

AFR

HIGH COURT OF CHHATTISGARH, BILASPUR**Second Appeal No. 100 of 2001****Judgment reserved on:19.03.2019****Judgment delivered on: 09.04.2019**

1. Barat Ram, S/o Neelamber, aged about 55 years.

2. Jeetram, S/o Neelamber, aged about 48 years,

3. Smt. Sewati Kuwar (since deceased) through LRs.

3.A Smt. Moharmati Patle, D/o Late Shri Puranjanlal, Wife of Shri Padamlochan, aged 60 years, R/o Village Hadaha, Post – Khursi, Tahsil Pamgarh, District Janjgir-Champa (C.G.)

3.B Smt. Dropati Patel, D/o Late Puranjalal, W/o Late Dayaram Patel, aged about 58 years, R/o Village- Khaira, Post Jairam Nagar, Tahsil Masturi, Distt. Bilaspur (C.G.)

3.C Smt. Ganga Patel, D/o Late Puranjalal, W/o Shri Parasram Patel, aged about 56 years, R/o Bedparsada, Post & Tahsil Masturi, Distt. Bilaspur (C.G.)

3.D Smt. Kumari Patel, D/o Late Puranjalal, W/o Shri Ramcharan Patel, aged about 54 years, R/o Village Farhada, Post- Dalha Pondi, Tahsil Akaltara, Distt. Bilaspur (C.G.)

4. Rajkumar, S/o Puranjanlal, aged about 20 years,

All resident of village Hadha Tahsl Janjgir, Distt. Janjgir-Champa, Chhattisgarh

----Appellants/Defendants**Versus**

Mahadev (since deceased) through Lrs.

1. Smt. Phool Bai (deleted)

2. Radhe Shyam, S/o Mahadev, aged about 50 years,

3. Shyam Sunder, S/o Mahadev, aged about 47 years,

4. Chotelal, S/o Mahadev, Aged about 11 years,

5. Kamlesh, S/o Mahadev, Aged about 35 years,

6. Sohan S/o Mahadev, Aged about 33 years,
Non appellants/respondents No. 1 to 6 R/o Village Loharsi,
Tah. Pam Garj, Distt. Janjgeer (Champa).
7. Smt. Shankutla, D/o Mahadev, Aged about 43 years, through
W/o Pratap Koka, R/o Aff Poat- Sarangarh, Distt. Raigarh.
8. Smt. Sahodra Yadav, D/o Mahadev, aged about 42 years,
Through W/o Amar Nath Yadav, R/o Sewni (Naila), Distt.
Janjgeer (Champa).
9. Smt. Sumitra Yadav, D/o Mahadev, aged about 39 years,
Through- W/o Ram Prasad Yadav, R/o Village-
Put Pura, Distt. Janjgeer (Champa)
10. Smt. Sushila Yadav, D/o Mahadev, Aged about 37
years, Through- W/o Kishore Yadav, R/o Village Libra,
Tah. Char Ghora, Distt. Raigarh (C.G.)
11. Smt. Usha Yadav (since deceased) through LR's.

11-A Awadhesh Kumar Yadav, H/o Late Usha Yadav, S/o
Shri Haricharan Yadav, aged about 50 years, R/o village &
post- Taga, Tahsil & Distt. Janjgeer (Champa) (C.G.)

11-B Gajendra Yadav, S/o Awadhesh Kumar, aged about
14 years,

11-C Devendra Yadav, S/o Awadhesh Kumar, aged about
11 years.

Respondents No. 11-B & C are minor through their father
Awadhesh, S/o Shri Haricharan Yadav, R/o Village & post –
Taga, Tahsil & Distt. Janjgeer (Champa) (C.G.)
12. Smt. Santoshi Yadav, D/o Mahadev, aged about 30 years,
Through W/o Sunil Kumar Yadav, R/o Kharod Nagar, Distt.
Janjgeer (Champa).

---- Respondents/Plaintiffs

For Appellants/Defendants	:	Shri Prafull Bharat & Shri R.S. Patel, Advocates
For Respondents/LRS' of Plaintiff	:	Shri Rajeev Shrivastava & Shri Malay Shrivastava, Advocates

Hon'ble Shri Justice Sanjay K. Agrawal

C.A.V. Judgment

(1) This second appeal preferred by the defendants has been admitted on following substantial question of law for determination:-

“1. Whether the first appellate Court is justified in reversing the judgment & decree of the trial Court holding that the plaintiff is entitled for declaration that he is the owner of the suit land and entitled for possession overlooking oral and documentary evidence on record ?

