

HIGH COURT OF CHHATTISGARH, BILASPUR**SA No.403 of 2001**

1. Bihari S/o Nakchhed Kalar, aged about 42 years

2 (A) Ganesh Ram S/o Late Ghasiya @ Ghasi Ram, aged about 55 years

2(B) Durga Prasad S/o Late Ghasiya @ Ghasi Ram, aged about 52 years

2(C) Deergan S/o Late Ghasiya @ Ghasi Ram, aged about 49 years

All are resident of Village Chakarbhata, Tahsil Mungeli, District Bilaspur (CG)]

3(A) Khorbaharin Bai W/o Late Malik Ram, aged about 60 years

3(B) Pankaj Agrawal S/o Late Malik Ram, aged about 28 years

3(C) Prafulla Jaiswal S/o Late Malik Ram, aged about 25 years

All are resident of Village Chakarbhata, Tahsil, Post Office and Police Station-Mungeli, District Bilaspur (CG)]

4. Jagdeesh S/o Jhadiram Kalar, aged about 44 years, R/o Village Chakarbhata, Tahsil Mungeli, District Bilaspur (CG)

5. Sushil Kumar S/o Late Ramji, aged about 26 years R/o Village Chakarbhata, Tahsil, Post Office and Police Station-Mungeli, District Bilaspur (CG)

---- Appellants/Plaintiffs**Versus**

1. Adalat S/o Sheo Prasad Kalar, aged about 53 Years R/o Village Chakarbhata, Ward No.1, Kasturi, Tehsil Mungeli, Police Station-Chakarbhata, District Bilaspur (now Mungeli) (CG)

2. The State Of Chhattisgarh Through Collector Bilaspur (CG)

---- Respondents/Defendants

For Appellants : Shri R. N. Jha, Advocate

None for Respondent No.1 though served.

For State : Shri Anmol Sharma, Panel Lawyer

Single Bench : Hon'ble Shri Justice Manindra Mohan Shrivastava

JUDGMENT

04/07/2019

Heard.

1. At the outset, Shri Vinay Pandey, learned counsel for respondent No.1 appeared and prayed that his application for withdrawal of power may be allowed. In the application, it is stated that the respondent-defendant is not placing any instruction and despite all efforts made, notice issued by this Court, the defendant is not appearing in this case.
2. It appears that the defendant is not interested in contesting the matter.
3. Heard on application under Order 6 Rule 17 CPC read with Section 151 CPC for amendment of plaint.
4. The amendment in the application is sought to be made at this belated stage. The application does not contain any weighty reasons as to why contents of the pleadings could not be made during the pendency of the suit or even at the First Appellate Court Proceedings. Even otherwise, the pleadings are only explanatory in nature and appear to be more in the nature of evidence rather than pleadings, therefore, the application is rejected.
5. Before examining the substantial question of law involved in the present appeal, it is relevant to state and place on record that earlier the appellants had moved an application under Order 41 Rule 27 CPC, which was allowed and the appellant-plaintiff was allowed to lead additional evidence before the trial Court. Plaintiff's evidence was recorded and additional documents Ex.P-16, P-17, P-18 and P-19 were admitted in evidence and the records forwarded to this Court.
6. This appeal was admitted for hearing on 08-10-2014 on the following substantial question of law:-

“Whether the first appellate Court was justified in reversing the well reasoned judgment and decree of the trial Court on the ground that the plaintiff has not been able to establish that the suit premises was not partitioned?”

7. The appellants-plaintiffs filed a suit seeking declaration and permanent injunction and recovery of Rs.3300/- on the pleadings inter alia that the disputed pond situated over submerged land admeasuring 14.83 acres in Village Chakarbhata , P.H.No.15, Revenue Division Mungeli was recorded in the name of ancestral of plaintiffs and defendants. The said village tank was prepared by their forefathers, which is used for nistari purpose by the villagers and for irrigating lands. It was also pleaded that the parties have equal share over the tank. According to plaintiffs pleadings, in the year 1994-95, the defendant-Adalat, taking undue advantage of entries made in Kistabandi Khatoni B-1 Revenue Records, in which, the disputed tank was recorded in the name of Adalat S/o Shiv Prasad and other shareholders, started claiming that the tank belongs to him and thereafter, he executed deed of lease for rearing fish to villagers and started earning. When the plaintiffs asked for their share in the earning, the defendant refused and asserted that the tank belongs to him to the exclusion of all, giving rise to cause of action for filing suit.

