

HIGH COURT OF CHHATTISGARH, BILASPURSecond Appeal No.390 of 2010

1. Girdhar, S/o Gariba Sahu, aged about 40 years, Occupation Cultivation.
2. Harihar, S/o Gariba Sahu, aged about 38 years.

Both R/o Village Bami, P.S. Sahaspur/Lohara, Tahsil Kawardha, District Kabirdham (C.G.)

(Defendants)
---- Appellants

Versus

1. Sitaram, S/o Shiv Prasad, aged about 53 years, Occupation Cultivation, R/o Village Bami, P.S. Sahaspur Lohara, Tahsil Kawardha, District Kabirdham (C.G.)

(Plaintiff)

2. State of Chhattisgarh, through Collector, Kawardha, District Kabirdham (C.G.)

(Defendant)
---- Respondents

For Appellants / Defendants No.1 and 2: -

Mr. Awadh Tripathi and Mr. Vivek Tripathi, Advocates.

For Respondent No.1 / Plaintiff: -

Mr. Rajeev Shrivastava and Mr. Malay Shrivastava, Advocates.

For Respondent No.2 / State: -

Dr. Veena Nair, Deputy Advocate General.

Hon'ble Shri Justice Sanjay K. Agrawal

Judgment On Board

24/08/2020

1. Proceedings of this matter have been taken-up for final hearing through video conferencing.
2. This second appeal preferred under Section 100 of the CPC by the appellants herein / defendants No.1 & 2 was admitted for hearing on

1-7-2011 by formulating the following three substantial questions of law: -

“(1) Whether in the state of evidence on record and particularly since all the witnesses have admitted the existence of marriage in Churi form, the finding on issue No.3 that Indroutin Bai is the illegal wife of Gariba is perverse?

(2) Whether finding on issue No.3 regarding the validity of marriage in Churi form between Indroutin Bai and Gariba can be recorded without joining the said Gariba in the suit?

(3) Whether, in the event it is found proved that marriage between Indroutin Bai and Gariba was lawful, the said Gariba would be an heir under Section 15 read with Section 16 of Hindu Succession Act, 1956 and in such eventually whether the plaintiff would be entitled to $1/4^{\text{th}}$ share and not $1/3^{\text{rd}}$ share as granted the Courts below?”

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

3. The suit property was originally the property of Shiv Prasad which he got in partition and ultimately inherited by his wife Indroutin Bai. The plaintiff is son of Shiv Prasad out of his wedlock with Indroutin Bai. It is the case of the plaintiff that after death of Shiv Prasad, his mother Indroutin Bai started residing with one Gariba and defendants No.1 & 2 are his sons out of his cohabitation with Indroutin Bai, though no marriage took place between them and therefore the plaintiff is the exclusive owner of 8 acres of land shown in Schedule A of the plaint. Alternatively, the plaintiff sought the relief that he may be granted $1/3$ share if the Court finds that defendants No.1 & 2 are also entitled to succeed the property of Indroutin Bai. Defendants No.1 & 2 opposed

the prayer made in the plaint by filing written statement stating inter alia that they are legitimate sons of Indroutin Bai out of her wedlock with Gariba in Churi form and therefore they will succeed the property in exclusion of the plaintiff. The trial Court after appreciation of oral and documentary evidence available on record held that no marriage took place between Gariba and Indroutin Bai and defendants No.1 & 2 are illegitimate children of Gariba and Indroutin Bai, but will succeed the property along with the plaintiff by virtue of Section 15(1)(a) of the Hindu Succession Act, 1956 which in turn, stood affirmed by the first appellate Court resulting in filing of second appeal by defendants No.1 & 2 which has been admitted by formulating three substantial questions of law and which have been set-out in the opening paragraph of this judgment for the sake of completeness.

4. Mr. Awadh Tripathi, learned counsel appearing for defendants No.1 & 2 / appellants herein, would submit that the witnesses have admitted the existence of marriage in Churi form of Indroutin Bai with Gariba and the finding of marriage of Gariba with Indroutin Bai could not have been recorded without impleading Gariba as a party defendant in the suit. He would further submit that marriage of Gariba with Indroutin Bai was lawful, therefore, Gariba would also get $\frac{1}{4}$ share in the suit property as such, the second appeal deserves to be allowed by answering the substantial questions of law in favour of defendants No.1 & 2 and against the plaintiff.

