

HIGH COURT OF CHHATTISGARH, BILASPUR**Second Appeal No.219 of 2004****Judgment reserved on :28.11.2018****Judgment delivered on:09.12.2019**

1. Rukmaniya D/o. Late Nanhka, Caste-Aheer, Aged About 55 years, R/o. Village – Agastpur, P.S. & Tahsil-Surajpur, District Surguja (CG)
2. Gopi, S/o. Late Nanhaka, Caste-Aheer, Aged About 50 years, R/o. Sonpur, P.S. & Tahsil Surajpur, Distt. Surguja (CG)
3. Ganga Ram, S/o. Late Nanhaka, Caste Aheer, Aged About 45 years, Occupation – Agriculture
4. Mainejar, S/o. Late Nanhaka, Caste Aheer, Aged About 40 years, Occupation Agriculture
(Appellants No.3 & 4 are R/o. Village Telaimuda, P.S. Ramanujnagar, Tahsil Surajpur, Distt. Surguja (CG))
5. Dharmjeet, S/o. Tejilal, Caste Aheer, Aged About 30 years, Occupation Agriculture
6. Lalan, S/o. Tejilal, Caste Aheer, Aged About 26 years, Occupation Agriculture
(Appellant No.5 & 6 Resident of Village Budar, P.S. Patna, Tahsil Baikunthpur, Distt. Koriya (CG))

----- Appellants/Defendants**Versus**

1. Jaymaniya, So-Called D/o. Kalu Aheer, W/o. Mitthuram, Aged About 50 Years, R/o. Village Sumerpur, Police Station Ramanujnagar, Tahsil Surajpur, District Surguja (CG)

----- (Plaintiff)

2. State of Chhattisgarh, Through Collector, Surguja, Distt. Surguja (CG)

----- Respondents

For Appellants/Defendants: Mr. Ashok Kr. Shukla, Advocate
 For Res.No.1/Plaintiff : Mrs. Meena Shashtri, Advocate
 For Respondent No.2/State: Mr. Ravi Bhagat, Dy.G.A.

Hon'ble Shri Justice Sanjay K. Agrawal

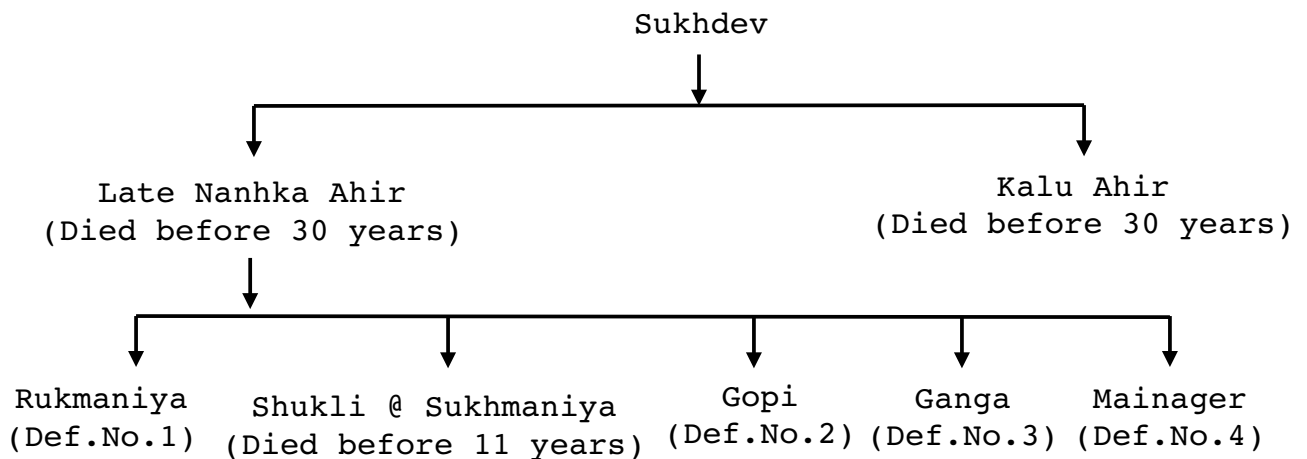
C.A.V. Judgment

1. The substantial question of law involved, formulated and to be answered in this defendants' second appeal is as under:-

"Whether the Court belows have erred in not appreciating the fact that whether respondent No.1 would have succeeded the property of her grandfather when her father died in the year 1954 i.e. prior to coming into force of the Hindu Succession Act, 1956 ?"

