

HIGH COURT OF CHHATTISGARH, BILASPURSecond Appeal No.497 of 2003Order reserved on: 27-11-2018Order delivered on: 7-12-2018

1. Mahanand (dead) through LRs

1 (i) Smt. Rajmati Ratre, Wd/o Late Mahanand Ratre, aged about 75 years

(ii) Smt. Pyari Bai Ratre, Wd/o Shani Kumar Ratre, aged about 38 years

(iii) Rajendra Kumar Ratre, S/o Late Mahanand Ratre, aged about 35 years

(iv) Sanjay Ratre, S/o Late Mahanand Ratre, aged about 33 years

All are R/o Shivnath Marg, Jarhabhata, Bilaspur, Tehsil & District Bilaspur (C.G.)

2. Dashmat Bai (dead) through LRs

2 (i) Ramkhilawan Kamlesh, S/o Shri Tiharu Kamlesh, aged about 50 years, R/o Village Uchabhathi (Mohalla Kawaridih), P.S., Tahsil & Distt. Bilaspur (C.G.)

(ii) Smt. Usha Bai, Wd/o Late Shri Ramayan Suryavanshi, aged about 35 years, R/o Village Nargoda, P.S. Seepat, Tahsil Masturi, District Bilaspur (C.G.)

(iii) Smt. Teras Bai, W/o Ramratan Suryawanshi, aged about 30 years, R/o Village Bhadora, P.S. & Tahsil Masturi, Distt. Bilaspur (C.G.)

3. Shakun Bai, aged about 40 years, W/o Khorbahara, R/o Ganiyari, Tehsil Takhatpur, District Bilaspur (C.G.)

(Plaintiffs)
---- Appellants

Versus

1. Smt. Sakira Begum, aged 31 years, W/o Sukhilal Ratre

2. Sukhilal Ratre, aged about 35 years, Occupation Government Service,

Both R/o Jarhabhata, Bilaspur, District Bilaspur (C.G.)

(Defendants)
---- Respondents

For Appellants:	Mr. Govind Ram Miri and Mr. Basant Kaiwartya, Advocates.
For Respondents:	Mr. Ravindra Agrawal, Advocate.

Hon'ble Shri Justice Sanjay K. Agrawal

C.A.V. Judgment

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

“Whether the Courts below by relying upon a documentary evidence like Ex.D-1 and sale deeds Ex.D-16 to Ex.D-19 coupled with the evidence of Lalhi Bai (PW-1) were justified in holding that after the death of Johan, the property including the suit house left by him was partitioned among his heirs?”

(Parties hereinafter will be referred as per their status shown in the plaint before the trial Court.)

2. The plaintiffs herein brought an action for declaration of their title and possession over the suit property stating inter alia that the suit property is the property of Hindu Undivided Family and the defendants have not acquired title by sale deed dated 18-10-1993 and further sought declaration that the order passed by the Municipal Corporation on 5-12-1994 is null and void and also claimed for permanent injunction against the defendants. It is appropriate to mention here that civil suit was filed by original plaintiff Smt. Lalhi Bai who died on 12-9-2000 during the pendency of suit and her legal representatives namely Mahanand, Smt. Dashmat Bai and Smt. Sakun Bai were substituted as plaintiffs. It was also pleaded that sale deed was executed by Sahdev on 18-10-1993 and he has not conferred any title to defendant No.1 Smt. Sakira Begum, as such, alienation and subsequent mutation has not conferred any title to defendant No.1 Smt. Sakira Begum and

therefore the suit be decreed accordingly.

