

IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT
JODHPUR.

JUDGMENT

Inder Chand through vs. Smt. Jethi & ors.
his legal representatives

S.B.Civil Second Appeal No.31/1982 against the judgment and decree dated 24.11.1981 passed by District Judge, Bikaner in Civil appeal(Decree) No.18/1971.

Date of Judgment: February 27, 2006.

PRESENT
HON'BLE MR. PRAKASH TATIA,J.

Mr. Manish Shishodia for the appellants.
Mr. L.M. Lodha & Mr. M.K. Dudy, for the respondents.

REPORTABLE

BY THE COURT:

Arguments heard.

This appeal is arising out of the judgment and decree passed by the trial court dated 20.8.1971 and upheld by the first appellate court by the judgment and decree dated 24.11.1981. The trial court decreed the suit of the plaintiff on different grounds than the grounds on which the first appellate court decreed the suit. The first appellate court also declared the share of the plaintiff as 1/3 in the suit property instead of 4/9 as declared by the trial court.

Brief facts of the case are that the property in dispute, situated in the city of Bikaner, was belonging to one Ganga Das and Mool Chand.

Ganga Das had 2/3 share whereas Mool Chand had 1/3 share in the suit property. Ganga Das had four sons, Moti Lal, Raman Lal, Shanker Lal and Shiv Ratan. Shiv Ratan died in the year 1931 leaving behind his widow Smt. Jethi, who is the plaintiff. Moti Lal and Raman Lal separated from Ganga Das in the year 1937. Shanker Lal s/o Ganga Das and Smt. Jethi widow of predeceased son of Ganga Das, were living together in the house in dispute. As per the old law, according to Ganga Das, Smt. Jethi plaintiff had only right of maintenance. Ganga Das in his life time, executed a *Tamliknama* on 18.1.1955 in favour of his son Shanker Lal and gave his 2/3 share in the property in dispute to said Shanker Lal. The copy of the *Tamliknama* is placed on record as Ex.A.5. This document is not in dispute. Ganga Das died in the year 1961 and on 18.10.1966 said Shanker Lal sold the entire house to the defendant-appellant Laxmi Chand by registered sale-deed. Plaintiff Smt. Jethi, daughter-in-law of deceased Ganga Das filed this present suit for pre-emption on the ground that she is co-sharer in the house in dispute, therefore, has prior right to purchase the share in house which has been sold by said Shanker Lal to Laxmi Chand under the Rajasthan Preemption Act.

The suit was contested by only the purchaser present-appellant defendant Laxmi Chand on various grounds including the ground of collusion between the plaintiff and other defendants, namely, with

Shanker Lal and Raman Lal. The case of the plaintiff Smt.Jethi was that Ganga Das had 2/3 share and by devolution of interest upon Ganga Das after the death of Mool Chand, Ganga Das became the owner of the entire house. The plaintiff pleaded that she being heir of Ganga Das being widow of Ganga Das's son Shiv Ratan, she got 1/3 share in the entire house after the death of Ganga Das as in the strip of her husband she was the only successor to the share of her husband. The defendant's contention is that the entire house was belonging to Shanker Lal and the plaintiff is not co-sharer in the suit property. Therefore, the plaintiff has no right to claim the property by pre-emption. The defendant-appellant submitted that in fact the plaintiff separated herself from the family of Ganga Das and the property was given by Ganga Das to Shanker Lal by registered dated 18.1.1955 which was registered on 20.1.1955. The possession *Tamliknama* was given to Shanker Lal and he started living in the house as absolute owner of the house since then. The defendant-appellant also denied that there was share of Mool Chand in the property and it devolved upon Ganga Das and specifically pleaded that Mool Chand has no share in the suit property. It is also pleaded that Shanker Lal became owner of the property by adverse possession, therefore, also there arises no question of Mool Chand's share in the property at the time of alienation by said Shanker Lal and it could not have inherited even by Ganga Das. The defendant purchaser submitted

that Ganga Das was not legal heir or successor of Mool Chand. However, it will be worthwhile to mention here that the defendant did not disclose any other heir of Mool Chand in the written statement.

Several issues were framed but for the purpose of deciding this appeal it will be sufficient to notice that the trial court while deciding issue no.11, held that the defendant no.3-appellant-purchaser failed to prove execution of *Tamliknama* and, therefore, failed to prove that Shanker Lal got 2/3 share of Ganga Das in the suit property. The trial court also held that the defendant failed to prove that Shanker Lal became owner of the property by adverse possession obviously of the share of Mool Chand. The trial court also held that the plaintiff has inherited 4/9 share in the house of Ganga Das and, therefore, she is co-sharer in the suit property and, therefore, she is entitled to maintain the suit for pre-emption. The trial court also held that Mool Chand died in the year 1959 and not before coming into force of the Hindu Succession Act, 1956. And after the death of Mool Chand in the year 1959, the share of Mool Chand devolved upon Ganga Das. With these findings, the trial court decreed the suit of the plaintiff and directed the plaintiff to deposit Rs.4500/- in the court, upon which she will be entitled to conveyance in her favour in the house property which was sold to the appellant-defendant.

