S. Gupta

Before A.K. Sikri,Chief Justice & Rakesh Kumar Jain, J.

JOGINDER DUTT (DIED) THROUGH HIS LRS—*Appellant*

versus

HANS RAJ (DIED) THROUGH HIS LRS AND OTHERS—*Respondents*

LPA No. 91 of 1984

April 10, 2013

Hindu Succession Act, 1956 - S. 14 - Hindu Women's Right to Property Act, 1937 - S. 3(3) - Nathu Ram died intestate in 1949 leaving behind his three sons and widow who were all entitled to succeed to the property of deceased in terms of Section 3 of the Act of 1937 - Interest devolving upon widow was limited (Hindu woman's estate), but she had a right to claim partition as a male owner of her interest - Widow became absolute owner of the property in which she had limited interest after coming into force of the Act of 1956 - Widow died in March 1974 bequeathing her share to appellant - Challenge to the competence of widow to make a will regarding her estate - Defendants claim was that widow could not prove that she was in possession of her share of the property which she had succeeded to along when the Act of 1937 was in force - Whether Section 14 would be applicable if female Hindu was not in actual, physical or constructive possession of property - Held - Section 14(1)

will become applicable to any property which is owned by a female Hindu, even though she is not in actual, physical or constructive possession of that property.

Held, that the use of the expression "possessed by" instead of the expression "in possession of" was intended to enlarge the meaning of this expression. It is further held that it is commonly known in English language that a property is said to be possessed by a person, if he is the owner, even though he may, for the time being, be out of actual possession or even constructive possession. On the language of Section 14(1), therefore, we hold that this provision will become applicable to any property which is owned by a female Hindu, even though she is not in actual, physical or constructive possession of that property

(Para 13)

Further held, that if a Hindu widow, who acquires rights in the property left by her husband, dying intestate, in terms of the Act of 1937, becomes absolute owner of her share possessed by her being the owner if she lives after coming into force of the Act of 1956 and it is not necessary that she should be in actual physical possession of her share in the property in dispute as all that is necessary that her limited interest in the property which devolved upon her in terms of the Act of 1937 continues till the enforcement of the Act of 1956.

(Para 17)

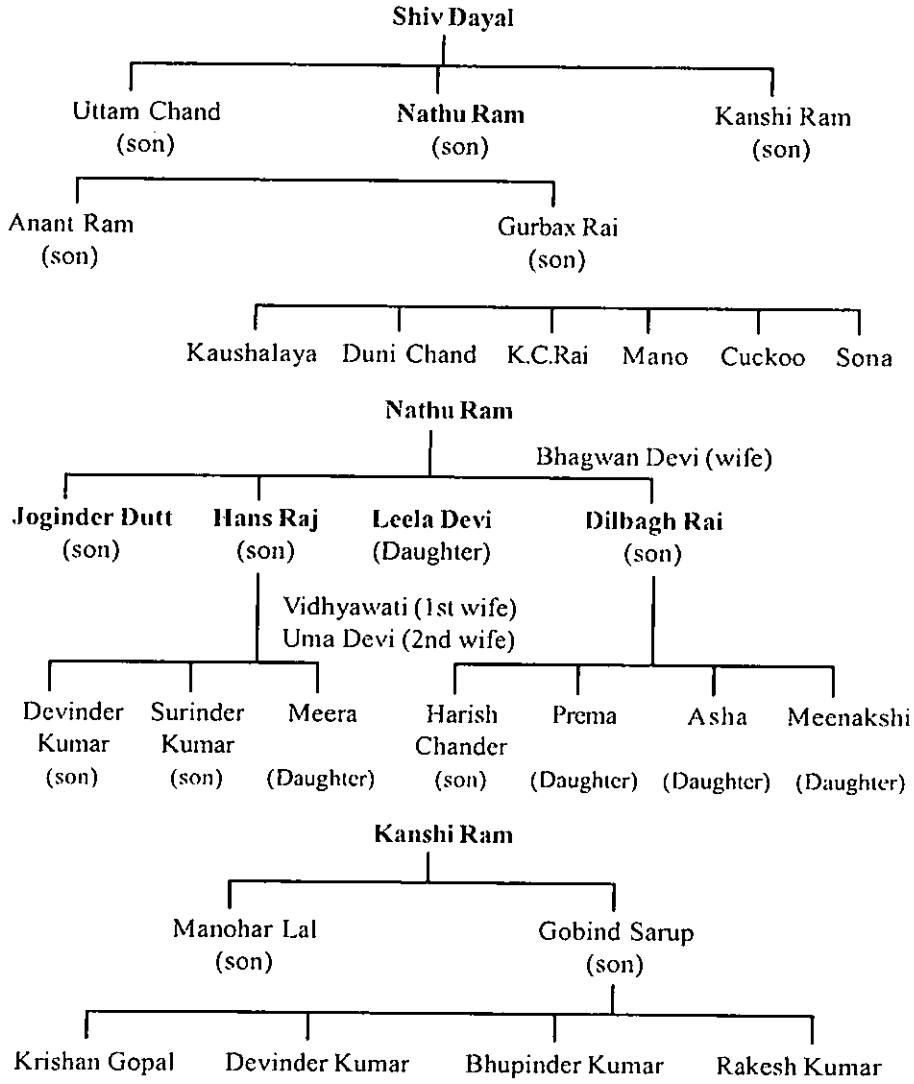
Anupam Gupta, Senior Advocate, with Shruti Gupta, Advocate, *for the appellants.*

