

HIGH COURT OF CHHATTISGARH, BILASPUR**Second Appeal No. 474 of 2015**

Raj Kumar Sahu S/o Late Asok Kumar Sahu, Aged About 39 Years
 R/o Andruyz Ward, Mungeli, Tehsil- Mungeli, Distt.- Mungeli,
 Chhattisgarh

---- Appellant**Versus**

1. Gopal Prasad S/o Late Ashok Kumar Sahu, Aged About 32 Years
 2. Shyam S/o Late Ashok Kumar Sahu, Aged About 30 Years
 3. Raja S/o Late Ashok Kumar Sahu, Aged About 28 Years
 4. Smt. Rani Bai D/o Late Ashok Kumar Sahu, Aged About 26 Years
 5. Sunil Kumar S/o Late Ashok Kumar Sahu, Aged About 24 Years
- All are R/o Andruyz Ward, Mungeli, District Mungeli, Chhattisgarh
6. State Of Chhattisgarh, Through- Collector, Distt.- Mungeli,
 Chhattisgarh

---- Respondents

For appellant – Shri Sanjay Patel, Advocate.
 For respondents No.1 to 5 – Shri Sanjay Shyam Agrawal, Advocate.
 For Respondent No.6/State – Shri Sangarsh Pandey, Dy.G.A.

Hon'ble Shri Justice Goutam Bhaduri**Order****5/05/2016**

1. The appeal is against the judgement and decree dated 25th July, 2015 passed by the Additional District Judge, Mungeli in Civil Appeal No.6-A/2014. The appeal was filed against the judgement and decree dated 24/01/2014 passed in Civil Suit No.30-A/2011 by the court of Civil Judge, Class-II, Mungeli.
2. Suit was filed by the appellant/plaintiff Raj Kumar. It was pleaded that father of the plaintiff Shri Ashok purchased the land bearing khasra No.1133/15 admeasuring 0.05 acres and khasra No. 1133/14 admeasuring 0.04 acres and thereafter in respect of land bearing khasra No.1133/15 name of father was recorded whereas in respect of land bearing khasra No. 1133/14 name of Sumitra Bai was recorded. It was stated that before 15-16 years of filing of the suit, the suit land was given

to the plaintiff by way of family partition and thereafter house was constructed over such part of land bearing khasra Nos. 1133/15 and 1133/14 wherein the defendants who were brothers and sister used to reside. It was stated that after death of Sumitra Bai, defendants started asserting right on the basis of WILL and as such plaintiff had filed the suit for declaration and injunction claiming right over the property bearing khasra No.1133/15 admeasuring 30x50 sq.ft. claiming that he is sole and exclusive owner of the said part of the land.

3. Defendants in their reply stated that the house was constructed over khasra Nos.1133/15 and 1133/14 from the self earning of the defendants. It was further stated that in the year 1983 only house was constructed at another place and the plaintiff Rajkumar was given the share in the property by partition. It was further stated that Sumitra Bai mother of the defendants and plaintiff executed a WILL on 29/08/2009 in favour of the defendants and on the basis of that they claimed to be the owner. The trial court decreed the suit in favour of the plaintiff by holding that area admeasuring 30x50 sq.ft of khasra No.1133/15 was given to the plaintiff and the plaintiff is in possession of the said land. The said statement has not been rebutted in the cross examination and it was held that said property was exclusive property of the father of the plaintiff and the defendants and it was given to the plaintiff in order to maintain peace in the family, therefore same would not be required to be registered. The said finding having been assailed in first appeal, the appellate court interefered in the finding and set aside the order of the trial court. Therefore, this instant second appeal.

4. Learned counsel for the appellant would submit that finding recorded by the appellate court is completely perverse and it is further

contended that statement on the family partition remained unrebutted and therefore the appellate court could not have interfered in such finding. It is further submitted that the defendants claimed their right on the basis of WILL but such claim was not made as a counter claim and no issue were framed on the authenticity of the WILL. As such, any finding on the basis of the WILL would trench upon right of the plaintiff without proper adjudication. Therefore, he submits that the judgement and decree of the appellate court be set aside.

5. I have perused the judgement and decree of the appellate court. The appellate court by its judgement and decree dated 25th July, 2015 set aside the judgement and decree of trial court dated 24/01/2014 as simplicitor. No further decree was granted. Thereby, by effect of such appellate court order plaintiff was non-suited. Decree also do not record a finding about the WILL. In judgement of the appellate court discussions have been made but the finding in respect of the WILL have not been given in the decree. It is therefore observed that issue of WILL having not been framed the finding and observation on WILL would not be binding on any of the parties and authenticity to challenge the WILL is kept open in the future. The parties may agitate their right in respect of the WILL in proper proceeding. Examining the record would show that suit was filed by Raj Kumar on the ground that the suit land was given to the plaintiff 15-16 years back from his father. There is no document to this regard has been placed on record how such property was given except oral statement that the suit property was given to the plaintiff. Nothing is on record to substantiate the same. Further more, if property was self acquired property of Ashok Kumar, then in such case the acquisition of property by partition in favour of one son cannot be upheld. Further this fact also cannot be appreciated that out of 2180 sq.ft. of land, 1500 sq.ft was given

to one son by partition. Perusal of the statement would show that the plaintiff has failed to prove the fact that suit property i.e. khasra No.1135/15 was given to him by any grant of partition. It is not also case of the plaintiff that self acquired property of the father was thrown into common stock of the joint hindu family with others and thereafter partition took place. On the contrary, it is the case of the plaintiff that exclusive property was given to one son by partition. Such proposition cannot be accepted and upheld that self acquired property was given to one of the son by partition. There is no evidence to uphold the same.

6. In the result, finding arrived at by the appellate court cannot be faulted with. Accordingly, no substantial question of law arises for consideration in this second appeal and it is dismissed.

Sd/-
(Goutam Bhaduri)
JUDGE