

HIGH COURT OF CHHATTISGARH, BILASPURSecond Appeal No.356 of 2008Judgment reserved on: 10-2-2020Judgment delivered on: 20-2-2020

Hiraman (Dead) Through Legal Representatives

(Plaintiff)

1. Motim Bai Dhiwar (Died and deleted)
2. Hemlal, S/o Hiranman, aged about 58 years, Dewanganpara, Rajim, Distt. Raipur (C.G.)
3. Kumari Bai, W/o Pushu, aged about 50 years, Manghapara, Kanker.
4. Laxmin, aged about 45 years, Nandkishore, Manghapara, Kanker.
5. Bhagwati, aged about 42 years, Bisheshar, R/o Viseda, Tehsil Ambikapur, Distt. Raipur (C.G.)
6. Raju Demar, aged about 40 years, S/o late Heeraman Dewangan Para, Rajim, Distt. Raipur (C.G.)

---- Appellants

Versus

1. Jyoti Prakash, aged 50 years, S/o Vir Singh.
2. Firan Bai, D/o Vir Singh, aged about 70 years.
3. Bundela Bai, D/o Vir Singh, aged about 65 years.
4. Jhuni Bai, S/o Vir Singh, aged 60 years.

All R/o Villge Rajim, Tahsil Rajim, District Raipur (C.G.)

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

(Defendants)

---- Respondents

For Appellants: Mr. Siddharth Dubey, Advocate.

For Respondents No.1 to 4: -

Mr. Ram Kumar Tiwari, Advocate.

For Respondent No.5 / State: -

Mr. Ravi Kumar Bhagat, Deputy Government Advocate.

Hon'ble Shri Justice Sanjay K. Agrawal

C.A.V. Judgment

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

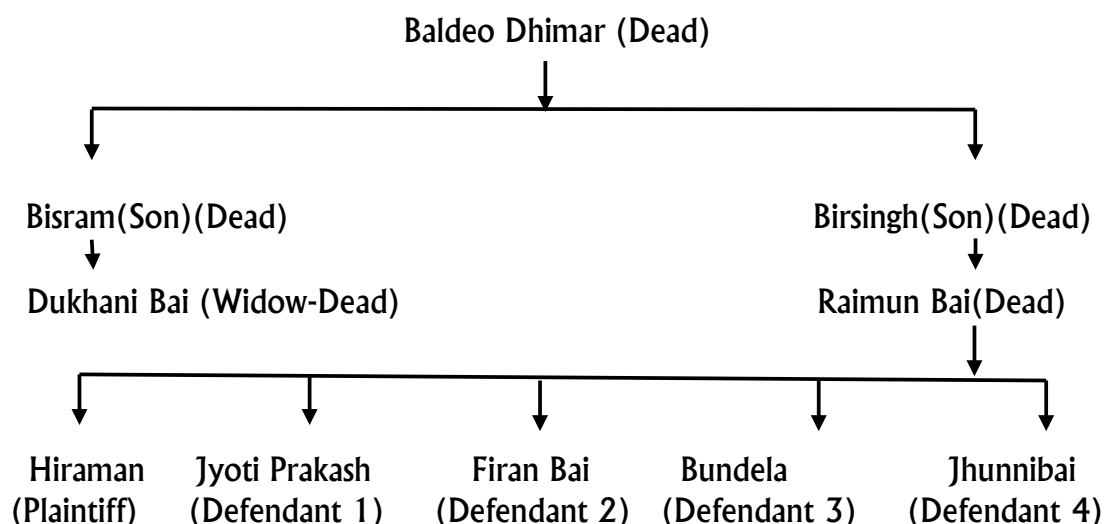
“i. Whether learned first appellate Court was justified in reversing the judgment and decree passed by the trial Court declaring the land bearing Khasra No.226 area 0.486 hectare and Khasra No.975 area 0.575 hectare total area 1.461 hectare is liable to be partitioned between the plaintiff and the defendants and holding that the same fell in the share of the defendants in partition amongst the parties took place way back in 25 to 30 years ?

ii. Whether both the Court below were justified in holding that the land Bearing Khasra No.1143 area 0.643 hectare is jointly held by the plaintiff and the defendants after death of Dukhni Bai and passing the decree for partition between the plaintiff and defendants ignoring the plea of ouster taken by the plaintiff ?

iii. Whether the finding regarding partition between the parties way back in 25 to 30 years is perverse ?”

