

HIGH COURT OF CHHATTISGARH, BILASPUR

Second Appeal No.806 of 1999

1. Dhaneshwar, S/o Late Devlal, aged about 47 years,
2. Hulaso, widow of Late Devlal, aged about 62 years,
3. Karamrajiya, D/o Late Shri Devlal, aged about 37 years,

No.1 and 2 resident of Village Puhputra, P.S. Lakhanpur, Tahsil Ambikapur, District Sarguja (M.P.) (now C.G.)

No.3 resident of Village Katkalo, P.S. & Tehsil Ambikapur, District Sarguja (M.P.) (now C.G.)

(Defendants)/
---- Appellants

Versus

1. Govindram, S/o Late Siyamber, age 42 years, R/o Puhputra, P.S. Lakhanpur, Tehsil Ambikapur, District Sarguja (M.P.) (now C.G.)
2. Jagdeoram (Died) Through LRs
 - 2.1) Smt. Shanti Bai, Wd/o late Jagdev Ram, aged about 50 years,
 - 2.2) Rajesh Kumar, S/o late Jagdev Ram, aged about 30 years,
 - 2.3) Naresh Kumar, S/o late Jagdev Ram, aged about 25 years,
 - 2.4) Smt. Chandramani, D/o late Jagdev Ram, aged about 35 years,No.2.1 to 2.4 R/o Puhputra, P.S. Lakhanpur, Tehsil Ambikapur, District Sarguja (M.P.) (now C.G.)
3. Phoolsundari, D/o Late Siyambar, W/o Ram Charan (DEAD NAME REMOVED)
4. Dilmet (Died and deleted)
5. Vifaiya (Dead) Through LRs
 - 5.1) Anand, S/o Late Vifaiya, aged about 25 years,
 - 5.2) Harihar, S/o Late Vifaiya, aged about 32 years,
 - 5.3) Basanti, D/o Late Vifaiya, aged about 20 years,
 - 5.4) Sakunti, D/o Late Vifaiya, aged about 18 years,No.5.1 to 5.4 all are residents of village Tikhri, Tarkeshpur, Tahsil

Surajpur, District Surajpur (C.G.)

(Plaintiffs)

6. State of M.P. (now State of C.G.), through Collector, Sarguja (M.P.)
(now C.G.)

(Defendant)/
---- Respondents

For Appellants: Mr. Sushil Dubey, Advocate.
For Respondents No.1, 2.1 to 2.4 and 5.1 to 5.4: -
Mr. A.K. Prasad, Advocate.
For Respondent No.6 / State : -
Mr. Ashish Surana, Panel Lawyer.

Hon'ble Shri Justice Sanjay K. Agrawal

Judgment On Board

10/09/2018

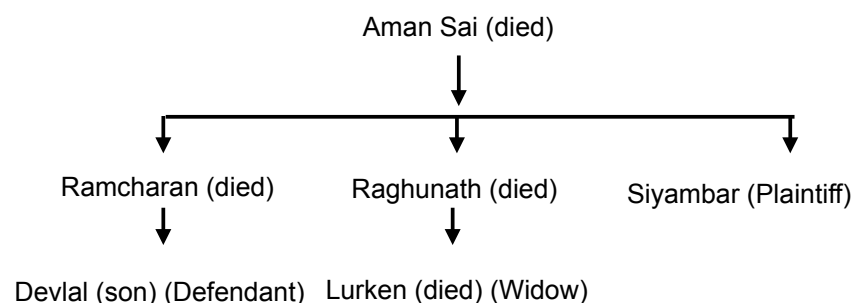
1. The substantial questions of law involved, formulated and to be answered in this defendants' second appeal are as under: -

(i) Whether the Courts below have committed an illegality by holding that the respondents are owners of the property recorded in the name of Aman Sai-predecessor-in-title of both the parties?

