

HIGH COURT OF CHHATTISGARH, BILASPUR**Second Appeal No.80 of 2011****1. Budharu (died) through LR's**

1A. Rohit Kumar Sahu S/o Late Budharu Ram Sahu, Aged about 54 years, R/o H. No.33/18, Behind Hardev Lala Mandir, New Subhash Nagar, Tikrapara, Dist. Raipur (CG)

1B. Rameshwar Sahu S/o Late Shri Budharu Ram Sahu, Aged about 53 years, R/o Ward No.46, Gurmukh Singh Nagar, near Ramakrishna Hospital, Pachpedi Naka, Tehsil & Dist. Raipur (CG)

1C. Mahesh Kumar Sahu S/o Late Shri Budharu Ram Sahu, Aged about 43 years, R/o Post Bendri, Nimora-2, Mana, Tehsil Abhanpur, Dist. Raipur (CG)

2. Lahri**3. Samaliya****4. Mahaliya**

Appellants No.2 to 4 are sons of late Vishal Sahu, (mother-late Keja Bai), R/o village-Nimora, Post-Bendri, Tehsil-Abhanpur, District-Raipur (CG)

5. Bahali Ram, S/o late Vishal Sahu, (mother-late Keja Bai), R/o village-Phudhar, Airport Road, Raipur, Tehsil & District-Raipur (CG)**----- Appellants/Defendants****Versus**

1-A) Smt. Puniya Bai, W/o late Ramlal Sahu, (dead)

1-B) Devnath Sahu, S/o late Ramlal Sahu,

1-C) Rukhmani Bai, D/o late Ramlal Sahu,

All R/o village-Pahanda, Tehsil & P.S.-Arang, District-Raipur (CG)

2. Smt. Ramkumari, D/o Mayaram Sahu, (mother-Bhago Bai), aged about 36 years, R/o village-Nimora, Post-Bendri, Tehsil-Abhanpur, District-Raipur (CG)

3-A) Punau Ram, S/o Mayaram Sahu, (mother-Bhago Bai), R/o Nevra, Tehsil-Tilda, District-Raipur (CG)

3-B) Brij Lal Sahu, S/o Mayaram Sahu, (mother-Bhago Bai), R/o Nevra, Tehsil-Tilda, District-Raipur (CG)

3-C) Kishan Ram S/o Mayaram Sahu, (mother-Bahgo Bai),
R/o Ram Nagar, near Dayaram Pan Stall, Raipur (CG)

3-D) Hira Singh (deleted)

3-E) Devcharan, S/o Mayaram Sahu, (mother-Bhago Bai),
R/o near Vyas Talaab, Gaji Nagar, Birgaon, Raipur
(CG)

3-F) Ahilya Bai, D/o Mayaram Sahu, (mother-Bhago Bai),
W/o Punit Ram Sahu, R/o Dhamdha, near Check post
Kadambini Nagar, Durg (CG)

----- **Plaintiffs**

4.State of Chhattisgarh, through the Collector,
Distt.Raipur

----- **Respondents**

For Appellants/Defendants:

Mr.Adhiraj Surana, Advocate

For Respondent No.3-C:

Ms Pragya Pandey, Advocate

For Respondent No.4/State:

Mr.Sanjay Pathak, P.L.

Hon'ble Shri Justice Sanjay K. Agrawal

Judgment on Board

9/3/2021

1.The substantial question of law involved, formulated
and to be answered in this second appeal preferred by
the appellants/defendants is as under:-

“Whether the suit was not maintainable on the
ground of non-joinder of necessary party who
are in actual possession as owner of the
property?”

