

HIGH COURT OF CHHATTISGARH, BILASPUR**Second Appeal No. 764 of 1999**

Basmatiya (since deceased) through LR.

- 1(A) Birsai, Aged 52 years, S/o Sant Ram, R/o. Village Andhala, P.S. Lakhanpur, Teh. Ambikapur, Civil and Revenue Distt. Surguja (C.G.)
- 1(B) Nohar Sai, Aged 50 years, S/o Sant Ram, R/o. Village Andhala, P.S. Lakhanpur, Teh. Ambikapur, Civil and Revenue Distt. Surguja (C.G.)
- 1(C) Taran Sai, Aged 48 years, S/o Sant Ram, R/o. Village Andhala, P.S. Lakhanpur, Teh. Ambikapur, Civil and Revenue Distt. Surguja (C.G.)
- 1(D) Kaushal, Aged 46 years, S/o Sant Ram, R/o. Village Andhala, P.S. Lakhanpur, Teh. Ambikapur, Civil and Revenue Distt. Surguja (C.G.)
- 1(E) Humeshwar, Aged 44 years, S/o Sant Ram, R/o. Village Andhala, P.S. Lakhanpur, Teh. Ambikapur, Civil and Revenue Distt. Surguja (C.G.)
- 1(F) Devnanden, Aged 42 years, S/o Sant Ram, R/o. Village Andhala, P.S. Lakhanpur, Teh. Ambikapur, Civil and Revenue Distt. Surguja (C.G.)
2. Maan Kunwar, wife of Santram, aged about 35 years, Caste-Kanwar

(Defendant No. 4)

----Appellants

Versus

Jugari (since deceased) through LR.

1. Smt. Kendi, W/o Ledaga Baboo, aged 45 years, resident of village Gourela, Tahsil Ambikapur, Distt. Surguja (C.G.)
2. Smt. Shiv Kunwar, daughter of Pawan Sai, Occupation -Cultivator, resident of village Salka, Tahsil Ambikapur, Distt. Surguja (M.P.) (Defendant No. 2)
3. The State of Chhattisgarh, Through the Collector, Surguja (Ambikapur) Distt. Surguja (M.P.)

----Respondents

For Appellants	:	Mr. S.V. Purohit, Advocate.
For Respondents No.1 & 2	:	None present.
For Respondent No. 3/ State	:	Mr. Adhiraj Surana, Dy. Govt. Advocate.

Hon'ble Shri Justice Sanjay K. Agrawal

Order On Board

28/11/2018

1. The substantial question of law involved, formulated and to be answered in this defendants' No. 3 & 4 second appeal state as under:

“1. Whether the finding of the first appellate Court was perverse while reversing the finding of the trial Court only on the basis of the fact that the plaintiff could not prove partition of the family property ?

2. Whether the finding of the first appellate Court is perverse in the light of the evidence which have come on record ?

2. The imperative facts required to be noticed for adjudication of this appeal are as under:

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

2.1 The Respondent No.1/plaintiff filed a suit for declaration and permanent injunction that alienation made by defendants No. 1 & 2 in favour of defendants No. 3 & 4 vide sale deed dated 7th June, 1984 vide Exs. D-7 & D-8 is null and void and defendants No. 3 & 4 be restrained from interfering with her possession stating *inter alia* that the suit land is originally held by late Mitku @ Nawapariha and the plaintiff is second wife of his son Kalam Sai whereas defendant No. 1 – Ghasnin is the second wife of Sonsai (son of Gajraj) and partition has taken place 25 years prior to the filing of the suit in which property situated at village Andhla fell in share of Kalam Sai whereas property situated at Village Salka fell in share of Gajraj and, as such, property situated at village Andhla could not have been sold by defendants No.1 & 2 in favour of defendants No. 3 & 4 and, therefore, the suit be decreed.

2.2 Defendants filed their written statement denying the plaint allegation stating inter alia that suit land was jointly acquired by Kalam Sai & Gajraj and settlement patta was granted in their name; the land situated at village Salka is self acquired property of Gajraj whereas the suit land situated at village Andhla was joint property of Kalam Sai and Gajraj and the suit land has already been sold by defendants No. 1 & 2 in favour defendants No. 3 & 4

3. The trial Court by its judgment & decree dated 29.01.1996 dismissed the suit holding that no partition has taken place between Kalamsai & Gajraj during life time of Mitku @ Nawapariha. Plaintiff preferred first appeal thereagainst. The first appellate Court by its impugned judgment & decree dated 30.03.1999 reversed the finding recorded by the trial Court and decreed the plaintiff's suit in her favour.

