

HIGH COURT OF CHHATTISGARH, BILASPUR**Second Appeal No.466 of 2009****Judgment reserved on: 7-10-2020****Judgment delivered on: 25-11-2020****1. Dhanushram (Dead) Through Legal Representatives****1.1. Shravan Kumar, aged 32 yrs, S/o Dhanush Ram****1.2. Pawan Kumar, aged 30 yrs, S/o Dhanush Ram****1.3. Narendra Kumar, 28 yrs, S/o Dhanush Ram****1.4. Nand Kunwar, 60 yrs, Wd/o Dhanush Ram****All R/o Motiyaridih, Post Tarenga, Tahsil Simga, Distt. Baloda Bazar (C.G.)****2. Banshilal, Aged 50 years, S/o Jeedhan Yadu,****3. Sonkuwar (died and deleted)****(Defendants 1 to 3)
---- Appellants****Versus****1. Dwarika Prasad, Aged 48 years, S/o Jeedhan Yadu, R/o Motiyadih, Tah. Simga, Distt. Raipur (C.G.)****(Plaintiff)****2. State of C.G. Through Collector, Raipur (C.G.)****(Defendant No.4)
---- Respondents**

For Appellants: Mr. Manoj Paranjpe & Mr. Anurag Singh, Advocates.**For Respondent No.1: -****Mr. Dheerendra Pandey, Advocate.****For Respondent No.2 / State: -****Mr. Ravi Kumar Bhagat, Deputy Govt. Advocate.**

Hon'ble Shri Justice Sanjay K. Agrawal**C.A.V. Judgment**

- 1. Proceedings of this matter have been taken-up through video conferencing.**

2. This second appeal preferred by defendants No.1 to 3 / appellants herein was admitted for hearing by formulating the following substantial question of law: -

"Whether the first appellate court was justified in directing the reopening of partition on the ground of alleged allocation of unequal share in partition between the plaintiff and defendants by recording a finding, which is perverse to the record and contrary to the principles of law laid down by the Supreme Court in the matters of **Ratnam Chettiar and others v. S.M. Kuppaswami Chettiar and others¹ as well as **Apoorva Shantilal Shah, HUF v. Commissioner of Income Tax, Gujarat-1, Ahmedabad**²?"**

[For the sake of convenience, parties hereinafter will be referred as per their status shown in the suit filed before the trial Court and ranking given in that suit.]

3. The suit property was originally held by Jeedhan Yadu who had inherited the property from his father. He had three sons namely, Dwarika Prasad – plaintiff, Dhanushram – defendant No.1 and Banshilal – defendant No.2 and his widow was impleaded as defendant No.3 in the suit. Dwarika Prasad, one of the sons of Jeedhan Yadu, filed suit for declaration and permanent injunction stating inter alia that the suit property being the ancestral property at the hands of his father, though they are in possession of their respective shares and are in cultivating possession of the suit land separately and also living separately, but it has not been actually partitioned and their mother is living with defendants No.1 & 2, but despite no partition, defendants No.1 & 2 taking advantage of their political influence got their names mutated in the revenue records and order of partition dated 22-7-2004 was passed by the Tahsildar, Simga in which more fertile land and productive land has been

1 (1976) 1 SCC 214

2 (1983) 2 SCC 155

kept by defendants No.1 & 2 and less fertile land has been given to him in the partition proceeding and no reasonable opportunity of hearing was accorded to him, as such, the order of partition dated 22-7-2004 deserves to be set-aside and the suit land be partitioned in accordance with law and suitable arrangement be made in respect of the land reserved for defendant No.3.

