

NAFR

HIGH COURT OF CHHATTISGARH, BILASPURSecond Appeal No.230 of 2005

1. Shiv Prasad S/o. Jaduram, aged about 48 years,
2. Nohri, widow of Rupnarayan, aged about 58 years,
3. Suraj Prasad, S/o. Rupnarayan, aged about 25 years,
4. Kanhaiya S/o. Rupnarayan, aged about 22 years,
5. Sumita D/o. Rupnarayan, aged about 19 years,
6. Rajiv Gandhi S/o. Rapnarayan, aged about 7 years
Minor through guardian mother Nohari, Appellant No.2
7. Kendi, Widow of Badri Prasad, aged about 60 years,
8. Yogendra Nath S/o. Badri Prasad, aged about 30 years
9. Dinesh S/o. Badri Prasad, aged about 22 years
10. Priteem S/o. Badri Prasad, aged about 15 years
11. Butki S/o. Badri Prasad, aged about 18 years
12. Munni D/o. Badri Prasad, aged about 25 years
13. Noni D/o. Badri Prasad, aged about 23 years
14. Guddi D/o. Badri Prasad, aged about 24 years
Appellant No.8 (Neurotic) & 10 (Minor) through guardian mother
Appellant No.7. All belong to caste-Rajwar, R/o. Village Bhatti Kala,
P.S. & Tahsil Ambikapur, Distt. Surguja (CG)

(Plaintiffs)
---- Appellants

Versus

1. Mathura S/o. Jaduram, aged about 50 years, Caste-Rajwar, R/o. Village Bhitthikala, P.S. & Tahsil Ambikapur, Distt. Surguja (CG)
2. Kota, D/o. Jaganram, Aged about 49 years, Occupation Housewife, R/o. Village Bankipur (Tangighutara) P.S. & Tahsil Ambikapur, Distt. Surguja (CG)
3. Smt. Vidhya Devi, W/o. Kundanlal, Aged about 55 years
4. Prayag Agrawal, S/o. Kundanlal Agrawal, Aged about 40 years
5. Redheshyam Agrawal, S/o. Kundanlal Agrawal, Aged about 37 years
6. Vinod Kumar Agrawal, S/o. Kundanlal Agrawal, Aged about 35 years,

All are resident of School Road, Ambikapur, P.S. & Tahsil Ambikapur, Distt. Surguja (CG)

7. State of Chhattisgarh, Through Collector, Distt. Surguja (CG)

---- Respondents

For Appellants: Mr.Ashok Kumar Shukla, Advocate

For Respondent No.1:-

Mr.D.N.Prajapati, Advocate

For Respondents No. & 4: -

Mr.Sushil Dubey, Advocate

For Respondent No.7 / State: -

Mr. Arun Sao, Deputy Advocate General.

Hon'ble Shri Justice Sanjay K. Agrawal

Judgment on Board

14.11.2018

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

1. Whether the lower appellate Court was justified in holding that the suit was liable to be dismissed as having abated upon death of purchaser/defendant-Chindagi Ram ?

2. Whether the Court below was obliged under the law to examine the appeal on its own merits and for that reason, the case is required to be remanded to the First Appellate Court for consideration of grounds raised in the appeal on merits ?

[For the sake of convenience, the parties would be referred hereinafter as per their status shown in the suit before the trial Court.]

2. The plaintiffs / appellants herein filed a suit for declaration of title, partition, separate possession and permanent injunction against defendants No.1 to 4 and also pleaded that sale made by defendants No.1 to 4 in favour of defendants No.5 and 6 be declared null and void. During pendency of the suit, defendant No.5 (one of the purchasers) died and by order dated 22.3.1993 the trial Court held the suit against defendant No.5 has abated by rejecting the application under Order 22 Rule 4 of the CPC. Thereafter the trial Court by its judgment and decree dated 4.1.2000 dismissed the

suit. First Appeal preferred by the plaintiffs was also dismissed by the First Appellate Court by judgment and decree dated 5.3.2005 holding that by order dated 22.3.1993 the suit had abated as a whole and further held that there is mis-joinder of the party so far as appellants No.3A to 3I is concerned. Questioning the judgment and decree passed by the First Appellate Court, this second appeal under Section 100 of the CPC has been filed by the plaintiffs/appellants, in which substantial questions of law have been framed by this Court, which have been set-out in the opening paragraph of the judgment.

3. Mr.Ashok Kumar Shukla, learned counsel for the appellants/plaintiffs, would submit that the First Appellate Court is absolutely unjustified in holding the suit to be fully abated and further unjustified in holding that the appeal suffers from mis-joinder of necessary party.
4. On the other hand, Mr.D.N.Prajapati, learned counsel for respondent No.1 and Mr.Sushil Dubey, learned counsel for respondents No.3 and 4, would support the impugned judgment and decree impugned.
5. I have heard learned counsel for the parties herein and considered their rival submissions made herein-above and went through the record with utmost circumspection.
6. Admittedly, defendant No.5-Chindgi was impleaded as party in the suit as he has purchased part of the suit property. The trial Court by order dated 22.3.1993 has held the suit against defendant No.5 to be abated by rejecting the application under Order 22 Rule 4 of the

CPC. That order was never challenged by either of the parties and that order has become final and thereafter the suit was dismissed on 4.1.2000, against which, the plaintiffs preferred first appeal before the First Appellate Court under Section 96 of the CPC. In that appeal, the First Appellate Court was required to examine legality, validity and correctness of the decree impugned, which the First Appellate Court has not gone into.

7. Legality, validity and correctness of the order dated 22.3.1993 was not a issue brought before the First Appellate Court by the appellant in first appeal so preferred as the defendants have neither filed cross-appeal nor cross-objection, if any, to question the order dated 22.3.1993. In absence of that, the First Appellate Court could not have entered into the dispute of abatement which has become final by order dated 22.3.193, which was not questioned by either of the parties and therefore, it was not open to set aside that order by the First Appellate Court. The First Appellate Court ought to have confined its finding on the issue decided by the trial Court, particularly the issue which has been decided against the appellants/plaintiffs as held by the Supreme Court in the matter of **Santosh Hazari v. Purushottam Tiwari (deceased) by LRs.**¹. The First Appellate Court ought to have dealt with all the issues which have been decided against the plaintiffs. Likewise, the First Appellate Court has dismissed the appeal on the ground of mis-joinder of necessary party. Dismissal of appeal on the ground of mis-joinder of necessary party is also unsustainable as the First Appellate Court ought to have directed the plaintiffs to make

¹ (2001) 3 SCC 179

necessary correction and the appeal could not have been decided thereafter on merits.

8. In view of above, the judgment of the decree of the First Appellate Court cannot be sustained. It is accordingly set aside. The matter is remitted to the First Appellate Court for hearing and disposal of appeal on merits in accordance with law.
9. The second appeal is allowed to the extent indicated hereinabove. Since first appeal was filed on 23.4.2005, the First Appellate Court is directed to conclude the hearing of appeal within four months from the date of receipt of certified copy of this order after hearing the parties. Records be sent back forthwith.
10. There shall be no order as to cost(s).

Sd/-
(Sanjay K. Agrawal)
Judge

B/-