

HIGH COURT OF CHHATTISGARH, BILASPUR**Second Appeal No.126 of 2011****Judgment Reserved on :12.7.2021****Judgment Delivered on:26.7.2021**

Khamhan Lal S/o Late Shri Mangal Sai, Aged about 45 years, caste Rawat (Yadav) R/o Village Baridih, Tah & District Korba (CG)

----- Appellant/Plaintiff**Versus**

1. Lala Ram S/o Shobha Ram, aged about 40 years, Caste Rawat (Yadav) R/o. Village Baridih, Tahsil & District Korba (CG) (wrongly mentioned caste as Raw in the order sheet)
2. State of Chhattisgarh through the Collector Korba, District Korba (CG)

----- Respondents/Defendants

For Appellant/Plaintiff:

Mr.Ashok Kumar Swarnkar, Advocate

For Respondent No.1/Defendant No.1:

Mr.Anil Tripathi, Advocate

For Respondent No.2/State:

Mr.Ravi Bhagat, Dy.G.A.

Hon'ble Shri Justice Sanjay K. Agrawal

C.A.V. Judgment (Through Video Conferencing)

1. The substantial questions of law involved, formulated and to be answered in this second appeal preferred by the appellant/plaintiff are as under:-

"1. Whether the lower Appellate Court justified in reversing the judgment of the Trial Court on the basis of disbelieving the will deed dated 17.04.2006 and treating the same executed by fraud.

2. Whether at the time of execution of the will deed dated 17.04.2006 late Laxmin Bai

was medically fit enough to execute the same."

2. The additional substantial question of law was formulated on 23.7.2021 as under:-

"Whether the first appellate Court is justified in partly setting aside the judgment and decree of the trial Court in favour of the plaintiff holding that the decree for declaration of title is barred by the proviso to Section 34 of the Specific Relief Act, 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 in the suit before the trial Court].

3. Learned counsel appearing for the parties were noticed and they were heard on additional substantial question of law.

4. The plaintiff filed a suit for declaration of title and permanent injunction stating inter-alia that Laxmin Bai had executed *Parwastinama* in favour of the plaintiff on 30.7.2004 (Ex.P-4) and thereby he became title-holder and in possession of the suit land, in which defendant No.1 is interfering by strength of Will dated 17.4.2006 (Ex.D-4).

5. Resisting the suit, defendant No.1 filed his written statement and denied the averments made in the plaint stating inter-alia that Will dated 17.4.2006 (Ex.D-4) has duly been executed by Laxmin Bai in his favour and he is in possession of the suit land and

cultivating the suit land, as such, the suit be dismissed with cost(s).

6. The trial Court upon appreciation of oral and documentary evidence available on record, by its judgment and decree dated 04.10.2020, partly allowed the suit holding that the plaintiff is title-holder of the suit land by *Parwastinama* dated 30.7.2004 (Ex.P-4), but he is not in possession of the suit land, rather defendant No.1 is in possession over the suit land, therefore, dismissed the suit relating to permanent injunction, against which, defendant No.1 preferred first appeal before the first appellate Court challenging the judgment and decree of the trial Court granting decree for declaration of title in favour of the plaintiff. The first appellate Court by the impugned judgment and decree held that though Will dated 17.4.2006 (Ex.D-4) executed by Laxmin Bai in favour of defendant No.1 is not proved, yet allowed the appeal holding that since the plaintiff is not in possession over the suit land, therefore, decree for declaration of title could not have been granted in favour of the plaintiff in view of proviso to Section 34 of the Specific Relief Act, 1963 (hereinafter called as 'Act of 1963'), against which, this second appeal under Section 100 of the

CPC has been preferred by the appellant/plaintiff, in which two substantial questions of law have been framed, which have been set-out in opening paragraph of this judgment for sake of completeness.

