

HIGH COURT OF CHHATTISGARH, BILASPUR**Judgment reserved on :29.11.2019****Judgment delivered on:20.12.2019****Second Appeal No.174 of 2005**

1. Dewarin Bai, W/o Vedram Lodhi, Aged 42 years,

2. Surit Ram, S/o Ghasia, 38 years,

3. Itwari, S/o Ghasia, 33 years,

All R/o Village-Katori, Tahsil & District Kawardha
(CG)**----- Appellants/Defendants No.1, 3 and 4****Versus**

1. Dukhu Ram (Dead) through his LR's

(a) Smt.Nirasha Bai, Widow of Late Dukhu Ram, aged 70
years,

(b) Pratap S/o Late Dukhu Ram, aged 50 years,

(c) Sashi Kumar, S/o Late Dukhu Ram, aged 45 years,

(d) Chandra Kumar S/o Late Dukhu Ram, aged 42 years,

(e) Sukhan Bai W/o Late Janku, aged 37 years,

(f) Mahendra S/o Late Janku, aged 19 years,

(g) Gulshan S/o Late Janku, aged 12 years, through
his mother Sukhan Bai, W/o Late Janku, R/o Gram –
Katari, P.O. Surajpura (1)2. Lakhan, S/o Late Brijlal, 45 years, Agriculturist,
R/o Village-Katori, Patwari Halka No.44, Tahsil-
Kawardha, District-Kabirdham (CG)**----- (Plaintiffs)**3. Tijiya Bai, W/o Muni Ram Lodhi, 37 years, R/o Vil-
lage-Katori, Tahsil-Kawardha, District-Kabirdham (CG)4. State of Chhattisgarh, Through: Collector, Kabirdham
(CG)**----- Respondents****And****Second Appeal No.244 of 2005**

Tijiya Bai W/o Late Muni Ram Lodhi, Aged about 37 years, R/o Village-Katori, Tahsil-Kawardha, Distt-Kabirdham (CG)

----- Appellant/Defendant No.2

Versus

1. Dukhu Ram (Dead) through his LR's

1.a Smt.Nirasha Bai, Wd/o Late Dukhu Ram, aged about 70 years,

1.b Pratap S/o Late Dukhu Ram, aged about 50 years,

1.c Sashhi Kumar, S/o Late Dukhu Ram, aged about 45 years,

1.d Chandra Kumar S/o Late Dukhu Ram, aged about 42 years,

1.e (e) Sukhan Bai W/o Late Janku, aged about 37 years,

1.f Mahendra S/o Late Janku, aged about 19 years,

1.g Gulshan S/o Late Janku, aged about 12 years, through his mother Sukhan Bai, W/o Late Janku,

All are R/o Gram - Katori, P.O. Kawardha, Dist. Kabirdham

2. Lakhan, S/o Late Brijlal, Aged-45 Yrs Agriculturist, R/o Village-Katori, P.H.No.44, Tah.-Kawardha, Distt. Kabirdham (CG)

----- (Plaintiffs)

3. Dewarin Bai W/o Vedram Lodhi, Aged-42 Yrs,

4. Surit Ram S/o Ghasiya, Aged-38 Yrs.

5. Itwari S/o Ghasiya, Aged about 33 years

All are the resident of Village-Katori, Tahsil-Kawardha, Distt-Kabirdham (CG)

6. State of C.G. through Collector, Kabirdham (CG)

----- Respondents

For Appellants/Defendants : Mr. Rajeev Shrivastava, Mr. Malay Shrivastava and Mr. Sanjay Patel, Advocates

For Res.No.1/LR's of : Mr. Arvind Shrivastava, Plaintiff NO.1 & Res.No.2/ Advocate Plaintiff No.2

For State : Mr. Sanjeev Kr. Agrawal, P.L.

Hon'ble Shri Justice Sanjay K. Agrawal

C.A.V. Judgment

1. These two second appeals viz., Second Appeal Nos.174 of 2005 and 244/2005 have arisen from common judgment and decree of the first appellate Court dated 10.2.2005 in Civil Appeal No.10-A/2004, therefore, these two second appeals though entertained separately, but since common substantial questions of law have been formulated, therefore, these appeals are heard analogously and being decided by this common judgment.

