

HIGH COURT OF CHHATTISGARH, BILASPURSecond Appeal No.266 of 2010

1. Bhagela Sahu, S/o Dhelu Ram Sahu, aged about 47 years,
2. Toman Lal, S/o Bhagela, aged about 8 years, (Minor) Through his legal guardian Father Bhagela Sahu.

Both are R/o Village Jaung, Post Jevra, Patwari Halka Number 33,  
Tahsil Bemetara, District Durg (C.G.)

(Defendants)  
---- Appellants

Versus

1. Raju Sahu, S/o Dhelu Ram Sahu, aged about 26 years, Present R/o Shankar Nagar, Simga, District Raipur (C.G.)

(Plaintiff)

2. State of Chhattisgarh, Through Collector Durg, District Durg (C.G.)

(Defendant No.3)  
---- Respondents

-----  
For Appellants / Defendants No.1 & 2: -

Mr. Pushpendra Kumar Patel, Advocate.

For Respondent No.1 / Plaintiff: -

None present.

For Respondent No.2 / State: -

Mr. Anshuman Rabra, Panel Lawyer.

*Amicus Curiae:* Mr. Ratan Pusty and Mr. Shobhit Koshta, Advocates.

-----

Hon'ble Shri Justice Sanjay K. Agrawal

Judgment On Board

27/02/2020

1. This second appeal preferred under Section 100 of the CPC by the appellants herein / defendants No.1 & 2 was admitted for hearing by formulating the following substantial questions of law: -

“(1) Whether the suit suffered from non-joinder of necessary parties as the daughters of defendant No.1 were not arrayed in the suit?

(2) Whether a decree for  $\frac{1}{2}$  share in the suit property can be passed in favour of the appellants in respect of the ancestral property for which the suit has been preferred during the lifetime of father?"

[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. It is the case of the plaintiff that the suit property mentioned in Schedule A appended with the plaint fell in the share of Bhagela Sahu – defendant No.1 in the family partition between his brother and his father and the property mentioned in Schedule B appended with the plaint was purchased out of the income of the property shown in Schedule A of the plaint. The plaintiff filed suit for declaration of title, partition, separate possession and mesne profit stating inter alia that he is son of Bhagela Sahu out of his marriage with first wife Kumari Bai, whereas defendant No.2, Chandrakali and Dhaneshwari Bai are son and daughters of Bhagela Sahu out of his marriage with second wife Kunti Bai. Defendant No.1 Bhagela Sahu filed written statement and disputed the paternity of the plaintiff stating inter alia that the plaintiff is not his son and therefore not entitled for partition over the suit land, that too during his lifetime.
3. The trial Court after appreciating oral and documentary evidence available on record, dismissed the suit holding that the plaintiff is not son of defendant No.1, but in appeal preferred by the plaintiff before the first appellate Court, the first appellate Court held that the plaintiff is the legitimate son of Bhagela Sahu – defendant No.1 out of his marriage with Kumari Bai and defendant No.2, Chandrakali & Dhaneshwari Bai are son & daughters of Bhagela Sahu out of his marriage with Kunti Bai

– second wife, during the subsistence of marriage with Kumari Bai (without *chod chutti*) and accordingly held that the plaintiff is entitled for half share in the suit property against which this second appeal under Section 100 of the CPC has been preferred by defendants No.1 & 2 in which substantial questions of law have been formulated which have been set-out in the opening paragraph of this judgment.

4. Mr. Pushpendra Kumar Patel, learned counsel appearing for the appellants herein / defendants No.1 & 2, would submit that Chandrakali and Dhaneshwari Bai – two daughters of Bhagela ought to have been impleaded as party defendants in the suit, as such, the suit is bad for non-joinder of necessary party. He would further submit that since defendant No.1 Bhagela is still alive, therefore, the plaintiff (son) could not have brought suit for partition during the lifetime of his father / defendant No.1. As such, the suit deserves to be dismissed on both the counts.
5. Per contra, Mr. Ratan Pusty and Mr. Shobhit Koshta, learned *amicus curiae*, would submit that the position with regard to filing of suit by son has been settled by the Supreme Court in the matter of **Puttrangamma and others v. M.S. Ranganna and others**<sup>1</sup> as with regard to the joint family property / coparcenary property, son is at liberty to file suit against his father during the lifetime of his father, as such, no exception can be taken to the suit which has been filed by the son – plaintiff against his father – defendant No.1. They would further submit that since daughters of Bhagela are illegitimate daughters and the suit property is the ancestral property in the hands of Bhagela, therefore,