7. Mr. Ashok Kumar Swarnkar, learned counsel for the appellant / plaintiff, would submit that the first appellate Court has committed legal error in granting the appeal by dismissing the suit in toto after having held that defendant No.1 has failed to prove his title over the suit land on the basis of Will dated 17.4.2006 (Ex.D-4) as the first appellate Court has clearly recorded a finding that defendant No.1 has failed to prove due execution and attestation of Will by Laxmin Bai in his favour and since the plaintiff has already claimed the relief of permanent injunction, therefore, the suit was not barred by proviso to Section 34 of the Act of 1963. He would rely upon the judgment of the Supreme Court in the matter of C. Mohammad Yunus v. Syed Unnissa and others¹.

8. On the other hand, Mr. Anil Tripathi, learned counsel for respondent No.1/defendant No.1, would submit that since the plaintiff is not in possession of the suit land, which proviso to Section 34 of the Act of 1963 bars, therefore, the first appellate Court is

¹ AIR 1961 SC 808

absolutely justified in holding that the suit is barred by proviso to Section 34 of the Act of 1963. He would rely upon the judgment of this Court in the matter of Bansdev (died) through LR's and others v. Shri Mandev and others (Second Appeal No.470/2006), decided on 10.12.2019.

9. 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 questions of law No.1 and 2:-

10. The suit filed by the plaintiff for declaration of title and permanent injunction was partly decreed by the trial Court holding that the plaintiff is title-holder of the suit land, but he is not entitled for permanent injunction as he is not in possession of the suit land on the date of institution of the suit. Feeling aggrieved against that decree, defendant No.1 filed first appeal before the first appellate Court. The first appellate Court agreed with the finding of the trial Court that the plaintiff is title-holder of the suit land and defendant No.1 has failed to establish the Will dated 17.4.2006 (Ex.D-4) executed by Laxmin Bai in his favour, but the first appellate Court further

held that since on the date of filing of the suit i.e. 15.10.2008, the plaintiff is not in possession over the suit land, therefore, decree for title granted by the trial Court is barred by proviso to Section 34 of the Act of 1963 and accordingly, allowed the appeal and dismissed the suit in toto by the first appellate Court. In second appeal filed by the plaintiff, on 27.11.2013 two substantial questions of law have been framed and both substantial questions relate to legality, validity and correctness of Will dated 17.4.2006 (Ex.D-4) and it is pertinent to mention here that both the Courts below have concurrently held that defendant No.1 has failed to prove execution and attestation of Will 17.4.2006 (Ex.D-4) by Laxmin Bai in his favour, as such, these two substantial questions of law formulated hereinabove have already been answered by two Courts below in favour of the plaintiff and therefore, both the questions are purely academic which have already been answered in favour of the plaintiff and against defendant No.1.

Answer to substantial question of law No.3:-

11. The first appellate Court reversed the decree for declaration of title granted in favour of the plaintiff in the light of proviso to Section 34 of

the Act of 1963. Section 34 of the Act of 1963 provides as under:-

"34. Discretion of court as to declaration of status or right.—Any person entitled to any legal character, or to any right as to any property, may institute a suit against any person denying, or interested to deny, his title to such character or right, and the court may in its discretion make therein a declaration that he is so entitled, and the plaintiff need not in such suit ask for any further relief:

Provided that no court shall make any such declaration where the plaintiff, being able to seek further relief than a mere declaration of title, omits to do so."

12. A careful perusal of proviso to Section 34 of the Act of 1963 would show that proviso to Section 34 prohibits the suit for declaration without further relief.

