

HIGH COURT OF CHHATTISGARH, BILASPUR

SA No. 543 of 2003

1. Nandkeshwar S/o Mangal Aged About 20 Years R/o Village Kuniya, Tehsil Ambikapur, District Surguja Chhattisgarh., District : Surguja (Ambikapur), Chhattisgarh
2. Ramdhan S/o Mangal Aged About 18 Years Occupation - Agriculture, R/o Village - Kuniya, Tehsil Ambikapur, District Surguja Chhattisgarh. (Def. No. 3 And 4), District : Surguja (Ambikapur), Chhattisgarh

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Versus

1. Lali Bai D/o Bhuneshwar Rajwar Aged About 30 Years Occupation - Household, R/o Village Kuniya, Tehsil Ambikapur, District Surguja Chhattisgarh. (Plaintiff)
2. Budhram (Dead) Through LR:
 - 2 (A) Laxmaniya D/o Latel Budhram (Dead): Through LRs:
 - 2.(A) (a). Shiva Ram S/o Late Hublal and Laxmaniya
 - 2.(A) (b). Etwari Bai W/o Tijan Ram, D/o Laxmaniya, aged about 45 years
 - Both R/o Village- Kuniya, Tahsil- Ambikapur, District – Surguja (CG)
 - 2.(B). Jagmaniya, D/o Late Budhram, Aged 35 years.
 - 2 (C). Andhi Bai D/o Late Budhram Aged About 30 Years
 - All R/o Village – Kuniya, Tehsil-Ambikapur, District- Sarguja, C.G.,
3. Mangal S/o Budhram (Dead) Through Lrs.
 - 3(A). Parmeshwari W/o Mangal Aged About 55 Years, Occupation- Household, Caste- Rajwar, R/o Village- Kuniyakala (Dhawaitikra), P.S. Darima, Tehsil Ambikapur, Distt. Surguja (CG)
 - 3(B). Shivatri W/o Chatarsay, Aged About 35 Years , Occupation- Household, R/o Village- Latori (Mahuapara) PS Lakhanpur, Tehsil Ambikapur, District- Sarguja (CG)
 - 3(C). Meera W/o Kewla Ram Rajwar Aged About 25 Years, Occupation- Household, R/o Village- Shivpur, PS- Darima, Tehsil Ambikapur, Surguja (CG)
 - 3(D). Hirabai W/o Shivnath Ram Aged About 20 Years, Occupation- Household, Caste- Rajwar, R/o Village- Paraspara, PS Jainagar, Tehsil Surajpur, Distt. Surguja CG ...LRs of Def.No.2
4. The State Of Chhattisgarh Through Collector, Surguja., District : Surguja

(Ambikapur), Chhattisgarh

---- Respondents

For Appellants	:	Shri A.K. Prasad, Advocate
For Respondent No.1	:	Shri Ashok Shukla, Advocate
For Respondents No.2 & 3	:	Shri D.N. Prajapati, Advocate
For State/Respondent No.4	:	Shri Anmol Sharma, Panel Lawyer

S.B. : Hon'ble Shri Justice Manindra Mohan Shrivastava

Judgment On Board

25/09/2019

1. This appeal is directed against the impugned judgment and decree dated 30.8.2003 passed by learned First Additional District Judge, Ambikapur, District- Sarguja, whereby the learned lower appellate Court, reversing judgment and decree of the trial Court has decreed plaintiff's suit holding plaintiff entitled to half share in the property in dispute described in Schedule -"A" and also that the plaintiff is entitled to partition to the extent of her share. Learned lower appellate Court has cancelled four sale deeds Ex.D-1, Ex.D-2, Ex.D-3 and Ex.D-4 executed by defendant-Budhram (since deceased) in favour of defendant No.3- Nandkeshwar and defendant No.4 Ramdhan.
2. Respondent – plaintiff filed a suit seeking declaration of title and partition against Budhram (grandfather), Mangal (uncle), Nandkeshwar (son of Mangal) and Ramadhan (son of Mangal) on the pleadings, inter alia, that the property in dispute described in Schedule-"A" appended to the plaint was settled in favour of great-grandfather late Dhansai. The plaintiff's father Bhuvneshwar, son of Budhram died in the year 1959 when plaintiff was about one and a half years old. According to plaintiff, she was entitled to share in the schedule property as it was plaintiff's ancestral property and she was entitled to share by birth. The plaintiff came to know that defendant No.1 is trying to dispose off the property and adversely effecting plaintiff's rights, creating cloud over the same. It was prayed that the plaintiff be held entitled to share in the property and entitled to half share in the property and decree of partition be also granted. It was also prayed

that the defendant be restrained from alienating plaintiff's share in the property.

