

HIGH COURT OF CHHATTISGARH, BILASPUR**Second Appeal No.6 of 2010**

Ashish Kumar Bhattacharya (died) through LR's

(a) Subroto Bhattacharya, S/o Late Ashish Kumar Bhattacharya, aged 45 years, R/o C/o Bhilai Jaypee Cement Ltd., Jaypee Township Q.No.F-1, Babupur, Satna (M.P.)

(b) Devasish Bhattacharya, S/o Late Ashish Kumar Bhattacharya, aged 47 years, R/o D-45/146, Jangam Bari, Varanashi (U.P.)

(c) Gopa Nath, D/o Late Ashish Kumar Bhattacharya, aged 48 years, R/o 1531, Redwood Grove Terrace, Lake Mary, Florida U.S.A. 32746

----- LR's of the Appellant/Plaintiff

Versus

1. Smt. Krishna Agarwal, wife of Shri B.P. Agarwal, resident of 4-1/1, Motilal Nehru Nagar (East), Bhilai, Tehsil & District Durg (CG)
2. Smt. Namita Bansal, wife of Dr. Puranchand Bansal, resident of Block 75, Plot-16, Nehru Nagar (East), Bhilai, Tehsil and District Durg (CG) through its General Power of Attorney Holder Shiv Shankar Lal, son of Gopal Krishan Agarwal, resident of 75/16, Nehru Nagar (East), District Durg.
3. The President, Smriti Grih Nirman Shahkari Sanstha Maryadit, Bhilai, Smriti Nagar, Junwani, Tehsil and District Durg (CG)

----- Respondents/Defendants

For LR's of Appellant/Plaintiff:

Mr. Rajeev Shrivastava with Mr.
Sourabh Sahu, Advocates

For Respondent No.1/Defendant No.1:

Mr. Siddharth Radhod, Advocate

For Respondents No.2 and 3:

None present

Hon'ble Shri Justice Sanjay K. Agrawal

Judgment on Board

3/3/2021

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

"1. Whether both the courts below were justified in deciding the issue as well as the first appeal without properly appreciating the fact that the report of the Commissioner was not received by the courts below in spite of order on 6.4.04 to that effect and that the defendants were non cooperating with the demarcation report?

2. Whether courts below were justified in deciding the issue of title of the plaintiffs where relief was not for the declaration of title ?"

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

2. The plaintiff filed a suit for permanent injunction as well as for mandatory injunction stating inter-alia that he has purchased the suit land bearing Khasra No.526, rakba 0.07 hectare, area 5600 sq.ft. situated at Patwari Halka No.56/15, Revenue Circle Durg, Tahsil and District Durg, in which 3500 sq.ft. (50"x70"feet) land has been encroached by the defendants as shown in map attached with the plaint and as such, decree for mandatory injunction also be

granted directing eviction and thereafter decree for permanent injunction be granted in his favour.

3. Resisting the suit, defendant No.1 filed his written statement and denied the averments made in the plaint stating inter-alia that he is in possession after purchasing the suit land and pleaded that the suit is barred by limitation. Defendants No.2 and 3 also disputed the claim of the plaintiff.
4. The trial Court in order to adjudicate the lis framed as many as 8 issues and after appreciation of oral and documentary evidence available on record, by its judgment and decree dated 12.12.2008, held that the plaintiff is not owner and title-holder of the suit land bearing Khasra No.526, area 5600 sq.ft. and also held that the defendants have not encroached upon the plaintiff's suit land i.e. 3500 sq.ft. (50"x70"feet) and defendants No.1 and 2 are in possession of their respective lands.
5. It is pertinent to mention here that after filing of the suit on 12.3.2001, the plaintiff filed an application under Order 26 Rule 9 read with Section 151 of the CPC, which was rejected by the trial Court on 7.3.2003. However, the trial Court *suo moto* after evidence of the parties on 6.4.2004 directed for demarcation of the suit land and on 21.6.2004 in

