

HIGH COURT OF CHHATTISGARH, BILASPURSecond Appeal No.175 of 2009Judgment reserved on: 20-8-2020Judgment delivered on: 14-9-2020

1. Krishna Kumar Chandrakar, S/o Ram Raj, aged about 25 years,
2. Vishnoo Prasad, S/o Ram Raj, aged about 23 years,
3. Shankar, S/o Johan Lal, aged about 40 years,
4. Chamarin Bai, D/o Bhim Prasad Chandrakar, aged about 50 years,

All above Cultivators and residents of Village Sinodha in the Tahsil Kasdol, District Raipur (C.G.)

(Plaintiffs)
---- Appellants

Versus

Bhim Prasad (deceased) Through Legal Representatives:

1. Sadhawa @ Shankar Lal Chandranahu (Chandrakar) (Dead) Through Legal Representatives:

1(a) Duleshwari Chandranahu, Wd/o Late Sadhwa @ Shankar Lal Chandranahu, aged about 45 years, R/o Sinodha, Thana Kasdol, District Baloda Bazar (C.G.)

1(b) Santoshi, W/o Ishwar Prasad Banjare, aged about 28 years, R/o Yadunandan Nagar, Tifra, New Shri Ram Manas Mandir, Bilaspur, District Bilaspur (C.G.)

2. Santosh, S/o Shankar Lal Chandrakar, aged about 20 years,
3. Rajkamal, S/o Shankar Lal Chandrakar, aged about 20 years,
4. Kamlesh, S/o Shankar Lal Chandrakar, aged about 19 years,

Respondents No.2 to 4 are R/o Bilaspur (Tifra), District Bilaspur (C.G.)

5. The State of Chhattisgarh, Through the Collector, Raipur, District Raipur (C.G.)

(Defendants)
---- Respondents

AND

Second Appeal No.410 of 2008

1. Parwati Bai Chandranahu (Chandrakar), Wd/o Har Deo @ Hirday Lal, aged about 34 years,
2. Durga @ Durgeshwari, D/o Hardeo Chandranahu, aged about 16 years, Minor through next friend mother Parwati Bai, Wd/o Hardeo Chandranahu.

Both appellants R/o Village Sinodha in the Tahsil Kasdol, District Raipur (C.G.)

(Plaintiffs)
---- Appellants

Versus

1. Sadhawa @ Shankar Lal Chandranahu (Chandrakar) (Dead) Through Legal Representatives:

1(a) Duleshwari Chandranahu, Wd/o Late Sadhawa @ Shankar Lal Chandranahu, aged about 45 years, R/o Village Sinodha, Thana Kasdol, District Baloda Bazar (C.G.)

1(b) Santoshi, W/o Ishwar Prasad Banjare, aged about 28 years, R/o Yadunandan Nagar, Tifra, New Shri Ram Manas Mandir, Bilaspur, District Bilaspur (C.G.)

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Respondents No.2 to 4 are R/o Bilaspur (Tifra), District Bilaspur (C.G.)

5. The State of Chhattisgarh, Through the Collector, Raipur, District Raipur (C.G.)

(Defendants)
---- Respondents

For Appellants / Plaintiffs: -

Mr. Manoj Paranjpe and Mr. Anurag Singh, Advocates.

For Respondents No.1 (a) to 4 / Defendants: -

Mrs. Renu Kochar, Advocate.

For Respondent No.5 / State: -

Dr. Veena Nair, Deputy Advocate General.

Hon'ble Shri Justice Sanjay K. Agrawal

C.A.V. Judgment

1. Proceedings of these matters have been taken-up for final hearing through video conferencing.
2. These two appeals preferred by the two sets of plaintiffs separately were admitted by formulating the following substantial questions of law: -

S.A.No.175/2009 (By plaintiffs No.5, 6, 4 & 3/appellants herein)