2. Whether, in the facts of the case, the plaintiff's suit for declaration of title and possession was maintainable in absence of suit for rectification of sale deed in view of the provisions contained in Section 26 of the Specific Relief Act, 1963 and the oral evidence by the defendants is admissible under proviso (1) to Section 92 of the Indian Evidence Act, 1872 to prove mistake in expression of contract ?”

[For the sake of convenience, parties would be referred hereinafter as per their status shown and ranking given in the suit before the trial Court]

(2) Essential facts required to be noticed for adjudication of this appeal are as under:-

(2.1) Original plaintiff – Mahadev filed a suit for declaration of title and recovery of possession against the defendants stating *inter alia* that he is title-holder of the suit land bearing Khasra Nos. 273/1, 273/3 & 273/4, total area admeasuring 6.60 acres, situated at Village – Hadha, Tahsil – Janjgir Champa, District-Janjgir Champa now. It is the case of the plaintiff that four defendants forcibly took possession of the suit land and harvested the crops standing on the suit land on 7.11.1981 and also

lodged a false complaint against him. It was further pleaded by him that revenue records (Exhibit P-9 & P-10) reflected the name of the plaintiff till the date of dispossession and thereafter, the defendants, in collusion with local revenue officials, got their names recorded in revenue records, as such, the plaintiff is entitled for declaration of title and recovery of possession of the suit land.

(2.2) Defendants No. 1 & 2 filed joint written statement stating inter-alia that the plaintiff has sold the suit land to defendants No. 1 & 2 namely Baratram & Ajeetram and their brother Puranjan (now his legal representatives are impleaded as defendants No.3 and 4 before the trial Court in the plaint) on 19.4.1971 (Ex.D/4) for cash consideration of ₹ 41,500/-, but due to typographical error, khasra number of suit land was not mentioned, but consideration amount has been paid to the plaintiff, and they are in possession of the suit land, as such, the suit deserves to be dismissed.

(2.3) The trial Court framed as many as four issues along with two additional issues and dismissed the suit vide judgment & decree dated 11.4.1997 on the ground that the plaintiff has failed to prove that he has not sold the suit land to defendants No. 1 & 2 and their brother Puranjan and further failed to prove that the defendants are in illegal possession of the suit land.

(2.4) The plaintiff preferred first appeal before the first appellate Court under Section 96 of the CPC. During pendency of first appeal, the defendants amended their written statement on 9.7.89 inserting the plea that the plaintiff be directed for rectification of sale deeds and

consequently, the plaintiff also amended his plaint and inserted para 5(A) that he has not transferred the suit land in favour of defendants No.1 & 2 and Puranjan. The first appellate Court, by the impugned judgment and decree dated 17.1.2001, set aside the judgment and decree of the trial Court and decreed the suit, against which, this second appeal under Section 100 of the CPC has been preferred by the defendants, in which substantial questions of law have been formulated, which have been catalogued in the opening paragraph of the judgment.

(3) Shri Prafull Bharat, learned counsel for the appellants/defendants, would submit as under:-

3.1 The plaintiff entered into an agreement to sale the suit land and other land on 26.2.71 (Ex.D/1) with Raghubar Son of Ramuram and Puranjan (brother of defendant No.1 & 2) Son of Lilambar and thereafter he sold 24.86 acres of land to Ramoram on 19.4.1971 (Ex.D/2) and on the same day, he also sold 24.86 acres of land to Baratram, Ajitram and Puranjan vide Ex.D/4 for cash consideration of ₹ 41,500/-. In both sale deeds, amount of consideration was ₹ 41,500/-. In Ex.D/4, which is sale made in favour of defendants No.1 & 2 and Puranjan, stamp duty was paid as ₹ 38,500/- and registration charges levied was ₹ 3000/-, whereas in Ex.D/2, stamp duty paid was as ₹ 36,200 and registration charges levied was ₹ 2300/- and pursuant to the sale, possession of entire land i.e. 24.86 acres was delivered to defendants No.1 & 2 and one Puranjan. In proceeding initiated under Section 145 CrPC, possession of the defendants was declared by the Sub Divisional Magistrate, which has been upheld

by the revisional Court also.

