

HIGH COURT OF CHHATTISGARH, BILASPUR

Judgment reserved on 8/12/2017

Judgment delivered on 12/12/2017

SA No. 102 of 2017

(Arising out of judgment dated 16-11-2016 in Civil Appeal No.
19A/2016 of the learned Addl. District Judge, Kanker)

Yadu Prasad S/o Late Amritlal, Aged About 53 Years R/o Village-
Markatola, Tahsil- Kanker, District- North Bastar Kanker,
Chhattisgarh(Plaintiff)

---- Appellant

Versus

1. Smt. Premkunwar W/o Late Amritlal, Aged About 83 Years
 2. Smt. Nirmala W/o Dinesh Mishra, Aged About 45 Years
- Both are R/o Village- Markatola, Tahsil- Kanker, District- North
Bastar Kanker, CG
3. State of Chhattisgarh, through the Collector, District- North Bastar
Kanker, CG(Defendants)

---- Respondents

For Appellant	: Shri D. N. Prajapati, Adv.
For Respondent No. 1 and 2	: Shri Rajkumar Pali, Adv.
For Respondent/State	: Smt. Shobha Kashyap, Dy. Govt. Adv.

CAV Judgment

12-12-2017

1. In this second appeal, challenge is levied to the judgment and decree dated 16-11-2016 passed by the Additional District Judge, North Bastar, Kanker in Civil Appeal No. 19-A/2016 whereby he affirmed the order dated 12-7-2016 passed by the 1st Civil Judge Class-I, North Bastar Kanker in Civil Suit No. 86A/2013 whereby and whereunder she dismissed the suit of the appellant.
2. It is admitted by respondents No. 1 and 2 that the appellant is the son, respondent No. 1 is wife, respondent No. 2 is daughter of Amritlal Mishra. In the name of late Amritlal Mishra, 5.40 hectare land is recorded in the land records of village Markatola. Amritlal Mishra died in the year 2003. After his death entire land was

recorded in the name of the appellant and respondent No. 1 in revenue record. Respondent No. 1 has executed a gift deed on 26-4-2013 regarding Khasra No. 631 Rakba 0.71 RA.

3. In brief, case of the appellant is that respondent No. 1 could not have executed the gift deed regarding disputed land without obtaining his consent.
4. In brief, case of respondents No. 1 and 2 is that respondent No. 1 had executed gift deed in favour of her granddaughters. She was competent to execute the gift deed.
5. Being aggrieved the aforesaid judgment and the decree, the appellant has preferred this second appeal.
6. Shri D.N. Prajapati, counsel for the appellant argued that the main contesting parties-respondents No. 1 and 2 had appeared before the trial Court and they had also filed written statement, therefore, the suit could not be dismissed on the ground that he had not deposited process fee for issuance of notice to defendant No. 3 who was a formal party. He was not aware about the process fee, bonafidely believed that his counsel would comply the orders of the Court. Thus substantial questions of law is involved in this case which have been proposed in the memo of appeal.
7. I have gone through the record with utmost care and caution.
8. As per the provisions of Section 100 of the Code of Civil Procedure, 1908 (in brevity 'CPC'), a second appeal lies in the High Court if the High Court is satisfied that the case involves substantial question of law except otherwise expressly provided in the CPC or by any other law for the time being in force.

9. As per provision of Section 102 of the CPC, no second appeal shall lie except on the ground mentioned in Section 100 of the CPC.
10. As per Order XLI Rule 11 of the Code, the Court may dismiss the appeal after hearing the appellant or his pleader.
11. Hon'ble Supreme Court in **Mst. Sugani v. Rameshwar Das and another** (AIR 2006 SC 2122), while dealing with Section 100 of the CPC, has held that second appeal can be filed only if a substantial question of law is involved, right of appeal being a substantive statutory right, it has to be regulated in accordance with law in force, the concurrent findings of facts howsoever erroneous could not be disturbed by High Court in exercise of power” under this section, the substantial question of law has to be distinguished from substantial question of fact, what constitutes a substantial question of law.
12. Both the subordinate Courts have given the finding that despite giving several opportunities the appellant had not paid the process fee for issuance of notice to respondent No. 3.
13. The appellant was present in the trial Court on 9-5-2016 and 28-6-2016. More over, the appellant was unable to show as to why his counsel had not paid the process fee.
14. The findings given by the subordinate Courts are findings of the fact. From perusal of the record it does not appear that any substantial question of law is involved which may be formulated for adjudication in this appeal. In other words, in absence of any substantial question of law which may be formulated, this Court has no option except to dismiss this appeal.

15. More over, the order of dismissal of the suit on account of non-payment of process fee for issuance of notice to any defendant is not appellable. Remedy available to the plaintiff is either to apply for setting aside the order of dismissal in the same Court or to file a new suit afresh.
16. Looking to the above-mentioned circumstances, this Court dismisses the second appeal at motion stage.
17. No order as to costs.

Sd/-
(Sharad Kumar Gupta)
Judge