

HIGH COURT OF CHHATTISGARH, BILASPUR**FA No. 67 of 2002**

1. Ramkali, wife of Chhedilal Kachi, aged 40 years,
2. Laxmi, son of Chhedi Lal Kachi, aged 28 years

Both residents of Juna Bilaspur, Tahsil and District Bilaspur,
Chhattisgarh ... **Appellants/Plaintiffs**

Versus

1. Ramdaiya, widow of Sheetal Prasad
2. Smt. Chanda Bai, wife of Kishan Kashyap, aged 35 years
3. Ram Narayan, son of Ram Prasad Kashyap, aged 60 years.
4. Chhedilal, s/o Sheetal Prasad Kashyap, 50 years, died through
- 4 (1) Savita Kashyap, wife of Guddu, aged about 27 years, R/o Gram Kusund, near Pata Chowk, Thana Civil, Bilaspur
- 4 (2) Sangita Kashyap, wife of Manoj, aged about 23 years, r/o Juna Bilaspur
- 4 (3) Lalita Kashyap, wife of Raja, aged about 20 years, R/o Sipat Chowk, near Sarkanda Rice Mill, Thana Sarkanda, Bilaspur

For the appellant	:	Mr. Dev Ashish Biswas, Advocate.
For the Respondents	:	Mr. Shakti Raj Sinha, Advocate

Hon'ble Shri Justice Goutam Bhaduri

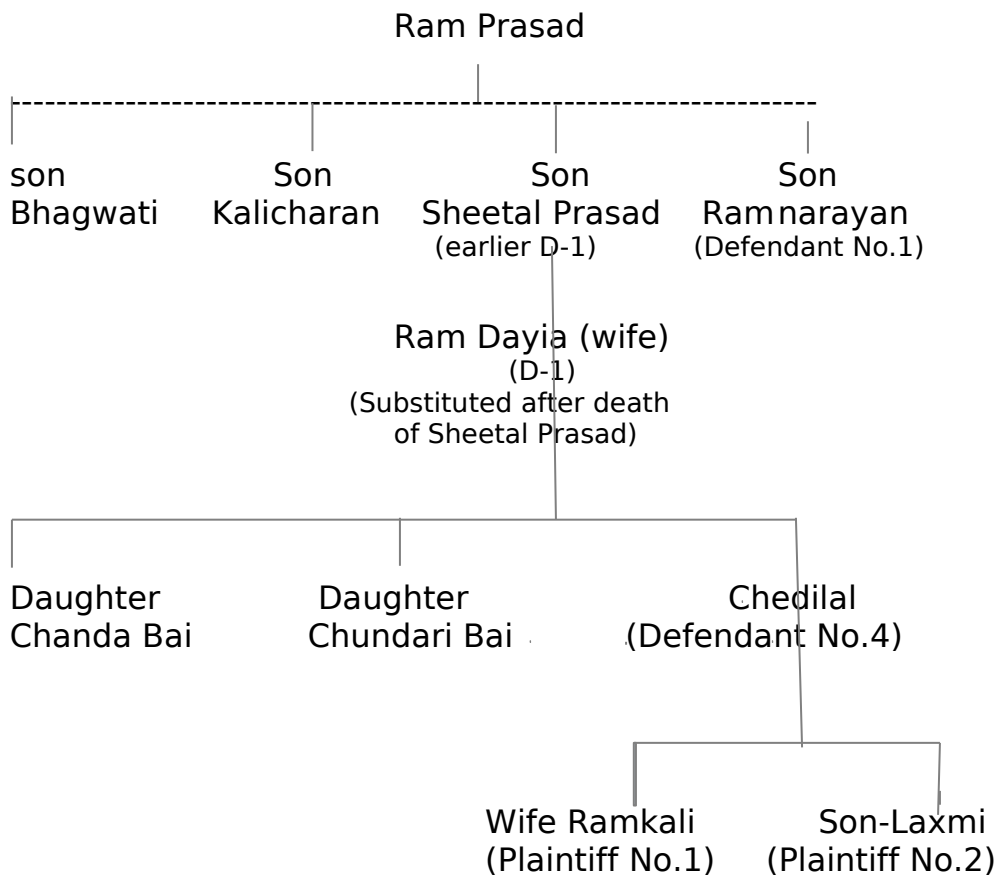
CAV JUDGMENT

RESERVED ON 24.10.2018

PRONOUNCED ON 05.12.2018.