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

2. The following genealogical tree would demonstrate the relationship between the parties:-



3. The plaintiff instituted a suit for declaration of title, partition and possession stating inter-alia that she is daughter of Kalu Ahir who died 30 years prior to the date of filing of the suit on 29.11.94 and the suit property was granted in the names of her father namely Kalu Ahir and father of the defendants namely Nanhka Ahir in Surguja settlement and after death of Kalu Ahir and Nanhka Ahir, the suit property was jointly inherited by the plaintiff and the defendants, from which the defendants dispossessed the plaintiff in the month of July, 1993 and her title has been denied by them, as such, she is entitled for 1/2 share in the suit property and also prayed for partition and possession.
4. The defendants filed their written statement and denied the averments made in the plaint stating inter-alia that Kalu Ahir died prior to coming into force of the Hindu Succession Act, 1956 (hereinafter called as 'the Act of 1956'), therefore, the plaintiff would not get any share in the suit property and she has already relinquished her title on 25.3.94 (Ex.D-9) before panchas that she has no right/title over the suit land and she has given 0.995 hectare of land to the defendants which has been mutated in the names of the defendants and

after death of their father Nanhka, they are in possession and cultivating the same, as such, the plaintiff is not at all entitled for declaration of title and possession. It was also pleaded that the plaintiff is not daughter of Kalu Ahir, as such, the suit is not maintainable.

5. The trial Court upon appreciation of oral and documentary evidence available on record, by its judgment and decree dated 22.4.2003, held that the plaintiff is daughter of Kalu Ahir and after death of Kalu Ahir and Nanhka Ahir, the plaintiff and the defendants have jointly succeeded the suit property and are in possession and cultivating the same. Therefore, the plaintiff is entitled for 1/2 share in the suit property as the plaintiff's father Kalu Ahir died on 15th August, 1954 and the suit is not barred by limitation, against which, the defendants preferred first appeal under Section 96 of the CPC before the first appellate Court. The said Court by the impugned judgment and decree dismissed the appeal finding no merit and affirmed the judgment & decree of the trial Court. Questioning the judgment and decree of the first appellate Court, this second appeal under Section 100 of the CPC has been preferred by the appellants/defendants, in which

substantial question of law has been formulated by this Court, which has been set-out in the opening paragraph of this judgment.

- 6.** Mr. Ashok Kumar Shukla, learned counsel for the appellants/defendant, would submit that admittedly the plaintiff's father Kalu Ahir died on 15th August, 1954 as recorded by the trial Court i.e. prior to coming into force of the Act of 1956 and succession was open on that day, therefore, the plaintiff being daughter of Kalu Ahir would not succeed to the property which was ancestral property of Sukhdev and it will be inherited only by Nanhka Ahir and after death of Nanhka Ahir the defendants have succeeded the suit property. He would further submit that by Ex.D-9 the plaintiff has relinquished her share in the suit property to the defendants and same cannot be used against them as she has no right, title and interest over the suit land. He would further submit that the plaintiff remained silent for a fairly long time since 15.8.1954 i.e. the date of death of her father till 29.11.94 i.e. the date of filing of the suit and even the names of the defendants were mutated in revenue records, which goes to show that the plaintiff has no share in the suit property and as such, the plaintiff would not succeed to the

property of her grandfather Sukhdev and after death of her father Kalu Ahir on 15.8.1954, as such, the judgment & decree of both the Courts below deserve to be set aside and the suit be dismissed.

7. On the other hand, Mrs. Meena Shashtri, learned counsel for respondent No.1/plaintiff, would submit that the suit property was settled in Surguja Settlement in favour of Sukhdev and it was granted vide Exs.P-1 and P-2 in favour of Nanhka, father of the defendants and Kalu, father of the plaintiff, which is also apparent from Exx.P-3 and P-4. She would further submit that before coming into force of the Act of 1956 she has full right by virtue of the provisions contained in Section 14 of the Act of 1956 and she is entitled for 1/2 share in the suit property of her father. She would also submit that Ex.D-9 is the document by which title of the plaintiff has clearly been acknowledged by the defendants, as such, both the Courts below have rightly decreed the suit in favour of the plaintiff, which is neither perverse nor contrary to record and the aforesaid substantial question of law does not arise for consideration.

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. In a suit filed by the plaintiff, the defendants firstly pleaded that the plaintiff is not daughter of Kalu Ahir, therefore, question of her succeeding to the property of Kalu Ahir does not arise. The trial Court has recorded a finding that plaintiff-Jaymaniya is daughter of Kalu Ahir which the first appellate Court did not disturb and as such, it has been held that plaintiff-Jaymaniya is daughter of Kalu Ahir. Apart from this, the plea of the plaintiff not being daughter of Kalu Ahir was not originally pleaded. It was pleaded by way of amendment dated 5.2.97, which the two Courts below did not find favour with. Thereafter, the defendants next pleaded that plaintiff-Jaymaniya has relinquished her share in the suit land in favour of the defendants vide Ex.D-9 on 25.3.94 by getting 0.995 hectares of land, which the trial Court as well as the first appellate Court did not accept, as such, the defendants have acknowledged the title of the plaintiff by setting up the plea that though the plaintiff had share in the suit property, but she has relinquished her share in the suit property vide Ex.D-9. Apart from this, the defendants have also

set-up a plea of adverse possession along with title over the suit land.

