

HIGH COURT OF CHHATTISGARH, BILASPUR**Second Appeal No. 281 of 2005**

1. Ramji Prasad (since deceased) through LRs:-

1A Pradeep Kumar, S/o Ramji Prasad, aged about 52 years,

1B Ashok, S/o Ramji Prasad, aged about 48 years,

1C Manoj, S/o Ramji Prasad, aged about 46 years,

1D Sanjay, S/o Ramji Prasad, aged about 43 years,

1E. Rajesh, S/o Ramji Prasad, aged about 38 years,

All are Resident of Village – Khamari, Damodarpur, P.S. and Tahsil -
Shankargarh, District – Ramanujganj – Balrampur (C.G.)

2. Pradip, S/o Ramji Prasad, aged about 42 years.

Both resident of Village Damodarpur, Tahsil Samari, District Surguja
(C.G.)

---- Appellants/Defendants

Versus

1. Ghuran Yadav, S/o Devnandan Yadav, aged about 35 years.

2. Ratan, S/o Ramdhin, aged 42 years.

3. Ramjatan, S/o Fazil Mahato, aged 65 years.

All resident of Village Damodarpur, Tahsil Smari, District Surguja
(C.G.)

4. The State of Chhattisgarh through the Collector, Surguja (C.G.)

---- Respondents/plaintiffs

For Appellants/plaintiffs	: Mr. Sunil Tripathi, Advocate.
For Respondents No. 1 to 3	: Mr. Rakesh Pandey, Advocate.
For Respondent No. 4/State	: Mr. Priyank Rathi, PL

Hon'ble Shri Justice Sanjay K. Agrawal

Judgment On Board

22/07/2019

(1) The substantial question of law involved, formulated and to be answered in this defendants' second appeal states as under:

“Whether the First Appellate Court ignoring the material evidence available on record and misinterpreting the evidence, has reversed the judgment and decree passed by the lower Court ?

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

(2) Father of plaintiff No. 1 – Devnandan Yadav, plaintiff No. 2- Ratan and plaintiff No. 3- Ramjatan executed two unregistered sale deeds dated 1.5.1963 vide Exs.D-12 & D-13, respectively in favour of Vidyasagar (minor) alienating the suit property in his favour and delivered the peaceful possession of the suit land in his favour for a consideration of Rs. 95/- in each of the sale deeds. On the basis of said sale deeds, name of Vidyasagar was recorded in the revenue records vide Exs. D-1 & D-2 on 12.08.1965 and that mutation was done in presence of father of plaintiff No. 1 namely Devnandan Yadav. Thereafter, as late as on 28.7.1998, three plaintiffs namely Ghuran Yadav, S/o. Devnandan, Ratan and Ramjatan filed a suit for declaration of title stating that they be declared the owner the suit land, by declaring the sale deeds dated 1.5.1963 Exs.D-12 & D-13 as ineffective and further sought that defendants No. 1 & 2 be restrained from interfering with their possession either through themselves or through their agents, if any.

(3) The plaintiffs' suit was resisted by the defendants by filing written statement pleading inter alia that they have purchased the suit land by unregistered sale deeds dated 1.5.1963 vide Ex.D-12 & D-13 and by getting their name recorded in the revenue record, they are in possession of the suit land since 1.5.1963, as such, the suit as framed and filed by the plaintiffs is barred by limitation and the plaintiffs are not in possession of the suit

land and bare suit of declaration of title is not maintainable, as such the suit deserves to be dismissed.

(4) On pleading of the parties, the trial Court framed as may as 9 issues and by its judgment and decree dated 16.08.2002 dismissed the suit holding that suit is barred by limitation and sale deeds Exs.D-12 & D-13 dated 1.5.1963 is not a forged document and the plaintiffs are not entitled for the decree as claimed. On an appeal being preferred before the first appellate Court, the said court allowed the plaintiff's appeal and decreed the suit holding that suit is within the limitation and the sale deeds {Ex. D-12 & Ex. D-13} are not the valid documents and the sale deed Ex. D-13 executed in favour of Vidyasagar, who was minor on the date of sale deed (Ex.D-13), therefore, it is not a valid document.

(5) Feeling aggrieved and dissatisfied with the judgment and decree of the first appellate Court, this second appeal under Section 100 of the CPC has been preferred by the appellants/defendants, in which, substantial question of law has been formulated and cataloged in the opening paragraph of this judgment.

