HIGH COURT OF MADHYA PRADESH
BENCH AT INDORE

First Appeal No.509 OF 2002

Visnushankar (since dead) and others
Vs.
Girdharilal and others

Shri Arvind Vikas Khare, Advocate for the appellants.
Shri Sunny Gawade, Advocate appeared on behalf of Shri Kamlesh Mandloi, Advocate for the respondent No.1.
Ms. Bhakti Vyas, Government Advocate for the respondent No.5/State.

Whether approved for reporting Yes/No.

(i) There exists a distinction between a Mitakashra Coparcenary property and Joint Family property. A Mitakashra Coparcenary carries a definite concept. It is a body of individuals having been created by law unlike a joint family which can be constituted by agreement of the parties. A Mitakashra Coparcenary is a creature of law.
(ii) Under the Mithakshara School of Hindu Law, the lineal male descendants of a person upto the third generation, acquire on birth ownership in the ancestral properties of such person.
(iii) Once the share of a co-parcener is determined, it ceases to be a coparcenary property. Hence it shall be deemed as self-acquired property. The parties in such an event would not possess the property as "joint tenants" but as "tenants in common.
(iv) For a valid 'Will' in terms of section 63 of Succession Act (39 of 1925), it is to be attested by two witnesses. Further, to prove factum of execution of 'will', in terms of section 68 of the Evidence Act, it is to be proved at least by one of the attesting witnesses.

(v) The trial Court fell in error decreeing the suit as in the instant case, the plaintiff does not fall within third generation of male descendant under the Mitakshara school of Hindu law and the 'Will duly proved by one of the attesting witnesses was not shrouded with suspicion.

- Appeal allowed.

Reserved on: 12/04/2018

JUDGMENT
(04/05/2018)

Rohit Arya, J

This appeal by defendants No.2 (since dead), 5, 6, 7 & 8 is directed against the judgment and preliminary decree dated 26/09/2002 passed in civil suit No.51A/2001 by II Additional District Judge, Ujjain, decreeing the suit to the extent that the plaintiff and defendant No.1 are entitled for 3/10th share in the suit house No.44/1 (described in paragraph 45 of the judgment) and agricultural land admeasuring 0.648 *Are* falling in survey

No.501/2 situated at village Jiyapur, tahsil & district Ujjain. Likewise, the defendants No.3 and 4 each are declared to have title and possession of 1/20th share with consequential relief of the nature of option available to the parties for exchange by mutual consent and the agricultural land be demarcated by the revenue authorities in the presence of parties, accordingly.

2. To appreciate the relationship amongst the parties, it is necessary to embody the pedigree as explained in paragraph 1 of the plaint:

Shobaram (dead)

Bhagirath (dead) | Nathulal (dead) | Punamchand (dead)

Bherulal (dead) | Anokhilal

Premnarayan (defendant 1) | Vishnushankar (defendant 2) | Girdharilal (Plaintiff) | Rampyaribai (defendant 3) | Savitribai (defendant 4)

3. Facts relevant and necessary for disposal of this appeal in nutshell are to the effect that father of the plaintiff and defendants No.1, 2, 3 and 4 had died on 12/12/1993 (wrongly mentioned as 12/12/1992 in paragraph 2 of the judgment). House No.44 situated at Lakshmibai Marg, Malipura, Ujjain and the agricultural land falling in survey No.501/2 admeausring 0.648 situated in village Jiyapur, tahsil & disrtrict Ujjain (boundaries of house are well described in paragraph 3A & details of land described in paragraph 3B of the plaint) are subject matter of the suit. As per plaint averments, the suit property is the ancestral property of the plaintiff and defendants No.1, 2, 3 and 4, the original owner thereof was late Shobharam. He had three sons, namely; Bhagirath, Nathulal and Punamchand. Punamchand had two

sons, namely; Bherulal and Anokhilal. After death of Punamchand, the property (paragraph 3A of the plaint) was partitioned by way of family settlement between his sons; Bherulal and Anokhilal followed by written partition. A part of the house numbered as 44A had fallen to the share of Bherulal and the other half had fallen to the share of Anokhilal numbered as 44 and entry to that effect was also made in the municipal record. Since then, they are in possession of their respective portions. It is further averred that the suit property being ancestral property, the plaintiff and defendants No.1 and 2 had a claim for title and possession thereof as coparceners. The cause of action for filing the suit arose at the time defendants No. 5 to 8 had filed an application in the Municipal Council for mutation on the strength of a 'Will' dated 25/11/1993 allegedly propounded by late Bherulal. The plaintiff and the defendant No.1 had objected to the same, on several grounds, viz; (i) Bherulal had no right to bequeath the suit property; coparcenary property, through the 'Will'; (ii) as a matter of fact, Bherulal never propounded the alleged 'Will'; (iii) the 'Will' is forged and fabricated; and (iv) Bherulal physically and mentally was also not of sound mind for propounding the 'Will'. In the backdrop of aforesaid factual matrix, the instant suit was filed.

