

HIGH COURT OF CHHATTISGARH, BILASPUR**Second Appeal No. 604 of 2004**

1. Dhaniram, S/o. Late Ghursai, Aged about 40 years,
2. Parshottam, S/o. Late Ghursai
3. Dakhal Singh, S/o. Late Ghursai, Aged about 35 years.

All R/o. Village Karanji, P.S. Rajpur, Tahsil Rajpur, District Surguja (C.G.)

---- Appellants/Plaintiffs

Versus

1. Sammal, S/o Late Malsai, Aged about 50 years.
2. Jammal, S/o Late Malsai, Aged about 35 years,
Both R/o. Village Karanji, Tahsil, Rajpur, Distt. Surguja (C.G.)
3. Mu. Jhari (deleted), Wd/o. Late Malsai, Aged about 65 years, R/o Village Karanji, Tahsil Rajpur, District Surguja (C.G.)
4. State of Chhattisgarh, Through : Collector, Surguja (C.G.)

---- Respondents/defendants.

For Appellants	:	Mr. Manoj Paranjpe & Mr. Anurag Singh, Advocate.
For Respondent No. 4	:	Mr. Akash Pandey, PL.

Hon'ble Shri Justice Sanjay K. Agrawal

Order On Board

29/08/2019

(1) The substantial questions of law involved, formulated and to be answered in this second appeal preferred by plaintiffs state as under:

“1. Whether the two Courts below were justified in dismissing the suit as well as first appeal of the appellants/plaintiffs ignoring the right of the appellants/plaintiffs over the suit property by virtue of

undisputed possession on the suit property ?

2. Whether the Courts below were justified in accepting the evidence of DW-1 as power of attorney holder when there was no reasons for the original defendants not be able to come for evidence ?

3. Whether the appellants/plaintiffs did not have better title over the suit property as compared to the defendants so as to at least get benefit of decree of permanent injunction ?

(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).

(2) The suit property was originally held by Miru Gond. He had two daughters namely Mankuwar and Duhini. Firstly, they filed civil Suit No. 17-A/1970 against the father of the plaintiffs namely late Ghursai and against the Jagar Sai and Mal Sai. That civil suit was decreed on 20.09.1973, against which father of the plaintiffs namely Ghursai filed the first appeal being First Appeal No. 55-A/1973, which was allowed by the first appellate Court vide its judgment & decree dated 20.09.1973. That was challenged before the High Court of Madhya Pradesh in Second Appeal No. 47/1976, which was allowed by the Madhya Pradesh High Court vide its judgment & decree dated 19.11.1981 restoring the judgment and decree of the trial Court dated 20.09.1973 holding that plaintiffs namely Mankunwar and Duhini are the title holders of the suit land and entitled for recovery of possession from father of the plaintiffs namely Ghursai and Jagarsai and Malsai. This subsequent civil suit from which this appeal has arisen was filed by sons of Ghursai claiming title over the suit land that they have perfected their title over the suit land as the decree passed in earlier suit in favour of Mankuwar and

Duhini was never executed and, therefore, they have perfected their title over the suit land by way of adverse possession and entitled for decree for declaration of title as well as for permanent injunction, which the trial Court dismissed by its judgment & decree dated 17.08.2001 passed in Civil Suit No. 87-A/1998, which was upheld by the first appellate court by its impugned judgment & decree dated 20.09.2004 principally on the ground that original owner namely Mankunwar and Duhini were not impleaded as defendants in the suit and in absence of necessary party, the suit cannot be decreed. Now, the second appeal has been preferred by the plaintiffs in which substantial questions of law have been framed and set out in the opening paragraph of the judgment.

(3) Mr. Manoj Paranjpe and Shri Anurag Singh, learned counsel appearing for the appellants/plaintiffs would submit that both the courts below are absolutely unjustified in dismissing the suit filed by the plaintiff holding that original owner Mankunwar and Duhini are the necessary party ignoring the fact that Mankunwar and Duhini had not been heard for last seven years and, therefore, presumption under Section 108 of the Evidence Act, 1872 would be available and, therefore, the suit ought to have been decreed by both the courts below.

(4) None for the respondents No. 1 & 2, though served.

(5) It is not in dispute that in first round of litigation initiated by Mankunwar and Duhini being the daughters of Miru Gond, decree of trial Court holding them to be title holder of the suit land and entitled for possession was set aside by the first appellate court and ultimately restored by the the High Court of Madhya Pradesh in Second Appeal No. 47 of 1976, decided on 19.11.1981. It is the case of the plaintiffs that they are in possession over the suit land as the earlier decree for possession was not executed by

Mankuwar and Duhini and, therefore, they have perfected their title over the suit land by way of adverse possession, but admittedly Mankuwar and Duhini were not impleaded as party defendants in the suit presumably on ground based under Section 108 of the Evidence Act, which states as under :-

“108. Burden of proving that person is alive who has not been heard of for seven years.- - Provided that when the question is whether a man is alive or dead, and it is proved that he has not been heard of for seven years by those who would naturally have heard of him if he had been alive, the burden of proving that he is alive is shifted to the person who affirms it.”