3.2 He would further submit that no additional evidence pursuant to the amendment was adduced by the plaintiff to prove that the suit land was not transferred in favour of defendants No.1 & 2 and Puranjan and the plaintiff has also not replied to the notice (Ex.P/5) delivered to him and in order to constitute the cause of action, crop sown by the defendants were harvested by the plaintiff, against which, FIR has been lodged. He would also submit that the first appellate Court only confining his appreciation of evidence to Ex.D/2, which is the sale made to Ramorao, which is not the disputed sale, allowed the appeal by recording a finding, which is perverse and contrary to record. He would lastly submit that the plaintiff was required to file a suit for rectification, but he did not file, therefore, bare suit for declaration of title after making sale in favour of defendants No.1 & 2 and Puranjan was not maintainable and the judgment and decree of the first appellate Court deserves to be set aside by restoring the decree passed by the trial Court and appeal be allowed.

(4) Shri Rajeev Shrivastav and Shri Malay Shrivastava, learned counsel for the respondents/legal representatives of the plaintiff, would submit that the suit land bearing khasra Nos. 273/1, 273/3 and 273/4 was never transferred to defendants No. 1 & 2 and one Puranjan by sale or otherwise. It was for the defendants to file suit for rectification, if any, if they feel that the suit land was transferred in their favour by the plaintiff. The plaintiff was not obliged to file a suit for rectification, if any. The first appellate Court acted within its scope and jurisdiction in appreciating the evidence and reached to the right conclusion that the plaintiff has not

transferred the suit land in favour of defendants No.1 & 2 and one Puranjan and therefore, rightly granted decree in favour of the plaintiff that he is title-holder of the suit land and entitled for decree for declaration of title and possession, which is neither perverse nor contrary to record and therefore, need not be interfered in exercise of jurisdiction of this Court under Section 100 of the CPC in the light of the judgment rendered by the Supreme Court in the matter of **Gurnam Singh (D) by Lrs. And others v. Lehna Singh (D) by Lrs.**¹.

(5) I have heard learned counsel appearing for the parties, considered their rival submissions made hereinabove and went through the record with utmost circumspection.

(6) For sake of convenience, second substantial question of law is taken first for determination.

Answer to 2nd substantial question of law: - This substantial question of law consists in two parts –

(1) Whether oral evidence by the defendants was admissible to prove that lands described in sale deed (Ex.P-4) were not correctly stated due to common/mutual mistake of the parties in view of proviso (1) to Section 92 of Indian Evidence Act, 1872?

(2) Whether plaintiff's suit for declaration of title and possession was maintainable in absence of suit for rectification under Section 26 of the Specific Relief Act, 1963 or the defendants were required to file suit for rectification of sale deed (Ex.D/4) to resist the suit filed by the plaintiff ?

¹ 2019 SCC OnLine SC 374

(7) Section 92 of the Indian Evidence Act, 1872 (hereinafter called as “the Act of 1872”) provides as under:-

“Section 92 - Exclusion of evidence of oral agreement:-

When the terms of any such contract, grant or other disposition of property, or any matter required by law to be reduced to the form of a document have been proved according to the last section, no evidence of any oral agreement or statement shall be admitted, as between the parties to any such instrument or their representatives in interest, for the purpose of contradicting, varying, adding to, or subtracting from, its terms:

Proviso (1).-Any fact may be proved which would invalidate any document, or which would entitle any person to any decree or order relating thereto; such as fraud, intimidation, illegality, want of due execution, want of capacity in any contracting party want or failure] of consideration, or mistake in fact or law.”

By Section 92 of the Act of 1872, the legislature has prevented oral evidence being adduced for the purpose of varying the terms of contract as between the parties to contract meaning thereby when the terms of all contracts or grant or other disposition of property are reduced in writing, whether or not such contract or grant is compulsorily required to be reduced in writing and registered, no oral evidence shall be admitted to contradict, vary, add to or subtract, from its terms.

(8) First proviso appended to this provision is exception to Section 92 of the Act 1872. By virtue of this proviso, the court can act on intrinsic evidence on the face of document itself that there was a mutual mistake. Parties can also prove about their concurrent intention at the time of execution of the document and that it failed to give effect to their concurrent intention. The mistakes contemplated in this provision are genuine and accidental mistakes just as mis-description of property. Evidence can be allowed to know whether a particular land was

conveyed under the document (see Rikhiram Pyarelal v. Ghasiram²).