10. It is well settled law laid down by the Supreme Court in the matter of Firm Srinivas Ram Kumar v. Mahabir Prasad¹ that it is open to the parties to raise even mutually inconsistent pleas and if the relief could be founded on the alternative plea it could be granted, which has been followed in the matter of Arundhati Mishra (Smt) v. Sri Ram Charitra Pandey².

11. The question is, whether the plea based on title and adverse possession are mutually inconsistent and whether the defendants can be permitted to set up a plea based on title and simultaneously on same breath can be allowed to raise a plea of perfection of title by way of adverse possession.

12. The Supreme Court in Arundhati Mishra (Smt) (supra) has clearly held that the pleas based on title and adverse possession are mutually inconsistent and the latter does not begin to operate until the former is renounced and in that case, the Supreme Court further held that since his plea is based on his title, he never denounced his

1AIR 1951 SC 177

2(1994) 2 SCC 29

title nor admitted the title of the appellant.

- 13.** Likewise, in the matter of **L.N. Aswathama and another v. P. Prakash**³, the Supreme Court relying upon its earlier decisions clearly held that the pleas based on title and adverse possession are mutually inconsistent and the latter does not begin to operate until the former is renounced. It has been observed as under: -

"17. ... The pleas based on title and adverse possession are mutually inconsistent and the latter does not begin to operate until the former is renounced. Unless the person possessing the property has the requisite animus to possess the property hostile to the title of the true owner, the period for prescription will not commence. (Vide *P. Periasami v. P. Periathambi*⁴, *Md. Mohammad Ali v. Jagdish Kalita*⁵ and *P.T. Munichikkanna Reddy v. Revamma*⁶.)"

- 14.** In the matter of **Mohan Lal v. Mirza Abdul Gaffar**⁷, it has been held that the pleas based on title and adverse possession both are mutually inconsistent and destructive. It has been observed as under: -

"4. As regards the first plea, it is inconsistent with the second plea. Having come into possession under the (sale) agreement, he must disclaim his right thereunder and plead and prove assertion

3(2009) 13 SCC 229

4(1995) 6 SCC 523

5(2004) 1 SCC 271

6(2007) 6 SCC 59

7(1996) 1 SCC 639

of his independent hostile adverse possession to the knowledge of the transferor or his successor-in-title or interest and that the latter had acquiesced to his illegal possession during the entire period of 12 years i.e. up to completing the period of his title by prescription *nec vi, nec clam, nec precario* (not by violence, not by stealth, not by permission). Since the appellant's claim is founded on Section 53-A (of the [Transfer of Property Act](#), 1882), it goes without saying that he admits by implication that he came into possession of the land lawfully under the agreement and continued to remain in possession till date of the suit. Thereby the plea of adverse possession is not available to the appellant."

- 15.** In the matter of Karnataka Board of Wakf v. Government of India and others⁸, similar proposition has been held by the Supreme Court and the principle of law rendered in Mohan Lal (supra) has been relied upon and it has been held as under: -

"13. As we have already found, the respondent obtained title under the provisions of the [Ancient Monuments Act](#). The element of the respondent's possession of the suit property to the exclusion of the appellant with the *animus* to possess it is not specifically pleaded and proved. So are the aspects of earlier title of the appellant or the point of time of disposition. Consequently, the alternative plea of adverse possession by the respondent is unsustainable. The High Court ought not to have found the case in their favour on this ground."

- 16.** Reverting to the facts of the present case, I hold that plea of the appellants/defendants before

the Courts below based on title as well as adverse possession are mutually inconsistent pleas set up by the defendants and both pleas are mutually inconsistent and the latter does not begin to operate until the former is renounced. In the present case, the defendants have not renounced the plea of title on them, but set up a plea of adverse possession, as such, both pleas are mutually inconsistent pleas. It is nowhere apparent from the plaint as well as from the pleading either before the trial Court or before the first appellate Court that the defendants have ever taken such plea that the plaintiff would not succeed to the property of her grandfather Kalu Ahir died in the year 1954 and for the first time at the time of admission, this plea has been raised before this Court.

17. It is the case of the parties that the suit land was granted to Nanhka Ahir and Kalu Ahir in Surguja settlement though jointly by Exs.P-1 and P-2.