(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 following genealogical tree would demonstrate the relationship amongst the parties: -



3. The suit property was originally held by Baldeo Dhimar. He had two sons namely Bisram and Bir Singh. Bisram and his wife Dukhani Bai died issue-less. Dukhani Bai died in the year 1978 after the death of her husband Bisram. However, Bir Singh had two sons namely Hiranman – the plaintiff herein and Jyoti Prakash (defendant No.1) and three daughters namely Firan (defendant No.2), Bundela (defendant No.3) and Jhunni Bai (defendant No.4). It is the case of the plaintiff that since Bisram and Dukhani Bai died issue-less and Dukhani Bai died subsequent in time, he inherited the property of Bisram after death of Dukhani Bai, by way of oral will allegedly executed by Dukhani Bai in his favour. Further case of the plaintiff is that there is no partition took place between them in the lifetime of Bir Singh, therefore, they are entitled for the property as per the Explanations appended to Section 6 of the Hindu Succession Act, 1956, as the said property was the ancestral property in the hands of his father Bir Singh and therefore the suit be decreed accordingly.
4. The defendants setup the plea that in the lifetime of Baldeo Dhimar, the property has been divided between Bisram and Bir Singh and Bisram died issue-less and so far as the property of Bir Singh is concerned, the plaintiff has sold his part of property given to him on partition vide Ex.D-1 i.e. Khasra No.413, area 0.024 hectare and Khasra No.914, area 0.445 hectare and he also made counter-claim with regard to the property of Bir Singh namely Khasra Nos.266, 975, 413 & 914, area 0.486 hectare, 0.575 hectare, 0.024 hectare and 0.445 hectare, respectively, as such, the plaintiff's suit is liable to be dismissed.

5. The trial Court upon appreciation of oral and documentary evidence on record, held that the suit property was the joint family property of parties, so far as the property of Bisram is concerned, the plaintiff and defendants No.1 to 4, both are entitled for 1/5 share each and also entitled for the property left by Bir Singh, however, appeals were preferred against the judgment & decree of the trial Court by both the parties and the appeal preferred by the plaintiff was dismissed, whereas the appeal preferred by the defendants was partly allowed and it was held that so far as the property left by Bisram and Dukhani is concerned, the plaintiff and defendants No.1 to 4, both are entitled for 1/5 share each, whereas only defendants No.1 to 4 will be entitled for the property left by Bir Singh and the plaintiff is not entitled in the property of Bir Singh, as partition has earlier been taken place and the plaintiff has sold his share against which this second appeal has been preferred by the plaintiff in which substantial questions of law have been formulated which have been set-out in the opening paragraph of this judgment.
6. Mr. Siddharth Dubey, learned counsel appearing for the appellants herein / LRs of the plaintiff, would submit that since there was no partition took place between the plaintiff and defendants No.1 to 4 in respect of the property left by Bir Singh, it is the coparcenary property as it was the ancestral property in the hands of Hiranman and Jyoti Prakash. Therefore, as per the Explanations appended to Section 6 of the Hindu Succession Act, 1956, the property will be divided amongst the coparceners. He would further submit that the property of Bisram after death of his wife Dukhani will be reverted in accordance with Section 15 of the Hindu Succession Act, 1956, if the plea of the

plaintiff's oral will is not found acceptable. He would also submit that as per the oral will of Dukhani, the plaintiff is entitled for the entire property, as such, the second appeal deserves to be allowed by answering the substantial questions of law in favour of the appellants herein / LRs of the plaintiff.

7. Mr. Ram Kumar Tiwari, learned counsel appearing for respondents No.1 to 4 herein / defendants No.1 to 4, would submit that the first appellate Court has rightly held that so far as the property left by Bir Singh, in partition, share of plaintiff Hiranman has already been given to Hiranman and he has sold the suit property Khasra No.413, area 0.024 hectare and Khasra No.914, area 0.445 hectare vide Ex.D-1, therefore, he is not entitled for any further property. He would further submit that the oral will is not permissible in law, therefore, the first appellate Court has partly dismissed the suit in favour of the plaintiffs in which no interference is warranted in exercise of the jurisdiction under Section 100 of the CPC.
8. I have heard learned counsel for the parties and considered their submissions made herein-above and also went through the record with utmost circumspection.

