

HIGH COURT OF CHHATTISGARH AT BILASPUR**Second Appeal No. 177 of 2003**

1. Vijay Kumar, Aged about 47 years, S/o Lakhanlal.
2. Vinod Kumar, Aged about 26 years, S/o Lakhanlal.
3. Chandrabai, Wd/o Lakhanlal (died) through LRs. :-

(a). Munni @ Uma W/o Ghanshyam R/o New Changorabhata, Near Ashadeep School, Raipur, Chhattisgarh.

(b). Dharmpal Kumari W/o Kishore Kesharwani Gudiyari, Gandhi Nagar, Behind Parsuram Dharmshala, Near House of Prakash Maheshwari, House of Panda Ji Raipur.

---Appellants/Defendants**Versus**

1. State of Chhattisgarh, Through District Magistrate, Bilaspur, Chhattisgarh.
2. Ashok Kumar, Aged about 37 years, S/o Lakhanlal.

--- Plaintiff No. 1

3. Dinesh Kumar, Aged about 32 years, S/o Lakhanlal.

--- Plaintiff No. 2

Both R/o Village Khaprikala, Tahsil Lormi, Distt. Bilaspur, Chhattisgarh.

--- Respondents

For Appellants :- Mr. Rajeev Shrivastava, Senior Advocate with Mr. Chandra Bhushan Kesharwani, Advocate

For Respondent 1/State :- Mr. Ravi Bhagat, Dy. G.A.

For Respondents 2 & 3 :- Mr. Pawan Kesharwani, Advocate

Hon'ble Shri Justice Sanjay K. Agrawal

Judgment on Board

08/06/2021

1. This second appeal preferred by the appellants/defendants was admitted for hearing on 03/04/2019 by formulating the following substantial question of law :-

“Whether the suit as framed by the Plaintiffs without impleading the other co-parceners by claiming the 1/5th share over the suit property bearing Khasra No. 72/05 admeasuring 3.25 acres could be held to be maintainable by virtue of proviso to Order 1 Rule 9 of the Code of Civil Procedure, 1908 ?”

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

2. Plaintiffs No. 1 and 2 as well as defendants No. 1 and 2 are the sons of Late Shri Lakhanlal Kesharwani and defendant No. 3 (now deceased) was the widow of Late Shri Lakhanlal Kesharwani. The two plaintiffs filed a suit against their two brothers and mother stating inter alia that the suit property situated at Village Khaprikala, Distt. Bilaspur bearing Khasra Nos. 9/5, 9/9, 72/3, 273 admeasuring 3.86 acres and

Khasra No. 72/5 admeasuring 3.25 acres is the joint family property of plaintiffs as well as defendants No. 1 to 3 and each one of them is entitled to get $1/5^{\text{th}}$ share in the said suit property and since the name of defendant No. 1 is recorded as the tilte-holder of suit property bearing Khasra No. 72/5 area 3.25 acres, therefore, decree for declaration be granted that all five of them are entitled to get $1/5^{\text{th}}$ share in the suit property.

3. Resisting the suit, defendants No. 1 to 3 filed their written statement and admitted the claim of the plaintiffs that suit property bearing Khasra Nos. 9/5, 9/9, 72/3, 273 admeasuring 3.86 acres is the joint family property of plaintiffs and defendants No. 1 to 3, however, they took a definite stand that suit property bearing Khasra No. 72/5 admeasuring 3.25 acres fell in the share of his father's brother namely Jairam Prasad during partition and since he was issueless, he gave it to defendant No. 1, therefore, suit property bearing Khasra No. 72/5 area 3.25 acres is the exclusive property of defendant No. 1 on which plaintiffs have no right, title or interest. Moreover, a plea was

also taken by defendants No. 1 to 3 with regard to the suit being bad for non-joinder of necessary party by pleading that Rambharos, who was the brother of Lakhanlal Kesharwani, his sons and daughters are necessary and proper party in the suit but they have not been impleaded, as such, the instant suit is liable to be dismissed for non-joinder of necessary party.

4. During the course of the trial, no issue qua impleadment of legal heirs of Rambharos being necessary party in the suit was framed and it was also not pressed by the defendants.
5. Learned trial Court upon appreciation of oral and documentary evidence on record, dismissed the suit by its judgment and decree dated 25/07/2001 holding that the suit property bearing Khasra No. 72/5 admeasuring 3.25 acres is the exclusive property of defendant No. 1 and therefore, plaintiffs are not entitled for decree as claimed by them. Questioning the judgment and decree passed by the trial Court, plaintiffs then preferred an appeal under Section 96 of CPC wherein learned first appellate Court reversed the judgment and decree

passed by the trial Court by holding that plaintiffs are also entitled to get 1/5th share in the suit property bearing Khasra No. 72/5 admeasuring 3.25 acres along with the defendants and accordingly allowed the appeal and decreed the suit by its impugned judgment and decree dated 22/02/2003 against which the instant appeal under Section 100 of CPC has been preferred by the appellants/defendants in which substantial question of law has been formulated and set out in the opening paragraph of this judgment.

