

IN THE HIGH COURT OF MADHYA PRADESH, JABALPUR

BEFORE

SHRI JUSTICE DWARKA DHISH BANSAL

ON THE 23rd JUNE, 2022

SECOND APPEAL NO. 153 OF 1995

BETWEEN:-

- 1. CHOKHELAL, SON OF
REBARAM, AGED 50 YEARS**
- 2. MANGALAL, SON OF
CHOKHELAL SONKAR,
AGED ABOUT 25 YEARS**
- 3. SANTOSH KUMAR, SON OF
CHOKHELAL, MINOR
THROUGH GUARDIAN
MOTHER HARBAI**
- 4. DASHRATHLAL, SON OF
CHOKHELAL**
- 5. BASORILAL, SON OF
CHOKHELAL, AGED
ABOUT 26 YEARS**
- 6. KISHORILAL, SON OF
CHOKHELAL, MINOR
THROUGH GUARDIAN
MOTHER CHHOTI BAI**
- 7. NANDILAL, SON OF
CHOKHELAL MINOR
THROUGH GUARDIAN
MOTHER CHHOTI BAI**

**ALL RESIDENTS OF 280,
BHANTALAIYA, JABALPUR
(M.P.)**

.....Appellant

**(BY SHRI RAVISH AGARWAL, SENIOR ADVOCATE WITH SHRI
DEV DATT BHAVE, ADVOCATE)**

AND

- 1. ASHWANI KUMAR, SON OF
VISHNUSWAROOP VERMA,
AGED ABOUT 22 YEARS,
R/O BHANTALAIYA WARD,
JABALPUR (MADHYA
PRADESH)**
- 2. (a) SHAILABALA WIFE OF
VISHNU KUMAR, AGED 40
YEARS
(b) BANTU S/O LATE
VISHNU KUMAR, AGED
ABOUT 25 YEARS, 7/14
CHAR IMLI BHOPAL
(MADHYA PRADESH)
(c) KU. DIVYA D/O LATE
VISHNU KUMAR, AGED
ABOUT 21 YEARS, 7/14
CHAR IMLI BHOPAL
(MADHYA PRADESH).**
- 3. VISHNU SWAROOP S/O
LATE RAMCHAND , AGED
ABOUT 56 YEARS, R/O 280
BHANTALAIYA WARD,
JABALPUR (MADHYA
PRADESH).**
- 4. SMT. SHANTIBAI W/O
VISHNU SWAROOP , AGED
ABOUT 46 YEARS,
BHANTALAIYA WARD**

- JABALPUR (MADHYA PRADESH)
5. HARIOM KUMAR S/O VISHNU SWAROOP , AGED ABOUT 29 YEARS, BHANTALAIYA WARD JABALPUR (MADHYA PRADESH)
6. OM PRAKASH S/O VISHNU SWAROOP , AGED ABOUT 21 YEARS, BHANTALA WARD JABALPUR (MADHYA PRADESH)
7. KU. MAMTA W/O VISHNU SWAROOP BHANTALAIYA WARD JABALPUR (MADHYA PRADESH)

.....Respondents

(BY SHRI RAVI RANJAN, ADVOCATE WITH SHRI SUSHANT RANJAN, RESPONDENT NO.1)

