

HIGH COURT OF CHHATTISGARH, BILASPUR

SA No. 440 of 2001

1. Umashankar Died Thr Lrs :

1.1 - Vinay Kumar Chauhan S/o Umashankar Chauhan Aged About 38 Years R/o Vidya Upnagar, Chauhan Bada, Bilaspur, Tahsil And District- Bilaspur, Chhattisgarh

1.2 - Shantosh Singh Chauhan S/o Umashankar Chauhan Aged About 34 Years R/o Vidya Upnagar, Chauhan Bada, Bilaspur, Tahsil And District- Bilaspur, Chhattisgarh

1.3 - Ku. Vrinda Chauhan D/o Umashankar Chauhan Aged About 32 Years R/o Vidya Upnagar, Chauhan Bada, Bilaspur, Tahsil And District- Bilaspur, Chhattisgarh

---- Appellants

Versus

1. Gulabi Bai Wd/o Late Asharam Aged About 73 Years R/o Vidya Up Nagar Bilaspur, Tahsil And District Bilaspur, Chhattisgarh, Chhattisgarh

2. Smti Kavita W/o Maniram Aged About 40 Years R/o Faizabad, Uttar Pradesh, District : Faizabad, Uttar Pradesh

3. Smt. Ragini W/o Shailendra Singh Aged About 38 Years R/o Korba, District- Korba, Chhattisgarh, District : Korba, Chhattisgarh

4. Smt. Rani W/o Sudhir Narayan Singh Aged About 36 Years R/o P.N.T. Colony, Bhopal, Madhya Pradesh, District : Bhopal, Madhya Pradesh

5. Smt. Rekha W/o Bhanjan Singh Aged About 30 Years R/o Vidya Up Nagar Bilaspur, Tahsil And District- Bilaspur, Chhattisgarh, District : Bilaspur, Chhattisgarh

6. Rajesh Chauhan S/o Asharam Aged About 34 Years R/o Vidya Up Nagar, Tahsil And District Bilaspur, Chhattisgarh, District : Bilaspur, Chhattisgarh

7. Rakesh S/o Asharam Aged About 30 Years R/o Vidya Up Nagar, Tahsil And District Bilaspur, Chhattisgarh, District : Bilaspur, Chhattisgarh

8. Keshav Dead Through Lrs :

8 (a) Tulsi Bai W/o Keshav Aged About 50 Years R/o Vidya Upnagar, Chauhan Bada, Bilaspur, Tahsil And District- Bilaspur, Chhattisgarh

8 (b) Smt. Maya Chauhan W/o Manharan Aged About 39 Years R/o Vidya Upnagar, Chauhan Bada, Bilaspur, Tahsil And District- Bilaspur, Chhattisgarh

8 (c) Dheeraj Chauhan (Died) Through Legal Heirs :

8 (c) (i) - Smt. Gayatri Singh Chauhan Wd/o Dhiraj Chauhan Aged About 47 Years

8 (c) (ii) - Prerna Singh Chauhan D/o Late Shri Dhiraj Chauhan Aged About 18 Years

8 (c) (iii) - Suraj Singh Chauhan S/o Late Shri Dhiraj Chauhan Aged About 16 Years (Minor) through natural guardian mother Wd/o late Dhiraj Chauhan, aged about 47 years.

8(d) Manoj S/o Keshav Aged About 30 Years R/o Vidya Upnagar, Chauhan Bada, Bilaspur, Tahsil And District- Bilaspur, Chhattisgarh

8(e) Ku. Rekha D/o Keshav Aged About 21 Years R/o Vidya Upnagar, Chauhan Bada, Bilaspur, Tahsil And District- Bilaspur, Chhattisgarh

8 (f) Anil S/o Asharam Aged About 26 Years R/o Vidya Upnagar, Chauhan Bada, Bilaspur, Tahsil And District- Bilaspur, Chhattisgarh

8 (g) Ku. Jyoti D/o Keshav Aged About 24 Years R/o Vidya Upnagar, Chauhan Bada, Bilaspur, Tahsil And District- Bilaspur, Chhattisgarh

