

HIGH COURT OF CHHATTISGARH, BILASPURJudgment reserved on : 31.07.2019Judgment delivered on: 02.08.2019Second Appeal No.203 of 2005

Amardas, S/o. Firturam Satnami, aged about 48 years, R/o. Village-Barbaspur, Tahsil & District-Korba (CG)

---- Appellant/Plaintiff

Versus

1. Sampat S/o. Late Sanpat Satnami, aged about 35 years,
2. Dareshlal, S/o. Late Sanpat Satnami, aged about 30 years,
3. Ganpat, S/o. Late Bijul Satnami, aged about 60 years,
All Resident of Village Bedarkona, Tahsil-Korba, District-Korba (CG)
---- Respondents/Defendants
4. State of Chhattisgarh Through Collector Korba
---- Respondents

For Appellant/Plaintiff	: Mr.Gyan Prakash Shukla, Advocate
For Res.No.1 to 3/Defendants	: Mr.Rakesh Thakur, Advocate
For Respondent No.4	: Mr.Akash Pandey, P.L.

Hon'ble Shri Justice Sanjay K. Agrawal

C.A.V. Judgment

1. The substantial questions of law involved, formulated and to be answered in this plaintiff's second appeal are as under: -

“1. Whether a document said to be sale deed 30 years old shall lost its sanctity for want of evidence of attesting witnesses ?

2. Whether the first Appellate Court ignoring material oral and documentary evidence regarding possession set aside the judgment and decree passed by the lower Court ?”

(For the sake of convenience, parties would be referred hereinafter as per their status shown in the plaint before the trial Court.)

2. Plaintiff-Amardas filed a suit for declaration of title, permanent injunction and possession also stating inter-alia that his father-Firturam

Ram purchased the suit land from father of defendants No.2 & 3 and husband of defendant No.1 by unregistered sale deed dated 20.6.40 in presence of witnesses and came into possession of the suit land and after death of his father, the plaintiff is in possession of the suit land. Sampat, father of defendant No.2 and 3 and husband of defendant No.1 filed an application for correction of records, in which the Naib-Tahsildar, Korba by order dated 4.11.92 directed the name of deceased Sampat Das to be recorded in revenue records, which was taken in appeal by the plaintiff, but during the pendency of the appeal, the defendants starting threatening to harvest the crops sown by them leading to filing of the suit and sought the order dated 4.11.92 passed by the Naib-Tahsildar, Korba be declared illegal and declaration of title in his favour and also for grant of possession.

3. The defendants filed their written statement and opposed the averments made in the plaint stating inter-alia that no sale deed has been registered in favour of plaintiff's father and sale deed, if any, has been registered, that is forged sale deed and no title has been conferred in favour of the plaintiff, as such, the suit deserves to be dismissed.
4. The trial Court after appreciating oral and documentary evidence available on record, by its judgment and decree dated 19.2.2004, decreed the suit holding that since the sale deed (Ex.P-2) is 30 years old document executed on 20.6.40, therefore, presumption under Section 90 of the Indian Evidence Act, 1872 (hereinafter called as "the Act of 1872") would be applicable, which the first appellate Court did

not agree and held that attesting witness of sale deed was required to be examined in view of the provisions contained in Section 68 of the Act of 1872 and thereby set aside the judgment and decree of the trial Court, against the judgment and decree of the first appellate Court, this second appeal under Section 100 of the Code of Civil Procedure, 1908 has been filed by the appellant/plaintiff, in which, substantial questions of law have been formulated and set-out in the opening paragraph of this judgment.

5. Mr.Gyan Prakash Shukla, learned counsel for the appellant/plaintiff, would submit that the first appellate Court is absolutely unjustified in holding that in order to prove the sale deed, the provisions contained in Section 68 of the Act of 1872 would be applicable as it is not applicable to the sale deed and therefore, presumption under Section 90 of the Act of 1872 would be applicable and even otherwise, witness to sale deed namely Gundu Ram has already died on 15.11.1956 and therefore, the first appellate Court is absolutely unjustified in setting aside the decree granted in favour of the plaintiff, as such, the judgment and decree of the first appellate Court deserves to be set aside and that of the trial Court be restored. He relied upon the judgment of the Supreme Court in the matter of Smt.Hans Raji v. Yosodanand¹ and recent judgment of the Supreme Court in the matter of Bayanabai Kaware v. Rajendra S/o Baburao Dhote².

6. Mr.Rakesh Thakur, learned counsel for the respondents/defendants, would support the impugned judgment and decree and submit that the

¹ AIR 1996 SC 761

² (2018) 1 SCC 585

first appellate Court is absolutely justified in granting the first appeal and dismissing the suit, as such, the second appeal deserves to be dismissed with cost(s).

7. I have heard learned counsel for the parties and considered their rival submissions made hereinabove and went through the records with utmost circumspection.
8. The trial Court held that with regard to sale deed dated 20.6.40 (Ex.P-2) though it is unregistered, but presumption under Section 90 of the Act of 1872 is available, which the first appellate Court reversed on the ground that attesting witness of sale deed has not been examined relying upon the provision contained in Section 68 of the Act of 1872
9. The question for consideration would be whether Section 68 of the Act of 1872 would be applicable in case of sale deed ?
10. Section 68 of the Act of 1872 states 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.”

