

HIGH COURT OF CHHATTISGARH, BILASPUR**Second Appeal No. 261 of 2006**

Remish (dead) through LR's

1. Manohar Kerketta, aged about 41 years, S/o Late Ramish Kerketta
2. Rajmani Kuldeep Kerketta, aged about 37 years, S/o Late Remish Kerketta
3. Neelam Prabhakar Kerketta, aged about 31 years, S/o Late Remis Kerketta
4. Ajay Kumar Kerketta, aged about 25 years, S/o Late Remish Kerketta,
5. Kamal Kerketta, aged about 19 years, S/o Late Remish Kerketta.
6. Theyodra Khalkho, aged about 63 years, wife of Late Remish Kerketta
7. Ku. Abhay Kerketta, aged about 29 years, Daughter of Late Remish Kerketta.

All R/o Kunkuri, Tahsil Kunkuri, District Jashpur (C.G.)

---- Appellants/Plaintiffs

Versus

1. Mst. Margrate, widow of Late Edward, aged 56 years.
2. Smt. Kesensia, Daughter of Late Edward, wife of Libunus, aged 36 years,
3. Smt. Amiya, Daughter of Late Edward, wife of Asit, aged 33 years.
4. Smt. Madhu, Daughter of Late Edward, wife of Pradeep, aged 30 years,
5. Ku. Rashmi, Daughter of Late Edward, wfe of Pradeep, aged 30 years.

All by caste Uraon, Religion Christian, resident of village Kunkuri, District Jashpur (C.G.)

6. State of Chhattisgarh, Through Collector Jashpur, District Jashpur (C.G.)

---- Respondents/defendants.

For Appellant	:	Mr. H.B. Agrawal, Senior Advocate assisted by Mrs. Prabha Sharma, Advocate.
For Respondents No. 1 to 5	:	Mr. A.K. Prasad, Advocate.
For Respondent No. 6	:	Mr. Ravi Kumar Bhagat, Dy. Govt. Advocate.

Hon'ble Shri Justice Sanjay K. Agrawal

Judgment On Board

19/08/2019

(1) The substantial questions of law involved, formulated and to be answered in this plaintiffs' second appeal state as under:

“1. Whether the First Appellate Court was justified in decreeing the counter claim filed by defendants No. 1 to 5 by recording a finding which is perverse and contrary to the record ?

2. Whether the First Appellate Court justified in decreeing the counter claim without payment of court fee in such counter claim ?

3. Whether the First Appellate Court was justified in dismissing the suit of the plaintiffs by recording a finding which are perverse to the record ?

(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 parties are Uraon tribe by caste and are governed by their own custom prevalent among them. The suit property was originally held by Johan. He had two sons namely Reshim, plaintiff herein and Adverd. Defendants are the widow, sons and daughter of late Adverd. Plaintiff filed a suit stating inter alia that in the Uraon tribe, married daughters do not get share in the property of their father and only widow and unmarried daughter are only having right of maintenance/livelihood, as such, the plaintiff is entitled for

declaration of title on the entire suit property i.e. Khasra No. 10, area 10.391 hectares.

(3) The defendants, by filing written statement, denied the plaint allegations stating the partition has already been effected by the revenue court and they are entitled for half share in the suit property and they also preferred counter claim on the suit property.

(4) The trial Court, after appreciating the oral and documentary evidence available on record, held that plaintiff is exclusive title holder of the suit property and did not pass any order with regard to counter claim preferred by the defendants.

(5) Defendants No. 1 to 5 preferred first appeal thereagainst. The said Court allowed the appeal in part and held that defendants are entitled for $\frac{1}{2}$ share in the suit property and also partly decreed the counter claim, against which this second appeal under Section 100 of the CPC has been preferred by the appellants/plaintiffs, in which, substantial questions of law have been formulated and set out in the opening paragraph of this judgment.

(6) Shri H.B.Agrawal, learned Senior counsel appearing for the appellants/plaintiffs would submit that the first appellate Court having held that defendants No. 1 and 5 are only right to maintenance in the suit property and thereafter it could not have partly allowed the suit. He would further submit that no court fee on counter claim was paid by the defendants before by the trial Court and, therefore, the first appellate Court was absolutely unjustified in granting counter claim and the finding are perverse and contrary to the record.

(7) On the other hand, counsel for respondents No. 1 to 5 would support the impugned judgment and decree.

(8) I have heard learned counsel appearing for the parties, and considered their rival submissions made hereinabove and went through the record with utmost circumspection.

(9) The trial Court, by its impugned judgment & decree, has held that plaintiff is exclusive title holder of the suit land as the married daughter do not get share over the property of their father and widow and unmarried daughter have only right to maintenance, which the first appellate has also accepted and granted decree in favour of defendant No. 1- widow and defendant No. 5-unmarried daughter on the ground that they have right to maintenance and thereafter granted decree in their favour. Thus, both the courts below have concurrently held that the defendants No. 1 and 5 are having right to maintenance over the suit property and that finding has been challenged further by plaintiff by filing cross objection.

(10) The question for consideration is whether the first appellate Court was justified in granting decree in favour of defendants No. 1 and 5 by giving them $\frac{1}{2}$ of the share in the suit property.