M.L.Sarin, Senior Advocate, with Nitin Sarin and Mr. Sandeep Bansal, Advocates, *for the respondents.*

RAKESH KUMAR JAIN, J.

(1) In order to narrate the facts properly, it would be relevant to refer to the relations of the parties with each other, involved in the present lis, and for that purpose their pedigree table is reproduced as under:-

PEDIGREE TABLE



(2) It all started with a Civil Suit filed by Joginder Dutt S/o Nathu Ram, Bhagwan Devi Wd/o Nathu Ram, Manohar Lal S/o Kanshi Ram and Anant Ram S/o Uttam Chand for partition of as many as 12 properties in which Joginder Dutt & Bhagwan Devi and defendant Nos.1 to 6 claimed 1/3th share, meaning thereby both claimed 1/12th share each; Manohar Lal and defendant Nos.7 to 10 claimed 1/3rd share, as per which Manohar Lal claimed 1/6th share; and Anant Ram and defendant No.11 claimed 1/3rd share, according to which Anant Ram was claiming 1/6th share. This

suit was decreed on 31.01.1975 and a preliminary decree was ordered to be drawn holding that "it is ordered that a preliminary decree to the effect that the property mentioned in plan 'B' is joint of the parties though business of firm Rai Brothers belongs to Hans Raj defendant. The property mentioned at plan 'E' which is in possession of Hans Raj defendant at present is joint of the parties. So far as the portion sold to Sant Ram is concerned, as mentioned in item 'E' and the property mentioned at plan 'F', it is proved that these are not joint. There is no dispute regarding the remaining properties mentioned at item Nos.A, C, D, G, H, I, J, K and L of the head note of the plaint. Plaintiff No.1 Joginder Dutt is entitled to 1/6th share in each of the properties in dispute. Manohar Lal plaintiff has 1/6th share therein, whereas share of Anant Ram plaintiff is 1/6th".

(3) Aggrieved against the judgment and decree of the Trial Court, two Regular First Appeals were filed bearing RFA No.309 of 1975 by the plaintiffs and RFA No.352 of 1975 by the defendants. The learned Single Judge, vide his order dated 21.09.1983, dismissed the RFA No.309 of 1975 and partly allowed the RFA No.352 of 1975, as indicated in the judgment.

(4) Dissatisfied with the order of the learned Single Judge, above mentioned 3 appeals bearing LPA Nos.91, 92 and 310 of 1984 have been filed which are being decided together by this common order, in view of the facts stated here-in-above.

