

HIGH COURT OF CHHATTISGARH AT BILASPUR**Second Appeal No. 51 of 2011****Judgment reserved on 10/03/2021****Judgment delivered on 22/03/2021**

Mariyam Bibi W/o Hafijul Haq, Aged about 52 years, R/o Village Bilhama, Post Baboli, Tahsil Lundra, Distt. Surguja, Chhattisgarh.

---Appellant/Plaintiff

Versus

1. Kutubuddin S/o Rojid Miya, Aged about 44 years, Occupation Agriculture and business, R/o Village Bilhama, Post Batoli, Tahsil Lundra, Distt. Surguja, Chhattisgarh.
2. Smt. Taajbun Bibi W/o Rojid Miya, Aged about 72 years, Occupation Housewife, R/o Village Bilhama, Post Baboli, Tahsil Lundra, Distt. Surguja, Chhattisgarh.
3. State of Chhattisgarh, Through Collector, Ambikapur, Distt. Surguja, Chhattisgarh.

--- Respondents/Defendants

For Appellant	:- Mr. Sushil Dubey, Advocate
For Respondents	:- Mr. D.N. Prajapati, Advocate
For State	:- Mr. Ravi Bhagat, Dy. G.A.

Hon'ble Shri Justice Sanjay K. Agrawal

C.A.V. Judgment

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

"1. Whether the lower appellate Court was justified in reversing the judgment of the trial court without properly appreciating the evidence available on record ?

2. Whether the 1 appellate court has committed an error of law by deciding the question of limitation when the same was not an issue before the trial court ?"

[For the sake of convenience, the parties will herein-after be referred as per their status before the trial Court.]

2. The parties are Mohammedans. The suit property was originally held by Rojid Miya. Plaintiff is the daughter of Rojid Miya and defendant No. 1 is son of Rojid Miya and defendant No. 3 is their mother and widow of Rojid Miya.

3. Plaintiff filed a suit for declaration of title, partition and mesne profit against the defendants stating inter alia that the suit property was the self-acquired property of her father Rojid Miya, therefore, she has right, title and interest over the said suit property for which she filed an application before the Revenue Court for mutation

but that was rejected and appeal preferred was also dismissed on the ground that she has already relinquished her share in the suit property as she has received 12 acres of land from her father by gift deed dated 16/09/1974 which she has already accepted and as such, she is entitled for decree for partition and possession.

4. Defendants No. 1 and 3 resisted the suit by filing their written statement stating inter alia that Rojid Miya, in his lifetime, has already given 9.97 acres of land to defendant No. 3 on 27/10/1959 by registered gift deed and after the death of Rojid Miya, defendants No. 1 and 3 had got their names registered in the revenue records on the rest of the land owned by Rojid Miya as his successors which is in the knowledge of the plaintiff. They further pleaded that plaintiff, in token of having received her share of 4.747 acres of land as well as some cash and gold ornaments, she has already relinquished her title over the suit property by relinquishment deed dated 25/02/1989 (Ex. D/1), as such, she is not entitled for any share in the suit property.
5. Learned trial Court framed as many as 7 issues and after appreciation of oral and documentary

evidence on record partly decreed the suit vide its judgment and decree dated 28/03/2006 holding that plaintiff is entitled for equal share in the suit property as defendants No. 1 and 3 and granted decree for partition.

6. On appeal being preferred by defendants No. 1 and 3 under Section 96 of CPC, learned first appellate Court allowed the appeal vide impugned judgment and decree dated 12/10/2010 holding that by way of relinquishment deed dated 25/02/1989 (Ex. D/1), plaintiff has already relinquished her title over the suit property and further held that the suit is barred by limitation against which this second appeal has been preferred by the appellant/plaintiff in which two substantial questions of law have been framed and set out in the opening paragraph of the judgment.

7. Mr. Sushil Dubey, learned counsel for the appellant/plaintiff, would make two-fold submission. Firstly, that the alleged relinquishment deed (Ex. D/1) executed by plaintiff in favour of the defendants is only an affidavit and an affidavit is not evidence within the meaning of Section 3 of the Indian Evidence Act, 1872 and that can be used for evidence only

if for sufficient reason the Court passes an order under Order 19 Rule 1 and 2 of CPC and he would rely upon the decision rendered by the Supreme Court in the matter of Smt. Sudha Devi v. M.P. Narayanan & Ors.¹. Secondly, the plea that plaintiff's suit is barred by limitation is a mixed question of fact and law which ought to have been raised before the trial Court which was not done and therefore, it was not adjudicated by the trial Court. The first appellate Court could not have entertained the plea of limitation for the first time as no foundation was laid and plaintiff was not given an opportunity to meet out the plea of limitation, if any. Even otherwise, the suit is also for partition and it is governed by Article 113 of Limitation Act, 1963. The application filed by the plaintiff for mutation was rejected by the Tahsildar on 30/09/2002 and thereafter, her appeal was dismissed by the Sub-divisional Officer, Ambikapur on 31/07/2003 and the suit was filed before the trial Court on 10/03/2004 which cannot be held to be barred by limitation, as such, the impugned judgment and decree passed by the first appellate Court deserves to be set aside and that of the trial Court be restored.