The judgment and decree dated 21.8.1971 of the trial court was

challenged by the defendant-purchaser present appellant. The first appellate court in its judgment dated 24.11.1981 held that the plaintiff, who was having right of maintenance from deceased Ganga Das, became owner of the property by virtue of Section 14 of the Hindu Succession Act and thereby became co-sharer in the property which was sold to appellant by Shanker Lal. The first appellate court even after considering one application (Ex.A6) submitted for obtaining the succession certificate in the properties of Mool Chand wherein pedigree of Mool Chand as well as Ganga Das was given, held that after the death of Mool Chand, Ganga Das alone succeeded to the share of Mool Chand in the property. All other grounds of the appellant-defendant were rejected by the first appellate court. The first appellate court in view of the findings recorded by it, different than as recorded by the trial court about the share, declared the plaintiff as owner of 1/3 share and held that the plaintiff is entitled to have conveyance in her favour for remaining 2/3 share from the defendant on payment of Rs.5334/-. Both the courts below also granted decree for possession of the suit property.

Aggrieved against the judgment and decree of the trial court dated 21.8.1971 and dismissal of the appeal by the appellate court on 24.11.1981, the defendant-purchaser of the property has preferred this second appeal.

Following substantial questions of law were framed by this Court

while admitting the appeal on 8.3.1982:-

"(i) Whether the first appellate court was right in holding that the share of Ganga Das could not be gifted by him to Shanker Lal in view of the fact that Smt. Jethi was predeceased son's wife of Ganga Das and had a right of maintenance ?

(ii) Whether the right of Smt. Jethi as a maintenance holder would invalidate the gift made by Gangadas in favour of Shanker Lal ?

(iii) Whether the right of preemption in respect of a part of the property sold and on payment of a part of the price could have been recognised by the court.

(iv) Whether the first appellate court was right in holding that Smt. Jethi being a maintenance holder, became the full owner of the property of Ganga Das to the extent of 1/3rd share under Section 14 of the Hindu Succession Act ?

The arguments at length were heard and thereafter this Court found that one more question arises in the appeal which was also framed by this Court on 24.2.2006, which is as under:-

"Whether the finding of the court that Ganga Das is sole heir of the deceased Mool Chand inheritance his 1/3 share in the house is bad in law, is based on no evidence."

According to the learned counsel for the appellant, both the courts below committed serious error of law in holding that the plaintiff possessed the property in dispute in lieu of maintenance and became absolute owner of the property by virtue of Section 14 of the Hindu Succession Act, 1956. It is vehemently submitted that mere having right of maintenance itself is not sufficient for fructifying the title in the property. Not only this even right of maintenance coupled with mere possession without there being intention to reserve the property that the female heir's limited right cannot be converted into full ownership right. The learned counsel for the appellant heavily relied upon the judgment of the Hon'ble Apex Court delivered in the case of Ram Vishal (Dead) By LRs. and others vs. Jagan Nath and another ((2004) 9 SCC 302) wherein Hon'ble the Apex Court held that said female must not only be possessed of the property but a pre-existing right is a sine qua non for conferment of a full ownership under Sec. 14 of the Act of 1956. A mere right of maintenance without actual acquisition in any manner, not sufficient to attract Sec.14. Hon'ble Apex Court also held that in absence of anything to show that the widow had got possession of share in the joint family property in lieu of maintenance or in arrears of maintenance or that there was a partition of the property and that in such partition, she had been given the property, the widow had no right at all which could fructify into full ownership under Section 14.

According to the learned counsel for the appellant, in present case, the plaintiff did not appear in the witness-box initially to prove her case and she has not proved that the property was given to her in lieu of maintenance nor it was the case pleaded at all, therefore, the plaintiff has not become the owner of the property even by the help of Section 14 of the Act of 1956. It is also submitted that in fact the suit was filed collusively which is apparent from the statement of the plaintiff where she clearly stated that none else than the seller Shanker Lal himself was looking after the interest of the plaintiff and was taking care for the present suit also. According to the learned counsel for the appellant, Shanker Lal became owner of the property by adverse possession of the share of Mool Chand and got the property from Ganga Das by *Tamliknama* in the year 1955. Said *Tamliknama* was never challenged by plaintiff Smt.Jethi at any point of time, therefore, in all probabilities, it can be inferred that Shanker Lal was absolute owner of the property and he sold the property by exercising his right of ownership.

In the alternate, it is submitted that the plaintiff herself failed to prove her case so far as devolution of interest of the property of Mool Chand upon Ganga Das. For that purpose, there is no evidence, even for the name shake. Therefore, it is a case of no evidence. The net result is that 2/3 property was belonging to Ganga Das and neither the property

nor any share in the property was given to the plaintiff in lieu of maintenance, therefore, she could not have become the owner of the property even with the help of Section 14 of the Act of 1956 as the said provisions cannot be invoked where the plaintiff is not fulfilling the requirements for becoming the owner of the property on the ground of claim of maintenance. In view of the above, the plaintiff cannot claim any share so far as 2/3 share of deceased Ganga Das is concerned in the property which was given out to Shanker Lal. So far as remaining 1/3 share which the plaintiff claimed was of Mool Chand and was denied by the defendant, there is no evidence that Ganga Das was the only heir of Mool Chand and succeeded to the share of Mool Chand.

The learned counsel for the appellant also submitted that the plaintiff sought partial pre-emption only which is not permissible under the law. For this the learned counsel for the appellant vehemently submitted that in the plaint the plaintiff pleaded that she is entitled to pre-empt the sale to the extent of the share only and she did not claim that after payment of share of other co-sharer to the seller, her name may be substituted in the sale-deed executed by Shanker Lal in favour of purchaser- Laxmi Chand.

