

HIGH COURT OF CHHATTISGARH, BILASPUR

Judgment reserved on 5-2-2019

Judgment delivered on 28-02-2019

FA No. 61 of 2004

1. Chakradhar S/o Dukaloo Gond Aged About 50 Years R/o Village Gourbahari, P.S. Tamnar, Tahsil Gharghoda, District-Raigarh, Chhattisgarh.
2. (a) Kartik S/o Nakul Aged About 38 Years R/o Village Gourbahari, P.S. Tamnar, Tahsil Gharghoda, District-Raigarh, Chhattisgarh. (died/deleted)
(b) Sartik s/o. Nakuj Gond, r/o. Village Jurda, Tahsil & Dist. Raigarh (CG). (died/deleted) through LR
2(b)(1) Bhog Singh s/o. Late Sartik Ram, aged about 30 years, r/o.l village Jurda, Tahsil & Dist. Raigarh (CG).
(c) Tej Ram s/o. Nakul, aged about 35 years R/o Village Gourbahari, P.S. Tamnar, Tahsil Gharghoda, District-Raigarh, Chhattisgarh.
(d) Mohit S/o Nakul Aged About 38 Years R/o Village Gourbahari, P.S. Tamnar, Tahsil Gharghoda, District-Raigarh, Chhattisgarh.
(e) Zila S/o Nakul Aged About 26 Years R/o Village Gourbahari, P.S. Tamnar, Tahsil Gharghoda, District-Raigarh, Chhattisgarh, District :
(f) Radhni S/o Nakul Aged About 32 Years R/o Village Gourbahari, P.S. Tamnar, Tahsil Gharghoda, District-Raigarh, Chhattisgarh.
(g) Kodpahalin wd/o Nakul, aged about 65 years, R/o Village Gourbahari, P.S. Tamnar, Tahsil Gharghoda, District-Raigarh, Chhattisgarh.

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Versus

1. Ghasi Ram S/o Subran Alias Pathin Aged About 44 Years R/o Village Jhinka Bahal, Post-Libra, P.S. Tamnar, Tahsil Gharghoda, Distt.- Raigarh, Chhattisgarh.

2. Govind S/o Subran Alias Pathin Aged About 42 Years R/o Village Jhinka Bahal, Post-Libra, P.S. Tamnar, Tahsil Gharghoda, Distt.- Raigarh, Chhattisgarh.
3. Gopal Alias Ranga S/o Subran Alias Pathin Aged About 35 Years R/o Village Jhinka Bahal, Post-Libra, P.S. Tamnar, Tahsil Gharghoda, Distt.- Raigarh, Chhattisgarh.
4. Mst. Barato we/o. Subran alias Pathin, aged about 72 years R/o Village Jhinka Bahal, Post-Libra, P.S. Tamnar, Tahsil Gharghoda, Distt.- Raigarh, Chhattisgarh. (died/deleted).
5. Rambati D/o Subran Alias Pathin w/o. Bairagu Aged About 38 Years R/o Village Minpur, P.O. Buldega Tahsil Pathalgaon, Chhattisgarh, Taluka : Patthalgaon, District : Jashpur, Chhattisgarh
6. Ratna Bai D/o Subran Alias Pathin wife of Sadashiv aged about 34 Years R/o Village Chitpahi, Post Kolam, Tahsil Ghargohoda, Distt.- Raigarh, Chhattisgarh.
7. Dileshwar s/o. Baiga (dead) Mst Kotbihin Wd/o Baiga aged about 55 years, r/o.; village Mukdega (Tangarjor) Tahsil Gharghoda, Dist. Raigarh.(deleed).
8. Sahdeo alias Thuru s/o. Baiga, aged about 56 years, r/o. Village Mukdega (Tangarjor) Tahsil gharghoda, Dist. Raigarh (CG). (deleted).
9. Rukman S/o Sukalu Gond Aged About 40 Years R/o Village Gourbahari, P.S. Tamnar, Tahsil Gharghoda, District- Raigarh, Chhattisgarh.
10. Noori s/o. Sukala Gond aged about 43 years, r/o. Village Hardijharia, Tahsil Gharghoda, Dist. Raigarh (CG). (deleted).
11. Bhoorasa S/o Dukaloo Gond Aged About 40 Years R/o Village Pithama P.S. Bagbahar, Tahsil Pathalgaon, District Raigarh, Chhattisgarh.
12. Podi s/o. Dukaloo, aged about 42 years, r/o. Village Jharna, P.S. Tamnar, Tahsil Gharghoda, Dist. Raigarh (deleted).
13. State Of Chhattisgarh Through Collector, Raigarh, Chhattisgarh, District :Raigarh, Chhattisgarh
14. Bhodhram S/o Dukalu Gond Aged About 50 Years R/o Village Gourbahari, Thana- Tamnar, Tahsil Gharghoda, District Raigarh, Chhattisgarh.

