

HIGH COURT OF CHHATTISGARH, BILASPUR**Second Appeal No.230 of 2009****Judgment reserved on :22.09.2020****Judgment delivered on :29.09.2020**

Ramkishun Son of Shri Budhan, aged about 50 years,
Resident of Village Khadgawan, Tahsil Surajpur,
District Surguja (CG)

----- Appellant/Defendant No.2**Versus****1. Nanhka (died) through LR's**

1(A) Viranchi Wd/o Late Nanka, aged about 60 years,

1(B) Chandradev Chakradhari, S/o Late Nanka, aged about 47 years,

1(C) Vijay Kumar S/o Late Nanka, aged about 37 years,

1(D) Smt.Meena Chakradhari D/o Late Nanka, aged about 34 years,

All are R/o Village Khadgawan Kala, P.S. Pratappur,
District Surajpur (CG)1(E) Durgawati W/o Ajay, D/o Late Nanka, aged about 32
years, R/o Village Kundikala, Post & Tahsil Ra-
jpur, District Balrampur (CG)**----- LR's of Respondent No.1/Plaintiff****2. Bhondul Son of Shri Budhan Kumhar, aged about 60
years, Resident of Village Khadgawan, Tahsil
Surajpur, District Surguja (CG)****----- Defendant No.1****3. State of Chhattisgarh, Through The Collector, Surguja
(Ambikapur) (CG)****----- Respondents**

For Appellant/Defendant No.2:-

Mr.Ashok Kumar Shukla, Advocate

For LR's of Respondent No.1/Plaintiff:-Mr.Manoj Paranjape and Mr.Anurag
Singh, Advocates**For Respondent No.2/Defendant No.1:-**

None present

For Respondent No.3:- Dr.Veena Nair, Dy.A.G.

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 second appeal preferred by the appellant/defendant No.2 are as under:-

"1. Whether both the Courts below are justified in granting decree in favour of the plaintiff by ignoring the fact that order of the Settlement Officer, Surguja (Ambikapur) dated 6.1.86 (Ex.D/8) affirmed by the Collector, Surguja (Ambikapur) on 22.7.1987 (Ex.D/9) was further affirmed by the Commissioner, Bilaspur Division, Bilaspur on 13.8.1993 (Ex.D/10), but order of the Commissioner was not challenged by the plaintiff and even Settlement Officer/Collector has not been impleaded as party defendant in the suit?

2. Whether both the Courts below are justified in holding that the order of the Settlement Officer Ex.D-8 dated 6-1-1986 and the order of the Collector Ex.D-9 dated 22-7-1987 are null and void by recording a finding which is perverse to the record ?

3. Whether both the Courts below are justified in granting decree for permanent injunction based on title and possession of the plaintiff in the suit filed before the trial Court by recording a finding which is

perverse to the record ?”

[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. Plaintiff-Nanhka, defendant No.1-Bhondul and defendant No.2-Ramkishun all are brothers. They applied for grant of patta in the year 1979 by making separate applications of land in their possession. It is the case of the plaintiff that he was granted patta of plot No.2100/86 area 0.643 hectare of the land (hereinafter called as 'suit land') and defendant No.2 was granted patta of plot No.2586/80 area 0.550 hectare of the land, whereas defendant No.1 was not granted patta of the land as he was not landless person as he was having more than 5 acres of land. It is further case of the plaintiff that after grant of patta he was also granted bhumiswami right on 29.7.86 vide Ex.P-1 and also granted rin pustika vide Ex.P-2, but thereafter defendants No.1 and 2 made an application before the Forest Settlement Officer that their names also be inserted in the said patta as owner of the suit land as they are in joint possession, in which the Forest Settlement Officer on 6.1.86 (Ex.D-8) directed for insertion of names of defendants No.1 and 2 along with the plaintiff, which the plaintiff challenged by way of appeal before the Collector, which was dismissed by the Collector on

22.7.1987 (Ex.D-9), against which, the plaintiff preferred revision before the Commissioner, Bilaspur Division, Bilaspur. The Commissioner dismissed the revision on 13.8.1983 (Ex.D-10) having no jurisdiction holding that appeal would lie to the State Government. Thereafter, the plaintiff filed a suit for declaring the order dated 6.1.86 passed by the Forest Settlement Officer as well as the order dated 22.7.1987 passed by the Collector, Surguja (Ambikapur) as null & void and also claiming permanent injunction against defendants No.1 and 2.

