

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR**Second Appeal No.303 of 2009**

- Lagni Bai Aged About 34 Years W/o Kanhaiya Caste Marar
Occup.Agriculture R/o Vill.Dhangaon, PO Doundilohara, Distt.
Durg (CG)

---- Appellant /Defendant No.4**Versus**

1. Mansharam, S/o Balduram, Aged about 48 years, Caste Marar
Occup.Agriculture R/o Vill.Dhangaon, Tah. Doundilohara, Distt.
Durg (CG) **(Plaintiff)**
2. Ajitram, S/o Balduram, Aged about 52 years, Caste Marar
Occup.Agriculture R/o Vill.Dhangaon, Tah. Doundilohara, Distt.
Durg (CG) **(Defendant No.1)**
3. Indalram, S/o Balduram, Aged about 40 years, Caste Marar
Occup.Agriculture R/o Vill.Dhangaon, Tah. Doundilohara, Distt.
Durg (CG) **(Defendant No.2)**
4. Belabai, W/o. Ghurva, Aged about 55 years, Caste Marar
Occup.Agriculture R/o Vill.Dhangaon, Tah. Doundilohara, Distt.
Durg (CG) **(Defendant No.3)**
5. State of MP/Chhattisgarh, Through Collector, Durg Distt. Durg
(CG)

---Respondents

For Appellant	:Shri Shobhit Mishra, Advocate
For respondent No.4	: Shri Atanu Ghosh, Advocate
For respondent No.5/State	: Shri Chandresh Shrivastava, Dy. Advocate General

Hon'ble Shri Justice Sanjay K. Agrawal**Order on Board****06.8.2020.**

1. Proceedings of this matter have been taken up for admission
through Video Conferencing.

2. Heard on admission and formulation of substantial question of law in this second appeal preferred by the appellant/defendant No.4 against the impugned judgment and decree passed by the first appellate Court affirming the judgment and decree of the trial Court by which the trial Court decreed the suit of the plaintiff.

3. Learned counsel for the appellant/defendant No.4 submits that the suit property was the self acquired property of Balduram, therefore, the appellant is entitled for 1/5th share whereas she has been given only 1/5th share in her father's share in the suit property by making notional partition and no right over the dwelling house has been given which is provided under Section 23 of the Hindu Succession Act, 1956 (unamended). The findings of the trial Court as well as the first appellate Court are perverse to the record, therefore, the appeal involves substantial question of law for determination and the appeal be admitted for hearing.

4. I have heard learned counsel for the appellant/defendant No.4, considered his submission and went through the records with utmost circumspection.

5. The suit property was earlier recorded in the name of Balduram. Balduram had three sons i.e. plaintiff and defendants 1 & 2 and two daughters i.e. defendant No.3 and the appellant/defendant No.4. Plaintiff Mansharam filed suit on the pleading that the suit property was

ancestral property of his father in which he has $\frac{1}{4}^{\text{th}}$ share as shown in Schedule A and also $\frac{1}{3}^{\text{rd}}$ share over a dwelling house as shown in Schedule B and decree for partition may be granted in his favour. The plea of the plaintiff was opposed by defendant No.4/appellant - Lagni Bai stating that the suit property is the self acquired property of their father, therefore, she is entitled for $\frac{1}{5}^{\text{th}}$ share in the suit property shown in Schedule A and also entitled for share in the dwelling house. On appreciating the oral and documentary evidence, the trial Court held that the suit property held by Balduram was the ancestral property in his hands and on notional partition among Balduram and his sons, each son i.e. the plaintiff and defendants 1 & 2 will get $\frac{1}{4}^{\text{th}}$ share in the suit property except dwelling house and thereafter out of $\frac{1}{4}^{\text{th}}$ share of Balduram, the plaintiff and defendants 1 to 4 each will get $\frac{1}{5}^{\text{th}}$ share in the property as mentioned in Schedule A and in the property i.e. dwelling house as mentioned in Schedule B, only the plaintiff and defendants 1 & 2 will get equal share, and defendants 4 & 5 will not get any share in the dwelling house, thereby decreed the suit, which has been maintained by the first appellate Court on an appeal preferred by the appellant/defendant No.4.

6. The argument advanced on behalf of the appellant that the suit property was the self acquired property of Balduram is not established. The trial Court taking into consideration evidence of Mansharam (PW-

1), Atal Singh (PW-2), Bela Bai (DW-3) and other evidence on record has clearly come to a conclusion that the property was ancestral property of Balduram in his hands and thereafter decreed the suit property firstly making notional partition among Balduram and his three sons namely Mansharam, Ajitram and Indalram and each of them will get $\frac{1}{4}^{\text{th}}$ share and thereafter $\frac{1}{4}^{\text{th}}$ share of Balduram will further be divided among his five children and each will get $\frac{1}{5}$ share. The appellant/defendant No.4 will get only $\frac{1}{5}$ share out of $\frac{1}{4}^{\text{th}}$ share of her father, is a finding of fact recorded by the trial Court by rightly appreciating the evidence available on record which has been rightly affirmed by the first appellate Court.

7. Next submission of learned counsel for the appellant is that both the Courts below have committed illegality in not giving right of residence to her in the dwelling house as per provisions of Section 23 of the Hindu Succession Act, 1956 which was amended from 09.9.2005. Proviso to Section 23 of the said Act clearly provide that right of residence female heir would be entitled in the dwelling-house, only if she is unmarried or has been deserted by or has separated from her husband or is a widow. Learned counsel for the appellant/defendant No.4 has failed to demonstrate that the appellant fulfills condition as provided under proviso to Section 23 of the said Act. As such both the Courts below have rightly decreed the suit of the

plaintiff holding that defendant No.4/appellant is entitled for only 1/5 share out of $\frac{1}{4}^{\text{th}}$ share in the property of her father in notional partition. The said finding is a finding of fact based on evidence available on record which is neither perverse nor contrary to the record and the appeal does not involve any substantial question of law for determination.

8. The second appeal deserves to be and is accordingly dismissed in limine without notice to the other side. No cost(s).

Sd/-
(Sanjay K. Agrawal)
JUDGE

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