

HIGH COURT OF CHHATTISGARH, BILASPUR**Second Appeal No.139 of 2009****Judgment reserved on :03.03.2020****Judgment delivered on :06.03.2020**

Narayan S/o Bhaklu Sahu, aged about 53 years,
Occupation Agriculturist, R/o Village Bhardakala,
Tahsil Saja, District Durg (CG)

----- Appellant/Defendant No.1**Versus**

1. Netram S/o Narayan Sahu (which is not admitted) aged about 28 years,
2. Amrika Bai W/o Narayan Sahu (which is not admitted) aged about 48 years, Both Agriculturist, Both R/o Village Somaikala, Tahsil Saja, District Durg (CG)

----- Plaintiffs

3. State of Chhattisgarh, Through the Collector, District Durg (CG)

----- Respondents

For Appellant/Defendant No.1:

Mr.Sachin Singh Rajput, Advocate

For Respondents No.1&2/Plaintiffs:

Mr.Amit Kumar Sahu, Advocate

For Respondent No.3: Mr.Ravi Bhagat, Dy.G.A.

Hon'ble Shri Justice Sanjay K. Agrawal

C.A.V. Judgment

1. The substantial questions of law involved, formulated and to be answered in this second appeal preferred by the appellant/defendant No.1 is as under:-

"1. Whether a Hindu wife can claim partition from her husband during the life time of the husband ?

2. Whether Janki Bai and the issues born out from her marriage with Narayan would be necessary party in the suit and in the absence of their joining, no effective decree for partition can be passed ?"

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

2. Plaintiff No.1 and plaintiff No.2 respectively claiming themselves to be son and wife of defendant No.1-Narayan filed a suit for declaration of title, partition and possession stating inter-alia that plaintiff No.2 is wife of defendant No.1 in *chudi* form and out of that wedlock plaintiff No.1 was born, as such, they are entitled for 2/3rd share in the suit property being ancestral property of defendant No.1. It was further pleaded that defendant No.1's legally wedded wife Draupadi Bai after six months of her gowna, left defendant No.1 and married with other person in *chudi* form by taking *chhod chhutti* after obtaining legal expenses for marriage and thereafter married with plaintiff No.2 in *chudi* form and therefore defendant No.1 allegedly remarried (third) with Janki Bai, as such, they are entitled for partition and possession.

3. Defendant No.1 has filed his written statement and

denied the averments made in the plaint stating inter-alia that plaintiff No.1 is not his son and plaintiff No.2 has married with some other person and further stated that he after taking divorce from Draupadi Bai in *chudi* form married with Janki Bai and out of his wedlock, Pushpabai, Domar, Dwarika @ Durbasa, Gangabai, Latabai and Omprakash were born and they are living with defendant No.1 and as such, the plaintiffs are not entitled for any share in the suit property and the suit is also not maintainable during life time of defendant No.1.

4. The trial Court after appreciating oral and documentary evidence available on record, by its judgment and decree dated 25.1.2007, held that the suit property being ancestral property and plaintiff No.2 being legally wife of defendant No.1 in *chudi* form and plaintiff No.1 being legitimate son of defendant No.1 out of his wedlock with plaintiff No.2-Amrika Bai are entitled for 2/3rd share in the suit property, which was assailed by defendant No.1 in appeal, but he remained unsuccessful, against which, this second appeal under Section 100 of the CPC has been preferred by the appellant/defendant No.1, in which substantial questions of law have been formulated by this Court, which have been set-

out in the opening paragraph of this judgment.

5. Mr. Sachin Singh Rajput, learned counsel for the appellant/defendant No.1, would submit that plaintiff No.2 is at all married with defendant No.1, the suit for partition during life time of her husband/defendant No.1 would not be maintainable, as such, decree is bad to that extent. He would further submit that Janki Bai, wife of defendant No.1 and his sons & daughters are necessary party in the suit and in absence of their impleadment as party defendant, no effective decree for partition could have been passed. He relied upon the judgment of the Bombay High Court in the matter of Uday Narendra Shah v. Narendra Amritlal Shah¹ and the judgment of the Supreme Court in the matter of Man Singh (Dead) by LRS. v. Ram Kala (Dead) by LRS. and others².

6. On the other hand, Mr. Amit Kumar Sahu, learned counsel for respondents No.1 and 2/plaintiffs, would support the impugned judgment and decree and submit that sons and daughters of defendant No.1 out of his third marriage with Janki Bai are illegitimate child and therefore, they are not necessary party in the suit and are not entitled for any share in the suit property which was ancestral property in the hands

1 2014(2) Mh.L.J. 739

2 (2010) 14 SCC 350

of defendant No.1. He relied upon the judgment of the Supreme Court in the matter of Jinia Keotin and others v. Kumar Sitaram Manjhi and others³.

