

HIGH COURT OF CHHATTISGARH, BILASPURSecond Appeal No.475 of 2007

Girdhari, S/o Sohan, aged about 50 years, Occupation Cultivator, R/o Gram Bazar, Thana & Tehsil Surajpur, Distt. Surguja.

(Plaintiff)
---- Appellant

Versus

1. Bhandari, S/o Sohan, aged about 55 years, R/o Gram Bazar, Thana & Tehsil Surajpur, Distt. Surguja.
2. Keshav Prasad, S/o Bhandari, aged about 29 years,
3. Agrasen, S/o Bhandari, aged about 27 years,

Both Respondents No.2 and 3 R/o Gram Bazar, Thana and Tahsil Surajpur, Distt. Surguja (C.G.)

4. Smt. Triveni Devi, W/o Bhandari, aged about 50 years, Sahu by caste religion of Gram Bazar, Post Office Bazar, Thana & Tahsil Surajpur, Distt. Surguja (C.G.)
5. The State of Chhattisgarh, Through Collector, Surguja.

---- Respondents

For Appellant: Mr. Ram Kumar Tiwari, Advocate.

For Respondents No.1 to 4: -

Mrs. Renu Kochar, Advocate.

For Respondent No.5 / State: -

Mr. Rahul Jha, Government Advocate.

Hon'ble Shri Justice Sanjay K. Agrawal

Judgment On Board

22/01/2020

1. This second appeal preferred by the plaintiff / appellant herein was admitted for hearing by formulating the following substantial questions of law:-

“Whether the learned Lower Appellate Court was justified in reversing the decree passed by the Trial Court and dismissing the suit on the basis of a finding of partition based on order dated 31.03.1989 (Ex.D/4) ignoring the evidence on record that the said order of partition was later on set aside by Appellate Revenue Court and there being no further order of partition on record?”

(For the sake of convenience, parties would be referred hereinafter as per their status shown and ranking given in the plaint

before the trial Court.)

2. The suit property was originally held by Sohan. The plaintiff is his son and defendant No.1 is also his son, whereas original defendant No.2 was his widow who died during the pendency of suit. The plaintiff filed suit for partition and separate possession of the suit land shown in Schedule A of the plaint stating inter alia that he is entitled for $\frac{1}{3}$ share in the suit property held by his father Sohan and the order of partition dated 31-3-1989 of the Naib Tahsildar has already been set-aside by the Sub-Divisional Officer on 6-9-1991 and no partition has taken place in which defendant No.1 setup the plea and admitted the fact that the order of partition dated 31-3-1989 has already been set-aside by the First Revenue Appellate Authority and the matter has been remanded to the Naib Tahsildar for fresh adjudication, as such, the suit deserves to be dismissed.
3. The trial Court by its judgment & decree held that the suit property shown in Schedule A of the plaint has not been partitioned, as the parties were not satisfied with the order of partition dated 31-3-1989 and there is no partition of the suit land by metes and bounds and further held that since the widow – mother of the plaintiff and defendant No.1 i.e. original defendant No.2 has died, therefore, the plaintiff and defendant No.1 will take half share each in the suit property against which the defendants preferred appeal and in appeal, the first appellate Court reversed the judgment & decree of the trial Court holding that partition had already been taken place vide Ex.D-4 and allowed the appeal. Being aggrieved against the judgment & decree of the first appellate Court, the plaintiff preferred this second appeal in which substantial question of law has been framed which has been set-out in the opening paragraph of this judgment.
4. Mr. Ram Kumar Tiwari, learned counsel appearing for the appellant

herein / plaintiff, would submit the first appellate Court has completely ignored the fact that the order of partition Ex.D-4 has already been set-aside by the appellate authority on 6-9-1991 and the matter has been remanded to the Naib Tahsildar for fresh adjudication and nothing has been brought on record, therefore, the learned first appellate Court relying upon Ex.D-1 misdirected itself in holding that once partition has already been done, again it cannot be subjected to re-partition.

