

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR**FA No. 121 of 2016**

- Kumari Sonam Gupta D/o Bajrang Lal Gupta, Aged About 20 Years R/o Gandhi Chowk, Bazzarpara, Janjgir, District Janjgir-Champa, Chhattisgarh

---- Appellant**Versus**

1. Kartikram S/o Borra Mahra, Aged About 37 Years R/o Village Madwa, Tahsil Dabhra, District Janjgir-Champa, Chhattisgarh
2. Subran S/o Borra Mahra, Aged About 34 Years R/o Village Madwa, Tahsil Dabhra, District Janjgir-Champa, Chhattisgarh
3. Munna S/o Pardeshi Mahra, Aged About 37 Years R/o Jairamnagar, Tahsil Masturi, District Bilaspur, Chhattisgarh
4. M/s Prakash Industries Limited, Najabgarh, New Delhi, Through The Manager, Santosh Shrivastava, Prakash Industries, Raipur, At Present Champa, Chhattisgarh
5. State Of Chhattisgarh, Through The Collector, Bilaspur, District Bilaspur, Chhattisgarh

---- Respondents

For Appellant	:	Shri Somnath Verma, Advocate
For Respondent No.4	:	Shri Manoj Paranjpe, Advocate
For State	:	Ms. S. Harshita, Panel Lawyer

D.B.:- Hon'ble Shri Justice Manindra Mohan Shrivastava
Hon'ble Smt. Justice Vimla Singh Kapoor

CAV Judgment**Per Manindra Mohan Shrivastava, J.****06/10/2020**

This First Appeal is directed against impugned judgment and decree dated 16/02/2016 passed by the District Judge, Janjgir -Champa in Civil Suit No.5-A/2011, by which, the learned Trial Court has dismissed the suit of the plaintiff.

2. The appellant / plaintiff filed a suit seeking declaration that the sale deed dated

06/10/2009 executed by defendants 1 to 3 in favour of defendant No.4 is void and inoperative in law. In addition, relief of cost was also sought.

3. The plaintiff's suit was based on pleadings *inter alia* that the property in dispute belonged to defendants 1, 2 and father of defendant No.3 and in need of money, the defendants sold the property in dispute for a valid consideration of Rs.2,61,000/- by executing sale deed dated 25/08/2009 in favour of the plaintiff and thereafter, possession was also handed over. Later on, the plaintiff came to know that defendants 1 to 3 re-sold the property in dispute in favour of defendant No.4 vide sale deed dated 06/10/2009 whereas the property was already sold to the plaintiff vide registered sale deed. The plaintiff came to know about this sale deed when the plaintiff submitted her sale deed for mutation purposes and she was informed that on the basis of subsequent sale deed, name of defendant No.4 has already been mutated.

4. Refuting the claim of the plaintiff, defendants 1 to 3 filed written statements stating that they never sold their property in favour of the plaintiff nor the amount as stated, was paid. According to them, the so called sale deed was a sham transaction and plaintiff's father – Bajrang Lal, who is a property broker, got an advance of Rs.53,000/- paid stating that he is arranging for sale of defendants' property to a power plant company and assured that in the matter of sale, he would ensure defendants get Rs.6 to 10 lakhs per acre and out of the same, after deduction of his commission, rest of the amount would be paid to defendants 1 to 3. It was further pleaded that defendants 1 to 3 had given Rs.53,000/- by way of loan and stated that as and when registry documents are prepared, balance amount would be repaid with interest. It was further pleaded that the two sale deeds were prepared by Bajrang Lal, father of the plaintiff, one in the name of Vinod Kumar and Krishnamohan Dewangan and other in the name of his own daughter and both were sham documents prepared as security for Rs.53,000/-. According to the defendants, the property was actually sold by them to defendant No.4 vide sale deed dated 06/10/2009 for a valid consideration of Rs.8,26,400/-.

5. Plaintiff, later on, amended the plaint and added an additional relief that if it is found that during the pendency of the suit, the defendants acquired possession, possession be granted to the plaintiff.

