NAFR

HIGH COURT OF CHHATTISGARH AT BILASPUR

Second Appeal No. 120 of 2009

1. Ajay Shankar S/o Ramadhin, Aged about 47 years, Railway Employee.

2. Mani Shankar S/o Ramadhin, Aged about 43 years, Postman Railway.

   Both are R/o Sirgitti Bannakdih, Tahsil and District Bilaspur, Chhattisgarh.

3. Om Shankar S/o Ramadhin, Aged about 57 years, R/o Kanti Nagar, Back Side of Sai Mangalam, Near Shiv Mandir Bilaspur, Tahsil and District Bilaspur, Chhattisgarh.

4. Vijay Shankar S/o Ramadhin (died) through LRs. :-

   4.1. Arun Yadav S/o Late vijay Shankar, Aged about 46 years.

   4.2. Pradeep Yadav s/o Late Vijay Shankar, Aged about 34 years.

   4.3. Smt. Sushma Yadav D/o Late Vijay Shankar, Aged about 53 years.

   4.4. Smt. Sarita Yadav D/o Late Vijay Shankar, Aged about 38 years.

   No. 1 to 4 R/o B/H Akas Gas Godown, Shri Nagar, Shiwanand Nagar, Sector 2, Khamtari 2, Raipur, District Raipur, Chhattisgarh.

   4.5. Smt. Lalita Yadav D/o Late Vijay Shankar, Aged about 40 years, R/o Bandhwapara, Arvind Nagar, Sarkanda, Bilaspur, District Bilaspur, Chhattisgarh.

4.6. Smt. Surekha Yadav D/o Vijay Shankar, Aged about 48 years, R/o Firangipara Ward 5, Kota Kargi Road, District Bilaspur, Chhattisgarh.

---Appellants/Defendants

Versus

1. Vinod Shankar S/o Hari Shankar Yadav, Aged about 36 years, Occupation Electrician, R/o Rajendra Nagar, Bilaspur, Chhattisgarh. **--- Plaintiff**

2. State of Chhattisgarh, Through the Collector, District Bilaspur, Chhattisgarh.

--- Respondents

For Appellants	:-	Mr. Subhash Yadav, Advocate
For Respondent 1	:-	Mr. Arvind Dubey, Advocate
For State	:-	Mr. Rahul Jha, G.A.

Hon'ble Shri Justice Sanjay K. Agrawal

Judgment on Board

26/08/2020

1. Proceedings of this matter have been taken up through video conferencing.

2. This second appeal preferred by the appellants/defendants was admitted for hearing on the following substantial questions of law :-

> "(1) Whether in the absence of mutation of the name of Harishankar Yadav, the purchaser of sale-deed dated 6-8-1995 from Sukharu, till filing of the suit, the learned first appellate Court was

justified in drawing presumption of the validity of the sale-deed ?

(2) Whether on the facts and in the circumstances of the case the finding that the plaintiff Vinod Shankar has proved execution of the sale-deed dated 6-8-1995 by Sukharu is perverse ?"

(For the sake of convenience, the parties will herein-after be referred to as per their status before the trial Court).

3. The suit land and house, situated at village Sirgitti, Bilaspur shown in Schedule 'A' of the plaint, were originally held by one Sukharu from whom plaintiff's father namely Harishankar Yadav purchased it by registered sale deed dated 06/08/1965 (Ex. P/1). Plaintiff's father namely Harishankar Yadav and the husband and father of original defendant No. 1 and defendants No. 2 to 5 namely Ramadhin, both were brothers.

4. It is the case of the plaintiff that his father Harishankar Yadav purchased the suit land and house from Sukharu by registered sale deed (Ex. P/1) for a cash consideration of ₹ 600/- and came into possession of the said suit land and house. Plaintiff's father died on 05/10/1999, but before his death, on 06/09/1997, he executed a Will and

transferred the suit land and house in favour of the plaintiff. It was further pleaded that after purchasing the suit land and house plaintiff's father repaired the suit house and permitted his younger brother Ramadhin and his family to reside therein, but thereafter, the defendants got their names mutated in the revenue records on 26/12/1994 which necessitated the plaintiff to file a civil suit for possession, permanent injunction and damages stating inter alia that since the suit land and house were purchased by his father Harishankar Yadav and defendants are licensees, therefore, plaintiff is entitled for possession, permanent injunction and mesne profit from the defendants.