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

2. The suit property was originally held by Vishambhar @ Bisae. He had three daughters namely Bhagobai, Keja Bai and Puniya Bai. The plaintiffs are descendants of Puniya Bai and Bhago Bai and defendants No.1(a) to (e) are sons of Keja Bai and defendants No.2(a) to 2(f) are sons of Bhago Bai. The plaintiffs/respondents herein filed a suit against the defendants for partition and separate possession, in which the defendants set-up a plea of earlier partition and also took a specific statement that the suit property has been alienated by defendant No.1(a)-Budharu to different persons and out of which, some of them have been impleaded as party defendants and claimed the decree as mentioned hereinabove.
3. The trial Court upon appreciation of oral and documentary evidence available on record, by its judgment and decree dated 30.4.2010, decreed the suit holding that Keja Bai's legal representatives would get 1/3 share, likewise, Bhago Bai's legal representatives would get 1/3 share and Puniya Bai's legal representatives would get 1/3 share in the suit property and they will be entitled for partition and possession and to that extent, sale deeds were declared void. Being aggrieved and dissatisfied with the judgment and decree of the trial Court, the

defendants preferred first appeal before the first appellate Court. The first appellate Court affirmed the judgment and decree of the trial Court by dismissing the appeal, against which, this second appeal under Section 100 of the CPC has been preferred by the appellants/defendants, in which one substantial question of law has been formulated, which has been set-out in opening paragraph of this judgment for sake of completeness.

4. Mr. Adhiraj Surana, learned counsel for the appellants/defendants, would submit that the persons to whom the property has been sold by dependants of Budharu are necessary party in the suit and they are in actual possession, therefore, decree cannot be executed and as such, the judgment and decree passed by both the Courts below deserve to be set-aside.
5. On the other hand, Ms Pragya Pandey, learned counsel for respondent No.3-C, would submit that no plea of non-joinder of necessary party has raised by the defendants either before the trial Court in written statement or in memo of appeal before the first appellate Court as new plea of non-joinder of necessary party cannot be permitted to be raised before this Court, as such, the second appeal deserves to be dismissed.

6. I have heard learned counsel appearing for the parties, considered their submissions made hereinabove and also went through the records with utmost circumspection.

7. At this stage, it would be appropriate to notice Order 1 Rule 9 of the CPC, which states as under :-

"9. Mis-joinder and non-joinder.-No suit shall be defeated by reason of the mis-joinder or non-joinder of parties, and the Court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it:

Provided that nothing in this rule shall apply to non-joinder of a necessary party."

8. A careful perusal of the aforesaid provision would show that proviso to Order 1 Rule 9 CPC is exception to Order 1 Rule 9 CPC and the suit has to be dismissed, if the necessary party has not been joined in the suit.

9. A necessary party is one without whom, no order can be made effectively and a proper party is one in whom absence an effective order can be made but whose presence is necessary for a complete and final decision of the question involved in the proceeding.

(See: State of Assam v. Union of India¹.)

10. Similarly, in the matter of Mumbai International Airport v. Regency Convention Centre &

¹ (2010) 10 SCC 408

Hotels (P) LTD.², the Supreme Court held as under qua the necessary party.

"15. A "necessary party" is a person who ought to have been joined as a party and in whose absence no effective order could be passed at all by the court. If a "necessary party" is not impleaded, the suit itself is liable to be dismissed. A "property party" is party who, though not a necessary party, is a person whose presence would enable the court to completely, effectively and adequately adjudicate upon all matters in dispute in the suit, though he need not be a person in favour of or against whom the decree is to be made. If a a person is not found to be a proper or necessary party, the court has no jurisdiction to implead him, against the wishes of the plaintiff. The fact that a person is likely to secure a right/interest in a suit property, after the suit is decided against the plaintiff, will not make such person a necessary party or a proper party to the suit for specific performance."

11. Further, objection regarding non-joinder of necessary party should be taken before the trial Court at first available opportunity in order to provide opportunity to the plaintiff to rectify the defect, which is apparent from Order 1 Rule 13 of the CPC and which states as under:-

"13. Objections as to non-joinder or mis-joinder.-All objections on the ground of non-joinder or mis-joinder of parties shall be taken at the earliest possible opportunity and, in all cases where issues are settled, at or before such settlement, unless the ground of objection has subsequently arisen, and any such objection not so taken shall be deemed to have been waived."

