

HIGH COURT OF CHHATTISGARH, BILASPURSecond Appeal No.475 of 2004Judgment reserved on: 8-1-2020Judgment delivered on: 15-1-2020

Kashi Prasad (Dead) Through LRs

(Defendant)

1. Smt. Durga Bai, W/o Late Kashi Prasad Tiwari, aged about 70 years,
2. Aarti Tiwari, D/o Late Kashi Prasad Tiwari, aged about 47 years, W/o Anil Khedulkar, R/o Priyadarshani Nagar, House No.385 (Behind Pachmedhi Naaka), Raipur (C.G.)
3. Anjana Tiwari, D/o Late Kashi Prasad Tiwari, aged about 40 years, W/o Kamal Kishore Dubey, R/o Brindavan Colony, H-33, Jagdalpur, District Bastar (C.G.)
4. Alka Tiwari, D/o Late Kashi Prasad Tiwari, aged about 36 years, W/o Akhilesh Mishra, R/o Rajnandgaon (Near Old Rest House), Post and District Rajnandgaon (C.G.)
5. Prakash Tiwari, S/o Late Kashi Prasad, aged about 43 years, R/o Majhapara, Kanker, Tahsil / District Kanker.
6. Prakhar Tiwari, S/o Late Kashi Prasad, aged about 33 years, R/o Majhapara, Kanker, Tahsil & District Kanker (C.G.)

---- Appellants

Versus

Murari Prasad (Dead) Through LRs

(Plaintiff)

1. Smt. Ritu Tiwari, W/o Late Murari Prasad Tiwari, aged about 58 years,
2. Smt. Neetu Tiwari, W/o Devesh, D/o late Murari Prasad Tiwari, aged about 35 years,
3. Ku. Neelam Tiwari, D/o Late Murari Prasad Tiwari, aged about 33 years,

All R/o Moolsorid Nagar, Dhamtari, Tahsil, Post Office and District Dhamtari (C.G.)

---- Respondents

For Appellants: Mr. R.N. Jha, Advocate.
 For Respondents: None present, though served.

Hon'ble Shri Justice Sanjay K. Agrawal

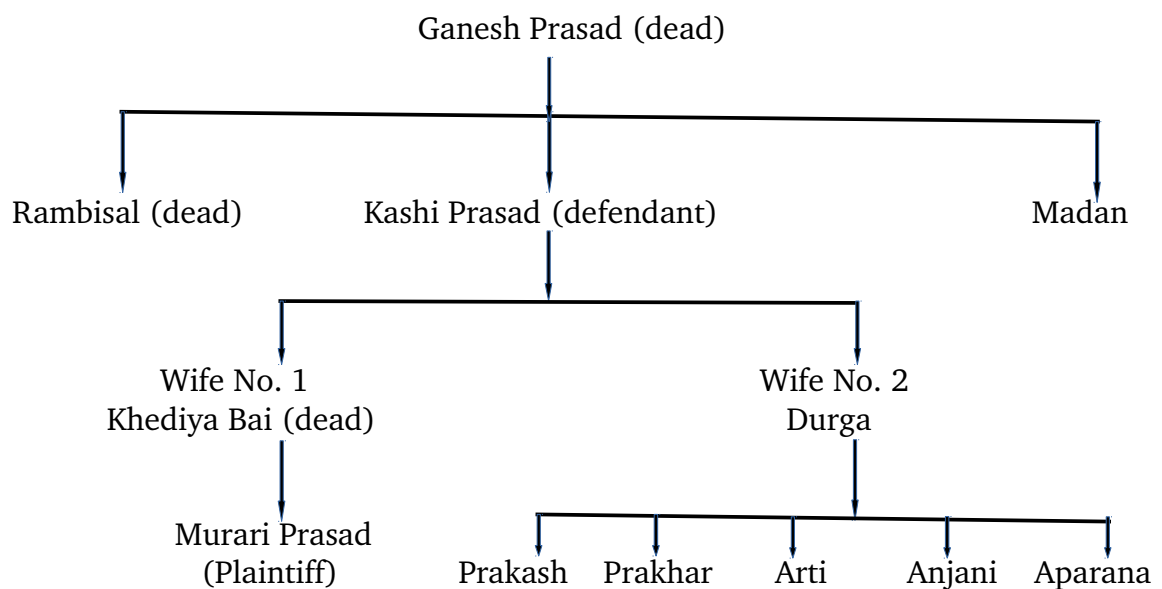
C.A.V. Judgment

1. This second appeal preferred by the defendant was admitted on the following substantial question of law: -

“Whether the lower appellate Court was not justified in passing a decree of declaration in favour of plaintiff No.2 to the extent of $\frac{1}{2}$ share in the suit property in view of the admissions regarding presence of 5 more co-parceners in the family of deceased Ganesh Prasad?”

