

HIGH COURT OF CHHATTISGARH, BILASPUR**Second Appeal No.664 of 1998**

1. State of M.P. through District Magistrate, Bilaspur, M.P.
2. Sub Divisional Officer, Irrigation Department, Sakti Tahsil Sakti, District Bilaspur

---- Appellants**Versus**

1.1 Smt. Kalyani W/o. Late Lalkumar, aged about 53 years, R/o Village Nawapara (D) Post, Police Station, Tahsil-Dabhra, District-Janjgir-Champa (CG)

1.2 Rahul S/o Late Lalkumar, aged about 25 years, R/o Village Nawapara (D) Post, Police Station, Tahsil-Dabhra, District-Janjgir-Champa (CG)

1.3 Priya D/o Lalkumar, aged about 23 years, R/o Village Nawapara (D) Post, Police Station, Tahsil-Dabhra, District-Janjgir-Champa (CG)

1.4 Ms. Rituna D/o Late Lalkumar, aged about 15 years, R/o Village Nawapara (D) Post, Police Station, Tahsil-Dabhra, District-Janjgir-Champa (CG)-minor and represented through her mother and natural guardian Smt. Kalyani W/o. Late Lalkumar

1.5 Ms. Nilima D/o Late Lalkumar, aged about 13 years, R/o Village Nawapara (D) Post, Police Station, Tahsil-Dabhra, District-Janjgir-Champa (CG)-minor and represented through her mother and natural guardian Smt. Kalyani W/o. Late Lalkumar

2. Shyam Kumar S/o. Dular Singh, aged about 43 years, R/o Office of the R.M.S. Bilaspur Railway Station, District Bilaspur (CG)

3. Parvati W/o. Gangaram Yadav, D/o Dular Singh, aged 47 years, R/o C/o. Gangaram, R.P.F. Railway Bhatapara, District Balodabazar (CG)

4. Santoshi W/o. Manoj Kumar, D/o Dular Singh, aged 32 years, R/o. Subra, P.O. Piparhi (Subra), Tahsil & Police Station Lailunga, District-Raigarh (CG)

---- Respondents

For Appellants	:	Mr.Arun Sao, Dy.A.G.
For Respondents	:	Mr.M.A.Latif Rahman, Advocate

Hon'ble Shri Justice Sanjay K. Agrawal

Judgment on Board

24/09/2018

1. The substantial question of law involved, formulated and to be answered by this Court in this defendants' second appeal is as under:-

“Whether the lower appellate Court has committed illegality in reversing well reasoned judgment and decree passed by the trial Court without there being any evidence of ownership of the respondents over the property in dispute ?”

The imperative facts required for determination of above-stated substantial question of law are as under:-

[For the sake of convenience, the parties would be referred hereinafter as per their status shown in the suit before the trial Court]

2. Plaintiffs-Dular Singh and Loknath filed a bare suit for permanent injunction stating inter-alia that the suit tank/land bearing khasra No.46 area 0.88 acres is owned by them in their bhumiswami rights, in which the plaintiffs names have been recorded pursuant to revenue proceedings and rin pustika has also been issued in their favour. It was further pleaded that they are exclusive title holder and possession holder of the suit tank/land. They also stated that in the suit tank/land, defendant No.2-Sub-Divisional Officer (Irrigation) has started dumping clay without leave of the plaintiffs despite notice having been issued to him and therefore, the defendants be restrained from dumping and collecting clay on the suit land by issuance of permanent injunction restraining the State and the Sub-Divisional Officer (Irrigation).

3. The defendants jointly filed their written statement before the trial Court stating inter-alia that the suit land is embankment of a tank and khasra No.46 has been vested with the State Government in revenue proceedings initiated by the Sub-Divisional Officer (Irrigation) under Section 251 of the Madhya Pradesh Land Revenue Code, 1959 (hereinafter called as "Code") on 9.5.68 and they are in possession of the suit tank/land, as such, suit is liable to be dismissed.

4. The trial Court by its judgment and decree dated 22.12.93 dismissed the suit holding that the suit tank/embankment is vested with the State Government under the provisions contained in Section 251 of the Code and the plaintiffs are not in possession of the suit tank/land.

5. On appeal being preferred by the plaintiffs, the First Appellate Court held that it is admitted position on record that the suit tank is vested with the State Government under Section 251 of the Code, but further held that the suit tank is not vested with the State Government in accordance with the provisions contained in Section 251 of the Code as interested persons (plaintiffs) were neither noticed nor heard and the suit tank is not unoccupied land, therefore, vesting of tank (embankment) is bad and granted decree in favour of the plaintiffs.