9. Kamala Bai 38 years, W/o Shri Ram Dead Through Lrs 9 (a) – Gyanwati, aged 22 years, D/o Kamala Bai , R/O Lucknow (UP)

10.Smt. Rampyari Wd/o Asharam Aged About 55 Years R/o Vidya Up Nagar, Tahsil And District Bilaspur, Chhattisgarh, District : Bilaspur, Chhattisgarh

11.Smt. Leela Bai D/o Asharam R/o Talapara Bilaspur, Tahsil And District- Bilaspur, Chhattisgarh, District : Bilaspur, Chhattisgarh

---- Respondents

For Appellants	:	Shri H.B. Agrawal, Senior Advocate with Shri Pankaj Agrawal, Advocate
For Respondents No. 1 to 7	:	Shri Manoj Paranjpe and Shri Anurag Singh, Advocates

And

SA No. 441 of 2001

1. Smt. Chandrawati Chauhan (Deleted)
2. Vinay Kumar Chauhan S/o Umashankar Chauhan Aged About 38 Years R/o Vidya Upnagar Chauhan Bada Bilaspur Tahsil And District Bilaspur Chhattisgarh. , District : Bilaspur, Chhattisgarh
3. Santosh Singh Chauhan S/o Umashankar Chauhan Aged About 34 Years R/o Vidya Upnagar Chauhan Bada Bilaspur Tahsil And District Bilaspur

Chhattisgarh. , District : Bilaspur, Chhattisgarh

4. Ku. Vrinda Chauhan D/o Umashankar Chauhan Aged About 32 Years R/o Vidya Upnagar Chauhan Bada Bilaspur Tahsil And District Bilaspur Chhattisgarh. , District : Bilaspur, Chhattisgarh

---- Appellants

Versus

1. Keshav (Dead) Through Lrs:

1(A) - Tulsi Bai, W/o Keshav Aged About 50 Years R/o Vidya Up Nagar Bilaspur Tahsil Bilaspur District Bilaspur Chhattisgarh.

1 (B) - Smt. Maya Chauhan W/o Manharan Aged About 35 Years R/o Vidya Up Nagar Bilaspur Tahsil Bilaspur District Bilaspur Chhattisgarh.

1 (C) Dheeraj Chauhan (Died) Through Legal Heirs :

1 (c) (i) - Smt. Gayatri Singh Chauhan Wd/o Dhiraj Chauhan Aged About 47 Years

1 (c) (ii) - Prerna Singh Chauhan D/o Late Shri Dhiraj Chauhan Aged About 18 Years

1 (c) (iii) - Suraj Singh Chauhan S/o Late Shri Dhiraj Chauhan Aged About 16 Years (Minor) through natural guardian mother Wd/o late Dhiraj Chauhan, aged about 47 years.

1 (D) Manoj S/o Keshav Aged About 30 Years R/o Vidya Up Nagar Bilaspur Tahsil Bilaspur District Bilaspur Chhattisgarh

1 (E) Kumari Kiran D/o Keshav Aged About 28 Years R/o Vidya Up Nagar Bilaspur Tahsil Bilaspur District Bilaspur Chhattisgarh.

1 (F) Anil S/o Asharam Aged About 26 Years R/o Vidya Up Nagar Bilaspur Tahsil Bilaspur District Bilaspur Chhattisgarh.

1 (G) Kumari Jyoti D/o Keshav Aged About 24 Years R/o Vidya Up Nagar Bilaspur Tahsil Bilaspur District Bilaspur Chhattisgarh.

2. Kamala Bai W/o Shri Ram Aged About 52 Years Dead Through Legal Representative:

2 (A) - Gyanwati W/o Dhaneeram Chauhan Aged About 26 Years, R/O Post Sadauddin Police Station- Jahangeerabad, Tahsil- Nawabganj, District- Barabanki (UP)

3. Rampyari Bai Wd/o Asharam Aged About 67 Years R/o Vidya Up Nagar Bilaspur Tahsil And District Bilaspur Chhattisgarh. , District : Bilaspur, Chhattisgarh

