

HIGH COURT OF CHHATTISGARH, BILASPURSecond Appeal No.488 of 2006

Deovansh

(Defendant)

(a) Anjani, Wd/o Late Deovansh, aged about 65 years.

(b) Rajesh, S/o Late Deovansh, aged about 25 years.

(c) Ujay, S/o Late Deovansh, aged about 23 years.

All above R/o Village Rampur, Tahsil Pratappur, District Surguja (C.G.)

---- Appellants

Versus

1. Ramlakhan, S/o Late Kanhaiyalal, Aged about 68 years, R/o Village Parasdiha, Tahsil Wadraf Nagar, District Surguja (C.G.)

(Plaintiff)

2. State of Chhattisgarh, Through Collector, Ambikapur, District Surguja (C.G.)

(Defendant)

---- Respondents

For Appellants / LR's of Defendant No.1: -

Mr. Manoj Paranjpe, Advocate.

For Respondent No.1 / Plaintiff: -

Mr. Sunil Tripathi, Advocate.

For Respondent No.2 / State: -

Mr. Ravi Kumar Bhagat, Deputy Government Advocate.

Hon'ble Shri Justice Sanjay K. AgrawalJudgment On Board03/12/2019

1. This second appeal preferred by defendant No.1 was admitted for hearing by formulating the following substantial question of law: -

“Whether the findings recorded by the Courts below regarding prior partition of the suit property between the parties are perverse in view of the fact that the revenue holding are joint and separate cultivation of land are only

a mode of enjoyment of the property?”

[For the sake of convenience, parties hereinafter will be referred as per their status in the plaint before the trial Court.]

2. The suit property was originally held by Kanhaiyalal. The plaintiff is elder son and defendant No.1 was the younger son of Kanhaiyalal who died 50 years prior to the date of filing of suit i.e. 23-2-2004. Plaintiff Ramlakhan filed suit for declaration of title and permanent injunction stating inter alia that after death of their father Kanhaiyalal and in presence of their mother Leelavati, after the Holi festival, they have (he and his brother defendant No.1) partitioned the suit property orally between them and the property situated in Villages Parasdiha, Jamai, Bhesamunda and Dhondha fell in the share of the plaintiff, whereas the property situated in Villages Rampur and Bhulai fell in the share of defendant No.1, but defendant No.1 made an application for partition of land before the Tahsildar which necessitated the filing of suit for declaration of title and permanent injunction, as such, earlier partition has taken place 33 years prior to the date of filing of suit, therefore, he is the title holder and defendant No.1 – his brother cannot interfere which defendant No.1 refuted and claimed for partition and stated that earlier no partition has taken place and therefore the suit deserves to be dismissed.
3. The trial Court after appreciating oral and documentary evidence on record held that there is already prior partition took place between the parties (plaintiff and defendant No.1) in presence of their mother after death of their father Kanhaiyalal, as such, the plaintiff

is in possession of the suit lands and house at Villages Parasdiha, Jamai, Bhesamunda and Dhondha, and defendant No.1 is in possession of the suit lands situated at Villages Rampur and Bhulai, and defendant No.1 is in possession of 15 acres of land more than the plaintiff. In other words, the plaintiff is in possession of 40 acres of land, whereas defendant No.1 is in possession of 55 acres of land.

4. On appeal being preferred by defendant No.1, the first appellate Court did not agree with the submissions of defendant No.1 and agreed with the findings and judgment of the trial Court and dismissed the appeal against which this second appeal has been preferred in which substantial question of law has been formulated and which has been set-out in the opening paragraph of this judgment.
5. Mr. Manoj Paranjpe, learned counsel appearing for the appellants herein / LRs of defendant No.1, would submit that both the Courts below have concurrently erred in holding that on the basis of separate possession and cultivation of land, the plea of prior partition has been accepted that is only a mode of enjoyment of property and unless there is partition by metes and bounds, no partition can be inferred or assumed as such, the finding recorded by the two Courts below is perverse and the suit deserves to be dismissed, as there is no prior partition between the parties and the substantial question of law be answered in favour of defendant No.1 by granting the appeal.
6. Mr. Sunil Tripathi, learned counsel appearing for the plaintiff / respondent No.1 herein, would submit that father of the plaintiff

