

HIGH COURT OF CHHATTISGARH, BILASPURSecond Appeal No.350 of 2004

Gohdul, S/o Shri Khora Gond, aged about 45 years, Gond, R/o Village
Paraswaskala, Tah. Rajpur, Distt. Surguja (C.G.)

(Plaintiff)
---- Appellant

Versus

1. Bachan Rai, S/o Gotia, aged about 30 years, Gond, R/o Village
Paraswarkala, Tah. Rajpur, Distt. Surguja (C.G.)
2. State of Chhattisgarh, through the District Collector, Surguja (C.G.)
---- Respondents

For Appellant: Mr. Vivek Bhakta, Advocate.
For Respondent No.2 / State: -
Mr. Vimlesh Bajpai, Govt. Advocate.

Hon'ble Shri Justice Sanjay K. Agrawal

Judgment On Board

01/02/2019

1. This second appeal by the plaintiff / appellant was admitted on the
following substantial questions of law: -

“(1) Whether the defendant no.2 namely Mankunwar was
having a limited interest in the suit property and she was
not entitled to alienate the same in favour of defendant
no.1?

(2) Whether the courts below were not justified in
dismissing the suit of the plaintiff in relation to the lands of
the Schedule-A of the plaint in the admitted facts and
circumstances of this case?”

(For the sake of convenience, parties would be referred
hereinafter as per their status shown and ranking given in the suit
before the trial Court.)

2. The plaintiff filed suit for declaration that the sale deed dated 28-10-
1994 executed by defendant No.2 in favour of defendant No.1 is null
and void. It was further stated that the suit property was held by
Khora and Mankunwar – his widow, has alienated the suit property,

she being the member of aboriginal caste was having only limited right of maintenance over that property, but she could not have alienated the suit property in favour of defendant No.1 which be declared null and void. The defendants remained ex parte and the suit was dismissed ex parte and on appeal preferred, the first appellate Court affirmed the finding of the trial Court against which this second appeal has been preferred in which substantial questions of law have been formulated which have been set-out in the opening paragraph of this judgment.

3. Mr. Vivek Bhakta, learned counsel for the appellant / plaintiff, submits that both the courts have concurrently erred in holding that Mankunwar was entitled to alienate the suit property.
4. I have heard learned counsel for the parties, considered their rival submissions made herein-above and went through the record with utmost circumspection.
5. The plaintiff has taken a plea that the provisions of the Hindu Succession Act, 1956 would not apply, as parties are Gond by caste and by the custom prevalent in the Gond caste, widow was not entitled to alienate the suit property.
6. In order to decide the plea, it would be appropriate to notice the provisions of Sections 101 and 103 of the Indian Evidence Act, 1872. which provide as under: -

“101. Burden of proof.—Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist.

When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.

103. Burden of proof as to particular fact.—The burden

of proof as to any particular fact lies on that person who wishes the Court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”

7. In the matter of Mohammad Baqar and others v. Naim-un-Nisa

Bibi and others¹, the Supreme Court has held as under: -

“(6) ... The burden of proving a custom in derogation of the general law being heavily on the party who sets it up, it was incumbent on the appellants to prove by clear and cogent evidence that there was such a custom as was pleaded by them.”

8. Thus, the burden that customary law excludes the woman from alienation of property inherited from her husband was on the plaintiff, who is son of original defendant No.2, which he failed to discharge by leading appropriate evidence and it would be impermissible for the Court to start with this assumption that customary law governing the parties excludes the woman from alienating the property.

9. In view of the aforesaid finding, I am of the considered opinion that the two courts below have rightly dismissed the suit holding that defendant No.2 Mankunwar had right to alienate the suit property in favour of defendant No.1 and the said finding is in accordance with law. The substantial questions of law are answered accordingly and the second appeal is liable to be and is hereby dismissed leaving the parties to bear their own cost(s).

10. Decree be drawn-up accordingly.

Sd/-
(Sanjay K. Agrawal)
Judge

Soma

1 AIR 1956 SC 548