4. Leela Bai W/o Pancham Punnoo Aged About 42 Years R/o Jarhabhatta Badhai Chowk, Tahsil And District Bilaspur Chhattisgarh. , District : Bilaspur, Chhattisgarh

5. Gulabi Bai W/o Late Asharam Aged About 75 Years R/o Vidya Up Nagar Bilaspur Tahsil And District Bilaspur Chhattisgarh., District : Bilaspur, Chhattisgarh
6. Smt. Kavita W/o Maniram Aged About 40 Years Resident - Faizabad U. P., District : Faizabad, Uttar Pradesh
7. Smt. Ragini W/o Shailendra Singh Aged About 48 Years Resident Korba District Korba Chhattisgarh. , District : Korba, Chhattisgarh
8. Smt. Rani W/o Sudhir Narayan Singh Aged About 36 Years Resident Po. No. To. Colony Bhopal Madhya Pradesh. , District : Bhopal, Madhya Pradesh
9. Smt. Rekha W/o Bhajan Singh Aged About 30 Years Resident Vidya Up Nagar Bilaspur Chhattisgarh. , District : Bilaspur, Chhattisgarh
10. Rajesh Chauhan S/o Asharam Aged About 34 Years Resident Vidya Up Nagar Bilaspur Tahsil And District Bilaspur Chhattisgarh. , District : Bilaspur, Chhattisgarh
11. Rakesh S/o Asharam Aged About 30 Years Resident Vidya Up Nagar Bilaspur Tahsil And District Bilaspur Chhattisgarh., Chhattisgarh

---- Respondents

For Appellants	:	Shri H.B. Agrawal, Senior Advocate with Shri Pankaj Agrawal, Advocate
For Respondents No. 5 to 11	:	Shri Manoj Paranjpe and Shri Anurag Singh, Advocates

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

Order On Board

25/07/2019

1. This order shall govern disposal of the aforesaid two Second Appeals No. 440 & 441 of 2001 filed by the appellants- Umashankar, aggrieved by common judgment and decree dated 29.2.2000 passed in Civil Appeal No.7-A/2000 and Civil Appeal No.8-A of 2000, both arising out of judgment and decree dated 29.2.2000 passed in Civil Suit No.109-A of 1997.
2. The two appeals were admitted on the following substantial question of law:-

“1. Whether the Courts below have committed an error in law in rejecting the claim of the appellant/plaintiff on

the ground of non-joinder of necessary parties ?

2. Whether the findings arrived at by the Courts below in respect of Annexure D-1 are perverse findings of facts or not ?”

3. Appellant- plaintiff filed a suit for partition and separate possession against the defendants in respect of property shown in Schedule A, B & C of the plaint on the pleading, inter alia, that Umashankar and defendants No. 1 to 4 are the legal heirs of deceased- Asharam who owned property shown in three Schedules. The plaintiff's case was that defendant No.5- Gulabi Bai was not legally wedded wife of Asharam because she claimed to be the wife of Asharam by virtue of marriage solemnized during subsistence of Asharam's marriage with Rampyari (defendant No.3). According to plaintiff, after death of Asharam, sons and daughters of Asharam, born out of first wedlock with Raghuri Bai and widow and daughter of second marriage with Rampyari alone are entitled to succeed to the property of Asharam. However, Gulabi Bai (defendant No.5), who is not legally wedded wife and her offsprings (defendants No. 6 to 11) are illegitimate children of void marriage and are, therefore, not entitled to succeed to the property of plaintiff -Umashankar. The stated cause of action for filing suit was that defendants No.5 to 11 are asserting their share in the property of deceased -Asharam and, therefore, the plaintiff was required to seek partition and separate possession of the property only amongst the plaintiff and defendant No. 1 to 4.
4. Defendants No.5, 8, 9, 10 & 11 filed their joint written statement and denied plaintiff's claim stating that marriage of Asharam with Gulabi Bai was legal and valid and their offspring, the aforesaid defendants, are legal heirs of deceased -Asharam and are entitled to succeed to his property along with all other heirs including plaintiff and other defendants.

Defendant No.6 filed written statement denying the claim of the plaintiff and so also defendant No.7. No other defendants filed their written statement.