2. Second Appeal No.174 of 2005 preferred by defendants No.1, 3 & 4 and Second Appeal No.244/2005 preferred by defendant No.2 were admitted for hearing by formulating the following common substantial questions of law:-

“(1) Whether the Lower Appellate Court committed an error of law in holding that the male Hindu cannot transfer his property to his married daughters in his life time by giving it in partition to them ?

(2) Whether the Lower Appellate Court committed an error of law by not considering this fact that the father died prior to the passing of judgment and decree of this case and after his death, both the daughters would succeed to the extent of $\frac{1}{4}$ share in

the self acquired property of their father which would certainly be less than property sold to the purchaser ?”

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

3. The suit property was originally held by Brijlal who was original plaintiff before the trial Court and who died during pendency of first appeal on 9.12.2002. He filed a suit for declaration of title and possession stating inter-alia that order of the Naib-Tahsildar dated 6.7.93 (Ex.P-1) i.e. namantaran panji is not binding on him and that does not confer any title to defendants No.1 & 2, daughters of original plaintiff-Brijlal and alienation made by defendants No.1 & 2 in favour of defendants No.3 & 4 on 28.4.1995 is not binding on him and does not confer any title to defendants No.3 & 4.

4. Defendants No.1, 3 and 4 filed their joint written statement and denied the averments made in the plaint stating inter-alia that order of partition was passed with the consent of the plaintiff and the plaintiff himself has put his thumb impression and the suit land was purchased by the plaintiff from Goutiya of village Katori. They also stated that defendants No.3

& 4 are *bona fide* purchasers as per provisions contained in Section 41 of the Transfer of Property Act, 1882 (hereinafter called as 'TP Act'), as such, the plaintiff has no cause of action for the instant suit and the suit deserves to be dismissed.

5. The trial Court upon evaluation and appreciation of oral and documentary evidence available on record, by its judgment and decree dated 25.11.99, dismissed the suit holding that the suit property is owned by the plaintiff, but further held that the plaintiff has failed to prove that order of Naib-Tahsildar dated 6.7.1993 is not binding on him and it does not confer any title to defendants No.1 & 2 and further failed to prove that sale deed dated 28.4.1995 (Ex.P-3) executed by defendants No.1 & 2 in favour of defendants No.3 & 4 is not binding on him. On appeal being preferred by the plaintiff, the first appellate Court entertained the appeal and thereafter set aside the judgment and decree of the trial Court and decreed the suit holding that order of Naib-Tahsildar dated 6.7.1993 is not binding on the plaintiff and alienation made by defendants No.1 & 2 in favour of defendants No.3 & 4 on 28.4.1995 (Ex.P-3) is also not binding on the plaintiff and also granted decree for possession, against which, defendants No.1, 3 and 4 have preferred Second Appeal No.174 of 2005 and

defendant No.2 has preferred Second Appeal No.244 of 2005 under Section 100 of the CPC before this Court, in which common substantial questions of law have been formulated by this Court, which have been set-out in second paragraph of this judgment.

6. Mr.Rajeev Shrivastava, Mr.Malay Shrivastava and Mr.Sanjay Patel, learned counsel for the appellants/defendants, would submit that the first appellate Court is absolutely unjustified in reversing the well merited and well reasoned judgment and decree of the trial Court. They would further submit that the plaintiff has failed to prove that partition has not taken place during his lifetime as defendants No.1 & 2 have clearly proved the fact of partition, which is duly recorded in Ex.P-3 which has been admitted by plaintiff-Brijlal in his statement before the trial Court that partition made and duly recorded in Ex.P-3 is duly proved by examining revenue officers as his two sons namely Dukhram and Lakhan have already been given share in partition by plaintiff-Brijlal during his lifetime, as such, share given to defendants No.1 & 2 on partition being their daughters namely Devarinbai and Tijiya Bai vide Ex.P-3 cannot be taken exception to by the plaintiff and now his two sons who are substituted after death of original plaintiff Brijlal. They would also submit

that during pendency of first appeal, plaintiff-Brijlal died and thereafter daughters would succeed to the extent of 1/2 share in self-acquired property of their father Brijlal which is less than the property sold to them (purchasers) which has been sold by defendants NO.1 & 2 to defendants No.3 & 4 and therefore, defendants No.3 & 4 are *bona fide* purchasers and protected by virtue of Section 41 of the TP Act, as such, these second appeals deserve to be allowed by answering the substantial questions of law in favour of the defendants and against the plaintiffs.

