

HIGH COURT OF CHHATTISGARH, BILASPUR**Second Appeal No.17 of 2003**

1. Parasram S/o Parmanand Patel, aged about 57years
2. Smt Hemwati, W/o Parasram Patel, aged about 55 years
3. Dharmendra, S/o Parasram Patel, aged about 22 years
4. Smt Parvati, D/o Parasram Patel, aged about 26 years
5. Gajendra, S/o Parasram Patel, aged about 24 years.

All Residents of Village Gorra, Tah & Distt. Raigarh (CG)

----Appellants

Versus

1. Chudamani, S/o Sukhram Sao, aged about 37 years
2. Manohar Sao, S/o Sukhram Sao, aged about 33 years
3. Deendayal Sao, S/o Sukhram Sao, aged about 30 years
4. Umashankar Sao, S/o Sukhram Sao, aged about 26 years
5. State of Chhattisgarh, through Collector Raigarh

All Residents of Village Gorra, Tah & Distt. Raigarh (CG)

-----Respondents

For Appellants: Shri Vivek Tripathi, Advocate.
 For Respondents no. 05/State: Shri RK. Jaiswal, Panel Lawyer.

Single Bench: Hon'ble Shri Sanjay Agrawal, J
Order On Board

20.2.2017

1. This is Defendants' Appeal filed under Section 100 of the Code of Civil Procedure, 1908 against the judgment and decree dated 23.10.2002 passed in Civil Appeal No.40-A/2001 by the Second Additional District Judge, Raigarh whereby the lower Appellate Court while affirming the judgment and decree dated 16.8.2001 passed by the IInd Civil Judge, Class-I, Raigarh in Civil Suit No.43-A/1996, has decreed the Plaintiff's claim for declaration of title and injunction.

2. The undisputed facts are that the Plaintiffs have instituted a suit for

declaration of title and injunction by submitting, inter alia, that they have purchased the property in question described as अ, ई, फ, च, छ, द, स, ब, ग, in plaint Schedule 'A' by virtue of a registered deed of sale dated 14.5.1979, said to have been executed by one Gopi Chand in favour of their father Sukhiram. It is pleaded that the Defendants have demolished their wall which was constructed in their house marked as ई, फ and opened the door there mentioned in “क ख” as shown in red colour in the plaint Schedule 'A'. It is averred further that by raising a wall marked as “फ, ग ” shown in red colour of plaint Schedule-A, the Defendants have obstructed the Plaintiffs' right of way in access to their house, giving rise to an instant action, instituted on 8.4.1996 for declaration of title and that for issuance of injunction in a mandatory form for removal of alleged obstruction as committed by them.

3. The Defendants have contested the aforesaid claim by saying that Plaintiffs have not acquired their right, title or interest by way of alleged sale deed and contested further on the ground that they have not obstructed the passage of the Plaintiffs, as alleged by them.

4. The Trial Court, vide its judgment and decree dated 16.8.2001, by considering the evidence led by the parties, has decreed the Plaintiff's claim by holding that the Plaintiffs are the owners of the property in question by virtue of the alleged registered deed of sale dated 14.5.1979 (Ex.P-2) executed by one Gopichand in favour of their father Sukhiram. It held further that the Defendants have demolished the wall as alleged by Plaintiffs and have obstructed their way by raising a wall in the portion marked as फ, ग ” as shown in red colour in the plaint Schedule-A. As a consequence, a decree for declaration of title and injunction in a mandatory form was granted by directing the Defendants for removal of the alleged obstruction committed by them.

5. The aforesaid finding of the Trial Court has been affirmed further by the lower Appellate Court in an Appeal preferred by the Defendants by its impugned judgment and decree dated 23.10.2002. The lower Appellate Court by relying upon the registered deed of sale dated 14.5.1979 (Ex.P-2) has come to the conclusion that the Plaintiffs are the owners of the property in question. The lower Appellate Court has also come to the conclusion by considering the evidence of both the parties that the Defendants have obstructed the Plaintiffs' alleged right of way. In consequence, the findings as recorded by the Trial Court have been affirmed.

6. Being aggrieved with the aforesaid findings, the Defendants have preferred this Appeal on the ground that the Courts below have erred in holding that the Plaintiffs are the owners of the property in question and Defendants have created an obstruction as alleged by the Plaintiffs. Shri Tripathi, Advocate appearing on behalf of the Appellants submitted that for non-examination of any of the attesting witnesses to the said document (Ex.P-2), it cannot be held that the Plaintiffs are the owners of the property in question on the strength of the alleged sale deed. He further argued that the Courts below have erred in holding that the Defendants have obstructed the Plaintiffs' right of way to their own house.