5. Mr. Malay Shrivastava, learned counsel appearing for the plaintiff / respondent No.1 herein, would support the impugned judgment &

decree and would submit that the first appellate Court as well as the trial Court, both are justified in recording the said finding.

6. I have heard learned counsel for the parties and considered their rival submissions and went through the record with utmost circumspection.
7. It is the case of the plaintiff that Indroutin Bai was legally wedded wife of Shiv Prasad, but after death of Shiv Prasad, his mother Indroutin Bai started residing with Gariba without marriage with him. Defendants No.1 & 2 setup the plea of marriage of Indroutin Bai with Gariba in Churi form. However, the trial Court as well as the first appellate Court, both, have recorded a clear cut finding that marriage of Indroutin Bai with Gariba never took place and the fact of marriage between them is not established therefore defendants No.1 & 2, though are illegitimate sons of Indroutin Bai with Gariba, but by virtue of Section 15(1)(a) read with Section 16 of the Hindu Succession Act, 1956, they will succeed the property along with the plaintiff and further held that since Gariba was not the legal husband of Indroutin Bai being not legally wedded, therefore, he would not be entitled to succeed the property of Indroutin Bai. The said finding is a finding of fact based on the evidence available on record which is neither perverse nor contrary to the record, as despite the long drawn submission, learned counsel for defendants No.1 & 2 / appellants herein failed to demonstrate that the finding recorded by the two Courts below holding that marriage of Indroutin Bai with Gariba is not proved.
8. Similarly, invalidity of marriage of Indroutin Bai with Gariba has been recorded by the trial Court by framing issue No.3. Defendants No.1 &

2 did not raise any objection in their written statement that Gariba is necessary party and unless Gariba is impleaded as party defendant in the suit, the suit cannot proceed. Defendants No.1 & 2 ought to have taken that plea in the written statement at the earliest available opportunity, as if it has not been taken at the stage of trial, then it cannot be permitted to be taken in the first appellate stage or in the second appellate stage, in view of the provision contained in Order 1 Rule 13 of the CPC which clearly provides that the plea of non-joinder of party has to be taken in the initial stage at the earliest possible opportunity, otherwise that plea not so taken earlier shall be deemed to have been waived. As such, the plea of non-joining of Gariba or non-impleadment of Gariba as party defendant in the suit, cannot be taken by defendants No.1 & 2 in the instant second appeal and this question is answered accordingly.

9. Since the marriage of Indroutin Bai with Gariba was not lawful, therefore, Gariba would not inherit the property of Indroutin Bai under Section 15(1)(a) of the Hindu Succession Act, 1956. Section 15(1) (a) of the Hindu Succession Act, 1956 states as under: -

“15. General rules of succession in the case of female Hindus.—(1) The property of a female Hindu dying intestate shall devolve according to the rules set out in section 16,—

(a) firstly, upon the sons and daughters (including the children of any pre-deceased son or daughter) and the husband;

(b) to (e) xxx xxx xxx”

10. By virtue of the aforesaid provision, the property of a female Hindu dying intestate shall devolve according to the rules set out in Section 16

of the Hindu Succession Act, 1956, upon the husband of the said female. If valid marriage between the female Hindu dying intestate and her husband is not established at the time of death of the said female Hindu, the said husband would not inherit; for husband to inherit, there must be valid marriage between the spouses and relationship should be subsisting at the time of death of the female Hindu dying intestate.

11. In the instant case, two Courts below have clearly held that the marriage of Indroutin Bai with Gariba in Churi form is not duly established. Therefore, in order to include within the meaning of husband under Section 15(1)(a) of the Hindu Succession Act, 1956, he must be legally wedded husband with the wife to whom the suit property belongs. Since Gariba was not validly married to Indroutin Bai and valid marriage between Gariba and Indroutin Bai has not been established and it was not subsisting at the time of death of Indroutin Bai on 11-5-2005, the first appellate Court has rightly affirmed the judgment & decree of the trial Court. I do not find any perversity or illegality in the said finding recorded by both the Courts below. The appeal has no merit, it deserves to be and is accordingly dismissed leaving the parties to bear their own costs. The substantial questions of law are answered accordingly.

12. Appellate decree be drawn-up accordingly.

Sd/-
(Sanjay K. Agrawal)
Judge