

HIGH COURT OF CHHATTISGARH, BILASPUR**Second Appeal No. 27 of 2005****Judgment Reserved on 12.12.2019****Judgment delivered on 19.12.2019**

1. K. Danteshwar Rao (since deceased) through LRs:-

(a) Smt. K. Shyamala Rao, W/o Late K. Danteshwar Rao, aged about -45 years,

(b) K. Lokesh Rao, S/o Late Danteshwar Rao, aged about 24 years,

(c) K. Raj Kumar Rao, S/o Late K. Danteshwar Rao, aged about 20 years,

Appellants/Plaintiffs No. 1(a) to 1(c) all are residents of Chitrakut Road Hikmipara, Jagdalpur, District Bastar (C.G.)

2. K. Mahesh Rao (since deceased) through LRs:-

(a) Smt. K. Gauri Rao, W/o Late K. Mahesh Rao, aged about - 40 years, residents of Chitrakut Road Hikmipara, Jagdalpur, District Bastar (C.G.)

3. K. Narsingh Rao, S/o Late Shri Kandi Somulu, aged about 26 years,

4. K. Om Prakash, S/o Late Shri Kandi Somulu, aged about 25 years,

Appellants No. 3 & 4 are resident of Hikmipara, Jagdalpur & Legal Representatives of Late Kandi Somulu, S/o Sanyasi (Dead), Hikmipara, Jagdalpur, District Bastar (C.G.)

-----Appellants/plaintiffs

Versus

1. K. Sharat Chandra Patnaik, S/o Late K.S.P. Rao (since deceased) through LRs:-

1(a) Smt. Bandita Patnaik, widow of late K. Sharat Chandra Patnaik, aged about 64 years,

1(b) Sailendra Kumar Patnaik, S/o K. Sharat Chandra Patnaik, aged about 43 years,

1(c) Shilpa Rao Patnaik, D/o K. Sharat Chandra Patnaik, aged about 41 years,

1(D) Smita Rao Patnaik, D/o K. Sharat Chandra Patnaik, aged about 39 years,

All respondents are R/o near Poonam Lodge, at Chandni-Chowk, Pratapdev Ward, Jagdalpur, District – Bastar (C.G.)

2. K. Lalit Kumar Rao (deleted)

3. K. Surendra Rao, S/o Late K.S.P. Rao,

4(i) Smt. B. Kamuamma (deleted)

4(ii) B. Venkat Rao, S/o Late B. Krishna Rao,

4(iii) B. Anand Rao (since deceased) Thorough Lrs:-

4(iii)(a) Smt. Rajeshwari Rao, widow of late B. Anand Rao, Aged about 35 years, R/o- Rajiv Gandhi Ward, near Durga Temple, Housing Board Colony, Jagdalpur, District Bastar (C.G.)

4(iv) B. Ravi Naidu, S/o Late B Krishna Rao,

Respondents No. 4(i) to 4(iv) all Legal representatives of Late B. Krishna Rao alias Rama Krishna Rao, S/o Late Sri Appal Swamy (dead)

5. Narayan Amma (deleted)

Respondents No. 1 to 5 all R/o Balaji Ward, Pratapganj Para, Jagdalpur, District Bastar (C.G.)

6. Sahayak Bandobast Adhikari, Bandobast Karyalaya, Jagdalpur, District Bastar (Chhattisgarh)

7. State of Chhattisgarh, through Collector, Bastar, C.G.

-----Respondents/defendants

For Appellants : Mr. Anurag Verma, Advocate.
 For Respondent No. 7: Mr. Ravi Kumar Bhagat, Dy.Govt. Advocate

Hon'ble Shri Justice Sanjay K. Agrawal

C.A.V. Judgment

(1) Heard on the question of admission and formulation of substantial question of law in this second appeal preferred by appellants/plaintiffs against the impugned judgment and decree passed by the first appellate Court affirming the judgment and decree of the trial court dismissing the suit.

(2) Learned counsel appearing for the appellants/plaintiffs would submit that both the courts below are absolutely unjustified in dismissing the suit of the plaintiffs for declaring the judgment & decree 27.10.1989 passed in Civil Suit No. 77-A/88 is void and not binding on them, by recording a finding, which is perverse and contrary to the record as the plaintiffs being the bonafide purchasers of the suit property from defendants No. 4 & 5 on 01.07.1986 vide Ex.P-20 were necessary party in that suit and in absence of their impleadment, the earlier civil suit could not have been decreed on 21.01.1987, as such, dismissal of suit by the trial Court and subsequent dismissal of appeal by the first appellate Court are absolutely illegal and, therefore, appeal deserves to be admitted for hearing by formulating substantial question of law for determination.

