

HIGH COURT OF CHHATTISGARH, BILASPURSecond Appeal No.353 of 2001Order reserved on: 28-1-2019Order delivered on: 1-2-2019

1. Dhoru, S/o Damaru, Caste Kanwar.
2. Vista Ram, S/o Kentha, Caste Kanwar.
3. Mangal Sai, S/o Mensai, Caste Kanwar.

All R/o Village Jamkani, Tahsil Sitapur, Distt. Surguja (C.G.)

4. Maninath, S/o Patwari, R/o Village Jamdhodhi, Tah. Sitapur, Distt. Surguja (C.G.)

(Defendants)
---- Appellants

Versus

1. Jagesher (Dead) Through LRs

(a) Kartik, S/o late Jageshar, aged about 40 years,

(b) Ramjivan, S/o late Jageshar, aged about 35 years,

Both are resident of Village Jamkani, Tahsil & P.S. Sitapur, Civil & Revenue District Surguja (C.G.)

2. Phulman, D/o Ratti.
3. Ganga Ram, S/o Ratti.
4. Atma Ram, S/o Ratti.
5. Sukhanath, S/o Ratti.

All Caste Tribal Bhuihar, R/o Village Jamkoni, Tah. Sitapur, Distt. Surguja (C.G.)

6. Musmat Thuraki Bai (Dead) Through LR

(a) Bhengtu, S/o Ratti, aged about 30 years, R/o Village Jamkani, Tahsil & P.S. Sitapur, Civil & Revenue District Surguja (C.G.)

7. Bishambher (Dead) Through LRs

(A) Ramnath, S/o late Bishambher, aged about 35 years,

(B) Ghana, S/o late Bishmabher, aged about 30 years,

Both R/o Sitapur, Distt. Surguja (C.G.)

(Plaintiffs)

8. Parasu Ram, S/o Surjan, Caste Kanwar (Dead) through legal representative Bali S/o Parsu Kanwar, R/o Village Sitapur, Distt. Surguja (C.G.)

9. State of Chhattisgarh, Through Collector, Surguja (Ambikapur) (C.G.)
---- Respondents

For Appellants: Mr. Ajay Kumar Pandey, Advocate.

For Respondents No.2 to 5: -

Mr. Amarnath Pandey, Advocate.

For Respondent No.9 / State: -

Mr. Vimlesh Bajpai, Govt. Advocate.

Hon'ble Shri Justice Sanjay K. Agrawal

C.A.V. Judgment

1. This second appeal by the defendants was admitted on the following substantial question of law: -

“Whether Lower Appellate Court was justified in holding that one Court was not competent to alienate the property?”

2. The substantial question of law is re-framed as under: -

“Whether Lower Appellate Court was justified in holding that Mankunwar (defendant No.1) was not competent to alienate the property?”

(For the sake of convenience, parties would be referred hereinafter as per their status shown and ranking given in the suit before the trial Court.)

3. Four plaintiffs filed suit for declaration that the sale deed dated 20-2-1984 (Ex.D-1) executed by defendant No.1 in favour of defendants No.2 & 3 is illegal and void and in alternative, also sought for possession stating inter alia that the property was held by Budha Bhuihar and he had three sons Chiru, Akal and Tilak. It was further pleaded that the suit land was acquired by Budha Bhuihar in survey settlement, as he was granted ryoti rights as shown in Schedule A of the plaint and it was partitioned among three sons of Budha Bhuihar

and the land was being cultivated jointly by three sons of Budha Bhuihar, two sons Akal & Tilak died, and plaintiff No.3 is son of Akal and Tilak died issue-less. It was also pleaded that Tilak had divorced his wife in the year 1971 by way of *chod chutti* as per the customary rights and Tilak had executed will deed in favour of plaintiffs No.2, 3 and 4 on 30-12-1980 (Ex.P-1), whereas Tilak's wife Mankunwar (defendant No.1) had sold the suit property vide Ex.D-1 in favour of defendants No.2 & 3 which is illegal and void, therefore, it be declared void, as the transfer is hit by Section 165 of the Chhattisgarh Land Revenue Code, 1959 which was opposed by the defendants by filing written statement stating inter alia that the suit land has rightly been alienated by Mankunwar in favour of defendants No.2 & 3 and as such, the suit is liable to be dismissed.

