

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR**Judgment reserved on 10.5.2019****Judgment delivered on 21.6.2019****First Appeal No.56 of 2002**

1. Kishun Yadu S/o Narsingh Yadav Aged About 32 Years R/o Village Charauda, Tahsil And District- Raipur, Chhattisgarh.
2. Smt. Gwalin (Died) Deleted
3. Narsingh (Died) Through Legal Heirs
 - 3(a) Krishlal S/o Late Shri Narsingh Yadav Aged About 57 Years R/o Village Khuteri, Tahsil And District- Raipur, Chhattisgarh.
 - 3(b) Ram Ashray S/o Late Narsingh Aged About 54 Years R/o Village Khuteri, Tahsil And District- Raipur, Chhattisgarh.
 - 3(c) Bimla W/o Manharan D/o Late Narsingh Yadav, R/o Village Tilda, Abhanpur, District- Raipur, Chhattisgarh.
 - 3(d) Kamla W/o Keshav R/o Gorbhant, Tahsil Arang, District-Raipur, Chhattisgarh.
 - 3(e) Ramla D/o Late Narsingh Yadav R/o Village Tilda, Tahsil Abhanpur, District- Raipur, Chhattisgarh.
 - 3(f) Nirmala Bai W/o Balla D/o Late Narsingh Yadav, R/o Village Sakri (Baradera), Tahsil And District- Raipur, Chhattisgarh.
 - 3(g) Puna Bai Wd/o Late Narsingh R/o Village Khuteri, Tahsil And District- Raipur, Chhattisgarh.

---- Appellants**Versus**

1. Smt. Prembati, age 35 years Wd/o Vishram Yadu Agriculturist, R/o Raipura, Tahsil And District- Raipur, Chhattisgarh.
2. Krishna Kumar S/o Kartikram Sahu Agriculturist, R/o Village Charauda, Tahsil And District- Raipur, Chhattisgarh.
3. Pawan Kumar Sahu S/o Kartikram Sahu Agriculturist, R/o Village Charauda, Tahsil And District- Raipur, Chhattisgarh.
4. Nandkumar Sahu S/o Kartikram Sahu R/o Village Charauda, Tahsil And District- Raipur, Chhattisgarh.
5. State Of Madhya Pradesh (Now State Of Chhattisgarh) Through Collector, Raipur, Chhattisgarh.

---Respondents

For the appellants : Shri Sudhir Verma, Advocate
For respondent No.1 : Shri VK Sharma, Advocate
For respondent No.5/State : Shri Afroj Khan, Panel Lawyer

Hon'ble Shri Justice Ram Prasanna Sharma

CAV Judgment

1. This appeal is preferred against judgment and decree dated 31.01.2002 passed by Fourth Additional District Judge Raipur, (CG) in a Civil Suit No.46A/2001 wherein the said Court decreed the suit filed by respondent No.1/plaintiff and declared her 1/3 share in the property mentioned in Schedule 1 & 2 of the plaint and further declared the sale deed executed in favour of respondents 2 , 3 & 4 by appellant Kishun Yadu is void.

2. The land in dispute is situated at village Charoda PH No.145 Nawapara Tah & Distt. Raipur and it is mentioned in Schedule I of the plaint with survey numbers and area 7.991 hectare and house and barn mentioned in Schedule II of the plaint situated in same village Charoda. The property was owned by one Maniram who had three daughters namely Soni Bai, Rahi Bai and Sonmat Bai. Soni Bai died without successor and Rahi Bai had one son namely Gwal and one daughter namely Gwalin Bai. Gwalin Bai died without successor and respondent No.1 Prembati is the sole daughter of Gwal. Sonmat Bai has one son namely Narsingh Yadav who died leaving behind three sons namely Kisun Yadav, Krishlal and Ram Ashray and five daughters namely

Bimla, Kamla, Ramla, Nirmala and Puna Bai, in all eight successors who are the appellants in the present appeal. Respondent No.1 Prembati/plaintiff filed civil suit for declaration, partition and separate possession in relation to agricultural land and house described in Schedule I & II of the plaint. She claimed her share and again claimed that judgment and decree passed in Civil Suit No.61A/87 was not binding upon her as late Soni Bai did not execute any will in favour of appellant Kishun. She also claimed that sale deed in relation to Survey No.28 area 1.39 hectare executed by appellant Kishun in favour of respondents 2, 3 & 4 is not binding upon her. As per the appellants, partition had already taken place and in the said partition, respondent No.1 had received agricultural land in village Govinda as her share. It is contended on behalf of the appellants that earlier suit No.61A/87 was contested by respondent No.1, therefore, finding in the said suit is binding on her.

3. Learned counsel for the appellants submits as under:

(i) The trial Court has wrongly decided the share of respondent No.1 because she is not entitled for 1/3 share which was allotted by the trial Court.

(ii) The trial Court has not framed any issue of question of fraud being played upon the Court to obtain decree in Civil Suit No.61A/87, therefore decree in the said suit is binding on respondent No.1.

(iii) The trial Court has wrongly determined that will deed executed on 22.02.83 has not been proved. Therefore, finding of the trial Court is liable to be reversed.