7. On the other hand, Mr.Arvind Shrivastava, learned counsel for respondents NO.1(a) to 1(g)/legal representatives of plaintiff NO.1 and respondent No.2/plaintiff No.2, would support the impugned judgment & decree and submit that the first appellate Court has rightly held that no partition has taken place in absence of registered instrument effected in view of the provisions contained in Section 17 read with Section 49 of the Indian Registration Act, 1908, as such, the first appellate Court has rightly recorded a finding that fact of partition has not been proved as even Brijlal has been examined before the trial Court and he categorically denied the fact of partition during his lifetime and that too

defendants No.1 & 2 who are married daughters on the date of alleged partition. He would further submit that plaintiff-Brijlal died on 9.2.2002, but the defendants did not amend their claim for share in the suit property or have not adopted any prescribed procedure to claim share and now they cannot claim any share in absence of cross-appeal or cross-objection in view of the judgment of the Supreme Court in the matter of Bachhaj Nahar v. Nilima Mandal and another¹, as such, these appeals deserve to be dismissed by answering the substantial questions of law in favour of the plaintiffs and against the defendants.

8. I have heard learned counsel for the parties and considered their rival submissions made hereinabove and also went through the records with utmost circumscription.

9. Suit was filed by original plaintiff-Brijlal, who died on 9.12.2002, stating inter-alia that order of the Naib-Tahsildar dated 6.7.93 (Ex.P-1) i.e. namantaran panji is not binding on him and that does not confer any title to defendants No.1 and 2, who are his daughters and alienation made by defendants No.1 & 2 in favour of defendants No.3 & 4 on 28.4.1995 is not binding on him and that does not

¹ (2008) 17 SCC 491

confer any title to defendants No.3 & 4, which was dismissed by the trial Court, but it has been reversed by the first appellate Court.

10. Admittedly, plaintiff-Brijlal was father and defendant No.1-Dewarinbai and defendant No.2-Tijiyabai are his two daughters. Defendants No.1 and 2 claimed that the suit land has been given to them on partition, which is duly recorded in Ex.P-1. Both the Courts below have recorded a finding that the suit property was self-acquired property of Brijlal, it was not ancestral property of Brijlal in his hands and said finding has become final as the defendants have not questioned the said finding.

11. Admittedly, partition is not actually a transfer of property. It effects a change in the mode of enjoyment of property, but is not an act of conveying property from one living person to another. Partition is really a process, in and by which a joint enjoyment is transformed into an enjoyment severally. (See Mulla's Transfer of Property Act, 13th Edition, page 65).

12. The Supreme Court in the matter of Vasantiben Prahladji Nayak and others v. Somnath Muljibhai Nayak and others² has held that in case of partition each co-sharer has an antecedent title and therefore

² (2004) 3 SCC 376

there is no conferment of a new title.

- 13.** The Supreme Court in the matter of **Kalyani (dead) by L.Rs. v. Narayanan and others**³ has defined the word "partition" by holding that it is an unequivocal intention to separate brings about a disruption of joint family status, at any rate, in respect of separating member of members and thereby puts an end to the coparcenary with right of survivorship and observed as under:-

"10....Partition is a word of technical import in Hindu law. Partition in one sense is a severance of joint status and coparcener of a coparcenary is entitled to claim it as a matter of his individual volition. In this narrow sense all that is necessary to constitute partition is a definite and unequivocal indication of his intention by a member of a joint family to separate himself from the family and enjoy his share in severally. Such an unequivocal intention to separate brings about a disruption of joint family status, at any rate, in respect of separating member or members and thereby puts an end to the coparcenary with right of survivorship and such separated member holds from the time of disruption of joint family as tenant-in-common. Such partition has an impact on devolution of share of such members. It goes to his heirs displacing survivorship....."