¹ (1988) 3 SCC 366

8. Mr. D.N. Prajapati, learned counsel for defendants No. 1 and 3, would submit that since plaintiff has already relinquished her share in the suit property in favour of defendants No. 1 and 3 vide Ex. D/1 and it does not require registration, therefore, learned first appellate Court has rightly reversed the judgment and decree passed by the trial Court and dismissed the suit by granting the appeal. He would also submit that plea of limitation can always be raised before any Court by virtue of Section 3 of the Limitation Act as the suit is barred by limitation even if it was not raised at the first instance before the trial Court, as such, the instant appeal deserves to be dismissed.

9. I have heard learned counsel for the parties, considered their rival submissions made hereinabove and went through the records with utmost circumspection.

Answer to substantial question of law No. 1 :-

10. Learned first appellate Court has relied upon Exhibit D/1 to non-suit the plaintiff. A careful perusal of Exhibit D/1 would show that it is an affidavit allegedly executed by the plaintiff Mariyam Bibi by which she is said to have

relinquished her share in the suit property in favour of her mother i.e. defendant No. 3 on 25/02/1989, therefore, it has been held that plaintiff is not entitled for any share in the suit property. A careful perusal would show that Exhibit D/1 is only an affidavit which is said to have been sworn by the plaintiff.

11. The Supreme Court in the matter of **Smt. Sudha Devi** (supra) has clearly held that affidavits are not 'evidence' within the meaning of Section 3 of Evidence Act, 1872 and they can be used as evidence only if for sufficient reason, the Court passes an order under Order 19 Rule 1 or 2 of CPC. As such, it cannot be held that by an affidavit (Ex D/1), plaintiff has relinquished her share in the suit property in favour of her brother and mother i.e. defendants No. 1 and 3 and affidavit would not be an evidence within the meaning of Section 3 of Indian Evidence Act.

12. Even otherwise, assuming Ex. D/1 to be a relinquishment deed, in the matter of **Yellapu Uma Maheshwari v. Buddha Jagadheeswararao**², it has been held by the Supreme Court that relinquishment deed in respect of immovable property through a document is required to be registered compulsorily

in accordance with Section 17(1)(b) of Indian Registration Act, 1908 and in absence of registration, it cannot be admitted in evidence and held as under :-

"15. ... A thorough reading of both Exts. B-21 and B-22 makes it very clear that there is relinquishment of right in respect of immovable property through a document which is compulsorily registrable document and if the same is not registered, it becomes an inadmissible document as envisaged under Section 49 of the Registration Act. Hence, Exts. B-21 and B-22 are the documents which squarely fall within the ambit of Section 17(1)(b) of the Registration Act and hence are compulsorily registrable documents and the same are inadmissible in evidence for the purpose of proving the factum of partition between the parties. We are of the considered opinion that Exts. B-21 and B-22 are not admissible in evidence for the purpose of proving primary purpose of partition."

13. As such, the first appellate Court is absolutely unjustified in holding that plaintiff has relinquished her share in the suit property in favour of her brother and mother i.e. defendants No. 1 and 3 by relying upon Exhibit D/1 i.e. affidavit/unregistered document by which plaintiff is said to have relinquished her share in the suit property in favour of defendants. The finding recorded by the first appellate Court in this regard is set aside.

Answer to substantial question of law No. 2 :-

14. It is quite apparent that no issue of limitation was framed by the trial Court, however, the first appellate Court has dismissed the suit finding it to be barred by limitation. Admittedly, the suit filed by the plaintiff is for partition and possession.
15. The question for consideration would be as to what would be the period of limitation prescribed for institution of suit for partition ?
16. The legislature has not prescribed any period of limitation for filing a suit for partition because partition is an incident attached to the property and there is always a running cause of action for seeking partition by one of the co-sharers if and when he decides not to keep his share joint with other co-sharers. Since the filing of the suit is wholly dependent upon the will of the co-sharer, the period of limitation, specially the date or time from which such period would commence, could not have been possibly provided for by the legislature. (See Vidya Devi alias Vidya Vati (Dead) by LRS. v. Prem Prakash and others³.)