6. Questioning legality and validity of the judgment and decree passed by the First Appellate Court, this second appeal under Section 100 of the Code has been filed by the appellants/defendants, in which substantial question of law has been framed by this Court, which has

been set-out in the opening paragraph of this judgment.

7. Mr.Arun Sao, learned Deputy Advocate General for the appellants/defendants, would submit that learned First Appellate Court having held that the suit tank (embankment) is vested with the State Government under Section 251 of the Code is absolutely unjustified in further holding an enquiry as to whether the order of vesting is legal and valid or not as the suit was for bare permanent injunction. Therefore, for want of pleadings, issues framed and evidence led in that behalf, the suit for permanent injunction ought not to have been converted into suit for title, which is clearly not permissible in view of decision rendered by the Supreme Court in **Anathula Sudharkar v. P. Buchi Reddy (dead) by LRS. and others**¹. He invited attention to para 21 (c) of the said report and according to him, substantial question of law deserves to be answered in favour of the defendants and against the plaintiffs.

8. On the other hand, Mr.M.A.Latif Rahman, learned counsel for the respondents, would support the impugned judgment & decree and submit that the First Appellate Court has rightly held that the order passed by the Sub-Divisional Officer (Irrigation) under Section 251 of the Code was clearly illegal and impermissible in law. Even otherwise, order passed under Section 251 of the Code alleging vesting of the suit tank in favour of the State Government was never exhibited, as such, not proved in evidence in accordance with law. Therefore, the second

¹ (2004) 6 SCC 325

appeal deserves to be dismissed by answering the substantial question of law against the appellants/defendants.

9. I have heard learned counsel for the parties and considered their rival submissions made herein-above and also went through the records with utmost circumspection.

10. In order to consider the plea raised at the Bar, it would be appropriate to notice averments raised in the plaint. It was a bare suit for injunction restraining the defendants in the suit land for collecting/dumping clay on the said land/tank stating that they are holding the land/tank in their bhumiswami rights. No further averment detailing the title of the plaintiffs has been averred in the plaint filed before the trial Court and mandatory injunction has also been sought for to remove clay already collected over the suit land/tank. The defendants while filing the written statement clearly came out with a plea that the suit tank bearing khasra No.46 along with khasra No.45/1 and its embankment has already been vested in Revenue Case No.1102A/60-61 under Section 251 of the Code on 9.5.1968 and the Government is in possession of the suit land and it is in their possession for last 22 years. The trial Court clearly recorded a finding that the suit tank is vested with the State Government under the provisions contained in Section 251 of the Code and the Government is in possession of the suit land and the plaintiffs have failed to establish their title and possession over the suit land. On appeal being preferred by the plaintiffs, the First Appellate Court also recorded a finding that

the suit tank is admittedly vested with the Government, but further delineated the question as to whether vesting of tank with the State Government under Section 251 of the Code was just and proper.

11. It is not in dispute that the defendants pleaded that the tank had been vested with the State Government under Section 251 of the Code, but thereafter the plaint was neither amended to question that order of vesting nor the order of vesting dated 9.5.68 under Section 251 of the Code was sought to be challenged by the plaintiffs, yet the First Appellate Court proceeded to consider and held that vesting of tank/land is not in accordance with law for two reasons, firstly, no notice was issued to the plaintiffs before vesting of tank/land under Section 251 of the Code and secondly, the suit tank (embankment) is not situated on unoccupied land.

12. The sole question for consideration would be whether the First Appellate Court is justified in adjudicating the validity of order of vesting of suit tank with the State Government in absence of challenge to that order ?

13. In Anathula Sudharkar's case (supra), Their Lordships of the Supreme Court have considered the legal position in regard to suits for prohibitory injunction relating to immovable property, which has been summarised in para 21 of the report as under:-

“21. To summarize, the position in regard to suits for prohibitory injunction relating to immovable property, is as under :

(a) Where a cloud is raised over plaintiff's title and he does not have possession, a suit for declaration and possession, with or without a consequential injunction, is the remedy. Where the plaintiff's title is not in dispute or under a cloud, but he is out of possession, he has to sue for possession with a consequential injunction. Where there is merely an interference with plaintiff's lawful possession or threat of dispossession, it is sufficient to sue for an injunction simpliciter.

(b) As a suit for injunction simpliciter is concerned only with possession, normally the issue of title will not be directly and substantially in issue. The prayer for injunction will be decided with reference to the finding on possession. But in cases where de jure possession has to be established on the basis of title to the property, as in the case of vacant sites, the issue of title may directly and substantially arise for consideration, as without a finding thereon, it will not be possible to decide the issue of possession.

