

HIGH COURT OF CHHATTISGARH, BILASPUR

Judgment reserved on 22-4-2019

Judgment delivered on 21 -06-2019

FA No. 541 of 2017

1. Shambhu Prasad S/o Raghunath Prasad, Aged About 68 Years R/o Village Gorakhnathpur, P. S. Jai Nagar, Tahsil Surajpur, District Surajpur, Chhattisgarh.
2. Dhananjay, S/o Shambhu Prasad, Aged About 50 Years R/o Village Gorakhnathpur, P. S. Jai Nagar, Tahsil Surajpur, District Surajpur, Chhattisgarh.

---- Appellants

Versus

1. Sudheer Prasad S/o Late Sudarshan Prasad, Aged About 35 Years R/o 1 B , 239, Hospital Colony, Bishrampur, District Surguja, Chhattisgarh., Chhattisgarh
2. Ramadhar Kushwaha, Naib Tahsildar, Pilkha, Bishrampur, District Surguja, Chhattisgarh.
3. State Of Chhattisgarh, Through Collector, Surguja, Ambikapur, District Surguja, Chhattisgarh..

---- Respondents

For appellants : Mr. H.B. Agrawal, Sr. Advocate with
Smt. Meera Jaiswal, Advocate

For respondent No.1 : Mr. Shashi Bhushan Tiwari, Advocate

For respondent No.2 : None.

For respondent No.3/ : Smt. Subha Shrivastava, Panel Lawyer
State.

SB: Hon'ble Shri Justice Ram Prasanna Sharma

CAV JUDGMENT

- 1) This appeal is preferred under Section 96 of the Code of Civil Procedure, 1908 against the judgment/decreed dated 1-11-2017

passed by 3rd Additional District Judge, Surajpur, Dist. Surajput (CG) in Civil Suit No. 77-A/11 wherein the said court decreed the suit filed by the respondent No.1 for declaration of title, restoration of possession and permanent injunction over the suit land bearing survey No. 202/2, 202/5, 233/2 (New No. 115, 134/1 & 142) area measuring 0.610, 0.510 and 1.450 total area 2.570 hectares situated at village Gorakhnathpur, Patwari Halka No. 25, Tahsil Surajpur, District Surajpur (CG).

2) As per version of respondent No.1/plaintiff, the suit property was recorded in the name of his father namely Sudarshan Prasad and after his death he succeeded the said property. It was pleaded that said property was purchased by his father from one Smt. Joginder Kaur vide registered sale deed and his father was cultivating the said land with the help of labourers. It was further pleaded that appellant No.1 and his son were residing at Bishrampur. There was some dispute between appellant No.1 and his son, therefore, appellant No.1 came to village Gorakhnathpur and father of respondent No.1 namely Sudarshan Prasad permitted him to reside over the suit property till he makes some alternate arrangement. It is pleaded that in order to grab the property, appellant No.1 moved an application for mutation before the Naib Tahsildar for which reports were made to Police. Subsequently father of respondent No.1 filed a suit for injunction which was

dismissed in default. Naib Tahsildar, Pilka after dismissal of the suit mutated the name of appellant No.1 in the records though he does not have any title.

3. As per version of appellant No.1, father of respondent No.1 and appellant No.1 hails from common ancestral and they are having joint family property in village Bheladi District Chhapra (Bihar). Both brothers had purchased properties at Bheladi jointly not only this they had also purchased certain other properties. The suit property is also purchased from the funds of joint family properties, therefore, all the properties are joint family properties and the appellant No.1 was in possession of premises and was cultivating the land also. Sale deed was made by both the brothers jointly after paying sale consideration. Taking advantage of the situation that at the time of execution of sale deed appellant No.1 was in Bihar, father of respondent No.1 got the sale deed executed in his individual name.

4) Learned counsel for the appellants would submit as under:

- i) Suit filed by father of respondent No.1 was dismissed on 25-1-1995 for want of prosecution, therefore, Rule 9 of Order 9 of the CPC would operate against respondent No.1 and he is precluded from bringing a fresh suit in respect of same cause of action.
- ii) Father of respondent No.1 and appellant

No.1 constituted joint family and having properties in their joint names thus presumption of joint Hindu family and its nucleus arises.

lii) Respondent No.1 was under obligation to prove that suit property was not purchased from the funds of joint family and it was purchased individually by Sudarshan Prasad, but that is not proved.

iv) The trial Court has ignored the document (Ex.D/1 and D/2, D/6, D/7, D/8, D/9 D/10, D/11, D/17, D/25 and D/26, therefore, finding of the trial court is liable to be reversed.

