

HIGH COURT OF CHHATTISGARH, BILASPUR**Second Appeal No.71 of 2009**

Sirichand, S/o Rama Rawat, aged about 50 years, R/o
Vill. Devrani, Tah: Bhatapara, Dist: Raipur (CG)

----- **Appellant/Defendant No.1**

Versus

1. Radha Bai, D/o Raghunath Rawat, aged about 60 years,
R/o. Vill. Devrani, Tah: Bhatapara, Dist: Raipur (CG)
At Present R/o. Vill. Raikheda, Tah. Tilda, Dist :
Raipur (CG)

----- **Plaintiff**

2. State of Chhattisgarh, Through Collector, Raipur,
Dist: Raipur (CG)

----- **Respondents**

For Appellant/Plaintiff:

Mr.B.P.Gupta, Advocate

For Respondent No.1/Plaintiff:

Mr.Y.C.Sharma and Mr.Sachin Nidhi,
Advocates

For Respondent No.2/State:

Dr.Veena Nair, Dy.A.G.

Hon'ble Shri Justice Sanjay K. Agrawal

Judgment on Board

11/08/2020

1. Final hearing of this second appeal has been conducted
through video conferencing.

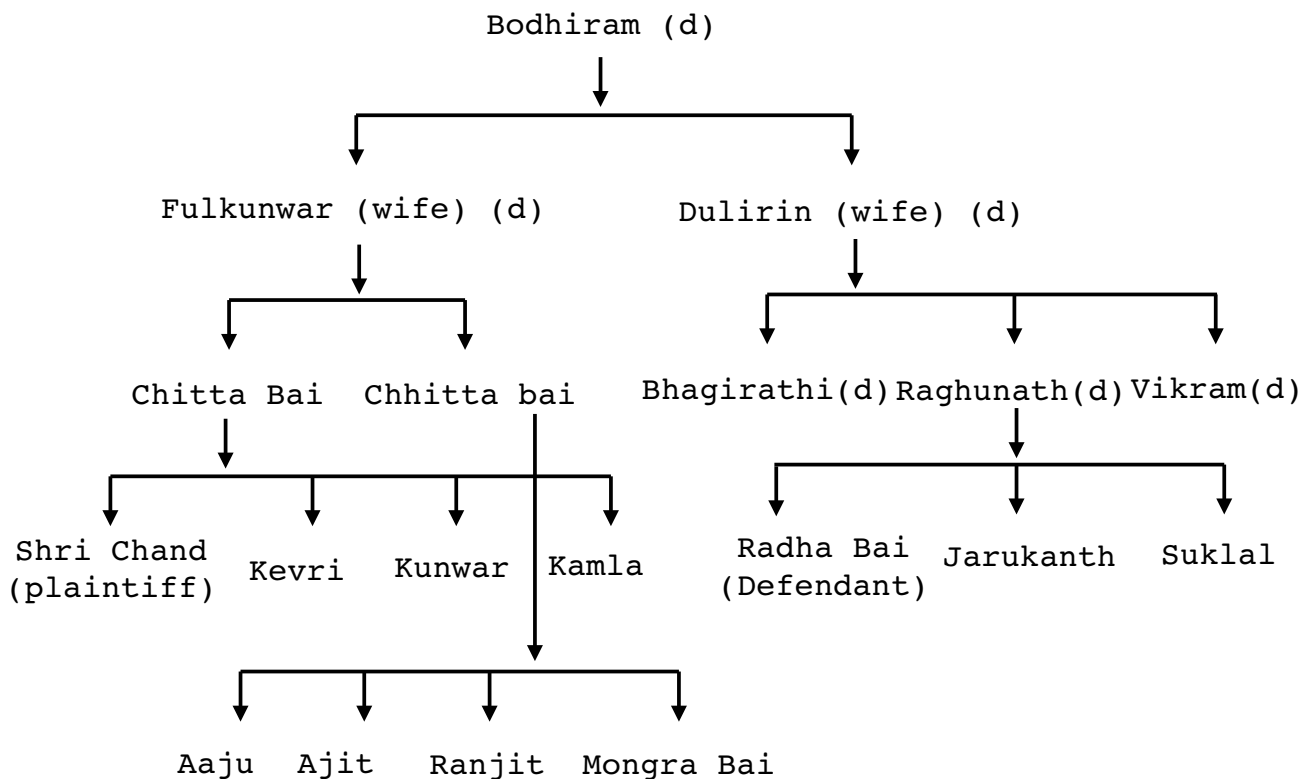
2. The substantial questions of law involved, formulated
and to be answered in this second appeal preferred by
the appellant/plaintiff are as under:-

