

HIGH COURT OF CHHATTISGARH, BILASPURSecond Appeal No.255 of 2005

1. Shanti Bai, D/o Bishamber Kurmi (wrongly written as Bisesar), W/o Jagat Ram Verma, Aged about 34 years,
2. Triveni Bai, D/o Bishamber Kurmi (wrongly written as Bisesar), W/o Sant Ram, Aged about 32 years.

Both are resident and cultivator of Village Funda, Tahsil Patan, Distt. Durg (C.G.)

(Plaintiffs)
---- Appellants

Versus

1. Jagdish Prasad, S/o Ramratan Verma, Aged about 72 years, R/o Village Funda, Tahsil Patan, Distt. Durg (C.G.) (Dead) Through his legal representatives

a. Taal Singh Verma (Dead) Through LRs

1. Smt. Satrupa, wife of Taal Singh Verma, aged about 55 years.
2. Kirti Kumar, S/o Taal Singh, aged about 40 years,
3. Revti Raman, S/o Taal Singh, aged about 35 years

All residents of Village Marra, Police Station Patan, District Durg

b. Nepal Singh, S/o Late Jagdish Prasad Verma, Aged about 50 years.

c. Rajendra Prasad Verma, S/o Late Jagdish Prasad Verma, Aged about 45 years,

Both R/o Village Marra, P.O. Marra, Tahsil Patan, Distt. Durg (C.G.)

d. Smt. Nemin Bai, W/o Kanhaiyalal Verma, Aged about 47 years, R/o Village Bortata, Tahsil Bhatapara, Distt. Raipur (C.G.)

2. State of Chhattisgarh, Through Collector, Distt. Durg (C.G.)
(Defendants)
---- Respondents

For Appellants / Plaintiffs:

Miss Sharmila Singhai, Advocate.

For LRs of Respondent No.1 / LRs of Defendant No.1: -

Mr. H.B. Agrawal, Senior Advocate with Mrs. Preeti Yadav, Advocate.

For Respondent No.2 / State: -

Mr. Sanjeev Kumar Agrawal, Panel Lawyer.

Hon'ble Shri Justice Sanjay K. Agrawal

Judgment On Board

19/09/2019

1. This second appeal preferred by the plaintiffs / appellants herein was admitted for hearing by formulating the following substantial question of law: -

“Whether the lower appellate court erred in law in holding that the sale-deed Exhibits P-1 and P-2, executed by Bishamber in favour of Shanti bai and Triveni bai does not confer any valid title to them?”

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

2. The suit property was originally held by one Bishamber Kurmi. The plaintiffs are his daughters out of his second marriage with Sukvaro Bai, whereas the original defendant Bhulin Bai was his daughter out of his first marriage with Sumran Bai. Bishamber Kurmi had one more daughter with Sumran Bai namely, Sonvati. It is the case of the plaintiffs that the suit property was sold by Bishamber Kurmi in favour of the plaintiffs – Shanti Bai and Triveni Bai vide Exs.P-1 & P-2 on 15-7-1966 and delivered peaceful possession to them through their guardian mother Sukvaro and since then they are in possession over the suit land. It is the further case of the plaintiffs that after death of Bishamber Kurmi, Bhulin Bai made an attempt to get her name mutated in the revenue records and ultimately, order dated 23-5-1988 was passed by the Assistant Settlement Officer, Durg directing the name of original defendant No.1 Bhulin Bai be recorded which necessitated the filing of suit by the plaintiffs, but thereafter, the Additional Collector by order dated 22-5-1990, set-aside that order and against that order, a revision was preferred by defendant No.1, but that was dismissed vide Ex.D-23 holding that civil suit has been

filed by the parties and that has been decreed also. In that view of the matter, the plaintiffs claimed decree for declaration of title and permanent injunction in which defendant No.1 Bhulin Bai set up the plea that since her father became old and weak, he executed a family arrangement on 13-6-1963 and partitioned the suit land between the plaintiffs and his other two daughters – defendant No.1 and Sonvati and he died on 9-4-1968 and he also executed affidavit dated 6-1-1967 and the plaintiffs are not in possession of the suit land, therefore, the suit is liable to be dismissed.