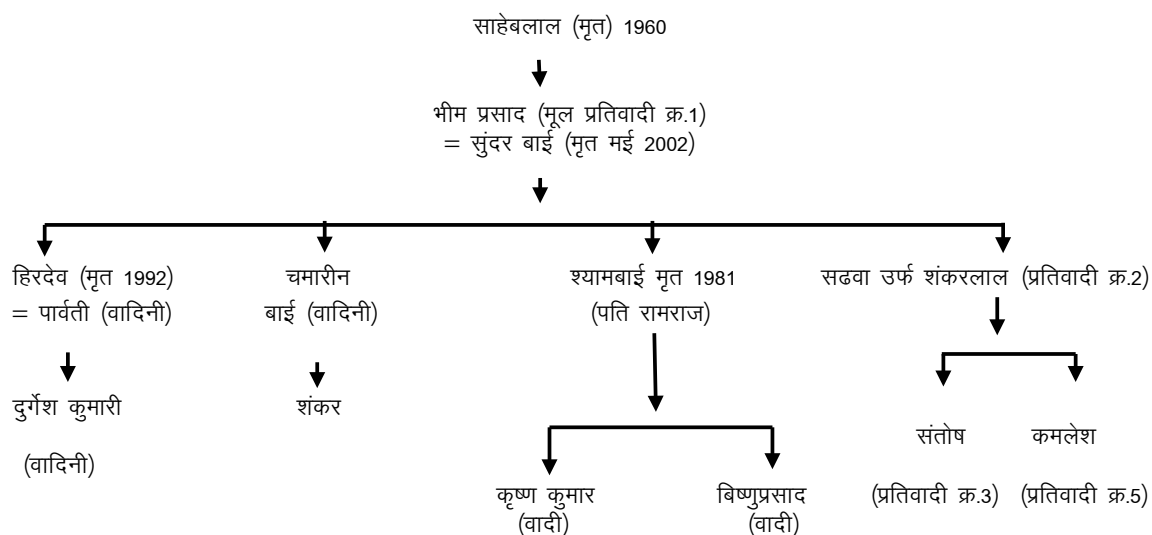
“Whether the two Courts below were justified in deciding the suit against the appellant/plaintiff and holding that the appellant/plaintiff do not have share in the property of Bhim Prasad in spite of the fact that the appellants/plaintiffs are the legal heirs of Bhim Prasad?”

S.A.No.410/2008 (By plaintiffs No.1 & 2/appellants herein)

“Whether the two Courts below were justified and deciding the suit against the appellant/plaintiff and holding that the appellant/plaintiff do not have share in the property of Bhim Prasad?”

(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.)

3. Since two separate appeals have been preferred by the plaintiffs / appellants herein against the common judgment & decree impugned dated 26-9-2008 passed by the first appellate Court, they have been clubbed together, heard together and are being disposed of by this common judgment.
4. The following genealogical tree would demonstrate the relationship among parties: -



5. The suit property was held by Bhim Prasad – original defendant No.1 impleaded in the suit filed on 28-8-2002, but he died during the pendency of suit on 18-11-2003 and thereafter, his name was deleted from the cause title by the order of the trial Court dated 12-12-2003. Plaintiff No.1 is wife of Bhim Prasad's son, plaintiff No.3 is daughter of Bhim Prasad, plaintiff No.2 is daughter of plaintiff No.1, plaintiff No.4 is son of plaintiff No.3 and plaintiffs No.5 & 6 are sons of Shyam Bai – daughter of Bhim Prasad. They jointly filed a suit for partition, separate possession and permanent injunction stating inter alia that the suit property shown in para 5.1 of the plaint situated at Village Sinodha, Tahsil Kasdol, District Raipur is the property held by Bhim Prasad from his ancestors, it is the joint family property and it is not the self-acquired property of Bhim Prasad. It is further pleaded that the property shown in para 5.2 of the plaint is recorded in the name of Sadhwa – defendant No.2, but it is not his self-acquired property, it is the joint family property. Similarly, the property shown in para 5.3 of the plaint is the property of joint family though it was purchased in the name of defendant No.2. It was also pleaded that partition has not taken place between the parties and on 26-6-2002, defendant No.2 in collusion with defendants No.3 & 5 got a document executed by defendant No.1 fraudulently which is absolutely forged and fabricated, as such, the plaintiffs are entitled for a separate decree of partition and possession and also for permanent injunction.
6. Resisting the suit, defendants No.1, 3 & 5 filed a joint written statement before the trial Court refuting the plaint allegations stating inter alia that it is the self-acquired property of Bhim Prasad and he has, out of the

services rendered by defendants No.3 & 5, executed a Will dated 26-6-2002 (Ex.D-10) in their favour and got registered it in favour of them, as such, the properties shown in Schedules 1 to 3 (para 5) of the plaint are not joint family properties and therefore the suit be dismissed.