The learned counsel for the respondent-plaintiff vehemently submitted that though the substantial questions of law are framed in the present appeal but in fact they do not arise in this appeal in view of the

plain and simple facts of the case. According to the learned counsel for the respondent-plaintiff, the defendant-appellant cannot disown *Tamliknama* as that is the alleged title deed of appellant's predecessor from whom he purchased the property. In the *Tamliknama*, Ganga Das predecessor in title, unequivocally stated that he had 2/3 share in the suit property and not more. He repeatedly mentioned this fact in the *Tamliknama* dated 18.1.1955 and clearly mentioned that he is alienating/transferring the property in favour of Shanker Lal to the extent of his share and which is 2/3 share in the entire property. Admittedly, Mool Chand was alive in the year 1955 and died in the year 1959 and he had 1/3 share in the suit property. Therefore, on the date when *Tamliknama* was executed even entire property which could have been passed on to Shanker Lal, then that was only to the extent of 2/3 share in the property and not more. So far as share of Mool Chand is concerned, that also stands fully proved from various cogent reasons given by the first appellate court in detail and finds support from the judicial proceedings in view of the fact that the suit for partition of the properties was filed by Mool Chand (C.O. No.81/1944), wherein preliminary decree was passed declaring Mool Chand's share as 1/3. It appears that said decree was not carried forward for obtaining the final decree for partition of the suit property. That fact only proves that partition was claimed but the property was never partitioned. In this

property Ganga Das had 2/3 share on 18.1.1955 is admitted case of the Ganga Das, therefore, persons claiming property through Ganga Das cannot dispute this fact and fact that Ganga Das was not owner of 1/3 share in the property in dispute. It has been held by the courts below that Mool Chand died after 1956, i.e. After coming into force the Hindu Succession Act, 1956. Devolution of property of Mool Chand could be only after 1956 and in accordance with the provisions of Hindu Succession Act, 1956 only. But according to the learned counsel for the respondent-plaintiff, that fact only discloses that Mool Chand had 1/3 share in the suit property and Ganga Das admitted his share to the extent of 2/3 as back as on 18.1.1955. According to the learned counsel for the respondent, acquisition of 1/3 share of Mool Chand by Ganga Das can only be in the year 1959 because Mool Chand died in the year 1959 and that is subsequent to Tamliknama dated 18.1.1955 otherwise Ganga Das would have written the fact in the Tamliknama itself that he was owner of 2/3 share in the suit property and became owner of 1/3 share of Mool Chand by virtue of otherwise than devolution of the property due to death of Mool Chand. Ganga Das could also have claimed ownership by adverse possession in the suit property for the share of Mool Chand. In view of the above even if the plaintiff did not appear in the witness-box to prove acquisition of 1/3 share of Mool Chand by Ganga Dass even then sufficient evidence is available on record which

proves beyond doubt that Ganga Das acquired 1/3 share in the suit property as successor of Mool Chand after 18.1.1955 and that share has could not have not been transferred to Shanker Lal by Ganga Das on 18.1.1955. Ganga Das died in the year 1961 intestate, therefore, the plaintiff being daughter-in-law, widow of predeceased son of Ganga Das also got the share in the property which devolved upon Ganga Das before his death and that is share of Mool Chand in the property.

The learned counsel for the respondent-plaintiff tried to distinguish the judgment relied upon by the learned counsel for the appellant and empathetically submitted that the judgment delivered in the case of Ram Vishal vs. Jagan Nath ((2004) 9 SCC 302) has no application to the facts of this case and cannot help the appellant-defendant purchaser in view of the fact that firstly, the plaintiff admittedly had a right of maintenance. The right of maintenance of the plaintiff has been admitted by Ganga Das himself in the Tamliknama . Ganga Das's successor and even transferee of Ganga Das's properties, cannot claim such right in view of admission of Ganga Das *in Tamliknama*. The right of maintenance culminates into the full ownership right even when property is disposed of and reaches in the hands of the transferor. In this case, even after execution of Tamliknama dated 18.1.1955, the property remained in the hands of none else than the family members of the plaintiff and deceased Ganga

Das himself and it is no body's case that any other provision was made for the maintenance of the plaintiff. The learned counsel for the respondents also submitted that the purpose for mentioning of right of maintenance in the Tamliknama can be construed to mean that the property was given to one of the family members but with reserving the plaintiff's right to get maintenance. Therefore, she fulfills all conditions of Section 14 as required in the light of the decision of the Hon'ble Apex Court in the case of Ram Vishal(supra). Otherwise also, in case even if it is held that the plaintiff was not fulfilling all the requirements of acquiring absolute ownership in the property of Ganga Das, being maintenance holder, even then the plaintiff's suit for preemption on the basis of the succeeding to share of Mool Chand, she became co-owner of the property with Shanker Lal and is entitled to seek preemption.

I considered the submissions of the learned counsel for the parties and perused the record and the judgments cited by the learned counsel for the parties.

In case where pre-emption is sought on the basis of being co-sharer in the suit property, the plaintiff is required to prove his/her share in the property. If there is share, irrespective of its extent or quantum, the plaintiff becomes entitled to purchase the property provided case is made out under Section 11 of the Rajasthan Pre-emption Act, 1966, after paying the consideration to the extent of

share which has been sold to the purchaser by other co-sharer. Therefore, there is core question which goes to the root of the matter is whether the plaintiff had any share in the property as on the date 18.10.1966 when the property was sold by the plaintiff's alleged co-sharer ?