Answer to substantial question of law No.2: -

9. For the sake of convenience, substantial question of law No.2 is taken first. It relates to the property left by Dukhani Bai – wife of Bisram to which plaintiff Hiranman claimed by way of oral gift alleged to have been executed by Dukhani Bai in his favour which the trial Court as well as the first appellate Court, both, have declined to accept and accordingly determined the share of the plaintiff as well as defendants No.1 to 4.

10. The question is, whether the oral will set up by the plaintiff has rightly been declined by both the Courts below?

11. In order to consider the plea, it would be appropriate to notice Section 57 of the Indian Succession Act, 1925, which reads as under :-

“57. Application of certain provisions of Part to a Class of Wills made by Hindus, etc. - The provisions of this Part which are set out in Schedule III shall, subject to the restrictions and modifications specified therein, apply -

(a) to all Wills and codicils made by any Hindu, Buddhist, Sikh or Jaina on or after the first day of September, 1870, within the territories which at the said date were subject to the Lieutenant-Governor of Bengal or within the local limits of the ordinary original civil jurisdiction of the High Courts or Judicature at Madras and Bombay; and

(b) to all such Wills and codicils made outside those territories and limits so far as relates to immovable property situated within those territories or limits; and

(c) to all Wills and codicils made by any Hindu, Buddhist, Sikh or Jaina on or after the first day of January, 1927, to which those provisions are not applied by clauses (a) and (b):

Provided that marriage shall not revoke any such Will or codicil.”

12. By virtue of clause (c) of Section 57 of the Indian Succession Act, 1925, all Wills and codicils made by any Hindu on or after 1st January, 1927 must comply with Sections of Part VI specified in Schedule III of the Act. Part VI of the Act comprises of Sections 57 to 191. Schedule III of the Act states as under:-

SCHEDULE III

(See section 57)

PROVISIONS OF PART VI APPLICABLE TO CERTAIN WILLS AND CODICILS DESCRIBED IN SECTION 57

Sections 59, 61, 62, 63, 64, 68, 70, 71, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90,

95, 96, 98, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, [117], 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189 and 190.

Restrictions and modifications in application of foregoing sections

1. Nothing therein contained shall authorise a testator to bequeath property which he could not have alienated inter vivos, or to deprive any persons of any right of maintenance of which, but for the application of these sections, he could not deprive them by Will.

2. Nothing therein contained shall authorise any Hindu, Buddhist, Sikh or Jaina, to create in property any interest which he could not have created before the first day of September, 1870.

3. Nothing therein contained shall effect any law of adoption or intestate, succession.

4. In applying Section 70 the words “than by marriage or” shall be omitted.

5. In applying any of the following sections, namely, sections seventy-five, seventy-six, one hundred and five, one hundred and nine, one hundred and eleven, one hundred and twelve, one hundred and thirteen, one hundred and fourteen, one hundred and fifteen, and one hundred and sixteen to such Wills and codicils the words “son”, “sons”, “child”, and “children” shall be deemed to include an adopted child; and the word “grand-children” shall be deemed to include the children, whether adopted or natural-born, of a child whether adopted or natural-born; and the expression “daughter-in-law” shall be deemed to include the wife of an adopted son.

13. Thus, Section 57 read with Schedule III of the Indian Succession Act, 1925, makes Section 63 of the Act of 1925 applicable to all Hindus. It would also be appropriate to notice Section 63 of the Indian Succession Act, 1925, which states as under :-

“63. Execution of unprivileged Wills. - Every testator, not being a soldier employed in an expedition or engaged in actual warfare, or an airman so employed or engaged, or a mariner at sea, shall execute his Will according to the following rules:-

(a) The testator shall sign or shall affix his mark to the Will, or it shall be signed by some other person in his presence and by his direction.

(b) The signature or mark of the testator, or the signature of the person signing for him, shall be so placed that it shall appear that it was intended thereby to give effect to the writing as a Will.