3. Defendant No.1- Budhram did not file any written statement. The other three defendants No. 2, 3 & 4 filed their written statement denying the claim of the plaintiff and disclosed in the written statement that Budhram had not only two sons Bhuvneshwar and Mangal but also three daughters. According to plaintiff, after death of Bhuvneshwar who died in 1955, plaintiff's mother left the house and the plaintiff was also taken by her along with her. Plaintiff's mother started leaving with second husband and there only she was brought up and marriage was arranged. According to defendants, as the plaintiff's father died prior to 1956, she was not entitled to succeed to the family/ancestral property.
4. Records speak, initially learned trial Court decreed plaintiff's suit by judgment dated 1.2.1991, which, however, upon being challenged was set aside by learned lower appellate Court vide judgment dated 1.5.1997 passed in Civil Appeal No. 16-A/1991 and the case was remanded.
5. After remand, learned trial Court decided the case on as many as ten issues. After allowing the parties to lead oral and documentary evidence, learned trial Court held that as the plaintiff's father Bhuvneshwar died prior to coming into force of Hindu Succession Act, the plaintiff was not entitled to any share in the property. On issue No.9 as to whether the sale deed executed by late Budhram was required to be set aside to grant any relief, it was held that if plaintiff's title is established, sale deed is not required to be set aside as the sale would be void ab initio .

The plaintiff's suit was dismissed. Aggrieved by the judgment and decree, appellant-plaintiff filed first appeal. Learned lower appellate Court found that after death of plaintiff's father Bhuvneshwar, the plaintiff was entitled to appropriate maintenance and, therefore, she should be treated as having interest in the property in dispute and that interest will become absolute by virtue of provision contained in Section 14 of Hindu Succession Act, 1956. Learned lower appellate Court, taking into consideration the subsequent event that during the pendency of the suit, Budhram also died, held that after death of Budhram, half share of the property which would

have been received by the plaintiff's father equally along with other brother Mangal, would devolve upon the plaintiff and in this manner, the plaintiff would be entitled to half of the share in the property.

As far as the four sale deeds are concerned, learned lower appellate Court held that as the suit is for partition and if the plaintiff's title is established there is no need to get sale deed cancelled or set aside as such sale deed is void.

6. This second appeal was admitted on following two substantial question of law:-

“1. Whether the judgment of the 1st appellate Court in reversing the judgment of the trial Court holding that the plaintiff derives a right in the property of her grand father on account of the fact that the grand father had died subsequent to coming into force of the Act of 1956 though her father has died prior to coming into force of the Act of 1956 was proper, legal and justified ?

2. Whether the plaintiff could have challenged the sale deed executed by the great grand father of defendant No.2 & 3 when the plaintiff has not raised any ground of fraud or non-payment of consideration at the time of execution of the sale deed ? ”

7. Assailing legality and validity of the impugned judgment and decree, learned counsel for the appellants-defendant would argue that the finding of the Court below being that Bhuvneshwar died prior to coming into force of Hindu Succession Act, the property being ancestral, as held by the Court below, widow and daughter of the deceased- Bhuvneshwar would not get any share by survivorship. He would next submit that the finding of learned lower appellate Court that as the daughter had a right of maintenance, therefore, she has as an interest which will become perfect and absolute upon coming into force of Hindu Succession Act suffers from serious illegality, infirmity because such right of maintenance cannot crystallise

into any right over the property by applying Section 14 of the Hindu Succession Act. Next submission is that though, the defendants clearly came out with four sale deeds, duly registered in the name of some of the defendant, the plaintiff's suit in the absence of any challenge to those sale deeds was liable to be dismissed. It is next submitted that after death of Budhram, how and in what manner the property would devolve upon surviving heirs under Hindu Succession Act, was not an issue for consideration before the Court because after his death also, no specific amendment was carried out seeking any relief in view of subsequent event. Next submission of learned counsel for the appellants-defendant is that even assuming that sale deed was not required to be challenged, learned lower appellate Court also could not have gone into legality and validity of sale transactions under four sale deeds by holding that transactions were sham, without consideration or they were fraudulent in the absence of there being any kind of pleading in the plaint to that effect.

