

HIGH COURT OF CHHATTISGARH, BILASPUR**Second Appeal No.376 of 2009**

1. Puranik Chandrakar S/o Late Jailal Chandrakar, aged about 67 years;
2. Puranlal S/o Late Jailal Chandrakar, aged about 64 years,
3. Ganeshyam Chandrakar S/o Late Jailal Chandrakar, aged about 60 years,
4. Chhotan Chandrakar S/o Late Jailal Chandrakar, aged about 57 years,
5. Nandkumar S/o Late Jailal Chandrakar, aged about 54 years,
6. Pawan Kumar Chandrakar S/o Late Jailal Chandrakar, aged about 48 years,
7. Anup Kumar S/o Late Jailal Chandrakar, aged about 45 years,
8. Smt. Rajkunwar (died and deleted)
All R/o Village Sumhera, Tahsil Chhura, District Raipur (CG)
9. Kheduram Chandrakar (died) through his LR's
 - 9.A Khubchand S/o Late Kheduram Chandrakar, aged about 30 years
 - 9.B Roshan S/o Late Kheduram, aged about 26 years,
 - 9.C Laxmi wd/o Late Kheduram, aged about 58 years,
 All R/o Village – Chhura, Tahsil – Chhura, District – Gariyaband (CG)
10. Smt. Munnibai W/o Rikhiram Chandrakar, aged about 40 years, R/o Village Bodridadar, Tahsil & District Mahasamund (CG)
11. Smt. Sevtibai W/o Somnath Chandrakar, aged about 35 years, R/o Purana Kurmipara, Mahasamund, District Mahasamund (CG)

----- Appellants/Defendants**Versus**

1. Jivrakhan Chandrakar (died) through LR's
 - 1.A Ambalal S/o Late Jivrakhan, aged about 55 years, R/o Village – Dulla, Tahsil – Gariyaband, District – Gariyaband (CG)
 - 1.B Hulsia Bai Wd/o late Ramanand, D/o Late Jivrakhan, aged about 57 years, R/o Village – Kharora, District – Mahasamund (CG)

- 1.C Pannalal S/o Late Jivrakhan, aged about 52 years, R/o Village – Kosmi, Block – Chhura, District – Gariyaband (CG)
- 1.D Thakur Ram S/o Late Jivrakhan, aged about 50 years, R/o Village – Semra, Block – Chhura, District – Gariyaband (CG)
- 1.E Hemchand S/o Late Jivrakhan, aged about 49 years, R/o Village – Tonhidabri, District – Gariyaband (CG)
- 1.F Rukmani D/o Late Jivrakhan, aged about 50 years, R/o Village – Palod, Near International Cricket Stadium, Raipur, District-Raipur (CG)
- 1.G Mohit S/o Late Jivrakhan, aged about 51 years, R/o Village – Dulla, Tahsil – Gariyaband, District – Gariyaband (CG)
2. Bhuwanlal Chandrakar (died) through LR's
 - 2.A Mitlesh S/o Late Pitambar Grand Son of Late Bhuwanlal, R/o Village – Semra, Block – Chhura, Tahsil – Gariyaband, District – Gariyaband (CG)
 - 2.B Laxmi Narayan S/o late Bhuwanlal, aged about 40 years, R/o Village – Tonhidabri, District – Gariyaband (CG)
 - 2.C Nirmala D/o Late Bhuwanlal, W/o Amrit Chandrakar, aged about 42 years, R/o Khurud, Tahsil – Khurud, District – Dhamtari (CG)
 - 2.D Kunti D/o Late Bhuwanlal, Wd/o Sudama, aged about 45 years, R/o Bhagbahara, District – Mahasamund (CG)
 - 2.E Janak S/o Late Bhuwanlal, aged about 46 years, R/o Village – Dulla, District – Gariyaband (CG)
 - 2.F Lata W/o Nand Chandrakar, D/o Late Bhuwanlal, aged about 45 years, R/o Village – Kauwadhih, Sildevri, District – Balodabazar (CG)
 - 2.G Munna S/o Late Bhuwanlal Chandrakar, aged about 45 years, R/o Village – Dulla, District – Gariyaband (CG)
3. Smt. Rukmani Bai Widow of Late Bhuwan Chandrakar, aged about 70 years,
4. Chhannu Lal Chandrakar S/o Late Bhukhan Chandrakar, aged about 54 years,
5. Keshav Chandrakar S/o Late Bhukhan Chandrakar, aged about 51 years,
6. Dilip Chandrakar S/o Late Bhukhan Chandrakar, aged about 45 years,
7. Kamdev Chandrakar (died) through LR's