(6) Section 108 of the Evidence Act, 1872 came up for consideration before the Supreme Court in the matter of LIC of India Vs. Anuradha¹ in which their Lordships have considered the aforesaid provisions and held as under :-

“14. On the basis of the abovesaid authorities, we unhesitatingly arrive at a conclusion which we sum up in the following words. The law as to presumption of death remains the same whether in Common Law of England or in the statutory provisions contained in [Sections 107](#) and [108](#) of the Indian Evidence Act, 1872. In the scheme of [Evidence Act](#), though [Sections 107](#) and [108](#) are drafted as two Sections, in effect, [Section 108](#) is an exception to the rule enacted in [Section 107](#). The human life shown to be in existence, at a given point of time which according to [Section 107](#) ought to be a point within 30 years calculated backwards from the date when the question arises, is presumed to continue to be living. The rule is subject to a proviso or exception as contained in [Section 108](#). If the persons, who would have naturally and in the ordinary course of human affairs heard of the person in question, have not so heard of him for seven years the presumption raised under [Section 107](#) ceases to operate. [Section 107](#) has the effect of shifting the burden

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of proving that the person is dead on him who affirms the fact. [Section 108](#), subject to its applicability being attracted, has the effect of shifting the burden of proof back on the one who asserts the fact of that person being alive. The presumption raised under [Section 108](#) is a limited presumption confined only to presuming the factum of death of the person whose life or death is in issue. Though it will be presumed that the person is dead but there is no presumption as to the date or time of death. There is no presumption as to the facts and circumstances under which the person may have died. The presumption as to death by reference to [Section 108](#) would arise only on lapse of seven years and would not by applying any logic or reasoning be permitted to be raised on expiry of 6 years and 364 days or at any time short of it. An occasion for raising the presumption would arise only when the question is raised in a Court, Tribunal or before an authority who is called upon to decide as to whether a person is alive or dead. So long as the dispute is not raised before any forum and in any legal proceedings the occasion for raising the presumption does not arise.

15. If an issue may arise as to the date or time of death the same shall have to be determined on evidence-direct or circumstantial and not by assumption or presumption. The burden of proof would lay on the person who makes assertion of death having taken place at a given date or time in order to succeed in his claim. Rarely it may be permissible to proceed on premise that the death had occurred on any given date before which the period of seven years' absence was shown to have elapsed."

(7) In the aforesaid judgment, their Lordships have clearly held that burden of proof would lay on the person who makes assertion of death having taken place at a given date or time in order to succeed in his claim.

(8) In the instant case, the plaintiffs in the amended paragraph 9A inserted on

7.11.1998 made averment that whereabouts of Mankunwar and Duhini have not been known since last 15 years and they are not residing in village in which they are residing earlier but no issue was framed in this regard. The trial Court, in paragraph 17 has discussed the matter and held that plaintiff has failed to prove the aforesaid averments by leading clinching evidence, which the first appellate Court has also accepted by holding that plaintiff has failed to establish the fact that Mankunwar and Duhini have not been heard for the last seven years and, therefore, declined to raise presumption under Section 108 of the Indian Evidence Act.

(9) In order to get the benefit of Section 108 of the Evidence Act, plaintiffs are required to lead clear evidence to hold on the date of suit they have not been heard for seven years by those who could normally have heard of them if they had been alive, the burden placed upon the plaintiffs raising the plea based on section 108 of the Evidence Act was very heavy which the plaintiff have failed to discharge as concurrently recorded by both the two courts below, in which I do not find any illegality or perversity warranting interference in this second appeal. Admittedly, Mankunwar and Duhini were held to be title holder of the suit land in the first round of litigation, which was upheld up to the High Court of Madhya Pradesh also and, therefore, in order to establish his claim of adverse possession, plaintiffs were required to implead original title holder i.e Mankunwar and Duhini as a necessary party in the suit. In a suit for declaration of title based on adverse possession, original owner are necessary party and, therefore, in absence of necessary party, the suit for declaration of title has rightly been dismissed by the trial Court and rightly upheld by the first appellate Court. I do not find any illegality of perversity in the said finding recorded by both the courts below dismissing the suit for want of necessary party.

(10) In view of the aforesaid analysis, I do not find any merit in this second appeal and substantial questions of law is answered accordingly. The second appeal deserves to be and is accordingly dismissed re-affirmng the judgment and decree passed by both the courts below.

(11) Decree be drawn up accordingly.

Sd/-

(Sanjay K. Agrawal)
Judge

D/-