(9) The Nagpur High Court in the matter of Rajaram v. Manik and others³ has held that by virtue of proviso (1) to Section 92 of the Act of 1872, oral evidence is thus admissible to prove that the expression of the contract is contrary to the concurrent intention of all the parties due to a common mistake. Sen J. pertinently held as under:-

“(9) In Proviso (1) to Section 92 of the Indian Evidence Act, 1872, it is laid down that any fact may be proved such asmistake in fact or law which would entitle any person to any decree or order relating to a document. Oral evidence is thus admissible to prove that the expression of the contract is contrary to the concurrent intention of all parties due to a common mistake: vide 'ABDUL HAKIM KHAN v. Ram Gopal', 44 All 246; 'KESHEO SINGH v. Roopan Singh', AIR (14) 1927 All 355; 'SUKHDEO RAI v. Ram Narain Bai', AIR (17) 1930 All 387 Col 1; 'DAGDU v. Bhana', 28 Bom 420; 'MADHAVJI v. Ramnath', 30 Bom 457; 'MOHOMED BHOY PUDDUMSEE v. Chutterput Singh', 20 Cal 854; 'MAHENDRA NATH v. Jogendra Nath', 2 Cal W N 260; 'ASITULLA v. Sadatulla', AIR 1918 (5) Cal 809; 'BEPIN KRISHNA v. Jogeshwar', AIR (8) 1921 Cal 730; 'NANDI LAL v. Jogendra Chandra', AIR (10) 1923 Cal 53; 'K. CHINA MELLAYYA v. K. Veeriah', AIR (3) 1916 Mad 795 Col 1 'RANGASAMI v. SOWRI', 39 Mad 792 and 'SAB HAJI v. Nawalsingh', AIR (15) 1928 Nag 4. As stated by Banerjee, J., in 'MAHENDRA NATH MUKHERJEE v. Jogendra Nath Roy Chaudhury'. 2 Cal W N 260 at p. 262, cited 'supra' the proviso is not limited in its application to suits for rectification of instruments.”

As such, oral evidence is clearly admissible to demonstrate to find out the actual, real and concurrent intention of parties in expressing the contract due to common mistake in the document.

(10) The Nagpur High Court in the matter of Rajaram (supra) has clearly held the combined effect of proviso (1) of Section 92 of Indian Evidence Act, 1872 and Section 31 of the Specific Relief Act, 1877 (pari-materia to Section 26 of Specific Relief Act, 1963) is that a defendant

² AIR 1978 MP 189

³ AIR 1952 Nagpur 90

may plead and prove any mistake in expression of contract notwithstanding that he had not filed a suit for rectification and can resist a suit on the ground that what was sold to him was different from what the document described.

(11) Similarly, the Nagpur High Court in the matter of **Balaprasad Asaram Charkha and others v. Asmabi w/o. Fakruddin Bohri**⁴ has held that combined effect of Section 31 of Specific Relief Act, 1877 (pari-materia to Section 26 of the Specific Relief Act, 1963) and Section 92, proviso (1) of the Indian Evidence Act is to entitle either party to contract, whether plaintiff or defendant, to protect his right by proving the mistaken expression of the agreement. It was observed as under:-

“10. Even if Plaintiff were required to sue for rectification of the sale deed her claim is tenable. Section 31 is an enabling provision and it is not the only remedy for seeking the relief of rectification. It is stated in the plaint in the instant case that No. 56/1 was written in the instrument clue to a common mistake. Under similar circumstances it was held in-'Mahadeva Aiyar v. Gopala Aiyar' 34 Mad 51(C), that omission of a prayer for rectification was, at most, a matter of form. If the conditions of Section 31 are satisfied, the Court cannot refuse rectification merely on account of the omission of a prayer for it. This decision was followed in-'Rangaswami v. Sowri Ayyangar AIR 1916 Mad 519(D) and-'Sabhaji v. Nawalsingh AIR 1923 Nag 4(E). In - 'AIR 1928 Nag 4(E)' the intention of the parties was to sell survey No. 181, but by mutual mistake it was shown as survey No. 161, Kin-khede A.J.C. held that the combined effect of Section 31, Specific Relief Act, and Section 92, proviso (1), Evidence Act was to entitle either party to a, contract, whether Plaintiff or Defendant, to protect his right by proving the mistaken expression of the agreement. The suit was brought within 3 years. In the instant case, the suit was brought within three years of the execution of Exhibit P-1 and as a suit for rectification it is within time. The Plaintiff would therefore be entitled to relief under this section in view of the mutual mistake.”