To find out whether the plaintiff had any share in the property sold by Shanker Lal, one of the co-descendant of Ganga Das, the plea of the plaintiff is that the plaintiff and defendants no.1 and 2's ancestor Ganga Das had 2/3 share in house in dispute and one Mool Chand had 1/3 share. Mool Chand died on 31.7.1959 at Bombay and Mool Chand's 1/3 share devolved upon Ganga Das. This is not disputed that Ganga Das had four sons, Shiv Ratan, Moti Lal, Raman Lal and Shanker Lal. Ganga Das's son Shiv Ratan died in the year 1931 and the plaintiff is widow of Ganga Da's deceased son Shiv Ratan. Moti Lal and Raman Lal separated from Ganga Das in the year 1935. Therefore, according to plaintiff, after the death of Ganga Das on 20.1.1961, entire house devolved upon plaintiff, being widow of predeceased son of Ganga Das and upon two sons of Ganga Das, Raman Lal and Shanker Lal each having 1/3 share. It will be relevant to mention here that Ganga Das in his life time executed a gift deed *Tamliknama* dated 18.1.1955 and gifted his property to Shanker Lal.

Dispute arose when Ganga Das's son Shanker Lal sold the property

in dispute on 18.10.1966 to appellant-defendant No.3 Laxmi Chand on assumption that he (Shanker Lal) became sole owner of Ganga Das's property by *Tamliknama* (gift deed) dated 18.1.1955. The plaintiff when came to know about the said sale dated 18.10.1966 by Shanker Lal to appellant Laxmi Chand, she filed present suit claiming that her share in the suit property be declared to be 1/3 and she has right to purchase the property under her right of pre-emption and to get her name substituted in the sale-deed as transferee in place of original transferee appellant Laxmi Chand. Said is the relief which can be granted in suit on the basis of right of pre-emption under the Rajasthan Pre-emption Act, 1966.

The suit was contested only by defendant no.3 purchaser from the said Shanker Lal defendant no.2. Ganga Das's other son Raman Lal though was defendant in the suit, did not contest the suit but appeared as witness of the plaintiff. It was pleaded by the defendant no.3 appellant in his written statement that entire house property was of Ganga Das alone and he gifted it to his son Shanker Lal defendant no.2. Vaguely it has also been pleaded that Mool Chand had no share in the suit property and if said Mool Chand had any share in the suit property, defendant Shanker Lal became owner of share of Mool Chand by adverse possession.

it will be proper to look into the sale-deed dated 18.10.1966

executed by Shanker Lal s/o deceased Ganga Das in favour of the present appellant-defendant Indra Chand. The present appellant being successor in interest and claiming title through Shanker Lal, therefore, he is bound by the admission made by Shanker Lal in the sale-deed dated 18.10.1966 with respect to the fact how Shanker Lal himself became owner of the property. In the sale-deed dated 18.10.1966, copy of which is available on record, it is clear that Shanker Lal admitted that the property is covered by the *Patta of Samvat Year 1962* and came in the share of Ganga Das by virtue of partition dated 1.3.1937. There is reference of one *Tamliknama* dated 1.3.1937 by which it appears Ganga Das's sons Moti Lal and Raman Lal separated from Ganga Das. (This fact was admitted by Ganga Das in his *Tamliknama dated 18.1.1955 Ex.5*). The property, which was subject matter in the sale-deed dated 18.10.1966 has been described as ancestral property of Shanker Lal. It is also admitted in the said sale-deed dated 18.10.1966 by Shanker Lal that he became owner of the entire house as his father Ganga Das gave the house to him by registered gift deed (*Tamliknama*) dated 18.1.1955. Contrary to stand of defendants about Ganga Das being sole owner of entire home, in the *Tamliknama* dated 18.1.1955 deceased Ganga Das admitted that his share in the suit property is only 2/3 and he (Ganga Das) gave this 2/3 share in the property to his son Shanker Lal. Therefore, in view of the Tamlikname dated 18.1.1955 and the sale-

deed dated 18.10.1966 neither Shanker Lal nor purchaser from him Laxmi Chand appellant can deny that till 18.1.1955 Ganga Das had only 2/3 share in the house in dispute and consequently Shanker Lal got the 2/3 share of Ganga Das (if it is held that Ganga Das was the sole owner of 2/3 share in the said house and the property was not ancestral or even if it was ancestral, no other person had any right or title or share in said 2/3 share claimed by Ganga Das in *Tamliknama* dated 18.1.1955.)

The next important question arises is that whether Smt.Jethi widow of pre-deceased son of Ganga Das had any right, title or interest or share in the 2/3 share of Ganga das in the life time of Ganga Das and as on 18.1.1955, which can effect the alienation by Ganga Das by *Tamliknama* dated 18.1.1955 in favour of Shanker Lal ? The plaintiff's admitted case is that the plaintiff's husband, son of Ganga Das, died on 16.11.1931, therefore, plaintiff's husband's succession opened as per the law prevailing on 16.11.1931. It is not in dispute that as per the old Hindu Law, the plaintiff, being widow of predeceased son of Ganga Das, was only entitled of maintenance and did not get any share even in the ancestral property of her husband. In view of this admitted legal position, it is not material, whether the property in dispute in the Ganga Das's hand was ancestral or not for the purpose of this appeal. The plaintiff, therefore, can succeed only when her said limited right (right of maintenance) fructified in full ownership right as on 18.1.1955.

Answer to this question is also not difficult because of the reason that Hindu Succession Act, 1955 came into force w.e.f. 17.6.1956, i.e. after gift by Ganga Das to Shanker Lal on 18.1.1955. Therefore, Ganga Das had right to deal with the property as per his wishes as owner of the property, hence, gift by Ganga Das in favour of Shanker Lal has not affected because of only right of maintenance of plaintiff Smt. Jethi. It may be different question that gift dated 18.1.1955 may have liability or charge of maintenance of plaintiff Smt. Jethi but depending upon the other facts.