6. Learned Trial Court framed as many as six issues.

“1. क्या वादी ने खसरा नम्बर 45/1 रकबा 0.33 एकड़, खसरा नम्बर 70 रकबा 0.23 एकड़, खसरा नम्बर 100 रकबा 0.09 एकड़, खसरा नम्बर 102 रकबा 0.18 एकड़, खसरा नम्बर 110 रकबा 0.24 एकड़, भूमि पंजीकृत विक्रयपत्र दिनांक 25/08/2009 को क़य कर भूमि पर आधिपत्य प्राप्त कर लिया है ?

2. क्या वादी के पक्ष में दिनांक 25/08/2009 को निष्पादित विक्रय पत्र प्रतिवादी क्रमांक-1 से 3 के साथ कपटपूर्वक एवं छल कर निष्पादित करा लिया गया है ?

3. क्या वादी के पिता बजरंगलाल ने प्रतिवादी क्रमांक-4 से एक लाख तिरपन हजार रुपये प्राप्त कर विवादित भूमि पर कोई दावा नहीं है, इस आशय का इकरारनामा निष्पादित किया है ? यदि हाँ, तो प्रभाव ?

4. क्या वादी का वादभूमि पर आधिपत्य नहीं है ? और आधिपत्य के अभाव में वादी का वाद पोषणीय नहीं है ?

5. क्या विवादित भूमि के संबंध में प्रतिवादी क्रमांक-4 के पक्ष में निष्पादित विक्रयपत्र शून्य एवं अवैध है ?”

7. After allowing parties to adduce oral and documentary evidence, learned Trial Court recorded specific finding that the plaintiff failed to prove, by clinching evidence, that there was an out and out sale of the property by defendants 1 to 3 in favour of the plaintiff and the plaintiff's suit was dismissed.

8. Assailing legality and validity of the judgment and decree impugned in this appeal, learned counsel for the appellant would argue that learned Trial Court committed gross illegality and error of fact as well ignoring that the pleadings of the defendants clearly amounted to admission of execution of sale deed, meaning thereby that a valid title eventually passed in favour of the plaintiff. He would argue that the

defendants having admitted execution of sale deed in favour of the plaintiff, in earlier point of time, the burden was very heavy on them to prove that the document / sale deed executed in favour of the plaintiff was never intended to sell the property but it was only a sham document merely prepared as a measure of security against loan of Rs.53,000/- given by Bajrang Lal to defendants 1 to 3. Next submission is that the learned Court below committed error of fact in holding that the plaintiff failed to lead any evidence whereas plaintiff's witness have clearly stated regarding execution of sale deed. The finding of the learned Court below that non-examination of plaintiff herself and she not entering into witness box requires adverse inference to be drawn against the plaintiff is bad in law as well as facts because it was without proper appreciation of evidence led by the plaintiff. He further argues that the defendants came out with a plea of sale of property vide registered deed in favour of defendant No.4 but no counterclaim was made by the defendant No.4 in that regard. According to him, the evidence of Bajrang Lal Gupta (PW1) and Bharat Lal Rathore (PW2) not only prove execution of sale deed but also passing of valid consideration in favour of the plaintiff and therefore, the plaintiff was entitled to appropriate declaration. In support of his submission, learned counsel for the plaintiff placed reliance upon **Gurbax Singh v. Kartar Singh and ors, AIR 2002 SC 959, Pandurang Jivaji Apte v. Ramchandra Gangadhar Ashtekar (dead) by LRs and ors., AIR 1981 SC 2235, Bishundeo Narain Rai (dead) by LRs and ors. v. Anmol Devi and ors., AIR 1998 SC 3006, Smt. Bhimabai Mahadeo Kambekar (D) through LR v. Arthur Import and Export Company and ors., AIR 2019 SC 719 and Smt. Shefali Roy v. Hero Jaswant Dass and other Respondents, AIR 1992 Allahabad 254.**