1 AIR 1968 SC 1018

daughters would not be necessary party in the light of the decision of the M.P. High Court in the matter of Smt. Gomati Devi v. Ram Prasad Prabhudayal and others<sup>2</sup>.

6. None present for respondent No.1 / plaintiff, though served with the notice of appeal.
7. I have heard learned counsel for the parties present and considered their rival submissions made herein-above and also went through the record with utmost circumspection.
8. The trial Court dismissed the suit holding that the plaintiff is not son of defendant No.1 which the first appellate Court reversed holding that he is son of defendant No.1 and that finding has not been assailed in this second appeal, as such, this finding of son and father relationship has become final.

**Answer to Substantial Question of Law No.1: -**

9. The question for consideration is, whether Chandrakali and Dhaneshwari Bai – daughters of defendant No.1 Bhagela out of his wedlock with Kunti Bai during the subsistence of his first marriage with Kumari Bai, are necessary party by which the plaintiff is liable to be non-suited?
10. In this regard, Sir Dinshaw Fardunji Mulla in his celebrated work “*Hindu Law*” (23<sup>rd</sup> 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."

11. 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).

12. The M.P. High Court in Smt. Gomati Devi (supra) 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.

13. Reverting to the facts of the present case, in this case, express objection was taken by defendant No.1 before the trial Court and the trial Court struck issue No.6 and held that the suit suffers from non-joinder of necessary party, but that finding has been reversed by the first appellate Court holding that defendant No.1 Bhagela married Kunti Bai – second wife without giving divorce to his first wife Kumari Bai, even no customary divorce took place between them, as such, out of the marriage of Kunti Bai with Bhagela during the subsistence of his first marriage with Kumari Bai, Tomanlal – defendant No.2, Chandrakali and Dhaneshwari Bai were born being illegitimate son and daughters, therefore, they (Chandrakali & Dhaneshwari Bai) were not necessary party. Since it has been held by the first appellate Court that the suit property was the ancestral property in the hands of Bhagela, therefore, Chandrakali and Dhaneshwari Bai being the illegitimate daughters of Bhagela out of his wedlock with Kunti Bai would not be entitled for share in the ancestral property of Bhagela by virtue of Section 16(3) of the Hindu Marriage Act, 1956, as held by the Supreme Court in the matter of Jinia Keotin v. Kumar Sitaram Manji<sup>3</sup>, by virtue of Section 16(3) of the Hindu Marriage Act, 1956, illegitimate sons and daughters are only entitled to succeed the self-acquired property of their

father and they are not entitled to succeed the ancestral property of their father, though the issue has been referred to larger Bench, but the legal position as stands today is, the illegitimate sons and daughters are entitled to succeed the self-acquired property of their father and not entitled for ancestral property of their father. As such, in the present case, since Chandrakali and Dhaneshwari Bai are illegitimate daughters of Bhagela – defendant No.1 out of his wedlock with Kunti Bai and the suit property is the ancestral / coparcenary property in the hands of Bhagela, they were not even entitled to succeed the property of their father by virtue of the amendment incorporated in Section 6 of the Hindu Succession Act, 1956 with effect from 9-9-2005 and therefore they were not necessary party and suit for partition is not bad for want of impleadment of Chandrakali and Dhaneshwari Bai as necessary party. The first substantial question of law is answered accordingly.