JUDGMENT

DWARKA DHISH BANSAL, J.:-

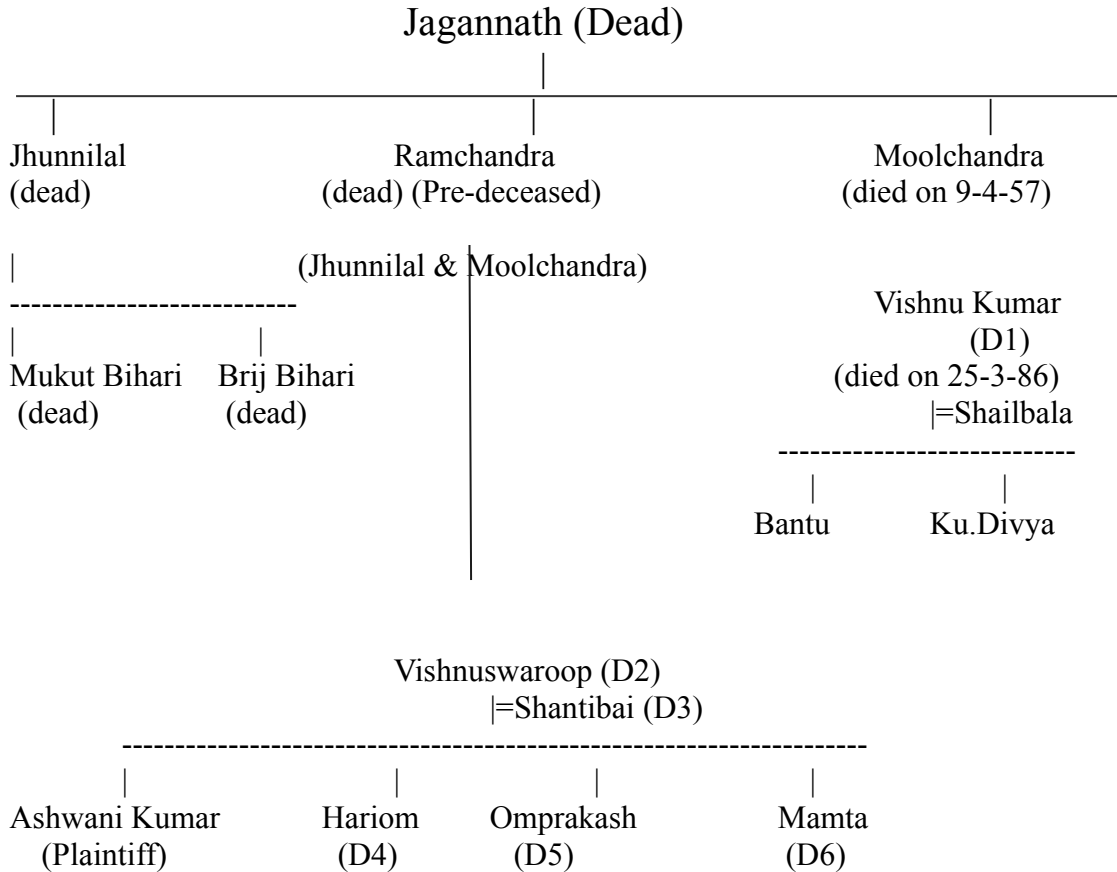
This second appeal has been filed by appellants/defendants 7-13 challenging the judgment and decree dated 24.10.1994 passed by learned 5th Additional Judge to the District Judge, Jabalpur in Civil Appeal No.1-

A/94 & 2-A/94 whereby reversing the judgment and decree dated 10.04.1992 passed by Civil Judge Class-II, Jabalpur in Civil Suit No.77-A/89 whereby learned trial Court dismissed the suit of the respondent No.1/plaintiff as well as the counter claim filed by the present appellants/defendants 7, 8 & 11.

2. By the impugned judgment and decree, learned lower appellate Court has by allowing the civil appeal No. 1-A/94 decreed the suit of the respondent No. 1/plaintiff but dismissing the appeal No.2-A/94 affirmed the judgment and decree of trial Court with regard to dismissal of counter claim of the appellants/defendants 7, 8 & 11.

3. In short, the facts of the case are that the plaintiff/respondent No. 1 had instituted a suit for declaration of his 1/12 share, partition and also for separate possession of the house No.310 (changed No.280) in question situate at Bhantalaiya Ward, Jabalpur alleging it to be his ancestral property belonging to common ancestor of the parties and great-grandfather of the plaintiff.

4. Undisputed genealogical tree is as under:-



5. The plaintiff alleged that after death of great-grandfather Jagannath, his son Jhunnilal became *karta* and after death of Jhunnilal his brother Moolchandra became *karta* of the family and thereafter Vishnu Kumar-defendant No.1 became *karta* and his name was recorded over the suit property. He alleged that the suit property being joint family property and he being

coparcener is having right by birth and is entitled to 1/12 share, partition and separate possession.

