

HIGH COURT OF CHHATTISGARH, BILASPUR**Second Appeal No.54 of 2010**

Sundariya Bai D/o. Lal Singh Gond, aged about 55 years, Village Belar, Revenue Circle Khallari, Tahsil & Distt. Mahasamund (CG)

----- Appellant/Plaintiff

Versus

1. Pitamber (died) through LR's

1-A. Smt. Sukhbai, Wd/o Late Pitambar, aged about 65 years, R/o Village: Belar, Revenue Circle Khallari, Tahsil & District Mahasamund (CG)

2. Pyarelal (died) through LR's

2-A. Smt. Shayam Kumari Kanwar, Wd/o Late Pyarelal Kanwar, aged about 45 years,

2-B. Parmeshwar Kanwar S/o Late Pyarelal Kanwar, aged about 20 years,

Both Resident of C/o Shri Bihari Sidar, Village Mohandi, Tahsil and District Mahasamund (CG)

----- LR's of the defendants

3. State of Chhattisgarh, Through District Collector, Mahasamund, Distt. Mahasamund (CG)

----- Respondents

For Appellant/Plaintiff:

Mr. Malay Jain, Advocate

For LR's of respondents No.1 and 2/Defendants NO.1 and 2:

None present

For Respondent No.3/State:

Mr. Ravi Bhagat, Dy.G.A.

Hon'ble Shri Justice Sanjay K. Agrawal

Judgment on Board

22/02/2021

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

"Whether the lower appellate court was justified in reversing the well reasoned order passed by the trial court without there being any specific consideration of the contentions raised by the appellant in appeal and therefore the finding is perverse or not?"

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

2. The plaintiff's father Lal Singh had one more brother i.e. Lala. The suit property belonged to Lala. Lala had one son Sunder Singh, who died issueless. The plaintiff filed a suit for declaration of title and possession stating inter-alia that since she is sole surviving legal heir of Lala as he had one son Sunder Singh who died issueless, therefore, she is entitled for the suit property owned by Lala.
3. Defendant No.1-Pitamber claiming to be adopted son of Sunder Singh and defendant No.2 claimed that since Sunder Singh has taken loan from him, therefore, he is having possession over the suit property.
4. The trial Court upon appreciation of oral and documentary evidence available on record, by its judgment and decree dated 24.7.2008, did not accept the plea of defendants NO.1 and 2 and finally granted decree in favour of the plaintiff holding that the

suit property belonged to Lala and she being sole surviving legal heir of Lala and his son Sunder Singh who died issueless, would inherit the property of Lala. On appeal being preferred by the defendants, the first appellate Court reversed the judgment and decree of the trial Court and allowed the appeal only on the ground that the provisions contained in Section 2(2) of the Hindu Succession Act, 1956 (hereinafter called as "Act of 1956") would not be applicable to the plaintiff who is aboriginal tribe (Gond), against which, this second appeal under Section 100 of the CPC has been filed by the appellant/plaintiff, in which one substantial question of law has been formulated, which has been set-out in the opening paragraph of this judgment for sake of completeness.

5. Mr. Malay Jain, learned counsel for the appellant/plaintiff, would submit that the first appellate Court did not follow the principle of reversal laid down by the Supreme Court in the matter of Santosh Hazari v. Purushottam Tiwari (Deceased) by LRS.¹ and simply reversed the judgment and decree of the trial Court on the ground which was not taken before the trial Court, as such, the judgment and decree of the first appellate Court deserves to be set

1 (2001) 3 SCC 179

aside.

6. None present for legal representatives of respondents No.1 and 2/defendants NO.1 and 2 though served.

7. I have heard learned counsel for the appellant/plaintiff, considered his submissions made herein-above and also went through the records with utmost circumspection.

8. It is the case of the plaintiff that she is sole surviving legal heir of his father's brother Lala and his son Sunder Singh and his wife Savitri died issueless. Defendant No.1 claimed to be adopted son of Sunder Singh, which was not accepted by the trial Court. Similarly, defendant No.2 was having the suit property on account of loan taken by Sunder Singh, which was also not accepted by the trial Court. When the first appeal was preferred by them, the first appellate Court reversed the judgment and decree of the trial Court only on the ground that the parties are aboriginal tribe (Gond) and the provisions contained in the Act of 1956 is not applicable to them by virtue of the provisions contained in Section 2(2) of the Act of 1956, which was not even pleaded by the defendants before the trial Court nor it was established.

9. The Supreme Court in the matter of Santosh Hazari

(supra) has laid down the principle of reversal of the judgment and held as under:-

"15..... While writing a judgment of reversal the appellate Court must remain conscious of two principles. Firstly, the findings of fact based on conflicting evidence arrived at by the trial Court must weigh with the appellate Court, more so when the findings are based on oral evidence recorded by the same Presiding Judge who authors the judgment. This certainly does not mean that when an appeal lies on facts, the appellate court is not competent to reverse a finding of fact arrived at by the trial Judge. As a matter of law if the appraisal of the evidence by the trial Court suffers from a material irregularity or is based on inadmissible evidence or on conjectures and surmises, the appellate court is entitled to interfere with the finding of fact (See *Madhusudan Das v. Narayanibai*²). The rule is - and it is nothing more than a rule of practice - that when there is conflict of oral evidence of the parties on any matter in issue and the decision hinges upon the credibility of witnesses, then unless there is some special feature about the evidence of a particular witness which has escaped the trial Judge's notice or there is a sufficient balance of improbability to displace his opinion as to where the credibility lies, the appellate court should not interfere with the finding of the trial Judge on a question of fact. (See *Sarju Pershad Ramdeo Sahu v. Jwaleshwari Pratap Narain Singh*³). Secondly, while reversing a finding of fact the appellate court must come into close quarters with the reasoning assigned by the trial court and then assign its own reasons for arriving at a different finding. This would satisfy the court hearing a further appeal that the first appellate court had discharged the duty expected of it. We need only remind the first appellate courts of the additional obligation cast on them by the scheme of the

2 (1983) 1 SCC 35

3 AIR 1951 SC 120

present Section 100 substituted in the Code. The first appellate court continues, as before, to be a final Court of facts; pure findings of fact remain immune from challenge before the High Court in second appeal. Now the first appellate court is also a final Court of law in the sense that its decision on a question of law even if erroneous may not be vulnerable before the High Court in second appeal because the jurisdiction of the High Court has now ceased to be available to correct the errors of law or the erroneous findings of the first appellate Court even on questions of law unless such question of law be a substantial one."

10. A careful perusal of the records would show that the even first appellate Court did not notice to the principle of law laid down by the Supreme Court in Santosh Hazari (supra) for reversal of the judgment and reversed the judgment and decree of the trial Court on the ground which was not pleaded by the defendants before the trial Court and even did not record a finding that the plaintiff is not legal heir of Lala and Sunder Singh and even did not record a finding that defendant No.1 is adopted son of Sunder Singh, who inherited the property of Sunder Singh, as such, the judgment and decree of the first appellate Court cannot stand and it has to be set-aside as it is contrary to the principles of law laid down by the Supreme Court in Santosh Hazari (supra).
11. Accordingly, the impugned judgment and decree passed by the first appellate Court is hereby set-

aside and that of the trial Court is hereby restored by answering the substantial question of law in favour of the plaintiff and against the defendants.

12. The second appeal is allowed to the extent indicated hereinabove leaving the parties to bear their own cost(s).

13. A appellate decree be drawn-up accordingly.

Sd/-

(Sanjay K.Agrawal)
Judge

B/-