4. On the other hand, learned counsel for the respondent No.1 submits that Soni Bai did not execute any will in favour of appellant Kishun and will is not proved as per provisions of Section 63C of the Indian Succession Act, 1925, therefore, finding of the trial Court on this count is not liable to be interfered with. As Soni Bai died without successor, other two daughters of Maniram namely Rahi Bai and Sonmat Bai are the successors of Maniram and each branch will get $\frac{1}{2}$ share in the property in question. Rahi Bai left behind her son Gwal and one daughter Gwalin Bai. Gwalin Bai died without successor, therefore, Prembati who is the sole successor of Gwal will get $\frac{1}{2}$ share in the property in question. Narsingh was the sole son of Sonmat Bai, therefore his three sons and five daughters who are the appellants in the present appeal will get $\frac{1}{2}$ share of Narsingh. Therefore, decree is liable to be modified and respondent No.1 Prembati/plaintiff will get $\frac{1}{2}$ share in the whole property. As the property is not divided between the share holders, therefore, appellant Kishun was not entitled to alienate any specific portion of the land therefore, sale deed executed by him for specific portion of the land i.e. Survey No.28 area 1.39 hectare is beyond the right of Kishun therefore, said sale deed is not binding on Prembati.

5. Admittedly, late Maniram was the sole owner of the property in question. Now the point for consideration is as to how many

successors of Maniram will get his property which is the subject matter of the suit. Maniram left behind him three daughters namely Soni Bai, Rahi Bai and Sonmat Bai. Soni Bai died without successor. Rahi Bai has one son Gwal and one daughter Gwalin Bai. Gwalin Bai died during the pendency of the appeal leaving no successor. Gwal also died leaving his successor namely Prembati who is respondent No.1/plaintiff in the present case. Sonmat Bai left behind her son Narsingh as her successor who passed away during the pendency of the appeal and appellant No.1 and appellants 3(a) to 3(g) are his legal representatives. On the entire evidence, pedigree is not under challenge, therefore, respondent No.1 Prembati who is the only successor of branch of Rahi Bai will get $\frac{1}{2}$ share and appellants 1 and 3(a) to 3(g) being successors of Sonmatbai will get $\frac{1}{2}$ share in the property in question.

6. It is contended on behalf of the appellants that Soni Bai executed will in favour of appellant Kishun, therefore, he will get the share of Soni Bai. The said will is Ex-P/10 produced before the trial Court. In the said will four persons namely Samarulal, Dayadas Kotwar, Pyariram Panch and Panchu Ram are mentioned as attesting witnesses. Only Panchu Ram (DW-2) was examined before the trial court by the appellant for proving the will. Other attesting witnesses namely Jhannulal (PW-2), Dayadas (PW-3), Pyarelal (PW-4) have been examined by respondent No.1/plaintiff. All the three attesting witnesses clearly stated that documents Ex-P/10 was not written as will but it is a

document which was written after the death of Soni Bai and it was written for mutation of others names in the property in question. As three attesting witnesses have specifically stated before the trial court that no will was executed by Soni Bai and the document was executed after her death, therefore, version of Panchu Ram regarding will is clearly rebutted by these witnesses and execution of the will by Soni Bai is not established. Therefore, the trial Court was right in holding that no will is executed by Soni Bai in favour of appellant Kishun Yadu. There is no record of partition produced before the trial Court. Record of Rights (Ex-P/5 to Ex-P/8) goes to show that the property was in joint possession and it was recorded in the names of Prembati, Gwal, Gwalin and Narsingh. It is not proved by the appellants before the trial Court that which land is allotted to him on the date of partition and which land is allotted to other share holders. In absence of evidence regarding partition, the trial Court is right in holding that no partition took place between the parties and the property is still a joint property. When the property is joint property, all the share holders have right in every part of the property and no share holder can alienate any specific portion of the land. Share holders can alienate his own undivided interest and the purchaser will get right of the partition but the fact remains that in the present case appellant Kishun sold specific portion of the land which is beyond his right, therefore, the trial Court is right in holding that sale deed executed in favour of respondents 2 to 4 is not binding on

respondent No.1/plaintiff. The arguments advanced on behalf of the appellants' side is not sustainable.

7. Now only two branches are existing for partition. One branch is of Rahi Bai and another branch is of Sonmat Bai. Respondent No.1/plaintiff is the sole successor of Rahi Bai. She will get $\frac{1}{2}$ share in the whole property in question. Appellant No.1 and 3(a) to 3(g) being successors of Sonmat Bai will jointly get other $\frac{1}{2}$ share in the property in question. Accordingly, the decree is liable to be modified upto that extend. Appeal filed by the appellant is liable to be dismissed but the decree is liable to be modified.

8. Accordingly, dismissing the appeal the decree is modified in favour of respondent No.1/plaintiff Prembati and against appellants as under:

(i) Respondent No.1/plaintiff Prembati will get $\frac{1}{2}$ share in the property mentioned in Schedule I (Ex-P/6) and Schedule II of the plaint. Schedule I & II of the plaint shall be the part and partial of the decree.

(ii) Appellant No.1 and appellants 3(a) to 3(g) will jointly get $\frac{1}{2}$ share in the property mentioned in Schedule I & II of the plaint.

(iii) Sale deed executed by appellant No.1 in favour of respondents 2 to 4 for Survey No.28 area 1.39 hectare is not binding on respondent No.1/plaintiff.

(iv) The purchaser has right to file suit for partition between the share holders and they will get property which comes under the share of appellant Kishun.

(v) Decree passed in Civil Suit No.61A/1987 dated 27.01.88/01.02.1988 is not binding on respondent No/1/plaintiff Prembati.

(vi) Actual partition of the land shall be done by revenue authority and partition of house and barn shall be done by Commissioner appointed by the Executing Court.

(vii) The parties to bear the cost of the suit throughout.

(viii) Pleader's fee, if certified be calculated as per certificate or as per schedule whichever is less.

(ix) A decree be drawn up accordingly.

Sd/-
(Ram Prasanna Sharma)
JUDGE