

W.R.

IN THE BOARD OF REVENUE FOR RAJASTHAN, AJMER

AppealDecree/TA/1863/2004/Udaipur.

1. Chaturbhuj s/o Bhura Lohar
2. Shankar s/o Bhura Lohar  
rs/o Dhaneriya Tehsil Mavli Distt. Udaipur.
3. Bhanwarlal s/o Rupa Lohar (deceased) through LRs-
  - 3/1. Mangilal s/o Bhanwarlal r/o Dhaneriya Tehsil Mavli Distt. Udaipur
  - 3/2. Chandibai d/o Bhanwarlal r/o Sakroda Tehsil Mavli Distt. Udaipur
4. Heeralal s/o Jalu Lohar
5. Mangilal s/o Chunnilal Lohar
6. Sohanlal s/o Chunnilal Lohar
7. Heeralal s/o Rupa Lohar (deceased) through LRs-
  - 7/1. Banshilal s/o Heeralal
  - 7/2. Shaymlal s/o Heerala
  - 7/3. Udibai wd/o HeeralalAll rs/o Dhaneriya Tehsil Mavli Distt. Udaipur

.....Appellants

VERSUS

1. Mst. Bakhtawari Khane Anaj Ramlal Lohar, r/o Daroli at present residing in Village Talai via Kelwa Tehsil and Distt. Rajsamand.
2. Ratanlal s/o Bhura Lohar r/o Dhaneriya Tehsil Mavli Distt. Udaipur.

..... Respondents.

**D.B.**  
**Shri R.K. Jaiswal, Member**  
**Shri Rajinder Kumar, Member**

**Argued by:-**

Shri Poorna Shankar Dashora, counsel for the Appellant.

**JUDGMENT**

**Date: 11-07-2018**

1. This second appeal is preferred by the plaintiff under section 224 of the Rajasthan Tenancy Act, 1955 against the judgment and decree dated 03-03-2004 of the learned Revenue Appellate Authority, Udaipur passed in Appeal No. 195/03.
  
2. Facts leading to the present controversy in brief are there the appellants/plaintiffs filed a suit for declaration and injunction in the court of learned Assistant Collector, Mavli under sections 88 and 188 of the Rajasthan Tenancy Act, 1955 in respect of the land situated in Village Dhaneriya Tehsil Mavli. It was alleged in the plaint that the disputed land was khatedari land of one Sh. Nanga, which was inherited by Uda. It was further alleged in the plaint that Smt. Sringari was the legally wedded wife of Uda. During her life time and without divorcing her, Uda contracted Nata marriage with the respondent no. 1 Smt. Bakhtawari. After sometimes, Smt. Sringari left the company of Uda and thereafter, Smt. Bakhtawari also left his company and she contracted 'Nata' with Rama. At the time of death of Uda, none of his wives were present and thus, the plaintiffs performed all the last rites and ceremonies of the deceased Uda. The plaintiffs are in occupation of the lands of Uda. In the revenue record, the names of the plaintiffs ought to have been recorded whereas the Halka Patwari illegally entered the name of respondent no. 1 as khatedar of the disputed land. Therefore, it was prayed in the plaint that the

plaintiffs and respondent no. 2 be declared as khatedar tenants of the land left by Uda after deleting the name of respondent no. 1. A relief of permanent injunction was also sought against the respondent no. 1 restraining her from transferring the land in dispute. The suit was contested by respondent no. 1 by filing written statement and counter-claim wherein it was alleged that Smt. Sringari contracted 'Nata' with some other person and thereafter, Uda contracted Nata with her as per custom prevailing in their community. Therefore, her name has been correctly entered in the revenue record as successor of Uda. She never contracted 'Nata' with Rama. At the time of death of Uda, his last rites were performed by her out of the money left by the deceased. She has been turned out of the matrimonial home by the plaintiffs, as she is poor widow. Therefore, while making prayer for dismissal of suit, a request for passing a decree of partition of the disputed land was also made in the counter claim. A further relief of permanent injunction was also sought against plaintiffs and respondent no. 2. The trial court framed as many as six issues and put the parties on trial. After recording their evidence, the trial court vide judgment dated 7-04-2001 passed the following decree:-