5. Learned trial Court framed as many as seven issues. The seventh issue, relevant for present case was whether the plaintiff suit is not maintainable

for non-joinder of necessary party. Learned trial Court, in its judgment, held that as the suit was for partition and separate possession and Kamini Bai was, admittedly, one of the daughters born out of wedlock of Asharam with Gulabi Bai, she was necessary party. It was also held that since one of the disputed property is a shop which was leased out in favour of Asharam, therefore, Railways is also necessary party. The aforesaid judgment and decree was assailed in appeal. The lower appellate Court affirmed the judgment and decree of the learned trial Court dismissing the suit of the plaintiff giving rise to second appeal.

6. On the first substantial question of law, learned counsel for the appellant Umashanker in both the appeal would argue that on admitted position on record, in view of the pleadings and evidence of the parties, Asharam was first married to Raghuri Bai and Umashankar, Keshav and Kamala Bai were born out of this wedlock. Later on, when Raghuri Bai died, Asharam performed second marriage with Rampyari and from this wedlock, Leela Bai was born. While Rampyari was alive, Asharam contracted third marriage during subsistence of marriage and lifetime of living spouse. Therefore, marriage of Asharam with Gulabi Bai was void and children born out of this wedlock, namely defendants No. 6 to 11 and Kamini all were illegitimate children. He would argue that, though, the three sons and daughters born out of first wedlock and the widow of second marriage Rampayari as also daughter Leela were legal heirs and entitled to succeed property of deceased Asharam, Gulabi Bai and her children were not entitled to any share in the property as they were not legal heirs of deceased -Asharam. Gulabi Bai and defendant No.5 and sons and daughters of Gulabi namely defendant No. 6 to 11 were impleaded not because the plaintiff admitted that they were legal heirs but because they were asserting their right in the property of deceased Asharam which gave the plaintiff cause of action to seek separate possession and partition. Therefore, Kamini was not necessary party and at the most, she could only be a proper party. Therefore, the suit was not liable to be dismissed for non-joinder of Kamini. It is next submitted that as Railways had only licensed the shop in favour of Asharam, but Railways itself was not a necessary party for determination of issue with regard to share in the property of Asharam, Railways was only a proper party and not a necessary party. Learned counsel for the appellant

submits that in view of the provision contained in Section 19 CPC, non-joinder of proper party will not lead to dismissal of the suit.

7. On the second question of law, submission of learned counsel for the appellant is that document (Ex.D-1) is an agreement which is duly proved. The findings of the learned Court below in respect of Ex. D-1 are perverse findings of facts, because it has come in the evidence that Gulabi Bai's husband is still alive and that document of ' chhorchhutti ' does not amount to legal divorce in the eyes of law.
8. On the other hand, learned counsel for the respondents would argue that both the Courts below have recorded concurrent finding that Kamini Bai was born out of the wedlock of Asharam with Gulabi Bai and from the evidence of the parties, it is an admitted position. It is further submitted that Kamini Bai may have been an offspring born out of this marriage which may be void or voidable but she would be entitled to inherit the property of her father Asharam being one of the legal heirs and in that capacity was having an inheritable interest in the property after death of Asharam. She, therefore, being necessary party, non-joinder of necessary party was fatal to the suit as the plaintiff's suit is for partition and separate possession. In support of this submission, he places reliance upon the decisions in the cases of **Jinia Keotin and Ors. Vs. Kumar Sitaram Manjhi & Ors.** (2003) 1 SCC 730, **Revanasiddappa and Anr. Vs. Mallikarjun and Ors.** (2011) 11 SCC 1, **Shanmugham Vs. Saraswathi** 1997 AIR (Mad) 226, **Kanakarathanammal Vs. V.S. Loganatha Mudaliar & Anr.** AIR 1965 SC 271, **Kayambu (died); Velammal (died); Vallimayil Vs. Athi Narayanan Servai; Kamala** (Second Appeal No.201 of 2017) reported in 2018 LawSuit (Mad) 5707.
9. I have heard learned counsel for the parties and perused the records of the Courts below.
10. The pleadings and evidence led by the parties and the findings recorded by the learned Courts below on other issues which are not under challenge is that Asharam was first married to Raghuri Bai and out of this marriage, Umashankar(plaintiff), Keshav (defendant No.1) and Kamla Bai (defendant No.2) were born. Later on, when Raghuri died, Asharam married Rampyari (defendant No.3) and out this wedlock, Leela (defendant No.4) was born.