8. The defendant filed his written statement, in which, though, they admitted that the tank was initially prepared and belonged to their forefathers and all used the tank for nistari purposes, they came up with the plea that the partition had taken place between Shiv Prasad, father of Defendant No.1-Adalat and Nakchhed, father of plaintiff No.1-Bihari, even before the death of Nakchhed. It was also pleaded that partition between Mohan and Hinchha Ram had also taken place and thereafter, all the shareholders are in occupation and possession of their respective shares. According to the defendant, the disputed tank was allotted to defendant No.1 in partition, which had taken place in the

year 1955-56, though partition of holdings was effected in Revenue Records only in the year 1970. He further pleaded that as the tank belongs to Adalat, he alone draws water for irrigation purposes and also carries out repair work in the tank and is used by the villagers for nistari purposes. It was further pleaded that in the year 1991, when proceedings for acquisition of tank were initiated at the instance of the then Sarpanch, the Revenue Court passed an order directing the tank to be recorded in the name of defendant No.1. At that time, though notice was given to the plaintiffs, had not recorded any objection in these proceedings. It was also pleaded that the tank was never leased out for rearing fish for anyone.

9. The learned trial Court framed an issue as to whether the tank was jointly owned by the parties. The plaintiff's, in order to prove its case, led oral evidence and also filed number of documents, which included revenue records showing tank recorded jointly in the name of large number of co-sharers including defendant No.1-Adalat.

The defendant led his own evidence and also of the Kotwar of the village and filed certified copy of the revenue records, in which, disputed tank is recorded in his name and other co-sharers.

10. The learned trial Court recorded a finding that the disputed tank was admitted by both the parties being joint family property and therefore, if the defendant had taken a plea that it was subjected to partition, the burden was on the defendant to prove this fact. Therefore, the learned trial Court relying upon the oral evidence as also the documentary evidence led by the plaintiffs and that the defendant had not led any documentary evidence of partition or any other clinching and reliable evidence of partition to hold that the tank was continued to be joint family property of the plaintiffs and defendant, granted the

reliefs, as prayed for, except monetary relief.

11. Aggrieved by the trial Court judgment, decreeing suit of the plaintiff, the defendant went up in appeal and the First Appellate Court came to the conclusion that as the case of the plaintiff was that of partial partition, it was for the plaintiff to prove, despite partition of other properties, that the disputed tank continued to be joint family property and that the learned trial Court committed illegality in holding that the burden was on the defendant to prove that the partition had taken place. The learned lower appellate Court further recorded that the documentary evidence led by the plaintiffs could not prove that the disputed tank continued to be joint family property. It was relied upon the evidence of the plaintiff that the partition had taken place and also that in revenue records Kishtabandi Khatoni, the name of Adalat was recorded. On this basis, the learned lower appellate Court reversed the judgment and decree passed by the learned trial Court and dismissed plaintiff's suit.

12. Learned counsel for the appellants would argue that even if it is accepted that the plaintiffs in their evidence admitted that partial partition had taken place, burden was on the defendant to prove partition because the tank continued to be joint family property and plaintiff, apart from leading oral evidence, led clinching documentary evidence to prove that since old times, it recorded names of shareholders and it was not recorded exclusively in the name of Adalat. His next submission is that *Shartnama*, Ex.P-4 was a clinching document, which contained a clear acknowledgement by the shareholders including defendant-Adalat that the tank was jointly owned by all of them, this document was completely omitted from consideration. Next submission is that the learned lower appellate Court completely misread the evidence of Bihari, PW-1 and Bhulauram, PW-2, as the evidence was required to be appreciated

as a whole, which clearly spelt out that the plaintiff's witnesses had clearly stated that the disputed tank was not subjected to partition. Further submission is that the judgment of learned lower appellate Court suffers from perversity and patent illegality in as much as the learned lower appellate Court has relied upon upon the entries made in the Revenue records (Kishtabandi Khatoni) produced by the defendant, which records the name of Adalat along with other shareholders. Thus, except oral evidence, the defendants could not come out with any clinching evidence of partition of tank and as the plaintiff had led abundance of evidence both oral as well as documentary that the tank continued to be remained in joint possession and enjoyment of the plaintiffs, the learned lower appellate Court was not justified in reversing the judgment passed by the learned trial Court.