7. It is pertinent to mention here that during the pendency of suit, defendant No.1 Bhim Prasad whose property is under dispute, died on 18-11-2003, but the plaint remained un-amended and the suit continued and proceeded further and ultimately, the trial Court framed following five issues: -

	वाद प्रश्न:-	निष्कर्ष:-
1-	क्या वादीगण वाद भूमि के 3/5 भाग के स्वामी होकर उस भाग का बंटवारा व कब्जा प्रतिवादीगण से पाने की पात्रता रखते है।	‘नही’
2-	क्या तहसीलदार कसडोल द्वारा पारित आदेश राजस्व प्रकरण क्रमांक -30अ6/2001-02 वादीगण पर गैर बंधनकारी है।	‘प्रमाणित नही’
3-	क्या वादीगण प्रतिवादीगण के विरुद्ध निषेधाज्ञा का उपचार पाने की पात्रता रखते है।	‘नही’
4-	क्या वादीगण ने दावे का उचित मुल्यांकन कर सही न्याय शुल्क अदा किया है।	‘नही’
5-	स्हायता एवं व्यय।	अंतिम पैरा अनुसार / नियमानुसार

8. Thereafter, the trial Court after appreciating oral and documentary evidence available on record, dismissed the suit and with regard to the property shown in para 5.1 of the plaint held that it is the self-acquired property of original defendant No.1 and he has executed the Will dated 26-6-2020 (Ex.D-10) in favour of defendants No.3 & 5. With regard to the property shown in para 5.2 of the plaint, it was held that it is the self-acquired property of defendant No.2 Sadhwa and therefore the plaintiffs have no right, title and interest over that property. With respect to para 5.3 of the plaint, it was held that it is the joint family

property and the plaintiffs are at liberty to make application for partition before the revenue court and as such, no decree is required to be passed in respect of that property.

9. Being aggrieved against the judgment & decree of the trial Court, the plaintiffs filed two sets of appeals before the first appellate Court being Civil Appeal No.13A/2007 {Krishna Kumar and three others v. Bhim Prasad (dead) through legal representatives} and Civil Appeal No.14A/2007 {Parvati Bai Chandranahu (Chandrakar) and another v. Bhim Prasad (dead) through legal representatives}. The first appellate Court dismissed the two first appeals holding that the disputed properties, particularly, the property shown in para 5.1 of the plaint is the self-acquired property of Bhim Prasad and therefore the plaintiffs have no right and title over the said property.
10. Feeling dissatisfied and aggrieved with the judgment and decree of the first appellate Court, again two sets of second appeals have been preferred under Section 100 of the CPC which have been clubbed and heard together and substantial questions of law have been framed which have been quoted in the opening paragraph of this judgment for the sake of completeness.
11. Mr. Manoj Paranjpe, learned counsel appearing for the appellants herein / plaintiffs, at the outset, would submit that the plaintiffs are confining their dispute with regard to the property shown in para 5.1 of the plaint with respect to 5.148 hectares of land and are not disputing the correctness of the finding with regard to the property shown in para 5.2 of the plaint i.e. 0.756 hectare of land and further para 5.3 of the plaint i.e. 0.453 hectare, which the trial Court has held to be the joint

family property, therefore, he is confining his argument only questioning the finding with regard to the property shown in para 5.1 of the plaint i.e. 5.148 hectares of land. He would submit that both the Courts below have held that though the suit property shown in para 5.1 of the plaint is the self-acquired property of Bhim Prasad, accepting the finding as it is and taking the suit property (para 5.1 of the plaint) that it is the self-acquired property of Bhim Prasad, then also the plaintiffs being daughter, grand-sons and grand-daughters of Bhim Prasad are entitled to inherit the property and would be entitled to a share in the suit property. He would further submit that the Will dated 26-6-2002 has not been proved in accordance with law, as none of the attesting witnesses was examined for proving validity and correctness of the Will as per the provisions contained in Section 63(c) of the Succession Act, 1925 read with Section 68 of the Evidence Act, 1872. He would also submit that though earlier, suit was filed based on pleading that the property mentioned in para 5.1 of the plaint is the ancestral property of Bhim Prasad – original defendant No.1, but then also, after the death of Bhim Prasad during the course of trial on 18-11-2003, though the pleading was not amended claiming share in the self-acquired property of Bhim Prasad, yet, validity of the Will can be gone into in the suit for partition, in view of the decision of the Supreme Court in the matter of **Maddineni Koteswara Rao v. Maddineni Bhaskara Rao and another**¹. He would further submit that the propounders of the Will i.e. in this case, defendants No.3 & 5 have to prove the Will, whereas even it is not challenged, in view of the decision of the Supreme Court in the matter