4. Resisting the suit, defendants No.1 & 2 filed their written statement stating inter alia that during the lifetime of Jeedhan Yadu, their father, the suit property was partitioned orally, but revenue records were not corrected, however, they were in cultivating possession of their respective shares and they are living separately, as such, partition has been effected in its letter and spirit and since revenue records were not corrected, proceeding under Section 178 of the Chhattisgarh Land Revenue Code, 1959 (for short, 'the Code') was initiated and after notice to the parties, order of partition dated 22-7-2004 has been passed which is strictly in accordance with law and therefore the suit deserves to be dismissed.
5. The trial Court upon appreciation of oral and documentary evidence available on record finding that partition has taken place between the plaintiff and defendants No.1 & 2 during the lifetime of their father Jeedhan Yadu, dismissed the suit which was reversed by the first appellate Court in the instance of first appeal preferred by the plaintiff holding that partition has taken place between the parties, but equal share has not been allotted to the plaintiff and therefore the partition made cannot be said be proper partition.
6. Feeling aggrieved and dissatisfied against judgment and decree

of the first appellate Court reversing the judgment and decree of the trial Court, this second appeal has been preferred by defendants No.1 to 3 in which substantial question of law has been formulated and set-out in the opening paragraph of this judgment.

7. Mr. Anurag Singh, learned counsel appearing for the appellants herein / defendants, would submit that there is overwhelming evidence available on record to hold that partition has taken place between the plaintiff and defendants No.1 & 2 during the lifetime of their father Jeedhan Yadu and they are in cultivating possession of their respective lands allotted to them and they are living separately pursuant to which on the basis of mutual partition already taken place, the Tahsildar had already passed the order of partition after noticing all the parties including the plaintiff, as such, that has become final and particularly, partition already effected can be reopened only on the ground of fraud, coercion, misrepresentation, undue influence etc., as held by the Supreme Court in Ratnam Chettiar (supra) and Apoorva Shantilal Shah (supra), as such, the judgment & decree of the first appellate Court deserve to be set-aside.
8. Mr. Dheerendra Pandey, learned counsel appearing for the plaintiff / respondent No.1 herein, would submit that the first appellate Court is absolutely justified in holding that partition made is unfair and suit land has not been divided separately and therefore it can be reopened and rightly set aside the judgment & decree of the trial Court and rightly directed for fresh partition in which no interference is called for under Section 100 of the CPC.

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

10. In order to answer the substantial question of law, it would be appropriate to notice the meaning of “partition”.

11. The Principles of Hindu Law by Mulla, 20th edition page 321, defines “partition” as under:-

“According to the true notion of an undivided Mitakshara family, no individual member of that family, whilst it remains undivided, can predicate of the joint property, or that a particular member, has a certain definite share, one-third or one-fourth. Partition, according to that law, consists in a numerical division of the property; in other words, it consists in defining the shares of the coparceners in the joint property; an actual division of the property by metes and bounds is not necessary. Once the shares are defined, whether by an agreement between the parties or otherwise, the partition is complete. After the shares are so defined, the parties may divide the property by metes and bounds, or they may continue to live together and enjoy the property in common as before. However, whether they do the one or the other, it affects only the mode of enjoyment, but not the tenure of the property. The property ceases to be joint and immediately the shares are defined, and henceforth, the parties hold the property as tenants-in-common.”

12. The Supreme Court in the matter of Kalyani (dead) by L.Rs., v.

Narayanan and others³ defined “partition” as under:-

“... a disruption of joint family status by a definite and unequivocal indication to separate implies separation in interest and in right although not immediately followed by a de facto actual division of the subject-matter. This may at any time be claimed by virtue of the separate right. From the time of such disruption, each member holds his aliquot share as tenant-in-common irrespective of whether there is actual division of the properties by metes and bounds. Such would be the position, unless there is proof or reunion

as understood in law. It is established law that actual physical division or partition by metes and bounds is not an essential ingredient for the purpose of effecting severance of status. That is really a formality in the process of partition. When there is a severance of the joint family from a particular date, but the properties are not partitioned, the members of the family become tenants in common and would be liable to account for the incomings received by them till the time that a final partition of such members. Such coparceners are tenants in the common but cannot be characterized as trustees.”