"1. Whether the Court below has erred in not
declaring the appellant as owner of the suit
property ?

2. Whether the findings of the Court below is
perverse and ambiguous ?"

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

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



4. It is the case of the plaintiff that the suit property was originally held by Bodhiram and during his lifetime he partitioned his property among his sons and daughters and his son Raghunath from his second wife Dulirin was also given 5 acres of land. The suit property was duly recorded in the name of Bodhiram's first wife Fulkunwar and after her death the plaintiff being grandson of Bodhiram has inherited the suit

property. Defendant No.1-Radha Bai, who has inherited 5 acres of land from her father Raghunath, has sold the suit land by registered sale deed dated 20.5.76 vide Exs.P-1 and P-2 to Lakhanlal and Ramcharan respectively, as such, defendant No.1 has no right, title and possession over the suit land. The plaintiff alone is in possession of the suit land and defendant No.1 be restrained from interfering with his peaceful possession and decree for declaration of title also be granted in his favour.

5. Resisting the suit, defendant No.1 filed her written statement and controverted the allegations made in the plaint stating inter-alia that the suit property was originally belonged to Bodhiram and she inherited the property under succession. She is in continuing possession of the suit land. She has not sold any property as there was no previous partition between the parties and the suit land was mutated in her name and also pleaded in para-7 that other legal representatives of Bodhiram have not been impleaded as party defendant in the suit, therefore, the suit is liable to be dismissed.

6. The trial Court framed as many as 5 issues and partly allowed the suit by its judgment and decree dated 18.7.2007, holding that the plaintiff is in possession

of the suit land and entitled for declaration of title and possession along with other co-sharers namely Aaju, Ajit, Ranjit, Kunwar Bai, Kamla Bai and Kewari holding that the suit property was owned and possessed by the plaintiff along with other co-sharers, but declined to grant decree for permanent injunction in favour of the plaintiff. Feeling aggrieved against the judgment and decree of the trial Court partly granting decree for declaration of title in favour of the plaintiff, defendant No.1 preferred first appeal before the first appellate Court. The first appellate Court though confirmed the finding of the trial Court with regard to ownership and title of the plaintiff, but set aside the decree on the ground that other legal representatives of Fulkunwar were not impleaded as party defendant in the suit and relief which has not been sought has been granted to the plaintiff. Feeling aggrieved and dissatisfied with the judgment and decree of the first appellate Court, this second appeal under Section 100 of the CPC has been filed by the appellant/plaintiff, in which substantial questions of law have been formulated, which have been set-out in the opening paragraph of this judgment for sake of completeness.

7. Mr. B. P. Gupta, learned counsel for the

appellant/plaintiff, would submit that the first appellate Court is absolutely unjustified in setting aside and reversing the judgment and decree of the trial Court merely on the ground other legal representatives of Fulkunwar, first wife of Bodhiram, have not been impleaded as party defendant in the suit and that too after holding that defendant No.1 has no right and title over the suit land and she has already sold the share allotted to her father Raghunath by registered sale deed dated 20.5.76 vide Exs.P-1 and P-2 to Lakhanlal and Ramcharan respectively, as such, the second appeal deserves to be allowed and the judgment and decree of the first appellate Court be set aside and that of the trial Court be restored.