4. Questioning the judgment and decree passed by the first appellate court, this second appeal has been preferred by defendants No. 3 & 4 in which the substantial questions of law have been formulated for consideration, which have been set out in the opening paragraph of the judgment.

5. Learned counsel appearing for the appellants / defendants No. 3 & 4 would submit that the first appellate Court was unjustified in reversing the well reasoned judgment & decree passed by the trial Court, as such, the impugned judgment and decree passed by the first appellate Court deserves to be set aside and the decree of the trial Court deserves to be restored, and thereby the suit be dismissed.

6. I have heard learned counsel appearing for the appellants and perused the record of both the courts below including judgment & decree impugned with utmost circumspection.

7. The trial Court has clearly recorded a finding that there was no partition between Kalamsai and Gajraj and the suit land was self acquired property of predecessor-in-title of the plaintiff and defendant No.1 .

8. The question for consideration is whether the partition has been effected between the predecessor-in-title of plaintiff and defendant No.1.

9. In order to prove partition of the property fell in share of her predecessor -in- title, the plaintiff has examined four witnesses. Rajmat Bai (PW-1), daughter of the plaintiff, who has been appointed as power of attorney by the plaintiff to try the suit on her behalf, has stated in her evidence that during the life time of Mitku @ Nawapariha, predecessor-in-title has partitioned the suit property between Kalamsai & Gajraj and the property situated at village Andhla fell in share of her father – Kalamsai whereas property situated at village Salka fell in share of Gajraj, as such, defendant No. 1 by playing fraud has alienated the property situated at village Andhla in favour of defendants No. 3 & 4.

10. Likewise, Bodhram (PW-2) has stated in his evidence that partition had effected between Kalamsai & Gajraj and property situated at village Andhla fell in share of Kalam Sai whereas property situated at village Salka fell in share of Gajraj. However, in the cross-examination in paragraph 8 he has clearly stated that he was not present at the time of partition and he has only heard the fact of partition, as such, his testimony does not prove the fact of partition. Likewise, Kawalsai (PW-3) has stated in his evidence that partition had effected between Kalamsai & Gajraj and the suit property fell in share of Kalamsai but similarly in cross-examination paragraph 6 he has clearly stated that he was not present at the time of partition and he has only heard about the fact of partition between them. Similarly, Viphan Ram (PW-4) has stated in his evidence that on the suit land situated at village Andhla Kalamsai & Gajraj both had share but has not stated anything about the

partition, as such, plaintiff's witnesses except self-serving statement of the plaintiff did not speak about specific partition between Kalamsai & Gajraj.

11. Apart from that, vide document (Ex.P-6), order of Tahsildar dated 30.11.1983, the learned Tahsildar while rejecting the application filed by the plaintiff has clearly recorded a finding that the suit land is held by Ghasnin after death of her husband – Sonsai, as such, there is no evidence on record to hold that there was partition between Kalamsai & Gajraj and, therefore, the first appellate Court is absolutely unjustified in holding that suit land fell in share of the plaintiff and was succeeded by the plaintiff from her predecessor-in-title and defendant No. 1- Ghasnin had no right or title over the suit property situated at village Andhla, and such a finding is perverse and contrary to the record and is liable to be set aside.

12. In view of the aforesaid discussion, the judgment and decree passed by the first appellate Court is liable to be and is hereby set aside and the judgment and decree passed by the trial Court is restored. The second appeal is consequently, allowed and the plaintiff's suit stands dismissed leaving the parties to bear their own cost(s).

13. A decree be drawn-up accordingly.

Sd/-

(Sanjay K. Agrawal)
Judge

D/-

HIGH COURT OF CHHATTISGARH, BILASPUR

Order Sheet

Second Appeal No. 764 of 1999

Birsai and others **Versus** Smt. Kendi and others.

30/01/2019	This is an office reference for modification of the order dated 28.11.2018 passed in this case. On due consideration, it is allowed and the order dated 28.11.2018 is modified in the following terms. Let in place of <i>“Maan Kunwar, wife of Santram, aged about 35 years, Caste-Kanwar”</i> as has been typed in cause title of this appeal as appellant No. 2, it be read as <i>“ Maan Kunwar, wife of Ghur Sai, aged about 36 years, caste – Kanwar, resident of Village Andhla, Thana Lakhanpur, Tahsil Ambikapur, District Surguja (M.P.)”</i>. Rest of conditions mentioned in the order shall remain intact. The order dated 28.11.2018 stands modified accordingly and be read along with this order. Accordingly, the office reference stands disposed of. Sd/- (Sanjay K. Agrawal) Judge
D/-	