

HIGH COURT OF CHHATTISGARH, BILASPUR**SA No.36 of 2003**

1. Rambai (Dead). Nil.
2. Bharatlal S/o Late Sevaram Aged About 48 Years Occupation Agriculturist, R/o Kandayee, Tahsil Saja District Durg, Chhattisgarh., District : Durg, Chhattisgarh
3. Parvatibai (Dead) Through Lrs. Nil.
 - 3.1 - (A). Top Singh Patel S/o Bhuvanlal Aged About 42 Years R/o Village Hadgaon, Barela District Bemetara, Chhattisgarh., District : Bemetara, Chhattisgarh
 - 3.2 - (B). Durgesh Patel S/o Bhuvanlal Aged About 40 Years R/o Village Hadgaon, Barela District Bemetara, Chhattisgarh., District : Bemetara, Chhattisgarh
4. Gauribai W/o Bharatlal Aged About 44 Years Occupation Agriculturist, R/o Village Toran, P. S. Khamhariya, Tahsil Saja, District Durg, Chhattisgarh., District : Durg, Chhattisgarh
5. Peelabai Alias Durpatibai W/o Dashrathlal Aged About 42 Years Occupation Agriculturist, R/o Village Jani, P. S. And Tahsil Saja, District Durg, Chhattisgarh., District : Durg, Chhattisgarh
6. Roshanlal (Dead) Through Lrs. Nil.
 - 6.1 - 6 (A). Smt. Sushila Bai Wd/o Late Roshan Lal Aged About 48 Years R/o Village Kandayee Tahsil Saja, District Durg, Chhattisgarh., District : Durg, Chhattisgarh
 - 6.2 - 6 (B). Chandan Lal S/o Late Roshan Lal Aged About 18 Years R/o Village Kandayee Tahsil Saja, District Durg, Chhattisgarh., District : Durg, Chhattisgarh
7. Sachibai W/o Shri Ramhari Aged About 30 Years Occupation Agriculturist R/o Village Medesara, P. S. Nandini, Tahsil Dhamdha, District Durg, Chhattisgarh., District : Durg, Chhattisgarh
8. Madhu S/o Shri Sevaram Aged About 30 Years Occupation Agriculturist, R/o Village Kandayee, P. S. Bemetara, Tahsil Saja, District Durg, Chhattisgarh., District : Durg, Chhattisgarh
9. Late W/o Kuber Aged About 34 Years Occupation Agriculturist, R/o Village Tura Semariya, P. S. Bemetara, Tahsil Bemetara, District Durg, Chhattisgarh., District : Durg, Chhattisgarh
10. Sandhya W/o Shri Govind Aged About 27 Years Occupation Agriculturist R/o Village Tura Semariya, P. S. Bemetara, Tahsil Bemetara, District Durg, Chhattisgarh., District : Durg, Chhattisgarh
11. Manju W/o Dakwar Aged About 28 Years Occupation Agriculturist R/o Village Supartala, P. S. And Tahsil Saja, District Durg, Chhattisgarh.Appellants/ Plaintiffs., District : Durg, Chhattisgarh

