

HIGH COURT OF CHHATTISGARH, BILASPUR**Second Appeal No.642 of 1997**

1.A.a Aryan Ram S/o late Mokil, aged about 8 years, through her mother namely Kalawati Wd/o late Mokil

1.A.b Kalawati Wd/o Late Mokil, aged about 40 years

Both are R/o Village Bhafauli, Tahsil – Ambikapur, District – Surguja (CG)

1.B.a. Samundra Ram S/o late Ukil, aged about 7 years through her mother namely Duleshwari Wd/o late Ukil, aged about 38 years

1.B.b. Duleshwari Wd/o late Ukil, aged about 38 years

1.B.c. Chanda D/o late Ukil, aged about 18 years

1.B.d. Soni D/o late Ukil, aged about 14 years

through her mother namely Duleshwari Wd/o late Ukil, aged about 38 years All are R/o Village – Bhafauli, Tahsil – Ambikapur, District Surguja (CG)

1.D Doctor Ram S/o Late Somar Say, aged 20 years, Caste Kanwar R/o. Village Bhafauli Tehsil Ambikapur, District Surguja (CG)

---- Appellants/LR'S of plaintiff

Versus

Dulari W/o. Ramcharan, mother of late Mohan, aged about 50 years, R/o Village Bhafauli, P.S. Dhaurpur, Tehsil Ambikapur, Distt. Surguja (CG)

---- Respondent

For Appellants/LR's of the plaintiff	: Mr.A.K.Prasad, Advocate
For Respondent	: Mr.Sunil Tripathi, Advocate

Hon'ble Shri Justice Sanjay K. Agrawal

Judgment on Board

11/03/2019

1. The substantial questions of law involved, formulated and to be answered in the second appeal preferred by the plaintiff are as under:-

“1. Whether the lower appellate Court had ignored the

valuable admissions which are suggestive of the fact that Smt.Dulari was not the daughter of deceased Sukhanram ?

2. Whether the learned Courts below were right in holding that after the death of deceased Sukhan, the property was absolutely succeeded by Smt.Reman Bai when admittedly the parties are Kanwar (Adivasis) by Cast and have admitted to be governed by the old Hindu Law ?”

[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 suit land was originally held by Sukhan. Two plaintiffs-Bhukhal and Somar Sai filed a suit seeking declaration simpliciter that they have become title-holders of the suit land described in Schedule “A” of the plaint stating inter-alia that plaintiff No.1 is real brother of Sukhan and plaintiff No.2 is his nephew as Sukhan died issueless in the year 1969 and his first wife-Tapeshwari died in the year 1982 and the defendants have no right and title over the suit land.
3. Defendant No.1 set up a plea that after death of Tapeshwari, first wife of Sukhan, Sukhan married with defendant No.1 and remained with her and out of their wedlock, Dulari Bai was born, Dulari Bai married with Ramcharan and defendants No.2 to 4 are sons of Dulari Bai, as such, they are title-holders of the suit land. The trial Court after appreciating oral and documentary evidence available on record, by its judgment and decree dated 2.11.83, dismissed the suit holding that after death of Tapeshwari, first wife of Sukhan,

Sukhan married with defendant No.1 and Dulari is daughter of Sukhan out of his wedlock with defendant No.1 and Sukhan and Tapeshwari kept Dulari's husband Ramcharan as gharjamai. On appeal being preferred by the plaintiffs, the first appellate Court affirmed the judgment and decree of the trial Court. Questioning legality and validity of the impugned judgment and decree of the first appellate Court, this second appeal under Section 100 of the CPC has been preferred by the appellants/legal representatives of the plaintiff, in which substantial questions of law have been formulated, which have been set out in the opening paragraph of this judgment.

4. Mr.A.K.Prasad, learned counsel for the appellants/legal representatives of the plaintiff, would submit that both the Courts below legally erred in law in holding that Sukhan had married with defendant No.1 and Dulari is daughter of Sukhan out of his wedlock with defendant No.1. He would further submit that parties are Kanwar by caste, therefore, provisions contained in Hindu Succession Act would not be applicable to them, therefore, the judgment and decree of both the Courts below are liable to be set aside.
5. On the other hand, Mr.Sunil Tripathi, learned counsel for the respondent, would submit that both the Courts below have rightly dismissed the suit filed by the plaintiffs, as such, second appeal deserves to be dismissed.
6. I have heard learned counsel for the parties and considered their rival submissions made hereinabove and also went through the

records with utmost circumspection.

Answer to substantial question of law No.1:-

7. It is the case of the plaintiffs that Sukhan to whom the property originally belonged had not married with defendant No.1 and Dulari Bai is not daughter of Sukhan out of his wedlock with defendant No.1. The trial Court after appreciating oral and documentary evidence available on record came to specific conclusion that Sukhan had married with defendant No.1 after death of his first wife Tapeshwari and Dulari Bai is daughter of Sukhan out of his wedlock with defendant No.1 and they kept Ramcharan, husband of Dulari Bai as gharjamai. This finding was challenged by the plaintiffs before the first appellate Court, but they remained unsuccessful. My attention was invited by learned counsel for the appellants to para-11 of statement of defendant No.1 to buttress his submission that before Sukhan married with defendant No.1 she was already pregnant, therefore, Dulari Bai was not daughter of Sukhan out of his wedlock with defendant No.1, but careful perusal of the statement of defendant No.1 would show that in same paragraph, defendant No.1 has stated that her husband Bagar Sai has already died and Sukhan used to visit her house and after marriage with Sukhan, Dulari has born. The trial Court after appreciating oral and documentary evidence available on record including para-11 of statement of defendant No.1 came to the conclusion that Dulari Bai is daughter of Sukhan out of wedlock with defendant No.1 and Sukhan has already accepted Dulari Bai as his daughter and kept

Dulari's husband as gharjamai. The trial Court also recorded a finding that Dulari is daughter of Sukhan out of his wedlock with defendant No.1. The said finding has been upheld by the first appellate Court. I do not find any perversity or illegality in the said finding recorded by two Courts below holding that defendant No.1 had married with Sukhan after death of his first wife Tapeshwari and Dulari is their daughter.

Answer to substantial question of law:-

8. The plaintiff's claimed that in aboriginal tribes, person performing last rituals is entitled to succeed to the property left by deceased person. The plaintiffs have failed to establish valid custom governing & prevalent in their caste that person performing last rituals is entitled to succeed to the property of the deceased person. It was incumbent on the part of the plaintiffs to bring out appropriate and clinching evidence and to prove the custom to which they wish to rely upon and in absence of that prove, both the Courts below are justified in not relying upon and rightly declined to grant decree in their favour.
9. There is yet another reason for upholding the judgment and decree of the trial Court. The trial Court has clearly recorded a finding that the plaintiffs' suit was declaration simpliciter and they are not in possession of the suit land. Therefore, they ought to have sought relief of possession as consequential relief while seeking declaration, as such, suit is barred by proviso to Section 34 of the

Specific Relief Act, 1963 though the plaintiffs have filed the application claiming relief of possession before the first appellate Court, but since this Court has found that the plaintiffs are not entitled for declaration of title as suit has already been dismissed by both the Courts below, I do not find any good ground to entertain this appeal, as such, both the Courts below are absolutely justified in dismissing the suit filed by the plaintiffs. The substantial questions of law are answered accordingly.

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

11. A decree be drawn up accordingly.

Sd/-

(Sanjay K.Agrawal)
Judge