4. The trial Court after appreciating oral and documentary evidence on record, dismissed the suit holding that Mankunwar had right to alienate the suit property in favour of defendants No.2 & 3, as it was sold for legal necessity and she had sold the suit property to the extent of her share and defendants No.2 & 3 are bona fide purchasers and the sale deed dated 20-2-1984 is valid which has been reversed and decree has been granted by the first appellate Court on appeal preferred by the defendants against which this second appeal has been preferred and substantial question of law has been framed which has been set-out in the opening paragraph of this judgment.
5. Mr. Ajay Kumar Pandey, learned counsel for the appellants / defendants, would submit that the judgment & decree passed by the first appellate Court deserves to be set aside as Mankunwar – defendant No.1 was competent to alienate the suit property to the extent of her share to defendants No.2 & 3 vide Ex.D-1 on 20-2-1984

and as such, the judgment & decree of the lower appellate Court deserves to be set-aside, whereas learned counsel for respondents No.2 to 5/plaintiffs would support the judgment & decree of the trial Court and submits that the second appeal deserves to be dismissed with cost(s).

6. I have heard learned counsel for the parties, considered their rival submissions made herein-above and went through the record with utmost circumspection.
7. As per the plaint allegation, the suit land was held by Budha Bhuihar and he had three sons namely, Chiru, Akal and Tilak. Chiru is plaintiff No.1 and plaintiffs No.2 & 3 are sons of plaintiff No.1, whereas plaintiff No.4 is son of Akal and original defendant No.1 Mankunwar was widow of Tilak who died issue-less. The dispute mainly relates to the share of Tilak in the property left by his father Budha Bhuihar. The plaintiffs alleged in the plaint that Tilak had executed a Will Ex.P-1 in favour of plaintiffs No.2, 3 & 4 on 30-12-1980 and therefore they have become title holders of the suit land and the alienation made by Mankunwar – original defendant No.1 in favour of defendants No.2 & 3 vide Ex.D-1 on 20-2-1984 is illegal and void.
8. The trial Court framed as many as fifteen issues and dismissed the suit holding that the plaintiffs have failed to prove the Will in accordance with Section 63(c) of the Indian Succession Act, 1925 that the property holder (Tilak) – husband of Mankunwar (defendant No.1) had executed a will in their favour on 30-12-1980 and further held that parties are aboriginal tribe by caste and therefore the provisions of the Hindu Succession Act, 1956 would not be applicable and they will be governed by their custom and rites prevailing among them, and also while answering issue No.15 held that the aboriginal tribes' widow gets

limited rights in the property of her husband and for legal necessity also the widow can alienate the suit property and thus, Mankunwar has rightly alienated the suit property finding difficulty to maintain her and defendants No.2 & 3 are bona fide purchasers.

9. On appeal being preferred, the first appellate Court reversed all the findings of the trial Court and held that Mankunwar was already customarily divorced by her husband Tilak whose property is in dispute and therefore Mankunwar had no right to alienate the suit property in favour of defendants No.2 & 3 and set aside the judgment & decree of the trial Court.
10. From the aforesaid narration of facts, it is quite vivid that the plaintiffs claimed the suit property only on the basis of Ex.P-1 – Will said to have been executed in favour of plaintiffs No.2, 3 & 4 on 30-12-1980 by Tilak – original property holder which the trial Court found that the Will is not proved in accordance with Section 63(c) of the Indian Succession Act, 1925 and consequently, repelled the plea of Will and conferment of title to the plaintiffs on the strength of Will Ex.P-1. This finding on Will was not challenged by the plaintiffs before the first appellate Court and that has attained finality.
11. The plaintiffs have simultaneously taken a plea that defendant No.1 Mankunwar – widow of Tilak had no right to execute sale deed in favour of defendants No.2 & 3. The plaintiffs sought relief that the sale deed dated 20-2-1984 be declared illegal, as Tilak had already divorced Mankunwar by the custom of *chod chutti* and therefore defendant No.1 had no right to alienate the suit property and in Bhuihar Adivasi, divorced woman only gets the right of maintenance with no right to alienation which was accepted by the trial Court, but reversed by the first appellate Court. The plaintiffs claimed suit land

which was held by the husband of defendant No.1 by way of Will, which was negated by the trial Court and not challenged further by the plaintiffs. The plaintiffs did not claim any successory right over the suit land held by Talk, but claimed that the sale deed dated 20-2-1984 be declared illegal.