18. The question for consideration would be, whether the aforesaid suit land which was held by Nanhka Ahir and Kalu Ahir by Surguja settlement would be self-acquired property in their hands or it would be ancestral property in the hands of Nanhka

Ahir and Kalu Ahir ?

- 19.** In order to decide the said question, paragraph 228 of Mulla Hindu Law (23rd Edition) can be referred pertinently herein which states as under: -

"§ 228. **Separate property.**—Property acquired in any of the following ways is the separate property of the acquirer, it is called 'self-acquired' property, and is subject to the incidents mentioned in § 222:

(1) xxx xxx xxx

(2) xxx xxx xxx

(3) *Government grant.*—Property granted by government to a member of a joint family is the separate property of the donee, unless it appears from the grant that it was intended for the benefit of the family."

- 20.** The learned author (Mulla) in the next page 342 (23rd Edition) has also remarked that self-acquired property, in its technical sense, means property obtained by a Hindu without any detriment to ancestral property as to the property described in clauses (1)-(3) and (5) of paragraph 228.

- 21.** As such, the property acquired by Government grant even to a member of joint family would be separate property of the donee. (See Katama Natchiar v. Rajah of Shivagunga⁹ and Sri Mahant Govind v. Sitaram¹⁰.)

9(1863) 9 MIA 539, pp 543, 610

10(1899) 21 All 53 : 20 IA 195

22. Mayne's Hindu Law & Usage (16th Edition) revised by Justice Ranganath Misra in para 308 while dealing with the grants made by the Government observed: Estate conferred by Government in the exercise of their sovereign power becomes the self-acquired property of the donee, whether such gifts are absolutely new grants, or only the restoration to one member of the family of property previously held by another but confiscated, unless some contrary intention appears from the grant, or the conduct of the donee and the other members of his family shows that they treated it as joint family property, as such, the property in the hands of Nanhka Ahir and Kalu Ahir was the self-acquired property of the plaintiff's father and the defendants' father Nanhka and it was never ancestral property of Nanhka Ahir and Kalu Ahir. The argument of learned counsel for the parties that the property was ancestral property of Nanhka Ahir and Kalu Ahir is not correct submission as argued by learned counsel for the appellant.

23. The Supreme Court in the matter of **Panchugopal Barua and others v. Umesh Chandra Goswami and others**¹¹ has clearly held that new question cannot be

¹¹ (1997) 4 SCC 713

permitted to be raised in second appeal and held as under:-

"8. Generally speaking, an appellant is not to be allowed to set up a new case in second appeal or raise a new issue (otherwise than a jurisdictional one), not supported by the pleadings or evidence on the record and unless the appeal involves a substantial question of law, a second appeal shall not lie to the High Court under the amended provisions. In the present case, no such question of law was formulated in the memorandum of appeal in the High Court and grounds (6) and (7) in the memorandum of the second appeal on which reliance is placed did not formulate any substantial question of law. The learned single Judge of the High Court also, as it transpires from a perusal of the judgment under appeal, did not formulate any substantial question of law in the appeal and dealt with the second appeal, not on any substantial question of law, but treating it as if it was a first appeal, as of right, against the judgment and decree of the subordinate Court. The intendment of the legislature in amending Section 100 CPC was, thus, respected in its breach. Both the trial court and the lower appellate court had decided the cases only on questions of fact, on the basis of the pleadings and the evidence led by the parties before the Trial Court. No pure question of law nor even a mixed question of law and fact was urged before the Trial Court or the First Appellate Court by the respondent. The High Court was, therefore, not justified in entertaining the second appeal on an altogether new point, neither pleaded nor canvassed in the subordinate courts and that too by overlooking the changes brought about in Section 100 CPC by the Amendment Act of 1976 without even indicating that a substantial question of law was required to be resolved in the second appeal. to say the least, the approach of the High Court was not proper. It is the obligation of the courts of law

to further the clear intendment of the legislature and not to frustrate it by ignoring the same."

As such, the defendants cannot be permitted to raise altogether a new case not set up before the trial Court or before the first appellate Court as the appellants/defendants firstly pleaded that the plaintiff is not daughter of Kalu Ahir and then pleaded that the plaintiff has relinquished her share in favour of the defendants, then they pleaded that the defendants have perfected their title by adverse possession and when all these pleas have been not found favour with the two Courts below, the defendants have invented a new ground that the plaintiff would not succeed to the property of her grandfather died in the year 1954.

24. In view of the aforesaid analysis, I do not find any merit in this second appeal. The second appeal deserves to be and is hereby dismissed. The defendants will bear their own cost(s) and cost of the plaintiff. Counsel fee ₹5000/-, if certified.

25. A decree be drawn-up accordingly.

Sd/-

(Sanjay K.Agrawal)

Judge

B/-