(ii) Whether denial of right of succession to the appellants upon the property owned by their predecessor-in-title Aman Sai at the time of his death is illegal?

(For sake of convenience, parties would be referred hereinafter as per their status shown in the plaint before the trial court.)

2. The following genealogical tree will demonstrate the relationship among parties: -



3. Late Shri Aman Sai had three sons Ramcharan, Raghunath and

Siyambar as shown in the aforesaid tree. The original defendant was Devlal, S/o Ramcharan who died during the pendency of civil suit and respondents No.1 to 5 herein are legal representatives of Late Siyambar, the original plaintiff, who also died during the pendency of civil suit and who had filed the civil suit against Devlal for declaration and permanent injunction stating inter alia that the lands described in Schedule-A of the plaint were self-acquired property of Aman Sai prior to the Survey Settlement of Sarguja State. It is the case of the plaintiff that Aman Sai separated from his two sons Ramcharan and Raghunath by giving them lands described in Schedule-B & Schedule-C annexed to the plaint and the lands described in Schedule-D were retained by him. Since Siyambar, the original plaintiff, was living with his father Aman Sai, after the death of Aman Sai, Siyambar has succeeded to the property shown in Schedule-D. But the original defendant got his name mutated in the revenue records as co-owner over the suit property leading to filing of suit for the above-stated reliefs. With these facts, the plaintiff filed suit for declaration of title and permanent injunction that he is title holder of the property described in Schedule-D and the defendant had no right and interest over the suit property.

4. The original defendant filed his written statement denying the plaint averments stating inter alia that the suit property shown in Schedule-B & Schedule-C were self-acquired properties of Ramcharan and Raghunath, sons of Aman Sai. The defendant further stated that after the death of Aman Sai, the properties shown in Schedule-D have been inherited by three sons

Ramcharan, Raghunath and the original plaintiff, and the defendant's father and Raghunath never separated from their father during his lifetime. The defendant is also entitled for share in the properties shown in Schedule-D, therefore, decree for partition and possession of half share on the lands shown in Schedule-D be granted to him.

5. The trial Court after appreciating oral and documentary evidence on record came to a specific conclusion that Aman Sai had separated his two sons namely, Ramcharan – father of the defendant and Raghunath by giving them the lands described in Schedule-B & Schedule-C and retained the properties shown in Schedule-D which was inherited by his son / original plaintiff (after the death of Aman Sai), who was living with Aman Sai, and also dismissed the counter claim filed by the defendant. The trial Court also recorded a finding that the properties shown in Schedule-D are self-acquired properties of Late Aman Sai. The first appellate Court by its well reasoned judgment affirmed all the findings of the trial Court and dismissed the appeal. In second appeal preferred, the substantial questions of law have already been framed and set-out in the opening paragraph of this judgment.
6. Mr. Sushil Dubey, learned counsel appearing for the appellants/ defendants, would submit that both the Courts below have committed a grave legal error in holding that original plaintiff Siyambar has exclusively succeeded the property (shown in Schedule-D of the plaint) of Late Aman Sai after his death and committed illegality in denying the right of succession to original

defendant who is also a son of Late Aman Sai and as such, the finding recorded by the two Courts below denying share to the defendant and holding the plaintiff as exclusive title holder is unsustainable and bad in law and therefore the judgments passed by the two Courts below are liable to be set aside.

7. Mr. A.K. Prasad, learned counsel appearing for respondents No.1, 2.1 to 2.4 and 5.1 to 5.4 / plaintiffs, would submit that the trial Court as well as the first appellate Court are absolutely justified in holding that Aman Sai during his lifetime separated his sons – defendant's father and Raghunath by giving them share in the properties shown in Schedule-B & Schedule-C and retained the properties shown in Schedule-D which was inherited by the plaintiff after the death of Aman Sai and as such, the property was rightly held by the two Courts below to be the self-acquired property of Aman Sai and therefore both the Courts below are absolutely justified in holding so and did not commit any error in law. Thus, the substantial questions of law deserve to be answered in favour of the plaintiffs and against the defendants.
8. I have heard learned counsel for the parties and considered their rival submissions made herein-above and also went through the record with utmost circumspection.
9. Undisputedly, the property is held / owned by Aman Sai, father of the original plaintiff and grand-father of the defendant. It is the case of the plaintiff that his father Late Aman Sai owned the properties shown in Schedule-A which is total 35.11 acres of land and out of which Late Aman Sai had given 10.03 acres of land to his elder son