1. The present appeal is against the judgment/order dated 21st February 2002 passed in Civil Suit No.12A/2000 whereby the suit for declaration and possession was dismissed.
2. As per the plaint averments, the suit was brought by

Ramkali, wife of Chhedilal and one Laxmi, son of Chhedilal. In such suit, declaration was sought on the ground that they are the joint owners of the suit house along-with defendants 1 & 4. The genealogical tree of the parties is reproduced herein-below :



3. According to the plaintiff, a house which is situated at a place Juna Bilaspur is the ancestral property of the plaintiffs as well as defendants 1 to 4. The said house fell to the share of Sheetal Prasad after partition of property was made among the brothers of Sheetal Prasad. It is stated that Laxmi who is one of the plaintiffs is grand-son of Sheetal Prasad has also share in the property and Sheetal Prasad without his consent sold the suit house in favour of Chanda Bai by a sale deed dated 17.01.1997 and gave the possession which was supported by defendants 3 & 4. It is stated that by such sale, defendant No.2 Chanda Bai who purchased the property did not get absolute right over the same as in the property

the right and share of Ramkali, wife of Chhedilal Laxmi son of Chhedilal were also enveloped. The prayer was made for cancellation of sale deed and also for possession of the suit house.

4. In reply, the defendants came out with a stand that the property was the self-acquired property of Sheetal Prasad on partition and thereafter he became the absolute owner. It was further stated that he being the absolute owner of the property, they have all the right to execute the sale deed. It was further stated that since Sheetal Prasad was suffering from Cancer as such in order to get proper value of house, he sold the house on 17.01.1997 to defendant No.2 one of the daughter Smt. Chanda Bai and since then she is in possession and enjoyment of suit property.
5. On the basis of pleading, the learned Court below framed 5 issues and eventually dismissed the suit, therefore, this appeal.
6. Learned counsel for the appellant would submit that the ancestral property having been acquired by Sheetal Prasad on partition of ancestral property, the share allotted to him being a coparcener amongst other brothers would be ancestral property as regards his male issue. Therefore, Laxmi, one of the plaintiff who is grandson of Sheetal Prasad had the right in the property i.e., the house which was sold by Sheetal Prasad and in absence of any consent by such plaintiffs, the sale cannot be executed in respect of share of Laxmi including his share. He, therefore, submits that the entire trial conducted by the trial Court has failed to appreciate those facts. Consequently the appeal is liable to

be allowed.

7. Per contra, learned counsel for the respondents submits that the ancestral property in the hands of Sheetal Prasad being co-parcener has not been properly proved. He further submits that since the property was devolved on Sheetal Prasad by virtue of Section 6, as such, operation of Section 8 of Hindu Succession Act 1956 would not be applicable. He has placed reliance in *(2016) 4 SCC 68 Uttam v. Saubhag Singh and others ; AIR 1987 S.C. 558* and submits that therefore the property would not remain as ancestral in the hands of Sheetal Prasad and it would be an exclusive/joint property.
8. Heard learned counsel for the parties and also perused the documents and records.
9. The suit was filed by Ramkali wife of Chhedilal Kachi and Laxmi son of Chhedilal. The sale deed was executed by Sheetal Prasad, father of Chhedilal. Pleading of the plaint shows that the plaintiffs have averred that they belonged to the same family and further pleaded that a partition had earlier taken place between the brothers of Shitla Prasad. No date of partition has been pleaded or proved. Subsequent paras of the plaint shows that the suit property is pleaded to be an ancestral property of Sheetal Prasad (since deceased). Sheetal Prasad was arrayed as defendant no.1 and Chhedilal was arrayed as defendant No.4. Further it is stated in the plaint that the suit property was obtained in partition by Shitla Prasad and it is a joint Hindu Family Property. Subsequently it is stated that Sheetal Prasad had sold the property to his daughter Chanda Bai without the consent of

plaintiff i.e., wife Ramkali and grandson Laxmi. As against this, the defendant stated that after the partition of suit land, it became self acquired property of Shital Prasad.

