

HIGH COURT OF CHHATTISGARH, BILASPUR**Second Appeal No.605 of 2004**

1. Tukni Bai, Widow of Ramnath, Aged about 67 years, R/o village Mani, Tahsil Pratapur, District Surguja (CG)
2. Sonkunwar, W/o. Shivprasad, Aged about 42 years
3. Belasiya, W/o. Ramkeshwar, D/o. Ramnath, Aged about 41 years.

Appellant No.2&3 are R/o. Village Khairi, Tahsil Surajpur, District Surguja (CG)

4. Shyamprasad, S/o. Ramnath, Aged about 26 years.
5. Ahibaran, S/o. Ramnath, Aged about 24 years.

Appellant No.4&5 are R/o. Village Mani, Tahsil Pratappur, District Surguja (CG)

---- Appellants/Defendants

Versus

1. Laxmaniya, Wife of Budnu, so-called widow of Jagmohan, aged about 61 years, R/o. Village Mani, Tahsil Pratappur, Distt. Surguja (CG)
2. State of Chhattisgarh, Through Collector, Surguja

---- Respondents

For Appellants/Defendants	: Mr.Ashok Kumar Shukla, Advocate
For Respondent No.1/Plaintiff	: None present
For Respondent No.2/State	: Mr.Akash Pandey, Panel Lawyer

Hon'ble Shri Justice Sanjay K. Agrawal
Judgment on Board

29/07/2019

1. The substantial questions of law involved, formulated and to be answered by this Court in this defendants' second appeal are as under:-

“1. Whether the Courts below were justified in not granting the appellants share of 1/6th portion in the suit property ?

2. Whether Courts below were justified in not considering and deciding the counter claim put forth by the appellants/defendants ?”

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

2. The suit property originally owned by Kanhai, which was inherited by his son Ramnath after his death. First wife of Ramnath was Ghurti and Jagmohan was their son. Jagmohan died in the year 1967 and Laxmaniya is his widow, who was plaintiff before the trial Court. After death of first wife Ghurti, Ramnath entered into second marriage with Tukun Bai in Bandhwa form (type of customary marriage as prevalent). Ramnath was defendant No.1 before the trial Court and after death of Ramnath, his second wife Tukun Bai and his two daughters namely Sonkunwar and Belsiya were impleaded as party defendants before the trial Court and defendants No.2 and 3 are sons of Ramnath out of his wedlock with Tukun Bai. Plaintiff-Laxmaniya filed a suit for declaration of title, partition and possession stating inter-alia that in the suit property, her husband-Jagmohan had 1/2 share along with Ramnath as the suit property was originally held by Kanhai, father of Ramnath as patta was granted in his name in Surguja Settlement and after death of Kanhai, the suit property was inherited by son Ramnath and grandson Jagmohan being son of his first wife and after death of Jagmohan, the plaintiff is entitled for 1/2 share in the suit property.

3. The defendants filed their written statement denying the

averments made in the plaint stating inter-alia that Laxmaniya is not legally wedded wife of Jagmohan and therefore, she is not entitled to inherit the property of Jagmohan. It was further pleaded that in the suit land Ramnath and plaintiff's husband Jagmohan, both had equal share, but Ramnath being *Karta* of the family, his name came to be recorded in revenue records.

4. The trial Court after appreciating oral and documentary evidence available on record, by its judgment and decree dated 24.4.90, came to the specific conclusion that the plaintiff is legally wedded wife of Jagmohan, defendant No.1(A) is second wife of Ramnath and defendants No.1(B) and 1(C) are daughters of Ramnath out of his wedlock with Tukni Bai-defendant No.1(A), as such, the plaintiff is entitled for 1/3rd share in the suit property and partly decreed the suit. On appeal being preferred by the defendants, the first appellate Court, by the impugned judgment and decree, partly allowed the appeal and held that the suit property was owned by Ramnath & Jagmohan, partition has not taken place between them and the plaintiff is legally wedded wife of Jagmohan and further held that the plaintiff will be entitled 1/5th share in the suit property and Ramnath's 1/5th share in the suit property will be equally divided in 6 share i.e. Tukunbai, Shyamprasad, Ahibaran, Somkunwar, Belsiya and plaintiff Laxmaniya and each of them will be entitled for 1/30 share in the share of Ramnath and the plaintiff will be entitled for $1/5 + 1/30$ share in the suit property.

5. Being aggrieved and dissatisfied with the judgment and

decree passed by the first appellate Court, this Second appeal under Section 100 of the CPC has been preferred by the appellants/defendants, in which substantial questions of law have been formulated and set-out in the opening paragraph of this judgment.

6. Mr.Ashok Kumar Shukla, learned counsel for the appellants/defendants, would submit that the first appellate Court has committed grave legal error in not holding that the plaintiff and the defendants will be entitled for $\frac{1}{6}$ share in the suit property and the plaintiff will only be entitled for $\frac{1}{6} + \frac{1}{36}$ share in the suit property. He would further submit that both the Courts below were unjustified in not considering the counter-claim put forth by the defendants.

