

HIGH COURT OF CHHATTISGARH, BILASPUR**Second Appeal No.323 of 2003**

Gulab Chand Soni, son of Baldev Soni, aged about 48 years, R/o. Ward No. 6, Manindragarh, Korea, Distt: Korea (C.G.)

----Appellants/Defendant No. 2

Versus

1. Brijwasi Lal (since deceased) through LRs.

1(a) Smt. Chabdrakala Soni, D/o late Shri Brijwasi Lal Soni, W/o Shri Laxmi Prasad Soni, aged about 63 years, R/o Panden tola, Rewa (M.P.)

1(b) Om Prakash Soni, S/o late Shri Brijwasi Lal Soni, aged about 60 years, R/o Noida, District – Gautam Budh Nafar (U.P.)

1(c) Adya Narayan Soni, S/o late Shri Brijwasi Lal Soni, aged about 58 years, R/o Manendragarh, District Korea (C.G.)

1(d) Keshav Prasad Soni, S/o late Shri Brijwasi Lal Soni, aged about 56 years, R/o Manendragarh, District Korea (C.G.) (Plaintiffs)

2. Municipal Corporation, through Chief Executive Officer, Municipal Corporation, Chirmiri (C.G.) (Defendant No.1)

---- Respondents

For Appellant	: Shri Ashish Surana, Advocate.
For LRs. of Respondent 1	: None appeared, though served.
For Respondent No. 2	: Shri H.B. Agrawal, Senior Advocate assisted by Smt. Preeti Yadav

Hon'ble Shri Justice Sanjay K. Agrawal
Order On Board

16/11/2018

(1) The substantial questions of law involved, formulated and to be answered in this defendant No. 2's second appeal states as under:

“1. Whether the first appellate Court was justified in reversing the finding passed by the trial Court ignoring the fact that there was no notice under Section 319 of Municipal Act issued by the plaintiff to the defendant before filing of the suit ?

2. Whether the finding of the first appellate Court is perverse in the light of the fact that there is no document to show the right and title of the suit property that of the plaintiff ?

3. Whether the suit of the plaintiff itself was barred by limitation ?”

2. The imperative facts required to be noticed for adjudication of this appeal are as under: [For the sake of convenience, parties would be referred hereinafter as per their status shown in the suit before the trial Court]

2.1 Original plaintiff – Brijlal Soni brought a suit for declaration of title, and for declaration that entries corrected in the record of Municipal Council, Chirmiri are null & void and permanent injunction against Municipal Council, Chirmiri and private defendant – Gulab Chand Soni be granted on the ground that the suit shop was allotted to him by District Administration in the year 1954-55 and recorded in tax assessment register, which was got corrected by defendant No. 2 in collusion with defendant No. 1- Municipal Council, Chirmiri [During pendency, Municipal Corporation was constituted in place Municipal Council] leading to filing of the civil suit for declaration of title and declaring the correction of entries in the record of Municipal Council as illegal and improper.

2.2 By filing written statement, defendant No.1 – Municipal Council, Chirmiri has pleaded that correction of entries made in the record of Municipal Council as well as in the tax assessment register are in accordance with law; it was further pleaded

that the suit filed by the plaintiff is not maintainable, as no notice under Section 319 of the Chhattisgarh Municipalities Act, 1961 was issued to defendant No. 1 – Municipal Council, Chirmiri by the plaintiff before filing of the suit, as such, suit be dismissed.

2.3 Defendant No. 2, by filing written statement, has stated that the suit property came in his share in partition from his father, as such, plaintiff's suit is liable to be dismissed.

3. The trial Court, by its judgment & decree dated 27.03.2002, has dismissed the plaintiff's suit for non-compliance of service of notice under Section 319 of the Act, 1961 to defendant No. 2- Municipal Council, Chirmiri.

4. Plaintiff preferred First Appeal there-against. The First appellate court, on re-appreciation of entire evidence and material placed on record, allowed the plaintiff's appeal and decreed the suit. Questioning the judgment and decree passed by the first appellate court, this second appeal has been preferred by the appellant/defendant No. 2 in which the substantial questions of law have been formulated for consideration, which have been set out in the opening paragraph of the judgment.

5. Mr. Ashish Surana, learned counsel appearing for the defendant No. 2 submits that the first appellate Court was unjustified in reversing the well reasoned judgment & decree passed by the trial Court, as the suit is clearly not maintainable in view of non-service of statutory notice under Section 319 of the Act, 1961, as such, the impugned judgment and decree passed by the first appellate Court deserves to be set aside and the decree of the trial Court deserves to be restored, and thereby the

suit be dismissed.