1 (2009) 13 SCC 179

of S.R. Srinivasa and others v. S. Padmavathamma². Lastly, he would submit that Will cannot be proved by examining document writer, as in this case it is not sought to be done in view of the decision of the Supreme Court in the matter of N. Kamalam (dead) and another v. Ayyasamy and another³. As such, the judgment & decree of both the Courts below deserve to be modified by holding that the plaintiffs are entitled to partition in the suit property mentioned in para 5.1 of the plaint as daughter, grand-sons and grand-daughters of Bhim Prasad – original defendant No.1.

12. Mrs. Renu Kochar, learned counsel appearing for respondents No.1(a) to 4 herein / defendants, would submit that the suit as framed and filed was based on the pleading and the basis that the suit property was the ancestral property of Bhim Prasad, whereas the trial Court has clearly held that the suit property shown in para 5.1 of the plaint is the self-acquired property of Bhim Prasad which has been upheld by the first appellate Court; till now, that finding has attained finality and in appeal also correctness of the finding has not been questioned, what has been questioned is the self-acquired property of Bhim Prasad – original defendant No.1 which has been bequeathed by original defendant No.1 in favour of defendants No.3 & 5 they being the legal heirs to succeed the property of Bhim Prasad. Further, question is with regard to legality and validity of execution of Will which cannot be permitted to be questioned collaterally unless proper amendment in consistent with the relevant rules is made in the plaint and evidence to that effect is brought out and the defendants are given opportunity to meet out those

² (2010) 5 SCC 274

³ (2001) 7 SCC 503

pleadings and led evidence in support of their amended pleading. The defendants cannot be taken to surprise by changing the stand of the plaintiffs that too during the course of final hearing of second appeal before this Court. As such, the finding relating to the property being self-acquired property of Bhim Prasad and he having bequeathed the suit property shown in para 5.1 of the plaint in favour of defendants No.3 & 5 having become final, the second appeals deserve to be dismissed. Mrs. Kochar, learned counsel, would further submit that legality and validity of Will cannot be gone into in a suit which is based altogether on different pleadings and validity of Will was never questioned or Will executed in favour of defendants No.3 & 5 was never in question before any court, as such, the second appeals deserve to be dismissed.

13. 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.

14. Admittedly and undisputedly, the suit property belongs to Bhim Prasad, he was impleaded as defendant No.1 before the trial Court and subsequently, during the pendency of suit, he died on 18-11-2003. The plaintiffs laid the claim of partition and separate possession on the basis of pleading that the suit property shown in para 5.1 of the plaint was ancestral property in the hands of Bhim Prasad and he had no right and title to transfer the same in any manner including by instrument dated 26-6-2002 to defendants No.3 & 5 and they have a particular share in the suit property, therefore, decree for partition and possession be granted in their favour which was refuted by the original defendant No.1, who was alive at that time, by filing written statement on 17-12-

2002 and also clearly stated that it is the self-acquired property and he has executed Will in respect of that property in favour of defendants No.3 & 5, but then also the pleading was not amended claiming what is being claimed now and since Bhim Prasad died, therefore, the plaintiffs are entitled to get share in his self-acquired property and accordingly decree be passed and allowed the suit to be proceeded and ultimately, with regard to the property shown in para 5.1 of the plaint, the trial Court held that it is the self-acquired property of Bhim Prasad and he has executed Will in favour of defendants No.3 & 5 by Will dated 26-6-2002 and in turn, the two appeals preferred by the plaintiffs came to be affirmed by the first appellate Court. Now, in the present second appeals, at the time of final hearing, the plaintiffs have claimed that even if the finding that the suit property was self-acquired property of Bhim Prasad is taken to be correct, yet, they are entitled for share in the suit property, as the Will Ex.D-10 is invalid being not properly proved by examining attesting witnesses and therefore appropriate share be granted in their favour.