(12) The Madhya Pradesh High Court in the matter of **Tulsiram v.**

Durga Prasad⁵ relying upon Rajaram (supra), Balaprasad (supra) and Rikhiram (supra) has held that mutual mistake regarding Khasra Number in a sale deed can be allowed to be varied by leading oral evidence. Thus oral evidence is admissible to fill a blank which has been left in the document by common mistake.

(13) Turning to the next question, whether the defendant is entitled to resist the suit for declaration of title and possession brought by the plaintiff without getting his sale deed (Ex.D-2) rectified under Section 26 of the Act of 1963. Rectification of an instrument consist in bringing in conformity with prior real agreement between the parties. Section 26 of the Act of 1963 states as under:-

“Section 26 - When instrument may be rectified:- (1) When, through fraud or a mutual mistake of the parties, a contract or other instrument in writing (not being the articles of association of a company to which the Companies Act, 1956, applies) does not express their real intention, then--

- (a) either party or his representative in interest may institute a suit to have the instrument rectified; or
- (b) the plaintiff may, in any suit in which any right arising under the instrument is in issue, claim in his pleading that the instrument be rectified; or
- (c) a defendant in any such suit as is referred to in clause (b), may, in addition to any other defence open to him, ask for rectification of the instrument.

(2) If, in any suit in which a contract or other instrument is sought to be rectified under sub-section (1), the court finds that the instrument, through fraud or mistake, does not express the real intention of the parties, the court may, in its discretion, direct rectification of the instrument so as to express that intention, so far as this can be done without prejudice to rights acquired by third persons in good faith and for value.

(3) A contract in writing may first be rectified, and then if the party claiming rectification has so prayed in his pleading and the court

thinks fit, may be specifically enforced.

(4) No relief for the rectification of an instrument shall be granted to any party under this section unless it has been specifically claimed:

Provided that where a party has not claimed any such relief in his pleading, the court shall, at any stage of the proceeding, allow him to amend the pleading on such terms as may be just for including such claim.”

(14) In order to invoke Section 26 of Specific Relief Act, 1963), it is necessary to prove –

(1) That sale deed doesn't truly express the intention of parties to it,

(2) That it is due to mutual mistake in framing the instrument the court has not only to find it clearly proved that there has been fraud or mistake in framing the instrument, but has also to ascertain the real intention of parties in executing it.

(15) Two maxims have to be born in mind in construing a deed. Courts are bound so to construe or agreement by deed or parol. “*utres magis valeat quam pereat*” (that it may be made to operate rather than be sufficient). In Harihar Banerji v. Ramshashi Roy⁶, it was held that deeds are be construed not with a desire to find fault in them which render them defective, but are to be construed to make them operative.

(16) Other maxim is “*falso demonstratio non nocet*” a mere false description doesn't vitiate, if there be sufficient certainty as to the object.

⁶ AIR 1918 PC 102

(17) The Nagpur High Court in the matter of **Rajaram** (supra) clearly laid down the principle on which the court has to act while granting rectification. It was held as under:-

"8. The principles upon which a Court has to act before making a decree for rectification are stated in the following passage from the judgment of Lord Chelmsford, Lord Chancellor, in 'Fowler v. Fowler', 1859 4 D E G & J 250 :45 E R 97:

"The power which the Court possesses of reforming written agreements where there has been an omission or insertion of stipulations contrary to the intention of the parties and under a mutual mistake, is one which has been frequently and most usefully exercised. But it is also one which should be used with extreme care and caution. To substitute a new agreement for one which the parties have deliberately subscribed ought only to be permitted upon evidence of a different intention of the clearest and most satisfactory description. Lord Thurlow's language is very strong on this subject; he says, the evidence which goes to prove that the words taken down in writing were contrary to the concurrent intention of all parties must be strong, irrefragable evidence: 'Lady Shelburne v. Lord Inchiquin', (1784) 1 BCC 338 at p. 341. And this expression of Lord Thurlow is mentioned by Lord Eldon in the 'Marquis of Townshend v. Stangroom', (1801) 6 Ves 323 at p. 334, without disapprobation. If, however, Lord Thurlow used the word 'irrefragable' in its ordinary meaning, to describe evidence which cannot be refuted or overthrown, his language would require some qualification; but it is probable that he only meant that the mistake must be proved by something more than the highest degree of probability and that it must be such as to leave no fair and reasonable doubt upon the mind that the deed does not embody the final intention of the parties. It is clear that a person who seeks to rectify a deed upon the ground of mistake must be required to establish, in the clearest and most satisfactory manner, that the alleged intention to which he desires it to be made conformable continued concurrently in the minds of all parties down to the time of its execution, and also must be able to shew exactly and precisely the form to which the deed ought to be brought. For there is a material difference between setting aside an instrument and rectifying it on the, ground of mistake. In the latter case you can only act upon the mutual and concurrent intention of all parties for whom the Court is virtually making a new written agreement."