*"सारांशतः वाद वादीगण एवं प्रतिवादिया सं.1 का काउंटर क्लेम आंशिक रूप से स्वीकार किये जाते हैं तथा वादीगण एवं प्रति.सं. 2 को इस आशय की स्थाई निषेधाज्ञा से पाबंद किया जाता है कि वे मौजा धनेरिया प.ह. खरताणा के खाता सं. 346 की आ.नं. 906 रकबा 7.9 में प्रतिवादिया सं. 1 के 1/2 हिस्से, खाता सं. 345 की आ.नं. 1882 रकबा 1.11, आ.नं. 1886 रकबा 1.2, आ.नं. 1887 रकबा 1.12, आ.नं. 1896 रकबा 0.3, आ.नं. 1901 रकबा 0.11, आ.नं. 2170 रकबा 2.9 एवं 2171 रकबा 2.6 किता 7 रकबा 9.14 में प्रतिवादिया सं.1 के सम्पूर्ण हिस्से तथा खाता सं. 342 की आ.नं. 1883 रकबा 0.16, आ.नं. 1898 रकबा 0.5, 1899 रकबा 0.3, आ.नं. 2175 रकबा 0.9, आ.नं. 2176 रकबा 0.8, आ.नं. 2177 रकबा 2.12, आ.नं. 2178 रकबा 6.3, आ.नं. 2179 रकबा 0.7, आ.नं. 2183 रकबा 2.1, आ.नं. 2185 रकबा 3.17, आ.नं. 2186 रकबा 6.13 एवं आ.नं. 2187 रकबा 10.11 किता 12 रकबा 34.3 में प्रतिवादिया सं. 1 के 1/4 हिस्से में उसके काश्त करने में किसी भी प्रकार का व्यवधान अथवा बाधा उत्पन्न न करे। प्रतिवादिया सं.1 को इन*

आराजीयात पर राजस्व रिकार्ड में दर्ज हिस्से अनुसार खेती कर शेष जीवन यापन करने का अधिकार होगा लेकिन वह इन आराजीयात में अपने हिस्से को किसी भी प्रकार यथा विक्रय, बक्षीय आदि के द्वारा अन्य को हस्तांतरित तथा खुरद बुर्द करने का अधिकार नहीं होगा। प्रतिवादिया सं.1 के अवसान पश्चात राजस्व रिकार्ड में अंकित उसका हिस्सा वादीगण एवं प्रति.सं.2 के बराबर हिस्से के खातेदारी स्वत्व में अंकित कर दिया जावे।

निर्णय अनुसार पर्चा डिक्री जारी हो तथा निर्णय अनुसार राजस्व रिकार्ड में अमल दरामद कर दिया जावे।"

Feeling aggrieved, the plaintiffs preferred first appeal before the learned R.A.A Udaipur and vide judgment dated 3-03-2004, the following decree was passed by the first appellate court.

"उपरोक्त विवेचन अनुसार अपील अपीलान्ट आंशिक रूप से स्वीकार की जाती है तथा अधिनस्थ न्यायालय में अपीलान्टगण की ओर से प्रस्तुत वाद तथा रेस्पोंस.1 का काउण्टर क्लेम दोनों ही निरस्त किये जाते हैं।"

Hence, this appeal by the plaintiffs.