13. “Partition” is a redistribution or adjustment of pre-existing rights, among co-owners/coparceners, resulting in a division of lands or other properties jointly held by them into different lots or portions and delivery thereof to the respective allottees. The effect of such division is that the joint ownership is terminated and the respective shares vest in them in severalty. (See Shub Karan Bubna alias Shub Karan Prasad Bubna v. Sita Saran Bubna and others⁴.) The Supreme Court further held qua partition in the aforesaid case – Shub Karan Bubna (supra) as under:-

“6. A partition of a property can be only among those having a share or interest in it. A person who does not have a share in such property cannot obviously be a party to a partition. Separation of share” is a species of “partition”. When all co-owners get separated, it is a partition. Separation of share(s) refers to a division where only one or only a few among several co-owners/coparceners get separated, and others continue to be joint or continue to hold the remaining property jointly without division by metes and bounds. For example, where four brothers owning a property divide it among themselves by metes and bounds, it is a partition. But if only one brother wants to get his share separated and other three brothers continue to remain joint, there is only a separation of the share of one brother.

7. In a suit for partition or separation of a share, the prayer is not only for declaration of plaintiff's share in the suit properties, but also division of his share by metes and bounds. This involves three issues:

- (i) whether the person seeking division has a share or interest in the suit property/properties;
- (ii) whether he is entitled to the relief of division and separate possession; and
- (iii) how and in what manner, the property/properties should be divided by metes and bounds?

If a suit is for partition or separation of a share, the court at the first stage decides whether the plaintiff has a share in the suit property and whether he is entitled to division and separate possession. The decision on these two issues is exercise of a judicial function and results in first stage decision termed as "decree" under Order 20 Rule 18(1) and termed as "preliminary decree" under Order 20 Rule 18(2) of the Code. The consequential division by metes and bounds, considered to be a ministerial or administrative act requiring the physical inspection, measurements, calculations and considering various permutations/combinations/alternatives of division is referred to the Collector under Rule 18(1) and is the subject-matter of the final decree under Rule 18(2)."

14. Similarly, learned Author Mulla at page 326 has also stated about the evidence of partition and burden of proof as under:-

"2. The next case is of the kind dealt with by the Privy Council in *Appovier v. Rama Subba Aiyar*⁵, where the coparceners, with a view to partition executed a writing, whereby they agreed to hold the joint property in defined shares as separate owners. Such writing operates in law as a partition, though the property is not physically divided. This is a case where the agreement declares on the face of it, the intention of the parties to hold the joint property as separate owners, and no evidence is admissible of the subsequent acts of the parties to control or alter the effects of the document.

3. The third case is of the kind dealt with by the Privy Council in *Doorga Pershad v. Kundun*⁶, where the agreement was in writing, but the document did not declare on the face of it, the intention of the parties to hold the joint property as separate owners. In such a case, when the question arises as to whether the document operates as a partition, the intention of the parties is to be inferred from: (1) the document; and from (2) their subsequent acts.

Where an instrument of partition, after giving one member his share, provided that the rest of the property was to be divided in a particular manner and that the remaining members should live like an ordinary undivided family subject to survivorship, it was held by the Privy Council that there was no partition between the other members.

4. The last case is of the kind dealt with by the Privy Council in *Ganesh Dutt v. Jewach*⁷, a case where there was no writing at all. In such a case, when the question arises as to whether there has been a partition or not, the intention of the parties as to separation can only be inferred from their acts. The question is one of fact to be decided with due regard to the cumulative effect of all the facts and circumstances, and primarily the burden of showing that there has been a partition is on the person setting it up.”

15. Similarly, the Supreme Court in Ratnam Chettiar (supra), has laid down the principles of law when partition can be reopened by observing as under: -

“19. Thus on a consideration of the authorities discussed above and the law on the subject, the following propositions emerge:

(1) A partition effected between the members of the Hindu undivided family by their own volition and with their consent cannot be reopened, unless it is shown that the same is obtained by fraud, coercion, misrepresentation or undue influence. In such a case the Court should require a strict proof of facts because an act inter vivos cannot be lightly set aside.