(c) The Will shall be attested by two or more witnesses, each of whom has seen the testator sign or affix his mark to the Will or has seen some other person sign the Will, in the presence and by the direction of the testator, or has received from the testator a personal acknowledgement of his signature or mark, or the signature of the such other person; and each of the witnesses shall sign the Will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary.”

14. The Division Bench of the Delhi High Court, in the matter of Sunita Shivdasani v. Geeta Gidwani and another¹, has held that a Hindu Will is required to be in writing and an oral Will executed by a Hindu is impermissible in law. Paragraphs 12 and 13 of the report state as under:

“12. In view of Section 57 read with Schedule III of the Act, requirements of Section 63 must be complied with and are mandatory for a Will executed by a Hindu. A Will which does not comply with the requirement of Section 63 of the Act is null and void. Section 63 of the Act requires a Will should be in writing because it is to be signed or marked by the testator himself or signed by some other person in the presence of the testator or on his direction. A Will, as per Section 63, is also required to be attested by two or more witnesses. Thus, Section 63 of the Act requires a Will to be in writing.

13. Section 65 of the Act relates to execution of privileged Wills or oral Wills. Section 65 has not been included in Schedule III and in view of Sections 57 of the

¹ AIR 2007 Delhi 242

Act, the same is therefore not applicable to Hindus. It, therefore, follows that Hindus cannot make a privileged Will after 1st January, 1927 even if conditions of Section 65 are satisfied. Section 66 of the Act will obviously have no application to Hindus as the said Section relates to mode of execution of an oral or a privileged Will and other conditions for a valid oral Will.”

15. In view of the afore-stated legal analysis and in view of the principle of law laid down by the Delhi High Court in Sunita Shivdasani (supra), it is quite vivid that there cannot be an oral Will executed by a Hindu.
16. In view of the aforesaid settled legal position, in the considered opinion of this Court, both the Courts below have rightly turned down to accept the plea of oral will set up by the plaintiff, alleged to have been executed by Dukhani Bai in respect of the property held by her. As such, the plea of oral will is totally unacceptable and invalid as contemplated under Section 57 read with Section 63(c) of the Indian Succession Act, 1925.
17. The next plea of Mr. Dubey, learned counsel for the appellants herein / LRs of the plaintiff, is that the property of Dukhani Bai cannot be divided equally among the plaintiff and defendants No.1 to 4 in view of the provisions contained in Section 11 of the Hindu Succession Act, 1956.
18. Dukhani Bai died leaving the suit property bearing Khasra No.1143, area 0.643 hectare, as such, she died leaving intestate which would devolve upon the heirs of her husband in view of Section 15(1)(b) of the Hindu Succession Act, 1956 and the plaintiff & defendants No.1 to 4 being brother's sons & brother's daughters would be covered by Entry IV of Class II heirs by virtue of the Schedule enacted under Section 8 of the Hindu Succession Act, 1956. The argument that plaintiff Hiranman

and defendant No.1 Jyoti Prakash being brother's sons would take more share than defendants No.2 to 4 in view of Section 11 of the Hindu Succession Act, 1956 is also not acceptable in view of the decision rendered by the Supreme Court in the matter of Krishna Minor Through his father and guardian and others v. State of Haryana and others² in which the Supreme Court has held that both brother and sister are Class II heirs and both of them are in Entry II of the Schedule enacted under Section 8 and would share the property equally. It was observed as under: -

“7. ... Another point mentioned in the written submission is that though a sister can have a such a claim, a brother cannot, and so, the same results in discrimination. This argument is misconceived inasmuch as under the aforesaid Hindu Succession Act, both brother and sister are Class II heirs and both of them are in Entry II result of which is that because of what has been provided in Section 11 of the Act, such heirs share the property equally.”

19. In view of the aforesaid legal position, the first appellate Court is absolutely justified in holding that the plaintiff & defendants No.1 to 4 being the heirs of Dukhani Bai's husband, all would take $\frac{1}{5}$ share of the suit property left by Dukhani Bai. I do not find any perversity or illegality in the said finding. It is accordingly affirmed and substantial question of law No.2 is answered accordingly.

