

AFR**HIGH COURT OF CHHATTISGARH, BILASPUR****First Appeal No. 439 of 2018****Reserved on 27-1-2020****Judgment delivered on 29-1-2020**

1. Smt. Manju Tiwari, W/o Shri Arun Kumar Tiwari, aged about 54 years.
2. Kumari Nidhi Tiwari, D/o Arun Kumar Tiwari, aged about 28 years.
3. Vicky Tiwari, S/o Shri Arun Kumar Tiwari, aged about 27 years.
4. Arvind Tiwari, S/o Shri Arun Kumar Tiwari, aged about 25 years.

All the above appellants are resident of Tulsipur, Ward No.16, Near Patta Godam, Tahsil and District Rajnandgaon (CG).

----Appellants**Versus**

1. Arun Kumar Tiwari, S/o late Gajanand Tiwari, aged about 58 years, R/o Tulsipur, Ward No.16, Tahsil and District Rajnandgaon (CG).
2. Uttam Kumar Yadav, S/o late Jagannath Yadav, aged about 46 years, R/o Kalar Para, Jai Stambh Chowk, Tahsil and District Rajnandgaon (CG).
3. State of Chhatisgarh, through Collector, Rajnandgaon (CG).

----Respondents

For Appellants	: Mr. Kshitij Sharma, Adv.
For Respondent No. 2	: Mr. Shashi Bhushan Tiwari, Adv.
For Respondent No. 3	: Mr. Praveen Shrivastava, PL.
For Respondent No. 1	: None, though served.

Hon'ble Shri Sharad Kumar Gupta, Judge**CAV JUDGMENT**

1. Appellants have preferred this Civil Appeal against the impugned judgment and decree dated 02.05.2018 passed by Additional District Judge, Rajnandgaon in Civil Suit No.5A/2014 whereby and whereunder he dismissed the appellants' suit and decreed the counter claim of respondent No.2 herein.

2. This is admitted by respondent No.1 that the ancestral house of the appellants and him is situated in the land bearing Khasra No. 344/20 ad-measuring $0.01 \frac{3}{4} = 792$ sq ft = 73.605 sq. meter at Tulsipur Ward No.16 behind Leaf Godown Rajnandgaon which has been shown in Schedule- A, which is the part of the plaint, he is a habitual drunker and gambler, he is father of the appellants No.2 to 4 and husband of appellant No.1, on

25.11.2008 the respondent No.2 threatened to the appellants for vacating the disputed house. This is also admitted by respondent No. 1 and respondent No. 2 that respondent No.1 had sold the said land along with disputed house by the registered sale deed dated 16-6-2018 vide Ex. D-2 to the respondent No.2. This is further admitted by respondent No. 1 that, he had never intimated the appellants regarding receiving of consideration, respondent No. 2 had got executed the registered sale deed from him under the conspiracy and playing fraud, he had no right to sale the said land along with disputed house.

3. In brief the appellants' case is that disputed house is ancestral property of the appellants and respondent No. 1. Appellants have 1/5th share each in disputed house and respondent No.1 has only 1/5 share in disputed house. The registered sale deed is null and void.

4. In brief the respondent No.2's case is that the partition had taken place between respondent No. 1 and his brothers. Said land along with disputed house was the property of only respondent No.1. During the lifetime of respondent No.1 the appellants had no right in disputed house. Now he has become sole owner of the disputed house. He is entitled for getting the vacant possession of disputed house.

5. By the impugned judgment and decree, the trial Court dismissed the plaintiff's suit and allowed the respondent No.2's claim.

6. Being aggrieved by the aforesaid judgment and decree, the appellants have preferred this appeal.

7. In brief, the appellants' case regarding the appeal is that the trial Court failed to appreciate the evidence in proper perspective. Respondent No. 1 has received said land with the disputed house from his father by partition, appellants No. 2 to 4 are children of respondent No. 1, thus, nature of property received by respondent No. 1, would not be changed and the property would remain to be ancestral qua the appellants.

8. **Points for determination:-**

There are following points for determination in the case in hand:-

- (i) Whether disputed house is the ancestral property of the appellants and respondent No.1?
- (ii) Whether the appellants have 4/5 share in disputed house?
- (iii) Whether the registered sale deed Ex. D-2 is null and void?
- (iv) Whether respondent No. 2 is the sole owner of disputed house ?

(v) Whether appellants are entitled to get permanent injunction against the respondent No. 2 ?

