

AFR

HIGH COURT OF CHHATTISGARH, BILASPUR**SA No.195 of 2001**

Chhediram And Others

---- Petitioner

Versus

Smt. Duleshwari And Others

---- Respondent

For Petitioners	:	Shri R. N. Jha, counsel for appellants.
For Respondent No.1-B to 1-F:	:	Shri Vishnu Koshta, Advocate
For Respondent No.2	:	Shri M. D. Sharma, Advocate
For Respondent No.4	:	Shri Ramakant Mishra, Dy.AG

Hon'ble Shri Justice Manindra Mohan Shrivastava**Order On Board****04/12/2015**

This appeal is directed against the impugned judgment and decree dated 23-03-2001 passed in Civil Appeal No.5-A/1994, whereby the learned lower appellate Court reversed the judgment and decree of the trial Court and granted decree of declaration and partition in favour of the plaintiff.

2. This appeal was admitted for hearing on following substantial questions of law:-

“Whether the lower appellate Court was justified in reversing the finding arrived at by the trial Court without discussing the evidence that has come on record and without giving the reasons for the finding arrived at by the trial Court?”

3. At the outset, learned counsel for the parties submitted that the question of law has been framed with regard to the finding of the trial Court contained in para 8 & 9 of the judgment in the matter, whereby the learned trial Court recorded a finding on the share, to which, Sirpatiya and his successors were entitled.

4. The plaintiffs filed a suit seeking declaration that plaintiff No.1-Maina Bai is entitled to $\frac{1}{2}$ as her share in disputed property ad measuring 58.44 acres along with remaining $\frac{1}{2}$ as share of Hukumat Ram. It was further prayed that it be declared that plaintiff No.2, defendants No.1 & 2 each are entitled to $\frac{1}{3}$ as their share in Hukumat Ram's property. A declaration was also sought to the effect that sale of 9 acres of land by Hukumat Ram without there being any partition, be declared null, void and inoperative. A prayer for grant of possession was also made by the plaintiffs.

5. Plaintiff's case before the trial Court was that Sirpatiya sold 58.44 acres of land in Villages Anjani and Kanharपुरi. He died on 02-01-1962. Upon his death, his son-Hukumat Ram and daughter-Maina Bai-plaintiff No.1 were entitled to succeed to property of Sirpatiya in equal shares but Hukumat Ram got his name mutated in the land records of aforesaid land without notice and knowledge of the plaintiff-Maina Bai, whereas name of Maina Bai was also required to be mutated along with Hukumat Ram, after death of Sirpatiya. It was also pleaded that Hukumat Ram could not have sold any part of the land without consent, therefore, sale of 9 acres of land by Hukumat Ram be declared null and void.

6. The appellants-defendants resisted claim of the plaintiff on the pleadings that Maina Bai being daughter, was not entitled to any share in the property of the deceased-Sirpatiya. She was also married and her share was already given by the father and therefore, suit was liable to be dismissed.

7. Though, learned trial Court found that upon death of Sirpatiya, Maina Bai was entitled to receive her share of 19.47 acres of land, held that the suit was barred by limitation and thus dismissed the suit.

8. Aggrieved by the judgment and decree of the trial Court, the respondents-plaintiffs preferred an appeal. Learned lower appellate Court held that the suit was not barred by limitation. It also proceeded to hold that upon death of Sirpatiya, Maina Bai

was entitled to succeed to $\frac{1}{2}$ as her share in the property of Sirpatiya along with Hukumat Ram. Aggrieved by the judgment and decree of the learned lower appellate Court, without being heard on the substantial question of law framed by this Court, the appellants-defendants have filed this appeal.

9. Submission of learned counsel for the appellants is that even if it is held that Maina Bai was entitled to succeed to the property of the deceased (Sirpatiya) along with her brother-Hukumat Ram by applications of provision laid down in Section 6/8 of the Hindu Succession Act (In short "the Act"), the evidence on record proved that the entire land was ancestral property and it was first required to be notionally partitioned amongst all the coparceners, which included Sirpatiya, Hukumat Ram and his two sons Chhedi Ram and Barik Ram. Maina Bai would be entitled to succeed to the property only in accordance with the provisions contained in Section 8 of the Act, out of the share, which Sirpatiya would have received, had he been alive, in the event of partition amongst co-partioners. As there were four coparceners out of total land available, upon death of Sirpatiya, only his share as self-acquired property would devolve upon his successors in accordance with the provisions of Section 8 of the Act. In this manner, Maina Bai would be entitled to only 7.30 acre of land. Therefore, the decree granted by the learned lower appellate Court in favour of Maina Bai suffers from gross illegality and perversity. The learned lower appellate Court in para 8 & 9 of the judgment elaborately dealt with the possession, extent of share, to which, the coparceners and their successors were entitled to receive. The learned lower appellate Court did not traverse these findings yet recorded its own finding that Maina Bai was entitled to $\frac{1}{2}$ of the property as her share in the property of Sirpatiya, which is illegal.

10. On the other hand, learned counsel for the respondents-plaintiffs submitted that neither the plaintiffs nor the defendants have stated that the property was ancestral property, therefore, in the absence of any specific case whether the property was ancestral property or self-acquired property of Sirpatiya, it cannot be presumed that the

property was ancestral. Therefore, upon death of Sirpatiya, succession will take place without application of Section 6 and only by application of Section 8 of the Act, meaning thereby Maina Bai would be entitled to $\frac{1}{2}$ of the property in dispute as her share in the entire property of Sirpatiya held by him at the time of his death.

11. There is no dispute between the parties that at the time of death of Sirpatiya, 58.44 acres of land was recorded in the name of Sirpatiya. Out of this, 15.26 acres of land was situated in Village Kanhanpuri and 43.18 acres of land was situated in Village Anjani. However, the question is whether it was ancestral property or self-acquired one.

