

HIGH COURT OF CHHATTISGARH, BILASPUR**Second Appeal No.680 of 2018****Judgment reserved on :15.11.2019****Judgment delivered on:25.11.2019**

Tulsa Bai D/o Thanda Ram (Dead) LR's

1. Phuleshwari alias Ramvati, aged 50 years, D/o Bodhiram Caste Ravat Occupation Agriculture
2. Tularam aged 68 years, S/o Bodhiram Caste Ravat, Occupation-Agriculture

Both R/o Village Dansara Tehsil Sarangarh, District Raigarh (CG)

----- Appellants/Defendant No.1 & 2)**Versus**

1. Ganesh Ram aged 57 years S/o Tiharu Caste Teli Occupation Agriculture R/o Village Khoksipali Tehsil Sarangarh District Raigarh (CG)

----- Plaintiff

2. Samaru aged 60 years S/o Nanhu Caste Ravat Occupation Agriculture
3. Gahira Ram aged 58 years, S/o Nanhu Caste Ravat, Flocculation Agriculture
4. Bundram aged 48 years S/o Nanhu Caste Ravat Occupation Agriculture

Respondent No's 2 to 4 R/o Village Dansara Tehsil Sarangarh District Raigarh (CG)

5. Droupati Bai aged 53 years D/o Nanhu Caste Ravat Occupation Agriculture R/o Village Devgaon, Tehsil Sarangarh District Raigarh (CG)
6. State of Chhattisgarh Through Collector Raigarh District Raigarh (CG)

----- Respondents

For Appellants/Def.No.1&2:	Mr.S.N.Nande, Advocate
For Res.No.1/Plaintiff	: Mr.Ratan Pusty, Advocate
For Respondent No.6	: Mr.Anshuman Rabra,P.L.
For other respondents	: None present

Hon'ble Shri Justice Sanjay K. Agrawal

C.A.V. Judgment

1. The substantial question of law involved, formulated and to be answered in this second appeal preferred by the appellants herein/defendants No.1 and 2 is as under:-

"Whether findings of the Appellate Court decreeing the plaintiff's claim with regard to the plaint Schedule-B property by upholding part of the registered deed of sale dated 31.03.1995 (Exp-3), executed in his favour by legal representatives of one Nanhu Ram and Gahira Ram, could be held to be sustainable, particularly, when the right of said Nanhu Ram and Gahira Ram was itself not found to be proved in an earlier instituted suit, as evidenced by judgment and decree dated 21.02.1994 and order dated 19.08.1994 ?"

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

2. The suit land bearing Khasra No.294/2, area 1.39 acres, Khasra No.214/2, area 0.33 acre and Khasra No.216/1, area 0.10 acre situated at village Dansara, Tahsil Sarangarh, Distt. Raigarh are subject-matter of the dispute in the instant second appeal. Originally all the suit lands belonged to one Thanda Ram. Firstly, the land bearing Khasra No.294/2, area 1.39 acre is said to have been sold by Thanda Ram in favour of Nanhu Ram on 21.6.72 vide Exp.P-1 and the plaintiff has purchased the suit land

from defendants No.3 to 7 i.e. legal representatives of Nanhu Ram. Likewise, the land bearing Khasra No.214/2 area 0.33 acre and Khasra No.216/1 area 0.10 acre are said to have been purchased by Gahira Ram from Thanda Ram vide registered sale deed dated 19.12.78 (Ex.P-2) and the plaintiff is said to have been purchased the suit land from legal representatives of Nanhu Ram including Gahiraram by registered sale deed dated 31.3.95 (Ex.P-3).

