

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR**FA No. 111 of 2012**

1. Praveen Kumar Pandey S/o Jugal Kishore Pandey Aged About 41 Years R/o C 66, Sector-3, Raurkela, Distt. Sundargarh Orissa
 2. Captain Sanjay Kumar Pandey S/o Jugal Kishore Pandey Aged About 46 Years R/o 3-206 Millennium Apartment, Plot No. 2, Sector 9, Dwarika, New Delhi
- Appellants**

Versus

1. Jugal Kishore Pandey (dead)
2. Smt. Tarinee Pandey W/o Jugal Kishore Pandey Aged About 64 Years R/o H-12, Ayodhya Nagar, Ring Road No. 2, Bilaspur C.G.
3. Smt. Jyotsana Dubey W/o Sanjay Dubey, Aged About 44 Years, Narmada Nagar, Distt. Bilaspur C.G.
4. Rakesh Sharma S/o S.M. Sharma, Aged About 33 Years, Partner M/s. Shubham Developers, R/o Tikarapara, Bilaspur C.G.
5. Rajesh Sarkar S/o Niranjan Sarkar, Aged About 41 Years, Partner M/s. Shubham Developers, R/o Tikarapara, Bilaspur C.G.,
6. State Of Chhattisgarh, Through- The Collector, Bilaspur C.G. **---- Respondents**

For Appellants	:	Ms. Deepali Pandey, Advocate
For Respondents	:	None appears

DB : Hon'ble Shri Justice Manindra Mohan Shrivastava**Hon'ble Smt. Justice Rajani Dubey****Judgment On Board****21/06/2018****Per Manindra Mohan Shrivastava, J**

Heard.

1. This appeal is directed against impugned judgment and decree dated 25.07.2012, by which, the third Additional District Judge, Bilaspur, has dismissed the plaintiffs' suit.

2. The appellants/plaintiffs filed a suit seeking a declaration that the sale deed dated 28.06.2004, by which, the property in dispute (land admeasuring 5.81 acres) has

been sold by defendant No.1, the plaintiffs' father, to defendants No.4 & 5 be declared illegal and inoperative in law. The plaintiffs' case, in their plaint, has been that the property in dispute was received by defendant No.1 Jugal Kishore Pandey, upon partition of his ancestral property held jointly by him along with his father and brother, under partition deed dated 02.06.1964, evident from registered partition deed Ex.P/4. The plaintiffs being the son of defendant -Jugal Kishore Pandey became coparceners upon their birth, in respect of the aforesaid coparcenary property. Further case of the plaintiffs has been that there has been no partition amongst the plaintiffs and their father in respect of coparcenary property but their father Jugal Kishore Pandey sold the property in dispute to defendants No.4 & 5 namely Rakesh Sharma and Rajesh Sarkar by sale deed dated 28.06.2004 without taking the consent of the plaintiffs, who have undivided equal interest and share in the ancestral property i.e. land admeasuring 5.81 acres situated in Village Koni, District-Bilaspur.

3. The defendant No.1/Jugal Kishore Pandey, father of the plaintiffs, Smt. Tarinee Pandey, mother and Smt. Jyotsana Dubey, sister, though filed their written statement, all admitted the property to be the ancestral property and did not dispute that the property was received by Jugal Kishore Pandey as his ancestral property under partition as pleaded by the plaintiffs. They also did not dispute the pleading of the plaint that the property in dispute was sold by Jugal Kishore Pandey without obtaining consent of the plaintiffs.

4. The purchasers Rakesh Sharma and Rajesh Sarkar remained ex parte.

5. Learned Trial Court, however, dismissed the suit holding that it was a collusive one and also recorded a finding that as the plaintiffs were not born on the date partition had taken place amongst their father Jugal Kishore Pandey and the then coparceners, the plaintiffs cannot be said to have acquired the status of coparceners in respect of coparcenary property in dispute.