12. The question is, whether the plaintiffs, who are not party to the sale deed and strangers, can question the fact of execution of sale deed by defendant No.1 in favour of defendants No.2 & 3? My answer is emphatic “NO”, as the plaintiffs, who are not party to the sale deed being third party, cannot question the sale deed on the ground that no consideration has been passed or the consideration passed is on the lower side.

13. The Supreme Court in the matter of Muddasani Venkata Narsaiah (dead) Through Legal Representatives v. Muddasani Sarojana¹ has held that passing of consideration under a sale deed cannot be questioned by third party. It was observed as under: -

“17. It is also settled law that passing of consideration under a sale deed cannot be questioned by third party. Defendant 3 has not been able to establish her case that she is an adopted daughter of the deceased Yashoda and thus, she being the third party, could not have questioned the execution of the sale deed by Buchamma on the ground of passing of consideration as rightly laid down by the High Court of Madhya Pradesh in *Ramjilal Tiwari v. Vijai Kumar*². The High Court of Patna has also held that passing of consideration can be questioned by a party or his representative in *Akli v. Daho*³. Similar is the view of the High Court of Nagpur in *Maroti Bansi Teli v. Radhabai*⁴. Thus, the High Court has erred in law on this ground also in dismissing the suit.”

14. Apart from this, the trial Court has clearly held that the provisions of the Hindu Succession Act, 1956 would not apply and parties are

1 (2016) 12 SCC 288

2 1969 SCC OnLine MP 55 : 1970 Cri LJ 1176 : 1970 MPLJ 50

3 1927 SCC OnLine Pat 200 : AIR 1928 Pat 44

4 1943 SCC OnLine MP 128 : AIR 1945 Nag 60

governed by their custom and in the Bhuihar tribe, the widow, though has limited right, but in case of legal necessity, the property can be alienated and further reached to a factual finding that Mankunwar being harassed by the plaintiffs and was unable to maintain herself decided to alienate the suit property and after alienation, went to her father's place to stay which was the finding of fact based on the evidence available on record and interference by the first appellate Court by the impugned judgment is not based on any rational or legal basis. The finding of the trial Court has been reversed on the ground that Mankunwar was divorced by her husband Tilak in *chudi* form and as per the prevalent custom, divorced woman has only right to get maintenance, but no right to alienate the property. It is the case of the plaintiffs that divorced woman in their community, as per prevalent custom, has no right to alienate the property; burden of proof lies on them as per Sections 101 and 103 of the Indian Evidence Act, 1872. which provide as under: -

“101. Burden of proof.—Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist.

When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.

103. Burden of proof as to particular fact.—The burden of proof as to any particular fact lies on that person who wishes the Court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”

15. In the matter of Mohammad Baqar and others v. Naim-un-Nisa Bibi and others⁵, the Supreme Court has held as under: -

“(6) ... The burden of proving a custom in derogation of the general law being heavily on the party who sets it up, it was incumbent on the appellants to prove by clear and

5 AIR 1956 SC 548

cogent evidence that there was such a custom as was pleaded by them.”

16. Thus, the burden that customary law excludes the woman from alienation of property inherited from parent was of the plaintiffs which they failed to discharge by leading appropriate evidence and it would be impermissible for the Court to start with this assumption that customary law governing the parties excludes the woman from alienating the property.

17. In view of the finding reached herein-above, I am of the considered opinion that the finding recorded by the first appellate Court that Mankunwar had no right to alienate the suit property to defendants No.2 & 3 is perverse and contrary to law, it is liable to be and is hereby set aside and judgment & decree of the trial Court dismissing the suit is restored. The substantial question of law is answered accordingly and the second appeal is allowed to the extent indicated herein-above leaving the parties to bear their own cost(s).

18. Decree be drawn-up accordingly.

Sd/-
(Sanjay K. Agrawal)
Judge