(11) The Supreme Court in the matter of **Madhu Kishwar v. State of Bihar**¹ has held as under :-

“Traditionally and historically, the agricultural family is identified by the male head and this is what sections 7 and 8 of the Chhota Nagpur Tenancy Act, 1908 recognise. But on his death, his dependent family females, such as his mother, widow, daughter, daughter-in-law, granddaughter and others joint with him have, under Sections 7 and 8, to make way to a male relative within and outside the family of the deceased entitled thereunder, disconnecting them from the land and their means of livelihood. Their right to livelihood in that instance gets affected, a right constitutionally recognised, a right which the female enjoyed in common with the last male holder of the tenancy. It is in protection of that right to livelihood, that the immediate female relatives of the last male tenant have the constitutional remedy to stay on holding the land so long as they remain dependent on it for earning their

1 AIR 1996 SC 1864

livelihood, for otherwise it would render them destitute. It is on the exhaustion of, or abandonment of land by, such female descendants can the males in the line of descent take over the holding exclusively. In other words, the exclusive right of male succession conceived of in sections 7 and 8 of the Chhota Nagpur Tenancy Act, 1908 has to remain in suspended animation so long as the right of livelihood of the female descendant's of the last male holder remains valid and in vogue. It is in this way only that the constitutional right to livelihood of a female can interject in the provisions to be read as a burden to the intervening limited dependants/descendents under Sections 7 and 8 of the Chota Nagpur Tenancy Act, 1908. In this manner alone, and upto this extent can female dependents/descendents be given some succour so that they do not become vagrant and destitutes. This this extent, it must be so held.”

(12) In the matter of **Sukhmani and others v. Jagarnath**², the Madhya Pradesh High Court applying the principles of equity, justice and good conscience, finding no provision of law governing right to succession among Gond-caste held as under :-

“10. The trial Court had rightly held that the daughters are entitled to a share in the property of father in the Gond community and they along with Sonamati and the respondent succeeded to the property of Jatu. After the death of Sonamati half share of Sonamati was also transmitted to the appellants as there was no prohibition in law to succeed the property of their step-mother. In fact, sections 5 and 6 of the Central Provinces Law read together would show that in absence of any law governing the right to succession, the principles of equity, justice and good conscience shall apply.

11. For all these reasons, this Court comes to the conclusion that the appellants and the respondent are entitled to 1/6th share each in the suit property.”

(13) This Court in the matter of **Mst. Sarwango and others v. Mst. Urchamahin and others**³, applying Section 6 of the Central Provinces Laws Act, 1875, held that in absence of any law of inheritance or custom prevailing in Gond-caste, Courts are required to decide right according to justice, equity and good conscience and granted ½ share to daughters on the property left by their father. It was observed as under :-

“10. In the present case, both the parties have failed to prove any law of inheritance or custom prevailing in their Gond caste i.e. member of Scheduled Caste whom Hindu Law or other law governing inheritance is not applicable. In absence of any law of inheritance or custom prevailing in their caste governing the inheritance the Courts are required to decide the rights according to justice, equity and good conscience in term of Section 6 of the Act. Plaintiffs Sawango and Jaituniya are daughters of Jhangal, nearest relative rather the respondents, who were daughter-in-law of brother of Jhangal and legitimate or illegitimate son of Balam Singh, son of Dakhal.

11. In these circumstances, plaintiffs Sawango and Jaituniya would be the persons' best entitlement to inherit the property left by their father. The Courts below ought to have decreed the suit for partition to the extent of share of Jhangal, but the Court below i.e. the lower appellate Court has allowed the appeal and dismissed the suit in absence of any law or custom for inheritance for a member of Schedule Tribe. The Courts below are required to decide their rights of inheritance in accordance with the provisions of Section 6 of the Act applicable to the State of Chhattisgarh and undivided State of Madhya Pradesh.”

(14) In view of the decision rendered by the Supreme Court in ***Madhu Kishwar (Supra)***, High Court Madhya Pradesh in ***Sukhmani and others (Supra)*** and this Court in ***Mst. Sarwango (supra)***, it cannot be held that the defendants No. 1 & 5 are not entitled for share in the subject land held by their father and the arguments in this behalf is hereby

rejected. It is clarified that the plaintiff will be entitled for half share in the suit property i.e. Khasra No. 10, area 5.196 hectare. However, the question of court fee is concerned, admittedly the defendant did not pay court fee on the counter claim, which he has made before the trial Court and ultimately by order dated 29.04.2006, the appellate Court granted permission to make payment of court fee, which the defendant paid and it was affixed along with the written statement filed by the defendants before the trial Court and, thereafter, the first appeal preferred by defendants was considered and allowed.

(15) At this stage, learned counsel appearing for the appellant/plaintiff would submit that though it was allowed but in the first appeal, no court fee was paid with regard to the part of the decree, by which the counter claim of the defendants were rejected.

(16) Fact remains that the defendants had preferred substantive appeal before the first appellate Court challenging the grant of decree in toto in favour of the plaintiff, which the first appellate Court has modified holding that defendants No. 1 & 5 would be entitled for 1/2th share in the suit property. Even otherwise, the plaintiffs, who are challenging the counter claim granted by the first appellate Court, have not paid any court fee *qua* the grant of counter claim.

(17) In view of the aforesaid legal analysis, the second appeal is allowed in part. It is held that the plaintiff is entitled for half share in the suit property shown in Schedule "A" of the plaint and defendants No. 1 & 5 will be entitled for ½ share in the property shown in Schedule "A" annexed with the plaint and the same be made part of the decree. The parties shall bear their own costs.

(18) A decree be drawn up accordingly.

Sd/-
(Sanjay K. Agrawal)
Judge