15. It is well settled law that a Hindu may possess self-acquired property. Such property belongs exclusively to him and he is empowered to make a gift of it or bequeath it by will, to any person he likes. It is not liable to partition. The Mulla's Hindu Law (23rd Edition), page 326, describes "Incidents of separate or self-acquired property". Para 220 of the Mulla's Hindu Law states as under: -

"§ 220. Incidents of separate or self-acquired property.—A Hindu, even if he be joint, may possess separate property. Such property belongs exclusively to him. No other member of the coparcenary, not even his male issue, acquires any interest in it by birth. He may sell it, or he may make a gift

of it, or bequeath it by will, to any person he likes. It is not liable to partition, and, on his death intestate, it passes by succession to his heirs, and not by survivorship to the surviving coparceners.”

16. The Supreme Court in the matter of C.N. Arunachala Mudaliar v. C.A.

Muruganatha Mudaliar and another⁴ considered the issue and it has been held that A Mitakshara father is not only competent to sell his self-acquired immovable property to a stranger without the concurrence of his sons but he can make a gift of such property to one of his own sons to the detriment of another and he can make even an unequal distribution amongst his heirs. It was held as under: -

“9. ... Clearly the latter passages are in flat contradiction with the previous ones and in an early Calcutta case: vide – ‘Muddun Gopal v. Ram Buksh, 6 WR 71 (A), a reconciliation was attempted at by taking the view that the right of the sons in the self-acquired property of their father was an imperfect right incapable of being enforced at law. The question came pointedly for consideration before the Judicial Committee in the case of Rao Balwant v. Rani Kishori, 25 Ind App 54 (PC) (B) and Lord Hobhouse, who delivered the judgment of the Board, observed in course of his judgment that in the text books and commentaries on Hindu Law, religious and moral considerations are often mingled with rules of positive law. It was held that the passages in Chap. I, Sec. 1, verse 27 of Mitakshara contained only moral or religious precepts while those in S. 5, verses 9 and 10 embodied rules of positive law. The latter consequently would override the former. It was held, therefore, that the father of the joint Hindu family governed by Mitakshara law has full and uncontrolled powers of disposition over his self-acquired immovable property and his male issue could not interfere with these rights in any way.

This statement of the law has never been challenged since then and, it has been held by the various High Courts in India, and in our opinion rightly, that a Mitakshara father is not only competent to sell his self-acquired immovable property to a stranger without the concurrence of his sons:

vide – ‘6 WR 71 (Cal) (A)’, but he can make a gift of such property to one of his own sons to the detriment of another: vide – ‘Sital v. Madho’, 1 All 394 (C); and he can make even an unequal distribution amongst his heirs: vide – ‘Bawa Misser v. Rajah Bishen’, 10 WR 287 (Cal) (D).”

17. Thus, it has been clearly held by their Lordships that a Mitakshara father has absolute right to dispose of his self-acquired property in any manner he liked, to which his male descendant were not entitled to object in any way.

18. In the instant case, the two Courts below have already concluded that the suit property shown in para 5.1 of the plaint was the self-acquired property of original defendant No.1 Bhim Prasad, which has become final as the plaintiffs are in this appeal not questioning the validity and correctness of that finding. The two Courts below have already held that the original defendant No.1 had during his life time bequeathed the suit property (para 5.1 of the plaint) by Will dated 26-6-2002 (Ex.D-10) in favour of defendants No.3 & 5.

19. In the considered opinion of this Court, once the original defendant No.1 *propositus* and holder of the property died on 18-11-2003 bequeathing the suit property (self-acquired property) to defendants No.3 & 5, the plaintiffs could have made amendment in the pleading in consistent with the rules prevalent in that regard and conforming with the law laid down in this behalf questioning the authority of defendant No.1 to make Will as well as also the legality and validity of Will executed in favour of defendants No.3 & 5.

20. The Supreme Court in the matter of Om Prakash and others v. Ram Kumar and others⁵, has clearly held that a party cannot be granted a

relief, which is not claimed, if the circumstances are such that granting such relief would result in serious prejudice to the interested party and deprive him of valuable rights under the statute. In reference to Order 7 Rule 7 of the CPC, it has further been held that plaintiff cannot base new cause of action on plea of defendant unless he amends the plaint or files separate proceedings.

