

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR**SA No. 725 of 1999**

1. Sukhni Wd/o Alim Miyan, Aged About 50 Years R/o Village Chirai, P.S. Shankargarh, Tehsil Kusmi, Distt. Sarguja M.P. Now Chhattisgarh
2. Aalauddin S/o Late Shri Alim Miyan, Aged About 37 Years R/o Village Chirai, P.S. Shankargarh, Tehsil Kusmi, Distt. Sarguja M.P. Now Chhattisgarh
3. Shahabuddin S/o Late Shri Alim Miyan, Aged About 30 Years R/o Village Chirai, P.S. Shankargarh, Tehsil Kusmi, Distt. Sarguja M.P. Now Chhattisgarh
4. Sakisa D/o Alim Miyan, Aged About 28 Years W/o Shri Rayees Miyan, R/o Village Karkeh, P.S. Meral, Tehsil And Distt. Gadhwa Bihar
5. Maijun D/o Alim Miyan, Aged About 24 Years W/o Islam, R/o Village Newra, P.S. Chainpur, Tahsil Daltenganj, District- Palamu Bihar
6. Munni D/o Late Shri Alim Miyan, Aged About 21 Years W/o Shri Roshan, R/o Nagar Masjidpara Ambikapur, P.S. And Tehsil Ambikapur, Distt. Sarguja M.P. Now Chhattisgarh
7. Jametun D/o Late Alim Miyan, Aged About 12 Years Minor Through Mother And Natural Guardian Sukhni Bai Wd/o Late Alim Miyan R/o Village Chirai, P.S. Shankargarh, Tehsil Kusmi, Distt. Sarguja M.P. Now Chhattisgarh
8. Hulsania Bibi D/o Tunnu Miyan, Aged About 50 Years R/o Village Hoor, P.S. Gadhwa, District Palamu Bihar
9. Halkania Bibi D/o Tunnu Miyan, Aged About 45 Years R/o Village Sobrasa, P.S. Husenabad, Distt. Orangabad Bihar
10. Fudeni Bibi D/o Bhul Miyan, Aged About 60 Years R/o Village Diharia, P.S. Vishrampur, Distt. Palamu Bihar
11. Raham S/o Jakira Miyan, Aged About 20 Years R/o Village Diharia, P.S. Vishrampur, Distt. Palamu Bihar
12. Karamat S/o Jakira, Aged About 20 Years R/o Village Diharia, P.S. Vishrampur, Distt. Palamu Bihar

---- Appellants**Versus**

1. (Deleted) Abdulgani As Per Hon'ble Court Order Dated 26-04-2016.
2. Fatma (Died) Through Legal Heirs As Per Hon'ble Court Order Date-25-02-2019.

- 2.1 - Yunis Ansari S/o Shaheed Ansari Aged About 50 Years
 - 2.2 - Mafeeda D/o Shaheed Ansari Aged About 46 Years
 - 2.3 - Saabra S/o Shaheed Ansari Aged About 42 Years
 - 2.4 - Akhtar S/o Shaheed Ansari Aged About 37 Years
 - 2.5 - Guddi D/o Shaheed Ansari Aged About 34 Years
 - 2.6 - Bano D/o Shaheed Ansari Aged About 30 Years
3. Yunus S/o Shri Sayeed Miyan, Aged About 32 Years R/o Village Chirai, Tehsil Samri, Distt. Sarguja M.P. Now Chhattisgarh
 4. Akhtar S/o Shri Sayeed Miyan, Aged About 22 Years R/o Village Chirai, Tehsil Samri, Distt. Sarguja M.P. Now Chhattisgarh
 5. Nanhu Bibi D/o Abdulgani, Aged About 46 Years W/o Shri Ibrahim Miyan, R/o Village Chirai, Tehsil Samri, Distt. Sarguja M.P. Now Chhattisgarh,
 6. Hareri S/o Shri Ibrahim Miyan, Aged About 17 Years Minor Through Father And Natural Guardian Ibrahim Miyan, R/o Village Chirai, Tehsil Samri, Distt. Sarguja M.P. Now Chhattisgarh
 7. Taslim S/o Shri Ibrahim Miyan, Aged About 15 Years Minor Through Father And Natural Guardian Ibrahim Miyan, R/o Village Chirai, Tehsil Samri, Distt. Sarguja M.P. Now Chhattisgarh
 8. State Of Madhya Pradesh Now Chhattisgarh, Through Collector Sarguja M.P. Now Chhattisgarh