5. Mrs. Renu Kochar, learned counsel appearing for respondents No.1 to 4 herein, would submit that the plaintiff has not brought on record any document showing that the order dated 6-9-1991 by which the order of partition has been set-aside by the Sub-Divisional Officer in an appeal preferred by the defendants, has been set-aside and as such, it cannot be held that the order of partition has been set aside and even the order of remand was not placed on record, as such, Ex.D-4 is still in existence and therefore the second appeal deserves to be dismissed.
6. I have heard learned counsel for the parties and considered their rival submissions made herein-above and also went through the record with utmost circumspection.
7. In a suit for partition filed by the plaintiff, as admitted, the suit property was held by Sohan – father of the plaintiff & defendant No.1 and husband of original defendant No.2 who died during the pendency of suit, and the defendants claimed that there is an order of partition vide Ex.D-4 and also setup the plea of partition dated 25-4-1980. The fact of order of partition dated 31-3-1989 was stated to be set-aside by defendant No.1 in his written statement in para 2 filed before the trial Court clearly stating that appeal against that order was admitted and the order has been set-aside and the matter has been remanded to the Naib Tahsildar for fresh adjudication, though during the course of evidence, order of the Sub-Divisional Officer – appellate authority was

not brought on record. The trial Court decreed the suit holding that there is no partition and did not rely upon Ex.D-4 to hold partition, giving half share to the plaintiff and half share to defendant No.1. But the first appellate Court in appeal preferred by defendant No.1 took cognizance of the fact that by Ex.D-4 partition had already taken place by the order of the Naib Tahsildar and the order of the Sub-Divisional Officer remanding the matter setting aside the order dated 31-3-1989 has not been placed on record. Once partition is held and is proved vide Ex.D-4, the suit property cannot be again subjected to partition.

8. The fact remains that the order of partition dated 31-3-1989 (Ex.D-4) passed by the Naib Tahsildar has been set-aside by the Sub-Divisional Officer and the order of the Naib Tahsildar has merged into the order of the Sub-Divisional Officer dated 6-9-1991 and thus, the order operative which is in force is the order of the Sub-Divisional Officer setting aside the order of partition passed by the Naib Tahsildar. This fact has clearly been admitted by defendant No.1 in his statement before the trial Court. There is no dispute that the order of partition Ex.D-4 has not been set-aside by the revenue court in revenue proceeding on 6-9-1991. By virtue of Section 58 of the Evidence Act, admitted facts need not be proved by the party to the suit. Since the effect of the order of partition having been set-aside by the appellate court on 6-9-1991 is an admitted fact, as such, no order of partition is in existence as on date, it was not further required to be proved by virtue of Section 58 of the Evidence Act. First appeal could not have been allowed by the first appellate Court only on the ground that the order setting aside the order of partition Ex.D-4 has not been placed on record which is sought to be produced before this Court. The fact remains that the order of Tahsildar dated 31-3-1989 (Ex.D-4) has been set-aside by the revenue appellate court and which has been admitted

by defendant No.1, therefore, because of non-production of the said document, judgment & decree of the trial Court directing partition could not have been set-aside by the first appellate Court, especially and particularly when the said fact is not in dispute and it is born out from the written statement filed by defendant No.1 himself and further order after remand by the Sub-Divisional Officer has not been brought to the notice of the Court by either of the parties. The substantial question of law is answered accordingly.

9. In view of the aforesaid analysis, I am unable to sustain the judgment & decree of the first appellate Court, it is accordingly set-aside and that of the trial Court is restored.
10. Learned counsel for respondents No.1 to 4 herein submits that the plaintiff has sold some part of the property which is subject-matter of partition. If that be so, the court making partition would consider the said fact while allotting share to the plaintiff.
11. With the aforesaid observation, the second appeal is allowed. No order as to cost(s).
12. Decree be drawn-up accordingly.

Sd/-
(Sanjay K. Agrawal)
Judge