8. On the other hand, learned counsel for the respondent-plaintiff would argue that according to defendants' own case, as stated by them in their memo of appeal before the Court below, Dhansai died in the year 1966, therefore, the law of succession will operate treating the property in hand of Dhansai at the time of his death and will accordingly devolve upon his three sons namely Budhram, Deepan and Lodu. He would submit that otherwise also, learned lower appellate Court has rightly held that as, after death of Bhuvneshwar, plaintiff had a right of maintenance, after coming into force of Hindu Succession Act, 1956, the plaintiff would become entitled to a share in the property as successor of Budhram as she happened to be the daughter of predeceased son. It is next argued that the plaintiff had applied for amendment in the plaint which was wrongly rejected by the trial Court and that issue was also raised before the learned lower appellate Court. Learned lower appellate Court had recorded a specific finding in her favour that if the plaintiff's title in the property is established, the plaintiff is not required to get sale deed cancelled or set aside, as in such an event, the sale deed would be ab initio not requiring any challenge to be made. He would also argue that in any case, after coming into force of the amendment in the Hindu Succession Act vide Amendment Act of 2005, the plaintiff would become absolute owner in

respect of the property to which her father would have succeeded as share holder in the coparcenary property.

9. I have heard learned counsel for the parties and perused the records of the Court below.

10. As far as first question of law is concerned, this question of law is required to be decided on the basis of unchallenged finding of the Court below that Bhuvneshwar died prior to coming into force the Hindu Succession Act, 1956. While the plaintiff's case was that Bhuvneshwar, her father, died in the year 1959, defendant's case has been that Bhuvneshwar died in the year 1955. Learned trial Court as well as learned lower appellate Court both have recorded concurrent finding to this effect that Bhuvneshwar died in the year 1955 i.e. prior to coming into force of Hindu Succession Act.

11. As to what was the nature of the property, according to the plaintiff, the property was settled in favour of Dhansai, plaintiff's great grandfather through Sarguja State. In para -8 of the plaint, the plaintiff's has clearly stated that property is ancestral one and therefore, the plaintiff is entitled to succeed to the property as one of the shareholder.

The defendant, on this specific pleadings that property was settled in favour of late Dhansai and that it was received by sons of Dhansai including Budhram has not been disputed and has remained on admitted position. That means, the parties have not disputed this fact, having admitted this position that the property held in hands of Budhram was ancestral property.

12. Learned lower appellate Court has also recorded specific finding that no partition had taken place.

13. On the basis of the aforesaid admitted and factual position, it has to be decided as to what was the right of the plaintiff in the ancestral property admeasuring 19.12 acres held by Budhram, as stated by the plaintiff in her plaint.

14. Prior to coming into force of Hindu Succession Act, 1956, the property was held by late Budhram along with his two sons Bhuvneshwar and Mangal. As the property which was received to Budhram in his hand was the ancestral

property, Bhuvneshwar, Budhram and Mangal were coparcener. As Bhuvneshwar admittedly died prior to coming into force the Hindu Succession Act, the share of Bhuvneshwar as one of the coparcener will not devolve upon either his widow or his daughter by inheritance and would revert back to coparcener namely Budhram and Mangal.

