IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/SPECIAL CIVIL APPLICATION NO. 14382 of 2019

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HEIR OF NIRUBEN CHIMANBHAI PATEL

Versus

STATE OF GUJARAT

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Appearance:
MR SALIL M THAKORE(5821) for the Petitioner(s) No. 1.1,1.2,1.3,1.4
for the Respondent(s) No. 5,6
NOTICE SERVED BY DS for the Respondent(s) No. 1,2,3,4

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CORAM:**HONOURABLE DR. JUSTICE A. P. THAKER**

Date : 09/06/2022

ORAL ORDER

1. Being aggrieved and dissatisfied with order dated 3.5.2019 passed by learned SSRD in Revision Application No.MVV/JMN/ST/67/2017, whereby he confirmed the order of learned Collector dated 16th May 2017 passed in RTS/Revision Application/REG.No.24 of 2016, the petitioner has filed present petition under Article 226 of the Constitution of India.

2. The brief facts giving rise to present petition are as under:-

2.1 That one Makanbhai Hashjibhai Patel was the owner of land bearing Survey No.43 admeasuring Acre 1.06 gunthas and Survey No.87 admeasuring Acre 1-19 Gunthas and Survey No.169 admeasuring Acre 6-16 and paiki 1/2 admeasuring 12-32 gunthas of mouje Khajod, Taluka and District-Surat. He has expired in the year 1969 and, subsequently names of his heirs viz. Naginbhai Makanbhai, Bhanabhai Makanbhai and Kunvarben i.e. wife of Makanbhai were entered in revenue

record vide entry No.530 dated 15.7.1989. Subsequently, entry no.536 dated 24.8.1982 came to be mutated, whereby lands were divided and heirs of Makanbhai got shares in the land in question. On 5th March 2009. Kunvarben widow of Makanbhai Hasjibhai executed Will for undivided share in land bearing Survey No.43 admeasuring Acre 1-06 gunthas and Survey No.87 admeasuring Acre 1-19 Gunthas and Survey No.169 admeasuring Acre 6-16 and paiki 1/2 admeasuring 12-32 gunthas of mouje Khajod, Taluka and District-Surat in favour of Niruben Chimanbhai Patel, who is daughter-in-law of Kunvarben and present petitioners are heirs of Niruben Chimanbhai Patel. Entry No.1324 dated 3.4.2014 was mutated in Village Form No.6 as Kachcha entry. Kunvarben died on 3.3.2010.

2.2 Being aggrieved and dissatisfied with entry no.1324 dated 3.3.2014, mutated in Village Form No.6. Respondent nos.5 and 6 raised objections for the same and, respondent no.4 registered the case being RTS/Takrari Case No.42/2014, which entry came to be cancelled by Mamlatdar with the observation that the land in question is ancestral property and, if the dispute arise, necessary order is to be obtained from Civil Court. It was also directed to enter names of straight-line heirs of Kunvarben widow of Makanbhai as per family tree.

2.3 Being aggrieved and dissatisfied with that order of Mamlatdar, mother of the petitioner preferred appeal before respondent no.3, Deputy Collector, being RTS/Appeal No.236 of 2014, who confirmed the order of Mamlatdar. In the meantime, heirship entry of Kunvarben being entry No.1346 dated 14.8.2014 was mutated in land bearing Survey No.169

admeasuring Acre 6-16 gunthas and paiki ½ admeasuring 12 Acres and 32 gunthas and heirship Entry No.1350 dated 27.8.2014 was mutated in revenue Survey No.43 admeasuring 1 Acre and 06 gunthas and Survey No.87 admeasuring Acre 1-19 gunthas of mouje Village-Khajod, whereby names of respondent no.5 and 6 were mutated in revenue record. Against this entry, mother of the petitioners raised objection before Mamlatdar and in the said proceedings being RTS/Khajod/Block No.43, 87, 169/ Takrari Case No.60/2014, learned Mamlatdar confirmed heirship entry No.1346 dated 14.8.2014 and by order dated 6.2.2015 in RTS/Khajod/Heirship Entry no.1350/14 Takrari Case No.74/2014 confirmed entry no.1350 dated 27.8.2014.

2.4 Being aggrieved and dissatisfied with orders of Mamlatdar confirming aforesaid heirship entry, mother of the petitioner preferred Appeal being RTS Appeal No.77 of 2015 and RTS Appeal No.87 of 2015 before Deputy Collector. Deputy Collector passed common order in both the appeals and confirmed the order of Mamlatdar. Being aggrieved and dissatisfied by orders of Deputy Collector passed in RTS Appeal No.236 of 2014, 277 of 2015 and 77 of 2015 and 87 of 2015, petitioner preferred revision before the Collector-respondent no.2. The Collector also confirmed the order of Deputy Collector and rejected revision application.