4. Defendants No.2, 3, 4, 5 and 8 had filed a joint written statement and denied the plaint allegations *inter alia* contending that the suit property is not the coparcenary property of joint Hindu family. As a matter of fact, house No.44, a part of the suit property (described in paragraph 3A of the plaint) though originally ancestral property but, was partitioned between Bherulal and Anokhilal in the year 1960 in the family settlement and the same was reduced in writing on 23/05/1972 as a consequence thereof, the house was divided into two equal parts; one part had fallen to the share of Bherulal and the other part to the share of Anokhilal which were mutated as house No.44A and house No.44 in the municipal record, respectively. As regards the agricultural land (part of the suit property described in paragraph 3B of the plaint) was self-acquired property of Bherulal as he had purchased the same from one Peeru s/o Gopal by a registered sale deed dated 03/08/1981 (exhibit D/1). The coparcenary was

broken after partition of the property between the sons of Punamchand, namely; Bherulal and Anokhilal, therefore, the part of the suit house fallen to the share of Bherulal had become his self-acquired property, besides, agricultural land. As such, the plaintiff and the defendant No.1 have no right, title and interest on the suit property. As a matter of fact, at the time of partition in the year 1960 (reduced in writing in the year 1972), the plaintiff was not even born and, therefore, the plaintiff had no right, muchless as coparcener in the suit property as claimed.

5. On the aforesaid pleadings, the trial Court framed as many as 14 issues. In the opinion of this Court, the decision on other issues depend upon the answer to issue Nos.1, 8 and 9. For ready reference, issue No.1 is quoted below:

> ''1– क्या वादग्रस्त भवन भेरूलाल की पैतृक संपत्तित थी तथा उसे यह बंटवारे में प्राप्त हुआ था, उसमें वादी तथा प्रतिवादी क्र. 1 प्रेमनारायण व क्र. 2 विष्णुशंकर, भेरूलाल के साथ ही कोपार्सनर की हैसियत से काबिज चले आ रहे थे तथा भेरूलाल की मृत्यु के बाद भी वे काबिज रहे ?''

6. The trial Court has answered issue No.1 in paragraphs 14 to 17. The trial Court opined that the suit property, viz., house No.44A and agricultural land described in paragraphs 3A and 3B of the plaint respectively was ancestral property as the original owner was Shobharam and thereafter, it was succeeded by his three sons, namely; Bhagirath, Nathulal and Punamchand. After death of Punamchand though the suit property was partitioned between Bherulal and Anokhilal about 10 to 12 years ago since the time it was reduced in writing on 23/05/1972 vide exhibit P/12, according to the trial Court, the suit property shall devolve upon surviving coparceners in the family by survivorship in terms of the then existing section 6 of the Hindu Succession Act, 1925 (for short, 'the Act, 1925') irrespective of the fact of partition between Bherulal and Anokhilal. The trial Court further observed that as the plaintiff and the defendant No.1 are in their respective possession of the suit property, therefore, unless partition take place between them, it shall not change its character and continued to be coparcenary property.

7. The moot question that arises for determination is whether

the trial Court was justified having declared the suit property as coparcenary property and thereby held that the plaintiff and the defendant No.1 are entitled to succeed the same as surviving coparceners in the family by way of survivorship by applying the provision as contained in section 6 of the Act, 1925 as it then was?

8. Admittedly, as averred in paragraph 5 of the plaint, the suit house No.44; ancestral property (boundaries described in paragraph 3A of the plaint) fell to the share of Punamchand was further divided between his two sons, namely; Bherulal and Anokhilal in the family settlement somewhere in the month of May, 1960 followed by written partition in the year 1972 (exhibit P/12) and mutated in their names as house No.44A and 44 in the municipal record, respectively. It is also an admitted fact that the agricultural land (described in paragraph 3B of the plaint) was purchased by Bherulal by a registered sale deed dated 03/08/1981 (exhibit D/1) from Peeru s/o Gopal, i.e., after about 11 years since the time of partition took place between Bherulal and Anokhilal.

9. However, before expressing the view in the backdrop of the aforesaid facts, it is expedient to reiterate the principles of law laid down by the Hon'ble Supreme Court in the case of joint family property according to Mithakshara Hindu school is held by the joint Hindu family is held in collective ownership by all the coparceners.