---- Respondents

For Appellant	:	Shri Hamida Siddiqui, Advocate
For State	:	Shri A.K.Prasad, Advocate

S.B.: Hon'ble Shri Justice Manindra Mohan Shrivastava

Order On Board

01/08/2019

This appeal is directed against impugned judgment and decree dated 22/04/1999 passed by the 2nd Additional District Judge, Ambikapur in Civil Appeal No.6-A/96 arising out of judgment and decree dated 16/01/1996 passed by the 1st Civil Judge, Class-II, Ambikapur in Civil Suit No.104-A/94 by which, the learned Lower Appellate Court has reversed the judgment and decree of the Trial Court and dismissed the suit of the plaintiff.

2. This appeal was admitted on following substantial question of law -

“(I) Whether the lower appellate Court rightly held that Raseed Bahee produced by the respondents could be admitted in evidence without its formal proof in accordance with law in exercise of its power under Order 41 Rule 27 of the Code of Civil Procedure ?

(II) Whether the lower appellate Court was right in holding that the appellants were not entitled to an opportunity to rebut the evidence led by the appellants at the appellate stage?

(III) Whether the lower appellate Court rightly held that the respondents have sustained their plea of adverse possession ?

(IV) Whether the law under the Wajibul Arg of Sarguja State permitted recording of only one member of the family and, therefore, the possession recorded with the one member of the family would enure to the benefit to all the members of the family?”

3. The appellants / plaintiffs filed a suit for partition against the respondents / defendants on the pleadings that the suit property originally belong to one Bhikari Miyan who was survived by five sons, namely Ramfali Miyan, Bhulan Miyan, Chulhan Miyan, Dulli Miyan and Tulli Miyan. Referring to the genealogy as claimed by the plaintiff, it was further averred by the plaintiff that after death of Bhikari Miyan, all his sons had taken the property as successors and later on, their successors including plaintiff and defendant No.1 – Abdul Gani. According to the plaintiffs, they are descendants of Bhulan Miyan and Tunnu Miyan. Defendant – Abdul Gani was son of Chulhan Miyan. According to the plaintiffs, after death of Ramfali Miyan, Bhulan Miyan and Chulhan Miyan and Dulli Miyan, only the plaintiffs and defendant No.1 were entitled to succeed to the property in dispute. According to the plaintiffs, the plaintiffs had gone to different places but their interest in the property remained until they came to know that Abdul Gani has started occupying and getting registered the disputed property in his name and also in the name of other defendants who were his relatives which gave rise

to the cause of action for the plaintiff to file suit.

4. Defendants 1 to 4 jointly filed a written statement and denied all plaintiff allegations including relationship and the family genealogy. It was emphatic denial on the part of the defendants that Bhikari had five sons. According to defendant No.1 / Abdul Gani, plaintiffs were nowhere related to him nor they were descendants of Bhikari Miyan through Bhulan Miyan or Tunnu Miyan. According to defendants, Chulhan Miyan and Dulli Miyan were their brothers being sons of Bhikari Miyan. The property was recorded in settlement in favour of Dulli Miyan and from him, Abdul Gani, the only survivor, succeeded to his property.

5. Learned Trial Court earlier framed as many as 11 issues.

Since the defendants had disputed the relationship and genealogy, learned Trial Court framed specific issue No.2 as to whether plaintiffs 1 to 4 are sons of Tunnu Miyan and plaintiffs 5 to 8 sons of Bhulan Miyan, both being brothers of Dulli Miyan. Learned Trial Court recorded a finding in affirmative in favour of the appellants / plaintiffs holding that Dulli Miyan had other brothers including Bhulan Miyan and Tunnu Miyan of which, the plaintiffs are successors and as the property devolved through their common ancestor - Bhikari Miyan, the plaintiffs being descendants of Tunnu Miyan and Bhulan Miyan, are entitled to take property in equal share with defendant – Abdul Gani being descendant of Dulli Miyan.