8. On the other hand, Mr. Sachin Nidhi, learned counsel for respondent No.1/defendant, would submit that the first appellate Court is absolutely justified in setting aside the judgment and decree of the trial Court as the trial Court has granted decree in favour of other co-sharers who were not party as plaintiff before the trial Court and the suit is also bad for non-joinder of necessary party, which has rightly been held by the first appellate Court, as such, the second appeal deserves to be dismissed.

9. I have heard learned counsel for the parties,

considered their rival submissions made herein-above and also went through the records with utmost circumspection.

10. From perusal of the judgment of the trial Court as well as the first appellate Court, it is quite vivid that the trial Court has clearly held that defendant No.1's father late Shri Raghunath was allotted 5 acres of land on partition during lifetime of his father Bodhiram, which was sold by Radha Bai (defendant No.1) vide Exs.P-1 and P-2 on 20.5.76 to Lakhanlal and Ramcharan respectively. It was further held that defendant No.1 has no right and title over the suit land. The said finding of the trial Court as affirmed by the first appellate Court has not been further challenged before this Court either by filing regular second appeal or by maintaining cross-objection, as such, finding of two Courts below that defendant No.1 has already sold the share allotted to her father and she has no right, title and possession over the suit land has become final in absence of challenge to that finding.

11. Now, the question for consideration would be the first appellate Court is justified in granting the appeal on the ground that other legal representatives of Fulkunwar, first wife of Bodhiram, have not been

impleaded as party defendant in the suit.

12. A careful perusal of written statement would show that though defendant No.1 has pleaded that other legal representatives of Bodhiram, have not been impleaded as party defendant, but no specific objection was raised in written statement filed by her that other legal representatives of Fulkunwar have not been impleaded as party defendant in the suit and the suit suffers from non-joinder of necessary party.

13. At this stage, it would be appropriate to notice Order 1 Rule 9 of the CPC, which states as under :-

"9. Mis-joinder and non-joinder. - No suit shall be defeated by reason of the mis-joinder or non-joinder of parties, and the Court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it :

Provided that nothing in this rule shall apply to non-joinder of a necessary party."

14. A careful perusal of the aforesaid provision would show that proviso to Order 1 Rule 9 CPC is exception to Order 1 Rule 9 CPC and the suit has to be dismissed, if the necessary party has not been joined in the suit.

15. A necessary party is one without whom, no order can be made effectively and a proper party is one in whom absence an effective order can be made but whose

presence is necessary for a complete and final decision of the question involved in the proceeding.

(See : **State of Assam v. Union of India**, (2010) 10 SCC 408).

16. Similarly, in the matter of **Mumbai International Airport v. Regency Convention Centre & Hotels (P) LTD.**¹, the Supreme Court held as under *qua* the necessary party.

" 15. A "necessary party" is a person who ought to have been joined as a party and in whose absence no effective order could be passed at all by the court. If a "necessary party" is not impleaded, the suit itself is liable to be dismissed. A "property party" is party who, though not a necessary party, is a person whose presence would enable the court to completely, effectively and adequately adjudicate upon all matters in dispute in the suit, though he need not be a person in favour of or against whom the decree is to be made. If a a person is not found to be a proper or necessary party, the court has no jurisdiction to implead him, against the wishes of the plaintiff. The fact that a person is likely to secure a right/interest in a suit property, after the suit is decided against the plaintiff, will not make such person a necessary party or a proper party to the suti for specific performance."

17. Further, objection regarding non-joinder of necessary party should be taken before the trial Court at first available opportunity in order to provide opportunity to the plaintiff to rectify the defect,

1(2010) 7 SCC 417

which is apparent from Order 1 Rule 13 of the CPC and which states as under :-

"13. Objections as to non-joinder or mis-joinder. - All objections on the ground of non-joinder or mis-joinder of parties shall be taken at the earliest possible opportunity and, in all cases where issues are settled, at or before such settlement, unless the ground of objection has subsequently arisen, and any such objection not so taken shall be deemed to have been waived."

18. Aforesaid Rule provides that on objection on the ground of misjoinder and non-joinder, if not taken at the earliest opportunity, shall be deemed to have been waived, it is based on principle that technical objection, which, if taken at the earliest stage of proceedings might have been cured and which has not been so taken, should not be allowed to be raised at the later stage so as to defeat rights of the parties.