(18) In **Rajaram** (supra), it was also held by the Nagpur

High Court that when a mistake is established, the deed can be construed as if mistake had been rectified in a suit brought for the purpose of Section 31 of the SR Act 1877 (now Section 26 of the SR Act 1963) subject to rights of the third party. It was also held that failure to rectify the sale deed doesn't extinguish title to the property which was really sold, but was not properly described in sale deed due to mistake. It was observed as under:-

"18. When a mistake is established, the deed can be construed as if the mistake had been rectified in a suit brought for the purpose under Section 31 of the Specific Relief Act, subject to the condition that the rights of third parties acquired in good faith and for value should not be prejudiced thereby: Vide 'KOTA CHINA MELLAYYA v. Kannekanti Veeriah', AIR (3) 1916 Mad 795 Col 1; 'MAHADEO AIYAR v. Gopala Aiyar', 34 Mad 51; 'TETALI SOORAMMA v. Kovvuri Venkayya', AIR (25) 1938 Mad 589; 'MAHENDRA NATH MUKHERJEE v. Jogendra Nath Roy Chaudhury', 2 Cal W N 260; 'ASITULLA v. Sadatulla', AIR (5) 1918 Cal 809; 'NANDI LAL AGRANI v. Jogendra Chandra Dutta', AIR (10) 1923 Cal 53 at p. 56 and 'SABHAJI v. Nawalsingh', AIR (15) 1928 Nag 4. As already stated, a third party has not acquired any interest in either of the two fields, and consequently there is no question of prejudice and there is no bar to the application of the principle stated above.

19. A failure to rectify the deed does not extinguish title to the property which was really sold but was not properly described in the sale-deed due to mistake: Vide 'KESHEO SINGH v. Roopan Singh', AIR (14) 1927 All 355; 'SUKHDEO RAI v. Ram Narain Rai', AIR 1930 (17) All 387 Col 1; 'MAHENDRA NATH MUKHERJEE v. Jogendra Nath Roy Chaudhury', 2 Cal W N 260; 'ASITULLA v. Sadatulla', AIR (5) 1918 Cal 809; 'NANDI LAL AGRANI v. Jogendra Chandra Dutta', AIR (10) 1923 Cal 53 at p. 56; 'LADHA SINGH v. Munshiram', AIR (14) 1927 Cal 605; 'LAKSHMI NARAIN v. Mt. Mohammadi Begam', 7 Luck 454 and 'BARSATI v. Sarju Prasad', 14 Luck 308 at p. 315. In some of the cases, it was held that lapse of time is no bar to the grant of the relief on the ground of mistake: Vide 'MAHENDRA NATH v. Jogendra Nath', 2 Cal W N 260; 'ASITULLA v. Sadatulla', AIR (5) 1918 Cal 809; 'SUKHDEO RAI v. Ram Narain Rai', AIR (17) 1930 All 387 Col 1; 'MINALAL SHADIRAM v. Kharsetji', 30 Bom 395; 'TETALI SOORAMMA v. Kovvuri Venkayya', AIR (25) 1938 Mad 589 and 'BARSATI v. Sarju Prasad', 14 Luck 308. In 'LAKSHMI NARAIN v. Mt. Mohammadi Begam', 7 Luck 454

and BARSATI v. Sarju Prasad', 14 Luck 308, cited 'supra' it was pointed out that S. 31 of the Specific Relief Act is an enabling section and therefore the fact that a plaintiff did not choose to avail himself of the section cannot deprive him of the rights which he had acquired under a sale-deed. The same principle was applicable in the case of a defendant who can successfully resist a suit on the ground that the property in his sale-deed was wrongly described though he had not filed any suit for rectification. The second ground therefore fails."

(19) Thus, it is well settled that the defendant is entitled to resist the suit on the ground that the suit property was wrongly described in sale deed (Ex.D-4) without filing any suit for rectification under Section 26 of the Act of 1963 and the plaintiff can also maintain suit for declaration of title without filing suit for rectification. Thus, this substantial question of law is answered accordingly.