6. On appeal being preferred, learned lower Appellate Court reversed the finding with regard to relationship of the parties as decided by learned Trial Court on second issue and held that the plaintiffs even failed to prove that they are related to defendant – Abdul Gani through common ancestor and further that the plaintiffs failed to prove that the property in dispute was joint property of predecessor of plaintiff and defendant No.1. Learned lower Appellate Court also

reversed finding of the Trial Court on issue No.6 that the defendants have otherwise perfected their title by adverse possession and therefore, the plaintiff is not entitled to any relief.

7. Assailing legality and validity of impugned judgment, learned counsel for the appellant argued with reference to four substantial question of law framed by this Court.

8. On the first and second question of law, though learned counsel for the appellant argued that *Raseed Bahee*, even if they were allowed to be brought in evidence by learned lower Appellate Court by allowing defendants' application under Order 41 Rule 27 CPC, the defendants were not absolved of their burden of proving their document by leading proper evidence. It is argued that mere allowing application under Order 41 Rule 27 CPC does not mean proof of documents, unless it is proved by any of the mode of formal proof of the document. On the second question of law, it is submitted that the learned Court below also committed patent illegality in not affording an opportunity to the plaintiffs / appellants to rebut additional evidence led by the respondents at the appellate stage.

9. In reply to the argument as above, learned counsel for the respondent would argue that the aforesaid two question of law cannot be said to be substantial question of law because the learned lower Appellate Court, while reversing the finding of the Trial Court and setting aside its judgment, has not relied upon those *Raseed Bahee*, which were allowed to be led as additional evidence. He would argue that as the result of the case does not change and the *Raseed Bahee*, the additional evidence have no bearing on the result of the case, the first and second question of law cannot be admitted as substantial question of law.

10. There is considerable force in submission of learned counsel for the respondent. The '*Raseed Bahee*' which was allowed to be taken in evidence by allowing the defendant's claim under Order 41 Rule 27 CPC by the lower Appellate Court, was infact, not taken into consideration by the learned lower Appellate Court to record its finding either way on any of the issue arising for consideration. Therefore, *Raseed Bahee*, which is said to be brought by way of additional evidence, has no bearing upon the finding recorded by learned lower Appellate Court. Therefore, for that reason, the consideration on the two substantial question of law becomes academic. As it does not have any bearing on the ultimate conclusion drawn by learned lower Appellate Court, the first and second question of law cannot be said to be substantial question of law and therefore, do not arise of decision making in the present appeal.

11. On the fourth question of law, the case of the plaintiff has been that the property belong to Bhikari Miyan, later on, it devolved upon his five sons, including father of defendant – Abdul Gani. Learned counsel for the appellant argued that merely because the name of Dulli Miyan was recorded as holder of land in State settlement (Ex.P/1), it could not be held that the property exclusively belong to Dulli Miyan and not a joint property of all the brothers of Dulli Miyan as successors of Bhikari Miyan.

12. Learned counsel for the respondent would argue that neither the Trial Court nor the Appellate Court have taken into consideration the effect of entries made in "*Wajibul Arz*". His argument is that the plaintiffs have failed to prove that they were descendants of Bhulan Miyan, brother of Chulhan and their respective fathers had taken property jointly along with Dulli Miyan and Chulhan Miyan, the fourth question of law is liable to be answered against the plaintiffs and in favour of the defendants. He would argue that unless there is proof that plaintiffs'

predecessors were related to Dulli Miyan, no claim can be made in respect of the property in dispute recorded in the name of Dulli Miyan.

13. This Court finds that the learned lower Appellate Court reversed the finding recorded on the second issue by the Trial Court which was as under -

“1. xxxxxx

2. क्या परि. अ की भूमि जो कि स्व. दुल्ली मिया के नाम से बंदोबस्त की गई थी, को वादी/उत्तरवादीगण तथा अपीलार्थी अब्दुलगनी स्व. भिखारी मिया के वंशज होने के कारण समान रूप से हिस्सा पाने के अधिकारी हैं ?