and defendant No.1 died 50 years prior to the date of institution of suit, thereafter, in presence of their mother Leelavati, they have made oral partition and according to the oral partition, parties are in possession of the suit land, though revenue records are jointly recorded that is on account of cordial relation, by that it cannot be held that there is no partition merely on the basis of mutation in the revenue records, as there is sufficient evidence on record to hold that prior partition has taken place and parties are in possession of their respective shares allotted in partition in the aforesaid villages. Therefore, concurrent finding recorded by the two Courts below holding prior partition is binding to this Court and it is not open to interference by this Court in second appeal under Section 100 of the CPC.

7. I have heard learned counsel for the parties and considered their rival submissions made herein-above and also went through the records with utmost circumspection.
8. The plaintiff and defendant No.1, both, are real brothers being sons of Kanhaiyalal who died prior to 50 years before the date of institution of suit and it is the case of the plaintiff that after the death of their father, in presence of their mother, immediately after the Holi festival, they partitioned the agricultural lands i.e. the landed property and houses situated in six villages and the property situated in Villages Parasdiha, Jamai, Bhesamunda and Dhondha – total 40 acres of land + house, came in the share of the plaintiff, whereas the property situated in Villages Rampur and Bhulai fell in the share of defendant No.1 and they are in possession of the

respective suit lands received on partition. When defendant No.1 got the order of partition under Section 178 of the Chhattisgarh Land Revenue Code, 1959, need to file suit has arisen.

9. The trial Court struck issue No.1 as to whether the suit land fell in the share of the plaintiff on prior partition and on detailed appreciation of oral and documentary evidence on record, came to the conclusion that 30-35 years prior to the date of filing of suit, oral partition had already taken place between the plaintiff and defendant No.1 and they are in possession of their respective shares of their property, though the properties are jointly recorded in the revenue records. The trial Court further recorded a finding that the properties mentioned in Schedules A, B, C & D – total 40 acres of land fell in the share of the plaintiff and defendant No.1 was given some additional land total 55 acres being less fertile than the land allotted to the plaintiff and they have also developed their properties after partition, as the plaintiff has purchased lands, tractor, etc., and they are cultivating separately also. Accordingly, the trial Court decreed the suit of the plaintiff. The first appellate Court did not interfere with the said findings of the trial Court and by the impugned judgment & decree affirmed the same.
10. The question is, whether the findings recorded by the two Courts below holding prior partition between the parties, is perverse?
11. Mr. Paranjpe, learned counsel appearing for the appellants herein / LRs of defendant No.1, has relied upon a judgment of the M.P. High Court in the matter of Kishan and others v. Dewa and another¹ in

1 1995 RN 373

which the M.P. High Court has held that separate cultivation and possession of certain part of land, such arrangement of cultivation will not amount to partition and cannot create a clog in the demand of effective partition. He further relied upon another judgment of the M.P. High Court in the matter of **Shambhu Prasad and others v. Smt. Deeson and another**² in which the M.P. High Court has held that prior partition not proved conclusively and record showing joint holding, partition suit is maintainable. Likewise, in the matter of **Chinthamani Ammal v. Nandagopal Gounder and another**³, the Supreme Court has held that the party raising plea of partition has to prove the same since in law there is presumption in regard to continuance of a joint family, even separate possession of portion of property by co-sharers itself would not lead to presumption of partition, several other factors are required to be considered therefor.