5. Resisting the suit, the defendants filed their written statement and controverted the plaint allegations stating inter alia that Sukharu had never alienated the suit land and house in favour of plaintiff's father, therefore, plaintiff has no title over the said suit land and house and alternatively it was also pleaded that defendants have perfected their title over the suit land and house as they are in peaceful possession of the same for the last ten years, therefore, they are

the title-holders of the suit land and house by way of adverse possession.

6. Learned trial Court, upon appreciation and evaluation of oral and documentary evidence on record, dismissed the suit vide its judgment and decree dated 31/08/2006 holding that plaintiff has failed to prove that his father purchased the suit land and house vide Ex. P/1 from Sukharu i.e. the predecessor-in-title of the defendants and he has further failed to prove that his father had allowed the defendants to reside in the suit house as a licensee.

7. Feeling aggrieved by the judgment and decree of the trial Court, the plaintiff preferred an appeal under Section 96 of the CPC wherein learned first appellate Court, vide its judgment and decree dated 07/11/2008, allowed the appeal holding that plaintiff's father purchased the suit land and house from Sukharu, the predecessor-in-title of the defendants and the defendants were staying in the suit house as licensees, therefore, plaintiff is entitled for decree for possession of the suit land and house.

8. Questioning the impugned judgment and decree passed by the first appellate Court, this second

appeal has been preferred by the appellants/defendants in which two substantial questions of law have been framed and set out in the opening paragraph of this judgment.

9. Mr. Subhash Yadav, learned counsel for the appellants/defendants, would submit that the first appellate Court is absolutely unjustified in holding that the bare suit for possession was maintainable as there is serious cloud over the title of the plaintiff, therefore, the suit for declaration of title ought to have been filed by the plaintiff in view of the law laid down by the Supreme Court in the matter of **Anathula Sudhakar v. P. Buchi Reddy (Dead) by LRs. and Ors.**[1]. He would further submit that the name of plaintiff's father i.e. Harishankar Yadav was never recorded in the revenue records till the date of filing of the suit, thus, the first appellate Court is also not justified in drawing the presumption of validity of the sale deed (Ex. P/1) and even otherwise, execution of the sale deed (Ex. P/1) by Sukharu in favour of plaintiff's father Harishankar Yadav is not even established, as such, the judgment and decree of the first

1 (2008) 4 SCC 594

appellate Court deserves to be set aside and that of the trial Court be restored.

10. Mr. Arvind Dubey, learned counsel for respondent No. 1/plaintiff, would submit that the impugned judgment and decree passed by the first appellate Court is strictly in accordance with law and it needs no interference in exercise of jurisdiction by this Court under Section 100 of the CPC.

11. I have heard learned counsel for the parties, considered their rival submissions made herein-above and went through the records with utmost circumspection.

[For the sake of convenience, substantial question of law No. 2 is answered first.]

Answer to substantial question of law No. 2 :-

12. The registered sale deed (Ex. P/1) by which Sukharu sold the suit land and house to plaintiff's father was executed on 06/08/1965 and the suit was filed on 01/11/2000 before the trial Court. Learned first appellate Court, after perusing the original sale deed (Ex. P/1), has clearly recorded a finding in paragraph 9 of its judgment that plaintiff's late father Harishankar Yadav purchased the suit land and house for a

cash consideration of ₹ 600/- and the execution of the sale deed was witnessed by two witnesses namely Balwant Singh and Baliram Patil and both of them died long back, therefore, they could not be examined and since, the sale deed (Ex. P/1) is a 30 years old document, presumption under Section 90 of the Evidence Act, 1872 would be made.

13. The sale deed dated 06/08/1965 is a registered document and original copy of the same has been produced and in that view of the matter, Section 90 of the Evidence Act has been pressed into service.

14. The question would be, whether the presumption under Section 90 of the Evidence Act, 1872 would be available in case of certified copy of a thirty years old document ?

15. It would be appropriate at this stage to notice Section 90 of the Evidence Act which reads as follows :-

> “**90. Presumption as to documents thirty years old.**— Where any document, purporting or proved to be thirty years old, is produced from any custody which the Court in the particular case considers proper, the Court may presume that the signature and every other part of such document, which purports to be in the handwriting of any particular

> person, is in that person's handwriting, and, in the case of a document executed or attested, that it was duly executed and attested by the persons by whom it purports to be executed and attested.
>
> *Explanation*.—Documents are said to be in proper custody if they are in the place in which, and under the care of the person with whom, they would naturally be; but no custody is improper if it is proved to have had a legitimate origin, or if the circumstances of the particular case are such as to render such an origin probable.
>
> This *Explanation* applies also to section 81."