3. Civil Suit NO.12A/81 (hereinafter called as "Suit NO.1") filed by one Nanhuram against daughters of Thanda Ram namely Sonai and Tulsa-defendant No.1 and one Jogender Singh, father of the plaintiffs seeking declaration of title in respect of the suit lands claiming himself to be adopted son of Thanda Ram. In that suit, present appellant Tulsa Bai, daughter of Thanda Ram filed written statement and denied the fact of sale by her father. That civil Suit No.1 was decreed by the trial Court in favour of the plaintiff Nanhu on 25.3.85 (Ex.P-5) upholding his claim to the property of deceased Thanda Ram in respect of the property shown in Schedule 'A' of the plaint of Suit No.1, but in first appeal under Section 96 of the CPC preferred by Sonae and Tulsa (appellant herein) questioning the judgment and decree of the trial Court of Suit No.1, by the judgment and decree dated

2.1.86 the first appellate Court allowed the appeal and set aside the judgment and decree of the trial Court with regard to the property shown in Schedule 'A' and the suit filed by plaintiff Nanhuram was dismissed. The judgment and decree of the first appellate Court was affirmed by the High Court of Madhya Pradesh in Second Appeal No.13/1986 and ultimately the SLP against the judgment of the second appellate Court was also not entertained by the Hon'ble Supreme Court.

4. In the instant suit (hereinafter called as 'Suit No.2') from which this second appeal has arisen was filed by plaintiff/respondent No.1-Ganeshram in respect of the aforesaid suit land on the strength of sale deed dated 31.3.1995 (Ex.P-3) for declaration of title, possession and mesne profit in which defendants No.1 and 2 filed their written statement and contended that vendor to plaintiff i.e. defendants No.3 to 7 i.e. LR's of Nanhu, had no title to the suit land as Suit No.1 filed by Nanhuram though initially decreed by the trial Court, but subsequently in first appeal, the first appellate Court allowed the appeal and dismissed the suit and the High Court of Madhya Pradesh has affirmed the judgment and decree of the first appellate Court in Second Appeal No.13/1986 and SLP was not entertained

by the Hon'ble Supreme Court. Consequently, no title was passed in favour of the plaintiff by sale deed dated 31.3.1995 (Ex.P-3) and the suit is hit by principle of res-judicata.

5. The trial Court after appreciating oral and documentary evidence available on record, by its judgment and decree dated 18.5.2017, dismissed the suit holding that the suit properties were subject-matter of Suit NO.1, which was decreed by the trial Court, but decree was set-aside by the first appellate Court and affirmed by the second appellate Court and therefore, Nanhuram had no right to the suit land. It was also held that since vendor-Nanhuram had no title to the suit lands, therefore, plaintiff-Ganeshram did not acquire any title over the suit land. In first appeal preferred by plaintiff-Ganeshram before the first appellate Court, the said Court set aside the judgment and decree of the trial Court and decreed the suit in favour of the plaintiff holding that the suit was not hit by principle of res-judicata and in Suit No.1, the land bearing Khasra No.214/2 area 0.33 acre and Khasra No.216/1 area 0.10 acre purchased by Gahira Ram vide Ex.P-2, there was no claim made and plaintiff-Nanhuram as he had expressly excluded the above-stated suit lands. Therefore, the plea of res-

judicata would not be applicable and the plaintiff has proved his title in respect of the property shown in Schedule 'B' of the plaint. Questioning the judgment and decree of the first appellate Court, the appellants herein/defendants No.1 and 2 preferred this second appeal under Section 100 of the CPC, in which substantial question of law has been formulated by this Court, which has been set-out in the opening paragraph of this judgment.

6. Mr. S. N. Nande, learned counsel for the appellants/defendants No.1 and 2, would submit that the first appellate Court fully went wrong in decreeing the suit of the plaintiff firstly with regard to the land bearing Khasra No.294/2 area 1.39 acre as the said land was subject-matter of the earlier Suit No.1 in which Nanhuram claimed title over the suit land having been purchased the suit properties from Thandaram by registered sale deed dated 21.6.1972 (Ex.P-1) and that was decreed by the trial Court in Suit No.1, though decree of the trial Court was set aside by the first appellate Court on the sole ground that Nanhuram was not adopted son of Thanda Ram and the judgment and decree of the first appellate Court was affirmed by the second appellate Court and SLP against the judgment of the second appellate Court was not entertained by the Hon'ble

