

HIGH COURT OF CHHATTISGARH, BILASPUR**Second Appeal No.460 of 2006****Judgment reserved on :12.12.2019****Judgment delivered on:19.12.2019**

Chandrika Prasad (Dead) through LR's

1. Tirath Kumar Mishra, S/o. Late Chandrika Prasad, aged about 49 years,
2. Yatindra Kuamr Mishra, S/o. Late Chandrika Prasad, aged about 47 years,
3. Anurag Mishra, S/o. Late Dharmendra Kumar Mishra, aged about 22 years,

All above are R/o. House No.13/415, R.S. Shukla Chowk, Near Fountain, Nayapara, Raipur, District Raipur (CG)

----- Appellants/LR's of Plaintiff**Versus**

Ghanika Prasad (Dead) through his LR's

1. Ravi Shankar S/o Late Ghanika Prasad, aged about 35 years,
2. Bala Shankar S/o Late Ghanika Prasad, aged about 32 years,

Both above are R/o. Bhagirathi Mandir, Near Fountain Square, Nayapara, Raipur, Distt. Raipur (CG)

3. Smt. Asha W/o Ashok Dubey, D/o Late Ghanika Prasad, aged about 48 years, R/o Village Badagaon (Basni), Distt. Varanasi (U.P.)
4. Smt. Reeta W/o Tara Pathak D/o Late Shri Ghanika Prasad, aged about 39 years, R/o village Kanuwani Tahsil Keraket, District Jaunpur (U.P.)

----- Respondent/LR's of Defendant

For Appellants/ LR's of Plaintiff:

Mr. Manoj Paranjape, Advocate

For Respondents/LR's of defendant:

Ms Savita Tiwari, Advocate

Hon'ble Shri Justice Sanjay K. Agrawal

C.A.V. Judgment

1. The substantial question of law involved, formulated and to be answered in this plaintiff's second appeal is as under:-

"Whether in the light of the judgment of the Supreme Court in D.K. Lakshmaiah and another Vs. L. Balasubramanyam and another 2003 AIR SCW 4247, both the Courts below have erred in shifting the burden of proving that the suit property was purchased by Brij Mohan out of his self acquired property on the appellant/plaintiff by drawing a presumption of jointness of the suit property in favour of the respondent/defendant on the ground that there was no partition between the parties who were living jointly?"

[For the sake of convenience, parties would be referred hereinafter as per their status shown and nomenclature in the suit before the trial Court].

2. The plaintiff filed a suit stating inter-alia that the suit property bearing House No.415 situated at Nayapara, Raipur was purchased by his father Brijmohan from Smt.Idanbi, Mohammed Yakub, Mohammed Khalil and Mohammed Habib vide registered sale deed dated 29.1.1946 (Ex.P-1) and since he was a need of

money, therefore, he sold some portion of the suit house to one Smt.Rajrani and rest of the portion was in his possession. His father died in the year 1961-62 and his brother came in possession of the suit house and started paying tax. It was further pleaded that the plaintiff and the defendant are relatives and the defendant was working in Municipal Council, therefore, he needed house for residential purpose and looking to the difficulty of the defendant, the plaintiff gave one room admeasuring 88 foot situated at first floor to the defendant as licensee and he is residing in the said room. The defendant while taking room as licensee gave assurance that he will vacate the room whenever the plaintiff require the suit room. It is submitted that the plaintiff retired from service in the year 1970-71 and he needed the suit property as his sons were married and therefore, the room was required and he requested the defendant to hand over the possession, leading to filing of the instant suit for possession based on title.

3. The defendant filed his written statement and denied the averments made in the plaint stating inter-alia that the plaintiff and the defendant are members of joint Hindu family property and it was purchased by

Baijnath Mishra out of income of joint Hindu family and father of the plaintiff was only residing with Baijnath Mishra to look after the religious activity of the temple and has never resided in the suit house. It was further pleaded that two more house were purchased by Baijnath Mishra out of income of joint Hindu family in the name of his nephews namely Jamuna Prasad and Brijmohan Prasad (father of the plaintiff) and since then father of the defendant was residing in those house as joint owner because it was joint Hindu family property and no partition of entire properties of Baijnath Mishra had taken place, therefore, the suit property cannot be considered as self-acquired property of the plaintiff. Counter-claim was also made by the defendant holding that the suit property was purchased by grandfather of the plaintiff and the defendant namely Baijnath Mishra out of joint Hindu family income, therefore, the defendant has right over the suit property. It was also pleaded that the plaintiff be precluded from evicting the defendant from the suit property and decree of permanent injunction be granted in his favour and the suit property be declared as joint Hindu family property.