6 (1873) 13 Beng LR 235

7 (1904) 31 Cal 262

(2) When the partition is effected between the members of the Hindu undivided family which consists of minor coparceners it is binding on the minors also if it is done in good faith and in bona fide manner keeping into account the interests of the minors.

(3) Where, however, a partition effected between the members of the Hindu undivided family which consists of minors is proved to be unjust and unfair and is detrimental to the interests of the minors the partition can certainly be reopened whatever the length of time when the partition took place. In such a case it is the duty of the Court to protect and safeguard the interests of the minors and the onus of proof that the partition was just and fair is on the party supporting the partition.

(4) Where there is a partition of immovable and movable properties but the two transactions are distinct and separable or have taken place at different times, if it is found that only one of these transactions is unjust and unfair it is open to the Court to maintain the transaction which is just and fair and to reopen the partition that is unjust and unfair.

The facts of the present case, in our opinion, fall squarely within propositions Nos. (3) and (4) indicated above.”

16. In **Apoorva Shantilal Shah** (supra), the Supreme Court quashed the reopening of partition holding as under: -

“30. The other question which falls for determination is whether the partition can be said to be bad as at the time of the partition there was no equal division of the shares by the father amongst himself and his minor sons and a part of the shareholding had not been distributed to the father or to the father and mother jointly. We may point out that the A.A.C. has found that at the time of division of the shares, the shares had been distributed equally taking into consideration the shares which had earlier been distributed amongst the parties. In our opinion, a partial partition of any joint family property by the father between himself and his sons does not become invalid on the ground that there has been no equal distribution amongst the co-sharers. It is expected that the father who seeks to bring about a partial partition of joint

family properties will act bona fide in the interest of the joint family and its members, bearing in mind in particular the interests of the minor sons. If, however, any such partial partition causes any prejudice to any of the minor sons and if any minor son feels aggrieved by any such partial partition, he can always challenge the validity of such partial partition in an appropriate proceeding and the validity of such partial partition will necessarily have to be adjudicated upon in the proceeding on a proper consideration of all the facts and circumstances of the case. Till such partial partition has been held to be invalid by any competent court, the partial partition must be held to be valid. It is not open to the Income Tax Authorities to consider a partial partition to be invalid on the ground that shares have not been equally divided and to refuse to recognise the same. It is undoubtedly open to the Income Tax Officer before recognising the partition to come to a conclusion on proper enquiry whether the partition is genuine or not. If the Income Tax Officer on enquiry comes to a finding that the partition is sham or fictitious, he will be perfectly within his right to refuse to recognise the same. In the instant case, there is no finding that the partial partition is sham or fictitious or that the partial partition is not a genuine one and has not been acted upon. As there is no finding that the partial partition is sham or fictitious or not a genuine one, on enquiries made by the Income Tax Officer, and as the partial partition is otherwise valid under the Hindu law, the partial partition has necessarily to be recognised under the provisions of Section 171 of the Income Tax Act and the assessment must be necessarily made on the basis that there is partial partition of the said shares.”

17. Reverting to the facts of the case, the question is, whether partition has taken place between the parties or not?
18. The plaintiff in his plaint came with a pleading that though there is no partition during the lifetime of their father, but they are in separate possession and he himself and defendants No.1 & 2 are living separately, but in fact, the suit property has not been partitioned by metes and bounds and in the partition proceeding concluded on 28-11-2005, defendants No.1 & 2 taking

advantage of their political influence got the fertile, productive and important land in their share and there is no proper and legal partition in accordance with Section 178 of the Code to which the defendants replied by holding that prior partition had already taken place between the parties i.e. the plaintiff and defendants No.1 & 2 during the lifetime of their father Jeedhan and for twenty years they are living separately, cultivating separately and are in cultivating possession of the suit land separately and since the lands were not corrected in the revenue records, it was done in the proceeding under Section 178 of the Code by the Tahsildar on 28-11-2005, therefore, the suit deserves to be dismissed.