11. A careful perusal of the aforesaid provision would show that Section 68 of the Act of 1872 would be applicable where the document is required by law to be attested. Sale deed is not the document which is required

to be attested by law like the Will, which is required to be attested by virtue of the provisions contained in Section 63(c) of the Succession Act, 1925.

12. The Supreme Court in the matter of Smt.Hans Raji (supra) has clearly held that sale deed of immovable property is not required by law to be attested and Section 68 of the Evidence Act which in term applies to the proof of execution of document required by law to be attested.
13. Very recently, the Supreme Court in the matter of Bayanabai Kaware (supra) has clearly held that Section 68 of the Evidence Act, 1872, which deals with the examination of the attesting witness to prove the execution of the document, does not apply to sale deed, which is governed by Section 54 of the Transfer of Property Act.
14. The first appellate Court has failed to notice the fact that Section 68 of the Act of 1872 does not apply to sale deed as the sale is governed by the provisions contained in Section 54 of the Transfer of Property Act, 1882, consequently the finding recorded by the first appellate Court in this regard is in teeth of the provisions contained in Section 68 of the Act of 1872 read with Section 54 of the Transfer of Property Act is liable to be set aside.
15. This would bring me to the next question as to whether presumption under Section 90 of the Act of 1872 is available to the unregistered document dated 20.6.40 (Ex.P-2) ?
16. Section 90 of the Act of 1872 states as under:-

“90. Presumption as to documents thirty years old.—
Where any document, purporting or proved to be thirty years old, is produced from any custody which the Court

in the particular case considers proper, the Court may presume that the signature and every other part of such document, which purports to be in the handwriting of any particular person, is in that person's handwriting, and, in the case of a document executed or attested, that it was duly executed and attested by the persons by whom it purports to be executed and attested.

Explanation.—Documents are said to be in proper custody if they are in the place in which, and under the care of the person with whom, they would naturally be; but no custody is improper if it is proved to have had a legitimate origin, or if the circumstances of the particular case are such as to render such an origin probable.

This Explanation applies also to section 81.”

17. Section 90 of the Act of 1872 is based on the principle of necessity and convenience. The object of this section is not to make it too difficult for persons relying upon ancient documents to utilize those documents in proving their case. It is intended to do away with the insuperable difficulty of proving the handwriting, execution, and attestation of documents in the ordinary way after the lapse of many years.
18. In the matter of Chhagan Lal Shobha Ram v. Madan Lal Shobha Ram³ it was held by the Madhya Pradesh High Court that Section 49 of the Registration Act, although a document is required by law to be registered, is not registered, it cannot be allowed to affect an immovable property comprising therein nor it can be received in evidence of any transaction affecting such property under Section 49 of the Registration Act, yet such document can be admitted to prove an admission of a party with regard to the character of property, whether it is joint or otherwise. Undisputedly, sale deed dated 20.6.40 (Ex.P-2)

executed in favour of the plaintiff was more than 30 years old document though it is unregistered sale deed, therefore, presumption under Section 90 of the Act of 1872 that document to be genuine will available and document must be presumed to be genuine under Section 90 of the Act of 1872.

19. In the matter of Inder Lal and others v. Abdul Salam and others⁴ the Rajasthan High Court has struck similar proposition. It was observed as under:-

“8.....This document was of more than 30 years old and as such a presumption about its genuineness will have to be drawn under Section 90 of the Evidence Act. Sua Lal had made a mortgage of his properties in favour of the forefathers of the defendant by this document Ex.4 and there is a clear recital in it that the ravish in question shall remain joint. It is neither the case of the defendant nor proved by any documentary evidence that he or his ancestors purchased this ravish and became its owner exclusively by such purchase. Thus from the recital of Ex.4, the ravish in question is proved beyond any manner of doubt to be a joint one.....”

20. In the instant case, document is sale deed dated 20.6.40, a very old sale deed, though it is unregistered, yet it has been produced from the proper custody and its witnesses are no longer available to adduce witnesses. The trial Court relied upon the sale deed in favour of the plaintiff to conclude that the plaintiff is title-holder of the suit land, which the first appellate Court held that attesting witness of sale deed is not examined and reversed, which has been held to be not required as Section 68 of the Act of 1872 is not applicable in case of sale deed.

21. In view of the aforesaid analysis, the first appellate Court is absolutely unjustified in holding that attesting witness of sale deed was

4 AIR 1983 Rajasthan 57

required to be examined to prove the sale deed and document being unregistered, presumption under Section 90 of the Act of 1872 is not available at all. In view of the aforesaid fact, the judgment and decree passed by the first appellate Court is hereby set aside and that of the trial Court is restored. The substantial questions of law are answered in favour of the plaintiff and against the defendants. The second appeal is allowed to the extent indicated hereinabove leaving the parties to bear their own costs(s).

22. Decree be drawn-up accordingly.

Sd/-

(Sanjay K. Agrawal)
Judge

B/-