---- Appellants/Plaintiffs**Versus**

1. Awadh Ram S/o Shri Kaduwa Lodhi Aged About 47 Years R/o Village Kanpal, Tehsil Saja, District Bemetara, Chhattisgarh., District : Bemetara, Chhattisgarh
2. Motilal (Dead) Through Lrs. Nil.
 - 2.1 - A. Amrika Bai Wd/o Late Shri Motilal Aged About 57 Years
 - 2.2 - B. Prakash Patel S/o Late Shri Motilal Aged About 40 Years
 - 2.3 - C. Vijay Patel S/o Motilal Aged About 38 Years
3. Pannalal S/o Shri Kaduwa Lodhi Aged About 33 Years R/o Village Kanpal, Tehsil Saja, District Bemetara, Chhattisgarh., District : Bemetara, Chhattisgarh
4. Heminbai (Dead) Through Lrs. Nil.
 - 4.1 - A. Govind Verma S/o Shri Pardeshi Ram Lodhi Aged About 55 Years
 - 4.2 - B. Ramnarayan Patel S/o Shri Pardeshi Ram Lodhi Aged About 53 Years
 - 4.3 - C. Bhagwan Singh Patel S/o Shri Pardeshi Ram Lodhi Aged About 51 Years
 - 4.4 - (B). Lalitabai W/o Karturam Lodhi
 - 4.5 - (C). Chandrikabai W/o Shri Karkharam Lodhi
 - 4.6 - (D). Kamalabai W/o Khiyaram Lodhi
 - 4.7 - (E). Gangabai W/o Badri Lodhi
5. Ramlal S/o Shri Sarkhsingh Aged About 43 Years Agriculture R/o Village Kandayee, Tehsil Saja, District Durg, Chhattisgarh., District : Durg, Chhattisgarh
6. Narad W/o Shri Surkhsingh Aged About 38 Years Agriculture R/o Village Kandayee, Tehsil Saja, District Durg, Chhattisgarh., District : Durg, Chhattisgarh
7. Sharda S/o Shri Surkhsingh Aged About 30 Years Agriculture R/o Village Kandayee, Tehsil Saja, District Durg, Chhattisgarh., District : Durg, Chhattisgarh
8. Jawahar S/o Shri Surkhsingh Aged About 32 Years Agriculture R/o Village Kandayee, Tehsil Saja, District Durg, Chhattisgarh., District : Durg, Chhattisgarh
9. Durga (Dead) Through Lrs. Nil.
 - 9.1 - A. Namita Wd/o Late Shri Durga Aged About 38 Years
 - 9.2 - B. Deepanshu Patel S/o Shri Durga Aged About 12 Years
 - 9.3 - C. Deepesh Patel S/o Shri Durga Aged About 8 Years
10. Smt. Shyambai W/o Sewaram Aged About 40 Years R/o Village Heyeetpur, Tehsil Saja, District Durg, Chhattisgarh., District : Durg, Chhattisgarh
11. Smt. Neerabai W/o Dudhram Aged About 34 Years R/o Village Kandayee, Tehsil Saja, District Durg, Chhattisgarh., District : Durg, Chhattisgarh
12. Smt. Kaveri Bai W/o Punilal Aged About 27 Years R/o Village Kandayee, Tehsil Saja, District Durg, Chhattisgarh., District : Durg, Chhattisgarh
13. Smt. Utarabai W/o Onkar Aged About 20 Years R/o Village Kandayee, Tehsil Saja, District Durg, Chhattisgarh., District : Durg, Chhattisgarh
14. Smt. Lachhanbai W/o Shri Surkhsingh Aged About 60 Years R/o Village Kandayee, Tehsil Saja, District Durg, Chhattisgarh., District : Durg, Chhattisgarh
15. State Of Chhattisgarh Through District Collector District Durg, Chhattisgarh., District : Durg, Chhattisgarh

---- Respondents

Shri PKC Tiwari, Senior Advocate with Shri Ashutosh Trivedi, Advocate for appellants.

Shri Vimlesh Bajpai, Advocate for Respondent No.1, 2 & legal Heirs of Respondent No.4.

Single Bench : Hon'ble Shri Justice Manindra Mohan Shrivastava

JUDGMENT

28/08/2019

Heard.

1. This second appeal arises out of the impugned judgment and decree dated 30-09-2002 passed by the Additional District Judge, Bemetara, District Durg in Civil Appeal No.102-A/2002, affirming the judgment and decree dated 21-09-1996 passed by the learned Trial Court in Civil Suit No.55-A/1991.

2. This appeal was admitted for hearing on 25-04-2003, on the following two substantial questions of law:-

- (1) "Whether on the facts and circumstances of the case, the finding that the suit was barred under the Specific Relief Act, 1963 was justified? and;
- (2) Whether the Court below committed an error of law in considering the merits of the documents proposed to be brought on record under Order 41 Rule 27 without first adjudicating whether a case for bringing the documents on record under the said provisions had been made out?"