Supreme Court and the plaintiff has purchased the suit land from legal representatives of Nanhuram including Gahira Ram, as such, title of Nanhuram having been finally adjudicated in Suit No.1 and plaintiff-Ganeshram being purchaser from legal representatives of Nanhuram i.e. defendants No.3 to 7, decree for declaration of title could not have been granted in favour of the plaintiff based on the principle that Nanhu has already claimed title over the suit land and held to be not title-holder of the suit land in first round of litigation in Suit No.1 in respect of the suit land, but the first appellate Court has committed legal error in decreeing the suit holding that the plaintiff is title-holder with respect to the land bearing Khasra No.294/2 area 1.39 acres. With respect to the lands bearing Khasra No.214/2 area 0.33 acre and Khasra No.216/1 area 0.10 acre, he would further submit that the plaintiff has claimed that Thanda Ram sold the suit property to defendant No.5-Gahira Ram vide Ex.P-2 on 19.12.1978 and thereafter Gahira Ram is said to have been sold the same to the plaintiff, but the plaintiff has not adduced any evidence to prove the contents of sale deed dated 19.12.1978 (Ex.P-2). Therefore, further transfer of title by defendant No.5-Gahira Ram in favour of the plaintiff by sale deed dated 31.3.1995

(Ex.P-3) cannot be said to have been proved conferring title to the plaintiff, as such, the impugned judgment and decree of the first appellate Court deserves to be set aside and that of the trial Court be restored.

7. Mr. Ratan Pusty, learned counsel for respondent No.1/plaintiff, would submit that in suit No.1 the trial Court held that Thanda Ram was title-holder of the land bearing Khasra No.294/2 area 1.39 acres, but thereafter the first appellate Court set aside that decree of the trial Court only on the ground that Nanhu was not adopted son of Thanda Ram, but the first appellate Court did not set aside finding of the trial Court that Nanhu has purchased the suit property from Thanda Ram by sale deed dated 21.6.1972 (Ex.P-1), therefore, that would not operate as res-judicata or constructive res-judicata in second suit and alienation made by defendants No.3 to 7 in favour of the plaintiff with regard to the land bearing Khasra No.294/2 area 1.39 acres is valid and has already been decreed by the first appellate Court. He would also submit that so far as the land bearing Khasra Nos.214/2 and 216/1 is concerned, the said land was independently purchased by defendant NO.5-Gahira Ram from Thanda Ram vide Ex.P-2 dated 19.12.1978 and having independent title he has sold

the suit land in favour of the plaintiff and the suit land of Gahira Ram was expressly excluded from earlier suit, therefore, the plaintiff being purchaser from Gahira Ram, title has been conferred to him and as such, decree has rightly been granted by the first appellate Court in his favour and the plaintiff has proved the transfer of title by the aforesaid sale deeds firstly in favour of Gahira Ram and thereafter in his favour by registered sale deed dated 31.3.1995 (Ex.P-3) and as such, the second appeal deserves to be dismissed.

8. I have heard learned counsel for the parties and considered their rival submissions made hereinabove and also went through the records with utmost circumspection.

9. The Supreme Court in the matter of **Ferro Alloys Corpn. Ltd. and another v. Union of India and others**¹ has held that before any issue is said to be heard and finally decided under Section 11 of the CPC, the Court considering it has to be shown to have expressly considered such an issue and to have decided it one way or other and such decision should have obtained finality in hierarchy of proceedings. Then only such an issue can be said to be heard and finally decided between the parties.

¹ (1999) 4 SCC 149

10. As noticed hereinabove, in Suit No.1 plaintiff Nanhuram in that suit claimed title over the land bearing Khasra No.294/2 area 1.39 acres having been purchased from Thandaram by registered sale deed dated 21.6.1972 and the trial Court in Civil Suit No.12A/81 by the judgment dated 25.3.85 (Ex.P-11) decreed the suit holding that plaintiff-Nanhuram is title-holder of the land bearing Khasra No.294/2 area 1.39 acres and decreed the suit with respect to the suit land shown in Schedule 'A' of the plaint, but the first appellate Court on appeal being preferred by legal representatives of Thandaram set aside the judgment and decree of the trial Court by its judgment dated 2.1.86 (Ex.D-3) holding that Nanhuram is not adopted son of Thandaram and allowed the appeal in toto and resultantly, the suit was dismissed and that was upheld by the second appellate Court and SLP was not entertained by the Hon'ble Supreme Court, as such, the suit land bearing Khasra No.294/2 area 1.39 acres was directly and substantially an issue in Suit No.1 and title of Nanhuram was not found by the jurisdictional civil Court in Suit No.1 by decree of the of the first appellate Court (Ex.D-3) between the parties herein and plaintiff-Ganeshram is purchaser of the suit land bearing Khasra No.294/2 area 1.39 acres vide sale