6. Defendant No.1 Vishnu Kumar appeared and filed written statement denying the plaint allegations and contended that there is no joint Hindu family and plaintiff or the defendants 2-6 are not coparceners. Neither Jagannath nor Jhunnilal was owner of the suit property. The house was constructed by his father Moolchandra in the year 1938-39 after obtaining permission from the Municipal Committee. After death of Moolchandra in the year 1957, his name was continued till 1961-62 and the application filed by defendant No.2 Vishnuswaroop was rejected on 20.09.1962, which was upheld vide order dated 10.03.1967. The plaintiff or defendant No.2 has no share in the suit house. The defendant No.1 contended that Moolchandra and he, allowed the defendant No.2 Vishnuswaroop alongwith his family to live in the suit property, as licensee. As the property was inherited by defendant No.1 from Moolchandra in the year 1957, hence the

suit is barred by time. With these allegations, the suit was prayed to be dismissed.

7. After death of defendant No.1, his LRs by filing separate written statement reiterated the same contentions as were made by defendant No.1 in his written statement.

8. In the two sets of written statements filed by the defendants 7-13, they adopted most of the pleas taken by defendant No.1 in his written statement. The defendants 7, 8 & 11 also filed counter claim with the contentions that they are bonafide purchasers and they are entitled for possession over the house of the possession of plaintiff by way of decree of mandatory injunction.

9. The plaintiff filed written statement to the counter claim filed by defendants 7, 8 & 11 denying the allegations made therein and contended that the plaintiff was never licensee of defendant No.1 or defendants 7-13 and the counter claim filed by them is barred by time and they are not entitled for decree

of mandatory injunction. Accordingly, the plaintiff prayed for dismissal of counter claim.

10. The defendants 2-6 did not file any written statement.

11. As has been stated above learned trial Court dismissed the suit of the respondent No.1-plaintiff holding that the suit property is not joint Hindu family property of the plaintiff and defendants 1-6 but the original defendant No.1-Vishnu Kumar was exclusive owner. It was also held that the defendant No.1-Vishnu Kumar became separate from plaintiff and defendants 2-6. With these findings learned trial Court held that the defendant No.1-Vishnu Kumar rightly sold the property to the defendants/appellants 8-13. However, at the same time, learned trial Court vide its judgment & decree dated 10.04.1992 dismissed the counter claim negating the plea of licensee taken by the defendants 7-13.

12. Being aggrieved by the aforesaid judgment and decree, the plaintiff-respondent No.1 against dismissal of his suit had

preferred civil appeal No.1-A/94 and the defendants 7-13 against dismissal of their counter claim preferred civil appeal No.2-A/94. The learned lower appellate Court vide its judgment and decree dated 24.10.1994 dismissed the civil appeal No.2-A/94 and confirmed the dismissal of counter claim but by allowing the civil appeal No.1-A/94, decreed the civil suit of the respondent No.1/plaintiff holding that the suit property is ancestral property of the plaintiff and defendants 1-6, which originally belonged to common ancestor Jagannath having house No.301, which later on was changed as 280 but infact the property remained the same. It is also held that the disputed house is not self acquired property of Moolchandra and the plaintiff/respondent No.1 having right by birth is entitled for 1/12 share after partition of the same.

13. This Court vide order dated 10.7.1995 admitted the present second appeal on the following substantial question of law:-

“Whether the suit filed by the respondent No.1 was maintainable under law for a decree for declaration or partition ?”

14. Learned senior counsel submits that the suit land/property bearing No.280, 280/1, 280/2, 280/3 and 280/4 is not the same property which was having house No.301 and the documents (Ex. P/1-P/19) do not prove the identity and there is no proof that Jagannath owned the property/house No.301 and further there is no proof that Jagannath, Jhunnilal and Ramchandra were recorded over the property/house No.280. He submits that sale deed dated 24.06.1976 (Ex. D/2) was not challenged but lower appellate Court has also given finding in that regard and exceeded its jurisdiction. The statement given by Vishnu Kumar regarding construction of house by his father Moolchandra is supported by the documentary evidence (Ex. P/14-P/19) and the application for mutation filed by defendant No.2 was rightly dismissed holding that Moolchandra was recorded owner of property/house No.280. These orders passed rejecting the application for mutation, dated 20.09.1962 and 10.03.1967

were not challenged. He submits that house No. 301 never changed into house No. 280, 280/1, 280/2, 280/3 & 280/4.