10. Ram Kali, the plaintiff No.1 in his deposition stated that the suit land was of her father-in-law i.e., Shitla Prasad as such has been inherited by her husband, mother-in-law and son. She further stated that the father-in-law has sold the property to sister in law and the consent of her husband was obtained by fraud. Though the averments of fraud has been made regarding execution of sale deed, but no pleading exists. In the cross examination of P.W.1 Ram Kali, she further stated that after partition between Sheetla Prasad and his brothers, others have sold their property to different persons. Statement of Durga Prasad (P.W.2) do not appear to be much help to the plaintiff as it is hear-say. Therefore, if the pleading and evidence of the plaintiff are accepted in totality even in such case, no case is made out to hold the right in their favour.
11. There is no pleading of the co-parcener family in entire plaint. Therefore there exists a distinction between Mitakshara co-parcenary property and joint family property. Mitakshara co-percenery carries a definite conception. It is a body of individuals having been created by law unlike a joint family which can be constituted by agreement of parties. A Mitakshara co-parcenery is a creature of law. The Supreme Court in case of *Hardeo Rai v. Sakuntala Devi and others (2008) 7 SCC 46* (para 19) has reiterated the principles laid down in *S.B.I. v Ghamandi Ram (1969) 2 SCC 33* which reads as under :

“5. According to Mitakshara School of Hindu Law all the property of Hindu joint family is held in collective ownership by all the coparceners in a quasi-corporate capacity. The textual authority of the Mitakshara lays down in express terms that the joint family property is held in trust for joint family members then living and thereafter to be born (see Mitakshara, Chapter I, pp. 1-27). The incidents of coparcenership under the Mitakshara Law are :

first, the lineal male descendants of a person upto the third generation, acquire on birth ownership in the ancestral properties of such person;

secondly, that such descendants can at any time work out their rights by asking for partition;

thirdly, that till partition each member has got ownership extending over the entire property conjointly with the rest;

fourthly, that as a result of such co-ownership the possession and enjoyment of the properties is common;

fifthly, that no alienation of the property is possible unless it be for necessity, without the concurrence of the coparceners, and

sixthly, that the interest of a deceased member lapses on his death to the survivors. A coparcenary under the Mitakshara School is a creature of law and cannot arise by act of parties except insofar that on adoption the adopted son becomes a coparcener with his adoptive father as regards the ancestral properties of the latter.”

12. Neither there is a pleading that the property was a coparcenary property nor any conclusion was arrived at by the trial Court that the appellant was a member of Mitakshara School of co-parcener. On the other hand, the manner in which the properties were possessed by the different brothers of Sheetal Prasad vis-a-vis the other co-owners, it shows that the parties were joint subsequently their jointness was divided.

13. The Supreme Court in *Commissioner of Wealth-Tax, Kanpur etc. etc. v. Chander Sen etc., AIR 1986 SC 1753* while interpreting section 8 of the Hindu Marriage Act, 1956 has held at Para 28 as under:

“20. In view of the Preamble to the Act i.e., that to modify where necessary and to codify the law, in our opinion, it is not possible when Schedule indicates heirs in Class I and only includes son and does not include son's son but does include son of a predeceased son, to say, that when son inherits the property in the situation contemplated by S. 8 he takes it as Karta of his own undivided family. The Gujarat High Court's view noted above, if accepted, would mean that though the son of a predeceased son and not the son of a son who is intended to be excluded under S.8 to inherit, the latter would by applying the old Hindu law get a right by birth of the said property contrary to the scheme outlined in S.8. Further more as noted by the Andhra Pradesh High Court the Act makes it clear by S.4 that one should look to the Act in case of doubt and not to the pre-existing Hindu Law. It would be difficult to hold today the property which devolved on a Hindu under S.8 of the Hindu Succession Act would be HUF property in his hand vis a vis his own son; that would amount to creating two classes among the heirs mentioned in Class I, the male heirs in whose hands it will be joint Hindu family property and vis-a-vis son and female heirs with respect to whom no such concept could be applied or contemplated. It may be mentioned that heirs in Class-I of Schedule under S.8 of the Act included widow, mother, daughter of predeceased son etc.”

14. On applying the aforesaid principles to the present case, prima facie it appears that the plaintiffs Ram Kali and Laxmi who were daughter-in-law and grand-son respectively are not included in the schedule of Section 8 of the Hindu Succession Act to maintain a suit of like nature. Therefore the property devolved on Sheetal Prasad cannot be held to be co-parcener HUF vis-a-vis his grandson and daughter-in-law as it would amount to create any other class as mentioned in Section 8 of the Hindu Succession Act.
15. On close scrutiny of facts and evidence, I am of the opinion

that neither there has been any pleading nor any evidence led by the plaintiffs to show that the property was a co-parcenary property so as to lay their hands for such property. Further more, the plaintiffs were not included even in Schedule-1 of Section 8 of the Act. Therefore under the circumstances the presumption of co-parcener cannot be injected or substituted.

16. In the result, the finding arrived at by the learned court below do not require any further evidence which mandates interference. Accordingly, the appeal fails and is dismissed.

**Sd/-
GOUTAM BHADURI
JUDGE**