(5) There is no dispute that on the pleadings of the parties before the Trial Court as many as 13 issues were framed in the said suit for partition, but in the appeals, the learned Single Judge only discussed issue Nos.2, 10 and 12B being relevant as the findings of the Trial Court on the other issues were not contested by either of the parties.

(6) There were 12 properties which are sought to be partitioned by each branch of Shiv Dayal claiming 1/3rd share each. It has been noticed by the learned Single Judge that the main controversy between the parties is with regard to the Will dated 16.03.1969 (Ex.P139) executed by Bhagwan Devi bequeathing her share in favour of Joginder Dutt. The dispute is not with regard to the due execution of the Will but the competence of the testator. The learned Single Judge has reversed the finding of the learned

Trial Court who had held that Smt. Bhagwan Devi had succeeded to her deceased husband Nathu Ram along with her three sons, who died somewhere in 1949, and since she died after coming into force of the Hindu Succession Act, 1956 (hereinafter referred to as the "Act of 1956"), she became absolute owner of her share by virtue of Section 14 of the Act of 1956. It has been observed by the learned Single Judge that firstly Smt. Bhagwan Devi was not in possession of the property in dispute which she had bequeathed by way of Will and secondly during her life time, she filed a suit as Forma Paupris for maintenance against her three sons in which she had claimed that she did not possess any property and that suit was decreed in her favour. The finding of the learned Single Judge in this regard reads thus:-

> "After hearing the learned counsel for the parties, I am of the considered opinion that the will Exhibit P-139 dated 16.03.1969 was invalid as Smt. Bhagwan Devi was not possessed of any property at the time of executing the said will. Even in the copy of the will placed on the record, there is no mention of any specific portion of the property of which she was in possession and could claim herself to be the absolute owner. Rather it has been stated therein that whatever property may fall to her share on partition that may be given to her son Joginder Dutt since he was serving her. Thus, it is quite evident that she was not possessed of any property either by way of maintenance or otherwise because of succession to her husband and, therefore, the question of making any will under the circumstances did not arise. The approach of the trial Court in this behalf is wrong. Simply because she died after coming into force of the Hindu Succession Act did not make her absolute owner of her alleged 1/4th share in the estate of her husband Nathu Ram. Assuming that she was entitled to succeed under the Hindu Women's Rights to Property Act, but as a matter of fact, she never succeeded and she never claimed any such succession at any time prior to the filing of the present suit. Besides, she was not in possession of any property or any portion thereof as to become its absolute owner by invoking the provisions of section 14 of the Hindu Succession Act. The ratio of Setra Veeravva's

case (supra) relied upon by the learned counsel for Joginder Dutt has no application to the facts of the present case. In the said case, the widow was held to be in possession through her adopted son which adoption was held invalid at the instance of collaterals. As regards the present case, the very fact that Smt. Bhagwan Devi filed a suit for maintenance against her three sons clearly proves that she was not in possession of any property. In this view of the matter, the finding of the trial Court in this respect is liable to be set aside. The will Exhibit P-139 dated 16.03.1969, is held to be invalid. Smt. Bhagwan Devi will be deemed to have died intestate and her three sons i.e. Hans Raj, Joginder Dutt and the children of her third son Dilbagh Rai who died earlier, will succeed equally in the share of 1/3rd each."

(7) Learned counsel for the appellants has submitted that Nathu Ram died in December 1949 when the Act of 1937 was in force. The Hindu Women's Rights to Property Act, 1937 (hereinafter referred to as the "Act of 1937") became effective from 14.04.1937 and extends, as per Section 1(2) thereof, to the whole of India except Part B States. It applies to the properties other than the agricultural. He further submitted that the properties involved in the present lis are all urban properties and none of them are situated in any part of the territories of any erstwhile Part B State. He further submitted that according to Section 3 of the Act of 1937, when a Hindu dies intestate leaving separate property, his widow, subject to the provisions of sub-section (3), would be entitled to the property in respect of which he dies intestate to the same share as that of a son. Subsection (3) of Section 3 of the Act of 1937, however, provides that any interest devolving on a Hindu widow under the provisions of this section shall be the limited interest known as a Hindu woman's estate, provided however that she shall have the same right of claiming partition as a male owner. He has further submitted that Bhagwan Devi widow of Nathu Ram died in March 1974 and became an absolute owner of her estate in terms of Section 14(1) of the Act of 1956 and was competent to execute the Will of her share which she had actually executed in favour of her son Joginder Dutt on 16.03.1969 (Ex.P139), therefore, it is asserted that the finding recorded by the learned Single Judge

that Bhagwan Devi died intestate and her three sons i.e. Hans Raj, Joginder Dutt and the children of her third son Dilbagh Rai who died earlier, would succeed equally to the share of 1/3rd each, is patently illegal. He has further submitted that the conclusion arrived at by the learned Single Judge about the competence of Bhagwan Devi to own the property in dispute bequeathed by her is on the basis that it has not been proved that she was in possession of the property in dispute at the time when the Act of 1956 came in to force. In this regard, he has relied upon various decisions of the Supreme Court in the cases of ***Mangal Singh and others*** versus ***Smt. Rattno (dead) by her legal representatives and another (1), Vaddeboyina Tulasamma and others*** versus ***Vaddeboyina Sesha Reddi (dead) by L.Rs. (2), Ram Kali (Smt)*** versus ***Choudhri Ajit Shankar and others (3),*** and two Division Bench judgments of the Madras High Court in the cases of ***R. Narasimhachari*** versus ***Andalammal (died) and others (4)*** and ***M.V.Chockalingam Pillai and others*** versus ***Alamelu Animal and another (5).*** He has submitted that as per Ex.P41, Bhagwan Devi, while appearing as PW1, has categorically stated that she holds 1/4th share in the property left by her husband, meaning thereby she did not accept that after the death of her husband, his property was inherited only by her three sons and not by her. It is also submitted that being widow of Nathu Ram, who died in 1949 when the Act of 1937 was in force, she succeeded to his property left by him as intestate in the same share as her sons had succeeded, may be having limited interest at that time which became absolute after coming into force of the Act of 1956 and for that matter, even if she had filed a Civil Suit for maintenance as a Forma Paupris alleging that she did not possess any property, it would not deprive her of the right which vested in accordance with the law.

(8) On the other hand, while contesting the claim of Joginder Dutt, learned counsel for the respondents, who happens to be the LRs of Hans Raj S/o Nathu Ram and are contesting this litigation because of the fact that if Bhagwan Devi does not get any share in the property left by Nathu Ram, then the entire property of Nathu Ram would be divided into three

(1) AIR 1987 SC 1786
(2) AIR 1977 SC 1944
(3) (1997) 9 SCC 613
(4) AIR 1979 MADRAS 31
(5) AIR 1982 MADRAS 29

parts which would go to Joginder Dutt, Hans Raj and Dilbagh Rai to the extent of 1/3rd share each, but if Bhagwan Devi gets 1/4th share by virtue of the provisions of Act of 1937 and Act of 1956 and had competence to bequeath the said share, then her 1/4th share would go to Joginder Dutt who would get 1/2th share in the property of Nathu Ram, whereas Hans Raj and Dilbagh Rai would get 1/4th share each, has submitted that Nathu Ram died on 05.12.1949 and after his death, an award was given by three referees on 24.12.1949 which was made Rule of the Court. In these proceedings, Bhagwan Devi was specifically joined as a party and was compensated with an amount of Rs. 60,000/- from one of the firms run by the family and the children of Nathu Ram were given 1/3rd share each by using the word "Aulad", which excludes Bhagwan Devi. He also argued that it is totally misconceived and misplaced that the amount of Rs. 60,000/- given to Bhagwan Devi was separate amount only in respect of the firm Shiv Dayal Uttam Chand, rather a conjoint reading of the decree Ex.P136 would show that Bhagwan Devi was given Rs.60,000/- as one time settlement for her complete share in the property and was not limited to one firm. He further submitted that since Bhagwan Devi was not found in possession of the share she alleged to have succeeded in terms of the Act of 1937, she could not be declared to have become absolute owner in terms of the Act of 1956 which could make her competent to execute the Will in favour of Joginder Dutt.