15. By placing reliance on the judgment of this Court in the case of **Uttam Vs. Saubhag Singh & ors.** reported in **ILR (2014) MP 1593**, learned senior counsel submits that by virtue of Section 4 of the Hindu Succession Act, 1956 and due to death of Moolchandra on 09.04.1957, the plaintiff has no right to file the suit that too in the lifetime of his father Vishnuswaroop-defendant No.2, which was upheld by Hon'ble the Apex Court in the case of **Uttam Vs. Saubhag Singh** reported in **(2016) 4 SCC 68**. He also placed reliance on the judgments pronounced by Hon'ble the Apex Court in the case of **Sheela Devi and others Vs. Lal Chand and another** reported in **(2006) 8 SCC 581**, **State of Assam Vs. Ripa Sarma** reported in **(2013) 3 SCC 63**, **Yudhishter Vs. Ashok Kumar** reported in **AIR 1987 SC 558** and argued that under the Hindu Law existing prior to coming into force of the Hindu Succession Act, 1956, grandson had birth right in the Mitakhshara coparcenary property in the hands of his grandfather but the position has changed after commencement

of the Act of 1956. He submits that Section 4 of the Act of 1956 provides for overriding effect of the Act on any text, rule or interpretation of Hindu Law or any custom or usage as part of that law in force immediately before the commencement of the Act being inconsistent with the provisions of the Act. By placing reliance on jurisprudence of Salmond, learned senior counsel submits that a precedent is not binding if it was rendered in ignorance of a statute or a rule having the force of statute, i.e., delegated legislation. He submits that even a lower Court can impugn a precedent on such grounds.

16. Learned senior counsel further pointed out that he has filed an application under Section 100(5) of CPC [I.A. No. 1178/2019] and submits that the additional substantial question of law is arising in the present second appeal case as under:-

“V. Whether from the entire oral as well the documentary evidence available on record it is legally proved that the suit property is not joint family property of the parties but is self acquired property of defendant No.1 and his father which evidence has been wholly misread and/or misconstrued by the Lower Appellate Court in holding to the contrary?”

17. Learned counsel for the respondent No.1/plaintiff in his reply submits that looking to the age of plaintiff mentioned in the plaint and not disputed by the defendants, it is clear that the plaintiff was born in the year about 1954 i.e., prior to commencement of the Hindu Succession Act, 1956, therefore, he submits that without doing any exercise it is clear that the rights of the plaintiff shall be governed by the old Hindu Law and he relied upon commentary of Hindu law (22nd Edition) which has stated the position with respect to succession under *Mitakshara* Law, as follows:-

“ Page 129

“A son, a grandson whose father is dead, and a great-grandson whose father and grandfather are both dead, succeed simultaneously as single heir to the separate or self-acquired property of the deceased with rights of survivorship.”

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“All property inherited by a male Hindu from his father, father’s father or father’s father’s father, is ancestral property. The essential feature of ancestral property according to Mitakshara law is that the sons, grandsons and great-grandsons of the person who inherits it, acquire an interest, and the rights attached to such property at the moment of their birth.

A person inheriting property from his three immediate paternal ancestors holds it, and must hold it, in coparcenary with his sons, son’s sons, and son’s son’s sons, but as regards other relations, he holds it, and is entitled to hold it as his absolute property.”

(emphasis supplied)

18. Learned counsel for the respondent No.1 submits that the property bearing No. 301 or in 280, 280/1, 280/2, 280/3, 280/4 are the same properties as No. 301 was changed later on as 280. He further submits that as per documentary evidence available on record and considered by lower appellate Court in para 10 of its judgment, the original owner was Jagannath and it was not self acquired property of Moolchandra. The learned appellate Court has rightly held that the property has never been partitioned and learned trial Court had wrongly presumed partition of the property on the basis of separate living. He submits that the plaintiff is in possession of part of

the disputed property and has rightly been held to be entitled for 1/12 share including partition and possession thereof. With the aforesaid submissions, he prays for dismissal of the second appeal.