16. The object of Section 90 of the Evidence Act is not to make it too difficult for persons relying upon ancient documents to utilize those documents in proving their case. It is intended to do away with the insuperable difficulty of proving the handwriting, execution, and attestation of documents in the ordinary way after the lapse of many years. When a document is or purports to be more than thirty years old, if it be produced from what the court considers to be proper custody, it may be presumed (a) that the signature and every other part of such document, which purports to be in the handwriting of any particular person, is in that person's handwriting, and (b) that it was duly executed and attested by the person by whom it purports to be executed and attested by the person by whom it

purports to be executed and attested. It is not necessary that the signatures of the attesting witnesses or of the scribe be proved, for if everything was proved, there would be no need to presume anything.

17. In this regard, the decision of the Supreme Court in the matter of **Lakhi Baruah and Ors. v. Padma Kalita and Ors.**[2] be noticed herein profitably in which Their Lordships have held that presumption under Section 90 of the Evidence Act does not apply to a copy or a certified copy even though thirty years old; but if a foundation is laid for the admission of secondary evidence under Section 63 of the Evidence Act by proof of loss or destruction of the original and the copy which is thirty years old is produced from property custody, then only the signature authenticating the copy may under Section 90 be presumed to be genuine. Their Lordships while highlighting the object of Section 90 of the Evidence Act held that it is based on the principle of necessity and convenience and observed as under :-

> "15. Section 90 of the Evidence Act is founded on necessity and convenience because it is extremely difficult and sometimes not possible to lead evidence to prove handwriting,

---
2 (1996) 8 SCC 357

signature or execution of old documents after lapse of thirty years. In order to obviate such difficulties or improbabilities to prove execution of an old document, Section 90 has been incorporated in the Evidence Act, which does away with the strict rule of proof of private documents. Presumption of genuineness may be raised if the documents in question is produced from proper custody. It is, however, the discretion of the Court to accept the presumption flowing from Section 90. There is, however, no manner of doubt that judicial discretion under Section 90 should not be exercised arbitrarily and not being informed by reasons.

16. So far as applicability of presumption arising from Section 90 of the Evidence Act in respect of copy of the old document is concerned, the earliest decision of the Indian Court was made in 1880 in Khetter vs. Khetter Paul (ILR 5 Calcutta 886). Later on, in the decisions of various High Court the presumption under Section 90 was also made applicable to the certified copy. The Privy Council, upon review of the authorities, however, did not accept the decision rendered in khetter and other decisions of the High Court, where the presumption was attached also to copies, as correct. It was indicated that in view of the clear language of section 90 the production of the particular document would be necessary for applying the statutory presumption under Section 90. If the document produced was a copy admitted under Section 65 as secondary evidence and it was produced from proper custody and was over thirty years old, then the signature authenticating the copy might be presumed to be genuine: but production of the copy was not sufficient to justify the presumption of due execution of the original under Section 90. In this connection, reference may be made to the decisions in Seetnayva Vs. Subramanya (56 IA 146 : AIR 1929 PO 115) and Basant VS. Brijri (AIR 1935 PO 115). In view of these Privy Council decision, disproving the applicability of presumption under Section 90 to the copy or the certified copy of an old document, in the subsequent decisions of the High Courts, it has been consistently held by

> different High Courts that production of a copy or a certified copy does not raise the presumption under Section 90.
>
> 17. The position since the aforesaid Privy Council decisions being followed by later decisions of different High Courts is that presumption under Section 90 does not apply to a copy or a certified copy even though thirty years old: but if a foundation is laid for the admission of secondary evidence under Section 65 of the Evidence Act by proof of loss or destruction of the original and the copy which is thirty years old is preduced from proper custody, then only the signature authenticating the copy may under Section 90 be presumed to be genuine."

18. Reverting to the facts of the present case in light of the principle of law laid down by Their Lordships of the Supreme Court in the aforesaid judgment, it is quite vivid that the original sale deed (Ex. P/1) was produced from proper custody and it has been duly marked and exhibited before the trial Court and it would be presumed that the sale deed has rightly been executed as it has been attested by two witnesses, as such, presumption under Section 90 of the Evidence Act regarding the validity of the sale deed (Ex. P/1) has rightly been drawn by the first appellate Court and the first appellate Court is absolutely justified in holding that Sukharu has sold the suit land and house in favour of plaintiff's father and by virtue of Section 54 of the Transfer of Property Act, 1882, title over the

suit property has been conferred upon plaintiff's father vide Ex. P/1 and thereafter upon the plaintiff after his father's death. Thus, the finding recorded by the first appellate Court in this regard is hereby affirmed.

