

HIGH COURT OF CHHATTISGARH, BILASPUR

Second Appeal No.73 of 2002

Order reserved on: 8-1-2019

Order delivered on: 11-1-2019

Chinttaram Pandey (Dead) Through LR – Rajesh Pandey, S/o Late Chinttaram Pandey, aged 31 years, R/o Near Kali Mandir, Birgaon, Tahsil & District Raipur (C.G.)

(Plaintiff)
---- Appellant

Versus

1. Kanti Bai, W/o Ramsnehi Sharma, aged about 55 years, R/o Ghasidas Nagar, Near Firewood Stall, Nandani Road, Jamul, P.O. Bhilai, Distt. Durg (C.G.)
2. Smt. Saraswatibai, W/o Jhabulal Tiwari, aged about 52 years, Near Jain Mandir, Baniya Para, Distt. Durg (C.G.)
3. Smt. Kamalbai, aged about 45 years, W/o Shri Rajendra Prasad Choubey, In front of Dewangan Aaramil, Shilatapara, Tah and P.O. Simga, Distt. Raipur (C.G.)
4. Sanat Kumar, aged about 24 years, S/o Gokul Prasad, Cultivator and R/o Vill. Kiritpur, Tah. Berla, Post Office Raka, Distt. Durg (C.G.)
5. Ramadhin, aged about 28 years, S/o Shri Jagatram Sahu, Cultivator and R/o Vill. Kiritpur, Tah. Berla, Distt. Durg (C.G.)
6. Takhathram, aged about 14 years, S/o Hiraram, R/o Gadariya, minor through his guardian father Hiraram, S/o Bodhi Gadariya, Cultivator and R/o Vill. Kiritpur, Tah. Berla, Distt. Durg (C.G.)
7. Banshilal, aged about years, S/o Shri Dharram Singh Sahu, Cultivator and R/o Vill. Kiritpur, Tah. Berla, Distt. Durg (C.G.)
8. Sanjay Kumar, aged about 15 years,
9. Kirde Ram, aged about 13 years,

Sl.No.8 & 9 are minors, represented through their natural guardian father Lalooram, S/o Bodhi Gadariya, R/o Village Kiritpur, Tah. Berla, Distt. Durg (C.G.)

10. Bise Narayan, aged about 30 years, S/o Radhe Yadav, Cultivator, R/o Vill. Kiritpur, Tah. Berla, Distt. Durg (C.G.)

11. Deenbandhu, aged about 31 years,

12. Chintaram, aged about 25 years,

Both Resp. No.11 & 12 sons of Dheluram, Cultivator, R/o Vill. Kiritpur, Tah. Berla, Distt. Durg (C.G.)

13. Mohit, aged about 24 years,

14. Benuram, aged about 20 years,

Both Resp. No.13 & 14 sons of Chabiram Sahu, Cultivator, R/o Kiritpur, Tah. Berla, Distt. Durg (C.G.)

15. Ramlal, aged about 45 years, S/o Sukalu Sahu, Cultivator, R/o Kiritpur, Tah. Berla, Distt. Durg (C.G.)

16. Saraju Prasad, aged about 30 years,

17. Saraju, aged about 24 years,

Both S/o Bhagbali Nishad, Cultivator, R/o Village Kiritpur, Tah. Berla, Distt. Durg (C.G.)

18. State of Chhattisgarh, Through Collector, Durg (C.G.)

(Defendants)

---- Respondents

For Appellant:	Mr. Shiv Kumar Guha, Advocate on behalf of Mr. Rajnish Singh Baghel, Advocate.
For Respondents No.1 to 3: -	Mr. Shantanu Awasthi, Advocate.
For Respondents No.4 to 17: -	Mr. Abhijeet Mishra, Advocate.
For Respondent No.18 / State: -	Mr. Rahul Tamaskar, Panel Lawyer.

Hon'ble Shri Justice Sanjay K. Agrawal

C.A.V. Judgment

1. The substantial questions of law involved, formulated and to be answered in this plaintiff's second appeal are as under: -

“(1) Whether without seeking the relief of declaring registered sale deed dated 14-6-1993 void the suit was not maintainable?

(2) Whether in a suit for declaration and possession no relief for part of the land was permissible?”

(For the sake of convenience, parties would be referred as

per their status shown in the trial Court.)