It is submitted that the plaintiff had since right of maintenance and it continued till the Hindu Succession Act, 1956 came into force in the year 1956, therefore, by virtue of Section 14 of the Act of 1956, the plaintiff's right of maintenance fructified in full ownership right. For this the learned counsel for the respondents relied upon the Full Bench decision of the Andra Pradesh High Court delivered in the case of T.A. Lakshmi Narasamba v. T. Sundaramma and other (AIR 1981 A.P. 88) and also tried to distinguish the judgments relied upon by the learned counsel for the appellant wherein it has been held that mere possession or mere right of maintenance without there being any acquisition of property in lieu of maintenance, the right of maintenance cannot become the absolute ownership right.

The Full Bench of the Andra Pradesh High Court considered

several earlier judgments as well as the old Hindu Law and Section 39 of the Transfer of Property Act and held as under:-

“The moral obligation of a father-in-law possessed of separate or self-acquired property to maintain the widowed daughter-in-law ripens into a legal obligation in the hands of persons to whom he has either bequeathed or made a gift of his property.”

and further held :-

“Under the Hindu law there is a moral obligation on the father-in-law to maintain the daughter-in-law and the heirs who inherit the property are liable to maintain the dependants. It is the duty of the Hindu heirs to provide for the bodily and mental or spiritual needs of their immediate and nearer ancestors to relieve them from bodily and mental discomfort and to protect their souls from the consequences of sin. They should maintain the dependants of the persons of property they succeeded. Merely because the property is transferred by gift or by will in favour of the heirs the obligation is not extinct. When there is property in the hands of the heirs belonging to the deceased who had a moral duty to provide maintenance, it becomes a legal duty on the heirs. It makes no difference whether the property is received either by way of succession or by way of gift or will, the principle being common in either case. “

and further held:-

“Even if a donee or devisee is a stranger, the liability to maintain does not cease. The entire background of the Hindu jurisprudence clearly indicates that the head of the family cannot dispose of property in favour of strangers in such a manner as to deprive the dependants of their maintenance. On principles of Section 39 of the T.P.Act the status of a widowed daughter-in-law is equal to that of a widow for the purpose of receiving maintenance and her moral right to receive maintenance alters into a legal right on the demise of her father-in-law.”

and consequently held:-

“Keeping in view the background of the Hindu Society and it existed and also having regard to the fact that there is no difference between a moral obligation and legal obligation in so far as the head of the family is concerned, the only inference that could be drawn is that the property, even if self-acquired, was treated as trust property for maintenance of the family members including the dependants. Therefore the transferees are affected by such charge and they would also constitute as trustees to maintain the dependants when the property is in their hands.”

The Full Bench of the Andra Pradesh High Court in the case of T.A. Lakshmi Narasamba(supra) only laid-down that what is the moral obligation of father-in-law qua the widow daughter-in-law and to what

extent the widow can enforce her right. For this, the earlier judgment relied upon by the learned counsel for the appellant is delivered in the case of *Kankoo v. Pukh Ram and other* (I.L.R. (1962) 12 Raj. 219), wherein the learned Single Judge of this Court held as under:-

“The right of residence and maintenance of a Hindu widow are substantive rights which are attached to property. These rights are enforceable against the transferee if he has notice thereof. These rights can only be defeated if it becomes necessary to sell the property to pay off the husband's debts or to discharge a legal necessity of the joint family. Debts contracted by the son would also have priority if the property were the self acquired property of a Hindu widow's son and she was claiming maintenance as a dependent of her son.”

In view of the two judgments referred above and in view of the fact that so far as right of plaintiff for maintenance is concerned, substantially there is no dispute and there cannot be any dispute in view of the fact that even after about 24 years from the passing away of the plaintiff's husband, the plaintiff's father-in-law Ganga Das admitted plaintiff's right to maintenance in the *Tamliknama* dated 18.1.1955. Further it is held that right of maintenance can be enforced against the transferee with notice of such right as per Section 39 of the Transfer of Property Act. In this case first transferee Shanker Lal had full knowledge of the right of maintenance of the plaintiff as this fact has been specifically mentioned in the *Tamliknama* dated 18.1.1955 by

Ganga Das himself. Consequently, the subsequent purchaser, present appellant also had knowledge of plaintiff's right of maintenance as in the sale-deed dated 18.10.1966 in favour of purchaser there is mention of *Tamliknama* dated 18.1.1955.

But here is not the end of the controversy because the next question arises that whether the plaintiff's right of maintenance has been converted into full property right by virtue of Section 14 of the Hindu Succession Act, 1956. There are judgments of the Hon'ble Apex Court on this issue itself.

The recent judgment relied upon by the learned counsel for the appellant is delivered in the case of Ram Vishal(dead) by Lrs. and Jagan Nath and another ((2004) 9 SCC 302), wherein the phrase "property possessed by a Hindu female" has been considered. The Hon'ble Apex Court held :-

"In our view, the authority in Raghubar Singh case can be of no assistance to the respondent. As has been held by this Court, a pre-existing right is a sine qua non for conferment of a full ownership under Section 14 of the Hindu Succession Act. The Hindu female must not only be possessed of the property but she must have acquired the property. Such acquisition must be either by way of inheritance or devise, or at a partition or "in lieu of maintenance or arrears of maintenance" or by gift or by her own skill or exertion, or by purchase or by prescription." (emphasis supplied).