3. The defendants – husband & wife, both filed their joint written statement stating inter alia that the suit property was originally held by Johan and after death of Johan, the property was partitioned between his two sons Mahanand & Sahdev in the year 1971-72 and the suit property was given to Sahdev in family partition, and defendant No.1 is a purchaser from Sahdev for a valid consideration and title has been passed in her favour, as such, the suit deserves to be dismissed.
4. The trial Court framed as many as nine issues and finding that Sahdev has rightly sold the suit property on 18-10-1993 in favour of defendant No.1, dismissed the suit. Appeal preferred by the plaintiff was also dismissed by the first appellate Court and in second appeal preferred, substantial question of law has been framed and set out in the opening paragraph of this judgment for consideration.
5. Mr. Govind Ram Miri, learned counsel appearing for the appellants / plaintiffs, submits concurrent finding recorded by the two courts below holding that the alienation made by Sahdev in favour of defendant No.1 is valid, is perverse and contrary to record. The suit house was the property of Johan which was never partitioned amongst his heirs, therefore, Sahdev alone has no right to alienate the suit property. He further submits that Ex.D-1 cannot be considered as deed of partition and Mahanand, being one of the sons of Johan, who was though subsequently substituted as plaintiff was cited as defendants' witness and the defendants have failed to examine Mahanand as their witness, therefore, adverse presumption should be drawn against them. He also submits that

possession of the suit house was never delivered to defendant No.1 and payment of consideration is also suspicious and therefore no title has been passed in favour of defendant No.1 by the alleged sale deed dated 18-10-1993, as such, the appeal be allowed and the substantial question of law be answered in favour of the plaintiffs.

6. Replying to the above-stated contention, Mr. Ravindra Agrawal, learned counsel appearing for the defendants/respondents, submits that the suit was filed by Smt. Lalhi Bai on 16-2-1995, she died on 12-9-2000 and her legal representatives were substituted on 22-12-2000 in which Mahanand, one of the sons, was also substituted as plaintiff No.1, but he did not step into the witness box and failed to refute the execution of memorandum of partition Ex.D-1 dated 13-6-1991 in which he was executant of the deed and as such, he is bound by the pleading made by Smt. Lalhi Bai – the plaintiff, as the plaint was even not amended by the newly substituted plaintiffs. He further submits that Sahdev has rightly executed the sale deed Ex.D-3 in favour of defendant No.1 by obtaining valid cash consideration, as such, it is a finding of fact recorded by the two Courts below based on the evidence available on record, therefore, the second appeal deserves to be dismissed by answering the substantial question of law in favour of the defendants.
7. I have heard learned counsel for the parties and considered the rival submissions and went through the record with utmost circumspection.
8. Admittedly, original plaintiff Smt. Lalhi Bai filed the suit for declaration of title that the suit house is owned by her and that is

the property of Hindu Undivided Family and the sale deed made on 18-10-1993 is null and void, it gives no title to defendant No.1 who has purchased the suit land and the order of mutation by the Commissioner of the Municipal Corporation dated 5-12-1994 is also null and void.

9. The trial Court while deciding issue Nos.1(a), 1(b) & 3 held that the property of Johan was partitioned in the year 1971-72 between Mahanand & Sahdev and Mahanand had executed the memorandum of partition on 13-9-1991 (Ex.D-1), the suit house fell in the share of Sahdev and Sahdev has executed the sale deed vide Ex.D-3 in favour of defendant No.1. It was also held that Smt. Lalhi Bai died during the pendency of the suit itself on 12-9-2000 and Mahanand was arrayed as one of the legal representatives of the plaintiff in the suit and he was one of the witnesses of the sale deed Ex.D-3, but he did not step into the witness box to contradict the sale deed or any transfer made by Sahdev in favour of defendant No.1 and as such, the trial Court reached to the conclusion that the suit house was partitioned between Sahdev & Mahanand evident from Ex.D-1 on 13-9-1991 and it came in the share of Sahdev and Sahdev has rightly sold the property to defendant No.1 vide registered sale deed dated 18-10-1993 (Ex.D-3) and that has been substantially agreed by the first appellate Court with said finding and the appeal was dismissed.
10. The question for consideration is, whether finding recorded by the two Courts below holding that Sahdev has sold the land in favour of defendant No.1 and the suit property after death of Johan, was partitioned among his heirs?