/ original defendant's father Ramcharan and 8.60 acres was given to his second son Raghunath, and separated them during his lifetime and retained the properties shown in Schedule-D i.e. 16.48 acres of land. But Raghunath died issue-less. The trial Court struck the issue as to whether the property is self-acquired property of Aman Sai and clearly recorded a finding after elaborately discussing the evidence on record that the property was self-acquired property of Aman Sai. Relying upon clause 14 of *wajibul urj* of Sarguja State, it has been held that in the year 1939, Sarguja State was in existence and as per the Survey Settlement on the basis of ryoti rights, Ex.P-1 was granted in favour of the plaintiff's father Aman Sai which is Ex.P-1 i.e. 16 acres 48 decimals and the defendant's father was also granted 10 acres 3 decimals vide Ex.P-2 and Raghunath was granted Ex.P-3. As the defendant's father and Raghunath were in possession of their respective lands shown in Schedule-B & Schedule-C, respectively, and on the basis of their possession at the time of Sarguja State Survey Settlement, they were granted ryoti rights and on that basis, the trial Court has reached to the conclusion that the defendant's father and Raghunath, both, were separated from their father Aman Sai during his lifetime and only the property retained by Late Aman Sai is the property shown in Schedule-D / Ex.P-1 and since no separate property was given to the plaintiff's father as he was staying with Aman Sai and cultivating the land being in joint possession, the plaintiff succeeded the suit land after the death of Aman Sai. The first appellate Court also after elaborate discussion and well reasoned finding, accepted the finding of the trial Court that Aman

Sai had separated the defendant's father and Raghunath during his lifetime by giving them the properties shown in Schedule-B and Schedule-C, respectively. The said finding has been challenged by the defendants in second appeal only on the ground that since the property was held by the defendant's grand-father (Aman Sai), therefore, the defendant being the grand-son is entitled for a share in the suit property. The trial Court as well as the first appellate Court have clearly recorded a finding to this effect that the property (Schedule-D) is self-acquired property of Late Aman Sai and therefore that property would go only to the undivided son i.e. the plaintiff to the exclusion of divided sons.

10. In Mulla's Hindu Law, 23rd Edition paragraph 327 (page 522-523) with regard to partial partition and partial as to property, it has been held as under:-

“328. Partial partition – (1) A Partition between coparceners may be partial either in respect of the property or in respect of the persons making it.

After a partition is affected, if some of the properties are treated as common properties, it cannot be held that such properties continued to be joint properties since there was a division of title but such properties were not actually divided.

(2) *Partial as to property*.- It is open to the members of a joint family to make a division and severance of interest in respect of a part of the joint estate, while retaining their status as a joint family and holding the rest as the properties of a joint and undivided family. However, where there is evidence to show that the parties intended to sever, then the joint family status is put an end to, and with regard to any portion of the property which remained undivided the presumption would be that the members of the family would hold it as tenants-in-common unless and until a special agreement to hold as joint tenants is proved. When a partition is admitted or proved, the presumption is that all the property was divided and a person alleging that family

property, in the exclusive possession of one of the members after the partition, is joint and is liable to be partitioned, has to prove his case.”