deed dated 31.3.1995 (Ex.P-3) from legal representatives of Nanhuram, whereas title of Nanhuram has already been negated by the jurisdictional civil Court and upheld by the High Court of Madhya Pradesh in Second Appeal NO.13/1986 on 21.2.1994 and SLP was declined by the Hon'ble Supreme Court, as such, decree of the first appellate Court dismissing the suit of Nanhuram *qua* the suit land bearing Khasra No.294/2 area 1.39 acres has become final.

11. Since Nanhuram had no title, his legal representatives i.e. defendants No.3 to 7 would not acquire title over the suit land (Khasra No.294/2 area 1.39 acres) and therefore could not have alienated by sale deed dated 31.3.1995 (Ex.P-3) to the plaintiff and the plaintiff in that transfer would not acquire any right/title over the suit land and finding of the first appellate Court in this regard is clearly erroneous when Nanhuram has held to be not title-holder in Suit No.1 instituted by him with respect to the land bearing Khasra No.294/2 area 1.39 acres between the same parties, which was upheld by the High Court of Madhya Pradesh in Second Appeal No.13/1986 and that has become final and his legal representatives i.e. defendants No.3 to 7 would not have alienated the suit property in favour of the

plaintiff having no title with them.

12. It is correct to say that the first appellate Court has merely dismissed the suit of Nanhuram (Suit No.1) only on the ground that Nanhuram is not adopted son of Thandaram and no express finding was recorded with regard to other issue including title of Nanhuram and finding recorded by the trial Court in Suit No.1 that Nanhuram has purchased the suit land (Khasra No.294/2 area 1.39 acres) from Thandaram by sale deed dated 21.6.1972 (Ex.P-1) and said finding was not expressly set aside by the first appellate Court holding to be erroneous, but once the judgment and decree of the trial Court is set aside by the first appellate Court, the judgment and decree of the trial Court merges into decree of the first appellate Court by principle of merger and decree of the trial Court is wiped out and no longer in existence and what is existed is decree of the first appellate Court by which the suit has been dismissed.

13. The doctrine of merger is based on the principle that there cannot be more than one decree or operative orders governing the same subject-matter at a given point of time. When a decree or order passed by inferior Court, tribunal or authority was subjected to a remedy available under the law before a superior forum then, though the decree or order

under challenge continues to be effective and binding nevertheless its finality is put in jeopardy. Once the superior Court has disposed of the lis before it either way – whether the decree or order under appeal is set aside or modified or simply confirmed, it is the decree or order of the superior Court, tribunal or authority which is the final, binding and operative decree or order wherein merges the decree or order passed by the Court, tribunal or the authority below. (See Kunhayammed and others v. State of Kerala and another².)

14. The Constitution Bench of the Supreme Court in the matter of Collector of Customs, Calcutta v. East India Commercial Co. Ltd., Calcutta and others³ has held that after the disposal of appeal, the operative order is the order of the appellate authority whether it has reversed the original order or modified it or confirmed it. Relevant extracts from paragraphs 4 and 5 of the report state as under: -

“(4) The question therefore turns on whether the order of the original authority becomes merged in the order of the appellate authority even where the appellate authority merely dismisses the appeal without any modification of the order of the original authority. It is obvious that when an appeal is made, the appellate authority can do one of three things, namely, (i) it may reverse the order under appeal, (ii) it may