10. The Hon'ble Supreme Court in the case of **SBI Vs. Ghamandi Ram, AIR 1969 SC 1330** has observed as under:

> "5. According to the Mitakshara School of Hindu Law all the property of a Hindu joint family is held in collective ownership by all the coparceners in a quasi-corporate capacity. The textual authority of the Mitakshara lays down in express terms that the joint family property is held in trust for the joint Hindu family members then living and thereafter to be born (see Mitakshara, Chapter I, pp.1-27). The incidents of coparcership under the Mitakshara Law are: first, the lineal male descendants of a person up to the third generation**,** acquire on birth ownership in the ancestral properties of such person; …...:
>
> (Emphasis supplied)

11. Relying upon the aforesaid judgment, the Hon'ble Supreme Court in the case of **Hardeo Rai Vs. Sakuntala Devi and others (2008) 7 SCC 46** has ruled as under:

> "18. There exists a distinction between a Mitakashra Coparcenary property and Joint Family property. A Mitakashra Coparcenary carries a definite concept. It is a body of individuals having been created by law unlike a joint family which can be constituted by agreement of the parties. A Mitakashra Coparcenary is a creature of law. It is, thus, necessary to determine the status of the appellant and his brothers.
> 22. For the purpose of assigning one's interest in the property, it was not necessary that partition by metes and bounds amongst the coparceners must take place. When an intention is expressed to partition the coparcenary property, the share of each of the coparceners becomes clear and ascertainable. Once the share of a co-parcener is determined, it ceases to be a coparcenary property. The parties in such an event would not possess the property as "joint tenants" but as "tenants in common....."
>
> (Emphasis supplied)

12. Under the Mithakshara School of Hindu Law, the lineal male descendants of a person upto the third generation, acquire on birth ownership in the ancestral properties of such person.

Now turning to the facts of the case in hand though the suit house No.44 (boundaries described in paragraph 3A of the plaint), a coparcenary property was originally owned by Shobharam. He had three sons, namely; Bhagirath, Nathulal and Punamchand. Punamchand had two sons, namely; Bherulal and Anokhilal. After death of Punamchand, admittedly; the property was partitioned between Bherulal and Anokhilal by way of family settlement somewhere in the month of May, 1960 followed by written partition on 23/05/1972 (exhibit P/12) and mutated in their names as house No.44A and 44 in the municipal record, respectively. Therefore, the suit property lost its character after its partition and had become self-acquired property of Bherulal. Further, the plaintiff was not even born at the time of such partition as averred in paragraph 5 of the written statement and not denied by the plaintiff. As such, the finding of the trial Court is in ignorance of the law related to the incidents of coparcenership under the Mitakshara Law referred above. More over, the partition of the suit property had already taken place between Bherulal and Anokhilal, therefore, section 6 of the Act, 1925 as then existed

had no application for want of character of the property ceased to be coparcenary property.

The trial Court has also considered part of the suit property; i.e., agricultural land (described in paragraph 3B of the plaint) as joint Hindu family property under the Mitakshara School of Law though the same was acquired by Bherulal by a registered sale deed dated 03/08/1981 (exhibit D/7) from Peeru s/o Gopal, on the premise that the family continued to be joint Hindu family and, therefore, the property so acquired shall be deemed to be joint Hindu family property. This Court disagree with the trial Court as the acquisition of property (paragraph 3B of the plaint) by Bhurelal was after 20 years of cessation of joint Hindu family property. Therefore, it is incorrect to say that the property in paragraph 3B of the plaint (agricultural land) was joint Hindu family property.

13. The next question that arises for consideration is whether the trial Court was justified having concluded that the 'Will' dated 25/11/1993 propounded by late Bherulal was suspicious in nature, forged and fabricated and not binding upon the plaintiff and the defendant No.1.

Issue Nos. 8 and 9 are relevant which are quoted below:

> ''8– क्या भेरूलाल को वादग्रस्त मकान व भूमि के लिए वसीयत करने का अधिकार नही था, उसके द्वारा दि. 25–11–93 को निष्पादित बतायी गयी कथित वसीयत प्रतिवादी क्र. 2 तथा 5 से लेकर 8 द्वारा षडयंत्रपूर्वक तैयार की गई है तथा यह फर्जी व बनावटी है, यदि हां तो क्या वादी तथा प्रतिवादी क्र. 1,3,4 इससे पाबंद है ?
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> 9– क्या वादग्रस्त भवन व संपत्ति स्व. भेरूलाल की स्वअर्जित संपत्ति है, अतः उसके द्वारा दि. 25–11–93 को निष्पादित की गयी वसीयत सही है ?''

