

AFR

HIGH COURT OF CHHATTISGARH, BILASPURFA No. 31 of 2013

(Arising out of judgment and decree dated 14-1-2013 passed by the Second Additional District Judge, Bilaspur, in Civil Suit No.05A of 2011)

1. Madhyapradesh Jesuits Loyola Niketan Lingiyadeeha, Bilaspur Through Father Fabianus Minj S/o Late Stanislas Minj, aged about 55 years, Treasurer Madhyapradesh Jesuits Loyola Niketan Lingiyadeeha, Bilaspur, R/o Loyola Niketan Lingiyadeeha, Bilaspur, P.S. Sarkanda, Bilaspur, Tah. and Distt. Bilaspur, Chhattisgarh

---- Appellant

Versus

1. Shri Ravatpura Sarkar Ashram, