

# ALLAHABAD HIGH COURT

Jagarnath

Vs.

Dy. Director, Consolidation

Civil Misc. Writ No. 1303 of 1972

(M.N. Shukla, J.)

11.05.1976

## ORDER

**M.N. Shukla, J.**

1. The petitioners have prayed by means of this Writ Petition for a writ of *certiorari* to quash the orders dated 13-3-1970 and 27-7-1971 passed by the Settlement Officer, Consolidation and the Deputy Director of Consolidation respectively in the appeal and the revision preferred by the petitioners in consolidation proceedings. The only question for decision in this writ petition is:-

"What is the nature of the rights acquired by a widow who enters into possession over a property of her deceased husband in which she had a life interest provided she matures her right by remaining in possession for the statutory period ?"

2. The petitioners are collaterals of Deo Narain, Smt. Dulari, respondent No. 5, is the widow of Deo Narain and respondents Nos. 6, 7 and 8 namely, Tirathraj, Brahmdeo and Smt. Subhagi are the donees from her. Deo Narain died issueless in 1925 as a member of a joint Hindu family of which the petitioners or their predecessors-in-interest were members and Smt. Dulari was only entitled to maintenance. After the death of Deo Narain the name of Smt. Dulari came to be recorded in the Khewat as Sirholder over 2/3rd share of Deo Narain. She, however gifted her 2/3rd share in the land in dispute to respondents Nos. 6 to 9 by means of a registered gift deed dated 1-11-1960. When the consolidation proceedings started in the village in or about the year 1969 the donees filed objections under Section 9 of the U. P. Consolidation of Holdings Act praying

that their names should be mutated in place of Smt. Dulari on the basis of the said gift deed. The petitioners objected to the claim of the aforesaid respondents and contended, inter alia, that since Deo Narain died issueless as a member of a joint Hindu family Smt. Dulari was only recorded in the revenue papers merely for consolidation, though she was not actually possessed of the land in dispute and her rights if any had extinguished both under Section 180 of the U. P. Tenancy Act and Section 210 of the U. P. Zamindari Abolition and Land Reforms Act, that the donees (respondent Nos. 6 to 9) did not obtain possession from Smt. Dulari and were not entitled to mutation of their names in her place by virtue of the gift deed dated 1-11-1960.

3. The Consolidation Officer found that Smt. Dulari had only 2/9th share in the six plots namely 1456, 1478, 1496, 1537, 782 and 269 and that Smt. Dulari had no rights in plot No. 776. With regard to the remaining plots he held that Smt. Dulari had 2/3rd share according to the Khewat and she had a right of making a gift of the land in question. At the very outset the learned counsel for the respondents has conceded before me that he does not press his case with regard to this plot nor with regard to the six plots mentioned before. The learned counsel for the petitioners has also urged that no appeal was filed by respondents Nos. 6 to 9 with regard to the aforesaid six plots or plot No. 776, still the Settlement Officer, Consolidation has maintained the finding of the Consolidation Officer with regard to plot No. 776 and has held Suit. Dulari to be entitled to 2/3rd share instead of 2/9th share in the six plots mentioned earlier. The Deputy Director of consolidation has affirmed this finding and, therefore, both the orders must be modified to that extent. In other respects, the Settlement Officer, Consolidation has affirmed the order of the Consolidation Officer and the same was also upheld by the Deputy Director of Consolidation. The ultimate findings recorded by the Deputy Director of Consolidation were that Smt. Dulari's succession to the tenancy of Deo Narain was in an independent capacity and she had become an independent tenure holder having all the rights of a Bhumidhar. It is these findings which have been strongly challenged before me and the petitioners have contended that Smt. Dulari had only a life interest in the 2/3rd share of the land which originally belonged to Deo Narain and as such she had no right to make a gift of the property to the donees who had therefore, acquired no rights and she should at best be deemed to be only a joint tenant along with the petitioners who have been recorded after

the abolition of Zamindari as co-Bhumidhars and consequently her share could be only 1/15th.