(vi) Whether respondent No.2 is entitled to get the vacant possession of disputed house from the appellants?

(vii) Relief and costs.

Point for determination No.(i)-Finding with reasons:-

9. Counsel for the appellants vehemently argued that father of the respondent No. 1 namely Gajanand Tiwari made partition and said land along with disputed house came in the share of respondent No. 1, appellants are his wife and children, hence, the disputed house is the coparcenary property. He placed reliance on the judgment of Hon'ble Supreme Court in the matter of **Arshnoor Singh Vs. Harpal Kaur & Ors.** passed in **Civil Appeal No.5124/2019** on **01st July, 2019**. He drew my attention on para Nos. 7.1, 7.2 and earlier portion of 7.4, which read as under:-

“7.1. Mulla in his commentary on *Hindu Law* (22nd Edition) has stated the position with respect to succession under *Mitakshara* law as follows:

“page 129

A son, a grandson whose father is dead, and a great-grandson whose father and grandfather are both dead, succeed simultaneously as single heir to the separate or self-acquired property of the deceased with rights of survivorship.”

“page 327

All property inherited by a male Hindu from his father, father's father or father's father's father, is ancestral property. The essential feature of ancestral property according to Mitakshara law is that the sons, grandsons and great-grandsons of the person who inherits it, acquire an interest, and the rights attached to such property at the moment of their birth.

A person inheriting property from his three immediate paternal ancestors holds it, and must hold it, in coparcenary with his sons, son's sons, and son's son's sons, but as regards other relations, he holds it, and is entitled to hold it as his absolute property.”

(emphasis supplied)

7.2. In **Shyam Narayan Prasad v. Krisha Prasad & Ors.**, [2018 (7) SCC 646] this Court has recently held that:

“12. It is settled that the property inherited by a male Hindu from his father, father's father or father's father's father is an ancestral property. The essential feature of ancestral property, according to Mitakshara Law, is that the sons, grandsons, and great grandsons of the person who inherits it, acquire an interest and the rights attached to such property at the moment of their birth. The share which a coparcener obtains on partition of ancestral property is ancestral property as regards his male issue. After partition, the property in the hands of the son will continue to be the ancestral property and the natural or adopted son of that son will take interest in it and is entitled to it by survivorship.”

(emphasis supplied)

7.4. In **Yudhishter v. Ashok Kumar** [1987(1) SCC 204] this Court held that:

“11. This question has been considered by this Court in Commissioner of Wealth Tax, Kanpur and Ors. v. Chander Sen and Ors. [1986] 161 ITR 370 (SC) where one of us (Sabyasachi Mukharji, J) observed that under the Hindu Law, the moment a son is born, he gets a share in father's property and become part of the coparcenary. His right accrues to him not on the death of the father or inheritance from the father but with the very fact of his birth. Normally, therefore whenever the father gets a property from whatever source, from the grandfather or from any other source, be it separated property or not, his son should have a share in that and it will become part of the joint Hindu family of his son and grandson and other members who form joint Hindu family with him.....”

10. Counsel for the respondent No. 2 put forth his argument that respondent No. 1 had got the land with disputed house from his father by partition, hence the property became the self acquired property of respondent No. 2, next to him only second generation is in existence, there is absence of third generation, thus, disputed house is not ancestral property. He placed reliance on the judgment of Hon'ble Supreme Court in

the matter of **Surjit Lal Chhabra Vs. Commissioner of Income Tax, Bombay [1976 (3) SCC 142]**. He drew my attention on para No.12, which reads as under:-

“12. It is true that the appellant cannot constitute a coparcenary with his wife and unmarried daughter but under the Income Tax Act a Hindu undivided family, not a coparcenary, is a taxable unit. A Hindu coparcenary is a much narrower body than the joint family. It includes only those persons who acquire by birth an interest in the joint or coparcenary property and these are the sons, grandsons and great-grandsons of the holder of the joint property for the time being, that is to say, the three generations next to the holder in unbroken male descent. Since under the Mitakshara law, the right to joint family property by birth is vested in the male issue only, females who come in only as heirs to obstructed heritage (*sapratibandha daya*), cannot be coparceners. But we are concerned under the Income Tax Act with the question whether the appellant's wife and unmarried daughter can with him be members of a Hindu undivided family and not of a coparcenary. In the words of Sir George Rankin who delivered the opinion of the Judicial Committee in **Kalyanji case** (*AIR 1937 PC 36*). The phrase ‘Hindu undivided family’ is used in the statute with reference, not to one school only of Hindu law, but to all schools; and their Lordships think it a mistake in method to begin by pasting over the wider phrase of the Act the words ‘Hindu coparcenary, all the more that it is not possible to say on the face of the Act that no female can be a member.”