(9) We have heard learned counsel for the parties and perused the record in this regard.

(10) The facts are not much in dispute inasmuch as Nathu Ram died intestate in 1949 leaving behind his three sons and his widow Bhagwan Devi as well. Bhagwan Devi widow of Nathu Ram was entitled to succeed to the property of her husband Nathu Ram along with her three sons in terms of Section 3 of the Act of 1937. It is also not in dispute that the interest devolved upon her was limited known as Hindu woman's estate, but she had a right to claim partition as a male owner of her interest but Bhagwan Devi died in March 1974 and, in the meantime, the Act of 1956 became enforceable. It is also not in dispute that after coming into force of the Act of 1956, Bhagwan Devi became absolute owner of the property which was earlier known as of her estate in which she had limited interest in terms of Section 3 of the Act of 1937.

(11) The only issue is as to whether a Hindu woman had to be in possession of the property of which she became the absolute owner in terms of the Act of 1956. The dispute in this case raked up by the defendants was that Bhagwan Devi could not prove that she was in possession of the property of her share which she had succeeded along with her three sons at the time of death of her husband when the Act of 1937 was in force.

(12) The learned Single Judge, while referring to a decision of the Supreme Court in the case of ***Gummalapura Tiqqina Matada Kotturuswami*** versus ***Setra Veeravva and others (6),*** has held that in that case the widow was held to be in possession through her adopted son, however, the adoption was held to be invalid at the instance of collaterals, but in the present case, Bhagwan Devi herself had filed a suit for maintenance against her three sons in which she had stated that she does not possess any property.

(13) After the judgment in **Gummalapura Tiqqina Matada Kotturuswami's case (supra),** the judgment in **Mangal Singh and others' case (supra)** has come in which the word "possessed by", as used in Section 14(1) of the Act of 1956, has been explicitly defined. In the said case, the plaintiff widow was dispossessed in the year 1954 before the Act of 1956 came into force and the question arose was as to whether she could be declared to be the absolute owner after coming into force of the Act of 1956. It was held in para 7 of the judgment that the Legislature has deliberately used the word "any property possessed by a female Hindu" and not "any property in possession of a female Hindu". It was further held that the constructive possession may be through a lessee, mortgagee, licensee, etc. The use of the expression "possessed by" instead of the expression "in possession of" was intended to enlarge the meaning of this expression. It is further held that it is commonly known in English language that a property is said to be possessed by a person, if he is the owner, even though he may, for the time being, be out of actual possession or even constructive possession. It was further held that "it appears to us that the expression used in Section 14(1) of the Act was intended to cover cases of possession in law also, where lands may have descended to a female

(6) AIR 1959 SC 577

Hindu and she has not actually entered into them. It would, of course, cover the other cases of actual or constructive possession. On the language of Section 14(1), therefore, we hold that this provision will become applicable to any property which is owned by a female Hindu, even though she is not in actual, physical or constructive possession of that property".

(14) The judgment in **Mangal Singh and others' case (supra)** was re-affirmed by the Supreme Court in **Vaddeboyina Tulasamma and others' case (supra).** Similar view has been expressed by the Supreme Court in **Ram Kali's case (supra)** approving the decision in Vaddeboyina Tulasamma and others' case (supra).

(15) In **R. Narasimhachari v. Andalammal (died) and others' case (supra),** the Division Bench of the Madras High Court has examined the question as to whether the statutory right of a Hindu widow under the Act of 1937, without her being in corporeal possession of the property and without her being obligated even to demand partition, enlarges into an absolute estate within the meaning of Section 14(1) of the Act of 1956. The answer to this question was given in affirmative to the following effect:-

> "The net result of the exposition of law as made by the Supreme Court and our Court is that it is not necessary for a Hindu widow entitled to rights under the 1937 Act to seek for partition either by demanding it or by filing a suit for that purpose. Her entitlement or right to possess the property under the 1937 Act enlarges itself by reason of the liberal and wide amplitude of Section 14(1) of the 1956 Act."