(For the sake of convenience, parties hereinafter will be referred as per their status shown and ranking given in the plaint before the trial Court.)

2. The following genealogical tree would demonstrate relationship among the parties: -



3. The suit property was originally held by Ganesh Prasad – paternal grand-father of plaintiff Murari Prasad. Murari Prasad – the original plaintiff, filed suit that the suit land was recorded in the name of his grand-father Ganesh Prasad and he has right in the suit land by birth, as the other properties have already been partitioned by his

father's two brothers namely, Rambisal and Madan and his father had removed him from his house and refused to give share and finally in January, 2000, when the plaintiff demanded his share, same was denied as such, the cause of action arose in January, 2000 and the plaintiff is entitled for declaration of title which the father – defendant disputed by filing written statement that he had already given 2 acres of land to the plaintiff on the condition that he will not demand any partition.

4. The trial Court after appreciating oral and documentary evidence on record dismissed the suit holding the suit property to be the ancestral property, but the first appellate Court granted half share in the suit property to the plaintiff against which this second appeal has been preferred by the defendant under Section 100 of the CPC in which substantial question of law has been framed which has been set-out in the opening paragraph of this judgment.
5. Mr. R.N. Jha, learned counsel appearing for the appellants herein / LR's of the defendant, would submit that the first appellate Court is absolutely unjustified in granting decree in favour of the plaintiff giving half share in the suit property ignoring that there are five coparceners in the family of the deceased Ganesh Prasad at the time when the decree was passed, who are now impleaded as appellants in this second appeal and who are daughters of Kashi Prasad out of his wedlock with his second wife Durga, therefore, the decree is liable to be set-aside and the second appeal deserves to be allowed.
6. None present for the respondents herein / LR's of the plaintiff, though served.

7. I have heard learned counsel for the appellants herein / LR's of the defendant and considered his submissions and also went through the record with utmost circumspection.
8. As noticed in the opening paragraph of this judgment, it is quite vivid that original plaintiff Murari Prasad, who died during the pendency of this second appeal, filed suit for declaration of title against his father Kashi Prasad stating the suit property to be the property of his grand-father Ganesh Prasad, and further stated that his father's two brothers namely – Rambisal was already dead and Madan had already took partition of the other property, and he is son out of the wedlock of his father with first wife Khediya Bai and Durga is second wife of his father. As such, no plea has been raised on behalf of original defendant Kashi Prasad while filing his written statement except the plea that the plaintiff has been given share by giving 2 acres of land. The trial Court has clearly held the property to be the ancestral property of the plaintiff and he being the only son has been given half share in the property, as in the suit property both Kashi Prasad and Murari Prasad have equal share.
9. It is true that during the pendency of second appeal, the plaintiff as well as the defendant both have died and in place of defendant Kashi Prasad, his daughters from second wife were impleaded as legal representatives of the defendant. Nothing has been pleaded in light of the subsequent event and nothing has been brought on record. The appellants herein / LR's of the defendant ought to have brought amendment in the pleading based on subsequent event and consistent with the rules in that behalf, that has not been done.

New plea cannot be permitted to be raised for the first time in second appeal. Even no formal objection has been taken in this regard in the written statement regarding presence of five other coparceners.

10. As such, the first appellate Court has rightly held that the suit property being the ancestral property of his father and plaintiff being the only son would be entitled for half share in the suit property. This finding is neither perverse nor contrary to record. I do not find any merit in this appeal. The substantial question of law is answered accordingly and the appeal deserves to be and is accordingly dismissed. No order as to cost(s).

11. Decree be drawn-up accordingly.

Sd/-
(Sanjay K. Agrawal)
Judge