- 14.** The Constitution Bench of the Supreme Court in the matter of **V.N. Sarin v. Ajit Kumar Poplai and another**⁴ has held that partition of joint Hindu family property is not a transfer of property and

3 AIR 1980 SC 1173

4 AIR 1966 SC 432

held as under:-

"10.....Having regard to the basic character of joint Hindu family property, each coparcener has an antecedent title to the said property though its extent is not determined until partition takes place. That being so, partition really means that whereas initially all the coparceners had subsisting title to the totality of the property of the family jointly, that joint title is transformed by partition into separate titles of the individual coparceners in respect of several items of properties allotted to them respectively. As this is the true nature of a partition, the contention that partition of an undivided Hindu family property necessarily means transfer of the property to the individual coparceners cannot be accepted....."

As such, partition signifies the surrender of a portion of a joint right in exchange for a similar right from the other co-sharer to co-sharers. Partition is not a transfer, and therefore, strictly not governed by the Transfer of Property Act, but that many of the provisions of the Transfer of Property Act may govern partition as embodying rules of justice, equity and good conscience.

15. Reverting to the facts of the present case in the light of aforesaid legal position, it is quite vivid that in the instant case, the property was self-acquired property of Brijlal and on the date of 6.7.93 in namantaran panji given partition to defendant No.1-Dewarinbai and defendant No.2-Tijiya Bai, they were not having any right of partition over

the suit land particularly for the reasons that at that time they were not coparceners as daughters became coparceners by virtue of the Act of 2005 which came into force on 9.9.2005 and also that the property was self-acquired property of Brijlal, therefore, defendants No.1 and 2 cannot claim that on the date of order dated 6.7.93 they were having any right of partition over the property of their father. They claimed only on the basis of order made in namantaran panji (Ex.P-1) on 6.7.93.

16. It is well settled that entries in the revenue records is neither a proof of title upon the property nor can it be used as a camouflage to defeat the legal right, title or interest of a person, who is the owner of the property in question. It is also settled that revenue entries or revenue receipts have nothing to do with the ownership and they cannot be treated as a conclusive evidence of the ownership of the property. Mutation of the property in the revenue record also does not create or extinguish title nor has it any presumptive value on title. It only enables the person in whose favour mutation is ordered to pay land revenue in question (See Mulla's Transfer of Property Act, 13th Edition, page 67).

17. It is the case of the plaintiff that order of partition dated 6.7.93 is illegal and contrary to the

rules for the reasons that no notice was given to the plaintiff prior to passing of the order and the plaintiff has not given any land in partition to defendants No.1 and 2 in said partition and no proceeding has been followed while making partition under Section 178 of the Chhattisgarh Land Revenue Code, 1959. The plaintiff himself has examined as PW-1. He has categorically stated that he has never made any partition during his lifetime giving share to defendants No.1 & 2 and therefore, question of giving share to defendants No.1 and 2 does not arise. The first appellate Court has clearly held that the suit property is self-acquired property of the plaintiff and he has not partitioned the property during his lifetime and there is no document on record evidencing the partition and order of mutation will not confer any title to defendant No.1 and 2.

- 18.** Apart from this, it is quite vivid that entry made in namantaran panji would not confer any title to defendants No.1 and 2 as patwari Vijay Lal Choure (DW-7) who has appeared before the trial Court along with namantaran panji failed to establish as to whether objections were invited before making namantaran and no certificate/objection has been affixed with namantaran panji. He has also failed to state as to whether concerned parties were noticed or

not as per rules. Even otherwise, mutation entry will not confer any title in favour of the person in whose name the revenue record is mutated and it will not confer any title to them. The first appellate Court came to the conclusion that the plaintiff never intended to transfer the suit property in favour of defendants No.1 & 2 and defendants NO.1 and 2 have no right of partition at the time when alleged partition was made, as such, the suit property being self-acquired property, daughters cannot claim any partition on that day. Neither defendants No.1 and 2 have right of partition on the date of namantaran panji (Ex.P-1) nor it has been proved that father voluntarily and out of his love & affection has given any property to defendants No.1 and 2 by making partition of land owned by him. Therefore, the first appellate Court has rightly reached to the conclusion that Brijlal never parted with the suit property in favour of defendants No.1 and 2 and order in namantaran panji is not binding on him and it has rightly annulled the sale deed dated 28.4.1995, which is neither perverse nor contrary to record.

