

HIGH COURT OF CHHATTISGARH, BILASPURSecond Appeal No.236 of 2004

1. Lakhan Lal, aged about 40 years, S/o. Baratia Sahu,
2. Hulasam Sahu, aged about 35 years, S/o. Baratia Sahu,
Both are R/o. Khandsara, Tah. & Distt.-Kawardha, Present Address-
Kabirdham (CG)
3. Kamla Bai, aged about 45 years, S/o. Shivcharan, R/o. Gram-
Doukabandha, Tah. & Distt.-Kawardha, Present Address- Kabirdham
(CG)

---- Appellants/Plaintiffs

Versus

1. Asharam, aged about 45 years, S/o. Hari Mahra, Kastkar, R/o.
Khandsara, P.S.-Bodla, Tah.-Kawardha, Distt.-Kabirdham
2. State of Chhattisgarh Through – Collector Kabirdham (CG)

---- Respondents/Defendants

For Appellants/Plaintiffs	:	Mr.B.P.Gupta, Advocate
For Res.No.1/Defendant No.1:	:	Dr.Shiv Kumar Shrivastava, Advocate
For Respondent No.2	:	Mr.Akash Pandey, P.L.

Hon'ble Shri Justice Sanjay K. AgrawalJudgment On Board06/08/2019

1. The substantial questions of law involved, formulated and to be answered in this second appeal preferred by legal representatives of the plaintiff are as under: -

“1. Whether without there being any cross appeal or cross objection challenging the finding of trial Court holding a document to be a sale deed can be altered by the First Appellate Court as deed of mortgage?

2. Whether on the ground that amendment application for relief of possession has been filed at appellate stage, can it be rejected ?”

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

2. The plaintiff filed a suit for declaration of title and permanent injunction restraining defendant No.1 from interfering with his peaceful possession stating inter-alia that he has purchased the suit land by registered sale deed dated 28.11.67 and he is title and possession holder of the suit land.
3. Defendant No.1 filed his written statement and denied the averments made in the plaint stating inter-alia that sale deed is not real sale, but it is a mortgage deed and also set-up a plea of adverse possession.
4. The trial Court after appreciating oral and documentary evidence available on record, by its judgment and decree dated 22.3.96, held that the plaintiff is title-holder of the suit land on the basis of sale deed dated 28.11.67 and since he is not in possession of the suit land, therefore, he is not entitled for decree for permanent injunction, against the judgment and decree of the trial Court, the plaintiff preferred first appeal before the first appellate Court, in which he also filed an application under Order 6 Rule 17 of the CPC seeking relief of possession as the trial Court has found while dismissing the suit that the plaintiff is not in possession of the suit land. The first appellate Court dismissed the appeal holding that sale deed dated 28.11.67 is not an outright sale and it is a mortgage deed and rejected the application for amendment holding that it has been filed at belated stage. Questioning that judgment and decree, legal representatives of the plaintiff have preferred this second appeal under Section 100 of the Code of Civil Procedure, 1908, in which,

substantial questions of law have been formulated and set-out in the opening paragraph of this judgment.

5. Mr.B.P.Gupta, learned counsel for the appellants, would submit that the first appellate Court is absolutely unjustified in holding the sale deed to be a mortgage deed in absence of challenge to finding of the trial Court holding the sale deed to be an outright sale as no cross-appeal or cross-objection was filed by the defendant questioning that part of decree declaring the plaintiff to be title-holder of the suit land before the first appellate Court. He would further submit that amendment at appellate stage is always permissible and it ought to have been granted in view of law declared by the Supreme Court in the matter of Mst. Rukhmabai v. Lala Laxminarayan and others¹, as such, the judgment and decree of the first appellate Court deserves to be set aside.
6. On the other hand, Dr. Shiv Kumar Shrivastava, learned counsel for respondent No.1/defendant No.1, would support the impugned judgment and decree and submit that the plaintiff was fully knowing that he is not in possession of the suit land, yet he did not claim relief of possession and therefore, the first appellate Court is justified in dismissing the application holding that it to be belated application. He would further submit that in view of Order 41 Rule 33 of the CPC, the first appellate Court has held the sale deed to be a mortgage deed though defendant No.1 did not prefer any cross-appeal or cross-objection, as such, the impugned judgment and decree of the first

1 AIR 1960 SC 335

appellate Court deserves to be upheld.