3. The respondents did not turn up despite service of notice of this appeal. Hence arguments of learned counsel for the appellants were heard.
4. Shri Poorna Shankar Dashora, learned counsel argued that the judgment of the trial court has been passed in ignorance of the provisions of Order 20 Rule 5 CPC, whereby the trial court is bound to give issue-wise findings. This aspect of the matter was not considered by the learned first appellate court as well. Admittedly, Smt. Sringari was alive when Smt. Bakhtawari came to 'Nata' of Uda. There is no evidence on record to prove that there is any custom in the community of the parites of bringing a lady in 'Nata' during the life time of a legally wedded wife. Therefore, the so called arrangement between Uda and Smt. Bakhtawari is void in pursuance to the provisions of section 5 of the Hindu Marriage Act, 1955. It was further argued that according to section 8 of the Hindu Succession Act, 1956, the property of a male Hindu dying intestate devolves firstly, upon

the heirs specified in class I of the Schedule. Secondly, if there is no heir of class I, then upon the heirs specified in class II of the Schedule. Thirdly, if there is no heir of any of the two classes, then upon the agnates of the deceased. Lastly, if there is no agnate, then upon the cognates of the deceased. In this case, the property devolved upon the plaintiffs and defendant no. 2, who are cognates of the deceased as per section 8 (d) of the above Act. It has been argued that the learned courts below committed grave illegality in appreciating the facts of this case as per the provisions of the Hindu Marriage Act, 1955 and the Hindu Succession Act, 1956. The property of a deceased Hindu dying intestate can devolve only upon his legal heirs. No importance can be given to the customary rights of the parties after the commencement of the above Acts. In this connection, learned counsel has relied upon section 5 of the Hindu Succession Act, 1956, which provides that any text, rule or interpretation of Hindu Law or any custom or usage as part of that law in force immediately before the commencement of this Act shall cease to have effect with respect to any matter for which provision is made in this Act. Therefore, a prayer has been made to accept the appeal and set aside the impugned judgments and decrees of the courts below with a further prayer to decree the suit of the plaintiffs in its entirety and dismiss the counter-claim filed by the respondent no. 1. In support of the arguments, learned counsel has relied upon the following citations:-

- (i) AIR 2005 S.C. 422 [Ramesh Chandra Ram Pratap Ji Daga Vs. Rameshwari Ramesh Chandra Daga]:- In this case, the second marriage of wife was held null and void, where her first marriage was subsisting when she went through second marriage.

- (ii) AIR 1994 S.C. 135 [Surjit Kaur Vs Garja Singh]:- In this case, it was held that mere living together as husband and wife by itself does not confer status of husband wife.
- (iii) AIR 1999 Karnataka 226 [Smt. Nimbamma Vs Smt. Rathnamma]:- In this case, the husband kept company with a lady while his first wife was alive and not divorced. In such circumstances, it was held that the status of that lady would be of a kept mistress and on death of husband, she will not be entitled to his properties.
- (iv) 1976 RRD 222 [Birbal Vs Ram Sukh]:- In this case, it was held that for a partition to be recognized, the requirements of section 53 of the Rajasthan Tenancy Act, 1955 have to be met. If the details of land are not given and no attempt is made out to get agreement of land holders in writing as envisaged by section 53 (3), there was no proper partition. In this case, it was also held that each co-tenant, in theory, remains in possession of every inch of the suit land.

5. We have given our thoughtful consideration to the rival submissions and perused the record carefully. We have also studied the law laid down in the above citations.
6. At the outset, it is noticeable that the trial court decreed the plaintiffs' suit only to the extent of restraining the respondent no. 1 from transferring the suit land in any manner during her life time and also directed that after her death, the disputed property would devolve upon the plaintiffs and respondent no. 2. As far counter-claim of the respondent no. 1 is concerned, the plaintiffs were also restrained by way permanent injunction in causing interference to the respondent no. 1 in cultivating the disputed land. In this way, the suit of the plaintiffs claiming the khatedari rights and counter-claim of the respondent no. 1 claiming partition were dismissed. The respondent no. 1 did not

challenge the judgment and decree of the trial court. It is the plaintiffs alone who filed an appeal in the court of the learned Revenue Appellate Authority.