9. Per contra, learned counsel for respondent No.4 would argue that the learned Court below has weighed oral and documentary evidence led by both the parties in the light of pleadings made by them. He would submit that the pleadings of the defendants do not amount to admission of execution of sale deed and on the contrary, it was pleaded that it was only a sham document prepared as security, as Bajrang Lal had given Rs.53,000/- to defendants 1 to 3 stating that as and when sale transaction is

finally struck between defendants 1 to 3 and defendant No.4, the said amount would be returned to Bajrang Lal and the defendants would be paid balance sale consideration amount. He would next submit that even assuming that defendants admitted that some document like sale deed was prepared, it has not only been specifically pleaded but evidence has also been led which is supported from the evidence of plaintiff's witness Bajrang Lal, who has admitted that he was witness to the subsequent sale deed executed in favour of defendant No.4 by defendants 1 to 3 and he also signed the consent letter (Ex.D/2) which have been heavily relied upon by the learned Trial Court to tilt balance and holding defendants' case as carrying more probative value as compared to that of the plaintiff. He would also submit that the relief of possession as sought renders the suit liable to be dismissed for want of proper relief. Next contention is that as the defendants, in their pleadings, cast serious cloud on plaintiff's title which the plaintiff was claiming by virtue of sale deed dated 25/08/2009, the plaintiff was required to seek appropriate declaration of her own title on the basis of that sale deed and without seeking any such relief, mere relief sought declaring the sale deed in favour of defendant No.4 void and inoperative, renders the suit liable to be dismissed on this count alone. He further submitted that as the plaintiff has been found to be not in possession of the suit property, mere addition of a relief of recovery of possession is not enough but the plaintiff was required to pay proper Court fee which has not been done. He also submitted that the plaintiff was required to prove that she had enough fund and she actually paid Rs.2,61,000/- to defendants 1 to 3. The evidence of Bajrang Lal is to be treated as evidence of plaintiff witness and not that of the plaintiff merely because he happened to be the Power of Attorney holder. In support of his submission, learned counsel for the respondent relied upon **Jharkhand State Housing Board v. Didar Singh, 2018 SCC OnLine SC 2170, Gwalior Ceramic and Potteries Pvt. Ltd. v. Karamchand Thapar and Bros. Coal Sales Ltd., Gwalior (First Appeal No.13/1992), Mohinder Kaur v. Sant Paul Singh, (2019) 9 SCC 358, State of Chhattisgarh Through the Collector and ors. v. M/s. Shree Krishna Industries (FAM No.182/2017), Executive Officer, Arulmigu**

Chokkanatha Swamy Koil Trust, Virudhunagar v. Chandran and ors., (2017) 3 SCC 702.

10. We have heard learned counsel for the parties and perused records.

11. On the basis of submission made, following points arise for determination in this appeal -

a) Whether the learned Trial Court committed any error of fact in coming to the conclusion that the plaintiff failed to prove the sale of disputed property by virtue of sale deed dated 25/08/2009 and whether learned Court below ignored admission of defendants regarding execution of sale deed.

b) Whether the plaintiff's suit is liable to be dismissed for want of proper relief of not seeking any declaration of her title on the basis of sale deed dated 25/08/2009.

12. Learned Court below, while examining plaintiff's case, upon scrutiny of oral and documentary evidence on record, found that the plaintiff herself did not enter the witness box to prove execution of sale deed in favour of defendants 1 to 3 nor proved payment of sale consideration as pleaded. Learned Trial Court also held that the plaintiff sought to establish her case by leading evidence of her Power of Attorney who could not depose and prove facts which were within the personal knowledge of the plaintiff as purchaser. Learned Trial Court was also of the view that defendants' plea that the so called sale deed dated 25/08/2009 was a sham one, is probable because the plaintiff neither examined herself nor the attesting witness of the sale deed whereas the defendants have examined the witnesses to prove sale deed dated 06/10/2009. One of the main consideration for the Trial Court to reject plaintiff's case and accept defendants' version on scales of probability was that the plaintiff's father Bajrang Lal who was examined as plaintiff's witness, has admitted that he was witness to sale deed dated 06/10/2009 and also that he had signed '*sahmati patra*' (Ex.D/2) and therefore, he could not depose against defendants nor could depose that there was out and out sale of the property vide sale deed dated 25/08/2009.