11. P.W. 1-Smt. Manju Tiwari says in para 20 during her cross-examination that this is true that her husband has two brothers, during the life-time her father-in-law i.e. Gajanand Tiwari, partition took place between her husband and his brothers. Moreover, counsel for the appellants had suggested witness of respondent no. 2 i.e. D.W.-1 Uttam Kumar Yadav who is the respondent No.2 himself during his cross examination in para 14 that disputed house was the property of Gajanand Tiwari, between respondent No.1 and his two brothers partition had taken place.

12. As per the certified copy of alleged sale deed Ex. P-1 Gajanand Tiwari had purchased a piece of land bearing Khasra No.344 admeasuring 0.05 decimal = 0.020 hectare situated at village Motipur from Kashinath on

17.06.1969.

13. As per true copy of entries of mutation register village Motipur of year 2006-2007 Ex. P-2, a piece of land bearing Khasra No. 344/20 – admeasuring 0.01 $\frac{3}{4}$ was recorded in the name of respondent No.1 on the basis of earlier possession and mutual consent.

14. As per true copy of mutation register of village Motipur of year 2007-2008 Ex. D-5, a piece of land bearing Khasra No. 344/20 – ad-measuring 0.01 $\frac{3}{4}$ was recorded in the name of respondent No.1 on the basis of earlier possession and mutual consent.

15. Looking to the above mentioned facts and circumstances of the case, this Court finds that Gajanand Tiwari had purchased a piece of land bearing Khasra No.344 ad-measuring 0.05 decimal =0.020 hectare situated at Motipur from Kashinath by registered sale deed on 17.06.1969. During his life time a partition was taken place between respondent No.1 and his another two brothers. A piece of land bearing Khasra No.344/20 ad-measuring 0.01 $\frac{3}{4}$ was recorded in the name of respondent No.1. Disputed house is situated in that piece of land.

16. Gajanand Tiwari died after the commencement of Hindu Succession Act, 1956 (in short 'Act, 1956').

17. In the matter of **Arshnoor Singh** (supra) later part of para No. 7.4 is relevant which reads as under:-

“74. In **Yudhishter -v- Ashok Kumar** [1987 (1) SCC 204 this Court held that :-

11.This Court observed that this position has been affected by Section 8 of the Act 1956 and, therefore, after the Act, when the son inherited the property in the situation contemplated by Section 8, he does not take it as Kar of his own undivided family but takes it in his individual capacity.”

18. In the matter of **Arshnoor Singh** (supra) in para No.7.5 the following judicial precedent has been laid down-

“7.5 After the Act 1956 came into force, this position has undergone a change. Post - 1956, if a person inherits a self-acquired property from his paternal ancestors, the said property becomes his self-acquired property, and does not remain coparcenary property.”

19. In the case in hand, material question is as to when succession opened.

20. In the case in hand, Gajanand Tiwari died after the commencement of

Act, 1956. Thus, succession was not opened under the Old Hindu Law and the parties would not be governed by Mitakshara Law. Hence the appellants do not get any help from the aforesaid para Nos. 7.1, 7.2 and first part of para No.7.4 and aforesaid para 12 of judgment of Hon'ble Supreme Court passed in the matter of **Surjit Lal Chhabra** (supra) is not helpful to respondent No. 2.

21. Looking to the provision of Section 8 of Act of 1956, second part of para No.7.4 and 7.5 of the case of **Arshnoor Singh** (supra), this Court finds that after the commencement of Act of 1956, succession opens and if a person inherits a self acquired property from his parental ancestors, the said property becomes his self acquired property and does not remain coparcenary property.

22. In the case in hand, succession was opened after the 1956, hence disputed house was inherited by respondent No.1 after the commencement of Act, 1956 hence disputed house became his self acquire property and does not remain coparcenary property regarding respondent No.1 and appellants No. 2 to 4. Hence this Court disapproves the aforesaid argument raised by counsel for the appellants and this Court finds that aforesaid argument raised by counsel for respondent No. 2 is not applicable in the case in hand.