(16) The aforesaid view has been further reiterated by the Madras High Court in **M.V.Chockalingam Pillai and others' case (supra)**.

(17) Thus, from the aforesaid legal position, it is absolutely clear that if a Hindu widow, who acquires rights in the property left by her husband, dying intestate, in terms of the Act of 1937, becomes absolute owner of her share possessed by her being the owner if she lives after coming into force of the Act of 1956 and it is not necessary that she should be in actual physical possession of her share in the property in dispute as

all that is necessary that her limited interest in the property which devolved upon her in terms of the Act of 1937 continues till the enforcement of the Act of 1956.

(18) Thus, in view of the aforesaid discussion, the finding recorded by the learned Single Judge that because Bhagwan Devi was not in possession of her share at the time when she died in March 1974, she had no competence to bequeath the said share is hereby reversed and that of the learned Trial Court is upheld.

(19) Insofar as the suit filed by the Bhagwan Devi for maintenance against her 3 sons as Forma Paupris being not in possession of any property does not debar her of her rights in the property in dispute which has come to her by operation of law much-less the Act of 1937 and the Act of 1956. It is not the case of the respondents herein that Bhagwan Devi had relinquished her right at any point of time and the argument raised by learned counsel for the respondent that her claim was settled by virtue of payment of Rs. 60,000/- is not acceptable because that amount was given to her while settling the accounts of one firm and not settling the share of the parties in the property in dispute which was given to the "Aulad" of Nathu Ram from which Bhagwan Devi cannot be excluded as the word "Aulad" had been used herein in general sense which includes Bhagwan Devi as well, otherwise had it been the intention of the referees to give the property only to the sons, the word "Ladke" or "Puttar" could have been used. The Trial Court has rightly observed that the word "Aulad" had been used in general sense which includes Bhagwan Devi as well.

(20) As regards the joint-ness of the property mentioned at point "E" is concerned, learned counsel for the appellants has submitted that the learned Trial Court, in para 14 of its judgment, holds that the property "E" is joint of the parties which has been affirmed by the learned Single Judge while observing that "learned counsel for Hans Raj defendant has contended that the properties in items 'B' and 'E' are not joint properties of the parties and the trial Court has wrongly relied upon the award Exhibit P-37/1 in this behalf" and concluding that "thus, it could not be successfully argued on behalf of defendant Hans Raj that property at item 'E' was not joint

property of the parties" and "same is the position with regard to property 'B'. The finding of the trial Court in this behalf could not be successfully challenged on behalf of the defendant-appellant Hans Raj".

(21) On the contrary, learned counsel for the respondents has submitted that in para 4 of the grounds of appeal in LPA No.91 of 1984, it has been pleaded that this property is not joint of the parties and if they have chosen to leave their claim on property 'E', at the time of filing the present appeal, they cannot be given advantage of the stand they had taken in the Courts below. It is further submitted that they have no concern with the property 'F' and as far as the property 'B' is concerned, the same is with the firm Rai Brothers.

(22) After hearing learned counsel for the parties, we are of the considered opinion that a finding of fact has been recorded by the learned Trial Court as well as the learned Single Judge about the jointress of the property itemized at 'E' which cannot be shaken only because of the fact that it has been wrongly mentioned in the grounds of appeal not to be joint, as stated by the counsel for the appellants.

(23) No other point has been raised.

(24) Before parting, it is also pertinent to mention that an application bearing C.M. No.1844-LPA of 2013 has been filed in LPA No.91 of 1984 for bringing on record the judgment dated 27.09.1983 as additional evidence. However, in view of our finding recorded in respect of the legal rights of Bhagwan Devi in terms of the Act of 1937 and the Act of 1956, supported by various judgment of the Apex Court, we do not find any reason to allow this application at this stage. Thus, the said application is dismissed.

(25) In view of the aforesaid discussion, all the three appeals are hereby allowed and the order of the learned Single Judge is set aside.

M. Jain