3. Resisting the suit, defendants NO.1 and 2 filed their joint written statement and denied the averments made in the plaint stating inter-alia that patta of the suit land was jointly granted in favour of all three brothers, but patta was issued only in favour of the plaintiff during settlement and they are jointly cultivating the suit land and therefore, their names have rightly been inserted in the said patta by order of the Forest Settlement Officer, which has been affirmed by the Collector as well as the Commissioner also. The plaintiff has no exclusive right and title over the suit land, as such, the suit deserves to be dismissed.

4. The trial Court upon appreciation of oral and documentary evidence available on record, by its

judgment and decree dated 30.4.2002, decreed the suit holding that the order of the Forest Settlement Officer as affirmed by the Collector is null and void and the plaintiff is entitled for declaration of title and permanent injunction. On appeal being preferred by the defendants, the first appellate Court affirmed the judgment and decree of the trial Court. Questioning the judgment and decree of the first appellate Court, this second under Section 100 of the CPC has been preferred by the appellant/defendant No.2, in which substantial questions of law have been formulated by this Court, which has been set-out in the opening paragraph of this judgment for sake of completeness.

5. Mr. Ashok Kumar Shukla, learned counsel for the appellant/defendant No.2, would submit that though order of the Collector (Ex.D-9) dated 22.7.1987 was affirmed by the Commissioner on 13.8.1993 (Ex.D-10), but order of the Commissioner has not been questioned by the plaintiff in civil suit. He would further submit that the Forest Settlement Officer and the Collector have not been impleaded as party defendant in the suit, as such, the suit is not maintainable. He would also submit that serious question of title has been raised by the defendants, but in the suit the plaintiff did not claim any declaration of title and as such, the suit as framed and filed was not

maintainable as jurisdiction of the Civil Court is expressly barred by the provisions of the Chhattisgarh Land Revenue Code, 1959 (hereinafter called as 'the Code'). Even otherwise, on merits the order passed by the Forest Settlement Officer duly affirmed by the Collector is strictly in accordance with law and it could not have been interfered with by the trial Court as affirmed by the first appellate Court and as such, the substantial questions of law be answered in favour of the defendant No.2 and the judgment & decree of both the Courts below be set aside by granting the appeal and dismissing the suit with cost(s).

6. On the other hand, Mr. Manoj Paranjape, learned counsel for legal representatives of respondent No.1/plaintiff, would submit that the defendants did not raise any question of impleadment of Forest Settlement Officer as well as the Collector as party defendant in the suit before the trial Court and therefore, by virtue of the provisions contained in Order 1 Rule 13 of the CPC, such a plea cannot be permitted to be raised for the first time before the second appellate Court/this Court. Even otherwise, the State has already been impleaded as party defendant in the suit, as such, the Forest Settlement Officer and the Collector were neither necessary nor proper party and they have rightly not been impleaded as party

defendant in the suit and further that the order of the Commissioner was not required to be challenged in view of decision of the Supreme Court in the matter of Smt.Kalawati v. Durga Prasad and another¹. He would also submit that bhumiswami right granted vide Ex.P-1 to the plaintiff has not been challenged and therefore, both the Courts below have rightly granted decree in favour of the plaintiff holding that order of the Forest Settlement Officer as affirmed by the Collector is strictly in accordance with law, in which no exception can be taken by defendant No.2.

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

Answer to substantial question of law No.1:-

8. It is correct to say that against the order of the Collector (Ex.D-9), plaintiff-Nanhka preferred revision before the Commissioner, which was dismissed vide Ex.D-10 as not maintainable and having no jurisdiction and that order has not been challenged. It is also borne out from the records that the Forest Settlement Officer and the Collector have not been impleaded as party defendant in the suit.

9. A careful perusal of written statement of defendants

¹ AIR 1975 SC 1272

No.1 and 2 would show that the defendants did not take such objection that the order of the Commissioner has not been challenged, therefore, the suit is not maintainable and it ought to have challenged in the suit in order to make the suit maintainable. Even before the first appellate Court, no such objection was raised by defendant No.2. Defendant No.2 for the first time at second appellate stage cannot take altogether a new plea which he has never taken before the Courts below, otherwise the plaintiff could have amended the suit and could have also assailed the order of the Commissioner dated 13.8.1993 (Ex.D-10) and as such, defendant NO.2 cannot be permitted to raise altogether a new point before the second appellate Court/this Court. Even otherwise, no failure of justice has occasioned on non-questioning the order of Commissioner as the Commissioner has simply held that he has no jurisdiction to hear the revision against the order of the Collector by dismissing the revision.