(6) Learned counsel appearing for the appellants/defendants No. 1 & 2 would submit that the first appellate Court went wrong in holding that the suit is not barred by limitation as it was *ex facie* barred by limitation and committed legal error in setting aside the finding of the trial Court in this regard. He would also submit that sale deeds Exs.D-12 & D-13 are the valid documents as Ramratan (PW-2), plaintiffs No. 3 herein has admitted, in paragraph 17 of his statement, that in order to make payment of the loan from the Kusumi Bank, the suit land was subjected to sell and, as such, the father of plaintiff No. 1 and plaintiff No. 3 both were aware of the sell made in favour of defendants No. 1 & 2. Even otherwise, witness to the sale deed Bishun Sao (DW-2) has been examined, who has proved the sale in favour of Vidyasagar and the said document are 30 years' old and

produced from proper custody, therefore, it will raise presumption under Section 90 of the Indian Evidence Act of said documents. He would further submit that plea with regard to the minority of Vidyasagar qua Ex.D-13 was never raised by the plaintiffs before the trial Court and, therefore, new plea ought not to have been permitted by the first appellate Court.

(7) Per contra, learned counsel appearing for respondents No. 1 to 3 would support the impugned order and submit that the decree *qua* execution of alleged sale deed in favour of Vidyasagar is hit by Section 11 of the Indian Contract Act, 1872 (for short "Act, 1872"). He would further submit that the first appellate Court has rightly concluded that no sale has been made in favour for defendants No. 1 & 2 and they are even not in possession of the suit land and, therefore, the judgment & decree of the first appellate Court deserves to be maintained.

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

(9) Admittedly, father of plaintiff No.1 – Devnandan Yadav, plaintiff No. 2- Ratan & plaintiff No. 3 – Ramjatan executed two unregistered sale deeds i.e. Ex.D-12 & D-13 in favour of one Vidhyasagar on 1.5.1963 and immediately thereafter, as per plaint averments in presence of Davnandan Yadav, father of plaintiff No.1 and with his consent, name of Vidyasagar was recorded in the revenue records vide Exs. D-1 & D-2 on 12.08.1965 vide Ex.D-1 & D-2, as such, Devnandan Yadav (father of plaintiff No. 1) was admittedly aware of the sale and mutation in the name of purchaser as per plaint averment, father of plaintiff No. 1 and plaintiffs No. 2 & 3 are the other sellers but all the three plaintiffs filed a suit for declaring the sale deeds dated 1.5.1963 vide Ex. D-12 & D-13 ineffective and declaration of title only on 28.07.1998, which the trial Court has held to be barred by limitation and first appellate Court has reversed to be within limitation.

(10) Plaintiff No. 3 – Ramjatan was examined as PW -2, in paragraph 17 of his statement, he has clearly admitted that in order to make payment of the loan from the Kusumi Bank, the suit land was subjected to sell and, as such, the father of plaintiff No. 1 and plaintiff No. 3 both were apparently and admittedly aware of the sell made in favour of defendants No. 1 & 2 and, therefore, they ought to have filed the suit within a period of limitation from the date of registration of the sale deed dated 1.5.1963 vide Exs.D-12 & D-13 or from the date of mutation in favour of plaintiffs, which they admittedly did not do so for the reasons best known to them. The father of plaintiff No. 1, plaintiff No. 2 and plaintiff No. 3 were admittedly party to the sale deed, therefore, they being the party to the sale deed vide Exs. D-12 & D-13, they ought to have filed suit for cancellation of the sale deed under Section 31 of the Specific Relief Act, 1963.

(11) The Supreme Court in the matter of Suhrid Singh @ Sardool Singh v. Randhir Singh & others¹ has clearly laid down the difference between a prayer for cancellation and declaration in regard to a deed of transfer/conveyance. Paragraph 6 of the report states as under :-