12. Mr. Tripathi, learned counsel appearing for respondent No.1 herein / plaintiff, has relied upon a judgment of the Supreme Court in the matter **Gur Narain Das and another v. Gur Tahal Das and others**⁴ in which the Supreme Court has held that two brothers living in separate houses and being separate in mess, and produce divided between them half and half, in that circumstances, it was held that though there was no partition by metes and bounds, the two brothers were divided in status. It was observed as under: -

“(7) ... It seems to us that if the parties were really joint in the legal sense of the term, there was no question of

2 2000 RN 174

3 (2007) 4 SCC 163

4 AIR 1952 SC 225

examining the accounts and adjusting them, and there would have been no reference to the share of Kuldip in the produce or the money collected. The proper conclusion to be arrived at is, as the witnesses for defendant No.5 have stated, that though there was no partition by metes and bounds, the two brothers were divided in status and enjoyed the usufruct of the properties according to their respective shares. Several witnesses were examined on behalf of defendant No. 5, who have stated from their personal knowledge that the two brothers lived in separate houses, were separate in mess and the produce was divided between them half and half. It seems to us that the finding of the High Court as to the separation of the 2 brothers must be upheld.”

13. Likewise, Mr. Tripathi further cited a judgment of the M.P. High Court in the matter of **Bhuwan and others v. Nagu**⁵ in which it was held that mutual oral partition taken between the parties as family settlement and pursuant to that they are independent and separate cultivating possession is established by evidence and family settlement acted upon and continued for 30-35 years, such settlement cannot be disturbed at the behest of one of the parties of that family settlement.
14. Reverting to the facts of the present case in the light of the aforesaid legal position, it is quite vivid that in the instant case, after death of Kanhaiyalal – original holder and father of the plaintiff & defendant No.1, in presence of their mother, oral partition took place between the parties in which the properties mentioned in Schedules A, B, C & D situated in Villages Parasdiha, Jamai, Bhesamunda & Dhondha and the house situated therein – total 40 acres of land, fell in the share of the plaintiff in which he is in possession for last 30-40 years and in cultivating possession of the same, though revenue records remained joint between them, whereas the properties mentioned in

5 1996 RN 33

Schedules E & F situated in Villages Rampur & Bhulai – total 55 acres of land as being some less fertile than that of Villages Parasdiha, Jamai, Bhesamunda & Dhondha, fell in the share of defendant No.1. Both the Courts below taking into consideration oral and documentary evidence on record, particularly taking into account the statement of Deovansh Patel (DW-1) – defendant No.1, clearly reached to a finding that oral partition took place between the parties and both the parties have continued in possession of their respective shares and in cultivating possession and also developed the lands and house situated therein and acquired certain additional properties out of their income derived from the said property fell in their share / favour and developed the property. As such, both the Courts below have clearly come to a definite finding that since prior partition has not only been done, but it has also been acted upon between the parties, though the properties are recorded jointly in the revenue records, and declined to interfere on the ground that oral partition has been acted upon and respected by both the parties and it is improper to interfere with the fact of prior partition affected between the parties in presence of their mother, as the parties are in cultivating possession of the same for last 30-40 years, and thereby granted decree for permanent injunction in favour of the plaintiff. The finding recorded by the two Courts below is a finding of fact that prior partition took place between the plaintiff & defendant No.1 who are real brothers in presence of their mother immediately after the Holi festival and thereafter, they are in cultivating possession of their respective shares and developed

the lands and acquired further properties on account of the said income. The said finding is based on evidence available on record and it is binding on this Court which is neither perverse nor contrary to law and it does not suffer from illegality much less irregularity warranting interference in exercise of appellate jurisdiction under Section 100 of the CPC. Even otherwise, the fact of prior partition is absolutely a pure and simple question of fact, no question of law much less the substantial question of law is involved. The substantial question of law is answered accordingly.

15. As a fallout and consequence of the aforesaid discussion, the second appeal is liable to be dismissed and is accordingly dismissed relegating the parties to bear their own cost(s).

16. Decree be drawn-up accordingly.

Sd/-
(Sanjay K. Agrawal)
Judge

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