13. The plaintiff's case, as pleaded by her, rests mainly on the pleadings that vide sale deed dated 25/08/2009, she had purchased the disputed property from defendants 1 and 2 with the consent of defendant No.3. In support of the plea, the plaintiff has led in evidence, sale deed dated 25/08/2009. According to the plaintiff, the defendants 1 and 2 needed money and therefore, for valid consideration of Rs.2,61,000/-, sale deed was executed and possession was handed over. However, the plaintiff herself did not enter the witness box. The entire case of the plaintiff rested on a plea of execution of sale deed in her favour by defendants 1 to 3. As the defendants have emphatically denied that they had sold the property by the said sale deed, the burden was on the plaintiff to prove due execution of sale deed dated 25/08/2009 with the consequence of passing a valid title in favour of plaintiff by virtue of said sale deed. The plaintiff neither examined herself nor any of the witnesses of the sale deed. Plaintiff led in evidence Bajrang Lal (PW1)- her father and one Bharat Lal Rathore (PW2), who claim to have prepared the sale deed.

Learned Trial Court has clearly recorded in its judgment that though the plaintiff claims to have purchased the property from the defendants and the sale deed is said to be executed in the office of the Registrar recording her presence, meaning thereby that the plaintiff traveled up to the office of the Registrar and suit was filed by the plaintiff herself, nothing could be placed on record as to why the plaintiff herself could not appear to depose on mere statement that she was differently abled. Learned Trial Court also recorded that the plaintiff could have been examined on commission but that also was not done. This is one of the most important circumstance of the case which raises doubt on the case of the plaintiff.

14. One of the main contention of learned counsel for the plaintiff is that the defendants having admitted an out and out sale vide sale deed dated 25/08/2009, non-examination of plaintiff herself is not fatal to her case. According to him, as the execution of sale deed was admitted, the defendants could not get away unless they discharged their burden that the sale deed dated 25/08/2009 was not an out and out

sale but a sham document intended for some other purposes and not for sale.

15. As far as argument of admission is concerned, a close reading of the written statement filed by defendants 1 to 3 and defendant No.4 separately, cannot be said to be a case of admission of execution of sale deed. Pleadings of defendants 1 to 3 has been that they never sold the property to the plaintiff. Their case is that Bajrang Lal, father of the plaintiff was a property broker and he prepared a sham document by giving Rs.53,000/- to defendants 1 to 3 stating that as and when the sale deed is executed with the power plant company, sale consideration would be paid after deducting advance given by Bajrang, along with interest. They have clearly stated that the documents were only sham one. Similar pleading was that of defendant No.4 also, who is the purchaser of the property vide sale deed dated 06/10/2009. If that be the pleading of the defendants, it is clear that the defendants did not admit sale in favour of the plaintiff but all that they have stated is that Bajrang Lal, a property broker, got sham document prepared as security for loan against Rs.53,000/-, which was executed by defendants 1 to 3. Obviously therefore, the burden was heavy on the plaintiff to prove that sale deed dated 25/08/2009 is based on valid title in her favour. This could be proved by examining plaintiff herself and / or witnesses of the sale deed. The plaintiff neither examined herself nor the execution witnesses. The first witness of the plaintiff is her father who has come out with the evidence as if he was deposing as the plaintiff whereas he was examined merely as plaintiff's witness. Merely because he happened to be the power of attorney holder, it cannot be said that the plaintiff herself entered the witness box. The evidence of this person with regard to payment of Rs.2,61,000/- at the time of execution of so called sale deed dated 25/08/2009 has rightly been rejected by the learned Trial Court firstly because the plaintiff herself did not come to depose regarding payment of Rs.2,61,000/- as sale consideration and secondly, this witness Bajrang Lal, father of the plaintiff, has admitted in his cross-examination that in the sale deed dated 06/10/2009 executed by defendants 1 to 3 in favour of defendant No.4, he was one of the witness. If at all plaintiff's case was that a sale deed was already executed in her favour by defendants 1 to 3, it is wholly