19. Heard learned counsel for both the parties and perused the record.

20. First of all, it is relevant to mention here that learned counsel for the appellants has not disputed the factum of plaintiff's birth prior to year 1956 i.e. prior to commencement of the Hindu Succession Act, 1956 and according to the age mentioned in the plaint, his year of birth comes in the year 1954, therefore, undisputably, the rights of plaintiff shall be governed by the old Hindu Law and not by the Hindu Succession Act, 1956.

21. Secondly, before both the learned Courts, the question of maintainability of the suit was not raised by the defendants/appellants, therefore, the learned Courts below

have not considered the same in their judgments. As the question of maintainability of the suit was not raised before the Courts below, therefore, the question of maintainability of suit based on facts cannot be permitted to be raised at the second appellate stage.

22. However, fact remains that the plaintiff was born prior to commencement of the Hindu Succession Act, 1956 and he is claiming right in the property belonging to his great-grandfather, therefore, as per Mulla's Commentary on Hindu Law (supra) the plaintiff being coparcener would succeed the property having right by birth with rights of survivorship and his rights will not be affected by the Hindu Succession Act, 1956.

23. The Hon'ble Apex Court has recently in the case of **Arshnoor Singh Vs. Harpal Singh and others** reported in **(2020) 14 SCC 436** considered all the previous judgments, which were also cited by learned senior counsel for the appellants and held as under:-

“7.6. If succession opened under the old Hindu law i.e. prior to the commencement of the Hindu Succession Act, 1956, the parties would be governed by Mitakshara law. The property inherited by a male Hindu from his paternal male ancestor shall be coparcenary property in his hands vis-a-vis his male descendants up to three degrees below him. The nature of property will remain as coparcenary property even after the commencement of the Hindu Succession Act, 1956.”

24. Similar is the view taken by coordinate Bench of this Court in the case of **Uttam Vs. Saubhag Singh** reported in **ILR (2014) MP 1593**, which after considering the case of **Yudhishter (supra)** and **Sheela Devi and others (supra)**, held as under:-

“11. In the matter of Yudhishter Vs. Ashok Kumar, reported in AIR 1987 SC 558 referring to the earlier judgment in the case of Chander Sen (supra) it has been held by the Supreme Court that the property which devolved upon the father on the demise of the grand-father cannot be said to be HUF property in the hands of the father vis-a-vis his own sons. In the matter of Sheela Devi and other Vs. Lal Chand and another reported in (2006)8 SCC 581, it has been further clarified by the Supreme Court by holding that prior to the commencement of the Act as per the Mitakshara law usage once a son was born he used to acquire an interest in the coparcenary property as an incident of his birth, but now the Act would prevail over the Hindu law. In that case son’s son was born prior to the commencement of 1956 Act, therefore, it was held that he would retain his share of the property as a coparcener even after the commencement of the 1956 Act, while father who had died in 1889, his share will devolve upon his heirs according to the provisions of the Act.

- 25.** In view of the aforesaid, it is clear that the plaintiff having been born prior to coming into force of the Hindu Succession Act, 1956 has right in the joint Hindu family property belonging to his great-grandfather Jagannath and on that basis the learned lower appellate Court has rightly decreed the suit of the plaintiff and rightly dismissed the counter claim filed by the appellants/defendants 7, 8 & 11.
- 26.** Substantial question of law is answered accordingly.

27. As has been held by learned lower appellate Court on the basis of documentary evidence that the suit property is joint Hindu family property of the parties belonging to common ancestor Jagannath and it was never owned by original defendant No.1 or his father Moolchandra, the additional substantial question of law proposed by way of application (I.A. No. 1178/2019) being pure question of fact, is not arising in the present appeal accordingly, the I.A. deserves to be and is hereby **rejected**.

28. In view of the aforesaid, second appeal is dismissed and judgment & decree passed by first appellate Court stand confirmed.

29. No order as to costs.

(DWARKA DHISH BANSAL)
JUDGE