Neither in the plaint nor in the written statement, any specific averment has been made by any of the parties with regard to the fact as to whether the land was ancestral or self-acquired. However, in the evidence of Chhedi Ram, DW-1, it has come in para 9 of his cross-examination wherein he has admitted the suggestion that the property recorded in the name of Sirpatiya was ancestral property. Similarly, suggestion given to Jayram Singh, DW-4 has also been admitted that the land owned by Sirpatiya were his ancestral property. It is relevant to note that this evidence is based on the suggestion given by the plaintiff only which has been admitted by the Chhedi Ram, DW-1 and Jayram Singh, DW-4.

In view of above, it is clear and cannot be disputed by any of the parties that the land ad-measuring 58.44 acres recorded in the name of Sirpatiya at the time of his death on 02-01-1962 was not self-acquired but ancestral property.

12. As the property was ancestral, upon death of Sirpatiya, there being female relative of Class-I of Schedule, it will devolve by according to proviso to Section 6 of the Act. Thereafter, out of share, which Sirpatiya would have received, upon notional partition, had he been alive, succession will take place in accordance with Section 8 of the Act amongst the heirs of Class-I.

13. At the time of death of Sirpatiya, he had living son-Hukumat Ram, daughter-

Meena Bai-plaintiff No.1, Chhedilal and Barik Ram (Defendants No.1 & 2) being sons of Hukumat Ram and Laxmi, daughter of Hukumat Ram.

At the time, when Sirpatiya died, only male members, Hukumat Ram, Chhedilal and Barik Ram were the coparceners.

Thus, the property is first required to be notionally partitioned amongst all the coparceners in equal share. Thus, each of the four coparceners would be entitled to $\frac{1}{4}$ share out of 58.44 acres of land i.e. 14.60 acres. Thus, if Sirpatiya would have remained alive, he would have got 14.60 in the event of partition amongst coparceners. It is this share of Sirpatiya, which becomes his self-acquired property and available for intestate succession under Section 8 of the Act amongst Class I heirs.

14. Accordingly, applying the aforesaid formula and rule of succession, the following factual position emerges:

NOTIONAL PARTITION AMONGST CO-PARTIONERS

- | | | |
|-----------------|---|-------------|
| 1. Sirpatiya | - | 14.60 Acres |
| 2. Hukumat Ram- | | 14.60 Acres |
| 3. Chhedilal | - | 14.60 Acres |
| 4. Barik Ram | - | 14.60 Acres |

As 14.60 acres of land alone was available for intestate succession, upon death of Sirpatiya, this property would devolve upon his Class I heirs namely his son Hukumat Ram and daughter-Meena Bai, Plaintiff No.1 as there were no other class I heir on the date of death of Sirpatiya.

Though, learned trial Court in its judgment has held that at the time of death of Sirpatiya, his wife was also entitled to share, however, there is no evidence on record

to prove that on the date of his death, his wife was also alive. Both the parties have also submitted that at the time of death of Hukumat Ram, his wife was not alive and she predeceased her husband.

In this manner, out of 14.60 acres of land held by Sirpatiya as his self-acquired property, arrived at by notional partition, Meena Bai would take her $\frac{1}{2}$ of the share i.e. 7.30 acres along with Hukumat Ram for remaining half of the share i.e. 7.30 acres. In this manner, it is clear that after death of Sirpatiya, Meena Bai was entitled to only 7.30 acres of land and not $\frac{1}{2}$ of the share from the total property of 58.44 acres of land recorded in the name of Sirpatiya at the time of his death.

15. Consequently, total share of Hukumat Ram included that property which devolved upon him by survivorship along with property, to which, he succeeded by intestate succession. Thus, Hukumat Ram was entitled to $14.60 + 7.30 =$ total being 21.90 acres of land.

It is also held by the learned trial Court and not traversed by the lower appellate Court that after the death of Sirpatiya, Hukumat Ram sold in all 9 acres of land to one defendant-Sonu. Thus, out of total share of 21.90 acres of land, to which, Hukumat Ram was entitled to succeed, 9 acres of land already having been sold by him, 12.90 acres of land remained available for succession by way of intestate succession amongst his heirs after his death.

Hukumat Ram, upon his death, was survived by three heirs namely Chhedi lal, Barik Ram and Laxmi, who are all Class-I heirs then each of them would take equal share. 12.90 acres of land was available with Hukumat Ram at the time of his death. In this manner, Laxmi would be entitled to 4.30 acres of land, Chhedi lal would be entitled to $14.60+4.30 =$ total 18.90 acres of land and similarly Barik Ram would be entitled to $14.60+4.30 =$ total 18.90 acres of land.

16. In view of above conclusion, it has to be held that the learned lower appellate

Court has committed illegality in holding that Meena Bai was entitled to $\frac{1}{2}$ of the share in the entire property ad measuring 58.44 acres of land held by Sirpatiya at the time of his death, in respect of which, it has been found that the plaintiff-Meena Bai was entitled to 7.30 acres of land.

17. Accordingly, it is directed that the suit property be partitioned amongst the plaintiffs No.1 & 2, defendants No.1 & 2 as above and possession be granted to parties. Plaintiff No.1 is entitled to possession of her share upon such partition.

The shares, to which, the parties are entitled under the law, in the following manner:-

1. Plaintiff No.1-Meena Bai- 7.30 Acres
2. Plaintiff No.2-Laxmi - 4.30 Acres
3. Defendant No.1-Chhedi Lal- 18.90 Acres
4. Defendant No.2-Barik Ram- 18.90 Acres.

18. The appeal is accordingly allowed in the manner and to the extent indicated above. A decree be drawn accordingly.

Sd/-
Manindra Mohan Shrivastava
Judge