compliance of order of the trial Court, demarcation report was submitted by the Commissioner before the trial Court, but it was objected by defendant No.1, which was sustained and again writ of commission was issued for fresh demarcation of the suit land. Second demarcation report submitted on 28.3.2006 was also not accepted leading to filing of third demarcation report on 19.2.2007 holding that demarcation could not be done on account of non-cooperation of the defendants and thereafter the matter proceeded further, however, on 7.4.2008, defendant No.2 filed an application under Order 7 Rule 11 read with Section 151 of the CPC, which was rejected by the trial Court on 23.9.2008 and thereafter, time to time the parties appeared before the trial Court without any objection with regard to non-conducting of demarcation by the Commissioner as directed by order dated 6.4.2004 and non-cooperation of the defendants and ultimately, the trial Court dismissed the suit on merits on 12.12.2008.

- 6.** Being aggrieved and dissatisfied with the judgment and decree of the trial Court, first appeal was preferred by the plaintiff before the first appellate Court, in which specific ground was raised stating that it was duty on the part of the trial Court to get the land demarcated pursuant to order of demarcation dated

6.4.2004 as it could not be demarcated on account of non-cooperation of the defendants. The first appellate Court heard the matter on merits and rejected the objection of the plaintiff with regard to non-demarcation of the suit land stating that after third demarcation report was submitted on 19.2.2007 the matter was listed several times for hearing before the trial Court, but the plaintiff did not take any sort of objection with regard to non-conducting of demarcation in accordance with order dated 6.4.2004 though participated in the suit and thereafter the matter was heard on merits and dismissed the appeal affirming the judgment and decree of the trial Court, against which, this second appeal under Section 100 of the CPC has been filed by the appellant/plaintiff, in which two substantial questions of law have been formulated, which have been set-out in opening paragraph of this judgment for sake of completeness..

7. Mr. Rajeev Shrivastava, learned counsel for legal representatives of the appellant/plaintiff, would submit that question of title has not been raised, yet question of title has been decided by both the Courts below, as such, the judgment and decree of both the Courts below deserve to be set-aside. He would rely upon the judgment of the Supreme Court in the matter

of Haryana Waqf Board v. Shanti Sarup and others¹.

8. On the other hand, Mr. Siddharth Rathod, learned counsel for respondent No.1/defendant No.1, would support the impugned judgment and decree and submit that though the trial Court has directed for demarcation of the suit land in view of pleadings of the parties, yet after submission of third report by the Commissioner on 19.2.2007 allegedly stating that the defendants did not co-operate with demarcation of the suit land, the plaintiff also did not take any objection with regard to alleged non-demarcation and allowed the suit to proceed further and ultimately, when decree was passed against him, he has raised an objection that demarcation has not been made as per order dated 6.4.2004, he was not vigilant about his right and when the matter has progressed further and adverse finding has been recorded against him, the plaintiff cannot revert back and ask for fresh demarcation in view of the fact that even he has not been held to be owner and title-holder of the suit land bearing Khasra No.526 area 5600 sq.ft. for sake of permanent injunction and mandatory injunction. Mandatory injunction can be granted only when he is owner and title-holder of the suit land, as such, the judgment and decree of both the Courts below are in

1 (2008) 8 SCC 671

accordance with law and no exception can be taken with regard to dismissal of suit by the trial Court and affirmed by the first appellate Court.

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

10. It is not in dispute that the suit was bare suit for permanent injunction simpliciter as well as for mandatory injunction alleging that the defendants have encroached upon 3500 sq.ft. of land of Khasra No.526 held by the plaintiff, which is said to have been purchased by him. The trial Court on 7.3.2003 rejected the application filed by the plaintiff under Order 26 Rule 9 read with Section 151 of the CPC, but after hearing the parties and after closure of the evidence realized the fact that it is a fit case where the Commissioner should be appointed for demarcation of the suit land directed for demarcation and it was demarcated also on 21.6.2004, but it was objected by defendant No.1 and his objection was accepted, yet second demarcation was directed, which was also objected and ultimately, third demarcation report dated 12.2.2007 was submitted on 19.2.2007 as per direction of the trial Court.