7. I have heard learned counsel for the parties, considered their rival submissions made hereinabove and also went through the records with utmost circumspection.
8. Admittedly and undisputedly, the trial Court in a suit filed by the plaintiff, has clearly recorded a finding while answering issue Nos.1 and 4 that sale deed dated 28.11.67 executed in favour of the plaintiff by defendant No.1 is an outright sale and it is not a mortgage deed and as such, the plaintiff is title-holder of the suit land, but dismissed the suit holding that the plaintiff is not in possession of the suit land and relief of possession has not been claimed, against which, the plaintiff preferred first appeal and in order to have possession, also sought leave to amend the plaint by seeking relief of possession. The first appellate Court firstly rejected the application for amendment seeking leave to insert relief of possession in the plaint holding it to be belated application and thereafter, reversed finding on issue Nos.1 and 4 holding that sale deed is not an outright sale, but said transaction appears to be of mortgage. The fact remains that finding with regard to issue Nos.1 and 4 that the plaintiff is title-holder of the suit land on the basis of sale deed dated 28.11.67 holding the sale to be an outright sale and it is not a mortgage deed has become final as no cross-appeal or cross-objection was taken by defendant No.1 in appeal preferred by the plaintiff.
9. The question for consideration would be whether the first appellate Court is justified in interfering with a finding on issue Nos.1 and 4,

which was already decided in favour of the plaintiff and against defendant No.1 ?

10. Dr.Shiv Kumar Shrivastava, learned counsel for defendant No.1 has pressed into service of Order 41 Rule 33 of the CPC which states as under:-

“33. Power of Court of Appeal.-The Appellate Court shall have power to pass any decree and make any order which ought to have been passed or make and to pass or made such further or other decree or order as the case may require, and this power may be exercised by the Court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have filed any appeal or objection and may, where there have been decrees in cross-suits or where two or more decrees are passed in one suit, be exercised in respect of all or any of the decrees, although an appeal may not have been filed against such decrees:

Provided that the Appellate Court shall not make any order under Section 35-A, in pursuance of any objection on which the Court from whose decree the appeal is preferred has *omitted* or refused to make such order. ”

- 11.Order 41 Rule 33 of the CPC enables the appellate Court to pass any any decree or order. Ordinarily, the Appellate Court must not vary or reverse a decree/order in favour of a party who has not preferred any appeal and this rule holds good notwithstanding Order 41 Rule 33 of the CPC. However, in exceptional cases, the rule enables the Appellate Court to pass such decree or order as ought to have been passed even if such decree would be in favour of parties who have not filed any appeal. The power though discretionary should not be declined to be exercised merely on the ground that the party has not

filed any appeal. Resort to be provisions of Order 41 Rule 33 of the CPC is not required to be liberally exercised but only in exceptional cases. Where the ends of justice so demand, the court has the right to mould the relief by passing any decree or order which ought to have been passed despite the fact that the other side has not filed any appeal or cross-objections.

12. In the matter of Banarsi and others v. Ram Phal² the Supreme Court considered the provisions contained in Order 41 Rule 22 of the CPC and held that the respondent may defend himself without filing any cross objections to the extent to which decree is in his favour. It was observed as under:-

"10. The CPC amendment of 1976 has not materially or substantially altered the law except for a marginal difference. Even under the amended Order 41 Rule 22 sub-rule (1) a party in whose favour the decree stands in its entirety is neither entitled nor obliged to prefer any cross-objection. However, the insertion made in the text of sub-rule (1) makes it permissible to file a cross-objection against a finding. The difference which has resulted we will shortly state. A respondent may defend himself without filing any cross-objection to the extent to which decree is in his favour; however, if he proposes to attack any part of the decree he must take cross-objection. The amendment inserted by the 1976 amendment is clarificatory and also enabling and this may be made precise by analysing the provision. There may be three situations:

(i) The impugned decree is partly in favour of the appellant and partly in favour of the respondent.

(ii) The decree is entirely in favour of the respondent though an issue has been decided against the respondent.

(iii) The decree is entirely in favour of the respondent and all the issues have also been answered in favour of the respondent but there is a finding in the judgment

² (2003) 9 SCC 606

which goes against the respondent.