improbable that her own father and power of attorney holder becomes witness to sale deed dated 25/08/2009 executed by defendants 1 to 3 in favour of defendant No.4. He was not a third party or merely a property broker, he admittedly was the father of the plaintiff. He would have never become a party to the subsequent sale deed dated 06/10/2009 had there been a genuine sale transaction by defendants 1 to 3 in favour of plaintiff on 25/08/2009 and huge amount of Rs.2,61,000/- would have been paid by the plaintiff to defendants 1 to 3.

There is yet another reason why plaintiff's witness Bajrang Lal is liable to be disbelieved on the aspect of sale of property in dispute in favour of plaintiff vide sale deed dated 25/08/2009 is that this witness has admitted that he signed (Ex.D/2) which is a '*sahmati patra*'. Now its recital reads that Bajrang Lal has no objection and he had received Rs.1 lakh and executed that document. Thus, this conduct of the plaintiff's witness Bajrang Lal in executing agreement (Ex.D/1) and being witness to sale deed (Ex.D/2) dated 06/10/2009 has rightly been held to be supporting the case of the defendants rather than the plaintiff's case. Defendants 1 to 3 has clearly denied that they ever sold the property much less received sale consideration of Rs.2,61,000/-.

16. Once this is held, reliance placed on **Pandurang Jivaji Apte** (supra) becomes distinguishable on facts because in the absence of there being any acceptable evidence on record, non-examination of plaintiff herself has rightly been made a basis to draw adverse inference against the plaintiff. As far as decision in the case of **Gurbax Singh** (supra) is concerned, same would be applicable, provided the plaintiff first succeeded in proving that vide document dated 25/08/2009, a valid sale deed was executed which resulted in transfer of title in favour of the plaintiff and therefore, defendants 1 to 3 had no title left to transfer in favour of defendant No.4 vide sale deed dated 06/10/2009. For that reason, judgment **Bishundeo Narain Rai** (supra) also does not come to the help of the appellant because that decision itself holds that while examining whether the title has not passed on registration of sale deed, intention of parties are required to be gathered from averments and by other attending

circumstances.

17. On the other hand, in the case of **Mohinder Kaur** (supra), judgment cited by the respondent, the legal position with regard to proof of facts to the personal knowledge of the plaintiff and the effect of evidence of a power of attorney holder were considered by the Hon'ble Supreme Court as below -

“6. We have considered the submissions on behalf of the parties. It is an undisputed fact that the suit property stood redeemed from mortgage on 04.07.1989. The appellant sent due intimation by registered post to the respondent on 27.07.1989 and also provided him with a photocopy of the release deed, requiring the respondent to take steps for execution of the sale deed. The respondent by reply dated 02.08.1989 insisted on the no-dues certificate, denying receipt of the release deed. The respondent then gave a power of attorney on 02.11.1989 to PW1. The witness was naturally unaware of the preceding events and denied receipt of the notice dated 27.07.1989 itself. The witness was therefore also incompetent to deny receipt of photocopy of the release documents by the respondent. It was for the respondent to establish his readiness and willingness for execution of the agreement by entering the witness box and proving his capacity to pay the balance consideration amount. Except for the solitary statement in the plaint no evidence whatsoever was led on behalf of the respondent with regard to the same, if PW1 was competent to depose with regard to the same because these were facts which had to be personal to the knowledge of the respondent alone. Had the witness even led any documentary evidence on behalf of the respondent, in support of the plea for readiness and willingness on part of the respondent, different considerations may have arisen. The witness also sought to deny any knowledge regarding the cancellation of the agreement on 01.09.1989.