14. The said question is answered as issue Nos.8 and 9 from paragraphs 24 to 35 by the trial Court.

15. Before commenting upon the finding of the trial Court, it is apposite to reiterate the requirement of law for proving the 'Will' and the circumstances under which the 'Will' in a given situation may be declared to be shrouded by suspicion to discard the same.

16. Section 63 (c) of the Hindu Succession Act, 1925 defines that the 'Will' shall be attested by two or more witnesses, each of whom has seen the testator sign or affix his mark to the Will or … and each of the witnesses shall sign the Will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and there is no particular form of attestation is necessary.

17. In the instant case, the 'Will' dated 25/11/1993 (exhibit D/7) was attested by two witnesses, namely; Dr. Ramdas (D.W.2) and Gokulsingh. Dr. Ramdas (D.W.2) was examined for proving the 'Will'. He proved the 'Will' by stating that Bherulal put his thumb impression in front of him and he has signed the same. In his cross-examination, he has denied that Bherulal was physically and mentally not in fit condition to execute the 'Will' (paragraphs 4 and 5).

18. For a valid 'Will' in terms of section 63 of Succession Act (39 of 1925), it is to be attested by two witnesses. Further, to prove factum of execution of 'will', in terms of section 68 of the Evidence Act, it is to be proved at least by one of the attesting witnesses.

19. Section 3 of the Transfer of Property Act defines the word “attested” and the meaning of the definition clause is well explained by the Hon'ble Apex Court reported in **AIR 1969 SC 1147, M.L.Abdul Jabbar Sahib Vs. H.V.Venkata Sastri & Sons** to the following effect:

> “8. It is to be noticed that the word “attested”, the thing to be defined, occurs as part of the definition itself. To attest is to bear witness to a fact. Briefly put, the essential conditions of valid attestation under S.3 are: (1) two or more witnesses have seen the executant sign the instrument or have received from him a personal acknowledgment of his signature; (2) with a view to attest or to bear witness to this fact each of them has signed the instrument in the presence of the executant. It is essential that the witness should have put his signature *animo attestandi*, that is, for the purpose of attesting that he has seen the executant sign or has received from him a personal acknowledgment of his signature. If a person puts his signature on the document for some other purpose, e.g., to certify that he is as scribe or an identifier or a registering officer, he is not an attesting witness.”

20. In **AIR 2001 SC 2802, N. Kamalam (dead) and another Vs. Ayyaswamy and another**, Hon'ble Supreme Court has again elaborately and lucidly explained the scope, meaning and consequences of attestation in the context of factum of execution of 'will'. Significant requirements are found to be two fold; (1) that, the attesting witness should witness the execution which implies his presence; and (2) that, he should certify or mark for execution by subscribing his name as a witness; which implies a conscious intention to attest, i.e., attesting witness as *animus to attest.*

21. In view of the aforesaid enunciation of law holding the field, the 'Will' in question was attested by two witneses, therefore, the trial Court by erroneous reasons has discarded the fact of proving the 'Will' by one of its attesting witnesses, namely; Dr. Ramdas (D.W.2).

22. In the opinion of this Court, the finding so recorded in that behalf is perverse in nature based on surmises and conjectures and not upon careful reading of the deposition of Dr. Ramdas (D.W.2) in the context of propounding the 'Will' dated 25/11/1993 (exhibit D/7) by Bherulal.

23. This Court has carefully perused the evidence led in the Court below and is of the opinion that no such circumstance exists to declare that the 'Will' was shrouded with suspicion. The opinion formed by the trial Court suffers from perversity of approach and not on facts; based on conjectures and surmises applying the principle reiterated by the Hon'ble Supreme Court in the cases of **Joyce Primrose Prestor (Mrs) (Nee Vas) Vs. Vera Marie Vas (Ms) and others (196) 9 SCC 324** and **Rambai Padmakar Patil (Dead) through Lrs., and others Vs. Rukminibai Vishnu Vekhande and others, (2003) 8 SCC 537.**

24. In view of the above, the findings recorded by the trial Court on issue Nos.1, 8 & 9 are found to be contrary to law and *de hors* evidence placed on record. Hence, the same are set aside. The other issues though framed and answered by the trial Court since

are based thereupon, it is not required to deal with the same as a sequel to the issues so answered, they do not survive.

25. Consequently, the impugned judgment and decree is set aside. The appeal succeeds and is hereby allowed. The suit is dismissed.

(Rohit Arya)
Judge
04- 05-2018

b/-