

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR

Second Appeal No.42 of 2000

Sulochana, W/o Kamlu, aged 46 years, R/o Village Chhotemurma,
Tahsil Jagdalpur, Distt. Bastar (C.G.)

(Plaintiff)/
---- Appellant

Versus

1. Smt. Janki, Wd/o Jhitru, aged 41 years,
2. Satya Narayan, S/o Jhitru, aged 17 years, Minor Through natural guardian mother Janki,
 - A. "Respondent No.2 the then minor is now major."
3. Balram, S/o Jhitru, age 15 yr. Minor, through natural guardian mother Janki,
 - B. "Respondent No.3 the then minor is now major"
4. Smt. Tulwati, W/o Gulshan, age 25 years,
All R/o Village Chhotemurma, Tahsil Jagdalpur, Distt. Bastar (C.G.)
5. State of Chhattisgarh, through the Collector, Bastar.
(Defendants)/
---- Respondents

For Appellant:	Mr. R.N. Jha, Advocate.
For Respondents No.1 to 4: -	Mr. Prafull N. Bharat and Mr. Keshav Dewangan, Advocates.
For Respondent No.5 / State: -	Mr. Arun Sao, Deputy Advocate General.

Hon'ble Shri Justice Sanjay K. Agrawal

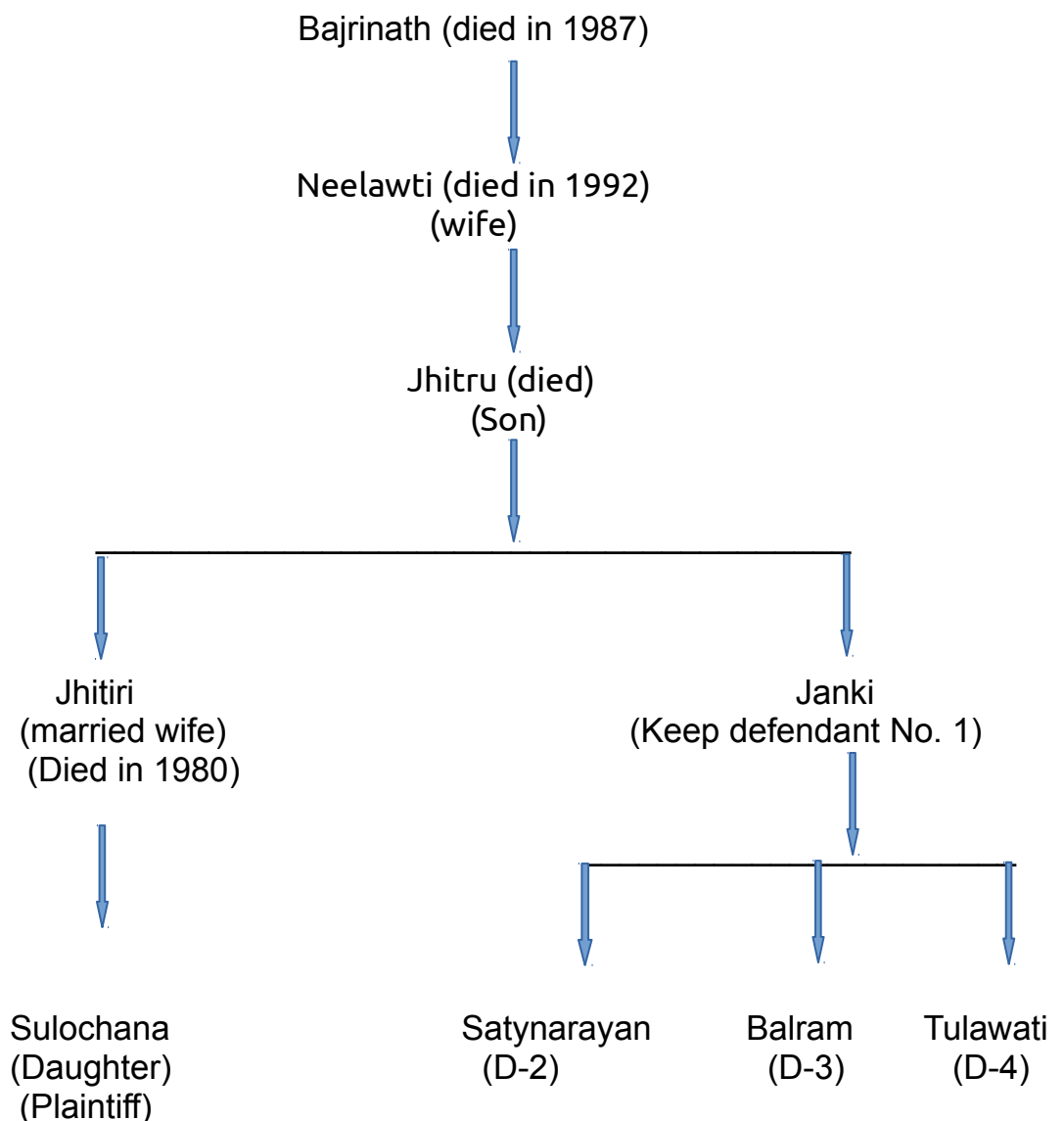
Judgment On Board

24/08/2018

1. The substantial questions of law involved, formulated and to be answered in the plaintiff's second appeal are as under: -
 - "1. Whether the 1st appellate court was justified in rejecting the application under Order 41 Rule 27 CPC moved by the appellant?
 2. Whether the two courts below were justified in not

properly appreciating the evidence led by the appellant/plaintiff to establish that she was in fact the legitimate issue of Jhitru?”

2. Following genealogical tree demonstrates the relationship amongst the parties: -



3. Sole plaintiff Sulochana filed a civil suit for declaration of her title that she is the exclusive owner of the suit land and entitled for permanent injunction and also for recovery of possession over the suit land, stating inter alia that her father Jhitru has solemnized marriage with her mother Jhitri and since she is the daughter out of the wedlock of Jhitru with Jhitri and defendant No.1 Janki is not legally wedded wife of Jhitru and, therefore, defendants No.1 to 4 are not entitled for any

share in the suit property and she is the exclusive owner of the suit property, as such, decree be granted to that effect in her favour.

4. Defendants No.2 to 4 have filed joint written statement stating inter alia that the property belongs to Bajirnath who died in 1987 inherited by his wife Neelawati and Jhitru was her son, Jhitru entered into marriage with Janki – defendant No.1 and defendants No.2 to 4 are sons & daughter of Jhitru out of the wedlock with Janki. It was further pleaded that during the lifetime of Neelawati, she had executed a will in favour of defendants No.2 to 4 on 5-9-1992 with respect to 5 acres of land and remaining land was inherited by Jithru and thereafter defendants No.1 to 4 have inherited the property as such, the plaintiff is not entitled for any share in the suit property.