Answer to 1st substantial question of law: -

(20) Instant suit was filed by the plaintiff for declaration of title that he is title-holder of the suit land and also sought recovery of possession, which was dismissed by the trial Court holding that the plaintiff has also sold the suit land bearing khasra No. 273/1, 273/3 and 273/4, total area 6.60 acres to defendant No. 1 & 2 and their brother Puranjan vide Ex.D-4 on 19.04.1971 and delivered peaceful possession of the suit land along with 24.86 acres of the land immediately after sale to him and further held that on account of typographical mistake 6.60 acres land of khasra No. 273 were not mentioned while framing sale deed (Ex.D-2). It was also held by the trial Court that the plaintiff had entered into agreement with Raghubar and one Puranjan to sell 54.80 acres of land including the suit land and obtained advance of ₹ 5,300/-. On appeal being preferred by the plaintiff, the first appellate Court allowed the appeal and set aside the

judgment and decree of the trial Court and decreed the suit in appeal holding that the suit land was not transferred by plaintiff- Mahadeo in favour of defendant No. 1 & 2 by sale deed (Ex. D-4) and the suit land was not included in the said sale deed.

(21) The question for consideration would be whether the defendants have successfully proved that it was through mutual mistake of the parties that sale deed in question (Ex.D-4) did not truly express the intention of the parties and mistake crept in framing the instrument namely sale deed (Ex.D-4) and what was the intention of the parties in executing the sale deed to include the suit land or it was mistakenly left out while framing the instrument.

(22) The plaintiff brought on action for declaration of title and recovery of possession that he is title-holder of the suit land and in the year 1981, he had sown crops in the suit land, but the defendants threatened him to harvest the standing crops for which he served legal notice to the defendants on 28.10.1981, but the defendants instead of correcting themselves lodged FIR on 07.11.1981 against him and harvested the crops and forcibly took possession of the suit land, as such, he is entitled for declaration of title and possession. The defendants set-up a plea that they are title-holders of the suit land pursuant to sale deed (Ex.D-4) which includes the suit land also and possession was also delivered to them along with khata of the suit land. It was further pleaded that in *sansodhan panji* (Ex.D-7), the concerned revenue officer while making mutation has totaled the suit land as 18.26 acres and taking advantage of said entry, the plaintiff initiated proceeding

under Section 145 of the Cr.P.C. against defendants, in which learned Sub-Divisional Magistrate in Case No. 30/1975 declared that the defendants are in possession of the suit land and that order was confirmed by the Additional Sessions Judge in Cr. R. No. 51/1976 on 01.03.1976 holding that the defendants are in possession of the suit lands.

(23) Thus, it appears that the plaintiff did not even aver in the original plaint filed that he has not sold the suit land in favour of defendant No. 1 & 2 and one Puranjan by Ex.D-4 and only when the defendants in the first appellate Court with the leave of the trial Court inserted amendment that the plaintiff be directed to rectify the sale deed pursuant to order of the trial Court dated 08.07.1999, then only the plaintiff on 12.11.1999 amended the plaint stating *inter alia* that the suit land was never transferred in favour of defendant No. 1 & 2 and one Puranjan by Ex.D-4, as in the sale deed the suit land has not been included and suit is barred by limitation which the first appellate Court has accepted and granted decree in favour of the plaintiff.

(24) On close perusal of oral and documentary evidence brought on record, following facts would emerge on the face of record:-

24.1. The plaintiff entered into agreement with one Raghubar and one Puranjan to sale 54.80 acres of land vide Ex.P-1 for cash consideration of ₹ 85,000/- and obtained ₹ 5,000/- as advance as this fact has been admitted by the plaintiff himself in paragraph 7 of his cross-examination, but since his sister's land was also included in this total area, he decided to sale his land only 49.80 acres of land to

defendants No.1 & 2 and his brother Puranjan and to one Ramorao excluding his sister's land.

24.2. Two sale deeds dated 19.04.1971 (Ex.D-2 & Ex.D-4) were executed in favour of Ramorao and in favour of defendant No. 1 & 2 and his brother Puranjan for consideration amount of ₹ 41,500/- alienating each of them total 24.86 and 24.86 acres respectively to them by the plaintiff in presence of two witnesses namely Panchram and Tarusingh Patel, respectively.

24.3. In the sale deed (Ex.D-2), which was executed by the plaintiff in favour of Ramorao, while typing the sale deed, 6.60 acres of land was omitted and not typed, but it was subsequently inserted by hand and initial was made by plaintiff Mahadeo, but in sale deed (Ex.D-4) though the total area of land has been mentioned as 24.86 acres of land, but in total, it comes to 18.86 acres of land.