13. The object of proviso is to avoid multiplicity of the suit and to protect the revenue from having a suit brought without proper ad valorem court fee having been paid. The further relief contemplated in the proviso is relief which is available to the plaintiff at the time of institution of the suit. The further relief referred to in the proviso must be a relief flowing directly and necessarily from the declaration sought and a relief appropriate to and necessarily consequent on the right asserted. The expression "further relief" employed in proviso to Section 34 would be the relief which would complete

the claim of the plaintiff and not to lead multiplicity of the suit. Specific relief has to be claimed necessarily flowing from relief of declaration. It must be relief ancillary to the main relief and not one in alternative. Such relief cannot be granted without declaration. (See M.K.Rappai and others v. John and others², Ram Saran and Another v. Smt.Ganga Devi³ and Executive Officer, Arulmigu Chokkanatha Swamy Koil Trust, Virudhunagar v. Chandram and others⁴).

14. If the plaintiff is out of possession of the land and seeks to have his title declared, his suit for mere declaration will not lie without relief of possession. Under proviso to Section 34, the plaintiff who is able to seek further relief than a mere declaration of title, is obliged to seek such relief. If he omits to do so, the Court will not make the declaration asked for. The plaintiff being out of possession seeking for declaration of title to land ought to pray for possession if the defendant is in possession. However, he is not obliged to do so if the defendant is not in possession. (See Vinay Krishna v. Keshav Chandra and another⁵ and Meharchand

2 1969(2) SCC 590

3 AIR 1972 SC 2685

4 (2017) 3 SCC 702

5 AIR 1993 SC 957

Das v. Lal Babu Siddique⁶).

- 15.** In **C. Mohammad Yunus** (supra), the Supreme Court has held that the question whether "further relief" claimed as consequential upon the declaration is adequate or not depends upon the facts and circumstances of the case and observed as under:-

"6....A suit for declaration with a consequential relief for injunction, is not a suit for declaration simpliciter; it is a suit for declaration with further relief. Whether the further relief claimed in a particular case as consequential upon a declaration is adequate must always depend upon the facts and circumstances of each case."

- 16.** Reverting to the facts of the case in the light of the aforesaid legal position, it is quite vivid that both the Courts have concurrently recorded that the suit property was earlier held by Laxmin Bai who died on 5.6.2007 and from the date of her death, defendant No.1 is in possession of the suit land and so on the date of institution of the suit i.e. 15.10.2008, as per admission made by the plaintiff in para-46 of his statement, defendant No.1 is in possession of the suit land and holding so, the trial Court granted only decree of declaration of title in favour of the plaintiff and did not grant decree for injunction in favour of the plaintiff and the first appellate Court reversed the decree for declaration

6 AIR 2007 SC 1499

of title holding that since the plaintiff is not in possession of the suit land on the date of institution of suit i.e. on 15.10.2008 and defendant No.1 is in possession, the plaintiff's suit is barred by proviso Section 34 of the Act of 1963.

17. In view of the above-stated finding, since the plaintiff is not in possession of the suit land on the date of institution of the suit, therefore, he must have asked for further relief of recovery of possession in a suit filed on 15.10.2008 and as such, relief of recovery of possession would be further relief which ought to have been claimed by the plaintiff in order to make the suit maintainable for decree of declaration of title and to save the suit from proviso to Section 34 of the Act of 1963, as such, the plaintiff being able to seek further relief of recovery of possession did not ask for the relief of possession, the plaintiff did claim the relief of injunction in a suit for declaration of title, but since the plaintiff was not in possession of the suit land on the date of institution of suit, the further relief of injunction was not "adequate" relief in the said suit in line with the principle of law laid down by the Supreme Court in the matter of C. Mohammad Yunus (supra) and the plaintiff must have asked for

further relief of recovery of possession. Consequently, the first appellate Court has rightly dismissed the suit holding it to be barred by proviso to Section 34 of the Act of 1963. I do not find perversity or illegality in the finding recorded by the first appellate Court while dismissing the suit holding it to be barred by proviso to Section 34 of the Act of 1963.

18. As a fallout and consequence of the aforesaid discussion, the second appeal is liable to be and is hereby dismissed leaving the parties to bear their own cost(s).

19. Appellate decree be drawn-up accordingly.

Sd/-

(Sanjay K.Agrawal)
Judge

B/-