11. As noticed herein-above, Smt. Lalhi Bai having filed the suit for the aforesaid reliefs died on 12-9-2000 and her LRs including one of her sons Mahanand were substituted as plaintiffs. Ex.D-1 was executed by Mahanand on 13-9-1991 and it is a memorandum of partition in which the suit house fell in the share of Sahdev. Though Mahanand became one of the plaintiffs after his substitution on the death of her mother Smt. Lalhi Bai, though Ex.D-1 – memorandum of partition has been proved by S.L. Ratre (DW-1) & Laxman Prasad Karowari (DW-3) and though Mahanand was one of the plaintiffs who is stated to have executed Ex.D-1, but he did not step into the witness box to contradict Ex.D-1. Likewise, Ex.D-16 was executed by Sahdev in favour of one Dr. Mohsin Bhai and Mahanand stood as a witness in Ex.D-16. In Exs.D-16 & D-17, it has been clearly recited by Sahdev while executing the sale deed in favour of Dr. Mohsin Bhai that the alienated property (other than the suit property) was obtained by him in partition. Again, Mahanand did not step into the witness box to clarify the position about partition which goes to show that the suit property was partitioned between Sahdev & Mahanand by Ex.D-1 and it fell into the share of Sahdev and he has rightly alienated the same in favour of defendant No.1 by sale deed Ex.D-3.
12. Claim of the original plaintiff was that there is no partition of the joint family between the parties. No partition deed was executed by Mahanand, but the status of Mahanand after having been arrayed as plaintiff after death of Smt. Lalhi Bai, has become that of the plaintiff and he is bound by the pleading made by Smt. Lalhi Bai in the plaint.

13. The Supreme Court in the matter of Ambalika Padhi (Smt) and another v. Radhakrishna Padhi and others¹ held that the right of partition or the right as prayed for was personal to the original plaintiff and observed as under: -

“13. ... The present plaintiffs are claiming under the original plaintiff and are continuing the same suit. They have not amended the basis of the suit or the reliefs asked for. We are unable to see how their cause of action is different from the cause of action of the original plaintiff, merely because they are claiming to be legal representatives under a settlement and a will. The Division Bench considers that had the present plaintiffs been natural heirs they would have been entitled to continue the suit but, they say, since the present plaintiffs are claiming on the basis of a deed of settlement and a will, they cannot do so. With respect, we are unable to understand this reasoning. The present plaintiffs were indeed seeking to continue the suit as filed by the original plaintiff and for the same reliefs as were claimed by her. They were not claiming any other or different right. Indeed, the settlement and will executed in their favour were in issue in the suit filed by the original plaintiff herself and findings were recorded affirming both the deeds. The right claimed by the original plaintiff was not a personal right. It was right to property which she settled upon and bequeathed to the present plaintiffs. ...”

14. It is trite that when a person is brought on record in his/her capacity as a legal representative, then he/she is bound by the pleadings already raised by the deceased, he/she cannot raise pleadings or defence which were otherwise not available to the original party, but the said principle would not apply in a case where a person who otherwise happens to be a legal representative but is brought on record under Order 1 Rule 10 of the CPC in his personal capacity.

15. As such, the plaintiffs / appellants were bound by the pleadings raised by Smt. Lalhi Bai.

16. In the matter of Vidhyadhar v. Manikrao and another², it has

1 (1992) 1 SCC 667

2 (1999) 3 SCC 573

been held that where a party to the suit does not appear into the witness box and state his own case on oath and does not offer himself to be cross-examined by the other side, adverse inference has to be drawn and it was observed as under: -

“17. Where a party to the suit does not appear in the witness-box and states his own case on oath and does not offer himself to be cross-examined by the other side, a presumption would arise that the case set up by him is not correct as has been held in a series of decisions passed by various High Courts and the Privy Council beginning from the decision in *Sardar Gurbakhsh Singh v. Gurdial Singh*³. This was followed by the Lahore High Court in *Kirpa Singh v. Ajaipal Singh*⁴ and the Bombay High Court in *Martand Pandharinath Chaudhari v. Radhabai Krishnarao Deshmukh*⁵. The Madhya Pradesh High Court in *Gulla Kharagjit Carpenter v. Narsingh Nandkishore Rawat*⁶ also followed the Privy Council decision in Sardar Gurbakhsh Singh case (supra). The Allahabad High Court in *Arjun Singh v. Virendra Nath*⁷ held that if a party abstains from entering the witness-box, it would give rise to an inference adverse against him. Similarly, a Division Bench of the Punjab and Haryana High Court in *Bhagwan Dass v. Bhishan Chand*⁸ drew a presumption under Section 114 of the Evidence Act, 1872 against a party who did not enter into the witness-box.”