13. None has appeared on behalf of the defendant for the reasons stated hereinabove.

14. The plaintiffs in their pleading have pleaded that the disputed tank ad-measuring 14.83 acres belonged to joint family property and it was prepared by the forefathers of the plaintiffs and defendant. This pleading that the tank was prepared by the forefathers of plaintiffs and defendant, as such it was the joint family property, has not been disputed by the defendant. However, the case of the defendant has been that the tank was subjected to partition. According to the defendant, oral partition had taken place in the year 1955-56 and partition of holding in revenue records was affected in the year 1970. Though, the plaintiffs did not make out any pleading with regard to other properties and confined its case only to the disputed tank, in their evidence, Bihari, PW-1 deposed that except pond, all other joint properties were partitioned amongst the shareholders. He deposed that the tank continued to remain as joint family

property and all the shareholders continued to jointly enjoy irrigation rights. Bhulauram, PW-2 has also deposed that the disputed tank is joint family property, though some of the agricultural lands near tank have been sold by them.

15. It thus appears that though in the plaint, the plaintiffs did not aver regarding any other joint family property and confined its case, reliefs and pleadings only in respect of the disputed tank, in their evidence, they have deposed by plaintiff-Bihari that partition of joint family property except tank has taken place in the past. However, the case of the defendant has been that a partition of all the properties including tank had taken place in the year 1954-55.

16. The learned lower appellate Court has recorded a finding that if the plaintiffs came out with the case that there was a partial partition and tank continued to be joint family property, the initial burden was on the plaintiffs to prove that the tank continued to be joint family property and it was not burden on the defendant to prove otherwise. For this purpose, the learned lower appellate Court has placed reliance upon the judgments in the case of ***Jumma vs. Abu and others, AIR 1926 Nagpur 301, Ramnagina Sah and others vs. Harihar Sah and others, AIR 1966 Patna 179, Bishesharnath vs. Mansingh, 1967 MPLJ, Notes of Cases 22 and Nira Dei vs. Sadasiba Mahanta and others, AIR 1974 Orissa 165.***

The aforesaid four decisions clearly settle legal proposition that where the plaintiffs admit that the partition was partial and some property remained joint family property, the burden will be on the plaintiffs to prove this fact. However, after reading the judgment of learned trial Court, it cannot be said that the plaintiff's suit was decreed only on the basis that the burden was on the defendant, which he failed to discharge, therefore, the plaintiff's case is

established. The learned trial Court, in addition to rely upon the oral evidence, also relied upon the large number of documents filed by the plaintiffs, in which, the disputed tank was recorded jointly in the name of joint holders and not in the name of defendant-Adalat. It also relied upon that the Shartnama, the written document, Ex.P-4 signed by number of shareholders including the defendant-Adalat, which shows that the disputed tank was admitted to be joint family property.

17. Ex.P-1, Ex.P-2. Ex.P-3, Ex.P-5 to Ex.P-15 all are old revenue records in respect of the period between 1909-10 to 1926-28, wherein the property including land submerged under the tank has been recorded in the name of shareholders. These are old documents and there is no reason to disbelieve these revenue records. It is, therefore, clear that the disputed tank was situated on the lands which were joint family property. This has also been admitted by all the parties. The plaintiffs have also produced Shartnama, Ex.P-4 executed on 26-04-1960, in which, the holders, including Adalat have acknowledged their joint needs in all action by giving specific reference to land forming part of tank. Ex.P-16 to P-18 are copies of proceedings and order of revenue case, wherein notices were issued to Adalat in the matter of application for recording tank as village tank. The written reply and statement of Adalat is that the tank has been recorded in the name of Adalat and other shareholders. The plaintiffs have also led documentary evidence, Ex.P-9, which is Nistar Patrak of Village Chakarbhata, which jointly records the name of Shiv Prasad and Nakchhed, who are sons of Dharati. However, it does not show as to when these entries were made.

