

HIGH COURT OF CHHATTISGARH, BILASPUR**Second Appeal No.103 of 2004**

Daan Singh S/o Parasram Gond, aged about 35 years, occupation Farming, R/o Village Salhevaar, P.H. No.1, Tahsil Chhuikhadan, District Rajnandgaon (CG)

---- Appellant/Plaintiff

Versus

1. Bhudram (dead),

Gabbu Singh S/o Budhram (dead) through LRs-

1(a) Smt. Sohaga Wd/o Late Gabbu Singh, aged about 45 years,

1(b) Keshar S/o Late Gabbu Singh, aged about 25 years,

1(c) Shekhar S/o Late Gabbu Singh, aged about 20 years,

All R/o village Salhevaar, P.H. No.1, Tahsil Chhuikhadan, District Rajnandgaon (CG)

2. State of Chhattisgarh, through Collector, District Rajnandgaon (CG)

3. Rajendra Kumar S/o Padum Singh Gond, aged 27 years, R/o Sarodhi, Post & P.S. Barkatta, Tahsil Chhuikhadan, District Rajnandgaon (CG)

4. Sanjay, caste Gond, age 24 years, R/o Village Deopura, Post & P.S. Salhewara, Tah. Chhuikhadan, District Rajnandgaon (CG)

5. Gangu Ram Meravi S/o Jagdeo Singh Mervi, Caste Gond, age 37 years, R/o Nachaniya, Post & P.S. Salhewara, Distt. Rajnandgaon (Cg)

6. Shatrughan Lal Urvasha S/o Shri Hari Ram Urvasha. Caste Halva, age 45 years, R/o Village Salhewara, Post & P.S. Salhewara, Tah. Chhuikhadan, Distt. Rajnandgaon (CG)

---- Respondents

For Appellant/Plaintiff	: Mr.R.N.Jha, Advocate
For Respondents No.1(a) to 1(c)	: Mr.Rakesh Pandey, Advocate
For Respondent No.2/State	: Mr.Ravi Bhagat, Dy.G.A.

Hon'ble Shri Justice Sanjay K. Agrawal

Judgment on Board

23/09/2019

1. In second appeal preferred by the appellant/plaintiff, the following substantial question of law was formulated for determination:-

“Whether the lower appellate Court has erred in not declaring the appellant as the testamentary successor of deceased Ankalhin Bai ?”

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

2. The suit property was originally held by Bhukhau. He had no issue from his first wife-Ankalhin Bai and defendant No.1 is his son out of his wedlock with his second wife. After death of Bhukhau, Ankalhin Bai has succeeded the suit property and she executed a Will dated 11.1.88 (Ex.P-1) in favour of the plaintiff. The plaintiff herein filed a suit for declaration of title and recovery of possession stating inter-alia that the suit land was attached by order of the Sub-Divisional Magistrate and he has been dispossessed from the suit premises which he entitled to recover from defendant No.1.

3. Defendant No.1 set up a plea that the parties are aboriginal tribe (Schedule Tribe) , they are governed by their custom and by virtue of sub-section (2) of Section 2 of the Hindu Succession Act, 1956 (hereinafter called as 'the Act of 1956'), the provisions contained in the Act of 1956 are not applicable to them and therefore, Ankalhin Bai being widow of Bhukau did not succeed to the property of her husband and by way of Will allegedly executed by her in favour of the plaintiff, he would not get right/title over the suit property.

4. Upon consideration of oral and documentary evidence available on record, the trial Court decreed the suit of the plaintiff holding that the parties are aboriginal tribe (Scheduled Tribe), to which the provisions contained in the Act of 1956 are not applicable by virtue of sub-section (2) of Section 2 of the Act of 1956 and defendant No.1 has failed to establish that as per customary tradition Ankalhin Bai would not succeed the property of her husband and the Will is proved in accordance with Section 63(c) of the Succession Act, 1925 read with Section 68 of the Evidence Act, 1872, which defendant No.1 assailed by way of first appeal before the first appellate Court. The first appellate Court by the impugned judgment and decree by allowing the appeal held that parties are not governed by the provisions of the Act of 1956, but the Will dated 11.1.88 (Ex.P-1) was validly executed by Ankalhin Bai in favour of the plaintiff, but since parties are not governed by the provisions of the Act of 1956, therefore, Ankalhin Bai had no right to execute the Will in favour of the plaintiff. 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 filed by the appellant/plaintiff, in which substantial question of law has been framed by this Court, which has been set-out in the opening paragraph of this judgment.