4. The concurrent findings recorded by the Consolidation authorities are that Smt. Dulari's name was entered in the Khewat over 2/3rd share after the death of Deo Narain and she continued to be in possession of that land continuously after the death of Deo Narain, which occurred. in 1925, until she made a gift of the property on 1-11-1960 in favor of respondents Nos. 6 to 9. It was held that she had perfected her rights by adverse possession, having remained in possession of the land for over 40 years and, therefore, she had become an absolute owner of the property and was competent to execute a gift of the same. It was also held that she did not take the property as an heir of Deo Narain and, therefore, her status was not that of a limited owner and she would succeed to 2/3rd share of Deo Narain and not merely 1/15th share as a joint tenant along with the other 14 joint tenants namely, the petitioners.

5. The question as to the nature of legal rights which accrue to a widow who enters into possession of the share of her husband's property after the death and remains in possession for the statutory period and thereby matures her rights had been the subject-matter of a series of judicial decisions from which I shall Endeavour to deduce a few general principles on which in my opinion a consensus appears to have been reached. The leading case on this point is a decision of the Privy Council in *Sham Koer v. Dah Koer*<sup>1</sup> which laid down the dictum that a widow is only entitled to maintenance out of the estate and her possession thereof or in part thereof would be adverse to the person who is in law entitled to it, unless it would be shown that the possession was the result of an arrangement between him and the widow. The following observations of the Judicial Committee shall be applicable to the present case:-

"Assuming that Bhau Nath was a member of an undivided Hindu family governed by the Mitakshara law, as the Lower Court found and the High Court assumed, neither his widow nor his sons' widow would be entitled to anything more than maintenance out of his estate. Their possession therefore of the three villages in question would be adverse to the reversionary heirs, unless it was the result of an arrangement with them. If the possession was adverse the rights of the reversionary heirs would of course be barred at the expiration of 12 years from the date of Bhau Nath

Singh's death or the date of the widow's taking possession, which seems to have been at or shortly after his death."

Thus, the basic principle enunciated by the Privy Council was that unless it was established that the widow either entered into possession as an heir or as a result of an agreement with the collaterals or other claimants, her possession would be deemed to be adverse and on the completion of the statutory period she would mature her rights.

6. This cardinal principle, however, gave rise to many other offshoots which later arose for decision in different High Courts. One such controversy which arose as a consequence of this basic principle was what would be the effect of the conduct of the widow, her pleadings and her action. In other words, it was mooted as to whether it was essential for the widow to assert her absolute rights and if it was necessary to do so what would be the effect, if she conceded that she had entered into possession as an heir and what legal inference could be drawn if she was merely silent and did not assert the source of her right in that manner. In a five Judge Full Bench decision of the Hyderabad High Court in *AIR Gunderao v. Venkamma*<sup>2</sup> the majority view was that where a Hindu widow not entitled to inherit an estate enters into possession of that estate and remains in possession for over the statutory period, the nature of her estate (a) where she asserts a title as an absolute owner from the very beginning of her possession will be an absolute estate, and (b) where she does not assert her absolute title, it does not become her absolute property but becomes an accretion to the estate of the last male owner. The minority view expressed by the other two Judges in the case was that the nature of the estate taken by a Hindu widow not entitled to inherit the estate is an absolute estate irrespective of the fact whether she asserts her title as an absolute owner or not. In another Full Bench decision of the Andhra Pradesh High Court in *M. Styannarayana v. J. Veeraraju*<sup>3</sup> the majority view of the Full Bench of the Hyderabad High Court expressed in Gunderao's case (supra) was dissented from and the minority view expressed in that case was adopted. It was ruled that in the case that where a Hindu woman not entitled to inherit an estate asserts her title as absolute owner, her title to the property is absolute. But where she does not assert her absolute title still the nature of the title is the same, in the absence of evidence that she stepped into possession of the property in her right as heir of the last male-holder or under an

arrangement or an agreement. The same view found favor with the Bombay High Court in *Sampat v. Surajmal*.<sup>4</sup> Mudholkar J., observed in that case:-

"Where a widow is only entitled to maintenance out of the estate, her possession thereof or of any part thereof would be adverse to the person who is in law entitled to it unless, it could be shown that that possession was the result of an arrangement between him and the widow."