7. I have considered the submissions of learned Counsel for the Appellants and have perused the entire record carefully.

8. It is true that none of the attesting witnesses to the alleged registered deed of sale (Ex.P-2) was examined but merely on their non-examination, the authenticity of due execution and attestation of it cannot be doubted particularly when it was neither objected nor denied by its executor, i.e. Gopichand of the said document.

9. Section 68 of the Indian Evidence Act, 1872 is relevant for the purpose is reproduced herein as under:-

“68. Proof of execution of document required by law to be attested.- If a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the Court and capable of giving evidence.”

“Provided that it shall not be necessary to call an attesting witness in proof of the execution of any document, not being a Will, which has been registered in accordance with the provisions of the Indian Registration Act, 1908 (16 of 1908), unless its execution by the person by whom it purports to have been executed is specifically denied.”

10. By virtue of proviso to the aforesaid provision, it is clear and in fact not necessary to call an attesting witness where a document has been registered and its execution has not been denied specifically by a person who has executed the same, except the deed of 'Will'. Under the said proviso, the obligation to produce at least one attesting witness, except in a case of a Will, would arise only when its execution is denied specifically by a person who has executed that particular registered document. What is gathered from the aforesaid provision is that everything hinges on the recording of this fact of such denial and proviso therein would be attracted only when such a specific denial is made by the executor or the person derived title or interest from him.

11. In order to appreciate the contention of Shri Tripathi in this aspect, it is necessary for this Court to examine the alleged registered deed of sale dated 14.05.1979 (Ex.P-2), purported to have been executed by its executor Gopichand in favour of Sukhram, the Plaintiffs' predecessor interest. Perusal of the entire record would disclose the fact that the execution of the said document (Ex.P-2) was never questioned or objected by its executor

Gopichand and the Defendants being stranger or third party to the sale deed, have no right to question the authenticity of its due execution and attestation.

12. As far as the contention with regard to the obstruction created by the Defendants is concerned, it is evident from the record that both the Courts below while examining the evidence led by the parties have arrived to a definite conclusion that the Defendants have created the obstruction as alleged by the Plaintiffs. The finding so recorded is a pure findings of fact and it does not involve the substantial questions of law so as to require the interference of this Court. In the matter of **Santosh Hazari vs. Purushottam Tiwari** reported in (2001) 3 Supreme Court Cases 179, the Supreme Court has observed at paragraph-15 as under:-

“.....As a matter of law if the appraisal of the evidence by the trial Court suffers from a material irregularity or is based on inadmissible evidence or on conjectures and surmises, the appellate court is entitled to interfere with the finding of fact. (See *Madhusudan Das v. Narayanibai*), (1983) 1 SCC 35: AIR 1983 SC 114. The rule is – and it is nothing more than a rule of practice – that when there is conflict of oral evidence of the parties on any matter in issue and the decision hinges upon the credibility of witnesses, then unless there is some special feature, about the evidence of a particular witness which has escaped the trial Judge's notice or there is a sufficient balance of improbability to displace his opinion as to where the credibility lie, the appellate court should not interfere with the finding of the trial Judge on a question of fact. (See *Sarju Pershad Ramdeo Sahu v. Jwaleshwari Pratap Narain Singh*) AIR 1951 SC 120. Secondly, while reversing a finding of fact the appellate court must come into close quarters with the reasoning assigned by the trial court and then assign its own reasons for arriving at a different finding. This would satisfy the court hearing a further appeal that the first appellate court had discharged the duty expected of it. We need only remind the first appellate courts of the additional obligation cast on them by the scheme of the present Section 100 substituted in the Code. The first appellate court continues, as before, to be a final court of facts; pure findings of fact remain immune from challenge before the High Court in second appeal. Now the first appellate court is also a final court of law in the sense that its decision on a question of law

even if erroneous may not be vulnerable before the High Court in second appeal because the jurisdiction of the High Court has now ceased to be available to correct the errors of law or the erroneous findings of the first appellate court even on questions of law unless such question of law be a substantial one”

13. In view of the foregoing discussions and in view of the principles laid down in the above mentioned case, no question of law, much less the substantial question of law is involved in the matter. Therefore, the Appeal being devoid of merits is hereby dismissed at admission stage itself. No order as to costs.

Sd/-

(Sanjay Agrawal)
JUDGE