6. Mr. Rajeev Shrivastava, learned counsel appearing on behalf of the appellants/defendants, would submit that since the suit property bearing Khasra No. 72/5 admeasuring 3.25 acres was also purchased by Rambharos vide sale deed dated 23/04/1960 (Ex. D/1), therefore, his sons and daughters were also necessary and property party in the suit and due to want of non-joinder of necessary party, plaintiffs' suit is liable to be dismissed. He would rely upon the decision rendered by the Supreme Court in the matter of

Kanakarathanammal v. V. S. Loganatha Mudaliar¹

to buttress his submission.

7. Per contra, Mr. Pawan Kesharwani, learned counsel appearing for respondents No. 2 and 3/plaintiffs, would support the impugned judgment and decree passed by the first appellate Court.

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

9. Plaintiffs No. 1 and 2 as well as defendants No. 1 and 2, all are brothers being sons of Late Lakhanlal Kesharwani and defendant No. 3 was his widow who also died during the pendency of this appeal. The suit property is in two parts, one bearing Khasra Nos. 9/5, 9/9, 72/3, 273 admeasuring 3.86 acres in which there is no dispute as the defendants in paragraphs 2 and 5 of their written statement have admitted the claim of the plaintiffs that the said suit property is the joint family property of plaintiffs as well as defendants No. 1 to 3. The dispute is with regard to the second part of the

¹ AIR 1965 SC 271

suit property bearing Khasra No. 72/5 admeasuring 3.25 acres in which plaintiffs claim that it is the joint family property of plaintiffs as well as defendants and each of them is entitled for $1/5^{\text{th}}$ share whereas defendants have set up a defence that since the said suit property fell in the share of plaintiffs and defendants No. 1 and 2's uncle namely Jairam Prasad in partition and since he was issueless, he has given it to defendant No. 1, therefore, it is the exclusive property of defendant No. 1, which learned trial Court accepted and dismissed the suit, but the first appellate Court reversed the judgment and decree of the trial Court and held that the said suit property is not the exclusive property of defendant No. 1 rather it is the joint family property of the parties herein. The said finding recorded by the first appellate Court that suit property bearing Khasra No. 72/5 admeasuring 3.25 acres is the joint family property of the parties has not been questioned by the appellants/defendants in the instant appeal and it has thus attained finality.

10. Now, the only substantial question of law that remains for determination is whether the suit is bad for want of non-impleadment of legal heirs of Rambharos as a party/defendant ?
11. It is the stand of the plaintiffs that suit property bearing Khasra No. 72/5 area 3.25 acres is held by the plaintiffs as well as defendants jointly whereas defendants took up a plea that the said suit property is the exclusive property of defendant No. 1 which he has received from his uncle Jairam Prasad as he was issueless. Admittedly, it is not the case of the defendants that the sons and daughters of Rambharos have any share in the suit property at present. In fact, it is not the case of either of the parties that the sons and daughters of Rambharos had any semblance of right, title or interest in the suit property bearing Khasra No. 72/5 area 3.25 acres, therefore, the sons and daughters of Rambharos are neither necessary nor proper party in the suit on the own showing of the defendants also. This fact is further corroborated as though the first appellate Court has recorded the finding that the suit property bearing Khasra No. 72/5 area 3.25 acres is the joint

family property of the parties, yet that finding has not been called in question by the defendants in the instant appeal. Therefore, it is held that the sons and daughters of Rambharos are neither necessary nor proper party in the suit and consequently, proviso to Order 1 Rule 9 of the Code of Civil Procedure, 1908 would not attract.

12. Likewise, though defendant No. 1 raised the plea that sons and daughters of Rambharos are necessary parties and due to their non-impleadment as party/defendant, plaintiffs' suit is bad and is liable to be dismissed, but it was not pressed before the trial Court either at the time of framing of issues or at the time of final hearing. Even thereafter, when the suit was dismissed and the first appeal was preferred by the plaintiffs, while defending the first appeal, defendants then too did not file any cross-objection stating that the suit is also liable to be dismissed for want of non-impleadment of sons and daughters of Rambharos who are necessary and proper parties in the suit. As such, the defendants though raised the plea of non-joinder of necessary

party in the suit, but they did not press it by inviting the attention of the Court to frame an issue in this regard and they further did not press it at the time of final hearing. The defendants took a well-calculated chance by not pressing the plea so raised by them before the two courts below and only when the first appeal was decided against them, then without questioning the main finding recorded by the first appellate Court that the suit property is the joint family property of the parties and plaintiffs along with defendants are entitled to get $1/5^{\text{th}}$ share each, the defendants have only raised the plea that the suit is bad for non-impleadment of necessary party, specially when in fact, the sons and daughters of Rambharos are neither necessary nor proper party in the suit.

13. As a fallout and consequence of the aforesaid discussion, it is held that plaintiffs' suit, as framed and filed, is not bad for non-joinder of necessary party and the first appellate Court is absolutely justified in granting the appeal preferred by the plaintiffs. I do not find any merit in the instant appeal.

14. The second appeal, being devoid of merits, deserves to be and is accordingly dismissed. In view of that, all the pending applications, if any, are finally disposed of. No cost(s).

15. Decree be drawn-up accordingly.

Sd/-
(Sanjay K. Agrawal)
Judge

Harneet