**, reported in 1961 MPLJ 398).
10. Altogether new plea based on para - 118 of the Mulla's Principles of Mahomedan Law was raised by the defendant No.1 before the First

Appellate Court, without raising it before the trial Court qua the capacity of an mahomedan to make a WILL of his or her property. Paras 117 & 118 of Mulla's Principles of Mahomedan Law (18th Edition) state as under:-

"117. Bequests to heirs – A bequest to an heir is not valid unless the heirs consent to the bequest after the death of the testator. Any single heir may consent so as to bind his own share.

118. Limit of testamentary power – A mahomedan cannot by WILL dispose of more than a third of the surplus of his estate after payment of funeral expenses and debts. Bequests in excess of the legal third cannot take effect, unless the heirs consent thereto after the death of the testator."

By the above stated provision, power of mahomedan to dispose of his property is limited in two ways, firstly as regards the persons to whom the property may be bequeathed and secondly extent to which the property may be bequeathed. The only case in which a testamentary disposition is binding upon the heirs is where the bequest does not exceed the legal third and it is made to a person who is not an heir, but bequest in excess of the legal third may be validated by

consent of other heirs. The reason is that the limits of testamentary power exist solely for the benefit of the heirs and heirs may, if they forgo, the benefit by giving their consent. For the same reason, if the testator has no heirs, he may bequeath the whole of his property to a stranger.

11. The First Appellate Court has accepted the said plea raised on behalf of defendant No.1 holding that Chhote Bee could not have executed a WILL of more than 1/3rd share in the suit property. Since the said plea was not raised before the trial Court, though it was available to be raised by the defendant No.1, as such the plaintiff was taken by surprise, otherwise the substituted plaintiff could have taken an appropriate stand including that Chhote Bee (testator) had no heirs, which she has been deprived for want of such defence in the written statement, rather defendant No.1 took a specific defence that in the WILL (Ex-P/1), suit property is not included, on which the trial Court framed two issues and answered against the defendant

No.1, as such altogether new plea ought not to have been entertained by the First Appellate Court and granting the appeal on the basis of the said new plea, the plaintiff was deprived to meet such a plea, resulted in serious prejudice to her violating her right to property, which is a constitutional right. Even otherwise, plea based on paras 117 & 118 is only available to the heirs of testator and third party like defendant No.1 can not take such a plea being unavailable to him. Accordingly, the judgment and decree dated 07.11.2009 passed by the First Appellate Court is set aside and that of the trial Court dated 29.09.2006 is restored. The substituted appellant/ plaintiff is thus entitled for the entire 210 sq feet of the suit land bearing Khasra No.129/1.

12. The second appeal is allowed. No order as to costs.
13. Appellate decree be drawn up accordingly.

Sd/-
(**Sanjay K. Agrawal**)
Judge