The Hon'ble the Apex Court considered the decision given by the Hon'ble Supreme Court in earlier judgment delivered in the case of Raghubar Singh vs. Gulab Singh ((1988) 6 SCC 314) and also considered the earlier judgment delivered in the case of Bai Vajia v. Thakorhai Chelabhai ((1979) 3 SCC 300). Long back in the year 1962, this Court also took the same view in the case of Kankoo v. Pukh Ram and other (I.L.R. (1962) 12 Raj. 219), wherein also this Court held that "by residing in a house in exercise of her right of residence, a woman never acquires property in the house." The decisions of the Hon'ble Supreme Court in the cases of Eramma v. Veerupana and others (AIR 1966 SC 1879) and Mangal Singh and others v. Smt. Rattnoo (dead) by her legal Representatives and another (AIR 1967 SC 1786) are also relevant wherein also it has been held that mere physical possession of the property without the right of ownership will not attract the provisions of Section 14(1) of the Hindu Succession Act, 1956 to make the female Hindu absolute owner of the property."

In the light of decision of this Court delivered in the case of Smt. Kankoo (supra) and in the case of Ram Vishal (supra) of the Hon'ble Apex Court, as well as earlier judgment of the Hon'ble Supreme Court referred above, it is necessary to find out whether the plaintiff, who had right of maintenance, became owner of the property by virtue of Section 14 of the Hindu Succession Act, 1956. For this, it will be relevant

to mention here that no factual foundation has been laid down by the plaintiff in his plaint for this purpose. The plaintiff nowhere stated that how she exercised her right of maintenance. She also did not plead her right under Section 14 of the Hindu Succession Act, 1956. Still, the right of the plaintiff if can be established by lawful inference on the basis of undisputed documentary evidence, the plaintiff cannot be denied relief because of lack of pleading only, in the peculiar facts of this case. The peculiar facts of this case are that the property was with Ganga Das in the year 1955 when the Hindu Succession Act, 1956 was not in force. Ganga Das himself admitted plaintiff's right of maintenance as back as in the year 1955 in the *Tamliknama* dated 18.1.1955 despite the fact of death of plaintiff's husband and Ganga Das's son Shiv Ratan in the year 1931 and in view of the fact that foundation of claim of Shanker Lal is the *Tamliknama* dated 18.1.1955 and as per the Section 39 of the Transfer of Proper Act, the right of maintenance can be enforced against transferee with notice and, therefore, said right could have been enforced against Shanker Lal and even against his transferee appellant Laxmi Chand. As held in the preceding paras, the plaintiff's right of maintenance could have been enforced against appellant transferees but the question still survives is that whether the plaintiff fulfills further condition as required by Section 14 of the Hindu Succession Act, 1956 for becoming owner of the properties of person

upon which there was obligation to maintain the plaintiff. Hon'ble the Apex Court in the case of Ram Vishal (supra) held that Hindu female must not only be possessed of the property but she must have acquired the property. Neither there is any pleading nor any evidence on record to the effect that the plaintiff acquired the property by way of inheritance or devise or at a partition or "in lieu of maintenance or arrears of maintenance or by gift or by her own skill or exertion, or by purchase or by prescription." Not only this, this Court in the case of Kankoo(supra) clearly held that by residing in a house in exercise of her right of residence, a woman never acquires property right in the house even by virtue of Section 14 of the Act of 1955. It is true that in the *Tamliknama* dated 18.1.1955, it is mentioned that the plaintiff is entitled to maintenance and she was residing with her father-in-law Ganga Das but those facts themselves are also not sufficient to convert the plaintiff's limited right of maintenance into full ownership right in the light of the decision referred above. At this juncture, it will be relevant to mention here that in the *Tamliknama* dated 18.1.1955 itself, it appears Ganga Das has mentioned that he has handed over possession of the property to Shanker Lal, therefore, if Ganga Das and Smt. Jethi continued to remain in the house, that could have been only a permissive possession of Ganga Das and plaintiff because of the reason that neither the *Tamliknama* dated 18.1.1955 has been challenged by

the plaintiff nor any fact mentioned therein has been disputed by the plaintiff. In addition to above, the plaintiff's own statement is relevant. The plaintiff in her own statement admitted that since last 10 years, she started living at *Chai Basa* (West Bengal). The plaintiff's statement was recorded on 24.7.1971, therefore, since 1961, admittedly, the plaintiff was not residing in the house in dispute. In her statement dated 24.4.1971 also, she did not state that she was given share in the house in lieu of maintenance and she was getting maintenance from the house property only. The plaintiff also in her statement, admitted that Raman Lal, her husband's brother was taking care interest of the plaintiff in the present suit despite the fact that Raman Lal has been impleaded as defendant and he did not choose to file the suit for getting the house on the basis of his right of pre-emption despite being cosharer with the plaintiff and defendant Shanker Lal. Not only this but initially the plaintiff did not appear to give statement in support of her case but when she got opportunity to give statement in rebuttal, she gave her statement on 27.4.1971 and the court permitted the plaintiff to give her statement on the issues of which burden was upon the plaintiff. Be it as it may be, even from the said statements of the plaintiff and her witnesses, the plaintiff failed to prove any of the conditions of Section 14 of the Hindu Succession Act for becoming owner of the property because of her right of maintenance.