11.In Mulla's Hindu Law, 23rd Edition, paragraph 322 (page 509)

learned author has stated about the partition by father during his lifetime as under:-

“This right of a father at times described as his ‘superior power’ or ‘peculiar power’ or *patria potestas* was reiterated by the Supreme Court in Apoorva Shantilal v. IT Commissioner, Gujarat, after referring to a number of decisions on the subject and it was observed that it was recognized in ancient Hindu law and due effect was given to the same. It was also held that a father was entitled to effect a partial partition of joint family properties by virtues of his right as *patria potestas* [See newly added Article 328 (2a)]. There was a subsequent amendment in Section 171 of the Income Tax Act, that no such partial partition would be recognized for the purposes of that enactment.”

12. Thus, from the aforesaid statement, it is quite vivid that when under the partition by a father, unequal shares are given to the sons, the transaction will be binding on the sons as a family arrangement, if acquiesced in by them. If the partition is unequal and unfair, it is open to the sons if they are majors to repudiate the partition. The partition will be good, until it is set aside and if the sons find that partition was not just and fair or unequal, it would thus be open to challenge.

13.In the matter of M. N. Aryamurthy and another v. M. D. Subbaraya Setty (through LRs)¹, the Supreme Court observed pertinently as under:-

“12.A father in a Mitakshara joint family has undoubted right to divide the family property at any moment during his life, whether his sons consent or do not consent to the division. The only limitation on his powers is that the division directed

1 (1972) 4 SCC 1

by him must be fair one in which he gives his son an equal share with himself.”

14. Similarly, in the matter of Apoorva Shantilal Shah, HUF v. Commissioner of Income Tax, Gujarat, Ahmedabad², Their Lordships of the Supreme Court while considering the partial partition of joint family property considered the effect of unequal distribution among the co-sharers and held as under:-

“26. We must, therefore, hold that partial partition of properties brought about by the father between himself and his minor sons cannot be said to be invalid under the Hindu law and must be held to be valid and binding. We wish to make it clear that this right of the father to effect a partial partition of joint family properties between himself and his minor sons, whether in exercise of his superior right as father or in exercise of the right as *patria potestas* has necessarily to be exercised bonafide by the father and is subject to the right of the sons to challenge the partition if the partition is not fair and just.

30. ... In our opinion, a partial partition of any joint family property by the father between himself and his sons does not become invalid on the ground that there has been no equal distribution amongst the co-shares. It is expected that the father who seeks to bring about a partial partition of joint family properties will act bonafide in the interest of the joint family and its members, bearing in mind in particular the interests of the minor sons. If however, any such partial partition causes any prejudice to any of the minor sons and if any minor son feels aggrieved by any such partial partition, he can always challenge the validity of such partial partition in an appropriate proceeding and the validity of such partition will necessarily have to be adjudicated upon in the proceeding on a proper consideration of all the facts and circumstances of the case. Till such partial partition has been held to be invalid by any competent court, the partial partition must be held to be valid.”

15. In the matter of M/s. Kalloomal Tapeswari Prasad (HUF) v. Commissioner of Income Tax³, Their Lordships of the Supreme Court have held that under the Hindu Law, partition may be either total or partial. A partial partition may be as regard the persons who

² (1983) 2 SCC 155

³ (1982) 1 SCC 447

are members of the family or as regard properties which belong to it. It is further held that Hindu Law does not require that the property must in every case be partitioned by metes and bounds or physically into different portions to complete a partition. A declaration of intention of coparcener to become divided brings about severance of status and it is open to the parties to enjoy their share of property as tenants-in-common in any manner known to law according to their desire.

16. In the matter of Arunachala v. Muruganatha⁴, the Supreme Court has held that in the self-acquired property of the father, rights of sons are unequal and held as under: -

“According to Mitakshara, the son has a right by birth in his father’s and grandfather’s estate, 'but a distinction is made in this respect by Mitakshara itself. In the ancestral or grand-father’s property in the hands of the father, the son has equal rights with his father, while in the self-acquired property of the father, his rights are unequal by reason of the father having an independent power over of predominant interest in the same.”