7. In *Janki Vashdeo* (supra), it was held that a power of attorney holder, who has acted in pursuance of the said power, may depose on behalf of the principal in respect of such acts but cannot depose for the principal for the acts done by the principal and not by the power of attorney holder. Likewise, the power of attorney holder cannot depose for the principal in respect of matters of which the principal alone can have personal knowledge and in respect of which the principal is entitled to be cross-examined. In our opinion, the failure of the respondent to appear in

the witness box can well be considered to raise an adverse presumption against him as further observed therein as follows :

“15. Apart from what has been stated, this Court in the case of *Vidhyadhar v. Manikrao* observed at SCC pp. 58384, para 17 that:

“17. Where a party to the suit does not appear in the witness box and states his own case on oath and does not offer himself to be cross-examined by the other side, a presumption would arise that the case set up by him is not correct....”

In this case, it was for the plaintiff to prove whether the plaintiff was in possession of sufficient fund and what was the source. The facts which had to be personal to the knowledge were sought to be proved by leading evidence of power of attorney holder who could not appear as plaintiff as the power of attorney holder is only a witness and merely because he happened to be a power of attorney holder, he does not become plaintiff nor can it be said to be plaintiff's own evidence.

18. The other issue arises for consideration regarding maintainability of the suit. On this issue, as to whether the plaintiff's suit is liable to be dismissed on account of plaintiff having not prayed for consequential relief as required under Section 34 of the Specific Relief Act, it is found that initially when the suit was filed, the plaintiff had only prayed for a declaratory decree that the sale deed dated 06/10/2009 said to be executed in favour of defendant No.4, be declared null and void, later on, by way of amendment, additional relief was sought that if it is found that during the pendency of the suit, plaintiff has been dispossessed, possession be also granted to the plaintiff. Therefore, as far as that part is concerned, there is no much substance in the argument of learned counsel for the respondent. However, there is considerable force in the submission that as in the present case, plaintiff's title was seriously disputed and cloud was created by the defendants by stating that the so called sale deed dated 25/08/2009 is a sham document and no sale ever took place and it was merely a security, the plaintiff ought to have prayed for specific relief of declaration of its own title by virtue of sale deed dated 25/08/2009 which was not done by the plaintiff.

19. Even though on this issue, learned Trial Court has recorded finding in favour of plaintiff and no cross – objection has been filed by the defendant, in view of the judgment of this Court in the case of **State of Chhattisgarh** (supra), this Court has jurisdiction to examine the findings of the learned Trial Court on this issue. In the aforesaid decision, it was held that -

“13. On the correctness of finding recorded by the trial Court on Issue No.1, learned Deputy Advocate General raised serious objection that the same may not be gone into this appeal, as no such specific cross objection by the plaintiff in this regard has been raised in his cross-appeal and cross appeal is confined only in so far as refusal of claim for damages is concerned. For this purpose, learned State counsel has placed reliance on the provisions contained under Order 41 Rule 22 of CPC, wherein it has been provided that the respondent may, in whose favour, decree has been passed, nevertheless raise cross objection against any finding that may have been recorded against him while deciding the case.

In this regard, we may refer to the provisions contained under Order 41 Rule 22 CPC, which reads as under:-

Order XLI - Appeals from original decrees.

Rule 22- “Upon hearing respondent may object to decree as if he had preferred a separate appeal.- (1)

Any respondent, though he may not have appealed from any part of the decree, may not only support the decree [but may also state that the finding against him in the Court below in respect of any issue ought to have been in his favour; and may also take any cross-objection] to the decree which he could have taken by way of appeal provided he has filed such objection in the Appellant Court within one month from the date of service on him or his pleader of notice of the day fixed for hearing the appeal, or within such further time as the Appellate Court may see fit to allow.

[Explanation—A respondent aggrieved by a finding of the Court in the judgment on which the decree appealed against is based may, under this rule, file cross-objection in

respect of the decree in so far as it is based on that finding, notwithstanding that by reason of the decision of the Court on any other finding which is sufficient for the decision of the suit, the decree, is, wholly or in part, in favour of that respondent.]