15. Learned lower appellate Court, in order to come to the conclusion that after coming into force of the Hindu Succession Act, the plaintiff would become absolute owner to the extent of share of her father, is completely misconceived in law. Under Section 14 of the Hindu Succession Act, 1956, it has been provided that where any property possessed by a female Hindu, whether acquired before or after the commencement of the Act shall be held by her as full owner thereof and not as a limited owner. Sub-Section (2) of Section 14 of the act, however, states that nothing in sub-section (1) shall apply to any property acquired by way of gift or under a will or any other instrument or under a decree or order of a civil Court or under an award where the terms of the gift, will or other instrument or the decree, order or award prescribe a restricted estate in such property.
16. In the present case, there is clear finding of the Court below that the property was held by Budhram, which was received by him from his father Dhansai. Learned lower appellate Court had also recorded a clear finding that the plaintiff, after death of her father, had gone along with her mother and her mother contacted second marriage has also been recorded as a finding of fact by the Court below. Therefore, there is no property which could be said to be possessed by the plaintiff. The learned Appellate Court however, said that as the plaintiff was entitled to maintenance, it has to be treated as if she was possessed of any property. This is wholly incorrect. Mere right to maintenance, even if assumed, would not mean that it would constitute property. It is not a case pleaded or proved by the plaintiff that she was given any property which she was possessing in lieu of maintenance or arrears of maintenance. Therefore, on the first question of law, this Court has to hold that the learned lower appellate Court committed patent illegality in holding that the plaintiff derives a right in the property of her grandfather on account of the fact that grandfather had died subsequent to coming into force of the Act of 1956 though her father

had died prior to coming into force of Act of 1956.

17. It appears that the learned lower appellate Court proceeding on the aforesaid incorrect assumption of law that upon coming into force of the Hindu Succession Act, 1956, plaintiff became absolute owner and on that basis, in view of subsequent event that Budhram died during the pendency of the suit in the year 1995, has proceeded to hold that plaintiff was entitled to her share to the extent of half of the entire property.

It needs be noticed that at the time of filing of the suit, Budhram was alive, the plaintiff's case as it was set up in the plaint when suit was filed on 24th March 1989 was that she was having interest in the ancestral property. The first defendant- Budhram died only in the year 1995 during the pendency of the suit. No specific amendment was carried out by the plaintiff to that effect because according to the plaintiff, the plaintiff was entitled to half share in the property. That means, the part, which her father would have taken had he remained alive along with Mangal, his brother. As to what share the plaintiff would be entitled to, after death of Budhram who died during the pendency of suit that has to be decided by applying the provisions regarding intestate succession as contained in Section 8 of the Hindu Succession Act because at the time of death of Budhram, Hindu Succession Act, 1956 had come into force. Budhram, at the time of death, was having coparcenary interest in the property along with his two sons Mangal and two sons of Mangal namely Nandkeshwar and Ramdhan. According to Section 6 of the Hindu Succession Act, upon death of Budhram, his interest in coparcenary property shall devolve by survivorship upon the surviving member of the coparcenary and not in accordance with the provision of Succession Act. However, the proviso to Section 6 of the Act carves out an exception that if the deceased had left him surviving a female relative specified in class-1 of the Schedule or a male relative specified in that class who claims through such female relative, the interest of the deceased in the Mitakshara coparcenary property shall devolve by testamentary or intestate succession, as the case may be, under this Act and not by survivorship. Applying the aforesaid provision, even though the share of Budhram in the ancestral property was that of a coparcenar, upon his death, his interest would devolve by the operation of Hindu Succession

Act either testamentary or intestate succession and not by survivorship, if he leaves behind a female relative specified in Class- 1 of the Schedule.

Further, in view of Explanation-1, the interest of Budhram shall be deemed to be share in property that would have been allotted to him if the partition of the property had taken place immediately after his death irrespective of whether he was entitled to claim partition or not.

18. Applying this provision, if the partition would have taken place just before death of Budhram, he would have taken his share along with his son Mangal and by grandsons namely Nandkewhar and Ramdhan, sons of Mangal. That means, Budhram would have got 1/4th share in the entire property that is 4.75 acres which is 1/4th of the property admeasuring 19.12 acres described in Schedule-A appended to the plaint. According to Section 10, *Rule 3* of the Hindu Succession Act, the heirs in the branch of each predeceased son shall take between them one share. That means, the plaintiff's mother and plaintiff were entitled to one share along with other heir of Class- 1. Applying the aforesaid rule of succession, upon death of Budhram, out of his share i.e. 4.75 acres, the plaintiff would be taking share in the property along with Mangal, Nandkeshwar and Ramdhan. That means, plaintiff and her mother would be entitled to 1/4th share and so also Mangal, Nankeshwar and Ramdhan would be entitled to 1/4th share. In this manner, the plaintiff would be entitled to 0.95 acres (4.75/5) out of the schedule property.