The finding of learned trial Court have been that during subsistence of marriage of Asharam with Rampyari, Asharam married Gulabi Bai (defendant No.5). However, on this aspect regarding validity of marriage of Asharam with Gulabi Bai, learned lower appellate Court reversed the finding of the trial Court and held that the marriage of Asharam with Gulabi was valid, placing reliance upon customary divorce deed filed by the defendant.

11. From the pleadings and evidence of the plaintiff or even of the defendants, there is nothing to conclude that the property in dispute happened to be the ancestral property of Asharam. In the plaint averment, appellant-plaintiff has nowhere asserted this fact. All that has been stated in the plaint is that the property in dispute, described in Schedule -A, B and C are property of Asharam. If that being the position, even if it were to be assumed that the marriage of Asharam with Gulabi Bai was not valid because of subsistence of his marriage with Rampyari, a living spouse, even a child born out of void or voidable marriage would be entitled to inheritance. This legal position has been considered by the Supreme Court in the case of **Jinia Keotin** (supra), wherein the Supreme Court interpreted the law of succession as provided in Section 16 of the Hindu Marriage Act, as below :-

“4. We have carefully considered the submissions of the learned counsel on either side. The Hindu Marriage Act underwent important changes by virtue of the Marriage Laws (Amendment) Act, 1976, which came into force with effect from 27.5.1976. Under the ordinary law, a child for being treated as legitimate must be born in lawful wedlock. If the marriage itself is void on account of contravention of the statutory prescriptions, any child born of such marriage would have the effect, per se, or on being so declared or annulled, as the case may be, of bastardizing the children born of the parties to such marriage. Polygamy, which was permissible and widely prevalent among the Hindus in the past and considered to have evil effects on society, came to be put an end to by the mandate of the Parliament in enacting the Hindu

Marriage Act, 1955. The legitimate status of the children which depended very much upon the marriage between their parents being valid or void, thus turned on the act of parents over which the innocent child had no hold or control. But, for no fault of it, the innocent baby had to suffer a permanent setback in life and in the eyes of society by being treated as illegitimate. A laudable and noble act of the legislature indeed in enacting Section 16 to put an end to a great social evil. At the same time, Section 16 of the Act, while engrafting a rule of fiction in ordaining the children, though illegitimate, to be treated as legitimate, notwithstanding that the marriage was void or voidable chose also to confine its application, so far as succession or inheritance by such children are concerned to the properties of the parents only.

5. So far as Section 16 of the Act is concerned, though it was enacted to legitimise children, who would otherwise suffer by becoming illegitimate, at the same time it expressly provide in Sub-section (3) by engrafting a provision with a non obstante clause stipulating specifically that nothing contained in Sub-section (1) or Sub-section (2) shall be construed as conferring upon any child of a marriage, which is null and void or which is annulled by a decree of nullity under Section 12, "any rights in or to the property of any person, other than the parents, in any case where, but for the passing of this Act, such child would have been incapable of possessing or acquiring any such rights by reason of his not being the legitimate child of his parents." In the light of such an express mandate of the legislature itself, there is no room for according upon such children who but for Section 16 would have been branded as illegitimate any further rights than envisaged therein by resorting to any presumptive or inferential process of reasoning, having recourse to the mere object or purpose of enacting

Section 16 of the Act. Any attempt to do so would amount to doing not only violence to the provision specifically engrafted in Sub-section (3) of Section 16 of the Act but also would attempt to court re-legislating on the subject under the guise of interpretation, against even the will expressed in the enactment itself. Consequently, we are unable to countenance the submissions on behalf of the appellants. The view taken by the courts below cannot be considered to suffer from any serious infirmity to call for our interference, in this appeal."