5. The trial Court after appreciating oral and documentary evidence on record, reached to the conclusion that defendant No.1 Janki is legally wedded wife of Jithru and defendants No.2 to 4 are sons & daughter out of the wedlock of Jithru with Janki. The trial Court held that Neelawati had executed the will in favour of defendants No.2 to 4 and the will is duly established and the suit property was self-acquired property of Jithru and thereby dismissed the suit.
6. In an appeal preferred by the plaintiff, the first appellate Court concurred with the findings of the trial Court and dismissed the appeal leading to filing of second appeal before this Court in which substantial questions of law formulated have been set out in the opening paragraph of this judgment.
7. Mr. R.N. Jha, learned counsel appearing for the appellant / plaintiff, would vehemently submit that the finding recorded by the trial Court

holding that the relationship of the plaintiff's mother Jhitri with Jhitru is not established, is a finding of fact which is not only perverse, but contrary to record, particularly ignoring the material evidence available on record in the shape of testimony of Shankar (PW-2), as such, the judgment & decree passed by the first appellate Court affirming the judgment & decree of the trial Court deserve to be set aside.

8. On the other hand, Mr. Prafull N. Bharat, learned counsel appearing for respondents / defendants No.1 to 4, would support the impugned judgment & decree and would submit that the judgment & decree passed by the first appellate Court is in accordance with law.
9. I have heard learned counsel for the parties and considered their rival submissions and went through the records with utmost circumspection.
10. The question is whether the finding recorded by the trial Court as affirmed by the first appellate Court holding that the plaintiff has failed to establish that her mother Jhitri was married with Jhitru is not established, is a finding of fact or not. In order to establish the said relationship, the plaintiff has examined Shankar (PW-2) who has stated that in the marriage of Jhitru with Jhitri in addition to himself; Sukman, Mahangu Patel, Hidma Raut, Mahadev, Laxminath, Mundrath, Sahdev, Bisai, Sonwar and others were the participants, but none of these persons were examined to establish the fact of marriage and even the priest (Pandit) who has got the marriage performed has also not been examined. The trial Court further found that the defendants have established the marriage of Janki – defendant No.1 with Jhitru and the said finding has been affirmed by

the first appellate Court.