**Answer to Substantial Question of Law No.2: -**

14. It is the case of defendant No.1 – father that during his lifetime son – plaintiff cannot seek partition. It is not in dispute that the suit property is the ancestral property as partly held by the first appellate Court and it has been held by the first appellate Court that the suit property is the ancestral property in the hands of defendant No.1 Bhagela.
15. Now, the question is, whether son can bring suit for partition during the lifetime of his father? This question is no longer res integra.
16. The Supreme Court in **Puttrangamma** (supra) has held that a member of a joint Hindu family subject to a Mitakshara law can bring about his separation in status by a definite, unequivocal and unilateral declaration of his intention to separate himself from the family and enjoy his share in

severalty. It was observed as under: -

“(4) It is now a settled doctrine of Hindu Law that a member of a joint Hindu family can bring about his separation in status by a definite, unequivocal and unilateral declaration of his intention to separate himself from the family and enjoy his share in severalty. It is not necessary that there should be an agreement between all the coparceners for the disruption of the joint status. It is immaterial in such a case whether the other coparceners give their assent to the separation or not. The jural basis of this doctrine has been expounded by the early writers of Hindu Law. ...”

17. The decision of the Supreme Court in Puttrangamma (supra) has been followed by the Mysore High Court in the matter of Devagya Tuklya and others v. Shivgya Igya and others<sup>4</sup> by concluding that a son is entitled to seek partition of joint family property without the consent of his father.

“11. We shall now proceed to consider whether by the decision of the Supreme Court in Puttarangamma's case, AIR 1968 SC 1018 the view of the Bombay High Court in Apaii's case, (1892) ILR 16 Bom 29 (FB) is impliedly overruled or not. In that case the Supreme Court has observed as follows:—

"It is now a settled doctrine of Hindu Law that a member of a joint family can bring about his separation in status by a definite, unequivocal and unilateral declaration of his intention to separate himself from the family and enjoy his share in severalty. It is not necessary that there should be an agreement between all the coparceners for the disruption of the joint status. It is immaterial in such a case whether the other coparceners give their assent to the separation or not. The jural basis of this doctrine has been expounded by the early writers of Hindu law. The relevant portion of the commentary of Vijnaneswara states as follows:—

(Text omitted)

And thus though the mother is having her menstrual courses (has not lost the capacity to bear children) and the father has attachment and does not desire a partition. Yet by the will (or desire) of the son a partition of the grand-father's wealth does take place. Saraswathi Vilasa, placitum 28 states:

(Text omitted)

From this it is known that without any speech (or explanation) even by means of a determination (or resolution), only partition is effected, just as an appointed daughter is consisted by mere intention without speech. "Viramitrodaya of Mitra Misra (Ch. II, pl. 23) is to the following effect :

(Text omitted)

Here too there is no distinction between a partition during the lifetime of the father or after his death and partition at the desire of the sons may take place or even by the desire (or at the will) of a single (coparcener). Vyavahara Mayukha of Nilakantabhatta also states:

(Text omitted)

Even in the absence of any common (joint family) property, severance does indeed result by the mere declaration "I am separate from these because severance is a particular state (or condition) of the mind and the declaration is mere ly a manifestation of this mental state (or condition)."

(underlining by us)

A reading of the above passage from the decision of the Supreme Court would show that the right of a member of coparcenery to demand a partition at his own will and without the concurrence of the other coparceners including the father is well recognised. It should, therefore, be held that the view of the High Court of Bombay in *Apaji's* case. (1892) ILR 16 Bom 29 (FB) stands impliedly overruled. At this stage we may refer to a decision of the Privy Council in *Shiba Prasad Singh v. Prayag Kumari Debi*, AIR 1932 PC 216, in which Sir Dinshah Mulla speaking for the Judicial Committee observed as follows:—

*"In the case of ordinary joint family property, the members of the family have: (1) the right of partition; (2) the right to restrain alienations by the head of the family except for necessity; (3) the right of maintenance; and (4) the right of survivorship."*

It is, therefore, clear that the right of partition is considered as a necessary incident of the co-ownership of property by members of a Hindu joint family. The above decision of the Privy Council must also be considered as having superseded the opinion expressed in *Apaji's case*, (1892) ILR 16 Bom 29 (FB)."