11. A careful perusal of the demarcation report would show that third demarcation could not be conducted on account of non-cooperation by the defendants as well as for the reason that other houses have also not been constructed and also for one more reason, but thereafter the suit proceeded on several dates and time was granted to the parties for various reasons, but ultimately, the trial Court dismissed the suit on 12.12.2008 on merits holding that the plaintiff is not title-title of the suit land bearing Khara No.526 area 5600 sq.ft. and he has failed to prove encroachment upon 3500 sq.ft. of land by the defendants

12. True, it is that demarcation of the suit land was necessary, but once third demarcation report was submitted on 19.2.2007 holding that demarcation could not have been done on account of default and non-cooperation of one or more of the defendants and for two more reasons as per report of the Commissioner, then it was the duty of the plaintiff to highlight and invite the attention of the Court and could have requested for further demarcation of the suit land as per order dated 6.4.2004. It appears from the records that the plaintiff participated in the suit thereafter without any objection & demur and allowed the suit to be proceeded with by participating it and took a

calculated chance to get the decree in his favour and ultimately after full-fledged trial when decree was passed dismissing the suit on merits, then before the first appellate Court he raised an objection that the suit land could not be demarcated as per order dated 6.4.2004, whereas the suit land ought to have been demarcated. The plaintiff cannot be allowed to make capital out of his wrong/carelessness/negligence. It was his legal right which was to be determined, therefore, he could have invited the attention of the trial Court qua the order dated 6.4.2004 and could have prayed for fresh demarcation of the suit land after third demarcation report was submitted by the Commissioner on 19.2.2007. Therefore, the plaintiff cannot be allowed to make a point in this second appeal particularly when he himself is guilty of non-inviting the attention of the Court by not making necessary prayer for fresh demarcation of the suit land and allowed the suit to proceed further and took calculated chance to get the decree and once the trial Court having dismissed the suit, finding the decision unpalatable, he cannot be allowed to revert back and submit that decree passed is not in accordance with law in view of the fact that demarcation has not been done as per order dated 6.4.2004. Even otherwise, non-

cooperation of the defendants was only reason for not demarcating the suit land. The Commissioner has expressed two other reasons for not demarcating the suit land in its report submitted to the trial Court, as such, the first appellate Court is absolutely justified in holding that the plaintiff did not make any objection in this regard, therefore, issue of demarcation is closed.

- 13.** Not only this, the plaintiff filed a suit for permanent injunction. It is his case that the defendants have encroached upon 3500 sq.ft. of the suit land of Khasra No.526 area 5600 sq.ft. and therefore, more the reason he had to file a suit for declaration of title also as held by the Supreme Court in the matter of Anathula Sudhakar v. P. Buchi Reddy (dead) by LRS. and others². In Anathula Sudhakar (supra) the Supreme Court observed 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 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 plaintiff's lawful possession or threat of dispossession, it is sufficient to

2 (2008) 4 SCC 594

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 straight-forward, the court may 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

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

discretion carefully to identify cases where it will enquire into title and cases where it will refer to plaintiff to a more comprehensive declaratory suit, depending upon the facts of the case. "

- 14.** Even otherwise, both the Courts below have prime-facie examined the title of the plaintiff by framing an issue in view of the fact that the plaintiff claimed perpetual injunction after removing encroachment, if any, made by the defendants over 3500 sq.ft. of land in which both the Courts below have prima-facie found that the suit land is not owned by the plaintiff and the plaintiff is not title-holder of the suit land and therefore, demarcation, if any, as per order dated 6.4.2004 would not serve any purpose as of now as the plaintiff has failed to prove his prima-facie title over the suit land though claimed decree of perpetual injunction after removal of encroachment.
- 15.** In view of the aforesaid finding, I do not find any force in submission of learned counsel for legal representatives of the appellant/plaintiff and even I do not find any illegality or perversity in the finding of the trial Court as affirmed by the first appellate Court.
- 16.** Resultantly, the second appeal deserves to be and is hereby dismissed leaving the parties to bear their

own cost(s). The substantial questions of law are answered in favour of the defendants and against the plaintiff.

17. Appellate decree be drawn-up accordingly.

Sd/-

(Sanjay K.Agrawal)
Judge

B/-