7. In the above background, following substantial questions of law arise for determination by us:-
  - (i) Whether the plaintiffs were bound to file two separate appeals impugning the trial court's judgment, as their suit was partly dismissed and the counter-claim of the defendant no. 1 was partly decreed?
  - (ii) Whether the judgment of the trial court is bad in law, as the same was passed without following the requirements of Order 20 Rule 5 CPC.
  - (iii) Whether the defendant no. 1 had no right, title or interest in the lands left by Uda, as she was not his legally wedded wife and thus, the findings of both the courts below that according to custom prevalent in the parties, respondent no. 1 was the legally wedded wife of Uda are perverse?
  - (iv) Whether the plaintiffs and defendant no. 2 being cognates of the deceased Uda are entitled to the property left by him and the findings of the court below in this regard have been given in disregard of section 8 (d) of the Hindu Succession Act, 1956?
8. We shall take up the above substantial questions one by one.
9. A cursory look at Order VIII Rule 6 of the Code of Civil Procedure, 1908 would reveal that a counter-claim is a cross-suit with all the trappings of a separate suit. In Premier Tyres Ltd Vs Kerala State Road Transport Corporation [AIR 1993 S.C. 1202], the Hon'ble Supreme Court has held as under:-

*“Where no appeal is filed, as in this case from the decree in connected suit it has the same effect of non filing of appeal against a judgment or decree. Thus the finality of finding recorded in the connected suit, due to non-filing of appeal precludes the Court from preceeding with appeal in other suit.”*

The question as to the impact of the principle of res-judicata in a case wherein the suit is resisted by a defendant not only by denying the plaintiff's claim, but by raising a counter-claim, was examined by Hon'ble Kerala High Court in Girija & ors Vs. Rajan and others [R.S.A. No. 14 of 2015 decided on 28-01-2015] and after discussing a catena of decisions on the subject, it was observed as under:-

*“From the above discussion, it is discernible that the law stated in Order 8 Rule 6A C.P.C makes it abundantly clear that the claim in a suit will have all the characteristics of a cross suit including the vulnerability of suffering the bar of res-judicata enshrined in section 11 C.P.C, if not properly challenged.”*

Thereafter, the Hon'ble High Court held as under:-

*“Therefore, I find that the question of law arising in this case can only be decided against the appellants, finding that if a defendant who raised a counter claim in a suit, fails both in the suit and in the counter claim, will have to file separate appeals challenging the decree in the suit and the counter claim. Since the appellants in this case failed to do so before the lower appellate court, I am of the view that the first appeal itself was barred by res judicata. Hence, the second appeal is not maintainable.”*

The facts of the present case are squarely covered by the *ratio decidendi* laid down in the cases of Premier Tyres Ltd (supra) and Rajan & ors (supra). Here also the plaintiffs were bound in law to file two separate appeals against the judgment, whereby their

suit was partly dismissed and counter claim of respondent no. 1 was partly decreed. Having failed to do so, only one appeal filed by them before the first appellate court was barred by the principle of res judicata. Therefore, the first substantial question of law is answered against the plaintiffs.

11. From a perusal of the judgment of trial court, it is revealed that issue-wise findings have been given by it. Though issue no. 2 and 3 were taken up prior to other issues but it does not make the impugned judgment as illegal. The first appellate court, being court of facts, gave issue wise finding as well. Therefore, the second substantial question of law is also answered against the plaintiffs/appellants.
12. On merits of appeal, it is revealed that there are concurrent findings of facts of both the courts below to the following effect:-
  - (i) That Smt. Sringari was the legally wedded wife of the deceased Uda. As no issue was born to them, the deceased Uda contracted a second marriage, which according to the custom prevalent among the 'Lohars' is a valid marriage commonly known as Nata marriage with the respondent no. 1 Smt. Bakhtawari.
  - (ii) At the time of the so called Nata marriage of Uda and respondent no. 1, Smt. Sringari was alive and her first marriage with Uda was still subsisting.
  - (iii) Even Smt. Bakhtawari was the legally wedded wife of some other person, when she contracted 'Nata' with Uda.
  - (iv) The deceased Uda and respondent no. 1 Bakhtawari lived as husband and wife for a considerable period of time until the death of Uda.
13. The above findings of fact are borne out from the materials produced by the parties on record. Though, 'Nata' marriage is

prevalent in the State of Rajasthan and by custom, it is considered to be a valid marriage yet the question in this case is whether the marriage of the respondent no. 1 with Uda was legal marriage and whether she is entitled to succeed to the properties left by the deceased?