18. The decision of the Mysore High Court in Devagya Tuklya (supra) has been followed with approval by the Rajasthan High Court in the matter of Kastoor Chand and others v. Board of Revenue and others<sup>5</sup> in which following the decision of the Supreme Court in Puttrangamma (supra), the Rajasthan High Court has clearly held that now, it is well settled that grand-son/son can seek partition of the ancestral joint Hindu property during the time of his father/grand-father. However, the Karnataka High Court in the matter of Kenchegowda v. K.B. Krishnappa and others<sup>6</sup> held as under: -

"25. Under the Hindu law, a Hindu son in the area covered by Mitakshara law acquires right in the co-parcenary property by birth. Therefore, he can maintain a suit against his father in respect of his right which he acquires by birth. That is what is precisely stated in Section 307 referred to supra

*"307. Sons, grandsons and great-grandsons-Every adult coparcener is entitled to demand and sue for partition of the coparcenary property at any time."*

30. The principle underlying the concept is that the property to be divided is Ex. vi termini, the property which has been previously held as Joint Property in co-parcenary. The son's right at birth, under the Mitakshara, is so connected with the right to share in, and to obtain partition

<sup>5</sup> 2006 SCC OnLine Raj 1534

<sup>6</sup> ILR 2008 Karnataka 3453

of, the estate, that it does not exist independently of the latter right. Thus under the Hindu law, the son acquires right to co-parcenary property by birth. In other words he acquires title to the co-parcenary property by birth. It is a vested right. It is that right in the property, i.e., the right to joint enjoyment of the property, which is transformed into an enjoyment in severally through the process of partition. It is that antecedent title which the members of a co-parcenary possess by birth jointly with other members of the co-parcenary which is specifically defined at the partition. Existence of an antecedent title is a prerequisite for enforcement of a right to partition. Separate or self acquired property of a member of the coparcenary or joint family cannot be the subject matter of partition amongst the member of a co-parcenary or Joint family. No child whether legitimate or illegitimate, acquires any right by birth in the separate property or the self acquired property of its parents. Thus they acquire no title to such property by birth. They do not possess any antecedent title to such property. The right to such property accrues to them only on their parents dying intestate. It is the death of the parents and not the birth of the child, which confers right on such property. In respect of such property, both legitimate and illegitimate child, succeed in accordance with the provisions of Section 8 and 15 of the Succession Act, if the parents die intestate. It is only after the event, i.e. death, the suit for partition could be filed. Therefore, it follows that no suit for partition could be filed against the parents during their life time, in respect of separate self acquired property of parents. The illegitimate son is not a co-parcener. He has no right in co-parcenary property. However, he has a right in the share of the father in co-parcenary property. That right he can exercise only on his father dying intestate. He has no right by birth in the separate or self acquired property of his parents. His right accrues only after his parents die intestate. Therefore, a son born of void or voidable marriage (illegitimate son) can never maintain a suit in respect of the property of his parent, against his or her parent.”

19. Mulla in “**Hindu Law**” (23<sup>rd</sup> Edition) at page 492 under the heading “Persons entitled to a share on partition” observed in Section 306 as under: -

“§ 306. Sons, grandsons and great-grandsons.—Every adult

coparcener is entitled to demand and sue for partition of the coparcenary property at any time. ...”

20. In view of the aforesaid settled legal position, son is entitled to seek partition only on the ancestral / coparcenary property of his father during his lifetime held as a coparcener and he would not be entitled to seek partition of the separate property of his father during the lifetime of his father. The second substantial question of law is answered accordingly.

21. As a fallout and consequence of the aforesaid discussion, the second appeal deserves to be and is accordingly dismissed. Parties shall bear their own cost(s).

22. This Court appreciates the assistance rendered by Mr. Ratan Pusty and Mr. Shobhit Koshta, Advocates, on short notice.

23. Decree be drawn-up accordingly.

Sd/-  
(Sanjay K. Agrawal)  
Judge