The privy Council decision in Sham Koer's case ((1902) ILR 29 Cal 664) (PC) (supra) was followed and it was held:-

"What a Hindu widow acquires by adverse possession becomes her Stridhan and does not become an accretion to her husband's estate unless it is shown that she took adverse possession of the property representing her husband's estate."

The preponderance of authorities appears to be in favor of this later view. In a Division Bench decision of the Patna High Court in *Tilakdhari Rai v. Parma Rai*<sup>5</sup> the proposition was stated as follows:-

"If a widow enters into possession of a property as a legal heir, any claim on the basis of her adverse possession enures to the benefit of the widow's estate, but where she enters into possession without being an heir or having any right, her possession is in her absolute right and she acquires absolute title by adverse possession, unless, at the time she enters into possession, or even subsequently, she makes any statement making it perfectly clear that she is taking possession of the property as her widow's estate or she enters into possession under some arrangement with the rightful owner. In other words, the presumption in such a case is that the possession of the widow must be taken to be in her absolute right, unless it is established that she was in possession under some arrangement or there was anything to show that she entered into possession with a clear indication of her possession being as the possession of a widow's estate."

The bed rock of all these decisions was the leading case of Sham Koer (supra) decided by the Judicial Committee of the Privy Council.

7. This vexed question of law, however, seems to be finally resolved by a decision of the Supreme Court in *Mst. Kirpal Kuar v. Bachan Singh*.<sup>6</sup> There a suit had been filed by some of the collaterals of one Ram Ditta against Harnam Kaur, his widow, Kirpal Kaur (daughter of Harnam Kaur and donee from her) and Satwant Singh, son of Kripal Kaur and transferee by a subsequent mortgage of Harnam Kaur, for a declaration that the gift of the lands made by Harnam Kaur to Kirpal Kaur and the mortgage of 1936 were illegal and were not binding on the collaterals who were the then reversionary heirs of Ram Ditta. The finding of fact recorded in the case was that Harnam Kaur took possession of the lands on the death of her husband Ram Ditta in 1920 and obtained mutation on the settlement record showing her as the owner of the lands in place of Ram Ditta. She made a gift of the lands to her daughter Kirpal Kaur. In these circumstances the suit was filed by collaterals of Ram Ditta and in the amended written statement both the ladies had raised the plea of adverse possession. On these findings the law laid down by the Supreme Court was to the following effect:

1. On the case as made and the evidence before the court Harnam Kaur could never have been the heir of Ram Ditta. That being so, it was impossible for her to have acquired by adverse possession title to property as his heir or to make such property good to his estate.
2. As there was no evidence of any arrangement with the respondents collaterals under which Harnam Kaur could be said to have taken possession of the lands, her possession must be taken to have been adverse to the collaterals.
3. Admittedly such possession commenced in 1920 on the death of Ram Ditta and had continued ever since, hence on the date of the mortgage and the gift Harnam Kaur had acquired title to the lands by adverse possession and the respondents' claim must fail.

8. Thus, the principles implicit in the authorities discussed above lead to some well-defined conclusions which may be stated as follows:-

The nature of the rights which a Hindu widow would acquire with respect to a property over which she enters into possession otherwise than as an heir of her husband would depend on a number of factors:

(a) Where she claims the property as the heir of her husband expressly or impliedly, if there is evidence to prove that she based her claim as an heir of her husband, she would only be entitled to a widow's estate and liable to make the property of her husband good to her estate.

(b) Where the widow asserts that she takes the property as an absolute owner and completes her possession for the statutory period, she would acquire full rights by adverse possession and shall not be a limited owner.

(c) Where she asserts nothing, there also she would acquire full rights unless it is established by the respondents that she had entered into possession as an heir or that she had taken possession of the property as a result of an arrangement with the collaterals or other claimants opposing her title.