17. Separation from the joint family involving severance in status with all its legal consequences is quite distinct from the de facto division into specific shares of the joint property. One is a matter of individual decision, the desire to sever himself and enjoy his hitherto undefined and unspecified share separately from the others; whilst the other a natural resultant from his decision is the division and separation of his share which may be arrived at either by private agreement or by arbitration appointed by the parties or in the last resort by the court. One should not confuse the severance of status, with the allotment of shares. Therefore, a division in status takes place when a member expresses his intention to become separate unequivocally and unambiguously, and makes it known to other members of the family from whom he seeks to separate. The process of communication may vary in the circumstances of each particular case. The filing of a suit for partition is clear expression of such an intention. A decree may be necessary for working out the results of severance and for allotting definite shares, but the status of the plaintiff as separate in estate is brought about by his

assertion of his right to separate whether he obtains a consequential judgment or not. (See Nanak Chand and others v. Chander Kishore and others⁴.)

18. Partition in its larger sense consists in a division by which the share of each coparcener with respect to all or any of the joint property is fixed, and once the shares are defined. The partition in the sense of severance or disruption of the family is complete, but after 'the shares are so ascertained', the parties might elect either to have 'a partition of their shares by metes and bounds' or continue to live together and 'enjoy their property in common as before'. The joint ownership turns into possession and enjoyment in common until the physical partition takes place according to the shares standing at the date of severance of status. In the matter of Raghunath Das v. Gokal Chand and another⁵ it has been held by their Lordships of the Supreme Court that a suit for such physical partition is governed by Article 120 of the Limitation Act, 1908 (Article 113 of the Act of 1963) and such a suit under Article 113 of the Act of 1963 is to be brought within three years from the time when the

4 AIR 1982 Delhi 520

5 AIR 1958 SC 827

right to sue accrues. The crucial question in such cases is, when a right to sue accrues. There can be no right to sue until there is an accrual of the right asserted in the suit and its infringement or, at least a clear and unequivocal threat to infringe that right by the defendant against whom the suit is instituted.

19. In the matter of Syed Shah Ghulam Ghouse Mohiuddin v. Syed Shah Ahmed Moriuddin Kamisul Quadri (Dead) By L.Rs.⁶, it has been held by the Supreme Court that cause of action for partition of properties is said to be "perpetually recurring one".

20. In that view of the matter, it cannot be held that the suit for partition filed by the plaintiff was barred by limitation particularly when the plea of limitation has not been expressly raised. In the instant case, plaintiff's application for mutation was rejected by the Tahsildar on 30/09/2001 and further affirmed by the Sub-divisional Officer on 31/07/2003, the suit filed for partition by the plaintiff on 10/03/2004 cannot be held to be barred by limitation.

21. Now, the next question would be whether decree of the trial Court can be restored as it is or it deserves modification as the trial Court, while

⁶ 1971 (1) SCC 597

granting decree, has only held that plaintiff is entitled for her share in the suit property by partition in accordance with law. In the matter of **Syed Shah Ghulam Ghouse Mohiuddin** (supra), it has been held by the Supreme Court that in Mohammedan law, doctrine of partial partition is not applicable because the heirs are tennants in common and heirs of deceased muslim succeed to the definite fraction of every part of his estate. The shares of heirs under Mohammedan law are definite and known before actual partition. Therefore, on partition of properties belonging to a deceased muslim, there is division by metes and bounds in accordance with specific share of each heir being already determined by law.

22. The parties herein are Sunni muslim and are governed by 'Hanifi Law of inheritance'. In the 'Hanifi Law of inheritance', heirs are divided into three classes which are extracted below from Chapter VII, page 64 of "**Principles of Mahomedan Law**" by Sir Dinshaw Fardunji Mulla (20th edition) :-

A. - THREE CLASSES OF HEIRS

61. Classes of heirs – There are three classes of heirs, namely, (1) Sharers, (2) Residuaries, and (3) Distant Kindred :

(1) "Sharers" are those who are entitled to a prescribed share of the inheritance;

(2) "Residuaries" are those who take no prescribed share, but succeed to the "residue" after the claims of the sharers are satisfied;

(3) "Distant Kindred" are all those relations by blood who are neither Sharers nor Residuaries.

23. Learned author has further stated that if there are no sharers, the residuaries will succeed to the whole inheritance. If there be neither sharers nor residuaries, the inheritance will be divided among such of the distant kindred as are entitled to succeed thereto.