17. A Division Bench of the Madhya Pradesh High Court in the matter of Inder Narayan v. Rupnarayan Pandit and another⁵ has held as under: -

“According to Mitakshara School of Hindu Law, the son gets a right by birth in the father's property, whether it is ancestral or self-acquired. However, while the son's right actually to dispose of the share is unobstructed when the father's property is ancestral, it is obstructed when it is self-acquired by the father's full rights of disposal. But this distinction does not affect the factum of the son's getting a right at the very moment of his birth in all the property owned by the father. Succession, therefore, even to the father's self-acquired property, is by survivorship, properly so called, and not by inheritance, and if the self-acquired property has been not disposed of by the father during his life-time, on his death, the

4 AIR 1953 SC 495

5 AIR 1965 MP 107

undivided sons and grandsons would take the property to the exclusion of separated sons or grandsons.”

18. The aforesaid view was also taken by the Rajasthan High Court in the matter of Vishweshwarlal v. Bhuramal and another⁶ in which it has been held as under: -

“(6) At any rate, as it is well settled that a son has a right by birth in his father's self-acquired property, that property would go to the undivided son to the entire exclusion of the divided son, because the divided son had ceased to have any interest in it on partition or separation. As the father was joint with one son, the ancestral and self-acquired property of the father belonged to the joint family and on the death of the father there could therefore be no question of his separated son getting any share in it. This is the view taken in *Mt. Ram Dei v. Mt. Gyarsi*, AIR 1949 All 545 (FB) with which I am in respectful agreement. Reference in this connection may also be made to *(Chintapenta) Narasimha Rao v. Narasimham*, AIR 1932 Mad 361 and *Vasudeo Ganesh v. Vishwanath Shripad*, AIR 1948 Bom 313. The decision in the Oudh case, AIR 1930 Oudh 77 on which reliance has been placed by the trial court is no longer good law in view of the Full Bench decision in *Mt. Ram Dei v. Mt. Gyarsi*, referred to above.”

19. Thus, in view of the aforesaid established legal position discussed herein-above; both the Courts below are absolutely justified in holding that the original defendant's father – Ramcharan and Ramcharan's brother – Raghunath had separated from their father Late Shri Aman Sai during his lifetime by getting the lands shown in Schedule-B & Schedule-C, respectively, the defendant had no further right / share in the property retained and reserved by his grand-father Aman Sai in his favour shown in Schedule-D, as it was being possessed and cultivated by the plaintiff along with his father Aman Sai and after death of Aman Sai it was inherited by the plaintiff exclusively in exclusion of the defendant's father and

6 AIR 1968 Rajasthan 277

Raghunath which is also apparent from the fact that though the property given by Aman Sai to the defendant's father – Ramcharan and Ramcharan's brother – Raghunath was the property prior to Sarguja State Survey Settlement, which was settled in favour of defendant's father Ramcharan & Raghunath separately vide Exs.P-2 & P-3, but no such property was settled in favour of the plaintiff as admittedly he was living jointly with his father Aman Sai and the property shown in Schedule-D was settled in favour of Aman Sai in Sarguja State Settlement, it was Ex.P-1 and he was not given any property by his father by partition or otherwise.

20. Thus, on the aforesaid legal analysis, I am of the considered opinion that the finding recorded by the two Courts below holding that the property shown in Schedule-D has been succeeded by the plaintiff after the death of his father Aman Sai and Aman Sai had already separated his sons i.e. the defendant's father and Raghunath by separating them during his lifetime. The said findings are findings of fact based on the evidence available on record and are binding on this Court. I do not find any illegality or perversity in the judgments of both the courts below. Consequently, both the substantial questions of law are answered in negative. The second appeal is liable to be dismissed and is accordingly dismissed leaving the parties to bear their own cost(s).

21. A decree be drawn-up accordingly.

Sd/-
(Sanjay K. Agrawal)
Judge