3. xxxxxx”

14. While learned Trial Court relied upon the oral evidence to come to the conclusion that the predecessor of plaintiffs and defendant No.1 were brothers and they all were sons of Bhikari Miyan, learned lower Appellate court reversed this finding by a well reasoned order. In para 21 of its judgment, learned lower Appellate Court relying upon decision of the Supreme Court in the case of **State of Bihar and ors. v. Sri Radha Krishna Singh and ors., AIR 1983 SC 684** has addressed to itself, the legal requirements of proof of genealogy and relevant evidence which is required to be produced to prove the same. Having so considered, learned lower Appellate Court has meticulously examined plaintiffs' evidence and after taking into consideration the said evidence as considered in para 22, 23 and 24, it has recorded a specific and categoric finding that the plaintiffs failed to prove relationship and the genealogy as pleaded by them. In this entire finding, learned Court below has noticed that the only evidence led by the plaintiffs was oral evidence. It has to be seen that the plaintiffs have not come out with the documentary evidence to prove that Bhikari Miyan has five sons which included predecessor of plaintiffs and defendant No.1. There is no documentary evidence that the property was recorded in the name of Bhikari.

There is no documentary evidence to prove that at any point of time, any of the authorities or even so named Bhulan Miyan, Tunnu Miyan, Ramfali Miyan, Chulhan Miyan or Dulli Miyan had ever declared themselves as the sons of Bhikari Miyan in any proceedings or their names were recorded as such in any revenue records or any other document. Therefore, in the absence of proof of relationship and genealogy as prayed by the plaintiff, no conclusion could be drawn that even if name of Dulli Miyan alone was recorded in Surguja State Settlement (Ex.P/1), property belong to all. Therefore, fourth question of law is answered in the manner that recording of name of Dulli Miyan, in the absence of there being any evidence of clinching nature, would not enure to the benefit of the predecessor in title of the plaintiffs for want of proof that they all belong to one family as descendants of Bhikari Miyan.

15. In the last, learned counsel for the appellant strenuously urged before this Court to frame an additional substantial question of law that the learned lower Appellate Court perversely and without any basis reversed the finding with regard to genealogy as found proved by learned Trial Court on issue No.2 relying upon observations of the Supreme Court in the case of **Madhusudan Das v. Smt. Narayani Bai and ors., AIR 1983 SC 114**. In para 8 of the aforesaid judgment, it has been held that in an appeal against the Trial Court judgment, when the Appellate Court considers an issue turning on oral evidence, it must bear in mind that it does not enjoy the advantage which the Trial Court had in having the witnesses before it and of observing the manner in which they gave their testimony. When there is a conflict of oral evidence on any matter in issue and its resolution turns upon the credibility of the witnesses, the general rule is that the appellate Court should permit the findings of fact rendered by the Trial Court to prevail unless it clearly appears that some special feature about the evidence of a particular witness has escaped the notice of the Trial Court or there is a sufficient

balance of improbability to displace its opinion as to where the credibility lies.

16. The finding of the learned lower Appellate Court, as recorded in para 23 and 24, while re-appreciating the oral evidence led by the plaintiffs are that the evidence of Alauddin (PW1) is not reliable because he is not related to the parties nor appears to be descendant of any of the parties and further, he has failed to specifically name the wife of Tunnu and further that he has not seen any of those persons, he does not know Bhikari and he also does not know where the plaintiffs and their predecessors were born and where they died. In the considered opinion of this Court, the said finding of the learned lower Appellate Court does not suffer from any perversity or illegality. On the other hand, it is found that the learned lower Appellate Court appreciated the oral evidence in its proper perspective.

The other submission of learned counsel for the appellant that the finding of the learned lower Appellate Court is perverse and contrary to specific admission of relationship by defendant No.1 does not merit acceptance. What has been stated by Abdul Gani Ansari (DW1) in para 15 of his evidence, by no stretch of imagination, can be said to be an admission on his part that Bhikari Miyan had five sons including Bhulan Miyan and Tunnu Miyan along with Ramfali Miyan, Dulli Miyan and Chulhan Miyan. The witness has clearly stated that he does not know these persons. How could it be treated as admission on his part. Therefore, no other substantial question of law arises for consideration in this appeal.

17. Without successful challenge to the finding of fact recorded by learned lower Appellate Court that the plaintiffs failed to prove that Bhulan Miyan and Tunnu Miyan were brothers of Dulli Miyan and were sons of Bhikari Miyan, no decree could be passed in favour of the plaintiffs. Therefore, it is not necessary for this Court to answer third substantial question of law whether the defendants

have otherwise perfected their side by way of adverse possession.

18. In the result, the appeal fails and is hereby dismissed. Parties to bear their respective costs. Let appellate decree be drawn.

Sd/-
(**Manindra Mohan Shrivastava**)
Judge

Deepti