
(2019) 02 CHH CK 0002
In the Chhattisgarh High Court
Case No : Second Appeal No. 350 Of 2004

Gohdul

APPELLANT

Vs

Bachan Rai & Others

RESPONDENT

Date of Decision : 01-02-2019

Acts Referred:

Evidence Act, 1872 — Section 101, 103

Citation : (2019) 02 CHH CK 0002

Hon'ble Judges : Sanjay K. Agrawal, J

Bench : Single Bench

Advocate : Vivek Bhakta, Vimlesh Bajpai

Final Decision : Dismissed

Judgement

1. This second appeal by the plaintiff / appellant was admitted on the following substantial questions of law: -

"(1) Whether the defendant no.2 namely Mankunwar was having a limited interest in the suit property and she was not entitled to alienate the same in favour of defendant no.1?

(2) Whether the courts below were not justified in dismissing the suit of the plaintiff in relation to the lands of the Schedule-A of the plaint in the admitted facts and circumstances of this case?"

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

2. The plaintiff filed suit for declaration that the sale deed dated 28-10-1994 executed by defendant No.2 in favour of defendant No.1 is null and void. It was further stated that the suit property was held by Khora and Mankunwar - his widow, has alienated the suit property, she being the member of aboriginal caste was having only limited right of maintenance over that property, but she could not have alienated the suit property in favour of defendant No.1 which be

declared null and void. The defendants remained ex parte and the suit was dismissed ex parte and on appeal preferred, the first appellate Court affirmed the finding of the trial Court against which this second appeal has been preferred in which substantial questions of law have been formulated which have been set-out in the opening paragraph of this judgment.

3. Mr. Vivek Bhakta, learned counsel for the appellant / plaintiff, submits that both the courts have concurrently erred in holding that Mankunwar was entitled to alienate the suit property.

4. I have heard learned counsel for the parties, considered their rival submissions made herein-above and went through the record with utmost circumspection.

5. The plaintiff has taken a plea that the provisions of the Hindu Succession Act, 1956 would not apply, as parties are Gond by caste and by the custom prevalent in the Gond caste, widow was not entitled to alienate the suit property.

6. In order to decide the plea, it would be appropriate to notice the provisions of Sections 101 and 103 of the Indian Evidence Act, 1872. which provide as under: -

"101. Burden of proof .-Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist.

When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.

103. Burden of proof as to particular fact.-The burden of proof as to any particular fact lies on that person who wishes the Court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person."

7. In the matter of Mohammad Baqar and others v. Naim-un-Nisa Bibi and others AIR 1956 SC 548, the Supreme Court has held as under: -

"(6) ... The burden of proving a custom in derogation of the general law being heavily on the party who sets it up, it was incumbent on the appellants to prove by clear and cogent evidence that there was such a custom as was pleaded by them."

8. Thus, the burden that customary law excludes the woman from alienation of property inherited from her husband was on the plaintiff, who is son of original defendant No.2, which he failed to discharge by leading appropriate evidence and it would be impermissible for the Court to start with this assumption that customary law governing the parties excludes the woman from alienating the property.

9. In view of the aforesaid finding, I am of the considered opinion that the two courts below have rightly dismissed the suit holding that defendant No.2

Mankunwar had right to alienate the suit property in favour of defendant No.1 and the said finding is in accordance with law. The substantial questions of law are answered accordingly and the second appeal is liable to be and is hereby dismissed leaving the parties to bear their own cost(s).

10. Decree be drawn-up accordingly.