3. The trial Court upon consideration of oral and documentary evidence on record held that the plaintiffs are title holders of the suit land on the basis of sale deeds Exs.P-1 & P-2 and defendant No.1 has no right and title over the suit property and the order of the Assistant Settlement Officer dated 23-5-1988 (Ex.D-18) is null and void and no will was executed by Bhulin Bai in favour of Jagdish Prasad Verma – her husband, on 6-2-1996 and decreed the suit.
4. On appeal being preferred by defendant No.1, the first appellate Court reversed the finding of the trial Court holding that consideration amount has not been paid by the plaintiffs to Bishamber Kurmi and the Assistant Settlement Officer has rightly held that defendant No.1 is title holder of the suit land and further held that defendant No.1 is cultivating the suit land and is in possession, therefore, no decree could have been passed in favour of the plaintiffs. Feeling aggrieved against that judgment & decree, this second appeal has been preferred in which substantial question of law has been framed which has been set-out in the opening paragraph of this judgment.
5. Miss Sharmila Singhai, learned counsel appearing for the plaintiffs / appellants herein, would submit that the first appellate Court is

absolutely unjustified in holding that no consideration amount has been paid to the seller and therefore the sale deeds Exs.P-1 & P-2 are void and no title has been conferred to the plaintiffs by the said sale deeds. She would further submit that the order of the Assistant Settlement Officer Ex.P-5 has already been set-aside by the Additional Collector on 22-5-1990 and that has become final as the revision preferred by defendant No.1 has already been dismissed in view of the pendency of civil suit, vide Ex.D-23, therefore, the judgment & decree of the first appellate Court deserve to be set-aside.

6. Mr. H.B. Agrawal, learned Senior Counsel appearing on behalf of the LR's of defendant No.1, would support the impugned judgment & decree and submit that the first appellate Court has rightly held that no consideration amount has been passed and therefore the sale deeds are void, as such, this appeal deserves to be dismissed.
7. I have heard learned counsel for the parties and considered their rival submissions made herein-above and went through the record with utmost circumspection.
8. The first appellate Court interfered with the judgment & decree of the trial Court mainly on the count that no consideration amount has been paid by the plaintiffs to seller Bishamber Kurmi, therefore, title has not passed in favour of the plaintiffs vide Exs.P-1 & P-2.
9. Section 54 of the Transfer of Property Act, 1882 defines "sale" as under: -

"54. "Sale" defined.—"Sale" is a transfer of ownership in exchange for a price paid or promised or part-paid and part-promised.

Sale how made.—Such transfer, in the case of tangible immovable property of the value of one hundred rupees and upwards, or in the case of a reversion or other intangible thing, can be made only by a registered

instrument.

In the case of tangible immovable property of a value less than one hundred rupees, such transfer may be made either by a registered instrument or by delivery of the property.

Delivery of tangible immovable property takes place when the seller places the buyer, or such person as he directs, in possession of the property.

Contract for sale.—A contract for the sale of immovable property is a contract that a sale of such property shall take place on terms settled between the parties.

It does not, of itself, create any interest in or charge on such property.”

10. The Supreme Court in the matter of Vidhyadhar v. Manikrao and another¹ while considering Section 54 of the Transfer of Property Act, 1882 held that even if the whole of the price is not paid, but sale deed is executed and thereafter registered, if the property is of value of more than ₹ 100, the sale would be complete. It was held as under:-

“36. The definition indicates that in order to constitute a sale, there must be a transfer of ownership from one person to another, i.e., transfer of all rights and interests in the properties which are possessed by that person are transferred by him to another person. The transferor cannot retain any part of his interest or right in that property or else it would not be a sale. The definition further says that the transfer of ownership has to be for a "price paid or promised or part-paid and part-promised". Price thus constitutes an essential ingredient of the transaction of sale. The words "price paid or promised or part-paid and part-promised" indicate that actual payment of whole of the price at the time of the execution of sale deed is not sine qua non to the completion of the sale. Even if the whole of the price is not paid but the document is executed and thereafter registered, if the property is of the value of more than Rs. 100/-, the sale would be complete.

37. There is a catena of decisions of various High Courts in which it has been held that even if the whole of the price is not paid, the transaction of sale will take effect and the title would pass under that transaction. To cite only a few, in *Gyatri Prasad v. Board of Revenue*², it was held that non-payment of a portion of the sale price would not effect validity of sale. It was observed that part payment of

1 (1999) 3 SCC 573

2 1973 All LJ 412

consideration by vendee itself proved the intention to pay the remaining amount of sale price. To the same effect is the decision of the Madhya Pradesh High Court in *Sukaloo and Anr. v. Punau*.