19. The plaintiff has been examined as PW-1. In his cross-examination, he has admitted that though no partition has been made, but 4 acres of land was given to him by his father and in para 3, he has stated that defendants No.1 & 2 are cultivating on the lands allotted to them on partition. PW-2 – Pardeshi has clearly admitted that the plaintiff and defendants No.1 & 2 are cultivating on the lands allotted to them since the lifetime of their father and if partition has taken place, he is not aware of that. Likewise, PW-3 – Shiv Kumar has also clearly admitted in para 3 of his cross-examination that the plaintiff and defendant No.1 are cultivating upon their respective shares in the lifetime of their father and also the defendants have made fencing on their land and tube-well has been dug by the defendants. Not only this, defendant No.1 has been cross-examined on behalf of the plaintiff in which in para 2, defendant No.1 has clearly said that partition has taken place between them during the life time

of their father and also admitted that they have received equal share and that partition was oral. DW-3 – Kartik has also stated that Jeedhan – father of the plaintiff and defendants No.1 & 2, has informed to him that he has partitioned his land. Likewise, defendant No.2 Bansilal (DW-2) in his cross-examination has also stated that oral partition has been made during the lifetime of their father, but revenue records were not corrected and on the basis of actual possession, the suit land was divided in the proceeding under Section 178 of the Code.

20. As such, there is overwhelming evidence on record to hold that partition was made between the plaintiff and defendants No.1 & 2 during the lifetime of their father and they are in separate cultivating possession of their respective shares till now and on the basis of their separate cultivation and possession, in the proceeding under Section 178 of the Code, the Tahsildar has passed order on 28-11-2005 which is sought to be challenged in the civil suit filed by the plaintiff. But surprisingly, the plaintiff has not filed the order of Tahsildar to demonstrate that the partition made was unequal or they have suffered any prejudice by the order of Tahsildar. No reason has been assigned as to why the order of Tahsildar under Section 178 of the Code, so passed though was appealable under Section 44 of the Code before the Sub-Divisional Officer (Revenue), was not challenged by filing appeal. It is well settled law, as held by the Supreme Court in **Ratnam Chettiar** (supra) that partition effected between the members of Hindu Undivided Family by their consent cannot be reopened unless it is shown that same is obtained by fraud, coercion, misrepresentation or undue influence as an act intra

vires cannot be lightly set aside. The plaintiff was required to discharge heavy burden placed upon him to show that earlier mutual partition made was by obtained by fraud, coercion, misrepresentation, undue influence, etc., as held by their Lordships of the Supreme Court in Ratnam Chettiar (supra), but except alleging that the partition proceeding conducted by the Tahsildar is discriminatory, nothing has been brought on record and even the order of the Tahsildar making partition under Section 178 of the Code on 22-7-2004 has also not been brought on record and exhibited for perusal of the Court. Therefore, the finding of the first appellate Court that no equal share has been made and the partition made by the Tahsildar is unequal and is not the actual partition, cannot be accepted particularly when the order of the Tahsildar directing partition has not been produced to demonstrate that unequal share has been made and more particularly when Ex.P-9 clearly records that the Tahsildar has made partition on the basis of mutual partition already taken place between the parties and they are in possession of their respective shares on the basis of mutual partition and possession. As such, the plaintiff has failed to establish that the partition so made was discriminatory, illegal or he has been given unequal share on the said partition and therefore the first appellate Court is absolutely unjustified in directing reopening of partition already made on the ground that equal shares were not allotted to the parties which runs contrary to the parameters laid down by their Lordships of the Supreme Court for reopening of partition in Ratnam Chettiar (supra) and further in Apoorva Shantilal Shah (supra). The

substantial question of law is answered accordingly.

21. As a fallout and consequence of the aforesaid discussion, I am unable to sustain the judgment & decree of the first appellate Court for the reasons and legal analysis made herein-above and consequently, it is hereby set aside and the judgment & decree of the trial Court is hereby restored.

22. The appeal is allowed to the extent indicated herein-above. No order as to cost(s).

23. Appellate decree be drawn-up accordingly.

Sd/-
(Sanjay K. Agrawal)
Judge

Soma