Answer to substantial questions of law No.1 & 3: -

20. The plaintiff has claimed partition of the suit property bearing Khasra No.266, area 0.486 hectare and Khasra No.975, area 0.575 hectare questioning the order of the Tahsildar, but defendants No.1 to 4 have taken the plea that Khasra Nos.413 & 914, area 0.024 hectare and 0.445 hectare, respectively, fell in the share of the plaintiff which he

sold by registered sale deed Ex.D-1, therefore, he is not entitled for any partition. The trial Court upon appreciation of oral and documentary evidence has held that vide Ex.D-1, the property was not only sold by the plaintiff alone, but defendant No.1 Jyoti Prakash also was a party to the sale deed Ex.D-1 which the first appellate Court did not accept and held that the plaintiff has sold the property in partition therefore would not be entitled for partition.

21. The plea of partition was set up by the defendants in their written statement in paragraph 8 that in the partition which took place between the plaintiff & defendants No.1 to 4 in the year 1965 in the lifetime of father of the plaintiff & defendants No.1 to 4, the suit property bearing Khasra Nos.413 & 914 fell in the share of the plaintiff which he sold (Khasra No.914) by registered sale deed Ex.D-1. A careful perusal of Ex.D-1 would show that it was sold by Hiranman – plaintiff and Fandi, both have been held to be sons of Birsingh. The trial Court held that Fandi is Jyoti Prakash – defendant No.1, but the first appellate Court did not accept it. In order to prove partition, defendant No.1 has examined himself as DW-1. He has stated in the statement that the property received on partition was sold by the plaintiff to Shyamlal vide Ex.D-1. But, as held by the trial Court, suit land Khasra No.914 was sold not by Hiranman alone but also by Fandi, S/o Birsingh, who is Jyoti Prakash – defendant No.1. Apart from the self-serving statement of defendant No.1, there is no other evidence on record to demonstrate that partition of the suit property actually took place between the plaintiff and defendant No.1, as defendant No.1 (DW-1) has admitted in his statement before the Court in para 8 that the suit property is still

recorded jointly in the names of the plaintiff and defendants No.1 to 4 and partition took place only between the plaintiff and defendant No.1.

22. Apart from this, it is not established from the record that the suit property bearing Khasra No.914 was the property held by Birsingh which was given to the plaintiff on partition. As such, there is no clinching evidence of acceptable nature available on record to show that the suit property bearing Khasra Nos.413 & 914 fell in the share of the plaintiff which he has alone sold exclusively as the sale deed Ex.D-1 even records the sale by the plaintiff and one Fandi. By Ex.D-1, only Khasra No.914 was sold. No evidence is available on record with respect to Khara No.413. Therefore, the plea of partition in the year 1965 between the plaintiff and defendant No.1 recorded by the first appellate Court is perverse and the first appellate Court went wrong in reversing the well reasoned finding of the trial Court in this regard.

23. Accordingly, it is held that partition between the plaintiff and defendants No.1 to 4 with respect to the aforesaid lands bearing Khasra Nos.266 & 975 is not established. Since Birsingh, Hiranman and Jyoti Prakash constituted a coparcenary being Joint Hindu Family, the property will be first divided among these three in accordance with Explanation 1 to Section 6 of the Hindu Succession Act, 1956 and Birsingh, Hiranman & Jyoti Prakash will get $\frac{1}{3}$ share each and thereafter, $\frac{1}{3}$ of Birsingh's share would be further divided into $\frac{1}{5}$ between two sons and three daughters and thereby the plaintiff would get $\frac{1}{3} + \frac{1}{5}$ in the property of Birsingh, defendant No.1 would also get $\frac{1}{3} + \frac{1}{5}$ and defendants No.2, 3 & 4 will get $\frac{1}{5}$ each in the suit property held by Birsingh. Accordingly, judgment & decree of the first appellate Court is partly modified with

regard to paragraph 20.2 and so far as paragraphs 20.1 & 20.3, same would remain intact and it is being maintained. Substantial questions of law No.1 & 3 are answered accordingly.

24. In the result, the appeal is allowed in part by modifying judgment & decree of the first appellate Court as indicated above. No order as to cost(s).

25. Decree be drawn-up accordingly.

Sd/-
(Sanjay K. Agrawal)
Judge