(2) Form of objection and provisions applicable thereto

— Such cross-objection shall be in the form of a memorandum, and the provisions of rule 1, so far as they relate to the form and contents of the memorandum of appeal, shall apply thereto.

2[(3) Omitted]

(4) Where, in any case in which any respondent has under this rule filed a memorandum of objection, the original appeal is withdrawn or is dismissed for default, the objection so filed may nevertheless be heard and determined after such notice to the other parties as the Court thinks fit.

(5) The provisions-relating to appeal by indigent persons shall, so far as they can be made applicable apply to an objection under this rule.”

14. Though, number of judgments were cited before us, in view of what has been authoritatively pronounced by Their Lordships in the Supreme Court in the case of **Delhi Electric Supply Undertaking** (supra), we conclude that even without such specific objection having been taken, this Court being the appellate Court, has all the power and jurisdiction to examine the correctness of finding recorded on Issue No.1. In the aforesaid decision, it was held-

17. “In our approach we can also draw strength from the provisions of rule 33 of Order 41 of the Code of Civil Procedure which is as under :

"33. Power of court of appeal. - The appellate court shall have power to pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree or order as the case may require, and this power may be exercised by the court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents or parties, although

such respondents or parties may not have filed any appeal or objection and may, where there have been decrees in cross-suits or where two or more decrees are passed in one suit, be exercised in respect of all or any of the decrees, although an appeal may not have been filed against such decrees :

Provided that the appellate court shall not make any order under section 35A, in pursuance of any objection on which the court from whose decree the appeal is preferred has omitted or refused to make such order."

18. This provision was explained by this court in *Mahant Dhangir v. Madan Mohan*, 1987 Supp (SCC) 528 in the following words (page 534) :

"The sweep of the power under rule 33 is wide enough to determine any question not only between the appellant and respondent, but also between respondent and co-respondents. The appellate court could pass any decree or order which ought to have been passed in the circumstances of the case. The appellate court could also pass such other decree or order as the case may require. The words 'as the case may require' used in rule 33 of Order 41 have been put in wide terms to enable the appellate court to pass any order or decree to meet the ends of justice. What then should be the constraint ? We do not find many. We are not giving any liberal interpretation. The rule itself is liberal enough. The only constraint that we could see, may be these : that the parties before the lower court should be there before the appellate court. The question raised must properly arise out of the judgment of the lower court. If these two requirements are there, the appellate court could consider any objection against any part of the judgment or decree of the lower court. It may be urged by any party to the appeal. It is true that the power of the appellate court under rule 33 is discretionary. But it is a proper exercise of judicial discretion to determine all questions urged in order to render complete justice between the parties. The court should not refuse to exercise that discretion on mere technicalities."

Therefore, even though, in the cross-appeal, the plaintiff may not have specifically raised the issue regarding the correctness and legality of the trial Court's finding on Issue No.1, we are inclined to examine the correctness of the said finding."

Though learned Trial Court has recorded a finding that subsequently the plaintiff added an additional relief of recovery of possession as well, learned Trial Court committed error of law in not taking note that even though plaintiff's title claim on the basis of sale deed dated 25/08/2009 was seriously disputed and cloud was created, no specific relief of declaration of title on the basis of sale deed dated 25/08/2009 was sought by the plaintiff. Once, cloud is created on the title, it was absolutely necessary for the plaintiff to seek appropriate relief of declaration of her own title on the basis of sale deed dated 25/08/2009, which was not done. Therefore, we are of the view that on this count also, plaintiff's suit was liable to be dismissed.

20. In the result, we do not find any good ground to interfere with the well reasoned judgment passed by the Trial Court dismissing the suit of the plaintiff. The appeal is consequently dismissed, though with cost.

Let appellate decree be accordingly drawn.

Sd/-

(Manindra Mohan Shrivastava)
Judge

Sd/-

(Vimla Singh Kapoor)
Judge