(c) But a finding on title cannot be recorded in a suit for injunction, unless there are necessary pleadings and appropriate issue regarding title (either specific, or implied as noticed in *Annaimuthu Thevar*²). Where the averments regarding title are absent in a plaint and where there is no issue relating to title, the court will not investigate or examine or render a finding on a question of title, in a suit for injunction. Even where there are necessary pleadings and issue, if the matter involves complicated questions of fact and law relating to title, the court will relegate the parties to the remedy by way of comprehensive suit for declaration of title, instead of deciding the issue in a suit for mere injunction.

(d) Where there are necessary pleadings regarding title, and appropriate issue relating to title on which parties lead evidence, if the matter involved is simple and straight-forward, the court may decide upon the issue regarding title, even in a suit for injunction. But such cases, are the exception to the normal rule that question of title will not be decided in suits for injunction. But persons having clear title and possession suing for injunction, should not be driven to the costlier and more cumbersome remedy of a suit for declaration, merely because some meddler vexatiously or wrongfully makes a claim or tries to

² (2005) 6 SCC 202

encroach upon his property. The court should use its discretion carefully to identify cases where it will enquire into title and cases where it will refer to plaintiff to a more comprehensive declaratory suit, depending upon the facts of the case.”

14. The plaintiffs' suit was for bare suit for perpetual injunction. The plaintiffs did pray injunction based on the fact that they are bhumiswami of suit tank and when the defendants pleaded that the suit land has been vested with the State Government under Section 251 of the Code and thereafter the trial Court has recorded a finding that the suit land/tank has been vested with the State Government, the plaintiffs ought to have either questioned the order of vesting by raising necessary pleadings or could have filed comprehensive suit for setting aside the order of vesting dated 9.5.68 passed by the Sub-Divisional Officer (Irrigation) under Section 251 of the Code to be bad and unsustainable in law that they did not do as such. In absence of necessary pleading and issue and in absence of challenge of order dated 9.5.68, legality and validity of order dated 9.5.68 could not have been gone into by the First Appellate Court, as no party to lis can be taken to by surprise by the First Appellate Court by determining the issue which was not the lis before that Court for determination, as such, the judgment and decree of the First Appellate Court cannot be upheld.

15. There is yet one more reason for not accepting the plea of the plaintiffs as the suit was filed way back on 8.3.1977 after passing of order of vesting on 9.5.68 and therefore, the plaintiffs were in a position to seek further relief questioning the order of vesting dated 9.5.68, as

such, further relief of setting aside of order dated 9.5.68 could have been claimed by the plaintiffs before the trial Court as provided under proviso to Section 34 of the Special Relief Act, 1963 (hereinafter called as “the Act of 1963”) and therefore, the suit as framed and filed by the plaintiffs is also hit by proviso to Section 34 of the Act of 1963.

16. The Supreme Court in the matter of Jugraj Singh and another v. Jaswant Singh and others³, dealing with similar situation, it has been held as under:-

“13.....It will be noticed that they neither asked for the cancellation of the order of the Collector nor for any injunction, two of the reliefs which they were entitled to ask in the case in addition to the declaration. Such a suit would be hit by Section 42 of the Specific Relief Act and we would be quite in a position to deny them the declaration without these specific reliefs. Indeed they had only to ask for setting aside of the order.”

17. Faced with this situation, Mr.M.A.Latif Rahman, learned counsel for the respondents/plaintiffs, submitted that document relating to vesting though was filed before the trial Court, but it was not assigned exhibit, therefore, both the Courts below ought not to have considered the fact of vesting of tank/land with the State Government. The fact remains that the Sub-Divisional Officer (Irrigation) has been examined on behalf of the Government who has clearly stated the fact of vesting of suit tank with the State Government under Section 251 of the Code and has submitted the copy of order of vesting though not exhibited. Both the Courts below have concurrently found the vesting to be proved

³ 1970(2) SCC 386

in favour of the Government and even the First Appellate Court has held the vesting to be undisputed, which the plaintiffs did not challenge even before this Court and therefore, the finding of vesting of suit tank/land has attained finality and its validity could not have been granted by the First Appellate Court.

18. As a fallout and consequence of the above-stated discussion, the First Appellate Court is absolutely unjustified in granting decree in favour of the respondents/plaintiffs. For the reasons mentioned hereinabove, the substantial question of law is answered in favour of the appellants/defendants and against the respondents/plaintiffs. Accordingly, the judgment and decree passed by the First Appellate Court are hereby set aside and that of the trial Court are hereby restored. No cost(s).

19. A decree be drawn up accordingly.

Sd/-

(Sanjay K.Agrawal)
Judge

B/-