21. In the matter of Satish Chand Makhan and others v. Govardhan Das Byas and others⁶, the Supreme Court has held that ordinarily a suit is tried in all its stages on the cause of action as it existed on the date of the institution, but the Court can look to subsequent events, when the relief claimed originally has (1) by reason of subsequent change of circumstances become inappropriate, or (2) where it is necessary to take notice of the changed circumstances to shorten litigation, or (3) to do complete justice between the parties.
22. Furthermore, in the matter of Ganesh Shet v. Dr. C.S.G.K. Setty and others⁷, their Lordships of the Supreme Court have held that under Order 7 Rule 7 of the CPC, the general or other relief, the Court may deem fit, sought by plaintiff can be granted only when it is consistent with the pleading as well as proof.
23. In the matter of Om Prakash Gupta v. Ranbir B. Goyal⁸, the Supreme Court has clearly held that subsequent events can be taken cognizance of only if Court's attention is invited towards them according to established rules of procedure so that the prerequisites of affording the opposite party an opportunity of meeting the new case and of determining the real questions in controversy are fulfilled by holding the following:-

6 (1984) 1 SCC 369

7 (1998) 5 SCC 381

8 (2002) 2 SCC 256

“11. The ordinary rule of civil law is that the rights of the parties stand crystalised on the date of the institution of the suit and, therefore, the decree in a suit should accord with the rights of the parties as they stood at the commencement of the lis. However, the Court has power to take note of subsequent events and mould the relief accordingly subject to the following conditions being satisfied : (i) that the relief, as claimed originally has, by reason of subsequent events, become inappropriate or cannot be granted; (ii) that taking note of such subsequent event or changed circumstances would shorten litigation and enable complete justice being done to the parties; (iii) that such subsequent event is brought to the notice of the Court promptly and in accordance with the rules of procedural law so that the opposite party is not taken by surprise. In *Pasupuleti Venkateswarlu Vs. The Motor & General Traders* - AIR 1975 SC 1409 this Court held that a fact arising after the lis, coming to the notice of the Court and having a fundamental impact on the right to relief or the manner of moulding it and brought diligently to the notice of the Court cannot be blinked at. The Court may in such cases bend the rules of procedure if no specific provision of law or rule of fairplay is violated for it would promote substantial justice provided that there is absence of other disentitling factors or just circumstances. The court speaking through Krishna Iyer, J. affirmed the proposition that court can, so long as the litigation pends, take note of updated facts to promote substantial justice. However, the court cautioned: (i) the event should be one as would stultify or render inept the decretal remedy, (ii) rules of procedure may be bent if no specific provision or fairplay is violated and there is no other special circumstance repelling resort to that course in law or justice, (iii) such cognizance of subsequent events and developments should be cautions, and (iv) the rules of fairness to both sides should be scrupulously obeyed.

12. Such subsequent event may be one purely of law or founded on facts. In the former case, the Court may take judicial notice of the event and before acting thereon put the parties on notice of how the change in law is going to affect the rights and obligations of the parties and modify or mould the course of litigation or the relief so as to bring it in conformity with the law. In the latter case, the party relying on the subsequent event, which consists of facts not beyond pale of controversy either as to their existence or in their impact, is expected to have resort to amendment of pleadings under Order 6 Rule 17 of the CPC. Such subsequent event the Court may permit being introduced into the pleadings by way of amendment as it would be necessary to do so for the purpose of determining real questions in controversy between the parties. In *Messrs. Trojan & Co. Vs. RM. N.N. Nagappa Chettiar* - AIR 1953 SC 235 this Court has held that the decision of a case cannot

be based on grounds outside the pleadings of the parties and it is the case pleaded that has to be found; without the amendment of the pleadings the Court would not be entitled to modify or alter the relief. In *Sri Mahant Govind Rao Vs. Sita Ram Kesho & Ors.* - (1898) 25 Indian Appeals 195 (PC), their Lordships observed that, as a rule, relief not founded on the pleadings should not be granted.

