

HIGH COURT OF CHHATTISGARH, BILASPURSecond Appeal No.97 of 2004Judgment reserved on: 14-11-2019Judgment delivered on: 19-11-2019

Abraham, S/o Dukha Uraon, age 56 years, R/o Bhusditoli, Tehsil Kunkuri, District Jashpur (C.G.)

(Defendant No.1)

---- Appellant

Versus

1. Domnik Toppo (Dead) Through LR's.

(Plaintiff)

1.a. Magdali Toppo, Wd/o late Domnik Toppo, aged about 60 years

1.b. Jon Toppo, S/o Domnik Toppo, aged about 30 years

1.c. Shashikant, S/o Late Domnik Toppo, aged about 35 years,

1.d. Anita, D/o Late Domnik Toppo, aged about 29 years,

1.e. Namita, D/o late Domnik Toppo, aged about 27 years,

All are R/o Bhurditoli, Tahsil Kunkuri, District Jashpur (C.G.)

2. The State of Chhattisgarh, through Collector, Jashpur (C.G.)

(Proforma Defendant)

---- Respondents

 For Appellant / Defendant No.1: -

Mr. A.K. Prasad and Mr. Rishi Mahobia, Advocates.

For Respondents No.1(a), (b) & (c) / Plaintiff: -

Mr. J.K. Shastri, Advocate.

For Respondent No.2 / State: -

Miss Shivali Dubey, Panel Lawyer.

Hon'ble Shri Justice Sanjay K. Agrawal
C.A.V. Judgment

1. This appeal preferred by defendant No.1 / appellant herein was

admitted on the following three substantial questions of law: -

“a) Whether the plaintiff's suit was maintainable without seeking declaratory relief against registered sale deed dated 27/08/1973?

- b) Whether the plaintiff's suit is barred by limitation?
- c) Whether the plaintiff's suit was barred under Section 4 of Benami Transactions (Prohibition) Act, 1988?"

[For the sake of convenience, parties will be referred hereinafter in this appeal as per their status shown and ranking given in the plaint before the trial Court.]

2. Respondent No.1 herein / plaintiff filed suit for declaration of title and for permanent injunction of the suit land described in Schedule 'A' of the plaint stating inter alia that the disputed land belongs to him, as in the year 1973, a sum of ₹ 1,300/- was given by him to his wife Makdali and directed her to purchase land in his name, but defendant No.1, who is his nephew, by playing fraud, got the sale deed Ex.P-4 dated 27-8-1973 executed from one Kutnaram, S/o Bitai, in his own name. It was further pleaded that defendant No.1 got the name mutated which was set-aside by the Tahsildar, but in appeal preferred by defendant No.1, the mutation order was set-aside by the Sub-Divisional Officer (Revenue) and the matter was remanded to the Tahsildar necessitating the institution of suit by the plaintiff for declaration of title and for permanent injunction in which defendant No.1 set up the plea that he has purchased the suit land by registered sale deed Ex.P-4 from one Kutnaram on 27-8-1973 for valid sale consideration and he is the title holder of the suit land which has not been questioned by the plaintiff in the suit filed and the suit is also barred by limitation and as such, the suit deserves to be dismissed.
3. The trial Court upon appreciation of oral and documentary evidence on record, decreed the suit holding that the plaintiff is owner and title holder of the suit land and consequently also restrained

defendant No.1 from interfering with the possession of the plaintiff. In appeal preferred by defendant No.1, he remained unsuccessful leading to filing of this second appeal in which three substantial questions of law have been framed which have set-out in the opening paragraph of this judgment.

4. Mr. A.K. Prasad, learned counsel appearing for the appellant / defendant No.1, would submit that defendant No.1 has purchased the suit land by registered sale deed Ex.P-4 and has acquired title which has not been questioned by the plaintiff in the suit filed, as consequential relief under the proviso to Section 34 of the Specific Relief Act ought to have sought for and in absence of that, bare suit for declaration of title simplicitor without seeking the relief of cancellation of sale deed or at least declaration of sale deed Ex.P-4 dated 27-8-1973 as null and void, the suit would not be maintainable. He would further submit that the sale deed was executed on 27-8-1973 and as per the plaint averment, it was hopelessly barred by limitation, yet both the Courts have decreed the suit ignoring that the suit was barred by limitation, as such, the impugned judgment & decree be set-aside with cost.
5. Mr. J.K. Shastri, learned counsel appearing for the LR's of the plaintiff / respondents No.1(a) to (c) herein, would support the impugned judgment & decree and would submit that it is the plaintiff's money by which the land was purchased by defendant No.1 in his own name by playing fraud taking the advantage of his absence at the place where the suit property is situated, as such, the plaintiff is in possession of the suit land and therefore the trial Court as well as the first appellate Court, both, are absolutely

justified in granting decree in favour of the plaintiff. He would further submit that the suit is neither barred by limitation nor hit by Article 58 of the Limitation Act, as such, the second appeal deserves to be dismissed.

6. I have heard learned counsel for the parties and considered their rival submissions made herein-above and went through the record with utmost circumspection.