7. None appeared for respondent No.1/plaintiff through served with notice of appeal.

8. I have heard learned counsel appearing for the appellants/defendants, considered his submissions made herein-above and also went through the records with utmost circumspection.

9. The trial Court by its judgment and decree dated 24.4.90 granted $\frac{1}{3}$ rd share in the suit property to the plaintiff, which has been modified by the first appellate Court and the plaintiff has been held to be entitled for $\frac{1}{5} + \frac{1}{30}$ share in the suit property in partition, which has been challenged by the defendants in this second appeal.

10. Section 6 of the Hindu Succession Act, 1956 (unamended) provides as under:-

“6. Devolution of interest in coparcenary property. —when a male Hindu dies after the commencement of this Act, having at the time of his death an interest in a *Mitakshara* coparcenary property, his interest in the property shall devolve by survivorship upon the surviving members of the coparcenary and not in accordance with this Act:

Provided that, if the deceased had left him surviving a female relative specified in class I 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.

Explanation 1.—For the purposes of this section, the interest of a Hindu *Mitakshara* coparcener shall be deemed to be the share in the property that would have been allotted to him if a partition of the property had taken place immediately before his death, irrespective of whether he was entitled to claim partition or not.”

11. The Supreme Court in the matter of **Smt.Raj Rani v. The Chief Settlement Commissioner, Delhi and others**¹ has considered Explanation I of Section 6 of the Hindu Succession Act, 1956 with regard to partition of coparcenary property by holding as under:-

“17..... The interest of Nanak Chand shall be deemed to be the share in the property that would have been allotted to him if a partition of the property had taken place immediately before his death irrespective of whether he was entitled to claim partition or not. In view of Explanation I of Sec. 6, Nanak Chand would have got 1/5th interest on partition between him and his wife and three sons. If once the interest of Nanak Chand is determined to be 1/5th before his death, his interest would devolve upon his widow, three sons and three daughters equally and thus the share of each one of them would be $\frac{1}{5} \times \frac{1}{7}$, that is, $\frac{1}{35}$ th each. The claim of these heirs cannot be denied merely because some of them have not advanced the claim. When the question of determination of share among the heirs crops up

¹ AIR 1984 SC 1234

before the Court, the Court has to see that every heir gets his due. Shri Itrora appearing for the respondents could not successfully meet the point raised on behalf of the appellant.

18. For the foregoing discussion the appeal must succeed and it is accordingly allowed and the judgment of the High Court as well as of the authorities below are set aside and shares of the three sons, three daughters and the widow are determined as follows: Each of the three sons - $\frac{1}{35}$; each of the three daughters - $\frac{1}{35}$; the widow - $\frac{1}{35} + \frac{1}{5}$. As the widow has inherited the interest of her husband after his death her share would be augmented by $\frac{1}{5}$. Therefore, her share would come to $\frac{1}{35} + \frac{1}{5} = \frac{8}{35}$."

12. Reverting to the facts of the present case in light of Section 6 read with Explanation I of the Act of 1956 as held by the Supreme Court in the matter of Smt. Raj Rani (supra), it appears the first appellate Court has held that the suit property held by Ramnath will be firstly subjected to notional partition in which Ramnath (original holder), his son Jagmohan (plaintiff's husband), his widow Tukunbai and his two sons namely Shyamprasad and Ahibaran, each of them will get $\frac{1}{5}$ th share in property and thereafter $\frac{1}{5}$ th share of Ramnath will be further divided among six persons namely, Jagmohan's widow Laxmaniya, his widow Tukunbai, his two sons Shyamprasad and Ahibaran, Ramnath's two daughters namely Sonkuwar and Belasiya and that will come to $\frac{1}{6} \times \frac{1}{5} = \frac{1}{30}$ and each of them will get $\frac{1}{30}$ in the share of Ramnath and the plaintiff will be entitled for $\frac{1}{5} + \frac{1}{30}$ share in the suit property. Such a division of share as recorded by the first appellate Court is strictly in accordance with Section 6 read with Explanation I of the Act of 1956, which is neither perverse nor contrary to record.

13. The defendants counter-claim was dismissed by the trial Court finding no substance. The defendants though preferred appeal against the decree granted by the trial Court in favour of the plaintiff, but did not seriously challenge that part of decree by which counter-claim was dismissed by the trial Court, as such, that part of decree has become final. It is also apparent from the record that before the first appellate Court, the defendants did not raise the plea that the trial Court legally erred in not granting counter-claim in their favour, as such, the defendants are not entitled for decree as claimed in counter-claim.

14. The said finding recorded by the first appellate Court is strictly in accordance with law, which is neither perverse nor contrary to record. I do not find any illegality or perversity in the said finding. The substantial questions of law is answered in favour of the plaintiff and against the defendants.

15. Accordingly, the second appeal deserves to be and is hereby dismissed leaving the parties to bear their own cost(s).

16. Decree be drawn-up accordingly.

Sd/-
(Sanjay K.Agrawal)
Judge