12. In the aforesaid decision, the Supreme Court, though, held that the children born out of void or voidable marriage would be entitled to inheritance, a caveat was placed that this law of inheritance would be confined only to the self acquired property of the parents and not the ancestral property. Later on, in another decision of the Supreme Court, in the case of **Revanasiddappa** (supra), a discordant note was struck in so far as restriction of inheritance in respect of ancestral property is concerned. The matter was referred to larger Bench on this aspect. As far as present case is concerned, as the plaintiff has not asserted that the property in dispute was ancestral property, it is not necessary for this Court to dwell upon this aspect. The property has to be treated as self-acquired property of the deceased Asharam and consequently the children born out of the void and voidable marriage would also be entitled to inherit the property as held in both the decisions referred to above.
13. The upshot of the aforesaid discussions would be that irrespective of whether marriage of Asharam with Gulabi Bai was valid or not, Kamini Bai who was born out of wedlock of Asharam with Gulabi would also be entitled to inheritable interest in the property of Asharam after his death. Consequently, Kamini is also a necessary party and not merely a proper party in the suit.
14. Once this Court holds as above, the settled legal position renders the suit filed by the plaintiff to be dismissed for non-joinder of necessary party, because it has been very well settled legal position, as adumbrated by the

Supreme Court in plethora of decisions that in a suit for partition and separate possession, each and every share holder would be a necessary party and non-joinder of any of them would be fatal to the suit because in that case, the suit is liable to be dismissed for non-joinder of necessary party. As early as in the case of **Kanakarathanammal** (supra), this legal position was clearly adumbrated by the Supreme Court, as below :

“15. It is unfortunate that the appellant's claim has to be rejected on the ground that she failed to implead her two brothers to her suit, though on the merits we have found that the property claimed by her in her present suit belonged to her mother and she is one of the three heirs on whom the said property devolves by succession under Section 12 of the Act. That, in fact, is the conclusion which the trial Court had reached and yet no action was taken by the appellant to bring the necessary parties on the record. It is true that under Order 1 Rule 10 of the Code of Civil Procedure no suit shall be defeated by reason of the mis-joinder or non-joinder of parties; but there can be no doubt that if the parties who are not joined are not only proper but also necessary parties to it, the infirmity in the suit is bound to be fatal. Even in such cases, the Court can under Order 1 Rule 10, sub-rule 2 direct the necessary parties to be joined, but all this can and should be done at the stage of trial and that too without prejudice to the said parties' plea of limitation. Once it is held that the appellant's two brothers are co-heirs with her in respect of the properties left intestate by their mother, the present suit filed by the appellant partakes of the character of a suit for partition, and in such a suit clearly the appellant alone would not be entitled to claim any relief against the respondents. The estate can be represented only when all the three heirs are before the Court. If the

appellant persisted in proceeding with the suit on the basis that she was exclusively entitled to the suit property, she took the risk and it is now too late to allow her to rectify the mistake. "

15. Therefore, the plaintiff's suit was liable to be dismissed for non-joinder of Kamini Bai who was one of the co-sharer along with the plaintiff and other defendants.

16. On the second question of law, this Court finds that finding of learned lower appellate Court is perverse in law. Irrespective of whether Gulabi Bai had taken valid divorce with her first husband, for which purpose, the defendants sought to rely upon customary divorce deed (Ex.D-1), on the face of reliable evidence on record that at the time of marriage of Asharam with Gulabi Bai, first marriage with Rampyari was subsisting, the marriage of Asharam with Gulabi was clearly not valid in law.

17. In the result, the first question of law is answered in the manner that the Courts below have not committed any error in law in rejecting claim of plaintiff on the ground of non-joinder of necessary party. On the second question of law, it has to be held that finding of learned lower appellate Court in respect of customary divorce deed (Ex.D-1) with regard to validity of marriage of Asharam with Gulabi Bai is perverse in law.

18. Even though the second substantial question of law has been answered in favour of the appellant/plaintiff, in view of finding on the first substantial question of law, no ground for interference with the impugned judgment is made out. Both the appeals are, therefore, dismissed. Let an appellate decree be accordingly drawn.

Sd/-
(Manindra Mohan Shrivastava)
Judge