

HIGH COURT OF CHHATTISGARH, BILASPUR**Second Appeal No.227 of 2012**

1. Jamidar, S/o. Bhagbali, aged 40 years,
2. Sukhiram, S/o Bhagbali, aged 35 years,
3. Rikhiram, S/o Bhagbali, aged 30 years,

All caste-Kewat, r/o village-Changeri, Tehail Marwahi,
District-Bilaspur (CG)

---- Appellants/Plaintiffs

Versus

1. Jamuni Bai, w/o Johan, aged 42 years, caste-Kewat,
r/o-village-Adbhar, Tehsil-Pendraroad, District-
Bilaspur (CG)
2. State of C.G. through Collector Bilaspur (CG)

---- Respondents/Defendants

For Appellants/Plaintiffs:

Mr.P.K.Verma, Senior Advocate with
Mr.Virendra Verma, Advocate

For Respondent No.1/Defendant No.1:

Mr.Aman Kesharwani, Advocate

For Respondent No.2/State:

Mr.Sanjay Pathak, P.L.

Hon'ble Shri Justice Sanjay K. Agrawal

Judgment on Board

8/3/2021

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

"1. Whether the court below has committed an
error of law in dismissing the suit of the
appellants/plaintiffs on the question of non-
joinder of the necessary party?

2. Whether the court below has committed an

error of law in dismissing the suit in *toto* when the appellants/plaintiffs were entitled at least one half share of the suit land?

3. Whether the finding arrived at by the trial court and confirmed by the lower appellate court is a perverse finding of fact?"

[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 Sahdewna. He had two sons namely Bhagbali and Raja. The plaintiffs are sons of Bhagbali. Defendant No.1-Jamunibai claimed to be daughter of Raja and in that capacity, she preferred an application vide Ex.P-3 before the Tahsildar, Marwahi under Section 178 of the Chhattisgarh Land Revenue Code, 1959 (hereinafter called as 'Code') claiming that though she is daughter of Raja, yet 1/2 share in the suit property is not being given to her, therefore, 1/2 share in the suit property be allotted to her by making partition, in which the plaintiffs appeared and claimed the suit property by way of Will dated 2.4.2003 (Ex.P-4) executed by Rajaram in their favour. Since the question of title was raised by the plaintiffs, proceeding under Section 178 of the Code was stayed and the matter was referred to the Civil Court for determination of question of title by learned

Tahsildar, Marwahi by order dated 26.7.2006. Accordingly, civil suit was filed in which the plaintiffs claimed the suit property to be exclusive property of them stating that they have succeeded 1/2 share in the suit property by their father and remaining 1/2 share on the basis of Will dated 2.4.2003 (Ex.P-4) executed by Rajaram in their favour, as such, decree for declaration of title be granted in their favour.

3. Resisting the suit, defendant No.1 filed her written statement and claimed 1/2 share in the suit property in para-3 and also in para-17 of her written statement claiming to be in possession of 1/2 share in the suit property and in 1/2 share the plaintiffs are in possession.
4. The trial Court upon appreciation of oral and documentary evidence available on record, by its judgment and decree dated 23.3.2011, did not accept the theory of Will put forth by the plaintiffs and dismissed the suit. On appeal being preferred, the first appellate Court dismissed the appeal by affirming the judgment and decree of the trial Court, against which, this second appeal under Section 100 of the CPC has been preferred by the appellants/plaintiffs, in which three substantial

questions of law have been formulated, which have been set-out in opening paragraph of this judgment for sake of completeness.

5. Mr.P.K.Verma, learned Senior Counsel with Mr.Virendra Verma, learned counsel for the appellants/plaintiffs, would submit that both the Courts below concurrently erred in overlooking and ignoring the overwhelming evidence available on record in which in paras-3 and 17 of her written statement defendant No.1 has clearly admitted the fact that the property is joint family property of Sahdewna, which Bhagbali and Raja were inherited and also by application dated 19.5.2006 (Ex.P-3) in which defendant No.1 has only claimed 1/2 share in the suit property before the Tahsildar, Marwahi, but looking to the dispute of title, the matter was referred to the Civil Court staying further proceedings of the matter, but the fact remains that even if the Will is concurrently held to be not proved by both the Courts below, then also the plaintiffs would be entitled for 1/2 share in the suit property. Learned Senior Counsel would further submit that even if the finding of two Courts below that defendant No.1-Jamunibai is daughter of Raja is accepted as it, though they are disputing, then also the plaintiffs would also be entitled for 1/2 share in the suit

property, as such, both the Courts below have committed legal error in dismissing the suit. Learned Senior Counsel would also submit that finding regarding non-joinder of the necessary party runs contrary to record as there is no dispute between the parties with regard to other wives of Raja as they were not necessary party, as such, the judgment and decree of both the Courts below deserve to be set aside.