2.5 Against rejection of revision by the Collector, mother of the petitioner preferred Revision Application before learned SSRD. In the meantime, mother of the petitioner died and, therefore, names of present petitioners were brought on record. Revision Application came to be rejected by learned SSRD. Hence, the petitioners have preferred present petition.

2.6 Main grievance of the petitioners is that both the entries No.530 dated 15.7.1982 and entry no.536 dated 24.8.1982 were never challenged by the respondents, whereby Kunvarben got share in the land in question by distribution and, hence, observation of revenue authority that the land in question is ancestral property is incorrect, as on getting her share, Kunvarben became absolute owner of the land in question. It is also the stand of the petitioners that once Will is executed, entry must be posted in the revenue record and, therefore, impugned orders deserve to be set aside.

3. Heard learned advocate Mr.Salil Thakore for the petitioners and learned AGP Mr.Nikunj Kanara for the respondent-State. Though served, none is present for private respondent. Perused the material placed on record and considered the decisions cited at bar.

4. Learned advocate Mr.Salil Thakore for the petitioners has vehemently submitted the same facts, which are narrated in the memo of petition, and has submitted that the land in question was earlier mutated in the name of Kunvarben, who was widow of Makanbhai. He has submitted that original owner of the land was husband of Kunvarben and, after his death, land got mutated in three names viz. Naginbhai Makanbhai, Bhanabhai Makanbhai and Kunvarben Makanbhai in the year 1982 and heirship entry was also mutated in the year 1982 and, as per the entry, 1/3rd share came to the share of Kunvarben. It is her property and, therefore, she has a right to distribute the same, according to her wish. He has submitted that heirship entry of 1982 has never been challenged by the

private respondent and since Kunvarben has got the land to her share, she has become absolute owner of the land in question. It is submitted that Kunvarben has executed a Will and, by that Will, she has given her share to her daughter-in-law i.e. mother of present petitioners and, therefore, there is no illegality. He has submitted that the Will is of 5th May 2004 and the petitioners are having right in the land in question and Will is never challenged by the private respondents and, therefore, the revenue authority ought to have made entry as per the Will. He has submitted that the revenue authority has committed an error of fact and law in holding that the property is ancestral property and beneficiary of Will may get it asserted by order of the Civil Court. He has submitted that when the Will has not been challenged by the private respondent by filing appropriate proceedings in the Civil Court, revenue authority cannot observe against the illegality of the Will. According to him, as per the contents of the Will, the authority ought to have made necessary entry in respect thereof. He has submitted that the impugned order of the revenue authorities are not in consonance with law. He has also submitted that entry needs to be made including the entry of name of son born ought of first marriage of Makanji and names of present petitioners may also be mutated in the revenue record. While referring to the following decisions, he has prayed to pass appropriate order setting aside the impugned orders of the revenue authorities.

(i) **Rama Ananda Patil v. Appa Bhima Redekar and Others** reported in **AIR 1969 Bombay 305;**

(ii) **Roshan Lal and Another v. Dalipa** reported in **AIR 1985 HP 8;**

(iii) **Savitaben alias Nathiben Widow of Somabhai Harkhabhai and Others** reported in **2014 SCC Online Gujarat 11787.**

5. *Per contra*, learned AGP, Mr.Kanara has submitted that the revenue authorities have not committed any error in passing the impugned orders. He has submitted that civil rights under the Will can only be decided by the Civil Court. He has submitted that the observations made by the revenue authorities are in consonance with law.

6. Considered the submissions made by both the sides coupled with the material placed on record and decisions cited at bar, it appears from order of the revenue authority that the lands in question originally belonged to one Makanbhai, who has died and, thereafter, entry was mutated in the name of his widow and two sons. Now, as per the contents of the Will, it appears that Kunvarben had earlier married with one Babubhai and upon his death, she along with her son Chiman born out of wedlock with Babubhai, re-married with Makanbhai. As per the recital in the Will, page 19, out of wedlock of Makanji, respondent nos.5 and 6 have born and, therefore, property of deceased Makanbhai was divided into three shares. It also appears that Chimanbhai, son born out of first wedlock with Babubhai, was also residing with Kunvarben. As per the Will of Kunvarben, she has given her 1/3rd share to wife of said Chimanbhai, who has died. Thus, it appears that Makanbhai died, his lands were inherited and mutation entry was made in the names of Kunvarben and two sons, who have born out of wedlock with Makanbhai. On the basis of the alleged Will, entry was made in the name of mother of the petitioners, which

came to be challenged by private respondents on the ground that property is ancestral property and only descending heirs of Makanbhai can have share in such property. At this juncture, it is worthwhile to refer to Hindu Succession Act, wherein under Section 15, a Hindu widow can inherit land from his second husband and even her children born out of first marriage can also inherit land from second husband. In this regard, observations of the Division Bench of the Bombay High Court in the case of **Rama Ananda Patil** (supra) needs to be referred to, wherein while dealing with Section 15, the Court has observed as under:-