5) On the other hand, learned counsel for the respondent No.1 would submit that cause of action accrued on 30-3-2011 when the name of appellant No.1 was ordered to be recorded jointly with name of respondent No.1 on the basis of an application filed on 1-5-2010, with the copy of the Ex.P/26 which is interlocutory order of civil court and representing the same to be a decree of civil suit is fraud on revenue court. He would further submit that the appellant No.1 filed the counter claim before the trial Court which was dismissed, but no appeal has been preferred by the appellant No.1 against the said decree. The appeal is preferred only decreeing the suit of respondent No.1, therefore, present appeal is not

maintainable. Previous suit was dismissed for non-prosecution, hence there was no decision of civil court, therefore, the trial Court is right in holding that principle of *res judicata* is not applicable in the present case. Order dated 28-2-1997 (Ex.P/26) was on an application for temporary injunction which is interlocutory matter and same is not decision of the court. Documents D/1 and D/2 are affidavits filed in the previous suit of 1997 in a proceeding for temporary injunction and same has no bearing with the merits of the case. Ex.D/17 and D/25 are orders of revenue court which were related to recording of name with respect to possession only in Khasra papers of the said year and there is no finding that property is joint property. He would further submit that the revenue court has no authority to decide the title, therefore, all the documents related to revenue court are not relevant for deciding the title between the parties. Finding recorded by the trial Court is based on proper marshalling of oral and documentary evidence and same is liable to be affirmed.

6) I have heard learned counsel for the parties and perused the record in which judgment and decree has been passed.

7) The first question for consideration of this court is whether the property in question is joint property or whether it is acquired by Sudarshan Prasad who is father of respondent No.1.

8) Respondent No.1/plaintiff adduced evidence of himself as PW/1 and produced documents Ex.P/1 to P/29. Appellant No.1/defendant adduced evidence of Tarsem Singh (DW/1), Shambhu Prasad (DW/2) and Dhananjay Prasad (DW/3) and produced documents Ex.D/1 to D/25. As per version of Sudheer Prasad (PW/1), suit property was purchased by his father namely Sudarshan Prasad on 11-10-1983 from Smt. Jogendra Kaur for cash consideration of Rs.15,000/-. As per his version, his father was working as an Accountant in Bishrampur Colliery and he was cultivating the land with the help of labourers and producing paddy and Makkai over the said land. After passing of his father, he is in possession of land and cultivating of paddy over the suit property and his mother is also in possession of the said land. Version of this witness is supported by Ex.P/9 which is registered sale deed executed in favour of Sudarshan Prasad in which suit property is clearly mentioned.

9) In rebuttal, appellant No.1 side produced affidavit of Tarsem Singh (DW/1), Shambhu Prasad (DW/2) and interim applications, other sale deeds, orders of revenue court and other papers regarding interlocutory applications which are Ex.D/1 to D/25. Oral evidence of Tarsem Singh (DW/1), Shambhu Prasad (DW/2) and Dhananjay Prasad (DW/3) is not sufficient to establish that property in question was purchased out of income of joint hindu family

property. No one deposed that which was the joint property and what was the income of the joint property and who was in possession of the said property and who accounted for expenses and earning of the said property. No account was produced before the trial Court regarding earning of joint property.

10. The trial Court has elaborately discussed the entire evidence and recorded finding that after assessing the evidence, it is not established that suit property was purchased out of earning of joint property, therefore, it is not rebutted that property was solely purchased by father of respondent No.1 Sudarshan Prasad as per Ex,P/29. In view of the above, the trial Court is right in recording the finding that property in question is not purchased out of income of joint property, but it is purchased by Sudarshan Prasad and he is sole owner of the property and after passing of Sudarshan Prasad, respondent No.1/legal representative of Sudarshan Prasad are tittle holder of the property in question.

11) It is contended on behalf of the appellant No.1 that previous suit was dismissed for want of prosecution, therefore, no suit can be brought by respondent No.1. Admittedly, previous suit was dismissed in the year 1995 but present suit was filed on the ground that when name of appellant No.1 was ordered to be recorded jointly by the Revenue Court on 30-3-2011. All the documents regarding revenue court filed by appellant No.1 side is not related

to title because declaration of title is exclusive jurisdiction of the civil court. This jurisdiction is not vested in any revenue court, therefore, order passed by the Naib Tahsildar/ Sub-Divisional Officer or Revenue Board has no bearing with issue of title between the parties.

12) In view of the above, the trial Court is right in holding that present suit is maintainable looking to the cause of action and order of revenue authorities is not order of deciding the title, therefore, same will not help to appellant No.1. Affidavits Ex.D/1 and D/2 were filed in previous suit in support of interlocutory application filed under Order 39 Rule 1 and 2 of the CPC, 1908 and same is not evidence before the Court. Affidavits (Ex,D/1 and D/2) were filed by Balwir Singh and Tetri Devi and both have not entered into witness box before the trial Court, therefore, Ex. D/1 and D/2 for which respondent No.1 was not provided opportunity to cross-examine, cannot be taken as evidence. The trial Court is right in holding that revenue court has no authority to decide the issue between the parties. Finding of the trial court is based on proper marshalling of the evidence and after re-assessing the evidence, this court has no reason to substitute contrary finding.

13) As a fallout and consequence of the aforesaid discussion, the appeal is held to be devoid of merit and same is liable to be

dismissed. Accordingly, decree is passed in favour of respondent No.1 and against the appellants as under:

- (i) The appeal is dismissed with cost.
- (ii) Appellants to bear the cost of the respondent No.1 through out.
- (iii) Pleader's fee., if certified, be calculated as per Schedule or as per certificate whichever is less.
- (iv) A decree be drawn up accordingly.

Sd/-

(Ram Prasanna Sharma)
JUDGE

Raju