Answer to Substantial Question of Law No. 1 :-

19. True it is that the name of plaintiff's father or the plaintiff was never recorded in the revenue records till the filing of the suit, but mere non-recording of the name of plaintiff or his father in the revenue records would not negative his title over the suit land and house. It is well settled law that the mutation entry is only to keep the revenue records up to date and it is only for the purpose of collecting land revenue. The mutation entry in the revenue records does not create or extinguish title over the land, nor such entry has any presumptive value on the title of such land. Therefore, the objection taken in this regard that the name of plaintiff or his father was not recorded in the revenue records may not be of much importance and the defendants make capital out of it.

20. As such, by way of the registered instrument (Ex. P/1) title has already been conferred in favour

of plaintiff's father and after his death, in favour of the plaintiff. Therefore, the first appellate Court is absolutely justified in holding that plaintiff's father has become the title-holder of the suit land and house by virtue of Ex. P/1 even if there is no mutation entry in his name.

21. At this stage, it would be appropriate to notice the argument which has vehemently been raised by Mr. Subhash Yadav, learned counsel for the appellant/plaintiff that plaintiff has filed a bare suit for possession and in absence of the suit for declaration of title, mere suit for possession was not maintainable.

22. The Supreme Court in the matter of **Anathula Sudhakar** (supra) considered the question as to when a bare suit for permanent injunction will lie, and when it is necessary to file a suit for declaration and/or possession with injunction as a consequential relief and held as under :-

> "13. The general principles as to when a mere suit for permanent injunction will lie, and when it is necessary to file a suit for declaration and/or possession with injunction as a consequential relief, are well settled. We may refer to them briefly.
>
> 13.1. Where a plaintiff is in lawful or peaceful possession of a property and such possession is interfered or threatened by

the defendant, a suit for an injunction simpliciter will lie. A person has a right to protect his possession against any person who does not prove a better title by seeking a prohibitory injunction. But a person in wrongful possession is not entitled to an injunction against the rightful owner.

13.2. Where the title of the plaintiff is not disputed, but he is not in possession, his remedy is to file a suit for possession and seek in addition, if necessary, an injunction. A person out of possession, cannot seek the relief of injunction simpliciter, without claiming the relief of possession.

13.3. Where the plaintiff is in possession, but his title to the property is in dispute, or under a cloud, or where the defendant asserts title thereto and there is also a threat of dispossession from defendant, the plaintiff will have to sue for declaration of title and the consequential relief of injunction. Where the title of the plaintiff is under a cloud or in dispute and he is not in possession or not able to establish possession, necessarily the plaintiff will have to file a suit for declaration, possession and injunction.

14. We may, however, clarify that a prayer for declaration will be necessary only if the denial of title by the defendant or challenge to the plaintiff's title raises a cloud on the title of the plaintiff to the property. A cloud is said to raise over a person's title, when some apparent defect in his title to a property, or when some prima facie right of a third party over it, is made out or shown. An action for declaration, is the remedy to remove the cloud on the title to the property. On the other hand, where the plaintiff has clear title supported by documents, if a trespasser without any claim to title or an interloper without any apparent title, merely denies the plaintiff's title, it does not amount to raising a cloud over the title of the plaintiff and it will not be necessary for the plaintiff to sue for declaration and a suit for injunction may be

sufficient. Where the plaintiff, believing that the defendant is only a trespasser or a wrongful claimant without title, files a mere suit for injunction, and in such a suit, the defendant discloses in his defence the details of the right or title claimed by him, which raises a serious dispute or cloud over the plaintiff's title, then there is a need for the plaintiff, to amend the plaint and convert the suit into one for declaration. Alternatively, he may withdraw the suit for bare injunction, with permission of the court to file a comprehensive suit for declaration and injunction. He may file the suit for declaration with consequential relief, even after the suit for injunction is dismissed, where the suit raised only the issue of possession and not any issue of title.