6. On the other hand, Mr. Aman Kesharwani, learned counsel for respondent No.1/defendant No.1, would support the impugned judgment and decree.

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

Answer to substantial question of law No.3:-

8. Admittedly, the suit property was originally held by Sahdewna. He had two sons namely Bhagbali and Raja and the plaintiffs are sons of Bhagbali, but defendant No.1-Jamunibai claimed to be daughter of Raja, which was disputed leading to filing of application under Section 178 of the Code by defendant No.1 claiming 1/2 share in the suit property vide Ex.P-3, in which the plaintiffs appeared and raised the question on title

holding that Raja has already executed Will in their favour. In that view of the matter, the Tahsildar, Marwahi asked the parties to get their title determined by the Civil Court staying further proceedings of the matter on 26.7.2006. In a suit filed before the trial Court, the trial Court did not accept the plea of the plaintiffs that Raja has executed Will dated 2.4.2003 (Ex.P-4) in favour of the plaintiffs and that finding has been affirmed by the first appellate Court and that finding has attained finality. Mr.Verma, learned Senior Counsel for the appellants/plaintiffs, despite all efforts could not demonstrate the said finding to be perverse holding that Will is not proved in accordance with law. Similarly, both the Courts below have recorded a finding that Jamunibai is daughter of Raja. Mr.Verma, learned Senior Counsel, could not demonstrate that Jamunibai is not daughter of Raja, as such, finding regarding Will having not been established and Jamunibai is daughter of Raja are finding of fact based on evidence available on record. The said findings are re-affirmed.

Answer to substantial question of law No.1:-

9. The trial Court has held that other wives of Raja have not been impleaded as party defendant in the suit,

which has been affirmed by the first appellate Court. The dispute is mainly between the plaintiffs and defendant No.1 pursuant to the application filed by defendant No.1 under Section 178 of the Code, as such, the present dispute is between the plaintiffs and defendant No.1 and the suit is for declaration of title and possession. In that view of the matter, the finding of two Courts below that the suit suffers from non-joinder of the necessary party deserves to be and is hereby set-aside.

Answer to substantial question of law No.2:

- 10.** It is not in dispute that in para-3 of written statement, defendant No.1 has also admitted that the suit property was originally held by Sahdewna and Bhagbali & Raja both had 1/2-1/2 share in the suit property. Defendant No.1 has also filed an application (Ex.P-3) under Section 178 of the Code before the Tahsildar, Marwahi, in which she has also admitted that she has only 1/2 share in the suit property. Even para-17 of written statement, defendant No.1 has also admitted that the plaintiffs are in possession of 1/2 share in the suit property. Not only this, in the application for partition, she has admitted that she has only 1/2 share in the suit property, which was not given to her by the plaintiffs. Defendant No.1 has

admitted in para-7 of her statement before the trial Court that khata is joint with the plaintiffs, as such, there is overwhelming oral and documentary evidence on record to hold that the suit property is held by Bhagbali and Raja jointly as they have succeeded from Sahdewna and defendant No.1-Jamunibai is held to be daughter of Raja, as such, legal representatives of Bhagbali and Raja both would be entitled for 1/2-1/2 share in the suit property.

11. Accordingly, finding recorded by two Courts below that the plaintiffs are not entitled for decree of declaration of title is set-aside and it is held that the plaintiffs would be entitled for 1/2 share in the suit property i.e. total area 8.127 hectare shown in Schedule-क appended with plaint. Schedule-क be made part of decree.

12. The second appeal is allowed in part by answering the substantial questions of law accordingly. Parties shall bear their own cost(s).

13. Appellate decree be drawn-up accordingly.

Sd/-

(Sanjay K.Agrawal)
Judge

B/-