3. This is plaintiffs appeal. The appellants-plaintiffs filed a suit seeking declaration and permanent injunction in respect of the property in dispute on the pleadings, interalia, that in the family partition, property in dispute fell to the share of the plaintiffs and the plaintiffs continued to be remain in possession of the property ever since partition, though in the revenue records, correction and mutation were not carried out. According to the plaintiff, the property originally belonged to three brothers namely Jhadua Singh, Jharu Singh and Sewa Ram.

It was the case of the plaintiff that a partition had taken place long back in the year 1963 and later on, a registered partition deed was also executed on 14-11-1963. According to the plaintiffs, at the time of preparation of the registered partition deed, the details of the property in dispute could not be included, because correct and complete details of the disputed property were not in the hands of the parties at the time of preparation of the registered deed. Later on, Awadh Ram, defendant No.1, S/o Jhadua, started asserting that the property belonged to all the family members jointly and not exclusively to the plaintiff, then cause of action arose for filing suit.

The defendants No.1 to 4 are legal heirs of the deceased-Jhadua and the defendants No.5 to 14 are the legal heirs of another brother, deceased-Jharu Singh. While defendants No.5 to 14 admitted claim of the plaintiffs, defendants No.1 to 4, son and widow of the deceased-Jhadua opposed the claim of the plaintiff, taking stand that the property was not partitioned. Defendants No.2 & 3 did not file any return and were proceeded ex parte.

4. Learned trial Court framed issues and after allowing the parties to lead oral as well as documentary evidence, came to the conclusion that the plaintiff failed to prove that the property in dispute was received by him by way of partition in the year 1963 and he also failed to prove that the property was in his possession and he was cultivating the same. Learned trial Court recorded finding that in the partition deed, disputed property was not shown to be partitioned and therefore, the plaintiff is not entitled to any relief.

5. On appeal being preferred, the learned lower appellate Court, while affirming the finding recorded by the learned trial Court, on the aspect of possession, however, held that the defendant-Awadh Ram came in possession of the property since 1993. It also held that the plaintiff failed to prove that the

property in dispute was received by him upon partition. An application for bringing additional evidence on record was rejected. The learned lower appellate Court also recorded a finding that as the defendant-Awadh Ram was found to be in possession of the property since 1993, plaintiff's suit was liable to be dismissed for want of seeking consequential relief for recovery of possession as required under proviso to Section 34 of the Specific Relief Act, 1963 (In short "the Act of 1963").

6. On the first substantial question of law, learned Senior Advocate appearing for the appellants would argue that the learned lower appellate Court committed patent illegality in holding that the suit was not maintainable under the Act of 1963, though there is no finding that Awadh Ram was in possession of the property on or before the date of filing of suit. He would argue that the finding recorded in para 35 of the impugned judgment dated 30-09-2002, passed by the learned lower appellate Court that Awadh Ram came in possession of the property in dispute in the year 1993, however, the plaintiff filed suit in the year 1991. That means, on the date of filing of the suit, Awadh Ram was not in possession of the property in dispute, therefore, on that ground, the plaintiff could not be non-suited. Therefore, no such specific issue was framed by the learned trial Court. Therefore, the learned lower appellate Court could not have decided any issue of fact other than those framed by the learned trial Court. If at all, the learned lower appellate Court considered necessary to examine additional issue, it ought to have framed an issue and allow the parties to lead oral as well as documentary evidence, requiring the trial Court to be return finding on the additional issue.

7. On the other hand, learned counsel for the respondent-defendant, however, would submit that even if it is accepted that till filing of the suit, the

respondent-defendant-Awadh Ram had not come in possession of the property and he came in possession of the property in the year 1993, thereafter, the plaintiff was required to suitably amend the plaint and seek relief of recovery of possession of the property. For want of such relief of consequential nature, suit was barred under Section 34 of the Act of 1963.