19. The Madhya Pradesh High Court in the matter of **Rahamatullah v. State of Madhya Pradesh**² has held that all the questions of misjoinder and non-joinder of the parties must be decided on the basis of allegations made in the plaint or written statement, the pleading of parties. Paragraph 5 of the report states as

21986 J LJ 443

under :-

"5. It is, thus a settled law and apparent from the very reading of Rule 13 of Order 1, that objection as to non-joinder or misjoinder must be taken at the earliest possible opportunity and objection not so taken, must be deemed to have been waived. Non raising of plea of non joinder of necessary party requires proof of certain facts on the evidence on record at the earliest stage as enjoined by Rule 13 and this would amount to waiver of pleading of a fact on which such a plea could be established. It is also settled law that such objection, if raised during the appellate stage, without taken any objection in written statement, the objection will not be allowed at all. All the questions of misjoinder or non-joinder must be decided on the basis of allegations made in the plaint or written statement, the pleading of parties. In absence of pleading to that effect, it was a wrong exercise of jurisdiction by the appellate Court and therefore, its order cannot be maintained."

20. The Supreme Court in the matter of Church of Christ Charitable v. Ms. Pooniamman Education Trust³ has clearly held that objection regarding non-joinder of necessary party should be taken before the trial Court in order to provide opportunity to the plaintiff to rectify the defect and only if even then the plaintiff persists in non-impleading the party, consequences of the non-joinder may follow. Relying upon its earlier pronouncement in the matter of State of U.P. v. Ram Swarup Saroj⁴, it was further held that

3(2012) 8 SCC 706

4(2000) 3 SCC 699

non-joinder of party cannot be raised for the first time before the Supreme Court, if same has not been raised in the trial Court and has not resulted in failure of justice.

21. A careful perusal of written statement filed by the defendant would show that no specific objection with regard to non-impleadment of other legal representatives of Fulkunwar of which the plaintiff also belongs was raised before the trial Court. Consequently, no issue was struck by the trial Court and even the first appellate Court after affirming the finding of the trial Court on other issues though held that in this appeal plea with regard to non-joinder of party cannot be permitted to be raised, but eventually came to the conclusion that it effects the interest of the parties particularly other legal representatives of Fulkunwar were not impleaded in the suit and proceeded to set aside the decree, which is absolutely unjustified and unsustainable. If the specific objection could have been raised in the written statement, then the plaintiff could have amended the plaint before the trial Court and it has not resulted in failure of justice to defendant No.1 as she has already alienated to property allotted on partition to her father, as such, finding with regard to non-

impleadment of legal representatives of Fulkunwar is covered by Order 1 Rule 13 of the CPC.

22. Now, the first appellate Court has also recorded a finding that relief which has not been claimed by the plaintiff has been granted in his favour by the trial Court. The plaintiff being grandson of Fulkunwar did not implead his brothers and also did not implead sons and daughters of Chhitta Bai (mother's sister) namely, Aaju Ajit, Ranjit and Mongra Bai, therefore, the suit is bad. The trial Court took note of the fact that although one co-owner has filed the suit, but other co-owners have also right, title and interest in the suit property proceeded to grant decree in favour of all co-owners, which would naturally avoid multiplicity of the suit, which cannot be objected by defendant No.1 for sake of raising technical objection that other co-owners have not been impleaded.

23. The trial Court has taken reasonable view of the matter by granting decree for declaration of title in favour of the plaintiff along with other co-owners, which is strictly in accordance with law.

24. In view of that, the first appellate Court has also committed illegality in holding that relief which has not been claimed has been granted in favour of the plaintiff and other co-owners. Consequently, the

judgment and decree of the first appellate Court is partly set aside to the extent of setting aside decree of declaration of title granted in favour of the plaintiff and co-owners. The appeal is allowed in part leaving the parties to bear their own cost(s).

25. A decree be drawn-up accordingly.

Sd/-

(Sanjay K.Agrawal)
Judge

B/-