---- Respondents

For appellants	:	Mr. Manoj Kumar Sinha, Advocate.
For respondent No.1	:	Mr. H.S. Patel, Advocate.
For State	:	Mr. Raghavendra Verma, G.A.

SB: Hon'ble Shri Justice Ram Prasanna Sharma

CAV JUDGMENT

1) This appeal is preferred under Section 96 of the Code of Civil Procedure, 1908 against the judgment/decreed dated 9-12-2003 passed by the First Additional District Judge, Raigarh (CG) in Civil Suit No. 9A/1993 wherein the said court decreed the suit filed by the original respondents No. 1 to 6 (respondent No. 4 died) for partition of land mentioned in Schedule- A of the plaint measuring area 28.46 acres situated at village Gourbahari Patwari Halka No. 29, Tahsil Gharghoda, District Raigarh and house situated at the same place mentioned in Schedule-B of the plaint and declared 1/4th share of respondents No. 1 to 6 in the said property mentioned in Schedule-A & B of the plaint and delivery of possession of the property after partition.

2) The suit was filed before the trial Court by respondents No. 1 to 6 that the land/house in question is joint family property recorded in the name of Hira Ram who inherited the same from his father and there was also paternal house which is described in Schedule

A & B of the plaint. The said Hira Ram had five sons namely Baiga, Dukalu, Sukalu, Sukaroo and Subrain @ Pathin. After death of Hira Ram, property was recorded in the name of their five sons jointly. During the life time Hira ram gave the land bearing Survey No. 26/26 area 4.50 acres and Khasra No. 147/159 area 2 acres in favour of Subran alias Pathin vide document dated 22-2-1956. The said Subran alias Pathin left the village Gourbahari and started living in village Kosampali with his in-laws. As per version of plaint, present appellants/defendants No. 3 and 4 mutated the land of Subran in their own names behind his back. After death of Subran, his sons namely Ghasiram, Govind and Gopal used to come to village Gourbahari from village Jhinkabahal for cultivating the lands. When they came to village Gourbahari for cultivating the lands in the year 1990, the appellants resisted them and not allowed to cultivate the lands. Amongst five sons of Hira Ram, Sukharoo died issue-less as such the property will be divided between four sons/legal representatives and the appellants being legal representatives of Subran are entitled for 1/4th share of the property in question. As per version of the appellants, there was 52.64 acres of land which was recorded in the name of Hira Ram and it was divided between his five sons during his life time and Subran sold not only his share of land but also share of land of Sukharoo who died issue-less during the year 1941 or 1942. As

Subran sold the property of his share, therefore, he is not entitled the share in property again for which the suit is filed.

3) Learned counsel for the appellants would submit as under:

- i) Ex. P/1 which is record of right shows total land was 52.64 acres, but no record of right is submitted updated, therefore, any decree passed by this court shall render infructuous. The respondent ought to have filed before the trial court updated record so that the decree can be executed.
- ii) The appellants are in possession of only 6 acres of land which is in the name of appellants because partition of the suit property took place long back in the year 1940.
- iii) There is record of alienating 2 acres of land by Subran and Heeraram by one Kriparam in the year 1939 which shows that the partition between the parties took place way back in the year 1939.
- iv) Name of respondents i.e. defendants/legal representatives of Subran have been omitted from the record since 1954-55, therefore, Schedule-A which is part of the plaint has no existence in record of right.