(d) Her subsequent conduct revealed in such things, as for instance, the recitals made in the documents of transfer would be consistent with her assertion as an absolute owner and would entitle her to full rights as such.

9. The above principles of law may now be applied to the facts of the instant case. It has been found by the Consolidation authorities that Smt. Dulari was recorded as a co-Bhumidhar in the basic year along with the petitioners. In the Khewat of 1359 Fasli she is recorded as co-proprietor of 2/3rd share with the petitioners. In the Khewat of 1333 Fasli she was recorded as Sir-holder of Khatas Nos. 530 and 534 i.e. of 2/3rd share. After the abolition of Zamindari she claimed to be recorded as co-Bhumidhar over the land in dispute. The Consolidation authorities have concurrently found that she had been in possession over the property since the death of her husband in 1925 i.e. for over 40 years till the year 1960 when she delivered possession to the donees. The learned counsel for the petitioners has not been able to point out anything either in the impugned order or in the record of the present case which may lead to the conclusion that Smt. Dulari ever claimed as an heir of her husband Deo Narain. On the other hand, the entries in the Khewats for the years are throughout as proprietor of 2/3rd share. Her subsequent conduct is also consistent only with her claim of independent rights. It is clear from the orders of the Consolidation authorities that the recitals in the gift deed executed by Smt. Dulari on 1-11-1960 were that she was making a gift of her entire 2/3rd share to Tirathraj and others. In fact, the Settlement Officer, Consolidation has observed in his order-

"Entries in Khatauni and Khewat in favor of Mst. Dulari are long standing and they have continued till the basic year. These entries cannot be expunged without strong convincing evidence to the contrary. Share of Mst. Dulari to the extent of 2/3rd is not denied by the appellant Jagarnath and others, rather at the time of argument, the learned counsel of the appellant told that there was no dispute regarding 2/3rd share of Mst. Dulari but the dispute was only that she had no right to transfer the land in dispute being widow of Deo Narain."

There is absolutely no evidence in the case to show that Smt. Dulari came into possession as a result of any agreement or arrangement with the collaterals. In these circumstances the conclusion becomes irresistible that Smt. Dulari became a co-tenure holder with the petitioners and succeeded to the tenancy of Deo Narain in an independent capacity. Having matured her rights by continuous adverse possession for over 12 years she acquired rights as an absolute owner to the property with regard to 2/3rd share of Deo Narain. The corollary of her absolute rights in the property is that she is not a joint tenant but a tenant in common with the petitioners who are co-tenure holders. In other words her share would be determined per capita and not per stirpes. Smt. Dulari being an absolute owner of the property, was fully competent to make a gift of the same to respondents Nos. 6 to 9 and the donees acquired a good title from her.

10. The effect of the enactment of the U. P. Zamindari Abolition and Land Reforms Act on the rights of Smt. Dulari is that she, being recorded a Sir holder in her own rights on the date of vesting, became a Bhumidhar under the provisions of Section 18 of the Act of the entire 2/3rd share and the other petitioners who are recorded as co-tenure holders along with her became co-Bhumidhars. Even though Smt. Dulari acquired full proprietary rights over her 2/3rd share prior to Zamindari Abolition the legal position which now obtains after the enforcement of the said Act is that her rights are transformed into Bhumidhari rights in accordance with the class of tenure holders created by the new Act. She may, therefore, be said to have succeeded in the tenancy rights of Deo Narain relating to 2/3rd share of the property. The learned counsel for the petitioners urged that it is only the tenancy rights which could be acquired by estoppel and acquiescence but it would be an erroneous proposition of law to

state that even the proprietary rights can be so acquired by adverse possession. I find no substance in this contention. Proprietary rights can certainly be acquired in this manner by adverse possession but the erstwhile proprietary rights have undergone a metamorphosis by the operation of law. The crucial point is as to whether such rights are absolute or limited in their character and it is beyond doubt that these rights in view of what has been said earlier are absolute rights. It cannot be disputed that under the U. P. Zamindari Abolition and Land Reforms Act a Bhumidhar is competent to transfer his Bhumidhari land.