6. None present for respondent No. 1, though served.

7. Mr. H.B. Agrawal, learned Senior counsel appearing for defendant No. 1 / Municipal Council, Chirmiri would submit that the correction of entries made in record of Municipal Council, Chirmiri; and name of defendant No. 2 in the tax assessment register, is in accordance with law.

8. I have heard learned counsel appearing for the parties, considered their rival submissions made hereinabove and gone through the record with utmost circumspection.

Answer to Question No. 1

9. In order to judge the correctness of the plea raised at the Bar, it would be appropriate to reproduce Section 319 of the Act, 1961, which reads as under:-

“319. Bar of suit in absence of notice.—(1) No suit shall be instituted against any Council or any Councillor, officer or servant thereof or any person acting under the direction of any such Council, Councillor, officer or servant for anything done or purporting to be done under this Act, until the expiration of two months next after a notice, in writing, stating the cause of action, the name and place of abode of the intending plaintiff and the relief which he claims, has been, in the case of a Council delivered or left as its office, and, in case of any such member, officer, servant or person as aforesaid, delivered to him or left at his office or usual place of abode; and the plaint shall contain a statement that such notice has been so delivered or left.

(2) Every such suit shall be dismissed unless it is instituted eight months from the date of the accrual of the alleged cause

of action.

(3) Nothing in this section shall be deemed to apply to any suit instituted under Section 54 of the Specific Relief Act, 1977 (1 of 1877).”

10. A careful perusal of the above stated provision would show that sub-section (1) of Section 319 of the Act bars the suit in absence of notice to the Council. However, sub-section (3) of Section 319 of the Act carves out exception which provides that Section 319(1) of the Act would not apply to any suit instituted under Section 54 of the Specific Relief Act, 1877 which is equivalent to Section 38 of the Specific Relief Act, 1963.

11. At this stage, it would be appropriate to notice Section 38 of the Specific Relief Act, 1877 which reads as under:

“38. Perpetual injunctions when granted.-(1) subject to the other provisions contained in or referred to by this chapter, a perpetual injunction may be granted to the plaintiff to prevent the breach of an obligation existing in his favour, whether expressly or by implication.

(2) When any such obligation arises from contract, the court shall be guided by the Rules and provisions contained in Chapter II.

(3) When the defendant invades or threatens to invade the plaintiff's right to, or enjoyment of, property the court may grant a perpetual injunction in the following cases, namely;

(a) where the defendant is trustee of the property for the plaintiff;

(b) where there exists no standard for ascertaining the actual damage caused, or likely to be caused, by the invasion;

(c) where the invasion is such that compensation in money would not afford adequate relief;

(d) where the injunction is necessary to prevent a multiplicity of judicial proceedings.”

12. Section 38 of the Specific Relief Act, 1877 provides the contingencies when perpetual injunction is to be granted. The aforesaid provision would show that bar of

Section 319(1) of the Act of 1961 would not apply when a suit is for perpetual injunction alone.

13. In a reported decision in the matter of **Nagarpalika Parishad, Mandsaur Vs. Saravdaman**¹, the Madhya Pradesh High Court has held that no notice is required for a suit for injunction and declaration, if the two reliefs are claimed in one suit and observed as under :-

“Agreeing with the interpretation put by Dixit C.J. on Section 17 of the Dewas Municipalities Act reported in *Kanhayalal v. Nagar Palika Dewas*, (1958 M.P.L.J. 676) and holding it to be in 'pari materia' it was observed:

“ A mere notice by the Council cannot be termed as an act done. The assertion of title to a property cannot be said to be doing an act or purporting to to an act and as such the suit filed by the plaintiff cannot be said to be one for any act done or purporting to be done under the Act by the Council or any officer. The relief of declaration that the encroachment cannot be removed as the property belongs to the non-applicant is merely an ancillary relief of the declaration of title. Mere combining of the two reliefs of declaration and injunction in the same would not attract the provisions of sub-section (1) of Section 319.” (Revision dismissed).”

14. The Nagar Palika Parishad questioned the order before the Supreme Court. The Supreme Court did not approve the order of the High Court and in the matter of **Nagar Palika Parishad, Mihona and another Vs. Ramnath and another**², their Lordships have held that Section 319(3) which is exception to 319(1) of the Act of 1961 would not be applicable where the suit is filed for declaration of title of property coupled with permanent injunction and allowed the appeal of the Nagar Palika Parshad and held as under :

9. Along with the trial court and the appellate court, the High Court also failed to appreciate the aforesaid fact and

1 1972 M.P.L.J. SN 144

2 (2014) 6 SCC 394

also overlooked the valuable interest and right of public at large to use the suit land which is a part of public street. Further, in absence of challenge to the notice of eviction issued by the appellant, it was not open to the trial court to decide the title merely because permanent injunction coupled with declaration of title was also sought for.”