8. After hearing learned counsel for the parties, I am of the view that the finding recorded by the learned trial Court on the first issue suffers from patent illegality. Admittedly, the suit was filed in the year 1991. According to the finding recorded by the learned lower appellate Court in para 35 of its judgment, defendant-Awadh Ram is found to have come into the possession over the property in dispute in the year 1993 i.e. two years after the filing of the suit. Moreover, this Court finds that no such issue was framed by the learned trial Court that the plaintiff's suit was not maintainable for want of any consequential relief. If at all, the learned lower appellate Court found that such issue was necessary to be decided, it ought to have framed an additional issue and allow the parties to lead oral as well as documentary evidence and finding to be returned on the said issue by the learned trial Court.

9. In view of above, this Court is inclined to hold that the learned lower appellate Court was not justified in law in holding that the plaintiff's suit was not maintainable, in view of the bar created under the Act of 1963.

10. On the second issue, this Court found that the learned lower appellate Court has, without allowing application under Order 41 Rule 27 CPC, examined the merits of the documents proposed to be led in evidence by the plaintiff as to whether the document was partition deed. True it is that the partition deed, according to the pleading of the parties, did not contain the details of the property in dispute. However, the said document being a deed of partition

between the family members, would definitely throw the light on the family settlement between the parties. In the matter of dispute between the family members as to whether partition had taken place or not, any deed of partition, particularly a registered partition deed, would certainly be a relevant piece of evidence.

11. The other document sought to be brought by way of additional evidence was so-called consent letter given in favour of defendant-Sewa Ram by Rohini Bai, Panna Lal and Jharu Singh. Rohini and Panna Lal are successors of Jhadua. Jharu Singh was the third brother of Sewa Ram and Jhadua. This was a vital document, as, if this consent letter is found in favour of the plaintiff, except Awadh Ram and Motilal, all other legal heirs of Jhaduwa were holding partition of the disputed property in favour of Sewa Ram. Not only this, it is found that for deciding the issue of possession, this document was relevant one. Therefore, rejecting application under Order 41 Rule 27 CPC by holding that this document was not relevant and will have no material bearing for adjudication of aforesaid issue involved in this case, is not correct. The learned lower appellate Court ought to have decided upon the merits of the documents, by first allowing application under Order 41 Rule 27 CPC, in which, this plaintiff would have been required to prove this document by leading evidence and the defendant would have got an opportunity to cross-examine the plaintiff's witnesses, in so far as documents proposed to be brought as additional evidence are concerned. Therefore, the finding recorded by the learned lower appellate Court in this regard is also not in accordance with law.

12. Both substantial questions of law are accordingly answered in affirmative, as discussed hereinabove.

13. In the result, the impugned judgment and decree passed by the learned

lower appellate Court, on 30-09-2002 in Civil Appeal No.102-A/2002, is accordingly set aside and the matter is remanded to the learned lower appellate Court to decide the appeal afresh. The learned lower appellate Court shall pass appropriate order on the application under Order 41 Rule 27 CPC and the plaintiff would be afforded opportunity to prove these documents by leading oral as well as documentary evidence before the trial Court. The learned lower appellate Court shall collect the evidence in this regard in accordance with law.

14. As far as issue as to whether the suit was barred under the provisions of the Act of 1963 is concerned, the learned lower appellate Court shall frame an appropriate additional issue and obtain finding of learned trial Court on this issue, in accordance with the provisions under Order 41 CPC, after allowing the parties to lead oral as well as documentary evidence.

15. In the present case, an application under Order 6 Rule 17 CPC read with Section 151 CPC is also filed.

16. In view of the decision on the two substantial questions of law, this Court is inclined to set aside the impugned judgment and decree passed by the learned lower appellate Court, therefore, no orders are required to be passed by this Court on the aforesaid application. However, it would be open for the appellant to file an application seeking amendment in the plaint, if any, before the learned lower appellate Court.

17. Accordingly, the appeal is allowed. Let appellate decree be drawn accordingly. Records of the Court below be remitted forthwith to the learned lower appellate Court. The parties shall appear before the learned lower appellate Court on 11-11-2019.

SD/-
(**Manindra Mohan Shrivastava**)
JUDGE