

HIGH COURT OF CHHATTISGARH, BILASPUR**Second Appeal No.82 of 2008****Judgment Reserved on :2.9.2020****Judgment Delivered on: 17.9.2020**

1. Shiv Balak Son of Late Goverdhan Singh, aged about 40 years,
2. Tirath Singh Son of Late Goverdhan Singh, aged about 35 years,
3. Birso Widow of Late Goverdhan Singh, aged about 70 years,
4. Penganga Son of Indel, aged about 70 years,
5. Bihari (died) through LR's
 - 5.a Bijo Bai W/o Bihari, aged about 55 years,
 - 5b. Ageshwar, S/o Shri Bihari, aged about 36 years,
 - 5c. Nilambar S/o Bihari, aged about 29 years,
 - 5d. Daulat Singh S/o Bihari, aged about 27 years,
 - 5e. Deepak Kumar S/o Bihari, aged about 20 years,

All are R/o Village Bakalo, P.S. Premnagar, Tahsil and District Surajpur (CG)
6. Pidhin (died) through LR's
 - 6a. Naiharo (died) through LR's
 - 6(a)-1 Manbahal S/o Late Sukhdev Singh, aged about 39 years,
 - 6(a)-2 Shivnarayan S/o Late Sukhdev Singh, aged about 34 years,

Both are R/o Village Bakalo (Nanjhariya), Post Bakalo, P.S. & Tahsil Premnagar, District Surajpur (CG)
7. Naiharo (died and deleted)
8. Dilbhajan Son of Jhelsai, aged about 60 years,
9. Mansai Son of Jhelsai, aged about 45 years,
10. Nansai Son of Jhelsai, aged about 40 years,
11. Kishorhin (died and deleted)
12. Umeshwar (died and deleted)
13. Bhakchand Son of Bhanwar Sai, aged about 40 years,
14. Bhakuli (died and deleted)
15. Budhiyaro D/o Jhelsai, aged about 50 years,
16. Sonmet D/o Jhelsai, aged about 45 years,

17. Kondi D/o Jhelsai, aged about 42 years,

18. Sohan Sai (died) through LR's

18(a) Baigaram S/o Late Sohan Sai, aged about 40 years, R/o Village Bakalo, P.S. Premnagar Tahsil & District Surajpur (CG)

18(b) Lakhan Singh (died) through LR's

18(b)-1 Karmen Bai, Wd/o Late Lakhan Singh, aged about 45 years,

18(b)-2 Jagdish, S/o Late Lakhan Singh, aged about 29 years,

18(b)-3 Raghuvir, S/o Late Lakhan Singh, aged about 27 years,

18(b)-4 Sukhvir S/o Late Lakhan Singh, aged about 25 years,

18(b)-5 Dalvir S/o Late Lakhan Singh, aged about 22 years,

18(b)-6 Shivratri, D/o Late Lakhan Singh, aged about 19 years,

All are R/o Village Pampanagar, Post Patrapali, Police Station and Tahsil Ramanujnagar, District Surajpur (CG)

19. Devmuniya (died) through LR's

19(A) Shesh Singh, S/o Late Nawal Sai, Aged about 45 years

19(B) Ambikeshwar Singh S/o Late Nawal Sai, aged about 43 years,

19(C) Balram Singh S/o Late Nawal Sai, aged about 40 years,

19(D) Uttam Singh, S/o Late Nawal Sai, aged about 38 years,

19(E) Sharda D/o Late Nawal Sai, aged about 32 years,

All are R/o Village Bakalo, P.S. Premnagar, Tahsil & District Surajpur (CG)

20. Fulbasiya D/o Indel Sai, aged about 55 years;

The appellant No.1 to 20 are Caste Gond, Occupation Agriculture, Resident of Village Bakalo, Police Station Premnagar, Tahsil Surajpur, District Sur-guja (CG)

----- Appellants/Plaintiffs

Versus

1. Dalpat Son of Ramsai aged about 50 years

2. Suhano (died) through LR's

2(A) Chhatradhari, S/o Premha, Aged about 70 years,

2(B) Rai Singh S/o Chhatradhari, aged about 30 years,

2(C) Bhan Singh, S/o Chhatradhari, aged about 35 years,

All are R/o Village Premnagar, Police Station & Tahsil Premnagar, District Surajpur (CG)

3. Aayam D/o Ramsai, aged about 53 years,

4. Sushila Widow of Visambher, aged about 45 years;

5. Amarsai Son of Visambher, aged about 25 years

The respondent No.1 and 3 to 5 are Caste Gond, Occupation Agriculture, Resident of Village Bakalo, Police Station Premnagar, Tahsil Surajpur, District Surguja (CG)

----- Defendants

6. State of Chhattisgarh, through the Collector, Surguja, Ambikapur (CG)

----- Respondents

For Appellants/Plaintiffs:

Mr. Ashok Kumar Shukla, Advocate

For Respondents No.1, 2(A) to 2(C), 3 to 5/Defendants:

Mr. D.N. Prajapati, Advocate

For Respondent No.6: Mr. Ravi Bhagat, Dy.G.A.