11. In the type of case (i) it was necessary for the respondent to file an appeal or take cross-objection against that part of the decree which is against him if he seeks to get rid of the same though that part of the decree which is in his favour he is entitled to support without taking any cross-objection. The law remains so post-amendment too. In the type of cases (ii) and (iii) pre-amendment CPC did not entitle nor permit the respondent to take any cross-objection as he was not the person aggrieved by the decree. Under the amended CPC, read in the light of the explanation, though it is still not necessary for the respondent to take any cross-objection laying challenge to any finding adverse to him as the decree is entirely in his favour and he may support the decree without cross-objection; the amendment made in the text of sub-rule (1), read with the explanation newly inserted, gives him a right to take cross-objections to a finding recorded against him either while answering an issue or while dealing with an issue. The advantage of preferring such cross-objection is spelt out by sub-rule (4). In spite of the original appeal having been withdrawn or dismissed for default, the cross-objection taken to any finding by the respondent shall still be available to be adjudicated upon on merits which remedy was not available to the respondent under the unamended CPC. In the pre-amendment era, the withdrawal or dismissal for default of the original appeal disabled the respondent to question the correctness or otherwise of any finding recorded against the respondent.”

13. In the instant case, in my considered opinion, Order 41 Rule 33 of the CPC could not have been invoked by learned first appellate Court as it is not an exceptional case which persuaded the first appellate Court to invoke such provision. The plaintiff's suit was dismissed only on the ground that he has not sought relief of possession after holding him to be title-holder of the suit land and thereafter, in an appeal filed by him challenging the decree of the trial Court and for getting the decree of possession, he also filed an application for amendment, which was rejected by the first appellate

Court further holding it to be belated.

14. In view of the fact that decree was of dismissal of the suit, therefore, it was entirely in favour of defendant No.1. Since an issue was decided against defendant No.1 as falling within 2nd and 3rd situation outlined by Their Lordships of the Supreme Court in **Banarsi** (supra) and in absence of cross-appeal or cross-objection, the first appellate Court did not have jurisdiction to modify the decree and could not have held that sale deed is a mortgage deed or nominal sale deed. Even otherwise, proviso to Section 58(c) of the Transfer of Property Act, 1882 provides that the sale cannot be said to be a mortgage as no such transaction shall be deemed to be mortgage, unless the condition is embodied in the document which effects or purports to effect the sale and admittedly, no such condition was embodied in the said sale deed in favour of the plaintiff as sale deed in question does not disclose that transaction is one of mortgage or that of conditional sale. (See **Dharmaji Shankar Shinde and others v. Rajaram Sripad Joshi (Dead) through LR's and others**³ and **Sopan (Dead) Through His LR's v. Syed Nabi**⁴.), as such, the first appellate Court is absolutely unjustified in upsetting finding on issue Nos.1 and 4 without any cross-appeal or cross-objection filed by defendant No.1.

15. It is well settled law that a bare suit for declaration of title is not maintainable by virtue of proviso to Section 34 of the Specific Relief Act, if the plaintiff is not in possession of the suit land, but before

³ (2019) (6) Scale 682

⁴ JT 2019 (7) SC 301

dismissing the suit, the Court must afford an opportunity to the plaintiff to amend the plaint seeking relief of possession, if so desired.

16. Their Lordships of the Supreme Court in the matter of **Mst. Rukmabai v. Lala Laxminarayan and others**⁵ have observed that an objection to the maintainability of the suit based on the proviso above-said should be taken at the earliest point of time because in that event, the plaintiff could ask for necessary amendment to comply with the proviso. Their Lordships further observed as under:-

“30.A plea that the plaintiff asked for a bare declaration though he was in a position to ask for further relief within the meaning of S. 42 and hence the suit should have been dismissed in limine should be raised at the earliest point of time, in which event the plaintiff could ask for necessary amendment to comply with the provisions of S. 42. It is a well-settled rule of practice not to dismiss suits automatically but to allow the plaintiff to make necessary amendment if he seeks to do so. (The plea was not allowed to be raised in the Supreme Court.).”