(3) The defendants No. 1 to 3 and one K.S.Prakash Rao filed a suit for declaration of tile against B. Kirshna Rao and Musu. Narayanamma, widow of Appal Swamy Rao being Civil Suit No.77A/88, which was decreed ex parte on 27.10.1989.

Thereafter, present plaintiffs namely Kundi Somulu and Mus. K. Aapal Narsamma filed a civil suit for declaration of title that judgment and decree dated 27.10.1989 (Ex.P-20) is not binding on them as they have purchased the suit property by registered sale deed dated 1.7.1986 vide Ex.P-62 and, therefore, decree obtained is null and void, which the trial Court dismissed holding that plaintiffs have failed to establish fraud in obtaining the decree in the earlier suit, which has been affirmed by the first appellate Court, on an appeal being preferred by the plaintiffs, against which instant second appeal under Section 100 of the CPC has been preferred.

(4) The question for consideration would be, whether regular civil suit so filed by the plaintiff would lie to set aside the *ex parte* decree mainly on the ground of non-joinder of necessary party?

(5) A defendant against whom an *ex-parte* decree has been passed under Rule 6 for default of appearance at the hearing has following courses open to him as remedies:

- (i) he may appeal from the *ex parte* decree under Section 96 CPC.
- (ii) he may apply for a review of judgment under Order 47, Rule 1 or file a suit for setting aside the *ex parte* decree on the ground of fraud.
- (iii) he may apply under Rule 13 for an order to set aside the *ex parte* decree, provided the application is made, within 30 days from the date of the decree, or

where the summons were not duly served, when he had knowledge of the decree, the relevant provision now would be Article 123 of the Limitation Act, 1963.

(6) The Supreme Court in the matter of Bhanu Kumar Jain v. Archana Kumar and another¹ has indicated the remedies open to the party against whom ex parte decree has been passed and held as under:-

"26. When an ex parte decree is passed, the defendant (apart from filing a review petition and a suit for setting aside the ex parte decree on the ground of fraud) has two clear options, one, to file an appeal and another to file an application for setting aside the order in terms of Order 9 Rule 13 of the Code. He can take recourse to both the proceedings simultaneously but in the event the appeal is dismissed as a result whereof the ex parte decree passed by the trial court merges with the order passed by the appellate court, having regard to Explanation appended to Order 9 Rule 13 of the Code a petition under Order 9 Rule 13 would not be maintainable. However, Explanation I appended to the said provision does not suggest that the converse is also true."

(7) Similarly, the principle of law laid down in Bhanu Kumar Jain (supra) has been followed with approval by the Supreme Court in the matter of Rabindra Singh v. Financial Commissioner Cooperation, Punjab and others².

(8) Reverting back to the facts of the case in light of principles of law laid down by the Supreme Court in above-cited cases(supra), it is quite vivid that present plaintiffs were not party in the earlier civil suit being Civil Suit No. 77A/88 and ex parte judgment & decree was passed on

1 (2005) 1 SCC 787

2 (2008) 7 SCC 663

27.10.198. The present suit has been filed by the plaintiffs merely on the ground that they have purchased the suit property by registered sale deed dated 01.07.1986 vide Ex.P-62, therefore, they were necessary party in the earlier suit. Both the courts below have held that no fraud was played by defendants No. 1 to 3 therein in obtaining the decree in the earlier suit.

(9) In view of the afore-cited judgments of the Supreme Court (supra), regular suit would lie to set aside *ex parte* decree on the ground of fraud and where a subsequent suit is filed on the ground of fraud, fraud must be alleged and pleaded in the suit to set aside *ex parte* decree. In the instant case, plea of fraud is set up except pleading that they were necessary party in the earlier suit and they were not impleaded as party defendant in the earlier suit, therefore, earlier *ex parte* decree deserves to be set aside. Both the courts below have not found the plea of fraud established by the plaintiffs and accordingly dismissed the suit. Remedy of the plaintiffs, if any, is to file an application under Order 9 Rule 13 of the CPC or to file regular appeal under Section 96 of the CPC but in absence of fraud, no fresh suit would lie to set aside the decreed passed by the court of competent jurisdiction as held by the Supreme Court in the matter of **Bhanu Kumar Jain** (supra) and **Rabindra Singh** (supra). The said finding is a finding of fact based on material available on record and I do not find it either perverse or contrary to

record and no question of law much less substantial question of law is involved in this appeal.

(10) Accordingly, the second appeal, being devoid of merit, is liable to be and is hereby dismissed in *limine* without notice to the other side. No costs

Sd/-

(Sanjay K. Agrawal)
Judge

D/-