15. In a suit for permanent injunction to restrain the defendant from interfering with the plaintiff's possession, the plaintiff will have to establish that as on the date of the suit he was in lawful possession of the suit property and the defendant tried to interfere or disturb such lawful possession. Where the property is a building or building with appurtenant land, there may not be much difficulty in establishing possession. The plaintiff may prove physical or lawful possession, either of himself or by him through his family members or agents or lessees/licensees. Even in respect of a land without structures, as for example an agricultural land, possession may be established with reference to the actual use and cultivation. The question of title is not in issue in such a suit, though it may arise incidentally or collaterally."

23. Their Lordships summarized the legal position qua the prohibitory injunction as under :-

"21. To summarize, the position in regard to suits for prohibitory injunction relating to immovable property, is as under :

(a) Where a cloud is raised over the plaintiff's title and he does not have possession, a suit for declaration and possession, with or without a consequential injunction, is the remedy. Where the plaintiff's title is not in dispute or under a cloud, but he is out of possession, he has to sue for possession with a consequential injunction. Where there is merely an interference with the plaintiff's lawful possession or threat of dispossession, it is sufficient to sue for an injunction simpliciter.

(b) As a suit for injunction simpliciter is concerned only with possession, normally the issue of title will not be directly and substantially in issue. The prayer for injunction will be decided with reference to the finding on possession. But in cases where de jure possession has to be established on the basis of title to the property, as in the case of vacant sites, the issue of title may directly and substantially arise for consideration, as without a finding thereon, it will not be possible to decide the issue of possession.

(c) But a finding on title cannot be recorded in a suit for injunction, unless there are necessary pleadings and appropriate issue regarding title (either specific, or implied as noticed in Annaimuthu Thevar[3]). Where the averments regarding title are absent in a plaint and where there is no issue relating to title, the court will not investigate or examine or render a finding on a question of title, in a suit for injunction. Even where there are necessary pleadings and issue, if the matter involves complicated questions of fact and law relating to title, the court will relegate the parties to the remedy by way of comprehensive suit for declaration of title, instead of deciding the issue in a suit for mere injunction.

(d) Where there are necessary pleadings regarding title, and appropriate issue relating to title on which parties lead evidence, if the matter involved is simple and straightforward, the court may

3Anniamuthu Thevar v. Alagammal, (2005) 6 SCC 202

> decide upon the issue regarding title, even in a suit for injunction. But such cases, are the exception to the normal rule that question of title will not be decided in suits for injunction. But persons having clear title and possession suing for injunction, should not be driven to the costlier and more cumbersome remedy of a suit for declaration, merely because some meddler vexatiously or wrongfully makes a claim or tries to encroach upon his property. The court should use its discretion carefully to identify cases where it will enquire into title and cases where it will refer to the plaintiff to a more comprehensive declaratory suit, depending upon the facts of the case."

24. The proposition laid down in **Anathula Sudhakar** (supra) (paragraph 14) has been followed with approval in the matter of **Kurella Naga Druva Vudaya Bhaskara Rao v. Galla Jani Kamma alias Nacharamma**[4].

25. Reverting to the facts of the present case in light of the aforesaid judgments rendered by the Supreme Court, it is quite vivid that plaintiff's father Harishankar Yadav purchased the suit land and house by registered sale deed dated 06/08/1965 (Ex. P/1) and as held by the Supreme Court in **Lakhi Baruah** (supra) that there is a presumption of execution of a registered document which is 30 years old. Merely because the defendants have questioned the validity of the sale

4 (2008) 15 SCC 150

deed which has not been successfully established by the defendants, it cannot be held that cloud has been raised on the title of the plaintiff especially when the first appellate Court has rightly held that the sale deed (Ex. P/1) has been duly executed in favour of plaintiff's father and title has rightly been conveyed by virtue of Section 54 of the Transfer of Property Act, as such, the plaintiff has rightly not filed the suit for declaration of title. Even otherwise, plaintiff's suit for possession was based on title, so title has already been examined by the two Courts below and the first appellate Court has found that plaintiff's father had purchased the suit land and house by the sale deed (Ex. P/1) and became the title-holder which plaintiff has inherited after his death. Therefore, the submission vehemently raised by learned counsel for the appellants/defendants that the suit for declaration of title was required to be filed by the plaintiff deserves to be and is hereby rejected, being meritless.

26. Consequently, the first appellate Court is absolutely justified in granting decree for recovery of possession in favour of the plaintiff

which is neither perverse nor contrary to the record. I do not find any merit in this second appeal.

27. The second appeal deserves to be and is accordingly dismissed. No cost(s).

28. Decree be drawn-up accordingly.

Sd/-
(Sanjay K. Agrawal)
Judge

Harneet