Raman Lal-defendant also appeared in the witness-box and gave his statement on 27.4.1971. Raman Lal admitted that he separated from his father and probably it was since 1937. He also stated that after the death of plaintiff's husband on 16.11.1931, the plaintiff started living at *Chai Basa* (West Bengal) and she was also living at Bikaner. Raman Lal also admitted that when house was sold by Shanker Lal, Smt. Jethi was residing at *Chai Basa*. However, defendant Raman Lal contradicted plaintiff's statements about his taking care of the plaintiff's suit. Raman Lal's evidence is also not any evidence of plaintiff's more right than right of maintenance. In view of the above, it is held that though the plaintiff had right of maintenance as on 18.1.1955 and the property was gifted by the plaintiff's father-in-law on 18.1.1955 in favour of Ganga Das after mentioning right of maintenance of plaintiff in the *Tamliknama* dated 18.1.1955, still the plaintiff's right of maintenance is short of plaintiff's becoming absolute owner of the property in place of her limited right of maintenance. On 18.1.1955, admittedly, the plaintiff had no title in the suit property nor she was co-sharer in the property and, therefore, Ganga Das could have alienated the property and, therefore, the alienation by Ganga Das in favour of his son Shanker Lal by the *Tamliknama* dated 18.1.1955 is a valid transfer of the property. The *Tamliknama* dated 18.1.1955 has not been challenged by any of the sons of Ganga Das on the ground that Ganga Das alone could not have

alienated the property in favour of Shanker Lal to the extent of his entire 2/3 share in the property, therefore, in the suit filed by the plaintiff, who herself had no title in the property, it is irrelevant whether the property was ancestral or not.

The next crucial question is about the share of Mool Chand in the suit property. Mool Chand had 1/3 share in the suit property, is an admitted fact by Ganga Das by admitting his own share to the extent of 2/3 only. Mool Chand filed the suit for partition against Ganga Das in the year 1944 claiming his share 1/3 and Ganga Das's share 2/3. Said Civil Original Suit No.81/44 was decreed by the court of District Judge, Bikaner on 21.3.1945 declaring Mool Chand's share 1/3. In present suit, the defendant-appellant purchaser of the property alone took the defence that Ganga Das alone was the owner of the entire house and because of gift (*Tamliknama*) dated 18.1.1955, Shanker Lal became owner of the property. This fact, in view of the facts and reasons mentioned above, appears to be wrong. Neither Shanker Lal nor his transferee, appellant-defendant had any right to say that deceased Ganga Das was the owner of the entire house as on 18.1.1955 because that plea is contrary to admission of Ganga Das himself made in the *Tamliknama* as well as contrary to the court's decision in the suit no.81/44 filed by Mool Chand. At this place it will be worthwhile to mention here that there is no evidence on record that whether any final

decree for partition was passed after the preliminary decree for partition dated 21.3.1945 in Mool Chand's suit no.81/1944. Further there is no evidence on record about whether suit property was in fact partitioned between Mool Chand and Ganga Das by metes and bounds. There is document on record and that is the application for obtaining succession certificate by Ratan Lal and Champa Lal (Case No.33/1960) Ex.A.6. It appears that Ratan Lal and Champa Lal submitted that Mool Chand are the nearest relatives and are entitled to obtain succession certificate for the properties of Mool Chand as other persons have no objection. Said succession petition was contested by Ganga Das and he submitted objection petition in the case No.33/1960(Ex.2). In this Ganga Das admitted that Mool Chand died on 31.7.1959 at Bombay. He had 1/3 share in the house in dispute and he (Ganga Das) is the nearest relative of Mool Chand. These documents are trustworthy documents as they are certified copies of the old record of court proceedings between the parties of whose property is involved in this suit. These documents also prove that Ganga Das had 2/3 share and Mool Chand had 1/3 share in the property in dispute even upto the year 1960. Ganga Das claimed that he is nearest relative of Mool Chand, therefore, property devolved upon him. Ultimately and admittedly Ganga Das alone transferred or gave his only 2/3 share to Shanker Lal by gift-deed dated 18.1.1955. There is no trustworthy oral or documentary evidence on record, nor it is the case

of Shanker Lal that he took possession of share of Mool Chand directly in the life time of Mool Chand or in the life time of Ganga Das or after the death of Mool Chand and Ganga Das was not in possession of Mool Chand's share.

Not only this but the purchaser defendant-appellant failed to plead his source of knowledge that how he came to know that Shanker Lal became owner of the share of Mool Chand by adverse possession. The sale-deed dated 18.10.1966 in favour of defendant-appellant also does not say so. Shanker Lal himself got the possession of 2/3 share of Ganga Das only on 18.1.1955 and at that time, Mool Chand's 1/3 share was intact and did not devolve upon any of the parties, therefore, Ganga Das gifted only his share in the property which was only 2/3. In the *Tamliknama* dated 18.1.1955, it is not mentioned that on 1/3 share of Mool Chand, Shanker Lal has taken over possession. Shanker Lal also did not say so in the sale-deed executed on 18.10.1966. Ganga Das died in the year 1961, till then he was also in possession of the suit property though it was gifted to Shanker Lal. Ganga Das died in the year 1961 and from the date of *Tamliknama*, by that time, only six years passed. Mool Chand died on 31.7.1959. It is not the case of any of the parties that in the life time of Mool Chand, he was ousted by Shanker Lal. Therefore, if exclusive possession of Shanker Lal in the house in dispute was there, then it could have been from the time of death of MoolChand. Before 12

years from the time of death of Mool Chand could have passed, the plaintiff filed the suit for declaration of her share and for pre-emption with relief of possession, therefore, even suit of the plaintiff is not barred by time for relief of possession from appellant on the basis of her share in the property.