Hon'ble Shri Justice Sanjay K. Agrawal

C.A.V. Judgment

1. Proceedings of this second appeal have been conducted through video conferencing.

2. The substantial question of law involved, formulated and to be answered in this second appeal preferred by the appellants/plaintiffs is as under:-

“Whether the first appellate Court was justified in setting aside the finding of previous partition between the parties by

recording a finding, which is perverse to the record and thereby unjustified in dismissing the suit of the plaintiff ?”

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

3. The suit property was originally held by Jhariya.

The plaintiff and the defendants are closed relatives of Jhariya. Defendants No.1 and 2 filed an application for partition of the suit land under Section 178 of the Madhya Pradesh Land Revenue Code, 1959 (hereinafter called as 'the Code') before the Naib-Tahsilar, Surajpur. The Naib-Tahsildar, Surajpur by its order dated 14.11.88 directed the parties to get their title adjudicated by the jurisdictional Civil Court. Consequently, the plaintiffs filed the instant suit for declaration of title and permanent injunction stating inter-alia that plaintiffs No.1 to 7 are title-holders of the suit land shown in Schedule 'A, B, C, D and E', whereas the defendants are title-holders of the suit land shown in Schedule 'F' as partition has already been taken place among the parties herein 40 years prior to the date of institution of suit and they are in possession of their respective shares, but their holdings are joint as they are living separately by constructing house and cultivating

separately as per prior partition held among the parties. Therefore, decree for declaration of title and permanent injunction be granted in their favour.

4. Resisting the suit, the defendants filed their written statement and denied the averments made in the plaint stating inter-alia that for sake of convenience the parties have constructed separate houses and cultivating lands separately, but it has not been partitioned and shares have not been defined, therefore, no such partition has taken place among them and the Naib-Tahsildar, Surajpur has unnecessarily directed the parties to get their dispute adjudicated before the jurisdictional Civil Court, as such, the suit deserves to be dismissed.

5. The trial Court upon appreciation of oral and documentary evidence available on record, by its judgment and decree dated 27.1.2006 decreed the suit holding that plaintiffs No.1 to 7 are title-holders of the suit land shown in Schedule 'A, B, C, D and E' of the plaint and the defendants are title-holders of the suit land shown in Schedule 'F' of the plaint, which the defendants challenged by way of first appeal. The first appellate Court allowed the appeal and set aside the judgment and decree of the trial Court. Questioning the judgment and decree

of the first appellate Court, this second appeal under Section 100 of the CPC has been filed by the appellants/plaintiffs, in which substantial question of law has been framed by this Court, which has been set-out in opening paragraph of this judgment for sake of completeness.

6. Mr. Ashok Kumar Shukla, learned counsel for the appellants/plaintiffs, would submit that the first appellate Court is absolutely unjustified in reopening the partition already concluded between the parties 40 years prior to the date of filing of the suit in view of judgment of the Supreme Court in the matter of Ratnam Chettiar and others v. S.M. Kuppaswami Chettiar and others¹ and finding recorded by the first appellate Court that prior partition is not proved is contrary to the facts and law available on record and as such, the judgment and decree of the first appellate Court is liable to be set aside and the appeal be allowed.

7. On the other hand, Mr. D.N. Prajapati, learned counsel appearing for respondents No. 1, 2(A) to 2(C) and 3 to 5/plaintiffs, would support the impugned judgment and decree and submit that the plaintiffs have only stated that the parties are residing separately and cultivating separately, but even there is no

¹ (1976) 1 SCC 214

pleading made and evidence led defining the shares of the parties, as such, it is the case of no partition and prior partition has not been even properly pleaded and established, therefore, the second 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. In order to answer the substantial question of law so formulated, it would be appropriate to notice the meaning of "partition".

10. The principles of Hindu law by Mulla, 20th edition page 321, defines the partition as under:-

"According to the true notion of an undivided Mitakshara family, no individual member of that family, whilst it remains undivided, can predicate of the joint property, or that a particular member, has a certain definite share, one-third or one-fourth. Partition, according to that law, consists in a numerical division of the property; in other words, it consists in defining the shares of the coparceners in the joint property; an actual division of the property by metes and bounds is not necessary. Once the shares are defined, whether by an agreement between the parties or otherwise, the partition is complete. After the shares are so defined, the parties may divide the property by metes and bounds, or they may continue to live together and enjoy the property in common as before. However, whether they do the one or the other, it affects only the mode of enjoyment, but not the tenure of the property. The property ceases to be joint and immediately the shares are defined, and

henceforth, the parties hold the property as tenants-in-common."