2 (2010) 7 SCC 417

12. Aforesaid Rule provides that an objection on the ground of mis-joinder and non-joinder, if not taken at the earliest opportunity, shall be deemed to have been waived, it is based on principle that technical objection, which, if taken at the earliest stage of proceedings might have been cured and which has not been so taken, should not be allowed to be raised at the later stage so as to defeat rights of the parties.

13. The Madhya Pradesh High Court in the matter of **Rahamatullah v. State of Madhya Pradesh**³ has held that all the questions of mis-joinder and non-joinder of the parties must be decided on the basis of allegations made in the plaint or written statement, the pleading of parties. Paragraph 5 of the report states as under:-

"5.It is, thus a settled law and apparent from the very reading of Rule 13 of Order 1, that objection as to non-joinder or mis-joinder must be taken at the earliest possible opportunity and objection not so taken, must be deemed to have been waived. Non raising of plea of non joinder of necessary party requires proof of certain facts on the evidence on record at the earliest stage as enjoined by Rule 13 and this would amount to waiver of pleading of a fact on which such a plea could be established. It is also settled law that such objection, if raised during the appellate stage, without taken any objection in written statement, the objection will not be allowed

at all. All the questions of misjoinder or non-joinder must be decided on the basis of allegations made in the plaint or written statement, the pleading of parties. In absence of pleading to that effect, it was a wrong exercise of jurisdiction by the appellate Court and therefore, its order cannot be maintained."

14. The Supreme Court in the matter of Church of Christ Charitable v. Ms. Pooniamman Education Trust⁴

has clearly held that objection regarding non-joinder of necessary party should be taken before the trial Court in order to provide opportunity to the plaintiff to rectify the defect and even then, the plaintiff persists in non-impleading the party, consequences of the non-joinder may follow.

15. Relying upon its earlier pronouncement in the matter of State of U.P. v. Ram Swarup Saroj⁵, it was further held that non-joinder of party cannot be raised for the first time before the Supreme Court, if same has not been raised in the trial Court and has not resulted in failure of justice.

16. Reverting to the facts of the case in the light of aforesaid legal proposition, it is apparent that though lengthy written statement has been filed, but there is no whisper in written statement with regard to non-joinder of necessary party and written statement is blissfully silent in this regard,

4 (2012) 8 SCC 706

5 (2000) 3 SCC 699

therefore, no issue could be be struck by the trial Court. The suit was dismissed and thereafter appeal was filed. There is no whisper in the said memo of appeal preferred before the first appellate Court taking the ground that the suit is liable to be dismissed for non-joinder of necessary party. Even before the first appellate Court during the course of argument, it is not stated that the suit was liable to be dismissed for non-joinder of necessary party, otherwise, the plaintiffs could have taken necessary steps to implead them necessary party by curing the defect (if any) and thereafter the suit would have proceeded. No plea of necessary party can be allowed at second appellate stage to rigour out the validly passed decree, the defendants cannot be allowed to invent a new ground to frustrate the decree, which could have been legitimately taken before the trial Court/first appellate Court, as such, it cannot be held that the suit is bad for non-joinder of necessary party in view of the provisions contained in Order 1 Rule 13 of the CPC and in the light of principle of law laid down by the Supreme Court in the above-stated judgments (supra), as such, finding recorded by two Courts below is a finding of fact based on evidence available on record, in which I do not find any

illegality or perversity. The substantial question of law is answered in favour of the plaintiffs and against the defendants.

17. Accordingly, the second appeal deserves to be and is hereby dismissed leaving the parties to bear their own cost(s).

18. Appellate decree be drawn-up accordingly.

Sd/-

(Sanjay K.Agrawal)
Judge

B/-