10. Now coming to non-impleadment of the Collector and the Forest Settlement Officer as necessary party in the suit.

11. At this stage, it would be appropriate to notice Order 1 Rule 9 of the CPC, which states as under :-

"9. Mis-joinder and non-joinder. - No suit

shall be defeated by reason of the mis-joinder or non-joinder of parties, and the Court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it :

Provided that nothing in this rule shall apply to non-joinder of a necessary party."

12. A careful perusal of the aforesaid provision would show that proviso to Order 1 Rule 9 CPC is exception to Order 1 Rule 9 CPC and the suit has to be dismissed, if the necessary party has not been joined in the suit.

13. A necessary party is one without whom, no order can be made effectively and a proper party is one in whom absence an effective order can be made but whose presence is necessary for a complete and final decision of the question involved in the proceeding.
(See : State of Assam v. Union of India²).

15. Similarly, in the matter of Mumbai International Airport v. Regency Convention Centre & Hotels (P) LTD.³, the Supreme Court held as under *qua* the necessary party.

"15. A "necessary party" is a person who ought to have been joined as a party and in whose absence no effective order could be passed at

2 (2010) 10 SCC 408

3(2010) 7 SCC 417

all by the court. If a "necessary party" is not impleaded, the suit itself is liable to be dismissed. A "property party" is party who, though not a necessary party, is a person whose presence would enable the court to completely, effectively and adequately adjudicate upon all matters in dispute in the suit, though he need not be a person in favour of or against whom the decree is to be made. If a a person is not found to be a proper or necessary party, the court has no jurisdiction to implead him, against the wishes of the plaintiff. The fact that a person is likely to secure a right/interest in a suit property, after the suit is decided against the plaintiff, will not make such person a necessary party or a proper party to the suit for specific performance."

16. Further, objection regarding non-joinder of necessary party should be taken before the trial Court at first available opportunity in order to provide opportunity to the plaintiff to rectify the defect, which is apparent from Order 1 Rule 13 of the CPC and which states as under :-

"13. Objections as to non-joinder or mis-joinder. - All objections on the ground of non-joinder or mis-joinder of parties shall be taken at the earliest possible opportunity and, in all cases where issues are settled, at or before such settlement, unless the ground of objection has subsequently arisen, and any

such objection not so taken shall be deemed to have been waived."

17. Aforesaid Rule provides that on objection on the ground of misjoinder and non-joinder, if not taken at the earliest opportunity, shall be deemed to have been waived, it is based on principle that technical objection, which, if taken at the earliest stage of proceedings might have been cured and which has not been so taken, should not be allowed to be raised at the later stage so as to defeat rights of the parties.

18. The Madhya Pradesh High Court in the matter of Rahamatullah v. State of Madhya Pradesh⁴ has held that all the questions of misjoinder and non-joinder of the parties must be decided on the basis of allegations made in the plaint or written statement, the pleading of parties. Paragraph 5 of the report states as under :-

"5. It is, thus a settled law and apparent from the very reading of Rule 13 of Order 1, that objection as to non-joinder or misjoinder must be taken at the earliest possible opportunity and objection not so taken, must be deemed to have been waived. Non raising of plea of non joinder of necessary party requires proof of certain facts on the evidence on record at the earliest stage as enjoined by Rule 13 and this would amount to waiver of pleading of a fact on which such a plea could be established. It is also settled law that such objection, if raised during the appellate stage, without taken any objection in written statement, the objection will not be allowed at all. All the questions of

misjoinder or non-joinder must be decided on the basis of allegations made in the plaint or written statement, the pleading of parties. In absence of pleading to that effect, it was a wrong exercise of jurisdiction by the appellate Court and therefore, its order cannot be maintained."

19. The Supreme Court in the matter of Church of Christ Charitable v. Ms. Pooniamman Education Trust⁵ has clearly held that objection regarding non-joinder of necessary party should be taken before the trial Court in order to provide opportunity to the plaintiff to rectify the defect and even then, the plaintiff persists in non-impleading the party, consequences of the non-joinder may follow. Relying upon its earlier pronouncement in the matter of State of U.P. v. Ram Swarup Saroj⁶, it was further held that non-joinder of party cannot be raised for the first time before the Supreme Court, if same has not been raised in the trial Court and has not resulted in failure of justice.

20. Reverting to the facts of the present case in the light of principle of law laid down in the above-stated judgments (supra), it is quite vivid that defendants No.1 and 2 in their written statement did not take such a plea that in absence of non-impleadment of the Forest Settlement Officer and the Collector, the suit deserves to be dismissed. They

5(2012) 8 SCC 706
6(2000) 3 SCC 699

ought to have taken such a plea in first available opportunity and in that case, the plaintiff could have amended the plaint impleading the Forest Settlement Officer and the Collector as party defendant in the suit. Even otherwise, the Collector heard the appeal as a Revenue Court within the meaning of Section 31 of the Code and being quasi-judicial authority he need not be impleaded as party defendant in the suit, as such, a plea with regard to non-impleadment of the Forest Settlement Officer and the Collector deserves to be rejected as having not been raised before two Courts below and no failure of justice has occasioned to defendant No.2. Accordingly, the substantial question of law is answered in favour of the plaintiff and against defendant No.2.