14. With that, we may at this stage refer to the relevant provisions of section 5 (i) of the Hindu Marriage Act, 1955, which are as under:-

"Section 5. A marriage may be solemnized between any two Hindus, if the following conditions are fulfilled:-

(i) neither party has a spouse living at the time of marriage."

Section 11 of the Act provides that any marriage solemnized after commencement of this Act shall be null and void, if it contravenes, inter-alia, the condition mentioned in section 5 (1).

15. Thus, in this case the inescapable conclusion is that the 'Nata marriage' solemnized between Uda and the respondent no. 1 had contravened the provisions of section 5 (i), for at that time both Uda and defendant no. 1 had their own spouses alive and their first marriages were subsisting. The result, therefore, was that by reason of section 11 of the Act, the marriage between Uda and respondent no. 1 was null and void. Though their second marriage might have been solemnized by performing necessary customary rites yet the same was rendered nugatory in law, as if the same had not taken place at all. Consequently, the parties to the said marriage, namely, Uda and Smt. Bakhtawari did not get a legal status of husband and wife. The result is that the respondent no. 1 cannot be considered to be a legally wedded wife of the deceased Uda. In this reference, we can rely upon the

law laid down in Ramesh Chandra's case (supra), Surjit Kaur's case and Smt. Minbamma's Case (supra).

16. Accordingly, the third substantial question of law is answered in favor of the plaintiffs that the respondent no. 1 had no right, title or interest in the lands left by the deceased Uda, as she was not his legally wedded wife and the findings of both the courts below in this respect are perverse.
17. The fourth substantial question of law is very crucial, as it will determine whether the plaintiffs are really entitled to the relief claimed by them or not. There is again a concurrent finding of both the courts below that on the date of institution of suit and on the date of decision of appeal by the first appellate court, Uda's legally wedded wife, namely, Smt. Sringari was alive. It may be that due to perusal reasons she may have left the company of deceased during his life time, but it does not take away from her the status of his legally wedded wife. Therefore, it was obligatory for the plaintiff to implead Smt. Sringari as party defendant to the suit but they did not do so for the reasons best known to them. A suit filed by the plaintiffs without impleading a necessary party thereto deserves dismissal.
18. It would be opposite here to refer to the provisions of section 8 of the Hindu Succession Act, 1956, which pertain to the General Rules of succession in the case of male.

*"8. General rules of succession in the case of males.- The property of a male Hindu dying intestate shall devolve according to the provisions of this chapter-*

*(a) firstly, upon the heirs, being the relatives specified in Class I of the Schedule;*

- (b) *secondly, if there is no heir of Class I, then upon the heirs, being the relatives specified in Class II of the Schedule;*
- (c) *thirdly, if there is no heir of any of the two classes, then upon the agnates of the deceased; and*
- (d) *lastly, if there is no agnate, then upon the cognates of the deceased."*

Thus, when a male Hindu dies after the commencement of this Act, i.e., 17-06-1956, leaving his widow as his sole heir, she gets the property as class I heir and there is no limit to her estate or limitation on her title. As she gets absolute estate, it would not devolve upon the heirs specified in class II of the Schedule or the agnates or the cognates of the deceased, as claimed by the plaintiffs. Therefore, the fourth substantial question of law is answered in the terms that the plaintiffs and defendant no. 2, who are stated to be the cognates of the deceased, were not entitled to succeed to the property of the deceased Uda during the life time of Smt. Sringeri and the findings of the learned court below are in accordance with the provisions contained in section 8 (d) of the Hindu Succession Act, 1956.

19. In view of the above discussion, no illegality is found in the judgment and decree of the learned first appellate court, though for the different reasons mentioned by us hereinabove.

20. Resultantly, the second appeal filed by the plaintiffs/appellants is dismissed.

Pronounced.

(Rajinder Kumar)  
Member

(R.K. Jaiswal)  
Member