25.4. Mutation pursuant to this sale was made in favour of the defendants on 09.04.1973/23.04.1973 (Ex.P-7) by the concerned Revenue Officer in presence of the parties including the plaintiff, but he did not object the fact of mutation of suit land in favour of the defendants and allowed the names of the defendants to be mutated in the revenue records and thereby the plaintiff's khata was closed.

24.5. The possession of entire suit land admeasuring 24.86 acres was delivered to defendant No. 1 & 2 and one Puranjan immediately after sale made by the plaintiff in their favour and in a proceeding initiated under Section 145 of the CrPC, learned Sub Divisional Magistrate recorded a finding that the defendants are in possession of the suit

land since the date of purchase and that finding was upheld by the learned Sessions Judge in revision dated 1.3.1976 holding that the defendants are in possession of suit land pursuant to sale deed (Ex.D-4).

24.6. Since the plaintiff sold his entire land *i.e.* 24.86 acres to the defendants vide Ex.D-4 and 24.86 acres to one Ramorao vide Ex.D-2 and thus, he sold the entire land which he had in his revenue account or khata and the Revenue Officer taking note of this position and finding that he had no land in his khata, closed his khata duly recorded in Ex.D-7, but the plaintiff taking advantage of note made by the Revenue Officer in Ex.D-7 that total area of land sold to the defendants mentioned in Ex.D-4 comes to 18.26, got his name recorded to the extent of 6.60 acres in revenue record and got issued a new khata for said land, which is the suit land.

(25) The above recorded facts clearly establish that plaintiff-Mahadeo firstly agreed to sale his entire land to Raghubar and defendant No.1 & 2 and his brother-Puranjan and accordingly, executed two sale deeds (Ex.D-2 and Ex.D-4) on 19.04.1971 for alienating 24.86 acres to each of them getting consideration of ₹ 41,500/- and delivered peaceful possession of lands owned by him and thereafter the defendants got their names recorded in revenue records in presence of the plaintiff (Ex.D-7) in which Revenue Officer made a note that total area of lands purchased by the defendants comes to 18.46 acres and thereafter, the plaintiff got the suit land 6.60 acres re-recorded in his name by issuance of fresh khata and tried to interfere with possession of the defendants, for which the

defendants lodged FIR against the plaintiff. Not only this, the plaintiff initiated Section 145 CrPC proceedings against the defendants, in which the competent Magistrate returned a finding that the defendants are in possession of the suit land, which was affirmed in revision, as such, the defendants' possession over the suit land is established since the date of purchase of the suit land. It appears that the plaintiff has agreed to sale and thereafter sold the total suit land i.e. 24.86 acres to defendants No. 1 & 2 and his brother – Puranjan, but while framing sale deed (Ex.D-4) though it was framed completing all the formalities including consideration amount and areas as 24.86 acres what was actually sold, but suit land bearing khasra Nos. 273/1, 273/3 and 273/4 area 6.60 acre was omitted to be incorporated in sale deed (Ex.D-4) by law, which was corrected in case of Ramoram (Ex.D-2) then and there, but it could not be noticed and corrected in case of the defendants, as such, it is the case of mutual mistake of parties in framing sale deed (Ex.D-4) as contract in shape of sale deed did not truly express the intention of parties as real intention of parties was to transfer the entire land 24.86 acres including the suit land in favour of defendants No.1 & 2 and his brother – Puranjan in executing the document/sale deed (Ex.D-4) and thereby a bare typographical error crept in framing sale deed, the title of suit land which had already been conferred to defendants No.1 & 2 with Puranjan will not revert back to the plaintiff on the basis of making revenue entry and issuance of new khata in his favour. The first appellate Court misdirected himself by undertaking the appreciation of evidence confirming to Ex.D-2 i.e. sale deed executed by the plaintiff in favour of Ramoram and thereby set aside the judgment and decree of the

trial Court which is well merited.

(26) In view of above-stated legal analysis, the judgment and decree of the first appellate Court suffers from perversity and illegality, which is liable to be and is hereby set aside and that of the trial Court is restored and thereby the plaintiff's suit would stand dismissed. The substantial questions of law are answered accordingly.

(27) The second appeal is allowed to the extent indicated hereinabove. No cost(s).

(28) A decree be drawn-up accordingly.

Sd/-

(Sanjay K. Agrawal)
Judge

B/-