7.A Smt. Sheema Wd/o Late Kamdev Chandrakar, aged about 45 years, R/o Village – Semra, District – Gariyaband (CG)

7.B Sumit S/o Late Kamdev Chandrakar, aged about 22 years, R/o Village – Semra, District – Gariyaband (CG)

7.C Priyanka D/o Late Kamdev, R/o Village – Semra, District – Gariyaband (CG)

8. Tikam Chandrakar S/o Late Bhukhan Chandrakar, aged about 40 years,

9. Paragbai D/o Late Bhukhan Chandrakar, aged about 35 years,

Respondents No.3 to 6, 8 and 9 are R/o Village Semra, Tahsil Gariyaband, District Raipur (CG)

----- Respondents/Defendants

For Appellants/Defendants No.11 to 21:-

Mr. Rishi Mahobia, Advocate

For LR's of respondent No.1/plaintiff:-

None present

For respondents No.3, 4, 5, 6, 8 and 9:-

Mr. Akash Pandey, Advocate

Hon'ble Shri Justice Sanjay K. Agrawal
Judgment on Board

14.09.2020

1. The substantial question of law involved, formulated and to be answered in this second appeal preferred by the appellants/defendants No.11 to 21 is as under:-

“Whether the both the Courts below were justified in holding that the suit property was not available for earlier partition and decreed the suit rightly by recording a finding which is perverse and contrary 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 dispute is with regard to the suit house situated at village Chhura, Tahsil Brindranavagarh, District Raipur area 1974.25 sq.ft. out of which in 1000 sq.ft. kachha house has been constructed. Admittedly, the suit house was joint family property headed by Brijlal Chandrakar. He had four sons namely, Jivrakhan, who is plaintiff herein, Bhuwanlal Chandrakar (defendant No.1), Jailal (defendants No.11 to 21 were successor-in-interest of Jailal) and Bhukhanlal. It is admitted position on record that the suit house was joint family property and apart from this property, the joint family had several other properties, which were partitioned by Brijlal Chandarkar in the year 1967 during his lifetime and thereafter Brijlal died in the year 1995. It is also admitted position on record that Brijlal Chandrakar had kept 6 acres of land at village Semhra, which was partitioned by the parties after his death in the year 2001-02. The plaintiff filed a suit as back as on 1.9.2007 stating inter-alia that the suit house was held by all four brothers, Jivrakhan (plaintiff herein), Lakhanlal, Jailal and Bhukhanlal and it has not been partitioned, therefore, the plaintiff is entitled for 1/4th share in the suit house.

3. Defendants No.11 to 21 not only opposed the plaint

allegations setting up a plea of earlier petition in the year 1967, but also laid counter-claim stating inter-alia that the suit property fell in their share on the partition held in the year 1967 during the life time of Brijlal Chandrakar and it be declared that partition has already been taken place between the parties in the year 1967 and the suit house has already been partitioned and fell in share of Jailal, predecessor-in-title of defendants No.11 to 21.

4. Resisting the counter-claim, the plaintiff filed the written statement and taken U-turn by pleading that in partition held in the year 1967 the suit house was kept by Brijlal Chandrkar for his own use and also kept 6 acres of land at village Semhra. So far as the land situated at village Semhra is concerned, it was partitioned after death of his father Brijlal Chandrakar, but the suit house was never partitioned, therefore, counter-claim is liable to be dismissed.