> *"10. ..... What is provided in Section 15 is the necessary incidence and consequence of conferring such absolute rights in the property on such female Hindus. The scheme of subsection (1) of Section 15(1) clauses (a) to (e) who can be said to be nearer and dearer to the deceased female Hindu having regard to the current notions and conceptions about the closeness of the relationship. Sub-section (2) provided for exceptions only with regard to one source of acquisitions viz., the inheritance, and then again the exceptions confined to the property inherited by her either from her (1) father or mother or (2) from her husband or from her father - in- law. But in engrafting these two exception the Legislature has taken care to emphasis that these exceptions will operate only in the event of the female Hindu not leaving her direct heirs, viz., her son or daughter or children of the pre-deceased son, or daughter. In our opinion, by making the exception to operate only in the contingency of female Hindu not leaving any son or daughter or children of the pre-deceased son, or daughter, the legislature has only acted consistently with its main object of conferring absolute title on*

female Hindus to the properties inherited by them. When female Hindus were made absolute owners of the property, the legislature seems to have rightly and justly thought that the question of reversion of such properties to the source such as father or the husband should not arise so long as direct heirs of such female Hindus dying intestate were still alive and available to claim the inheritance. If female Hindu could claim absolute rights in the said property inherited by her from her father or mother or from her husband and father-in-law, and could have disposed it of during her life time in any manner she liked without allowing it to go back to the heirs of her father or heirs of her husband from whom she had inherited this property, the legislature seems to have thought - and rightly - that in the event of property not having been disposed of by the female Hindu as obsolute owner during her lifetime, the sons and daughters born to her without regard to from which husband they were born, should be enabled to have preferential rights to succeed before the same goes to the heirs of the father or heirs of the husband. We are of the opinion, therefore, that there is no warrant to assume that the Legislature intended to deprive the sons and daughters or their children from inheritance of the property left by a female Hindu dying intestate merely because they were born to her from some to other husband than the one from whom the property in dispute was inherited by the female Hindu."

7. Section 15 of the Hindu Succession Act provides as under:-

"15. General rules of succession in the case of female Hindus.-

15 (1) The property of a female Hindu dying intestate shall devolve according to the rules set out in section 16-

(a) firstly, upon the sons and daughters (including the children of any predeceased son or daughter) and the husband;

(b) secondly, upon the heirs of the husband;

(c) thirdly, upon the mother and father;

(d) fourthly, upon the heirs of the father; and

(e) lastly, upon the heirs of the mother.

(2) Notwithstanding anything contained in subsection (1),- (a) any property inherited by a female Hindu from her father or mother shall devolve, in the absence of any son or daughter of the deceased (including the children of any predeceased son or daughter) not upon the other heirs referred to in sub-section (1) in the order specified therein, but upon the heirs of the father; and

(b) any property inherited by a female Hindu from her husband or from her father-in-law shall devolve, in the absence of any son or daughter of the deceased (including the children of any predeceased son or daughter) not upon the other heirs referred to in subsection (1) in the order specified therein, but upon the heirs of the husband."

8. The Scheme of sub-section (1) of Section 15 shows that the property of Hindu female dying intestate is to devolve on her own heirs. In the list of such heirs enumerated in Section 15 (1) (a), it is stated that who can be treated as nearer and dearer to the deceased female. The words "son or daughter of the deceased" in Section 15 (2) (b) of the Act can only mean a son or daughter of the female dying intestate without regard to the fact as to from which husband they were born to her. Under the proviso to definition of the word "related" in Section

3 (1) (3) of the Act, even illegitimate children are to be deemed to be “related” to their mother and to one another for the purpose of the Act. Effect of this definition is that the phraseology “son or daughter of the deceased” is to mean not only the sons and daughters of female, born from any of her husband, even sons and daughters born to her in a illegitimate manner are also included.