4. The trial Court after appreciation of oral and documentary evidence available on record, by its judgment and decree dated 31.3.2006, dismissed the suit and allowed the counter-claim filed by the defendant and held that the suit property was joint Hindu family property and further held that since no partition had taken place between the father of the plaintiff and father of the defendant, therefore, sale deed dated 29.1.1946 (Ex.P-1) executed by Smt.Idanbi, Mohammed Yakub, Mohammed Khalil and Mohammed Habib in favour of father of the plaintiff is presumed to be executed in favour of joint Hindu family. Consolidated appeal was filed by the plaintiff before the first appellate Court. The said Court dismissed the appeal, against which, this second appeal under Section 100 of the CPC has been filed by the appellant/plaintiff, in which substantial question of law has been formulated, which has been set out in the opening paragraph of this judgment.

5. Mr.Manoj Paranjape, learned counsel for the appellants/legal representatives of the plaintiff, would submit that both the Courts below have concurrently erred in decreeing the counter-claim filed by the defendant holding that the suit

property purchased by his father Brijmohan from Smt.Idanbi, Mohammed Yakub, Mohammed Khalil and Mohammed Habib vide registered sale deed dated 29.1.1946 (Ex.P-1) was joint Hindu family property and further erred in holding that since no partition had taken place between father of the plaintiff and father of the defendant and they were living together, it will be presumed that the suit property is joint Hindu family property and wrongly placed burden upon the plaintiff to prove that the property was purchased by Brijmohan out of his own income. He relied upon the judgment of the Supreme Court in the matter of **D.S. Lakshmaiah v. L. Balasubramanyam**¹, as such, judgment and decree of both the Courts below deserve to be set aside by dismissing the counter-claim.

6. Mr. Savita Tiwari, learned counsel for the respondents/legal representatives of the defendant, would submit that both the Courts below have rightly held that the suit property was joint Hindu family property purchased by the plaintiff's father out of income of joint family property, as such, concurrent finding recorded by two Courts below is finding of fact based on evidence available on record, which is neither perverse nor contrary to record and as such,

¹ (2003) 10 SCC 310

the appeal deserves to be dismissed.

7. I have heard learned counsel for the parties and considered their rival submissions made herein-above and also went through the records with utmost circumspection.

8. In order to consider the plea raised at the Bar, it would be appropriate to notice pertinent decisions in this regard.

9. The Supreme Court in the matter of Srinivas Krishnarao Kango v. Narayan Devji Kango and others²

has held that proof of the existence of a joint family does not lead to the presumption that property held by any member of the family is joint.

It was observed as under:-

"8....Proof of the existence of a joint family does not lead to the presumption that property held by any member of the family is joint, and the burden rests upon anyone asserting that any item of property was joint to establish the fact. But where it is established that the family possessed some joint property which from its nature and relative value may have formed the nucleus from which the property in question may have been acquired, the burden shifts to the party alleging self-acquisition to establish affirmatively that the property was acquired without the aid of the joint family property....."

10. In the matter of Mudi Gowda Gowdappa Sankh

(supra) the Supreme Court has held that there is no

presumption that merely because the family is joint so the property is also joint. So the person alleging the property to be coparcenary property must prove it. But if it is shown that there was a nucleus of the joint family property then any acquisition by its aid by a member is joint property. It was observed as under:-

"6..... This is however subject to the limitation that the joint family property must be such as with its aid the property in question could have been acquired. It is only after the possession of an adequate nucleus is shown, that the onus shifts on to the person who claims the property as self-acquisition to affirmatively make out that the property was acquired without any aid from the family estate....."

11. In the matter of Mudi Gowda Gowdappa Sankh (supra), the Supreme Court relied upon the ratio of Privy Council judgment in Randhi Appalaswami v. Randhi Suryanarayanamurti & Others³ and held as under:

"...Proof of the existence of a joint family does not lead to the presumption that property held by any member of the family is joint, and the burden rests upon anyone asserting that any item of property was joint to establish the fact. But where it is established that the family possessed some joint property which from its nature and relative value may have formed the nucleus from which the property in question may have been acquired, the burden shifts to the party alleging self-acquisition to

3 ILR 1948 Mad 440 (PC)

establish affirmatively that the property was acquired without the aid of the joint family property."