²AIR 2000 SC 2587

³AIR 1963 SC 1124

modify that order, and (iii) it may merely dismiss the appeal and thus confirm the order without any modification. It is not disputed that in the first two cases where the order of the original authority is either reversed or modified it is the order of the appellate authority which is the operative order and if the High Court has no jurisdiction to issue a writ to the appellate authority it cannot issue a writ to the original authority. The question therefore is whether there is any difference between these two cases and the third case where the appellate authority dismisses the appeal and thus confirms the order of the original authority. It seems to us that on principle it is difficult to draw a distinction between the first two kinds of orders passed by the appellate authority and the third kind of order passed by it. In all these three cases after the appellate authority has disposed of the appeal, the operative order is the order of the appellate authority whether it has reversed the original order or modified it or confirmed it. ...

(5) It is this principle, viz., that the appellate order is the operative order after the appeal is disposed of, which is in our opinion the basis of the rule that the decree of the lower court merges in the decree of the appellate court, and on the same principle it would not be incorrect to say that the order of the original authority is merged in the order of the appellate authority whatsoever its decision – whether of reversal or modification or mere confirmation...."

- 15.** The Supreme Court in the matter of **S. Shanmugavel Nadar v. State of T.N. and another**⁴ has held when a judgment or order has been dealt with by a superior forum resulting in confirmation, reversal or modification, what merges is the operative part i.e.

⁴ (2002) 8 SCC 361

the mandate or decree issued by the lower forum, expressed either in positive or negative and not the reasoning of the subordinate forum and it can be said to have merged, if superior Court adopts or reiterates the reasoning or expressly records the approval of the reasoning. It was held as under:-

"10. Firstly, the doctrine of merger. Though loosely an expression merger of judgment, order or decision of a court or forum into the judgment, order or decision of a superior forum is often employed, as a general rule the judgment or order having been dealt with by a superior forum and having resulted in confirmation, reversal or modification, what merges is the operative part, i.e. the mandate or decree issued by the Court which may have been expressed in positive or negative forum. For example, take a case where the subordinate forum passes an order and the same, having been dealt with by a superior forum, is confirmed for reasons different from the one assigned by the subordinate forum what would merge in the order of the superior forum is the operative part of the order and not the reasoning of the subordinate forum; otherwise there would be an apparent contradiction. However, in certain cases, the reasons for decision can also be said to have merged in the order of the superior court if the superior court has, while formulating its own judgment or order, either adopted or reiterated the reasoning, or recorded an express approval of the reasoning, incorporated in the judgment or order of the subordinate forum."

16. Reverting to the facts of the present case in light of principle of merger laid down by Their Lordships of the Supreme Court in the above-quoted judgment (supra), it is quite vivid that by principle

of merger, reversal of judgment and decree of the trial Court in Suit No.1 by the first appellate Court dismissing the suit, decree of the trial Court has merged into appellate decree and the operative decree would be appellate decree by which the suit of plaintiff- Nanhuram is finally dismissed and since it is a case of reversal of decree of the trial Court by the first appellate Court, disapproving the reasoning of the trial Court, therefore, the reasoning of the trial Court cannot be said to have been merged and only the operative decree passed by the first appellate Court dismissing the suit would be operative decree as on date and binding and reasoning given by the trial Court by reason of dis-approval by the first appellate Court would not merge into appellate decree and therefore, reasonings of the trial Court in Suit No.1 was not available and open for the first appellate Court in this subsequent Suit No.2 for consideration and for relying upon by the impugned judgment to hold that Nanhuram had title over the suit land bearing Khasra No.294/2 area 1.39 acres on the basis of reasoning of the trial Court, which has set aside by appellate decree passed as appellate decree would be operative decree and reasoning of the trial Court would not merge on reversal of that decree, as such, the the first appellate Court fell in legal error in holding

that the plaintiff, who is purchaser from defendants No.3 to 7 (legal representatives of Nanhuram), has valid title over the suit property and entitled for decree and fell into legal error in granting decree with respect to the suit land bearing Khasra No.294/2 area 1.39 acres, as such, finding of the first appellate Court with respect to the land bearing Khasra No.294/2 area 1.39 acres is clearly perverse and liable to be set aside.