6. Learned counsel for the appellants would argue that the learned Trial Court, swayed by the inference of collusion, has dismissed the suit. It is argued that once the material fact pleaded and duly proved by the plaintiffs by oral and documentary evidence that the land in dispute was a coparcenary property and there was no partition amongst the plaintiffs and their father Jugal Kishore Pandey, it ought to be held that the sale deed in respect of entire coparcenary property by Jugal Kishore Pandey was null and void.

7. Learned counsel for the appellants further contended that there was no case set up by any of the defendants that the property was sold by Jugal Kishore Pandey as karta of the joint Hindu family for any legal necessity. It is also submitted that the plaintiffs became coparceners by birth and the finding recorded by learned trial Court that the plaintiffs could not claim the status of coparceners because the plaintiffs were not born on the date partition had taken place amongst their father and coparceners in the year 1964, is misconceived in law.

8. None has appeared for any of the respondents.

9. The plaintiffs, in their suit, have come out with the pleadings that the property in dispute was ancestral property. It has further been pleaded that the ancestral property was received by their father under a partition amongst their father and other coparceners recorded in partition deed dated 02.06.64 and thereafter, it was sold by their father. Further, pleading is that the plaintiffs being the sons of Jugal Kishore Pandey are also having share in the coparcenary property. In order to prove their case, the plaintiffs examined two witnesses,. (PW1) is the plaintiff No.1-Praveen Kumar Pandey, who has stated in his affidavit under Order 18 Rule 4 CPC that the property in dispute was an ancestral property and it was received by his father under a family partition carried out in the year 1965 under a registered deed of partition. The partition deed has also been proved by placing on record a certified copy of registered partition deed Ex.P/4. He has also stated that there was no partition amongst the plaintiffs and their father and the father sold the property without their notice and knowledge and without their consent. This fact was not known to them until it was disclosed to them when they came to Bilaspur to attend their ailing father, who was admitted in the hospital. At this stage, it was known to them that a sale deed was executed by their father on 28.06.2004 without their consent. PW-2, the cousin of the plaintiffs, has also supported the case of the plaintiffs and deposed regarding the property being ancestral and received by Jugal Kishore Pandey under a partition in 1965. The plaintiffs claim of the property being ancestral received upon partition by his father under registered partition deed and emphatic pleading that the sale had taken placed without their consent, has not been disputed by any of the defendants. While defendants No.1 to 3 have not disputed the factual averments made by plaintiffs in their pleadings, the purchasers/defendants No.4 & 5 have chosen to remain *ex parte*. They were noticed in this appeal and then they have engaged a counsel but there is no representation made before this Court.

10. We find that learned Trial Court has recorded a finding that as the plaintiffs were

born after partition had taken place in the year 1964, they would not get any interest in the coparcenary property. This finding recorded by learned trial Court, if we may say so, is erroneous in law. Once, it is not disputed that the property in dispute was an ancestral property which was received by plaintiffs' father namely Jugal Kishore Pandey, upon partition from his father and the brother in the year 1964, the property remaining in the hands of Jugal Kishore Pandey, would be treated as ancestral property and not a self-acquired property. The sons of Jugal Kishore Pandey by birth acquired interest in the coparcenary property as coparceners. It is, therefore, erroneous to hold that the sons would not get any interest in the property as there were born after earlier partition amongst the coparceners in the year 1964.

11. Once the purchasers have not chosen to contest the matter or dispute the plaintiffs claim and the plaintiffs are found to have not only made specific pleadings but also proved from oral and documentary evidence that the property in dispute was an ancestral one, there was no partition amongst Jugal Kishore Pandey and his two sons/two plaintiffs and further that sale had taken place without the consent of the plaintiffs, in view of the decision of the Supreme Court in the case of **Rohit Chauhan Vs. Surinder Singh and Others, 2013 (9) SCC 419**, we are inclined to hold that the impugned sale deed to the extent of the share of the plaintiffs is null and void. In the aforesaid decision, their lordships in the Supreme Court held :