12. Likewise, in the matter of D.S. Lakshmaiah and another v. L. Balasubramanyam and another⁴ the Supreme Court relied upon its earlier decisions in this regard and held as under:-

"18. The legal principle, therefore, is that there is no presumption of a property being joint family property only on account of existence of a joint Hindu family. The one who asserts has to prove that the property is a joint family property. If, however, the person so asserting proves that there was nucleus with which the joint family property could be acquired, there would be presumption of the property being joint and the onus would shift on the person who claims it to be self-acquired property to prove that he purchased the property with his own funds and not out of joint family nucleus that was available."

13. The Supreme Court in the matter of Rangammal (supra) has held that in a suit for partition only joint family property has to be included by holding as under:-

"45. It hardly needs to be highlighted that in a suit for partition, it is expected of the plaintiff to include only those properties for partition to which the family has clear title and unambiguously belong to the members of the joint family which is sought to be partitioned and if someone else's property meaning thereby disputed property is included in the schedule of the suit for partition, and the

4 (2003) 10 SCC 310

same is contested by a third party who is allowed to be impleaded by order of the trial court, obviously it is the plaintiff who will have to first of all discharge the burden of proof for establishing that the disputed property belongs to the joint family which should be partitioned excluding someone who claims that some portion of the joint family property did not belong to the plaintiff's joint family in regard to which decree for partition is sought."

14. Reverting to the facts of the present case in the light of legal position noticed hereinabove, it is quite vivid that the suit property was purchased by the plaintiff's father vide Ex.P-1 on 29.1.1946. The suit was filed by the plaintiff that he has licensed one room to the defendant for temporary period for staying, which he is not vacating despite request, in which the defendant set up a plea of suit property being joint family property of their family stating that it was purchased by late Shri Baijnath Mishra from the income of joint family for collective use of all his family members and relatives and all the properties of them are joint, as partition has not been taken place of their joint family properties, as such, the suit house is all their joint family property. The trial Court held that it was purchased from the income of joint family as it is proved that there is no partition

between the plaintiff & the defendant and between their father & grandfather and they were living jointly, therefore, there is presumption that the suit property has been purchased from joint family income and the plaintiff has failed to prove that it was purchased from his own income. The said finding stood affirmed by the first appellate Court.

15. The suit property was admittedly purchased by the plaintiffs father Brijmohan Mishra way back on 29.1.1946 (Ex.P-1) and he was duly recorded in municipal records and thereafter it came to be recorded in original plaintiff's name. The defendant pleading and taking a defence that the suit property is joint family property purchased from income of joint family was required to plead and establish that joint family of them had a nucleus and out of that money the suit house was purchased by the joint family, therefore, it is joint family property, but both the Courts below have placed the burden on the plaintiff to prove the said fact and held that he has failed to establish that Brijmohan Mishra had separate earnings and his father had sufficient money to purchase the suit property, therefore, it is joint family property of the parties. Both the Courts below have also got impressed from the fact

that partition has not taken place between the parties and they are still joint and tax of the suit property is being deposited by the defendant, therefore, the suit property is joint family property. Both the Courts below are absolutely unjustified in placing reverse burden of proof on the plaintiff to establish that the plaintiff's father purchased it from his own income and had money for purchase the same. It is well settled law that a member of coparcenary can have his separate property though the family is still joint and having joint family property.

16. Both the Courts below committed legal error in directing and placing burden upon the plaintiff to prove that his father purchased the suit property from his own income and thereby held that the plaintiff has failed to establish the said fact and followed that since there was not partition among them, therefore, the suit property is joint family property, rather it was burden on the part of the defendant to plead and establish that joint family had a nucleus and out of that nucleus the suit property was purchased and therefore, it is joint family property of them. The defendant has failed to do so, as such, finding recorded by two Courts below

is perverse and liable to be set aside. It is held that the defendant has failed to establish that the suit house is joint family property of the plaintiff and the defendant. The substantial question of law is answered in favour of the plaintiff and against the defendant.

17. Accordingly, the judgment and decree of both the Courts below deserve to be and are hereby set aside and decree granted by two Courts below allowing the counter-claim that the suit house is the joint family property of the parties and the defendant has ownership over the suit house and decree of permanent injunction is set aside and accordingly, counter-claim would stand dismissed.

18. The second appeal is partly allowed to the extent indicated herein-above leaving the parties to bear their own cost(s).

19. A decree be drawn up accordingly.

Sd/-

(Sanjay K. Agrawal)
Judge

B/-