Answer to 2nd substantial question of law:-

- 19.** It is admitted position on record that Brijlal, original plaintiff, died on 9.2.2002, therefore, defendants No.1 and 2 have succeeded their share and

they had already sold less than share which they are otherwise entitled and defendants No.3 & 4 are *bona fide* purchasers. Admittedly, original plaintiff died on 9.2.2002 and thereafter the judgment and decree was passed by the first appellate Court on 10.2.2005, but neither written statement was amended nor any claim was made as per rules in this regard by the defendants before the first appellate Court and for the first time, at the time of admission of this appeal, this point was was urged and substantial question of law was formulated. The defendants ought to have brought the subsequent events on record consistent with the rules prevalent in this regard and in confirming with the decisions of the Supreme Court rendered in this behalf.

20. The Supreme Court in the matter of **Om Prakash and Ors. v. Ram Kumar and Ors.**⁵, has clearly held that a party cannot be granted a relief, which is not claimed, if the circumstances are such that granting such relief would result in serious prejudice to the interested party and deprive him of valuable rights under the statute. In reference to Order 7 Rule 7 of the CPC, it has further been held that plaintiff cannot base new cause of action

5 (1991) 1 SCC 441

on plea of defendant unless he amends the plaint or files separate proceedings.

21. In the matter of Satish Chand Makhan and Ors. v. Govardhan Das Byas and Ors.⁶, the Supreme Court has held that ordinarily a suit is tried in all its stages on the cause of action as it existed on the date of the institution, but the Court can look to subsequent events, when the relief claimed originally has (1) by reason of subsequent change of circumstances become inappropriate, or (2) where it is necessary to take notice of the changed circumstances to shorten litigation, or (3) to do complete justice between the parties.

22. Furthermore, in the matter of Ganesh Shet v. Dr. C.S.G.K. Setty and Ors.⁷, Their Lordships of the Supreme Court have held that under Order 7 Rule 7 of the CPC, the general or other relief, the Court may deem fit, sought by plaintiff can be granted only when it is consistent with the pleading as well as proof.

23. In Om Prakash Gupta v. Ranbir B. Goyal⁸, the Supreme Court has clearly held that subsequent

6 (1984) 1 SCC 369

7 (1998) 5 SCC 381

8 (2002) 2 SCC 256

events can be taken cognizance can be taken cognizance of only if Court's attention is invited towards them according to established rules of procedure so that the prerequisites of affording the opposite party an opportunity of meeting the new case and of determining the real questions in controversy are fulfilled by holding the following:-

"11. The ordinary rule of civil law is that the rights of the parties stand crystallised on the date of the institution of the suit and, therefore, the decree in a suit should accord with the rights of the parties as they stood at the commencement of the lis. However, the Court has power to take note of subsequent events and mould the relief accordingly subject to the following conditions being satisfied : (i) that the relief, as claimed originally has, by reason of subsequent events, become inappropriate or cannot be granted; (ii) that taking note of such subsequent event or changed circumstances would shorten litigation and enable complete justice being done to the parties; (iii) that such subsequent event is brought to the notice of the Court promptly and in accordance with the rules of procedural law so that the opposite party is not taken by surprise. In *Pasupuleti Venkateswarlu Vs. The Motor & General Traders* - AIR 1975 SC 1409 this Court held that a fact arising after the lis, coming to the notice of the Court and having a fundamental impact on the right to relief or the manner of moulding it and brought diligently to the notice of the Court cannot be blinked at. The Court may in such cases bend the rules of procedure if no specific provision of law or rule of

fairplay is violated for it would promote substantial justice provided that there is absence of other disentitling factors or just circumstances. The court speaking through Krishna Iyer, J. affirmed the proposition that court can, so long as the litigation pends, take note of updated facts to promote substantial justice. However, the court cautioned: (i) the event should be one as would stultify or render inept the decretal remedy, (ii) rules of procedure may be bent if no specific provision or fairplay is violated and there is no other special circumstance repelling resort to that course in law or justice, (iii) such cognizance of subsequent events and developments should be cautions, and (iv) the rules of fairness to both sides should be scrupulously obeyed.