17. Similarly, in the matter of **Khatri Hotels Private Limited and another v. Union of India and another**⁹, the Supreme Court has pertinently observed as under: -

“35. What is most surprising is that even though Appellant Lal Chand was cited as the first witness in Suit No. 303 of 2000 (renumbered as 473 of 2004), he did not step into the witness box. This appears to be a part of calculated strategy. He knew that if he was to appear as a witness, it will not be possible for him to explain the apparent contradictions in the pleadings of the three suits on the issue of cause of action and falsity of the averments contained in para 19 in Suit No. 303 of 2000 will be exposed. This is an additional reason for holding

3 AIR 1927 PC 230 : 32 CWN 119

4 AIR 1930 Lah 1 : ILR 11 Lah 142

5 AIR 1931 Bom 97 : 32 Bom LR 924

6 AIR 1970 MP 225 : 1970 MPLJ 586

7 AIR 1971 All 29

8 AIR 1974 P&H 7

9 (2011) 9 SCC 126

that the trial court and the High Court did not commit any error by recording a conclusion that the suit was barred by limitation.”

18. As such, despite best evidence of Mahanand, who was plaintiff and who is signatory and executant of Ex.D-1 – memorandum of partition and also a witness to Ex.D-16, he did not step into the witness-box and state his own case on oath and failed to offer himself to be cross-examined by the other side and also did not contradict neither Ex.D-1 nor Ex.D-16 – sale deed executed by Sahdev in which Sahdev has clearly made declaration that the suit property was obtained by him in partition.
19. The plaintiffs' case is that the property was joint property and therefore vendor has no right to alienate the same alone. Jointness of the property is a question of fact and not the question of law as held by the Madhya Pradesh High Court in the matter of **Jainendra Kumar and others v. Kailash Chand**¹⁰.
20. As such, there is a concurrent finding by the Courts below that the property was separate property of Sahdev obtained on partition vide Ex.D-1 and Sahdev in his own right has sold the property to defendant No.1 vide sale deed Ex.D-3, as Mahanand – executant of the partition deed, was not examined despite he has the opportunity to get himself examined and clarify the position about partition, as such, it is rightly held concurrently by the two Courts below that there was already partition between the parties and the suit property fell into the share of Sahdev and Sahdev has sold the property to defendant No.1 by sale deed Ex.D-3.
21. The Supreme Court in the matter of **Vishwanath Agrawal, S/o**

10 1985 JLJ 533

Sitaram Agrawal v. Sarla Vishwanath Agrawal¹¹ held that High

Court should not disturb the concurrent finding of fact, unless finding recorded are perverse being based on no evidence and observed as under: -

“36. In *Major Singh v. Rattan Singh*¹² it has been observed that when the courts below had rejected and disbelieved the evidence on unacceptable grounds, it is the duty of the High Court to consider whether the reasons given by the courts below are sustainable in law while hearing an appeal under Section 100 of the Code of Civil Procedure.

37. In *Vidhyadhar v. Manikrao* (supra), it has been ruled that the High Court in a second appeal should not disturb the concurrent findings of fact unless it is shown that the findings recorded by the courts below are perverse being based on no evidence or that on the evidence on record no reasonable person could have come to that conclusion. We may note here that solely because another view is possible on the basis of the evidence, the High Court would not be entitled to exercise the jurisdiction under Section 100 of the Code of Civil Procedure. This view of ours has been fortified by the decision of this Court in *Abdul Raheem v. Karnataka Electricity Board*¹³.”

22. Therefore, concurrent findings recorded by the courts below are finding of fact based on the evidence available on record. I do not find any illegality or perversity in the said finding. The substantial question of law is answered accordingly and the second appeal is dismissed leaving the parties to bear their own cost(s).

23. A decree be drawn-up accordingly.

Sd/-
(Sanjay K. Agrawal)
Judge

Soma

11 (2012) 7 SCC 288

12 (1997) 3 SCC 546 : AIR 1997 SC 1906

13 (2007) 14 SCC 138 : AIR 2008 SC 956