38. The real test is the intention of the parties. In order to constitute a "sale", the parties must intend to transfer the ownership of the property and they must also intend that the price would be paid either in presenti or in future. The intention is to be gathered from the recital in the sale deed, conduct of the parties and the evidence on record."

11. Similarly, the Supreme Court in the matter of **Kaliaperumal v. Rajagopal and another**³ has clearly held that payment of entire consideration is not a condition precedent for completion of sale and passing of title and further held that the true test of passing of property is the intention of parties. It was also observed by Their Lordships of the Supreme Court as follows: -

"17. It is now well settled that payment of entire price is not a condition precedent for completion of the sale by passing of title, as Section 54 of the Transfer of Property Act, 1882 ("the Act", for short) defines "sale" as "a transfer of ownership in exchange for a price paid or promised or part-paid and part-promised". If the intention of parties was that title should pass on execution and registration, title would pass to the purchaser even if the sale price or part thereof is not paid. In the event of non-payment of price (or balance price as the case may be) thereafter, the remedy of the vendor is only to sue for the balance price. He cannot avoid the sale. He is, however, entitled to a charge upon the property for the unpaid part of the sale price where the ownership of the property has passed to the buyer before payment of the entire price, under Section 55(4)(b) of the Act.

18. Normally, ownership and title to the property will pass to the purchaser on registration of the sale deed with effect from the date of execution of the sale deed. But this is not an invariable rule, as the true test of passing of property is the intention of parties. Though registration is prima facie proof of an intention to transfer the property, it is not proof of operative transfer if payment of consideration (price) is a condition precedent for passing of the property.

19. The answer to the question whether the parties intended that transfer of the ownership should be merely by execution and registration of the deed or whether they intended the transfer of the property to take place, only after receipt of the entire consideration, would depend on

³ (2009) 4 SCC 193

the intention of the parties. Such intention is primarily to be gathered and determined from the recitals of the sale deed. When the recitals are insufficient or ambiguous the surrounding circumstances and conduct of parties can be looked into for ascertaining the intention, subject to the limitations placed by Section 92 of the Evidence Act.”

12. The Full Bench of the Allahabad High Court in the matter of Dip Narain Singh v. Nageshar Prasad⁴ observed that once a document transferring immovable property has been registered the transaction passes out of the domain of a mere contract and into one of the conveyance. Such a completed transaction is governed by the provisions of the Transfer of Property Act and so much of the Contract Act as is applicable thereto.
13. A conspectus of the aforesaid judgment would show that mere non-payment of consideration will not arrest the passing of title as a sale of immovable property may be effected in exchange for the price paid or promised to be paid. But whether the vendor really intended to transfer the ownership by execution and registration or contracted to do so only after receipt of the consideration as a condition precedent, would depend upon the terms of the contract.
14. Reverting to the facts of the present case in light of the legal position qua Section 54 of the Transfer of Property Act, 1882, it is quite vivid that it is the case of the plaintiffs that they have purchased the suit land by making payment of cash consideration to Bishamber Kurmi. In the written statement filed by defendant No.1, it was pleaded that no consideration amount has been paid to Bishamber Kurmi by the plaintiffs and therefore title has not been conveyed to the plaintiffs. Even otherwise, no issue was framed in this regard by the trial Court, as no specific plea was raised.

15. On the other hand, the witness of sale deeds Exs.P-1 & P-2 namely,

⁴ ILR 52 All 338: AIR 1930 All 1 FB

Sadhuram (DW-2) has clearly stated in paragraph 2 of his statement that for the treatment of Bishamber Kurmi, money was required by him, therefore, sale deeds were executed by Bishamber Kurmi by alienating the suit land in favour of plaintiffs Shanti Bai & Triveni Bai and he has signed on the documents Exs.P-1 & P-2 as a witness. He has also proved the signature of Bishamber Kurmi as well as of another witness Sukhram Kurmi, as such, the execution of sale deeds has been proved.

16. The Supreme Court in Vidhyadhar (supra) and Kaliaperumal (supra) has clearly held that even if the whole of the price is not paid, but the document is executed and registered, if the property is of more than rupees one hundred, the sale would be complete, as such, it cannot be held that by the sale deeds executed by Bishamber Kurmi in favour of the plaintiffs vide Exs.P-1 & P-2, no title has been passed in favour of the plaintiffs. Defendant No.1 has failed to establish that Bishamber Kurmi never intended to transfer the property in favour of the plaintiffs and further failed to prove that consideration amount has not been passed in favour of Bishamber Kurmi.