5. The trial Court upon appreciation of oral and documentary evidence available on record, by its judgment and decree dated 5.11.2008, decreed the suit holding that the suit house was kept by Brijlal Chanadrkar for his own use in partition held in the year 1967 and it has not been partitioned, therefore, the plaintiff is entitled for 1/4th share, which has

further been affirmed by the first appellate Court in appeal preferred by defendants No.11 to 21, against which, the said defendants again preferred this second appeal under Section 100 of the CPC, in which substantial question of law has been formulated, which has been set-out in the opening paragraph of this judgment.

6. Mr. Rishi Mahobia, learned counsel for the appellants/defendants No.11 to 21, would submit that both the Courts below have erred in holding that the suit house was reserved for Brijlal Chandrakar for his own use and it was not partitioned. He would further submit that such a finding is perverse finding and there cannot be successive partition one after other and further there is no evidence on record to hold the the suit house was kept by Brijlal Chandrakar for his own use, rather in the year 1967 partition allotted to their predecessor in title Jaiyal and after his death they have succeeded the suit property. Both the Courts below have granted the decree on the basis of no evidence, which is liable to be set aside.

7. Mr. Akash Pandey, learned counsel for respondents No.3, 4, 5, 6 and 8 and 9 would submit that both the Courts below are absolutely justified in decreeing the suit in favour of the plaintiff as it is evident from the

record that the suit house was reserved by Brijlal Chandrakar for his own use for his lifetime and also kept 5 acres of land at village Semhra which has been partitioned admittedly in the year 2001-02, but suit house has not been partitioned, therefore, both the Courts below are justified in directing partition, which is neither perverse nor contrary to record, as such, the appeal deserves to be dismissed.

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

9. It is not in dispute that Brijlal Chandrakar had four sons namely, plainitff-Jivrakhan, Bhuwanlal, Jailal and Bhukhanlal. The defendants are successor-in-interest of Bhuwanlal, Jaylal and Bhukhanlal. It is admitted position on record that the suit property was joint family property of the parties and Karta of the family was Brijlal Chandrakar. He partitioned all his property between his four sons during his lifetime. It is also admitted position on record that he kept 5 acres of land at village Semhra and he died in the year 1995 and thereafter the successor-in-interest of all the four brothers herein have partitioned their agricultural lands received by them in the year 2001-

02. The only dispute is with regard to the suit house situated at village Chhura, Tahsil Brindranawagarh.

10. It is the case of the plaintiff that the suit house was not partitioned. In a suit filed by the plaintiff on 1.9.2007 he has simply made averment that the suit property is joint family property purchased by all four brothers from Prithvi Singh and it has not been partitioned, therefore, he is entitled for partition. In reply to the counter-claim filed by defendants No.11 to 21 the plaintiff has taken U-turn and taken a stand that the suit property was reserved by Brijlal Chandrakar for his own use and maintenance. Thus, for the first time, written statement filed to the counter-claim, the plaintiff took a stand that the suit house was reserved by Brijlal Chandrakar for his own use and maintenance. No documentary evidence has been brought on record to prove that the suit house was reserved by Brijlal Chandrakar for his own use.

11. At this stage, it would be appropriate to notice the decision of the Supreme Court in the matter of Kesharbai alias Pushpabai Eknathrao Nalawade (Dead) by LR's and another v. Tarabai Prabhakar Rao Nalawade and others¹ in which the Supreme Court has held that the joint and undivided family being the normal condition

¹ (2014) 4 SCC 707

of a Hindu family, it is usually presumed, until the contrary is proved, that every Hindu family is joint and undivided and all its property is joint. This presumption, however, cannot be made once a partition (of status or property), whether general or partial, is shown to have taken place in a family. It was observed as under:-

