

A.F.R. 35

HIGH COURT OF JUDICATURE AT BILASPUR (CHHATTISGARH)

Second Appeal No.718 of 2003

APPELLANTS:

1. Gokul, S/o Vishram Das,
Aged about 65 years,
R/o Sindhi Colony, Champa,
Tehsil Champa,
District: Janjgir-Champa.
2. Smt. Phoolbai,
W/o Bhajandas, aged about
57 years, R/o village
Paraskola, Tehsil
Saranggarh, District Ramgarh,
Hal Mukam Datod, Tehsil
Sakti, District: Janjgir-Champa.

Versus

RESPONDENTS:

1. Bharatdas, S/o Vishram
Das, aged 52 years, R/o
Patharra, P.O. Kotetara,
Tehsil Jaijaipur, District:
Janjgir-Champa (C.G.).
2. State of Chhattisgarh,
Through District Magistrate
District: Janjgir Champa.

JUDGMENT

Post for: ^{fb}16-02-2004

**Sd/-
L.C. Bhadoo
Judge**

26
A.F.R.

HIGH COURT OF JUDICATURE AT BILASPUR (CHHATTISGARH)

Second Appeal No.718 of 2003

APPELLANTS:

1. Gokul, S/o Vishram Das,
Aged about 65 years,
R/o Sindhi Colony,
Champa,
Tehsil Champa,
District: Janjgir-Champa.
2. Smt. Phoolbai,
W/o Bhajandas, aged about
57 years, R/o village
Paraskola, Tehsil
Saranggarh, District
Ramgarh, Hal Mukam
Datod, Tehsil Sakti, District:
Janjgir-Champa.

Versus

RESPONDENTS:

1. Bharatdas, S/o Vishram
Das, aged 52 years, R/o
Patharra, P.O. Kotetara,
Tehsil Jaijaipur, District:
Janjgir-Champa (C.G.).
2. State of Chhattisgarh,
Through District Magistrate
District: Janjgir Champa.

Present:

Shri A. W. Khan, counsel for the appellants.

Smt. Chitra Shrivastava, Panel Lawyer for the State/respondent No.2.

JUDGMENT

(Delivered on 26th February 2004)

As per L.C. Bhadoo J.

The appellants herein defendants in Civil Suit No.334-A/2002 (Bharatdas V. Gokuldas & Others) have preferred this second appeal being aggrieved by the judgment and decree dated 1-10-2003 of the appellate Court i.e. Additional District

Judge, Sakti passed in civil regular first appeal No.21-A/2002 and the judgment and decree dated 25-7-2002 passed by the Additional Civil Judge, Class-I, Sakti in civil regular suit No.334-A/2002 whereby the trial Court i.e. Civil Judge, Class-I decreed the suit of plaintiff/respondent No.1 against the appellants and confirmed by the Additional District Judge, Sakti in above civil first appeals.

2. Brief facts of the civil suit necessary for the disposal of this second appeal are that respondent No.1 herein, plaintiff in the suit, who is the real brother of the appellants, filed a civil suit against the appellants herein with the averments that the agriculture land bearing Khasra Nos.15/1, 42, 215, 266, 32, 79/1 and 228, area 0.01, 0.01, 0.79, 0.52, 0.03, 0.18 and 0.52 and Khasra No.7 and total area 3.06 acre of Patwari Halka No.18 of village Patharra, Tehsil Sakti is plaintiff's property and he is in possession of that property. The defendants have no right to interfere in his possession and the defendants have no right to claim declaration and partition of the land.

3. Further case of respondent No.1 was that the father of the appellants and respondent No.1 namely, Vishram Das was having total land of 5.85 acres, which was described in the Schedule-A and partitioned by their father by an oral partition in his lifetime amongst two brothers i.e. the plaintiff and the defendant No.1. The land mentioned in the schedule-B of the plaint was given in the share of the plaintiff respondent herein, as the defendant No.1 was not interested in residing at the village; therefore, he sold all his agricultural land to others. After the death of their father the defendant/appellant No.1 herein secretly got entered his name along with the name of defendant No.2 in the revenue records whereas, the plaintiff is in possession and he is the only owner of that land. The defendant No.1 had moved an application before the Tehsildar, Jaijaipur for partition of the said land whereas the plaintiff is in continues possession of that land for last more than 12 years.

4. The joint written statement was filed by the defendant Nos. 1 and 2 and they denied any partition in the lifetime of their father and it was further mentioned that the agriculture was the only source of income of their father. The appellant NO.1 used to maintain the whole family. He never sold his land, nor he secretly got the name of the defendant/appellant No.1 entered in the revenue records. The disputed land described in the schedule-B of the plaint was never came into the share of the plaintiff and the plaintiff wants to grab the joint Hindu Family Property. On the basis of the pleadings of the parties issues were framed and thereafter the suit of the plaintiff was decreed as mentioned above and the first appeal filed by the defendants was also dismissed.