Answer to substantial questions of law Nos.2 and 3:-

21. It is evident from the records that the plaintiff and defendant No.1 & 2 all are brothers. They have applied for grant of patta separately on the basis of their possession in forest land. The plaintiff was granted patta of plot No.2100/86 area 0.643 hectare of the land in the year 1979-80, defendant No.1 was not granted patta as he was having more than 5 acres of the land and defendant No.2 was granted patta of plot No.2586/80 area 0.550 hectare of the land, in which

they admittedly are in possession. After grant of patta, the plaintiff started paying land revenue and rin pustika was issued in his favour vide Ex.P-2 and Ex.P-3 and he continued to pay revenue since then and thereafter on 29.7.86 he was granted patta by Tahsilder conferring bhumiswami right, which has not been questioned by the defendants even after it has been exhibited as Ex.P-1.

22. The trial Court has held that once bhumiswami right is conferred under the provisions of the Code vide Ex.P-1, the plaintiff's title has become absolute and the land has been held to be of the Department of Revenue and therefore, the Forest Settlement Officer has no jurisdiction to interfere with the said order conferring bhumiswami right to the plaintiff, he was also found paying land revenue since 1975 to 1980 and he has duly granted patta vide Ex.P-1. The trial Court also held that the land was granted to the plaintiff in the year 1975 and on 15.2.1980 he was granted rin pustika, which cannot be questioned by the defendants. Even otherwise, at the instance of the defendants, in the cross-examination the plaintiff has clearly stated that earlier the suit land was encroached by all three brothers, but thereafter the suit land was partitioned and thereafter they applied for grant of patta before the Forest Settlement Officer separately, in which the

plaintiff and defendant No.2 were granted patta of their respective lands and defendant No.1 was not granted patta as he was having more than 5 acres of land in his possession at that time. Defendant No.2 has also admitted the fact of partition between three brothers in para-3 of his statement before the trial Court. He has also admitted that they have applied for settlement separately in para-7 of his statement and he has also stated the fact of partition between them since 1970. Kalpnath Jayaswal (DW-2) has also stated that on the basis of possession in forest land, patta was granted by the Forest Settlement Officer, he has also admitted the fact of division between the plaintiff and the defendants and they are in possession of their respective shares. In view of that, the trial Court has held that the Forest Settlement Officer has no jurisdiction to direct the insertion of names of defendants No.1 and 2 along with the plaintiff as patta was exclusively granted in favour of the plaintiff and further vide Ex.P-1 bhumiswami right has been conferred to the plaintiff. Said findings have been affirmed by the first appellate Court. On the basis of aforesaid analysis, this Court is also of the opinion that findings recorded by the trial Court holding that once bhumiswami right has been conferred to the plaintiff

and once nature of the suit land has been converted from forest land to revenue land, the Forest Settlement Officer cannot direct insertion of names of defendants No.1 and 2, which is absolutely without jurisdiction and without authority of law. The first appellate Court has rightly affirmed that finding recorded by the trial Court, in which I do not find any perversity or illegality.

23. Mr.Ashok Kumar Shukla, learned counsel for the appellant/defendant No.2, has also raised a plea that the plaintiff ought to have filed a suit for declaration of title.

24. On the basis of pleading of the parties, the trial Court has recorded three issues. Issue Nos.1 and 2 related to title and possession and further held that patta of suit land was granted to the plaintiff and he is exclusive owner and title-holder of the suit land, but thereafter only granted decree for declaration that the order of the Forest Settlement Officer and the order of the Collector are null and void and only granted decree for permanent injunction, which has been affirmed by the first appellate Court, as such, the plaintiff was not required to seek declaration of title. Thus, findings recorded by two Courts below are findings of fact based on evidence available on record. It is neither perverse nor

contrary to record. Accordingly, the substantial questions of law Nos.2 and 3 are also answered in favour of the plaintiff and against defendant No.2.

25. Accordingly, the second appeal being devoid merit is liable to be and is hereby dismissed leaving the parties to bear their own cost(s).

26. A appellate decree be drawn-up accordingly.

Sd/-

(Sanjay K.Agrawal)
Judge

B/-