17. So far as the land bearing Khasra No.214/2 area 0.33 acre and Khasra No.216/1 area 0.10 acre is concerned, though it was included in Suit No.1, but in that suit, it was expressly pleaded by plaintiff-Nanhuram that he has no claim over these properties and therefore, with respect to these lands, in Suit No.1 it was not considered and adjudicated and only with respect to the land bearing Khasra No.294/2 area 1.39 acres and other land it was adjudicated finally. Defendant No.5-Gahiraram has purchased the lands bearing Khasra No.214/2 area 0.33 acre and Khasra No.216/1 area 0.10 acre from Thandaram (original owner) vide Ex.P-2 on 19.12.1978 and plaintiff-Ganeshram has purchased those lands from legal representatives of Nanhuram including defendant No.5-Gahiraram by sale deed dated 31.3.1995 (Ex.P-3) though in the sale deed, other lands were also

transferred in favour of the plaintiff for which finding has already been recorded in forgoing paragraph.

18. Since Thandaram was original owner of the suit properties and defendant NO.5-Gahiraram independently purchased the said lands vide Ex.P-2 on 19.12.1978 and in turn, sold it to plaintiff-Ganeshram vide Ex.P-3 on 31.3.1995, plaintiff-Ganeshram has acquired title to the extent of the lands bearing Khasra No.214/2 area 0.33 acre and Khasra No.216/1 area 0.10 acre respectively. Therefore, it was not in issue directly and substantially in Suit No.1 and the plaintiff having been purchased the suit lands from defendant No.5-Gahiraram, who in turn, purchased from Thandaram vide Ex.P-2, the first appellate Court is right in decreeing the suit of the plaintiff with respect to the lands bearing Khasra No.214/2 area 0.33 acre and Khasra No.216/1 area 0.10 acre.

19. Consequently, it is held that the first appellate Court has committed legal error in decreeing the suit with respect to the land bearing Khasra No.294/2 area 1.39 acres, whereas it has rightly decreed with respect to the lands bearing Khasra No.214/2 area 0.33 acre and Khasra No.216/1 area 0.10 acre.

20. The submission of learned counsel for the appellant that sale deed (Ex.P-2) executed by

Thandaram on 19.12.1978 in favour of Gahiraram is not proved by examining the attesting witness of sale deed deserves to be rejected for two reasons. Firstly, the Supreme court in the matter of State of **Haryana v. Ram Singh**⁵ held as under:-

“5.....It is not the law that a certified copy of a registered agreement for sale is inadmissible in evidence unless the parties to the document are examined to prove it. That would be contrary to what Sections 77 read with Sections 74(2) and 76 of the Evidence Act, 1872 and more specifically Section 51A of the Act provide. As far as the provisions of the Evidence Act are concerned, a certified copy of the registered sale deed is admissible in evidence and does not need to be proved by calling a witness. (See **Ramappa V. Bojappa**⁶.)

Secondly, the provisions of Section 68 of the Indian Evidence Act, 1872 which deals with examining of attesting witness to prove the execution of document does not apply to sale deed, which is governed by Section 54 of the Transfer of Property Act. (**Bayanabai Kaware v. Rajendra S/o Baburao Dhote**⁷).

21. Accordingly, the judgment & decree of the first appellate Court with respect to the land bearing Khasra No.294/2 area 1.39 acres is set aside, whereas the judgment and decree with respect to the lands bearing Khasra No.214/2 area 0.33 acre and Khasra No.216/1 area 0.10 acre is hereby re-affirmed.

5 (2001) 6 SCC 254

6 AIR 1963 SC 1633

7 (2018) 1 SCC 585

Consequently, the suit with respect to the land bearing Khasra No.294/2 area 1.39 would stand dismissed, whereas the suit of the plaintiffs with respect to the lands bearing Khasra No.214/2 area 0.33 acre and Khasra No.216/1 area 0.10 acre would stand decreed.

22. The second appeal is allowed in part to the extent indicated hereinabove leaving the parties to bear their own cost(s).

23. A decree be drawn-up accordingly.

Sd/-

(Sanjay K.Agrawal)
Judge

B/-