2. The plaintiff / appellant brought a suit against the respondents / defendants stating inter alia that the plaintiff's father Late Gaya Prasad Pandey, who died in the year 1954, was title holder of the lands mentioned in Schedules A(1) and A(2) attached with the plaint ad-measuring 6.201 hectares and 5.91 hectares, respectively. It is further stated that mother of the plaintiff was murdered in the year 1985 and the properties mentioned in Schedule B were transferred by the sisters of the plaintiff – defendants No.1 to 3 to defendants No.4 to 17 on 14-6-1993. As such, the suit properties being the ancestral properties, the plaintiff has birth right in the properties and he is entitled for half of the share in the suit properties, as there is no partition in the lifetime of his father which defendants No.1 to 3 opposed by filing written statement.
3. The trial Court after appreciating oral and documentary evidence on record, came to the conclusion that the plaintiff has $\frac{3}{4}$ th share in the suit property and is entitled for declaration and possession from defendants No.1 to 17.
4. On appeal being preferred by defendants No.1 to 3, the first appellate Court substantially agreed with the finding of the trial Court that the plaintiff is entitled for $\frac{3}{4}$ th share in the entire suit property, but further held that the plaintiff did not seek partition and without seeking partition, decree for declaration of title cannot be granted and also held that defendants No.1 to 3 had already executed sale deed on 14-6-1993 in favour of defendants No.4 to 17 and the plaintiff has not prayed that the sale deed dated 14-6-

1993 is not binding on him. In absence of both the reliefs, suit for declaration of title declaring that the plaintiff is entitled for $\frac{3}{4}$ th share in the suit property could not have been granted against which this appeal has been preferred by the plaintiff in which substantial questions of law have been framed which have been set-out in the opening paragraph of this judgment.

5. Mr. Shiv Kumar Guha, learned counsel appearing for the plaintiff, would submit that defendants No.1 to 3 did not take any such objection before the trial Court and if objection could have been taken, the plaintiff could have amended the plaint and as such, objection ought to have taken at the first available opportunity and due to failure of defendants No.1 to 3 in taking objection, the plaintiff is deprived of his opportunity to correct the plaint, if any, and therefore the first appellate Court is absolutely unjustified in dismissing the suit only on this technical ground after affirming the judgment & decree of the trial Court on merits.
6. On the other hand, Mr. Shantanu Awasthi, learned counsel appearing for defendants No.1 to 3, and Mr. Abhijeet Mishra, learned counsel appearing for defendants No.4 to 17, would support the impugned judgment & decree.
7. I have heard learned counsel for the parties and also considered their rival submissions made herein-above and went through the record with utmost circumspection.
8. The original plaintiff brought a suit for declaration of title that he, being the son of Gaya Prasad Pandey, is entitled for $\frac{3}{4}$ th share in the suit property along with his sisters – defendants No.1 to 3 and

also sought possession of the said portion, as defendants No.1 to 3 have transferred the properties mentioned in Schedule B to defendants No.4 to 17 on 14-6-1993, but the plaintiff did not seek that the sale deed dated 14-6-1993 be declared void, as defendants No.1 to 3 are not entitled to alienate the entire property. The trial Court recorded a clear finding that the plaintiff is entitled for $\frac{3}{4}$ th share of the suit property and also granted for declaration of title to that extent and also directed for recovery of possession and in appeal preferred by defendants No.1 to 3 that finding has been affirmed by the first appellate Court on merits, but thereafter, though no plea has been taken by defendants No.1 to 3 that the suit was not maintainable for not claiming the relief of partition and declaration and likewise, since the sale deed dated 14-6-1993 has not been sought to be declared void, the suit is not maintainable, yet the first appellate Court proceeded and held that suit for partition ought to have been filed and the sale deed dated 14-6-1993, though has been said to be not binding on the plaintiff, yet it could have been sought to be not binding and thereby set aside the decree on this count only.

9. The first appellate Court has clearly recorded a finding that the plaintiff has asserted by pleading in the plaint that the sale deed executed by defendants No.1 to 3 in favour of defendants No.4 to 17 is not binding on him, but he should have sought relief that the sale deeds are not binding on him. The plaintiff is not a party to the sale deeds dated 14-6-1993 allegedly executed by defendants No.1 to 3 in favour of defendants No.4 to 17, therefore, he could have

claimed declaring the sale deeds not binding on him, but no such objection was taken by the defendants either before the trial Court or in first appeal before the first appellate Court and the trial Court decreed the suit without such declaration. But the first appellate Court reversed the decree of the trial Court on the ground that no such declaration that the sale deed dated 14-6-1993 is not binding, has not been claimed. The defendants did not take any such objection before the trial Court at the earliest available opportunity, in that event, the plaintiff could have amended his plaint seeking the sale deed dated 14-6-1993 to be not binding on him. Therefore, the first appellate Court is not right in reversing the decree only on the ground that the declaration to the effect that the sale deed dated 14-6-1993 is not binding has not been sought, in absence of objection and grounds in the memo of appeal, as the plaintiff cannot be taken by surprise by any party to suit and that too at the appellate stage and without giving him opportunity to meet those grounds at the appellate stage also, particularly when it has clearly been pleaded in the plaint that the sale deed dated 14-6-1993 is not binding on him. In view of that, the finding recorded by the first appellate Court to that extent is hereby set aside.