“11. We have bestowed our consideration to the rival submission and we find substance in the submission of Mr. Rao. In our opinion coparcenary property means the property which consists of ancestral property and a coparcener would mean a person who shares equally with others in inheritance in the estate of common ancestor. Coparcenary is a narrower body than the Joint Hindu family and before commencement of Hindu Succession (Amendment) Act, 2005, only male members of the family used to acquire by birth an interest in the coparcenary property. A coparcener has no definite share in the coparcenary property but he has an undivided interest in it and one has to bear in mind that it enlarges by deaths and diminishes by births in the family. It is not static. We are further of the opinion that so long, on partition an ancestral property remains in the hand of a single person, it has to be treated as a separate property and such a person shall be entitled to dispose of the coparcenary property treating it to be his separate property but if a son is subsequently born, the alienation made before the birth cannot be questioned. But, the moment a son is born, the property becomes a coparcenary property and the son would acquire interest in that and become a coparcener.

12. The view which we have taken finds support from a judgment of this Court in the case of [M. Yogendra v. Leelamma N.](#), (2009) 15 SCC 184, in which it has been held as follows:

“29. It is now well settled in view of several decisions of

this Court that the property in the hands of a sole coparcener allotted to him in partition shall be his separate property for the same shall revive only when a son is born to him. It is one thing to say that the property remains a coparcenary property but it is another thing to say that it revives. The distinction between the two is absolutely clear and unambiguous. In the case of former any sale or alienation which has been done by the sole survivor coparcener shall be valid whereas in the case of a coparcener any alienation made by the karta would be valid.”

13. Now referring to the decision of this Court in the case of Bhanwar Singh (supra), relied on by respondents, the same is clearly distinguishable. In the said case the issue was in relation to succession whereas in the present case we are concerned with the status of the plaintiff vis-à-vis his father who got property on partition of the ancestral property.

14. A person, who for the time being is the sole surviving coparcener as in the present case Gulab Singh was, before the birth of the plaintiff, was entitled to dispose of the coparcenary property as if it were his separate property. Gulab Singh, till the birth of plaintiff Rohit Chauhan, was competent to sell, mortgage and deal with the property as his property in the manner he liked. Had he done so before the birth of plaintiff, Rohit Chauhan, he was not competent to object to the alienation made by his father before he was born or begotten. But, in the present case, it is an admitted position that the property which defendant no. 2 got on partition was an ancestral property and till the birth of the plaintiff he was the sole surviving coparcener but the moment plaintiff was born, he got a share in the father's property and became a coparcener. As observed earlier, in view of the settled legal position, the property in the hands of defendant no.2 allotted to him in partition was a separate property till the birth of the plaintiff and, therefore, after his birth defendant no.2 could have alienated the property only as Karta for legal necessity. It is nobody's case that defendant no. 2 executed the sale deeds and release deed as Karta for any legal necessity. Hence, the sale deeds and the release deed executed by Gulab Singh to the extent of entire coparcenary property are illegal, null and void. However, in respect of the property which would have fallen in the share of Gulab Singh at the time of execution of sale-deeds and release deed, the parties can work out their remedies in appropriate proceeding.”

12. However, to the extent of share of defendant No1/Jugal Kishore Pandey, the sale deed would be valid.

13. As the validity of a sale deed which was executed in the year 2004 is in question before us, which is much prior to amendment of 2005 in the Hindu Secession Act, 1956, we are holding that at the time of sale of the property, the plaintiffs and their father alone were the coparceners and not any other female in the family including

defendant No.2 & 3.

14. In the result, the appeal is allowed in part. The impugned judgment and decree is set aside and the plaintiffs' suit is decreed to the extent that the sale deed dated 28.06.2004 to the extent of share of the plaintiffs is declared null and void. A decree be drawn accordingly.

Sd/-
(Manindra Mohan Shrivastava)
Judge

Sd/-
(Rajani Dubey)
Judge

Rekha