19. On the second question of law as to whether the plaintiff could have challenged the sale deed executed by the great-grandfather of defendant 3 and 4 when the plaintiff has not raised any pleading of fraud or non-payment of consideration, it is found that the plaintiff has not challenged the sale deeds executed by Budhram i.e. great grandfather of defendant 3 and 4. In fact in the plaint, there is no specific pleading as far as the sale deeds are concerned. It is found that the learned lower appellate Court has recorded finding with regard to four sale deeds i.e. Ex.D-1, Ex.D-2, Ex.D-3 and Ex.D-4 being sham without there being any specific pleading in that regard. There is no amount of pleading that these transactions were fraudulent. However, as the appeal does not involve any substantial

question of law with regard to finding recorded by both the Courts below that the plaintiff was not required to challenge the sale deeds, even if, it is found that the plaintiff had not actually challenged four sale deeds, nor sought any relief against it, in the absence of challenge to this finding that challenging those sale deeds was not necessary and in case plaintiff's share is established, sale deed to that extent would be void, this question of law does not appear to be a substantial one.

20. Learned counsel for the appellant-defendant has argued that the finding with regard to partition is perverse and bad in law. No such question of law was pressed into service at the time when this appeal was admitted. Moreover, this is a finding of fact therefore even at this stage, I am not inclined to frame any such question of law on the issue of partition, in the absence of ground of perversity.

21. Learned counsel for the respondent-plaintiff submits that even though, he had applied for amendment of plaint and the trial Court had rejected, even in second appeal he could challenge those findings. In view of finding recorded hereinabove, it is not necessary for this Court to go into that aspect anymore.

Learned counsel for the respondent-plaintiff also argued that the Amendment Act of 2005 in the Hindu Succession Act will apply retrospectively in favour of the plaintiff in the manner that upon death of her father way back in the year 1955, she would be entitled to absolute share in the property. This argument is misplaced in law. The father of the plaintiff died even prior to enactment of Hindu Succession Act. The devolution of the property had already taken place at that time. It is not a case that the plaintiff has come to seek partition of her property during the lifetime of Budhram claiming herself to be a coparcenary. In view of provision contained in Section 6 of the Act, as has been elaborately discussed hereinabove, upon death of Budhram, succession would be governed by the proviso to Section 6 of the Act as at the time of Budhram, female relative in Class-1 was alive i.e. the plaintiff. To that extent, this Court has also held that plaintiff is entitled to a share in the coparcenary interest of late Budhram who died during the pendency of the suit. However, this share, the plaintiff would be taking along with his mother, in

view of Section 10 Rule 3 of the Hindu Succession Act. Accordingly, the plaintiff would be entitled to half of that share which would devolve upon her in the capacity as daughter of predeceased son of late Budhram. In view of discussion held hereinabove, Budhram had 1/4th interest in the coparcenary property, that means, 4.75 acres only. Out of this, the plaintiff and her mother would be taking 1/4th and so also Mangal, Nandkeshar and Ramdhan in equal share. Out of this 1/4th of 4.75 acres, which comes to 1.18 acres, the plaintiff would have only half share. Thus, plaintiff is entitled to succeed to 0.59 acres of land upon death of Budhram and only to that extent, plaintiff's suit deserved to be decreed.

22. It is found that under the four sale deeds, Budhram sold 4.53 hectares of land which is far in excess of his share being 4.75 acres. However, as the plaintiff's share is held to be 0.59 acres ($4.75 / 8$) to that extent the sale deeds would not take effect and the plaintiff would be entitled to partition and separate possession of her share.

23. In the result, the aforesaid two questions of law are answered accordingly. The judgment of the learned lower appellate Court is modified and it is held that plaintiff is entitled to 0.59 acres of land out of property described in Schedule -"A" in respect of which she would be entitled to her share upon partition.

24. The appeal is accordingly partly allowed.

Sd/-
(Manindra Mohan Shrivastava)
Judge