11. It was contended on behalf of the petitioners that the property being ancestral it was coparcenery in the hands of the petitioners and Smt. Dulari and the share was undefined and consequently Smt. Dulari could not be held to be an independent tenant of 2/3rd share. In the first place, no female can be a coparcener although a female can be a member of a joint Hindu family. See Article 214 of Mulla's 'Hindu Law', Fourteenth Edition. Secondly, the Khewat entries clearly specify 2/3rd share of Smt. Dulari in different years and, therefore, there was, a disruption in the jointness of the estate. Even where there is no proof of actual partition of the joint estate at any time, there can be a partition of the joint property without an actual division of the property by metes and bounds. According to the Mitakshara law, by which the parties are governed, partition consists in defining the shares of the coparceners in the joint property, and a physical division of the property is not necessary. Once the shares are defined, there is a severance of the joint status. See *Malik Harkishan Singh v. Malik Partap Singh*,<sup>7</sup> In these circumstances the objection that the shares remained undefined and, therefore, 2/3rd share could not be predicated of Smt. Dulari is untenable. The ultimate result of the acquisition of her rights by Smt. Dulari in her independent capacity was that even what might have originally been a joint tenancy was transformed into a tenancy in common. There is no manner of doubt that Smt. Dulari who is recorded as a Bhumidhar with respect to 2/3rd share has an absolute interest in the same and could alienate it by means of a gift and, therefore, the donees impleaded in this writ petition as respondents Nos. 6 to 9 acquired a good title from the donor. It was held by the Supreme Court in *Ramji Dixit v. Bhirgunath*<sup>8</sup> that the interest of a female Bhumidhar was absolute and not merely a life interest. In this view of the matter the Deputy Director of Consolidation rightly decided the revision and the impugned orders passed in appeal and the revision by the Settlement Officer

of Consolidation and Deputy Director of Consolidation must be sustained and accepted except on the following points:-

So far as the six plots namely Nos. 1456, 1478, 1496, 1437, 782 and 269 are concerned the Consolidation Officer had held that Smt. Dulari had 2/9th share throughout and accordingly the consolidation Officer determined the share of dances also in those plots as 2/9th. Neither the donees nor Smt. Dulari preferred any appeal with regard to those plots. Still, however, the Settlement Officer of consolidation in the operative portion of his order wrongly made the assumption that Smt. Dulari had 2/3rd share in those plots and on that basis defined the share of donees. Against the order of the Settlement Officer, Consolidation two revisions were filed including the one preferred by the present petitioners. The Deputy Director of Consolidation dismissed both the revisions and confirmed the order of the Settlement Officer, Consolidation. Hence, the revisional order also suffers from the same error so far as the share of Smt. Dulari and the consequent shares of her observed in the earlier part of my order, it has been unequivocally admitted before me by Sri R. N. Pandey, learned counsel for respondents Nos. 5 to 9 that his clients had no rights in plot No. 776. this plot in the chak of the petitioners and had ordered expunction of the same of Smt. Dulari with regard to the same. The Settlement Officer, Consolidation committed the illegality of assuming that Smt. Dulari had 2/3rd share in all the Khewats including this plot. The same erroneous finding was affirmed by the Deputy Director of Consolidation which must be set aside.

12-13. In the result this writ petition partly succeeds and the orders passed by the Settlement Officer, Consolidation and the Deputy Director of Consolidation are quashed to this extent that in the six plots enumerated above the share of Smt. Dulari and her transferees would be 2/9th instead of 2/3rd and the respondents Nos. 5 to 9 shall have no right in plot No. 776, Excepting the above modifications the impugned orders shall not be disturbed. In the circumstances of the case the parties are directed to bear their own costs.

Petition partly allowed.

Cases Referred.

1. (1902) ILR 29 Cal 664 (PC)
2. 1955 Hyd 3
3. AIR 1959 And Pra 79
4. AIR 1959 Bom 504
5. AIR 1963 Pat 356
6. AIR 1958 SC 199
7. 1938 All LJ 763
8. AIR 1968 SC 1058