5. I have heard Shri A.W. Khan, learned counsel for the appellants on admission.

6. As per the provisions of Section 100 of the Code of the Civil Procedure "second appeal to the High Court lies only if the High Court is satisfied that the case involves a substantial question of law, otherwise second appeal is not maintainable." The substantial questions of law which the learned counsel for the appellants tried to raise are as follows:-

- (i) Whether the trial Court and the appellate Court have committed material illegality by believing the plaintiff's evidence and holding that the joint Hindu family ancestral property was partitioned by an oral partition between the two brothers in the lifetime of their father, as claimed by the plaintiff?
- (ii) Whether the judgment and decree of both the Courts are contrary to the Section 14 of the Hindu Succession Act, 1956 under which a Hindu female becomes an absolute owner of the property?

After going through the judgments of the trial Court as well as the appellate Court and also evidence of the parties, I am of the opinion that the appellants have failed in raising a substantial question of law. In other words, no substantial question of law is involved in this matter for consideration of this Court. As the plaintiff since beginning averred in his plaint that the father of the plaintiff/defendant namely Vishram Das partitioned the property in his lifetime and gave agriculture property described in the schedule-B of the plaint to the plaintiff and other property of schedule-A came to the share of the defendant No.1 who was working as Teacher and was not interested to reside in a small village and, therefore, he sold all properties of his share and started residing at Champa.

7. It has come in the evidence that even the property which came to the share of the plaintiff was mortgaged by his father and the defendant No.1. When plaintiff asked them to get the property released from mortgage, they asked him that since that property has come to his share, if he is interested then he can pay the mortgage money and get that property released from mortgage. Under the circumstances, he paid Rs.4800/- to his father and defendant No.1 and that property was got released from mortgage and since then that property is in his possession.

8. The appellant No.1, defendant has categorically admitted in para-5 and 6 of his evidence that in the lifetime of their father partition did take place and the plaintiff is in possession of agriculture land since beginning. He is cultivating that land. This fact even has been proved by the plaintiff's witnesses. On this point there is concurrent finding of both the Courts i.e. trial Court as well as the 1st appellate Court and there is no ground before this Court to take a different view or disturb the concurrent finding, as this finding is based on the evidence on record.

9. Now, coming to the question of the partition of the Hindu Joint Ancestral Property, it is settled law that the joint Hindu ancestral property can be partitioned by the co-sharer by oral partition as the partition is a severance of joint status, and as such it is a matter of individual volition. All that is necessary, therefore, to constitute a partition is a definite and unequivocal indication of his intention by a member of a joint family to separate himself from the family and enjoy his share in severalty. There should be an intimation, indication, or representation of such intention and that what from that manifestation should take would depend upon the circumstances of each case. It is implicit in this principle that this manifestation or declaration of intention should be to the knowledge of the persons affected for a mere uncommunicated declaration may amount to no more than merely harbouring an intent to separate. A partition can be effected by an oral agreement between the parties.

10. The transfer of property Act, which requires a registered instrument in the case of transfer of immoveable properties, does not require that a release, surrender, or partition of immoveable properties should be effected by a registered instrument, or even by a writing although in one sense each of them involves a transfer of property. A partition between the coparceners or co-owners, partakes the character of a release and conveyance, and it cannot be said to be either a sale or an exchange. No writing would, therefore, be necessary for a partition. Therefore, partition by agreement can take place of a joint hindu family property by the joint owners of the property and in this case as has been mentioned above, in the lifetime of the father of the plaintiff and defendant they partitioned the agriculture land and they were put into possession of their respective shares and since then the plaintiff is in possession of his share, as has been held by both the Courts.

11. Now coming to the question of absolute right of the defendant No.2 who is the sister of the plaintiff and the defendant No.1, as per the provisions of Section 14 of the Hindu Succession Act, 1956, first of all this point had not been raised in the written statement before the trial Court nor before the 1st appellate Court.

therefore, this question cannot be allowed to be raised for the first time in this second appeal. The defendant No.2 namely Smt. Phool Bai never claimed her share nor she was in possession of land at any given point of time, as she was married to Bhajandas of village Paraskola, therefore, she is residing with her husband. Even she had not come forward to give her evidence before the trial Court for claiming her share. Even the written statement was not filed by her separately, therefore, in the circumstances, this mixed question of fact and law cannot be allowed to be raised for the first time in second appeal. No other point was raised by the learned counsel for the appellants.

12. Since no substantial question of law is involved in this second appeal, this second appeal fails and it is dismissed in limine.

Sd/-
L.C. Bhadoo
Judge

Barve*