

HIGH COURT OF CHHATTISGARH, BILASPUR

SA No. 134 of 2015

1. Dev Singh Aged About 37 Years
2. Kosam Singh Aged About 42 Years

Through- Vadmitra Dev Singh Both S/o Jamme Caste Gond
(Scheduled Tribe) R/o Village- Sacharatola Tehsil-Marwahi District-
Bilaspur, Chhattisgarh

---- Appellants

Versus

1. Kunwariya Bai W/o Anandram Aged About 52 Years Caste Gond
Tehsil-Marwahi District-Bilaspur, Chhattisgarh
2. State Of Chhattisgarh Through Collector, District-Bilaspur,
Chhattisgarh

---- Respondents

For appellants - Shri Yogeshwar Sharma, Advocate.

For respondent No.1 – Shri Vivek Tripathi, Advocate appears on behalf of
Dr. Shailesh Ahuja, Advocate.

For Respondent/State – Shri Anil S. Pandey, G.A.

Hon'ble Shri Justice Goutam Bhaduri

Order

9/02/2016

1. This second appeal is against the judgement and decree dated 21 November, 2014 passed in Civil Appeal No. 92-A/2011 whereby the judgement and decree passed in Civil Suit No.169-A/2009 by the court of Civil Judge, Class-II Marwahi dated 11/04/2011 has been affirmed.
2. The instant appeal is by the appellants/plaintiffs. The case of the plaintiffs was that at village Sachratola and village Devridih certain lands were situated which were in the name of father of the plaintiffs namely Jamme and according to the plaintiffs Jamme had two wives one was Mahudahin whose daughter was Kunwariya Bai defendant No.1 and plaintiffs mother's name was Suhayan Bai. It was further case that plaintiffs were in possession of the land after death of their father Jamme and after death of father, the defendant No.1 Kunwariya Bai got her name mutated in the revenue record. It was further contended that plaintiffs are

governed by gond custom and were not governed by Hindu Succession Act. It was further contended that after death of Jamme father of the plaintiffs when order was passed to mutate the land in the name of the plaintiffs, against that order the defendant filed an appeal before the SDO Pendra Road and without hearing, it was directed to record name of defendant No.1. Consequently, the order dated 13/03/2008 was prayed to be set aside. Defendant in their written statement contended that the first wife of Jamme was Bartolin Bai and she left Jamme and married another person. Subsequently, Jamme married one Kanak Bai wherefrom Kunwariya Bai was born. After death of Kanak Bai, Jamme married to Suhayan Bai @ Devharin Bai by chudi custom and out of such wedlock plaintiffs were born. It was further stated that after death of Jamme from 2005 the defendant was recorded as owner along with plaintiffs and were in possession of the land but stealthily the plaintiffs got their name mutated in the record of right. When it came to the notice of the defendant appeal has been preferred before SDO and the appeal was allowed and the name of the defendant was directed to be added. It was further case of the defendant that parties are governed by gond custom and multiple marriage were permitted and according to the custom after death of husband, wife would get right over the property along with legal heirs. Therefore, prayer was made for dismissal of the suit.

3. Learned court below after evaluating the facts pleaded and on the basis of evidence led by both the parties came to the conclusion that custom pleaded has not been properly proved by the plaintiffs whereas the custom which has been proved by the defendant was supported by the plaintiffs in evidence. Consequently, it was held that custom which was prevailing and projected by the defendant was said to be proved and according to which wife would get right after death of her husband,

consequently, further legal heirs of the wife will get right and on that basis suit was dismissed. Appellate court affirmed the order of the trial court, therefore this second appeal.

4. Learned counsel for the appellants would submit that learned court below has failed to take into custom which has been pleaded and stated that the mother of the defendant No.1 Kunwariya Bai was not legally married wife which was admitted by the defendant. Consequently, defendant No.1 Kunwariya Bai would not get right over the property. He further submits that parties were not governed by Hindu Succession Act. Consequently, their custom would prevail for devolution of the property. He further submits that according to the evidence led court has failed to appreciate in proper perspective and has held that defendant No.1 is also entitled being legal heirs, as such perversity has been committed.

5. I have heard the parties, perused the documents, evidence and the pleadings. This fact is not in dispute that both the parties are governed by gond caste and therefore according to Sub section 2 of Section 2 the provisions of Hindu Succession Act, 1956 would not apply. Pleadings and the evidence would show that father of the plaintiffs 1 and 2 and the defendant No.1, Jamme was one and from the first wife Mahudahin, Kunwariya Bai was born and the second wife was Suhayan Bai @ Devharin Bai wherefrom plaintiffs were born. After death of Jamme, the land was recorded in the name of plaintiffs. Against that order the defendant preferred appeal before the SDO wherein SDO had directed the name of defendant to be added.

6. Though plaintiff Dev Singh has stated that in the event male members are alive, female do not get any right, such custom though has been stated has not been established by the plaintiff. As against this, defendant and the plaintiffs both have stated that multiple marriage are

permissible in their society and after death of husband, the rights are apportioned according to the remaining wife and their heirs. Defendant stated that after death of husband, wife would get the right and thereafter it will devolve on to the legal heirs and not other legal heirs. As per section 103 of the Evidence Act burden of proof of a particular fact lies on the person who wishes court to believe in its existence. Since in particular averments which has been stated that the female do not get right over the property of the father burden lies on the plaintiff. The evidence adduced would show that it has not been discharged. Statement of PW-2 Amol Singh would show that he has stated that after death of husband if there are number of wives remains then wife will get right and thereafter son will get right and in absence of the son, daughter will get right. It is also stated that it will apply to only when daughter and son born when mother is one. The defendant No.1 Kunwariya Bai stated that if there are number of wives remains then the division of property is made according to the number of wives and their legal heirs and if some wife has only one child she will get the right. This fact is also supported by DW-2 Birjhan Bai and DW-3 Phool Kunwar who has established the same existing custom which has been stated by DW-1 has fortified the fact that they have also got similar type of right. Therefore, this part of custom which has been projected by the defendant that if there are number of wives are existing then right are governed according to the existing number of wives is established by both plaintiff and the defendant. Thereby, custom which has been projected by the defendant has been established.

7. As per the record name of the defendant Kunwariya Bai was also added along with the plaintiffs in the revenue record and as custom has been established that Kunwariya Bai who was daughter of Mahudahin, and Mahudahin was first wife, therefore she would get right over the

property of Mahudahin being legal heir according to the custom. On that basis suit has been dismissed. Taking into evidence and the fact, I do not find any perversity in the order and the finding of fact which is arrived at by the court below. Consequently, no question of law arises for consideration in this second appeal to disturb concurrent finding of fact. Accordingly, second appeal is dismissed at the motion stage.

Sd/-

(Goutam Bhaduri)

JUDGE