9. In the case of **Roshan Lal and Another (supra)**, while dealing with the provisions of Section 15 (1) (a) of the Hindu Succession Act, it was observed that sub-section (2) is not attracted in the case, and for the purpose of succession to her estate under Section 15 (1) (a), it has been held that it is immaterial whether the person is the off-spring of marriage with the husband or of her illicit relationship with another person.

10. In the case of **Savitaben alias Nathiben (supra)**, while dealing with provisions of Section 15 and 16 of the Hindu Succession Act, this Court has observed as under:-

> *“5.2 About operation of Section 15 and Section 16 of the Act, the Apex Court in Lachman Singh(supra), stated that,*
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> > *“Sub-section (1) of section 15 provides that the property of a female Hindu dying intestate shall devolve according to the rules set out in section 16 of the Act firstly, upon the sons and daughters (including the children of any predeceased son or daughter) and the husband; secondly, upon the heirs of the husband; thirdly, upon the mother and father; fourthly, upon the heirs of the father; and lastly, upon the heirs of the mother. Sub-*

section (2) of section 15 of the Act arises for consideration only when a female Hindu dies intestate leaving property without leaving behind her any son or daughter (including the children of any predeceased son or daughter) and in that event any property inherited by her from her father or mother shall devolve not upon the other heirs referred to in sub-section (1) of section 15 of the Act in the order specified therein but upon the heirs of the father and any property inherited by her from her husband or from her father-in-law shall devolve not upon the other heirs referred to in subsection (1) of section 15 in the order specified therein, but upon the heirs of the husband, Rule 1 of section 16 provides that among the heirs specified in sub-section (1) of section 15 those in one entry shah be preferred to those in the succeeding entry and those included in the same entry shall take simultaneously."

5.2.1 In Lachman Singh (supra), the Supreme Court held that step-sons and step-daughters of a female Hindu dying intestate are not covered by the words "sons and daughters" occurring in clause (a) of Section 15(1), but they fall under clause (b). The Apex Court explained expression "sons and daughters ..... and the husband" in clause (a), stating as under,

"Under the Act a son of a female by her first marriage will not succeed to the estate of her 'second husband' on his dying intestate. In the case of a woman it is natural that a step son, that is, the son of her husband by his another wife is a step away from the son who has come out of her own womb. But under the Act a step-son of a female dying intestate is an heir and that is so

because the family headed by a male is considered as a social unit. If a step-son does not fall within the scope of the expression 'sons' in clause (a) of section 15(1) of the Act, he is sure to fall under clause (b) thereof being an heir of the husband. The word 'sons' in clause (a) of section 15(1) of the Act includes (i) sons born out of the womb of a female by the same husband or by different husbands including illegitimate sons too in view of section 3(j) of the Act and (ii) adopted sons who are deemed to be sons for purposes of inheritance. Children of any predeceased son or adopted son also fall within the meaning of the expression 'sons'.....We are of the view that the word 'sons' in clause (a) of section 15 (1) of the Act does not include 'stepsons' and that step-sons fall in the category of the heirs of the husband referred to in clause (b) thereof."

11. Considering aforesaid decisions relating to inheritance of estate of Hindu female, it clearly transpires that even in case of widow dying intestate, her heirs including son and daughter born out of wedlock or even from illicit relationship are entitled to get share in her property. In the present case, deceased Kunvarben has given her 1/3rd undivided share by Will to her daughter-in-law, who is mother of present petitioners. Such transaction cannot be said to be hit by any provisions of law, since deceased Kunvarben was one of the owner of the property. Further, she has every right to give her undivided share to anybody by Will.

12. Therefore, the observations of the revenue authorities in this regard are not in consonance with the provisions of the Hindu Succession Act. It also appears that the Will has not

been challenged by anybody before the Civil Court. Had it been challenged before the Civil Court and Civil Court has passed an order, then it was incumbent on the part of the revenue authority to follow that order of Civil Court. From the material placed on record, it nowhere appears that private respondent has challenged the impugned Will. Therefore, the impugned order of the revenue authority is not sustainable in the eyes of law. Entry on the basis of the Will made earlier is also proper. However, if the petitioners are not in possession of the property and if they want that property to be partitioned as per Will, appropriate course for them would be to approach the Civil Court.

13. Accordingly, this petition is allowed. Impugned order dated 3.5.2019 passed by learned SSRD in Revision Application No.MVV/JMN/ST/67/2017 is quashed and set aside, with all consequential benefits in favour of the petitioners. The parties are at liberty to approach the Civil Court in case of their dispute with regard to civil rights. No order as to costs. Direct service is permitted.

Sd/-

(DR. A. P. THAKER, J)

R.S. MALEK