Answer to the first substantial question of law: -

7. Admittedly, the subject-matter of the suit is the suit land bearing Khasra No.23/1, area 3.70 acres, situated at Village Bhumra, Patwari Halka No.14, Revenue Mandal Kunkuri, District Jashpur. Defendant No.1 is nephew of the plaintiff. The suit land was purchased by defendant No.1 by making payment of ₹ 1,200/- to one Kutnaram on 27-8-1973 vide Ex.P-4.
8. It is the case of the plaintiff that he paid the sale consideration in the year 1973 from his earnings out of his salary, as he is serving in Military service and he had given that amount to his wife Makdali and he had also entered into agreement to sale to purchase the suit land, but defendant No.1, playing fraud, got the suit land registered in his name in place of the plaintiff, therefore, he is the title holder of the suit land. Both the Courts have accepted the case projected by him that the plaintiff has paid the sale consideration amount of ₹ 1,300/- to seller Kutnaram.
9. It is not in dispute that the sale deed Ex.P-4 is registered in the name of defendant No.1 and value of the suit property is more than ₹ 100/- i.e. ₹ 1,200/-, therefore, by virtue of registered instrument in

accordance with Section 54 of the Transfer of Property Act, the sale must effected by registered instrument and accordingly, sale deed has been registered by Kutnaram in favour of defendant No.1, as such, title has passed in favour of defendant No.1 on execution of sale deed Ex.P-4 on 27-8-1973. But, the suit filed by the plaintiff is a bare suit for declaration of title and permanent injunction, though sale deed has admittedly been executed by Kutnaram in favour of defendant No.1, but neither the sale deed has been sought to be cancelled nor sought to be declared as not conferring title to defendant No.1, whereas, it ought to have been sought by virtue of the proviso to Section 34 of the Specific Relief Act, as the registered instrument is already existing in accordance with Section 54 of the Transfer of Property Act transferring title in favour of defendant No.1. Therefore, in absence of challenge to the title of defendant No.1 and in absence of claiming declaration under the proviso to Section 34 of the Specific Relief Act, the suit of the plaintiff ought not to have been decreed by the trial Court. It is a fatal defect. The suit was filed by the plaintiff claiming title over the suit land. If sale consideration has been paid by the plaintiff to defendant No.1 and in spite of that, sale deed has been executed by Kutnaram in favour of defendant No.1, the remedy of the plaintiff was to claim the consideration amount, if any, from defendant No.1 – Abraham, as no particulars of fraud are available on record either expressly pleaded or proved to hold that the sale deed was void; particularly in absence of any challenge to the said sale deed Ex.P-4, suit for declaration of title could not have been decreed by both the Courts below in favour of the plaintiff. As such, the first

substantial question of law is answered against the plaintiff and in favour of defendant No.1.

Answer to the second substantial question of law: -

10. Both the Courts have held that suit filed by the plaintiff is within the period of limitation, whereas, it is the case of defendant No.1 that suit was barred by limitation. The plaintiff filed suit for declaration of title and for declaring the order of the Sub-Divisional Officer (Revenue), Kunkuri, dated 30-8-1996 to be null and void, as by order dated 13-2-1995, the Naib Tahsildar, Duldula, held that only the plaintiff is entitled to be declared as title holder, therefore, the name of defendant No.1 be deleted from the revenue records, which defendant No.1 challenged by way of appeal and the appeal was allowed by the Sub-Divisional Officer (Revenue) on 30-8-1996 holding that on the basis of unregistered agreement to sale, no title can be conferred to the plaintiff and immediately thereafter, suit was filed on 24-6-1997.
11. Argument of learned counsel for defendant No.1 / appellant herein is that the plaintiff was aware of the sale deed dated 27-8-1973, as averred in the plaint, but he did not file suit within three years from the date of that sale deed and filed suit after the order of the Tahsildar directing deletion of the name of defendant No.1 was passed. Since the plaintiff only sought declaration of title and also sought declaration of the order of the Sub-Divisional Officer (Revenue) dated 30-8-1996 null and void, as he has filed suit within three years from the date of order of the Sub-Divisional Officer (Revenue), his suit cannot be held to be barred by limitation as held by both the Courts below. The plaintiff did not seek any declaration

for setting aside the sale deed dated 27-8-1973 as not binding on him, therefore, for the reason of not filing suit within three years from that date, suit of the plaintiff cannot be held to be barred by limitation.

12. Defendant No.1 his written statement only took one line defence that the suit is barred by limitation. The plea of limitation is a mixed question of law and facts, therefore, it ought to have been expressly pleaded and duly proved. Defendant No.1 ought to have clearly stated as to how the suit is barred by limitation. He cannot be permitted to make a new case during the course of argument after the casual plea of limitation as it was taken in the instant case. Therefore, it cannot be held that the suit was barred by limitation. As such, both the Courts below are absolutely justified in holding that the suit was not barred by limitation.

13. The second substantial question of law is answered accordingly.

Answer to the third substantial question of law: -

14. The third substantial question of law, whether the plaintiff's suit was barred under Section 4 of the Benami Transactions (Prohibition) Act, 1988, does not arise at all for consideration as stated by counsel for the parties during the course of submission.
15. In the result, by answering substantial question of law No.1, it is held that the plaintiff has failed to prove that he is the title holder of the suit land, rather defendant No.1 has purchased the suit land by registered sale deed Ex.P-4 and the plaintiff did not seek the relief of either declaring the sale deed as null & void nor prayed for cancellation of sale deed Ex.P-4. As such, both the Courts below

have committed legal error in granting decree in favour of the plaintiff on the basis of oral evidence ignoring the fact that defendant No.1 has purchased the suit property from the erstwhile owner. Consequently, judgments & decrees of both the Courts below are set-aside and the suit stands dismissed.

16. The second appeal is allowed. No order as to cost(s).

17. Decree be drawn-up accordingly.

Sd/-
(Sanjay K. Agrawal)
Judge

Soma