24. "Sharers" as defined by learned author in Chapter VII, page 65 reads as under :-

B. - SHARERS

63. Sharers — After payment of funeral expenses, debts, and legacies, the first step in the distribution of the estate, of a deceased Mahomedan is to ascertain which of the surviving relations belong to the class of sharers, and which again of these are entitled to a share of the inheritance, and, after this is done, to proceed to assign their respective shares to such of the sharers as are, under the circumstances of the case, entitled to succeed to a share.

25. The list of 'sharers' among the Sunni law has been indicated by learned author in Chapter VII page 66A and defendant No. 3 i.e. Wife of Rojid Miya will be 'sharer', which states as under:-

TABLE OF SHARERS – Sunni Law

(1) Sharers	(2) Normal Share		(3) Conditions under which the normal share is inherited	(4) This column sets our-- (A) Shares of Sharers Nos. 3, 4, 5, 8 and 12 as varied by special circumstances ; (B) Conditions under which Sharers Nos. 1, 2, 7, 8, 11 and 12 succeed as Residuaries.
	of one	of two or more collectively (b)		
1. xxx	xxx	xxx	xxx	xxx
2. xxx	xxx	xxx	xxx	xxx
3. xxx	xxx	xxx	xxx	xxx
4. WIFE (c)	1/8	1/8	When there is a child or child of a son h.l.s.	¼ when no child or child of a son h.l.s.

26.The next class of heirs is 'residuaries' which is defined by learned author in Chapter VII page 72, which is extracted below :-

C. - RESIDUARIES

65. Residuaries – If there are no Sharers, or if there are Sharers, but there is a residue left after satisfying their claims, the whole inheritance or the residue, as the case may be, devolves upon Residuaries in the order set forth in the annexed table (p. 74A). "

27. The rights of 'residuaries' are recognised by the Holy Quran (by implication) and by the traditions of the prophet (PBUH) in very specific terms according to the learned author, which are extracted below (page 73) :-

"The Holy Quran declares :

"from what is left by parents and near kindred, there is a share for men and a share for woman, whether the property be small or large-a determinate share."

"To (benefit) every one, we have appointed shares and heirs to property left by parents and near relatives.."

"Allah directs you concerning your children (their inheritance), to the male a portion equal to that of two females.."

"They ask thee for a legal decision. Say: Allah directs (thus) about those who leave no descendants or ascendants as heir. If it is a man that dies, leaving a sister but no child, she shall have half the inheritance. If (such a deceased was) a woman who left no child, her brother takes her inheritance.. If they are brothers and sisters, (they share), the male having twice the share of the female." "

28. The residue remaining after satisfying the sharer(s) claim is indicated in the following illustration by the learned author :-

Illustrations

[Note. - The residue remaining after satisfying the sharers' claims is indicated in the following illustrations thus.]

No. 1. - Sons and Daughters

(a) Son	..	2/3	}	(as residuaries)
Daughter	..	1/3	}	

Note. - The daughter cannot inherit as a sharer when there is a son. But if the heirs be a daughter and a son's son, the daughter as a sharer will take $\frac{1}{2}$, and the son's son as a residuary will take the remaining $\frac{1}{2}$.

29. Listed below is the table of 'residuaries' in order of succession - Sunni Law as depicted by learned author in page 74A :-

**TABLE OF RESIDUARIES IN ORDER OF SUCCESSION -
Sunni Law**

I. - DESCENDANTS:

1. SON.

Daughter takes as a residuary with the son, the son taking a double portion.

30. Reverting to the facts of the case in light of the above-stated share, which the parties are entitled to as per 'Hanifi Law of inheritance', in the instant case, the widow of Rojid Miya i.e. defendant No. 3 would take $\frac{1}{8}^{\text{th}}$ share in the

property of Rojid Miya as sharer and so far as the remaining $7/8^{\text{th}}$ share is concerned, defendant No. 1 being the son of Rojid Miya would be entitled to $2/3^{\text{rd}}$ share and plaintiff being the daughter of Rojid Miya would be entitled for $1/3^{\text{rd}}$ share in the said $7/8^{\text{th}}$ share of the suit property shown in Schedule 'A' appended with the plaint. The decree of the trial Court is modified accordingly.

31. Consequently, the judgment and decree passed by the first appellate Court is hereby set aside and that of the trial Court is restored to the extent indicated herein-above.

32. The second appeal is allowed to the extent indicated herein-above. No cost(s).

33. Decree be drawn-up accordingly and Schedule 'A' annexed with the plaint be made part of the decree.

Sd/-
(Sanjay K. Agrawal)
Judge