

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR**FA No. 30 of 2005**

1. (Deleted) Smt. Usha Rani Sarkar As Per Honble Court Order Dated 26.07.2018.
2. Fatick Sarkar S/o Late Tarapada Sarkar Aged About 40 Years R/o Block No.7 Mana Camp, Raipur, Tahsil and District Raipur Chhattisgarh

---- Petitioner**Versus**

1. Smt. Shriti Sarkar Wd/o Late Nirodh Sarkar Aged About 27 Years R/o Mana Camp, Raipur Present Address Village Rakhi, Tahsil And District Raipur Chhattisgarh., District : Raipur, Chhattisgarh
2. Ku. Nikita Sarkar D/o Late Nirodh Sarkar Aged About 3 Years Minor Through Gaurdian And Mother Smt. Shriti Sarkar Widow Of Late Nirodh Sarkar, R/o Mana Camp, Raipur Present Address Village Rakhi, Tahsil And District Raipur Chhattisgarh., District : Raipur, Chhattisgarh
3. Dukhu Sarkar S/o Late Tarapada Sarkar Aged About 30 Years R/o Block No.7, Mana Camp, Raipur, Tahsil And District Raipur Chhattisgarh., District : Raipur, Chhattisgarh
4. State Of Chhattisgarh, Through Collector Raipur, District Raipur Chhattisgarh.

---- Respondents

For Appellant
For Respondent-State

Shri M. K. Bhaduri, Advocate
Shri Anand Dadariya, Dy. GA

Hon'ble Justice Mr. Prashant Kumar Mishra**Hon'ble Justice Mrs. Vimla Singh Kapoor****Order On Board****29/11/2018**

1. The Trial Court has decreed plaintiffs' suit for recovery of possession of shop/room; recovery of the tent house articles and

other articles kept in the shop and means profit of Rs.51,000/- from 30.06.2001 to 07.12.2002.

2. Defendant No.1 Usha Rani Sarkar had 3 sons namely Niroj Sarkar, Photik Sarkar and Dukhu Sarkar. Plaintiff Shriti Sarkar is the widow of Niroj Sarkar, whereas plaintiff No.2 Nikita Sarkar is the minor daughter of Late Niroj Sarkar. Defendant No.1 Usha Rani Sarkar had a small row of 7 shops/rooms at Mana Camp, Raipur. In two shops/rooms, the deceased Niroj Sarkar was carrying on his tent house business, however, unfortunately he died of electrocution on 20.04.2001. For few months after his death, defendants started assisting plaintiff No.1 Smt. Shriti Sarkar in the business of tent house materials, but in due course they started neglecting her and eventually thrown her out of the rooms compelling her to reside with her parents in a nearby village. The plaintiff No.1 thereafter lodged an FIR on 04.01.2002 vide Ex-P-3 for an offence under Section 498A of IPC. In the said FIR, she also claimed return of possession of the tent house materials and the rooms. When no action was taken, the present suit was filed on 07.12.2002, which has been decreed by the Trial Court after a regular trial.
3. Learned counsel for the appellant/defendant would submit that the Trial Court's finding regarding partition of the family property is perverse. He would further submit that in the absence of any partition of the family property, a decree for delivery of possession could not have been granted. He would also submit that for passing a decree for means profit, the plaintiff is required

to prove the extent of damages suffered by her on account of the defendants' wrongful act. However, there is absolute lack of evidence to the said effect. It is also submitted that there is no proof that the articles described in Schedule attached to the plaint were infact available in the shop on the date when the plaintiff handed over possession of the shop to the defendants.

4. No one appears for the plaintiffs/respondent Nos.1 & 2, therefore, we have perused the record and requested learned State counsel to assist for disposal of the appeal, which is listed in a separate list of cases, which are pending for more than 10 years.
5. While deciding Issue No.1, the Trial Court has recorded a finding that the plaintiff has successfully proved a family partition, wherein her husband was allotted share of two rooms. The Trial Court has also recorded a finding that the lease of the subject property of 7 rooms was in favour of defendant No.1 Usha Rani Sarkar and that in the two rooms occupied by the plaintiff's husband, he was operating business of tent house materials and the defendants have dispossessed the plaintiff from the said rooms.
6. Although, there is no document proving partition of the lease hold property of which defendant No.1 Usha Rani Sarkar was the lessee, but there is abundance of evidence that Late Niroj Sarkar was doing his tent material business from two rooms out of 7 rooms constructed over the lease hold land of defendant No.1 who is none other than the mother of Late Niroj Sarkar. The dispute between the parties mainly appears to be between 3

brothers, of whom the plaintiff is the widow of one of the brother. After death of her husband, her condition in the family worsened and eventually she was dispossessed from the shop from which she was earning livelihood. From the contents of the FIR (Ex-P-3), the legal notice by the plaintiff to the defendants vide Ex-P-7 and its reply by the defendants vide Ex-P-8 and other certificates issued by the Sarpanch and other members of the locality, which are available in the record as Ex-P-10, P-12, P-13, P-14, & P-15, it is clearly established that Late Niroj Sarkar was having his independent business of tent house material, which he used to operate from the two shops/rooms, the possession of which was delivered to him by his mother, the defendant No.1 Usha Rani Sarkar. If there would have been no partition in the family, it was not possible that 3 brothers were carrying on separate business from separate rooms belonging to the mother. There being absence of jointness of business of 3 brothers and as a matter of fact that is not the plea of the defendants that the 3 brothers and mother were jointly residing having common kitchen and business, the finding of partition appears to be the only possible finding, which can be recorded on the principle of *preponderance of probabilities*.

7. In respect of the finding regarding damage to the tent house material, suffice it would be to say that there is no evidence on record that any of the defendants either jointly or severally taken away the materials. Similarly, there is no proof that the materials described in Schedule A, B & C of the plaint were available in those 2 rooms occupied by the plaintiff. In the absence of

clinching proof, the defendants cannot be directed after more than 18 years of the initiation of dispute to return those properties, therefore, decree to the said effect deserves to be and is hereby set aside.

8. The Trial Court has applied some guess work to calculate the income of the deceased Niroj Sarkar from 30.06.2001 till the date of filing of the suit. While the plaintiff No.1 claimed income of her husband at Rs.10,000/- per month, one of the plaintiffs witness namely PW-1, Anant Sarkar has stated that the husband of the plaintiff Late Niroj Sarkar was earning Rs.30,000/- per month. In the absence of any certificate of income or income tax return etc., the Trial Court has rightly applied some guess work to calculate the income of Late Niroj Sarkar, which cannot be faulted with as a business of tent house material in a village near Raipur can definitely fetch income of Rs.3,000/- per month in the year 2002-03. Challenge to the decree for means profit of Rs.51,000/- is therefore rejected. In the result, the appeal succeeds in part. While setting aside the decree for delivery of articles in Schedule A & B of the plaint, the decree passed by the Trial Court in respect of delivery of possession of 2 rooms and for payment of the means profit of Rs.51,000/- from 30.06.2001 to 07.12.2002 is affirmed.
9. A decree be drawn accordingly.

Sd/-
Prashant Kumar Mishra
Judge

Sd/-
Vimla Singh Kapoor
Judge