“6. Where the executant of a deed wants it to be annulled, he has to seek cancellation of the deed. But if a non-executant seeks annulment of a deed, he has to seek a declaration that the deed is invalid, or non-est, or illegal or that it is not binding on him. The difference between a prayer for cancellation and declaration in regard to a deed of transfer/conveyance, can be brought out by the following illustration relating to ‘A’ and ‘B’ -- two brothers. ‘A’ executes a sale deed in favour of ‘C’. Subsequently ‘A’ wants to avoid the sale. ‘A’ has to sue for cancellation of the deed. On the other hand, if ‘B’, who is not the executant of the deed, wants to avoid it, he has to sue for a declaration that the deed executed by ‘A’ is invalid / void and non-est / illegal and

he is not bound by it. In essence both may be suing to have the deed set aside or declared as non-binding. But the form is different and court fee is also different. If 'A', the executant of the deed, seeks cancellation of the deed, he has to pay ad-valorem court fee on the consideration stated in the sale deed. If 'B', who is a non-executant, is in possession and sues for a declaration that the deed is null or void and does not bind him or his share, he has to merely pay a fixed court fee of Rs. 19.50 under [Article 17\(iii\)](#) of Second Schedule of the Act. But if 'B', a non- executant, is not in possession, and he seeks not only a declaration that the sale deed is invalid, but also the consequential relief of possession, he has to pay an ad-valorem court fee as provided under [Section 7\(iv\)\(c\)](#) of the Act. [Section 7\(iv\)\(c\)](#) provides that in suits for a declaratory decree with consequential relief, the court fee shall be computed according to the amount at which the relief sought is valued in the plaint. The proviso thereto makes it clear that where the suit for declaratory decree with consequential relief is with reference to any property, such valuation shall not be less than the value of the property calculated in the manner provided for by clause (v) of [Section 7](#)."

(12) In the instant case, though father of plaintiff No.1 and plaintiffs No. 2 & 3 were admittedly and undisputedly were party to sale deed vide Ex.D-12 & Ex.D-13 and, therefore, as per the principle of law laid down by their Lordships of Supreme Court in the matter of **Suhrid Singh @ Sardool Singh (supra)**, they were required to seek cancellation of sale deed Exs. D-12 & D-13, which they did not and merely, sought declaration of those sale deeds as ineffective.

(13) The argument of Mr. Pandey, learned counsel appearing for respondents No. 1 & 2 that since sale deeds Ex.D-12 & 13 dated 1.5.1963 were void *ab initio*, therefore, the plaintiffs were not required to seek cancellation of those sale deeds deserves to be rejected as the plaintiffs did not even admit in their plaint that they have executed a sale deed but since sale deed (Ex.D-13) was executed in favour of minor, therefore, it is void

ab initio being hit by Section 11 of the Indian Contract Act, 1872, which states as under :-

“11. Who are competent to contract. - Every person is competent to contract who is of the age of majority according to the law to which he is subject, and who is of sound mind and is not disqualified from contracting by any law to which he is subject.”

(14) A careful perusal of the entire plaint would show that plaintiffs have not whispered about the sale deeds particularly Ex. D-13 being void document, they only pleaded that above-stated sale deeds are ineffective and plaintiffs are entitled for decree of declaration of title.

(15) It is well settled law that party to *lis* cannot be taken by the surprise by other side. If the plaintiff could have pleaded that the suit is hit by Section 11 of the Indian Contract Act, 1872, the defendants could have an opportunity to make a counter pleading and could have also sought rectification of document/sale deed, if any, as both the sale deeds vide Exs. D-12 & D-13 are executed on the same date i.e. 1.5.1963 and one sale deed i.e. Ex.D-12 is represented by his natural guardian to constitute document as valid document and, therefore, there was no reason not to execute other sale deed Ex.D-13 through his natural guardian.

(16) If this plea with regard to invalidity of document is allowed to be raised at the appellate stage, the defendants would bound to suffer prejudice in their defence, as such, the first appellate Court has fallen into legal error in entertaining the plea that the sale deed executed in favour of Vidyasagar vide Ex. D-13 is invalid document as it was allegedly executed in favour of minor Vidyasagar on the date of execution of sale deed and, therefore, the first appellate Court has committed grave legal error in holding that the suit is within the period of limitation and sale deed dated 1.5.1963 particularly Ex D-13 is invalid document executed by plaintiffs in favour of Vidyasagar.

(17) In view of the aforesaid findings that the suit filed by the plaintiffs was *ex facie* barred by limitation to question the sale deed dated 1.5.1963 vide Ex.D-12 & D-13 and in view of finding recorded by this Court that the plaintiff were required to seek cancellation of sale deed dated 1.5.1963 vide Exs.D-12 & D-13, I am of the considered view that the first appellate Court is absolutely unjustified in reversing the judgment & decree of the trial Court.

(18) Resultantly, judgment and decree passed by the first appellate Court are 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).

(19) A decree be drawn-up accordingly.

Sd/-

(Sanjay K. Agrawal)
Judge

D/-