17. In the matter of **Kalyan Singh v. Vakilsingh and others**⁶, the Madhya Pradesh High Court while following the principle enunciated in **Rukmabai** (supra) has held that a bare suit for declaration of title is not barred and proviso to Section 34 of the Specific Relief Act would not entail dismissal of the suit and the plaintiff must be afforded an opportunity of amending the plaint if so desired. It was held as under:-

“20. The legal position that flows from the above said authorities is as under:-

- (i) Further relief than a mere declaration referred to in the proviso to S. 34 of Specific Relief Act, 1963

5 AIR 1960 SC 335

6 AIR 1990 MP 295

contemplates the entitlement of the plaintiff as obtaining on the date of the suit;

(ii) Entitlement of the plaintiff enabling seeking further relief based on an event occurring during the pendency of the suit would not render the suit not maintainable;

(iii) It is the choice of the plaintiff to rest content by a mere decree for declaration in that suit and then to sue for further relief by bringing an independent suit subject to law of Limitation or to pray for further relief by making an amendment in the plaint in that suit itself;

(iv) Bar enacted by the proviso does not automatically entail dismissal of the suit but the plaintiff must be afforded an opportunity of amending the plaint if so desired;

(v) Further relief cannot be granted to the plaintiff without the same having been specifically asked for.”

18. It is trite law that a cause of action for a lis must precede the lis. But once a lis is so instituted on a pre-litem cause of action, the Court cannot shut its eyes to, but must take note of, all such post-litem developments which are likely to affect the question to be determined in the lis. (See Bibhas Chandra Bose Vs. Sm. Dolly Bose nee Dutt⁷).

19. The Supreme Court in the matter of Pratap Singh Vs. Shri Krishna Gupta and others⁸ has succinctly held that technicalities should be deprecated so that the substance may count and take precedence over form and it would be putting too much premium on technicalities of the rules of pleading and allowing them to become

7 AIR 1989 Calcutta 190

8 AIR 1956 SC 140

rather the mistress instead of being as they should be handmaid to the cause of administration of justice, if the Court folds its hand and doesn't take note of all subsequent event or developments which might affect the relief claimed in the law and derive the parties to obtain relief on the basis of changed or subsequent developments as it is well settled that Court is to take note of such subsequent event and to shorten litigation and to prevent multiplicity of proceeding (See M/s. M. Laxmi & Co. Vs. Dr. Anant R. Deshpande & another⁹ and Shikharchand Jain Vs. Digamber Jain Praband Karini Sabha¹⁰).

20. Reverting to the facts of the present case in light of judgment of the Supreme Court in Rukhmabai (supra) and followed by the Madhya Pradesh High Court in Kalyan Singh (supra), it is quite vivid that the plaintiff initially filed a suit for declaration of title and permanent injunction which was dismissed holding though he is title-holder of the suit land, but since he is not in possession of the suit land, therefore, he is not entitled for decree for permanent injunction. Before the first appellate Court, on 15.4.2000 the plaintiff sought leave of the Court to claim the relief of possession which the first appellate Court rejected on the ground of delay in moving the said application. The Supreme Court in the matter of Rukhmabai (supra) has clearly held that in a suit for declaration of title, if the plaintiff is not found in possession, opportunity should be given to amend the plaint and to claim the relief of possession and the suit should not be dismissed and further held that bar enacted by proviso to Section 34

9 AIR 1973 SC 171

10 AIR 1974 SC 1178

of the Specific Relief Act does not automatically entail dismissal of the suit and subsequent event should be taken cognizance of by the first appellate Court. In the instant case, the first appellate Court did not grant opportunity to the plaintiff to amend the plaint, rather objected the application for amendment sought for in line with judgment of the Supreme Court in Rukhmabai (supra).

21. In view of that, the first appellate Court is absolutely unjustified in rejecting the application for amendment, which ought to have been granted by the first appellate Court in light of principle of law laid down in Rukhmabai (supra) to allow the plaintiff to amend the plaint and therefore, the impugned order rejecting his application is set aside and consequently, application for amendment filed by the plaintiff before the first appellate Court on 15.4.2000 under Order 6 Rule 17 of the CPC (I.A.No.1) seeking to amend the relief clause in the plaint is allowed. The appellants (legal representatives of original plaintiff) are directed to incorporate the amendment in plaint within three weeks from today.

22. In view of aforesaid legal analysis, the judgment and decree of the first appellate Court is set aside and in view of amendment allowed by this Court, it is hereby directed and decreed that the plaintiff (appellant) is title-holder of the suit land and is entitled for delivery of possession of the suit land situated at village Khadsara, Tahsil Kawardha, District Rajnandgaon (Now District Kabirdham) bearing Khasra No.252, area 0.40 acre within two months from today subject to amendment in the plaint. The substantial questions of law

are answered accordingly.

23. The second appeal is allowed to the extent indicated hereinabove leaving the parties to bear their own cost(s).

24. Decree be drawn-up accordingly.

Sd/-

(Sanjay K. Agrawal)
Judge

B/-