- v) The suit is time barred. It can be filed for possession within 12 years as per Article 65 of the Limitation Act, 1963, but same is not done.
 - vi) The trial court has ignored the document and recorded its finding that the land which is mentioned in Schedule-A total area 28.64 acre is still undivided, but that is not true, therefore, finding of the trial court is liable to be reserved.
- 4) On other hand, learned counsel for the respondents would submit as under:
- i) The appellants have not denied the fact that the land mentioned in Schedule-A was Joint Hindu Family Property. There is no document regarding partition in the year 1933-34 and there is no record that defendant Subran or his representatives sold the property of his share.
 - ii) The land in question is still Joint Hindu Property, therefore, the decree passed

by the trial court is just and proper which is not liable to be interfered with.

iii) The suit is within time because partition of the property is not proved.

iv) Ex.P/2 shows that the property in question is not partitioned and the same should be acted upon.

5) I have heard learned counsel for the parties and perused the record in which judgment and decree has been passed.

6) The suit is filed before the trial court on 5-2-1993 but no record of right was filed of the agriculture year 1992-93 or preceding years. One Jamabandi (Ex.P/1) of the year 1922-1923 was filed by the respondents No. 1 to 6/plaintiffs which goes to show that Hira ram was recorded owner of the land area 52.64 acres. No record is filed relevant for the year 1992-93, therefore, revenue record as on date is required to enable the court to pronounce the judgment because the court has to pass executable decree. It would not be proper for the court to pass a decree which is unexecutable. Respondents No. 1 to 6 have filed the suit for partition of land for area measuring 28.46 acres and house but no record of right was produced before the trial court that on the date of filing of the suit 28.46 acres of land

was recorded as joint property. There is no record to show that any house was joint property of legal representatives of said Hira Ram. The appellants have filed an application under Order 41 Rule 27 of the Code of Civil Procedure, 1908 and produced the record of right of the year 2009 – 2010 in which total area of land is 6.784 hectares which comes to about 16.46 acres and same is recorded in the name of the appellants or respondents No. 6 to 9, but it is not recorded in the name of respondents No. 1 to 5/plaintiffs. Therefore, enabling the court to pronounce the judgment, the application filed under Order 41 Rule 27 of the CPC is allowed and record of right of the year 2009-2010 is taken on record.

7 From the evidence adduced by respondents No. 1 to 5 and the document produced by them, it is established that the originally the land was measuring 52.64 acres in the year 1922-1923 as per Ex,P/1. The suit was filed in the year 1993 for partition of land measuring 27.64 acres. In the year 2009-2010 the property which is now on record is 16.46 acres of land. Looking to the document it is clear that the property was earlier divided between the successor of Hiraram that is why it is reduced from the year 1922-1923 to year 2009-2010. As there is no record showing Subran as joint owner of the property in question, it appears that Subran received his share in the property in question during his life time and same was alienated by him and nothing is left to be succeeded by respondent

No.1 to 6 as his legal representative, even otherwise, the property as measured in plaint is not on record of right, therefore, no executable order can be passed in favour of respondents. No 1 to 6 regarding property in question because same is not in existence in the record of right. Therefore, version of the appellants is liable to be accepted that Hira Ram divided property between his sons and Subran alienated the property of his share that is why present respondents No. 1 to 5 being successors of Subran are not entitled for any relief. Suit regarding immovable property cannot be decided on the basis of bald statement of the parties. When there is documentary evidence available on record that property which is alleged to be joint not on record, the trial court was not right in passing the decree against the record. The judgment passed by the trial Court is clearly unexecutable which cannot be affirmed. Therefore, argument advance on behalf of the respondent No.1 is not acceptable. Argument on behalf of the appellants is liable to be accepted. Judgment and decree of the trial court is not sustainable.

8) Accordingly decree is passed in favour of the appellants and against the respondents No.1 to 5. as under:

- (i) The appeal is allowed.
- (ii) The suit filed by original respondents No. 1 to 6/plaintiffs is dismissed with cost.
- (iii) Parties to bear their own cost.

- (iv) Pleader's fee., if certified, be calculated
as per Schedule or as per certificate
whichever is less.
- (v) A decree be drawn up accordingly.

Sd/-

(Ram Prasanna Sharma)
JUDGE

Raju