"21. In our opinion, the aforesaid presumption is wrong in law in view of the fact that the High Court has affirmed the findings of the trial court that in 1985, there was a complete partition and the parties had acted on the same. It is a settled principle of law that once a partition in the sense of division of right, title or status is proved or admitted, the presumption is that all joint property was partitioned or divided. Undoubtedly the joint and undivided family being the normal condition of a Hindu family, it is usually presumed, until the contrary is proved, that every Hindu family is joint and undivided and all its property is joint. This presumption, however, cannot be made once a partition (of status or property), whether general or partial, is shown to have taken place in a family. This proposition of law has been applied by this court in a number of cases. We may notice here the judgment of this Court in *Bhagwati Prasad Sah v. Rameshwari Kuer*², wherein it was *inter alia* observed as under:

"8. Before we discuss the evidence on the record, we desire to point out that on the admitted facts of this case neither party has any presumption on his side either as regards jointness or separation of the family. The general principle undoubtedly is that a Hindu family is presumed to be joint unless the contrary is proved, but where it is admitted that one of the coparceners did separate

himself from the other members of the joint family and had his share in the joint property partitioned off for him, there is no presumption that the rest of the coparceners continued to be joint. There is no presumption on the other side too that because one member of the family separated himself, there has been separation with regard to all. It would be a question of fact to be determined in each case upon the evidence relating to the intention of the parties whether there was a separation amongst the other coparceners or that they remained united. The burden would undoubtedly lie on the party who asserts the existence of a particular state of things on the basis of which he claims relief."

12. Similarly, the Patna High Court in the matter of Ramnagina Sah and Ors. v. Harihar Sah and Ors.³ has held that when a partition is admitted or proved, the presumption is that all the properties were divided and a person alleging that family property in the exclusive possession of one of the members after the partition, is joint and is liable to be partitioned, has to prove his case. Therefore, it was further held that in a suit for partition the plaintiffs had to prove that in spite of the first partition or the second partition alleged by them the property in suit continued to be joint.

13. In the matter of Marjadi Devi and Ors. v. Jagarnath Singh and Ors.⁴ the Patna High Court has

³ AIR 1966 Pat 179

⁴ AIR 1983 Pat 129

held as under:-

"16. We approve of the finding of the trial court and the plaintiffs are not at all entitled to a partition as there was a partition by metes and bounds and the appellants could not displace the findings on the basis of the materials on record."

- 14.** Reverting to the facts of the present case in the light of principle of law laid down in the above-stated judgments (supra), it is quite vivid that partition has already taken place in the year 1967 in presence of Brijlal Chandrakar, karta of the family and since then they have divided their landed property and are residing separately except 5 acres of land at village Semhra, which has also been partitioned in the year 2001-02 after death of their father Brijlal Chandrakar. The plaintiff has pleaded that the suit house has not been partitioned in written statement to counter-claim, but except self-serving statement, no evidence has been brought on record by the plaintiff that the suit house was kept by Brijlal Chandrakar for his own use and maintenance. Both the Courts have heavily relied upon admission of defendant No.12-Puranik. Puranik (DW-1) has simply stated in his statement that Brijlal has kept the house and land for his own use, but in para-10 he has refuted the suggestion that it was kept by Brijlal for his own

maintenance in partition. Thus, in the instant case, partition has already been taken place firstly in the year 1967 and thereafter in the year 2001-02. Agricultural land reserved by Brijlal Chandrakar has also been partitioned. Burden of proof was on the plaintiff to adduce evidence and to prove that the suit house was joint and it was not partitioned, to which he has failed to lead evidence and could not prove that the suit property was not partitioned in the year 1967 and 2001-02, as such, the plaintiff has failed to plead and prove that in earlier partition the suit property was not subjected to partition and remained undivided and available for further partition.

15. Concludingly, both the Courts below were unjustified in holding that the suit property was not subjected to partition by recording a finding which is perverse and the plaintiff is not entitled for decree of partition of the suit property.

16. Accordingly, the judgment and decree of both the Courts below are hereby set aside and the suit would stand dismissed by answering the substantial question of law in favour of defendants No.11 to 21 and against the plaintiff.

17. The second appeal is allowed to the extent

indicated hereinabove.

18. A appellate decree be drawn-up accordingly.

Sd/-

(Sanjay K.Agrawal)
Judge

B/-