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

Answer to substantial question of law No.1:-

8. It is the case of defendant No.1 that plaintiff No.2 cannot claim partition during life time of her husband/defendant No.1.

9. The Supreme Court in the matter of Man Singh (supra) relying upon Mulla's Hindu Law held as under:-

"16. In *Kalyani v. Narayanan*⁴, this Court explained the "concept of partition in Mitakshara Hindu Law in SCC para 10 as under: (SCC p. 306)

"10.....Partition in one sense is a severance of joint status and coparcener of a coparcenary is entitled to claim it as a matter of his individual volition. In this narrow sense all that is necessary to constitute partition is a definite and unequivocal indication of his intention by a member of a joint family to separate himself from the family and enjoy his share in severalty. Such an unequivocal intention to separate brings about a disruption of joint family status, at any rate, in respect of separating member or members and thereby puts an end to the coparcenary with right of survivorship and such separated member holds from the time of disruption of joint family as tenant-in-common. Such partition has an

3 (2003) 1 SCC 730

4 1980 Supp SCC 298

impact on devolution of shares of such members. It goes to his heirs displacing survivorship. Such partition irrespective of whether it is accompanied or followed by division of properties by metes and bounds covers both a division of right and division of property....."

In SCC para 20 of the Report, this Court stated thus: (Narayanan case, SCC p.311)

"20. ...Till disruption of joint family status takes place no coparcener can claim what is his exact share in coparcenary property. It is liable to increase and decrease depending upon the addition to the number or departure of a male member and inheritance by survivorship. But once a disruption of joint family status takes place, coparceners cease to hold the property as joint tenants but they hold as tenants-in-common."

17. In *Principles of Hindu Law* by Mulla, Vol. I (17th Edn.) as regards the right of wife, it is stated that:

"**315. Wife.**-(1) A wife cannot herself demand a partition, but if a partition does take place between her husband and his sons, she is entitled (except in Southern India) to receive a share equal to that of a son and to hold and enjoy that share separately even from her husband (Article 315 at p. 506)."

- 10.** The Bombay High Court in the matter of Uday Narendra Shah (supra) relied upon para 315 of Hindu law noted by the Supreme Court and held similarly in paras 13, 14, 15 and 19 as under:-

"13. Consequently a wife has no share, right, title or interest in the HUF in which her husband is a coparcener with his brothers, father or sons (and after the amendment of section 6 of the Hindu Succession Act in 2005 with his sisters and daughters also).

14. The wife, such as the deceased, may be a member of a joint Hindu family. By virtue of being a member in the joint Hindu family she cannot get any share, right, title or interest in the joint Hindu property which that family owns. A joint Hindu family may own no property at all. If it owns property, a wife cannot demand partition unlike a daughter. She would get a share only if partition is demanded by her husband or sons and the property is actually partitioned. There has been no such demand and no consequent partition of any property. In fact there has been no partition in the HUF in which the husband is a coparcener. Hence the husband has not acquired any specific share in the coparcenary property - the bungalow in Ahmadabad - which could have become the property of his separate HUF consisting of his wife and children until the death of his wife, the deceased.

15. If there was a partition in the HUF of her husband's father, in which he is a coparcener, the husband would have got a share in that partition. That would have been ancestral property in his hands. That would have, therefore, been his HUF property. In that property the deceased who was a member of her husband's (the defendant's) HUF would have had a share. The deceased could not have demanded a partition. Had there been a partition upon the demand of the coparceners (the husband and children), she would have got a share thereunder. That share would have been her separate property bequeathable by her. She expired prior to such share being obtained. Since her husband did not expire, she would not have the rights of a widow also. Consequently she had no share and no bequeathable interest in any share which devolved upon her husband by survivorship until her death. Consequently the bequest of "my share" or the "monies" which may come to my share is wholly misconceived since her husband was alive on the date of her death and she was not a widow.

19. The claim by a wife during the lifetime of the husband in the share and interest which he has as a coparcener in his HUF is wholly premature and completely misconceived. Such bequest under the will does not show the title of the deceased to such property. The deceased, therefore, could not have bequeathed any "monies" as "my share" in the 1/3 share which her husband had in the HUF in which he was a coparcener along with his brothers, father and sons. Consequently the injunction in respect of such property cannot be granted as claimed."