23. After the appreciation of the evidence discussed herein before, this Court finds disputed house is not the ancestral property of the appellants and respondent No.1. Thus, this Court decides point for determination No.(i) accordingly.

Point for determination No.(ii)-Finding with reasons:-

24. This point for determination covers the scope of issue No.2. This has been earlier decided that disputed house is not the ancestral property of appellants and respondent No.1. This has also been earlier decided that disputed house was the self acquired property of respondent No.1. Thus, this Court finds that, the appellants have no any share in disputed house. Thus, this Court decides point for determination No. (ii) accordingly.

Point for determination No. (iii)- Finding with reasons:-

23. This has been earlier decided that disputed house was not the ancestral property. It has been also earlier decided that the disputed house was self acquired property of respondent No. 1.

24. In the case in hand, neither appellants nor respondent No. 1 himself

examined respondent No. 1 as a witness to prove that allegedly by playing the fraud, respondent No. 2 got executed registered sale deed Ex D-2.

25. D.W. 1 Uttam Kumar Yadav in para 1 and D.W. 2 Surendra Yadav in para 1 of their statement given on oath say that respondent No. 1 had told that for the purpose of marriage of her daughter Nikki and family work amount is needed, thus he wants to sale the disputed house.

26. In ex. D-2, there is averment that respondent No. 1 wanted amount for family work.

27. There is no such evidence available on record on the strength of which it can be said that aforesaid statements of DW 1 Uttam Kumar D.W. 2 Surendra Kumar Yadav, aforesaid averment of Ex. D-2 are not simple not natural and nor normal.

28. Moreover, P.W. 1 Smt. Manju Tiwari says in para 25 during her cross examination that marriage of her daughter was solemnized in the years 2008 after Diwali. Moreover P.W. 1 smt. Manju Tiwari says in para 25 that this is true that they have demanded time to vacate the disputed house.

29. Looking to the above mentioned facts and circumstances of the case, this Court finds that registered sale deed dated 16-6-2008 Ex. D-2 executed by respondent No. 1 in favour of respondent no. 2 is not null void. Thus, this Court decides point of determination point No. (iii) accordingly.

Point for determination No. (iv)- Finding with reasons:-

30. This Court prima facie, contingently and incidentally considering this aspect that whether respondent No. 2 is the sole owner of disputed house. Finding of this Court regarding this aspect shall not be binding on any civil suit brought regarding this aspect.

31. The Trial Court did not frame issue regarding this point for determination though it ought to have been by the Trial Court. The evidence available on record shows that the appellants and the respondent No. 2 have adduced evidence regarding this point for determination. The evidence available on record is sufficient to enable this Court to pronounce the judgment. Non-framing of additional issue regarding this point for determination does not cause any prejudice to either of the parties. Thus, looking to the provisions Order 41 Rule 24 of the Civil Procedure Code, 1908 this Court finds that it may pronounce the judgment in this appeal.

32. This has been earlier decided that disputed house is not the ancestral property rather it was the self acquired property of respondent No. 1. Sale deed Ex, D-2 is not null and void. Thus, this Court finds that respondent No.

2 is the sole owner of the disputed house.

POINT FOR DETERMINATION No. (v) : finding with reasons-

33. This has been earlier decided that the disputed house is not the ancestral property of appellants and respondent No. 1 rather it was a self acquired property of respondent No. 1. Ex. D-2 is not null and void. Thus, appellants are not entitled to get permanent injunction against the respondent No. 2, thus this Court decides point No. (v) accordingly.

Point for determination No. (vi)- Finding with reasons:-

34. This has been earlier decided that the disputed house is not the ancestral property of appellants and respondent No. 1 rather it was the self acquired property of respondent No. 1. Ex. D-2 is not null and void. Thus this Court finds that respondent No. 2 Uttam Kumar Yadav is entitled to get the vacant possession of disputed house from appellants. Thus, this Court decides point for determination No. (vi) accordingly.

Point for determination No. (vi)- Finding with reasons:-

35. After complete and full appreciation of evidence discussed herein before this Court finds that appellants failed to prove their suit and respondent No. 2 is succeeded to prove his counter claim. Consequently, the appeal preferred by the appellants deserves to be and is hereby dismissed. The impugned judgment and decree passed by the trial Court are affirmed.

36. A decree be drawn accordingly.

Sd/-
(Sharad Kumar Gupta)
Judge