12. Such subsequent event may be one purely of law or founded on facts. In the former case, the Court may take judicial notice of the event and before acting thereon put the parties on notice of how the change in law is going to affect the rights and obligations of the parties and modify or mould the course of litigation or the relief so as to bring it in conformity with the law. In the latter case, the party relying on the subsequent event, which consists of facts not beyond pale of controversy either as to their existence or in their impact, is expected to have resort to amendment of pleadings under Order 6 Rule 17 of the CPC. Such subsequent event the Court may permit being introduced into the pleadings by way of amendment as it would be necessary to do so for the purpose of determining real questions in controversy between the parties. In *Messrs. Trojan & Co. Vs. RM. N.N. Nagappa Chettiar* - AIR 1953 SC 235 this Court has held that the decision of a case cannot be based on grounds outside the pleadings of the parties and it is the case pleaded that has to be found; without the amendment of the pleadings the Court

would not be entitled to modify or alter the relief. In *Sri Mahant Govind Rao Vs. Sita Ram Kesho & Ors.* - (1898) 25 Indian Appeals 195 (PC), their Lordships observed that, as a rule, relief not founded on the pleadings should not be granted.

13. Power of the Court to take note of subsequent events, specially at the appellate stage, came up for the consideration of a Full Bench of Nagpur High Court presided over by Justice Sinha (as His Lordship then was) in *Chhote Khan Vs. Mohammad Obedulla Khan*, AIR 1953 Nag 361. Hidayatullah, J. (as His Lordship then was) held, on a review of judicial opinion, that an action must be tried in all its stages on the cause of action as it existed at the commencement of the action. No doubt, Courts 'can' and sometimes 'must' take notice of subsequent events, but that is done merely 'inter partes' to shorten litigation but not to give to a defendant an advantage because a third party has acquired the right and title of the plaintiff. The doctrine itself is of an exceptional character only to be used in very special circumstances. It is all the more strictly applied in those cases where there is a judgment under appeal. His Lordship quoted the statement of law made by Sir Asutosh Mookerjee, J. in a series of cases that merely because the plaintiff loses his title 'pendente lite' is no reason for allowing his adversary to win if the corresponding right has not vested in the adversary but in a third party."

24. The legal principle laid down in *Om Prakash Gupta* (supra) has consistently been followed by the Supreme Court in *Ram Nibas Gagar (dead) by Lrs. v. Debojyoti Das and Ors.*⁹, *Ram Kumar Barnwal v. Ram*

9 (2003) 1 SCC 472

Lakhan (dead)¹⁰, and Nidhi v. Ramkripal Sharma (dead) through Lrs.¹¹

25. Reverting to the facts of the present case in the light of principle of law laid down by the Supreme Court in the above-stated judgments (supra), it is quite vivid except making submission at the time of admission of this appeal nothing has been brought on record by the defendants in this regard, rather they could have amended the written statement or could have taken appropriate steps in the light of decisions rendered by the Supreme Court noticed hereinabove in Om Prakash Gupta (supra) and followed thereafter to bring subsequent event on record and that could have been adjudicated by the first appellate Court, but the defendants kept silent for their own reasons and only on the basis of aforesaid substantial question No.2, no relief can be granted to the appellants/defendants in absence of facts, pleading and evidence available on record.

26. In view of the aforesaid discussion, I do not find any merit in this second appeal. The second appeal being devoid of merit is liable to be and is hereby dismissed leaving the parties to bear their own cost(s).

10 (2007) 5 SCC 660

11 (2017) 5 SCC 640

27. A decree be drawn up accordingly.

Sd/-

(Sanjay K.Agrawal)
Judge

B/-