Whether Mool Chand was the nearest relative of Ganga Das or not, the fact remains is that in view of the sale-deed dated 18.10.1966 and in view of the *Tamliknama* dated 18.1.1955, none of the defendant can deny that ultimately Ganga Das alone became owner of the share of Mool Chand. This may be due to the fact that Ganga Das might have been the nearest relative of Mool Chand or property came in possession of Ganga Das, after death of Mool Chand but the defendant Shanker Lal only claimed that he became owner of the property as transferee from Ganga Das, therefore, Ganga Das was the owner of 1/3 share of Mool Chand after the death of Mool Chand, who died in the year 1959. Admittedly, Ganga Das died intestated and that too after coming into force of the Hindu Succession Act, 1956, therefore, Ganga Das's said share i.e. 1/3 devolves upon his natural heir of Class-I. At the time of death of Ganga Das in the year 1961, his two sons, defendant no.1 Raman Lal and defendant no.2 Shanker Lal and the plaintiff, widowed pre-deceased's son of Ganga Das, were alive, therefore, in 1/3 share which devolved upon or came with Ganga Das, each of three above got

equal share. By this, the plaintiff became co-sharer with Raman Lal and Shanker Lal in the house in dispute.

In view of the above discussion, for substantial question of law no.1, it is held that on 18.1.1955, Ganga Das had right to gift the house to Shanker Lal despite the fact that Smt. Jethi was his pre-deceased son's wife and she had right of maintenance and further in answer to substantial question no.2, it is held that because of right of maintenance of Smt. Jethi, the gift is not invalid.

The substantial question no.3 is to the effect whether right of pre-emption in respect of a part of the property sold and on payment of a part of the price could have been recognised by the court. For this, it will be appropriate to see the effect of the sale-deed dated 18.10.1966. In the sale-deed dated 18.10.1966, though Shanker Lal purported to have sold the entire house but since he had 2/3 share only by virtue of *Tamliknama* dated 18.1.1955 and got 1/3 of 1/3 (of Mool Chand through Ganga Das), therefore, in fact the defendant-appellant acquired the title to the 2/3+1/3 share in the suit property despite the fact that he paid the entire value of the suit property to the seller Shanker Lal. By sale dated 18.10.1966, the share of the plaintiff could not have been sold by Shanker Lal, therefore, sale to the extent of share of the plaintiff (1/9) is null and void and hence ineffective against the interest of the plaintiff.

The plaintiff could not have sought any decree for pre-emption for her own share in the property. When co-sharers files suit for enforcement of his/her right on the basis of pre-emption then the said person can only claim the substitution of his/her name in the executed sale-deed in place of the original transferee on payment of the value of the property proportionate to the share in law sold and cannot be asked to pay the value of the property which belongs to the plaintiff. In view of the above, it is held that it is not a case of seeking pre-emption in respect of part of the property on payment of part of price but it is suit for pre-emption for whole of the property which validly stands transferred in the name of original transferee appellant-defendant and on payment of the value of the property which in fact and validly stands transferred in favour of the defendant-appellant. The substantial question no.3 is decided in favour of the respondent-plaintiff and against the appellant-defendant.

In answer to substantial question no.4, it is held that when the first appellate court held that Smt. Jethi had 1/3 share in the property of Ganga Das, the first appellate court has committed error of law and in view of the finding of this Court on validity of gift (*Tamlikanama*) dated 18.1.1955, the plaintiff Smt. Jethi's share in the suit proper to is to the extent of 1/3 of 1/3, that is 1/9 only in the entire house (the 1/3 share of Mool Chand which devolved upon Ganga Das and since Ganga

Das died intestated living behind three co-sharers, the plaintiff, Raman Lal and Shanker Lal) inspite of reduction of share of plaintiff's right to get the decree on the basis of her right of pre-emption is not affected in any manner.

In answer to substantial question of law framed on 24.2.2006, it is held that though the plaintiff herself did not appear nor produced any witness in support of her case initially, but in view of the admitted fact and proved document, the *Tamliknama* dated 18.1.1955 and the sale-deed dated 18.10.1966 and the document referred herein above, the plaintiff's share in the property has been proved by the admission of the defendant as well as from the evidence on record and, therefore, the suit of the plaintiff cannot be dismissed for want of evidence and it is held that it is not a case decided on the basis of no evidence.

In view of the above, the appeal is partly allowed and the decree passed by the first appellate court is upheld so far as the plaintiff's right of pre-emption is concerned and it is held that the plaintiff is entitled to have her name substituted in place of original transferee Laxmi Chand in the sale-deed dated 18.10.1966. The appellate court's decree is modified about declaring the share of the plaintiff and it is held that the 2/3 share of the plaintiff of Ganga Das was validly transferred in favour of Shanker Lal by the *Tamliknama* dated 18.1.1955 and the plaintiff is entitled to get 1/3 share out of the share of Mool Chand

which devolved upon Ganga Das, thereby the plaintiff's share in the entire house is 1/9 only. Since Shanker Lal was rightful owner of 2/3 share, therefore, the appellant-defendant acquired the title of the property to the extent of 2/3 share in the suit property, plus 1/3 of 1/3 (originally of Mool Chand) and, therefore, the plaintiff is liable to pay 2/3+1/3 share of the sale consideration to the defendant-appellant. On payment of said amount, the plaintiff-respondent shall be entitled to get her name substituted in place of appellant Laxmi Chand in the sale-deed dated 18.10.1966. The defendant Shanker Lal shall pay the balance amount of Rs.8000/- plus interest @ 6% per annum from 18.10.1966 to the appellant. The plaintiff shall be entitled to take possession of the suit property from the appellant-Laxmi Chand after payment of the consideration mentioned above and after substitution of her name in the sale deed dated 18.10.1966. No order as to costs.

(PRAKASH TATIA),J.

mlt.