13. Power of the Court to take note of subsequent events, specially at the appellate stage, came up for the consideration of a Full Bench of Nagpur High Court presided over by Justice Sinha (as His Lordship then was) in *Chhote Khan Vs. Mohammad Obedulla Khan*, AIR 1953 Nag 361. Hidayatullah, J. (as His Lordship then was) held, on a review of judicial opinion, that an action must be tried in all its stages on the cause of action as it existed at the commencement of the action. No doubt, Courts 'can' and sometimes 'must' take notice of subsequent events, but that is done merely 'inter partes' to shorten litigation but not to give to a defendant an advantage because a third party has acquired the right and title of the plaintiff. The doctrine itself is of an exceptional character only to be used in very special circumstances. It is all the more strictly applied in those cases where there is a judgment under appeal. His Lordship quoted the statement of law made by Sir Asutosh Mookerjee, J. in a series of cases that merely because the plaintiff loses his title 'pendente lite' is no reason for allowing his adversary to win if the corresponding right has not vested in the adversary but in a third party."

24. The legal principle laid down in *Om Prakash Gupta* (supra) has consistently been followed by the Supreme Court in the matters of *Ram Nibas Gagar (dead) by LRs. v. Debojyoti Das and others*⁹, *Ram Kumar Barnwal v. Ram Lakhani (dead)*¹⁰ and *Nidhi v. Ramkripal Sharma (dead) through LRs.*¹¹.

25. Reverting to the facts of the case in the light of the principles of law laid down by the Supreme Court, it is quite vivid that the plaintiffs have laid their claim on the basis that the suit property was the ancestral property in the hands of Bhim Prasad and they have a particular share in that property and therefore entitled for share and as such, decree for

⁹ (2003) 1 SCC 472

¹⁰ (2007) 5 SCC 660

¹¹ (2017) 5 SCC 640

partition and possession be granted, but thereafter, the trial Court has clearly held that the property mentioned in para 5.1 of the plaint was the self-acquired property of Bhim Prasad who died during the pendency of suit on 18-11-2003 bequeathing the suit property in favour of defendants No.3 & 5 and thereafter, that finding has attained finality and the suit property being the self-acquired property, original defendant No.1 – Bhim Prasad had already executed a Will in favour of defendants No.3 & 5 which he was competent to do in the light of the decision of the Supreme Court in C.N. Arunachala Mudaliar (supra). The plaintiffs could have amended the plaint in the light of the decision of the Supreme Court in Om Prakash (supra) and could have challenged the legality and validity of Will executed by defendant No.1 in favour of defendants No.3 & 5 and could have claimed accordingly and could have specifically challenged the Will holding that either the original defendant No.1 was not entitled to execute the Will in favour of defendants No.3 & 5 or defendants No.3 & 5 have failed to prove legality and validity of the Will in accordance with law. The plaintiffs at the second appellate stage during the course of final hearing cannot be allowed take a U turn by taking the other side into surprise and claim that even if the property is the self-acquired property of Bhim Prasad, yet, being his daughter, grand-sons and grand-daughters, they are entitled for share in the self-acquired property of Bhim Prasad, whereas, Bhim Prasad had already bequeathed the suit property being his self-acquired property, in favour of defendants No.3 & 5, which he was empowered to do as per the law declared by their Lordships of the Supreme Court. The plaintiffs though well legally advised, yet, have

failed to take appropriate pleading after the death of original defendant No.1 Bhim Prasad and failed to make amendment in the pleading questioning the validity of Will Ex.D-10 to get the Will invalid and further questioning the legality and validity of the Will executed in favour of defendants No.3 & 5 shifting the burden to defendants No.3 & 5 to prove the legality and validity of the Will; in absence of that, the finding recorded by the two Courts below holding that the property being the self-acquired property of the original defendant No.1 and not the ancestral property in the hands of the original defendant No.1 and therefore the plaintiffs are not entitled to share in the suit property (para 5.1 of the plaint), is a finding of fact based on the evidence available on record. I do not find any merit in the second appeals. The substantial questions of law are answered accordingly and the second appeals are dismissed. However, it is made clear that so far as the finding recorded by the trial Court in respect of the property shown in para 5.3 of the plaint i.e. 0.453 hectare of land is the joint property would remain intact and this Court has not expressed any opinion about that. Judgment & decree of the first appellate Court is affirmed and the plaintiffs' suit would stand dismissed except the finding recorded by the trial Court with respect to the property mentioned in para 5.3 of the plaint. No order as to cost(s).

26. Appellate decree be drawn-up accordingly.

Sd/-
(Sanjay K. Agrawal)
Judge