- 11.** The Supreme Court in the matter of Kalyani (dead) by L.Rs., v. Narayanan and others² defined the partition as under:-

".....a disruption of joint family status by a definite and unequivocal indication to separate implies separation in interest and in right although not immediately followed by a de facto actual division of the subject-matter. This may at any time be claimed by virtue of the separate right. From the time of such disruption, each member holds his aliquot share as tenant-in-common irrespective of whether there is actual division of the properties by mets and bounds. Such would be the position, unless there is proof or reunion as understood in law. It is established law that actual physical division or partition by metes and bounds is not an essential ingredient for the purpose of effecting severance of status. That is really a formality in the process of partition. When there is a severance of the joint family from a particular date, but the properties are not petitioned, the members of the family become tenants in common and would be liable to account for the incomings received by them till the time that a final partition of such members. Such coparcener are tenants in the common but cannot be characterized as trustees."

- 12.** "Partition" is a redistribution or adjustment of pre-existing rights, among co-owners/coparceners, resulting in a division of lands or other properties jointly held by them into different lots or portions and delivery thereof to the respective allottees. The effect of such division is that the joint ownership is terminated and the respective shares

vest in them in severalty. (See Shub Karan Bubna alias Shub Karan Prasad Bubna v. Sita Saran Bubna and others³.) The Supreme Court further held qua partition in the aforesaid case-Shub Karan Bubna (supra) as under:-

"6. A partition of a property can be only among those having a share or interest in it. A person who does not have a share in such property cannot obviously be a party to a partition. "Separation of share" is a species of "partition". When all co-owners get separated, it is a partition. Separation of share(s) refers to a division where only one or only a few among several co-owners/coparceners get separated, and others continue to be joint or continue to hold the remaining property jointly without division by metes and bounds. For example, where four brothers owning a property divide it among themselves by metes and bounds, it is a partition. But if only one brother wants to get his share separated and other three brothers continue to remain joint, there is only a separation of the share of one brother.

7. In a suit for partition or separation of a share, the prayer is not only for declaration of plaintiff's share in the suit properties, but also division of his share by metes and bounds. This involves three issues:

- (i) whether the person seeking division has a share or interest in the suit property/properties;
- (ii) whether he is entitled to the relief of division and separate possession; and
- (iii) how and in what manner, the property/properties should be divided by metes and bounds?

In a suit is for partition or separation of a share, the court at the first stage decides whether the plaintiff has a share in the suit property and whether he is entitled to division and separate possession. The decision on these two issues is exercise of a judicial function and results in first stage decision termed as "decree" under Order 20 Rule 18(1) and termed as "preliminary decree" under Order 20 Rule 18(2) of the Code. The consequential division by metes and bounds, considered to be a ministerial or administrative act requiring the physical inspection, measurements, calculations and considering various permutations/combinations/alternatives of division is referred to the Collector under Rule 18(1) and is the subject-matter of the final decree under Rule 18(2)."

- 13.** Similarly, learned Author Mulla at page 326 has also stated about the evidence of partition and burden of proof as under:-

"2. The next case is of the kind dealt with by the Privy Council in Appovier v. Rama Subba Aiyar⁴, where the coparceners, with a view to partition executed a writing, whereby they agreed to hold the joint property in defined shares as separate owners. Such writing operates in law as a partition, though the property is not physically divided. This is a case where the agreement declares on the face of it, the intention of the parties to hold the joint property as separate owners, and no evidence is admissible of the subsequent acts of the parties to control or alter the effects of the document.

3. The third case is of the kind dealt with by the Privy Council in Doorga Pershad v. Kundun⁵, where the agreement was in writing, but the document did not declare on the face of it, the intention of the parties to hold the joint property as separate owners. In such a case,

⁴ (1866) 11 MIA 75

⁵ (1873) 13 Beng LR 235

when the question arises as to whether the document operates as a partition, the intention of the parties is to be inferred from: (1) the document; and from (2) their subsequent acts.

Where an instrument of partition, after giving one member his share, provided that the rest of the property was to be divided in a particular manner and that the remaining members should live like an ordinary undivided family subject to survivorship, it was held by the Privy Council that there was no partition between the other members.