5. Mr.R.N.Jha, learned counsel for the appellant/plaintiff, would submit that the first appellate Court is absolutely unjustified in setting aside the judgment and decree of the trial Court after having held that

the Will was validly executed by Ankalhin Bai in favour of the plaintiff by wrongly holding that since parties are not governed by the provisions of the Act of 1956, therefore, she had no right to execute the Will in favour of the plaintiff, as such, the judgment and decree of the first appellate Court deserves to be set aside and that of the trial Court be restored.

6. Mr. Rakesh Pandey, learned counsel for respondents No.1(a) to 1(c)/defendant, would submit that Ankalhin Bai being a member of aboriginal tribe (Scheduled Tribe) by virtue of the provisions contained in sub-section (2) of Section 2 of the Act of 1956, the provisions contained in the Act of 1956 would not apply and it is not the case of the plaintiff that Ankalhin Bai had become Hinduised and therefore, the Act of 1956 will also be applicable. Therefore, Ankalhin Bai had no right to execute the Will of her property in favour of the plaintiff, as such, the first appellate Court is absolutely justified in holding that Ankalhin Bai had no right to execute the Will of her property in favour of the plaintiff and the property was undivided family property.

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 trial Court as well as the first appellate Court both have rightly held that parties are aboriginal tribe (Scheduled Tribe) and the provisions contained in the Act of 1956 would not be applicable to them by virtue of the provisions contained in sub-section (2) of Section 2 of the Act of 1956. Likewise, both the Courts below have rightly concluded

that the Will by Ankalhin Bai, who was original holder of the suit property, was duly executed in favour of the plaintiff on 11.1.88 (Ex.P-1). The trial Court has held that defendant No.1 has failed to prove that Ankalhin Bai has only limited right according to their customary tradition, therefore, the plaintiff is entitled for decree of declaration of title having received the property by way of Will. The first appellate Court has held that since the provisions contained in the Act of 1956 would not be applicable, therefore, Ankalhin Bai had no right or title over the suit property and therefore, Will executed by Ankalhin Bai in favour of the plaintiff is of no use.

9. The plaintiff pleaded in the plaint that Ankalhin Bai being widow of Bhukau has succeeded the property of her husband and in that capacity she had executed the Will in favour of the plaintiff. Defendant No.1 has only pleaded that in the customary law of succession prevalent in their community, widow does not get any interest in the property after death of her husband, to which he (defendant No.1) has failed to establish that widow would not get any interest after death of her husband in the property of her husband without right to dispose of the same by sale, gift or will. It has rightly been held by the trial Court that the provisions contained in the Act of 1956 or Hindu law would not be applicable to the parties, therefore, it was incumbent on the part of defendant No.1 to plead and prove that in the customary law of succession prevalent in their community, widow gets no interest in the property of her husband after his death and she had no right to dispose

of the same by way of Will. Since defendant No.1 has failed to prove that in their customary law of succession widow gets no interest in the property, which the trial Court has rightly held, but the first appellate Court without recording any finding as to why widow cannot make the Will of her interest which she has received from her husband, set aside the judgment and decree of the trial Court. The right to property is though no longer fundamental right, but still it is constitutional right under Article 300-A of the Constitution of India and the said right cannot be curtailed without authority of law by merely holding that Ankalhin Bai was member of aboriginal tribe (Schedule Tribe), such a finding is absolutely perverse having no rationale behind it.

10. In the considered opinion of this Court, the first appellate Court is absolutely unjustified in setting aside the judgment and decree of the trial Court. Accordingly, the judgment and decree of the first appellate Court is set aside and that of the trial Court is restored.

11. The second appeal is allowed to the extent indicated hereinabove leaving the parties to bear their own cost(s).

12. A decree be drawn-up accordingly.

Sd/-

(Sanjay K.Agrawal)
Judge

B/-