18. The documentary evidence led by the plaintiffs clearly proved that the land underlying the tank were recorded jointly in the name of shareholders of

the family of the plaintiffs and defendants. Moreover, Ex.P-4, which is the document of year 1960 also contains acknowledgment of number of shareholders including the defendant Adalat regarding jointness in the use of tank.

19. The evidence of Bihari, PW-1 is that the tank continued to be in joint ownership.

20. The defendant's case rests only on oral evidence of the defendant that the entire property was partitioned in the year 1955-56 and it included the disputed tank also. In the year, 1970, the partition of holdings was also recorded in the revenue records. However, the defendant has not come out with any documentary evidence of partition in the year 1970. The defendant's witness No.2 admits that the water of the pond is used by others for agricultural purposes. In his cross-examination, he says that he does not know whether pond has been partitioned or not.

21. As against clinching documentary evidence in the form of Revenue Records (Kishtabandi Khatoni) since 1909-10 and document of acknowledgment in Shartnama, Ex.P-4. filed by the plaintiffs, the defendant did not produce any document and his case rested only on oral evidence.

22. The learned lower appellate Court recorded a finding of partition of tank between the parties mainly on the basis of the evidence of Bihari, PW-1, Bhulauram, PW-2 and the entries made in the Kishtabandi Khatoni of the year 1995-96 and record of rights. According to the learned lower appellate Court, the oral evidence led by the plaintiff himself and the revenue records produced by the defendant proved partition of joint family property and that the tank fell to the share of the defendant. However, this Court finds that the finding in this regard is perverse and suffers from patent illegality as it is based on misleading

of the oral as well as documentary evidence both. The evidence of Bihari, PW-1, is that though, other properties were partitioned, the tank continued to be joint family property. This cannot be said to be admission on the part of the plaintiff that the entire property including tank was also partitioned. The evidence of plaintiffs, read as whole is that, though, other properties were partitioned, the tank continued to be in joint possession of the parties, which was being used for nistari and irrigation purposes.

The evidence of Bhulauram, PW-2 has been read in isolation to record a finding that the Bhulauram, PW-2 has admitted partition of the property in dispute i.e. tank. Bhulauram, PW-2 has deposed in his evidence that the disputed tank continues to be joint family property. Though, he states that the partition had taken place, but the disputed tank was not given in partition. Shiv Prasad was the father of defendant No.1-Adalat. Therefore, the evidence of the aforesaid witness cannot be said to be admission of the fact by the plaintiffs that the entire property including tank was also partitioned. Thus, the finding of the learned lower appellate Court is based on misreading of the oral evidence.

23. The learned lower appellate Court has also recorded a finding of partition of tank, relying upon the revenue records of Kishtabandi Khatoni and records of rights produced by the defendant. It is found that these two documents were not admitted in evidence during trial, though the defendant produced these documents. These documents are certified copy of Kishtabandi Khatoni and B-1 and record of rights. In these documents also, it has been recorded as "Adalat valda Shiv Prasad, Jati-Jayasawal, Sahbhagi, Sakin Chakarbhata". The record of rights recorded the name of Shiv Prasad along with other shareholders and Kishtabandi Khatoni recorded the name of Adalat and other shareholders. These documents by no stretch of imagination, can be read as document

evidencing that upon partition, it was recorded exclusively in the name of Adalat. These documents on the other hand, supported the plaintiff's case that the tank was recorded jointly in the name of Adalat and Shiv Prasad and other shareholders. Thus, finding of the learned lower appellate Court is clearly perverse and suffers from patent illegality. The learned lower appellate Court has also acted perversely in ignoring the Missal records and the Shartnama, Ex.P-4 filed by the plaintiffs that the tank continued to be in joint possession.

24. In the absence of defendant having come out with any record of partition of holdings, the learned lower appellate Court was wholly unjustified in law in reversing the finding of the learned trial Court.

25. In the result, the appeal is allowed with costs. The impugned judgment and decree passed by the learned lower appellate Court is set aside and the judgment and decree passed by the learned trial Court is restored. Let appellate decree be drawn accordingly.

SD/-
(Manindra Mohan Shrivastava)
JUDGE