17. At this stage, it would be appropriate to notice Section 55(4)(b) of the Transfer of Property Act, 1882 which states as under:-

“55. Rights and liabilities of buyer and seller.—In the absence of a contract to the contrary, the buyer and the seller of immovable property respectively are subject to the liabilities, and have the rights, mentioned in the rules next following, or such of them as are applicable to the property sold:

(4) The seller is entitled—

(a) xxx xxx xxx

(b) where the ownership of the property has passed to the buyer before payment of the whole of the purchase-money, to a charge upon the property in the hands of the buyer, any transferee without consideration or any

transferee with notice of the non-payment, for the amount of the purchase-money, or any part thereof remaining unpaid, and for interest on such amount or part from the date on which possession has been delivered.”

18. The aforesaid provision provides that when the ownership of the property is transferred to the buyer before the payment of the whole price, the vendor is entitled to charge on that property for the amount of sale price as also for interest thereon from the date of delivery of possession.

19. The Supreme Court in Vidhyadhar (supra) while considering the applicability of Section 55(4)(b) of the Transfer of Property Act, 1882, held as under:-

“42. This clause obviously applies to a situation where the ownership in the property has passed to the buyer before the whole of the purchase money was paid to the seller or the vendor. What is contained in this clause is based on the English Doctrine of Equitable Lien as propounded by Baron Rolfe in *Goode v. Burton*⁵. This clause confers statutory recognition on the English Doctrine of Equitable Lien. As pointed out by the Privy Council in *Webb v. Macpherson*⁶ the statutory charge under this paragraph is inflexible. The charge does not entitle the seller to retain possession of the property as against the buyer but it positively gives him a right to enforce the charge by suit. (See: *Venkataperumal Naidu v. Rathnasabhpathi Chettiar*⁷; *Shobhalal Shyamlal Kurmi v. Sidhelal Halkelal Bania*⁸ and *Basalingaya Revanshiddappa v. Chinnaya Karibasappa*⁹.”

20. Further, Their Lordships in Vidhyadhar (supra) held as under:-

“43. In view of the above, the High Court was wholly in error in coming to the conclusion that there was no sale as only a sum of Rs 500 was paid to defendant No. 2 and the balance amount of Rs 4500 was not paid. Since the title in the property had already passed, even if the balance amount of sale price was not paid, the sale would not become invalid. The property sold would stand transferred to the buyer subject to the statutory charge for the unpaid part of the sale price.”

5 (1847) 74 RR 633 : 1 Ex 189

6 (1903) 30 IA 238

7 AIR 1953 Mad 821

8 AIR 1939 Nag 210: ILR 1939 Nag 636

9 AIR 1932 Bom 247 : 34 Bom LR 427

21. In view of the aforesaid legal analysis, it is quite vivid that remedy of respondent No.1 / defendant No.1 is to sue for consideration amount, if it has not been paid, but sale cannot be declared void for want of payment of consideration, as defendant No.1 has failed to establish that her father Bishamber Kurmi never intended to transfer the suit land in favour of the plaintiffs and consideration amount has not been passed to him. The first appellate Court is absolutely unjustified in granting the appeal and thereby reaching to a finding which is contrary to record and material available on record and which suffers from illegality and perversity.
22. The first appellate Court has placed great reliance on Ex.P-5 – order of the Assistant Settlement Officer and overlooked the fact that the order of the Assistant Settlement Officer Ex.P-5 was set-aside by the Additional Collector on 22-5-1990 and further appeal preferred by defendant No.1 was dismissed in the light of the decree passed in the civil suit. As such, the first appellate Court could not have relied upon the order Ex.P-5 which has already been set-aside by higher revenue authority. The first appellate Court has also erred in holding that defendant No.1 has established the adverse possession in absence of any pleading and proof by defendant No.1 qua adverse possession. Likewise, the plaintiffs never claimed that they are not in possession and the first appellate Court has not recorded the finding that defendant No.1 is in possession and therefore, further relief of possession was not required to be sought by the plaintiffs in light of the proviso to Section 34 of the Specific Relief Act.
23. Accordingly, the judgment and decree of the first appellate Court is set-aside and that of the trial Court is restored. The substantial question of law is answered accordingly and the second appeal is

allowed. No order as to cost(s).

24. Decree be drawn-up accordingly.

Sd/-
(Sanjay K. Agrawal)
Judge

Soma