11. Mr. Jha, learned counsel for the appellant / plaintiff, has laid great stress on the testimony of Shankar (PW-2) to say that since his statement on oath is un-controverted, therefore, that ought to have been relied upon to hold that Jhitri was married with Jhitru. However, the first appellate Court has appreciated the testimony of Shankar (PW-2), but declined to accept his statement on the ground that none of the persons named in his testimony were examined. It is true that Shankar (PW-2) has stated about the performance of marriage of Jhitri with Jhitru, but the fact remains that other persons who were present in the said marriage and particularly, the priest (Pandit) who had performed the marriage of Jhitru with Jhitri, were not examined. Merely to rely upon the oral testimony of a witness whose version is not supported by any other evidence on record and particularly in absence of examination of the persons who have participated in the marriage, particularly in absence of examination of priest who had performed the marriage, it would not be safe to rely upon the sole testimony of Shankar (PW-2), particularly when the two courts below after appreciation of evidence, declined to accept the testimony of Shankar (PW-2), as it would be again re-appreciation of fact with the realm of appreciation of evidence in the second appellate stage. It is well settled law that finding of fact of both the Courts below is based on the evidence available on record which cannot be re-appreciated in exercise of jurisdiction under Section 100 of the CPC. As such, in the considered opinion of this Court, finding recorded by the trial Court holding that the fact of marriage of Jhitru with Jhitri is not established

is a finding of fact based on the evidence available on record and I do not find any perversity or illegality in the said finding.

12. Coming to the question of rejection of application under Order 41 Rule 27 of the CPC, the plaintiff sought to produce the transfer certificate of Sulochana and copy of electoral roll in which the name of the plaintiff's father is named as Jhitru. It is well settled law that the application under Order 41 Rule 27 of the CPC cannot be granted to fill-up the lacuna. In this regard, paragraphs 37 and 38 of the decision rendered by the Supreme Court in the matter of Union of India v. Ibrahim Uddin and another¹ state as under: -

“37. The appellate court should not ordinarily allow new evidence to be adduced in order to enable a party to raise a new point in appeal. Similarly, where a party on whom the onus of proving a certain point lies fails to discharge the onus, he is not entitled to a fresh opportunity to produce evidence, as the court can, in such a case, pronounce judgment against him and does not require any additional evidence to enable it to pronounce judgment. (Vide *Haji Mohammed Ishaq v. Mohd. Iqbal and Mohd. Ali and Co.*²).

38. Under Order 41 Rule 27 CPC, the appellate court has the power to allow a document to be produced and a witness to be examined. But the requirement of the said court must be limited to those cases where it found it necessary to obtain such evidence for enabling it to pronounce judgment. This provision does not entitle the appellate court to let in fresh evidence at the appellate stage where even without such evidence it can pronounce judgment in a case. It does not entitle the appellate court to let in fresh evidence only for the purpose of pronouncing judgment in a particular way. In other words, it is only for removing a lacuna in the evidence that the appellate court is empowered to admit additional evidence. (Vide *Lala Pancham*³.)

13. In the present case, since the trial Court has dismissed the suit, in order to fill up the lacuna no such application can be granted. The

1 (2012) 8 SCC 148

2 (1978) 2 SCC 493

3 Municipal Corpn. of Greater Bombay v. Lal Pancham, AIR 1965 SC 1008

first appellate Court has assigned sufficient reason for declining the application under Order 41 Rule 27 of the CPC also. I do not find any illegality in rejecting the said application.

14. As a fallout and consequence of the aforesaid discussion, the second appeal deserves to be and is accordingly dismissed. The substantial questions of law are answered accordingly. No order as to cost(s).
15. Decree be drawn-up accordingly.

Sd/-
(Sanjay K. Agrawal)
Judge

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