

HIGH COURT OF CHHATTISGARH, BILASPUR**Second Appeal No.515 of 2012**

1. Smt.Champa Bai, aged about 55 years, W/o Bhagirathi Soni, R/o Sonar Para, Pandaria, Tahsil Pandaria, P.S. Pandaria, Post Pandaria, Distt.Kabirdham (CG)
2. Smt.Khedia Bai, aged about 52 years, W/o Khanwa Soni,
3. Smt.Kumari Bai, aged about 50 years, W/o Balwali Soni,
No.2 and 3 R/o Sonar Para, Takhatpur, P.S. and Tahsil Takhatpur, Distt.Bilaspur (CG)

---- Appellants/Plaintiffs**Versus**

1. Shankar Lal, aged about 45 years, S/o Lakhan Lal Soni, R/o Village Pandatarai, Tahsil Pandariya, P.S. Pandatarai, Distt. Kabirdham (Kawardha) (CG)
2. Smt.Genda Bai, aged about 55 years, W/o Jagdish Soni, R/o Village Pandatarai, Tahsil Pandariya, P.S. Pandatarai, Distt. Kabirdham (Kawardha) (CG)
3. State of Chhattisgarh, Through the Collector, Kabirdham
4. Bhisham Chand Tiwari, aged about 35 years, S/o Bali Ram Tiwari, R/o Village Kritbandha, Tahsil Kawardha, Presently R/o Village Pandatarai, Tahsil Pandariya, P.S. Pandatarai, Distt. Kabirdham (CG)

---- Respondents/Defendants

For Appellants/Plaintiffs:

Mr.Dharmesh Shrivastava, Advocate

For Respondents No.2 and 4/Defendants No.2 and 4:

Mr.Rakesh Pandey, Advocate

For Respondent No.3/State:

Mr.Ravi Bhagat, Dy.G.A.

Hon'ble Shri Justice Sanjay K. Agrawal**Judgment on Board****15/3/2021**

1. The substantial question of law involved, formulated
and to be answered in this second appeal preferred by

the appellants/plaintiffs is as under:-

“Whether the lower appellate Court was justified in dismissing appeal and suit on the ground that it has been filed after 31 years of 1974 ?”

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

2. In a partition held on 16.5.1974 the suit property fell in share of Lakhan Lal vide Ex.D-8. The plaintiffs No.1 to 3 are daughters of Lakhan Lal, original defendant No.1 was son of Lakhan Lal who died during pendency of the suit. Now defendant No.1-Shankar Lal is also son of Lakhan Lal and defendant No.2 is widow of original defendant No.1-Jagdish. The plaintiffs filed a suit for declaration of title, permanent injunction and partition stating inter-alia that their father has died in the year 1974 and widow Bhagwati Bai also died in the year 2004 and as such, they are entitled for 1/5 share in the suit property.
3. Resisting the suit, the defendants filed their written statement and denied the averments made in the plaint stating inter-alia that the plaintiffs are not entitled for 1/5 share in the suit property and the suit be dismissed with cost(s).
4. The trial Court upon appreciation of oral and documentary evidence available on record, by its

judgment and decree dated 2.1.2009, partly decreed the suit holding that since the suit property was subject-matter of partition dated 16.5.1974 (Ex.D-8), therefore, the amended provisions of the Hindu Succession Act, 1956 (hereinafter called as 'the Act of 1956') would not apply and the plaintiffs would be entitled for 1/15 share in the suit property excluding 2.12 acres of land which was held by defendant No.2 to which she has already sold in favour of defendant No.4.

5. Being aggrieved and dissatisfied with the judgment and decree of the trial Court, the plaintiffs preferred first appeal stating that they are entitled for 1/5 share in the suit property. The first appellate Court by the impugned judgment and decree surprisingly did not grant any further decree in favour of the plaintiffs which they claimed i.e. 1/5 share in the suit property rather set-aside the decree which has already granted by the trial Court despite the fact that there was no cross-appeal or cross-objection by the defendants, against which, this second appeal under Section 100 of the CPC has been preferred by the appellants/plaintiffs, 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.

6. Mr. Dharmesh Shrivastava, learned counsel for the appellants/plaintiffs, would submit that the first appellate Court went wrong in setting aside the decree which has even not sought to be quashed by the defendants by filing cross-appeal or cross-objection and that too in appeal preferred by the plaintiffs in which they have sought for relief which they claimed in plaint i.e. 1/5 share in the suit property, as such, the judgment and decree of the first appellate Court deserves to be set aside.
7. On the other hand, Mr. Rakesh Pandey, learned counsel for respondents No. 2 and 4/defendants No. 2 and 4, would support the impugned judgment and decree.
8. I have heard learned counsel appearing for the parties, considered their submissions made hereinabove and also went through the records with utmost circumspection.
9. It is not in dispute that the trial Court granted 1/15 share in the suit property to the plaintiffs by partly decreeing the suit, which was only appealed by the plaintiffs claiming 1/5 share rather than 1/15 share in the suit property, as such, there was no cross-appeal or cross-objection by the defendants in first appeal preferred by the plaintiffs before the

appellate Court. Therefore, there was no occasion by the first appellate Court to set-aside the decree already granted in favour of the plaintiffs, which was even not challenged by the defendants either by filing cross-appeal or by cross-objection.

10. The Supreme Court in the matter of Banarsi and others v. Ram Phal¹ held as under:-

"22. For the foregoing reasons we are of the opinion that the first appellate court ought not to have, while dismissing the appeals filed by the defendant-appellants before it, modified the decree in favour of the respondent before it in the absence of cross-appeal or cross-objection. The interference by the first appellate court has reduced the appellants to a situation worse than in what they would have been if they had not appealed. The High Court ought to have noticed this position of law and should have interfered to correct the error of law committed by the first appellate court."

11. In view of aforesaid legal position and in absence of cross-appeal or cross-objection by the defendants, the first appellate Court could not have set-aside the already granted decree in favour of the plaintiffs i.e. 1/15 share in the suit property.

12. In that view of the matter, the judgment and decree of 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 plaintiffs and against the defendants.

13. The second appeal is allowed to the extent

¹ (2003) 9 SCC 606

indicated hereinabove leaving the parties to bear their own cost(s).

14. Appellate decree be drawn-up accordingly.

Sd/-

(Sanjay K.Agrawal)
Judge

B/-