10. Now, coming to the next substantial question of law, only suit for declaration of title and possession was filed by the plaintiff which the trial Court has granted to the extent of $\frac{3}{4}$ th share and first appellate Court has affirmed on merits, but again the first appellate Court has held that the relief of partition could have been asked for by the plaintiff and without that, declaration of title cannot be

granted. This plea that relief of partition was necessary to be asked for was not raised either before the trial Court or in the memo of appeal by the defendants before the first appellate Court and the plaintiff is deprived of his opportunity to meet that ground even before the first appellate Court, as it has been held so by the first appellate Court.

11. Order 7 Rule 7 of the CPC states as under: -

“7. Relief to be specifically stated.—Every plaint shall state specifically the relief which the plaintiff claims either simply or in the alternative, and it shall not be necessary to ask for general or other relief which may always be given as the Court may think just to the same extent as if it had been asked for. And the same rule shall apply to any relief claimed by the defendant in his written statement.”

12. A careful perusal of the aforesaid provision would show that the provisions of Order 7 Rule 7 of the CPC are so widely worded that they do enable the Court to pass decree for partition in a suit for declaration of title to immoveable property and possession thereof where it turns out that the plaintiff is not entitled to all the interest claimed by him in the suit property. In such a situation there is nothing unusual in giving relief to the parties by directing partition of the suit property according to the share of the parties established in the suit. The normal rule that relief not founded on the pleadings should not be granted is not without an exception. Where substantial matters constituting the title of all the parties are touched in the issues and have been fully put in evidence, the case does not fall within the aforesaid rule. The Court has to look into the substance of the claim in determining the nature of the relief to be granted. Of course, the Court while moulding the relief must

take care to see that relief it grants is not inconsistent with the plaintiff's claim, and is based on the same cause of action on which the relief claimed in the suit, that it occasions no prejudice or causes embarrassment to the other side, that it is not larger than the one claimed in the suit, even if, the plaintiff is really entitled to it, unless he amends the plaint; that it had not been barred by time on the date of presentation of the plaint. (See **Smt. Neelawwa v. Smt. Shivawwa**¹.)

13. In similar circumstances, the Karnataka High Court in **Smt. Neelawwa** (supra) held as under: -

“No doubt the plaintiff has sought for exclusive title and he has not been able to prove his exclusive title; but has been able to prove that he is entitled to a half share in the suit properties. When a party claims exclusive title to the suit property and is liable to establish that he is entitled to half of the suit property, it will not be unusual for the Court to pass a decree for partition and possession of his half share. In fact such a relief flows from the relief prayed for in the plaint that he is the exclusive owner of the entire property. When a larger relief is claimed and what is established is not the entire relief claimed in the suit but a part of it, as whole includes a part, larger relief includes smaller relief, and it also arises out of the same cause of action. Therefore in the instant case, nothing prevented the Court to pass a decree for partition, in order to avoid another suit for partition and to give relief to the party in conformity with the right he had established.”

14. Similar is the proposition held by the Karnataka High Court in the matter of **Indira Bai v. Prof. Shyamasundar**², wherein it has been held that under Order 7 Rule 7 of the CPC, in a suit for partition shares of the parties have to be determined according to the findings arrived at by the court. The court is also required to take into account the events that take place subsequent to the filing of

1 AIR 1989 Karnataka 45

2 ILR 1988 Kar 1095

the suit and also determine the shares according to such events if these events have a bearing on the quantum of share of the parties to the suit. That the reliefs prayed for in the suit can be moulded as long as such relief flow from the same cause of action even though such reliefs are specifically prayed for or not.

15. Reverting to the facts of the case in light of the principle of law laid down by the Karnataka High Court in the afore-cited cases (supra), it is quite vivid that that plaintiff has filed suit for declaration of title and injunction in which the relief of plaintiff's share of partition and separate possession can always be granted even in absence of specific relief, particularly when it has not been objected to by the defendants at the earliest available opportunity and when it has not caused any prejudice to the defendants invoking Order 7 Rule 7 of the CPC. Likewise, there is no plea either in the written statement or in the memo of appeal before the first appellate Court that in absence of relief of partition, decree of declaration of title and possession cannot be granted, as the plaintiff cannot be taken at surprise by the other side at the appellate stage. As such, the judgment & decree of the first appellate Court as contained in paragraph 30 of the said judgment is set aside. The plaintiff's suit stands decreed, as decreed by the trial Court.
16. The substantial questions of law are answered accordingly and the appeal is allowed to the extent indicated herein above. No order as to cost(s).
17. Decree be drawn-up accordingly.

Sd/-
(Sanjay K. Agrawal)
Judge