4. The last case is of the kind dealt with by the Privy Council in *Ganesh Dutt v. Jewach*⁶, a case where there was no writing at all. In such a case, when the question arises as to whether there has been a partition or not, the intention of the parties as to separation can only be inferred from their acts. The question is one of fact to be decided with due regard to the cumulative effect of all the facts and circumstances, and primarily the burden of showing that there has been a partition is on the person setting it up.

- 14.** Reverting to the facts of the case in the light of aforesaid meaning of partition, it is quite vivid that the plaintiffs stated that the suit property was originally held by Jhariya, their forefather though holdings and revenue records are joint, but partition has taken place 40 years prior to filing of the suit on 18.3.1989 and in accordance with said partition they have constructed houses separately and also cultivating the suit land separately. The land shown in Schedule "A, B, C, D & E" belonged to plaintiffs No.1 to 7 and only the land shown in

6(1904) 31 Cal 262

Schedule "F" belonged to the defendants, as such, they are entitled for decree of declaration of title on the basis of earlier partition alleged to have taken place 40 years prior to the date of institution of the suit. The defendants filed their written statement and pleaded that since they have large family, therefore, for sake of convenience, the parties have constructed the houses separately and cultivating separately, but there is no partition and their share were never defined separately and therefore, they unnecessary create dispute in performance of agricultural operation and that is the reason they had filed an application for partition before the Tahsildar which was got adjourned by the plaintiffs for getting their title adjudicated by order dated 14.7.88 (Ex.P-1). Plaintiffs' witness No.1 Lohara Ram (PW-1) in his cross-examination before the Court has clearly stated that among the parties partition has not been taken place as per law, but the Tahsildar has made partition and the parties are cultivating as per their convenience. Plaintiff's witness No.2-Penganga (PW-2) has also stated in the same line stating that as per convenience they are cultivating and staying in the houses separately. Jageshwar (PW-3) has also

stated that Tahsildar has made partition. Similarly, plaintiff's witness No.4-Jaggu Ram (PW-4) in para-4 has also stated that since they have large family, therefore, as per their convenience they are living separately. The defendants have also stated about the partition made by Tahsildar, but the fact remains that fard batwara was prepared by Tahsildar to give effect to partition, but thereafter question of title has been raised and the matter was adjourned giving time to the plaintiffs to get the title adjudicated before the jurisdictional Civil Court and partition proceeding could not be concluded by the Revenue Court.

- 15.** Pleadings made and statements of the parties available on record would show that the parties are living separately and cultivating separately as per their convenience as their family is big and number of family members are more, but the fact remains that there is no actual partition among them defining their actual shares and there is no severance of status and their shares are not defined by the parties themselves. Merely staying separately in separate houses in joint family property by making construction and merely cultivating separately, it cannot be held that joint ownership

has been terminated and the shares vest in them in severalty as the plaintiffs and their witnesses have clearly stated that only for sake of convenience they are staying separately and cultivating separately and no partition has taken place among them and that is the reason defendants No.1 and 2 made an application for partition before the Tahsildar vide Exs.P-1 and P-2 in which fard batwara was also prepared by Tahsildar dividing the shares between the parties, but ultimately at the instance of the plaintiffs, time was given to get the title adjudicated before the Civil Court, as such, there is overwhelming evidence on record to hold that there is no partition either oral or by metes and bounds severing the status of joint family property into separate property of the parties which can be styled as partition resulting into division of lands or other property jointly held by them and it cannot be said to be partitioned as held by Their Lordships of the Supreme Court in the matter of **Shub Karan Bubna** (supra).

16. The judgment of the Supreme Court in the matter of **Ratnam Chettair** (supra) relied upon by learned counsel for the appellants/plaintiffs is clearly inapplicable to the facts of the present case as in

Ratnam Chettair (supra) the Supreme Court laid down the principle of law as to when partition already made can be re-opened as it cannot be re-opened unless it is obtained by fraud, coercion misrepresentation or undue influence as in the instant case, finding of this Court is also that there is no partition between the parties, therefore, it does not help the appellants herein.

17. In view of above-stated legal analysis, the first appellate Court is absolutely justified in holding that no partition in their family has taken place between the parties herein and nature of the property remained joint and that is the reason defendants NO.1 and 2 have filed an application for partition of the holdings before the Tahsildar vide Ex.P-1, as such, I do not find any perversity or illegality in the said finding recorded by the first appellate Court. The first appellate Court has rightly set aside the judgment and decree of the trial Court, which is hereby affirmed, as such, the substantial question of law is answered in favour of the defendants and against the plaintiffs.

18. Accordingly, the second appeal being devoid of merit is liable to be and is hereby dismissed leaving the parties to bear their own cost(s).

19. A decree be drawn-up accordingly.

Sd/-

(Sanjay K.Agrawal)
Judge

B/-