15. In light of the judgment of the Supreme Court in the matter of **Nagar Palika Parishad Mihona** (supra), if the facts of the case are examined, it is quite vivid that the suit was instituted by the plaintiff for declaration that entries corrected in the record of Municipal Council, Chirmiri as null & void; and also for seeking permanent injunction declaring the entry in the tax assessment register to be null and void. Thus it is not a bare suit for permanent injunction under Section 38 of the Specific Relief Act and it is a suit for declaration as well as permanent injunction. Therefore, the provision enumerated in Section 319(1) of the Act of 1961 would apply with full force and Section 319(3) of the Act would not be applicable and suit could not be filed by the plaintiff/respondent No.1 without service of notice under Section 319 (1) of the Act to respondent No. 2 – Municipal Council, Chirimiri and, as such, suit was not maintainable. Substantial Question of Law No.1 is answered accordingly in favour of the defendant.

Answer to substantial Question of law No. 2

16. In order to prove the title over the suit land, the plaintiff has examined himself and has filed no documents except document Ex.P-1, photograph of the suit property whereas Ex. D1C & Ex. D2C are the documents of the defendants i.e survey register of the years 1954-55 & 1991-92 and no other documents have been filed to establish the title of the plaintiff.

17. In the matter of **Union of India and others Vs. Vasavi Cooperative Housing Society Limited and others**³, their Lordships of the Supreme Court have held that in a suit for declaration of title, the burden always lies on the plaintiff to make out and establish a clear case for granting such a declaration and the weakness, if any, of the case set up by the defendants would not be a ground to grant relief to the plaintiff.

18. Let us examine the legal position with regard to whom the burden of proof lies in a suit for declaration of title and possession. The Supreme Court in the matter of **Moran Mar Basselios Catholicos v. Thukalan Paulo Avira**⁴ observed as under:-

“20..... in a suit [for declaration] if the plaintiffs are to succeed they must do so on the strength of their own title.”

19. In the matter of **Nagar Palika, Jind v. Jagat Singh**⁵, their Lordships of the Supreme Court have held as under:-

“The onus to prove title to the property in question was on the plaintiff-respondent. In a suit for ejectment based on title it was incumbent on the part of the appeal first to record a finding on the claim of title to the suit land made on behalf of the plaintiff. The court is bound to enquire or investigate that question first before going into any other question that may arise in a suit.”

20. The legal position, therefore, is clear that the plaintiff in a suit for declaration of title and possession could succeed only on the strength of its own title and that could be done only by adducing sufficient evidence to discharge the onus on it, irrespective of the question whether the defendants have proved their case or not. I am of the view that even if the title set up by the defendants is found against (*sic* them), in the absence of establishment of the plaintiff's own title, the plaintiff must be

³ (2014) 2 SCC 269

⁴ AIR 1959 SC 31

⁵ (1995) 3 SCC 426

non-suited.

21. Reverting to the facts of the case, it is clear that the plaintiff has not brought any document except photograph of the suit property vide Ex.P-1 to demonstrate his title. Admittedly, entry tax assessment register has already been corrected in the year 1991-92 vide Ex. D2C and even entries in the revenue record are the evidence of title and those documents are only for the purpose of collection of tax that will not confer any title to the plaintiff, as such, the first appellate Court was unjustified in granting decree of declaration of title in favour of plaintiff that too on the basis of revenue receipts which are in favour of defendants i.e. Ex-D1C & Ex.D2C and thereby committed illegality in allowing the appeal filed the plaintiff. Thus, the second substantial question of law is also answered in favour of defendant No.1.

22. The first & second substantial questions of law are answered in favour of the appellant herein / defendant No.1. In view of the fact that first & second substantial questions of law are answered in favour of the appellant / defendant No.1, I deem it inappropriate to answer the third substantial question of law.

23. Resultantly, judgment and decree passed by the first appellate Court is set aside and judgment and decree passed by the trial Court are restored. The second appeal is consequently, allowed and the plaintiff's suit stands dismissed with no order as to cost(s).

24. Decree be drawn-up accordingly.

Sd/-

(Sanjay K. Agrawal)
Judge

D/-