11. Reverting to the facts of the present case in light of principles of law flowing from the judgment of the Supreme Court (supra), it is quite vivid that in the instant case, though the suit property is ancestral property in the hands of defendant No.1, but plaintiff No.2 being wife cannot demand a partition by filing the suit from her husband-defendant No.1 during his life time, as such, both the Courts below have committed legal error in holding that plaintiff No.2 being wife of defendant No.1 during his life time claim partition and entitled for share in the property held by her husband. The substantial question of law is answered accordingly.

Answer to substantial question of law No.2:-

12. In this regard, **Sir Dinshaw Fardunji Mulla** in his celebrated work "**Hindu Law**" (23rd Edition) at

page 529 under the heading "Suit for Partition" indicated in sub-section (2) of Section 332 as to who should be party (necessary and / or proper) in a suit for partition which reads as under: -

"(2) *Parties to suit.*—(a) The plaintiff in a partition suit should plead as defendants:

- (i) the heads of all branches;
- (ii) females who are entitled to a share on partition;
- (iii) the purchaser of a portion of the plaintiff's share, the plaintiff himself being a coparcener;
- (iv) if the plaintiff himself is a purchaser from a coparcener, his alienor.

The above are necessary parties and if any of them is not joined, the suit is liable to be dismissed. The entire joint family must be represented either expressly or implicitly. Reference may be made to section 6 of the Hindu Succession Act, 1956, and particularly to the proviso to that section. Also, see notes under that section post.

(b) It is desirable that the following persons should be made parties; though not necessary parties, they are proper parties to such a suit:

- (i) a mortgagee with possession of the family property or of the undivided interest of a coparcener;
- (ii) simple mortgagees of specific items of the family property;
- (iii) purchaser of the undivided interest of a coparcener;
- (iv) persons entitled to provision for their maintenance and marriage, i.e., widows, daughters, sisters and such like and distinguished heirs;

(v) any person entitled to maintenance from the family."

13. A careful perusal of the aforesaid provision would show that in the suit for partition, the head of all branches; females who are entitled to a share on partition; the purchaser of a portion of the plaintiff's share, the plaintiff himself being a coparcener; and if the plaintiff himself is a purchaser from a coparcener, his alienor, are necessary parties and otherwise, the suit is liable to be dismissed, and proper parties has also been indicated in clause (b) of sub-section (2).

14. The M.P. High Court in Smt. Gomati Devi v. Ram Prasad Prabhudayal and others⁵ has clearly held that where a person in a suit for partition is interested in its result and is entitled to a share he must be regarded as a necessary party. Relying upon Mayne's Treatise on Hindu Law and Usage, 1953 Edition, it has further been held that the females are also necessary parties to the suit when they are entitled to share on partition.

15. The question for consideration would be whether Janki Bai and the issues born out from her marriage with defendant No.1 would be necessary party in the suit?

5 AIR 1958 MP 6

16. Admittedly, when Draupadi Bai (first wife of defendant No.1) left defendant No.1 by divorce in *Chhod Chhutti* form, he had remarried with plaintiff No.2 and plaintiff No.1 is son out of his wedlock with plaintiff No.2 and during subsistence of that marriage, defendant No.1 is again said to have married with Janki Bai and Pushpabai, Domar, Dwarika @ Durbawa, Gangabai, Latabai and Omprakash are sons and daughters of defendant No.1 out of his marriage with Janki Bai, as such, Janki Bai being third wife during subsistence of second marriage with plaintiff No.2 and Pushpabai, Domar, Dwarika @ Durbawa, Gangabai, Latabai and Omprakash, sons & daughters of Janki Bai are illegitimate sons and daughters for the purpose of Section 16(3) of the Hindu Marriage Act, 1955 and would be only entitled for partition in self-acquired property of their parents including defendant No.1, but since the suit property is ancestral property in the hands of defendant No.1, they would not succeed and therefore, they were not necessary party in the suit. Both the Courts below have not committed illegality in recording the finding that they are not necessary party in the suit. It is made clear that finding has been recorded only for the purpose of ascertaining

whether Pushpabai, Domar, Dwarika @ Durbawa, Gangabai, Latabai and Omprakash are necessary party or not in the suit and it has not been decided to confer any right or to take away any right which they are otherwise entitled. The substantial question of law No.2 is answered accordingly.

17. In the result, the appeal is partly allowed. Plaintiff No.1 would be entitled for 1/3rd share in the property of defendant No.1, however, plaintiff No.2 would not be entitled for any share in the property of defendant No.1 in the life time of defendant No.1. No cost(s).

18. Decree be drawn-up accordingly.

Sd/-

(Sanjay K.Agrawal)
Judge

B/-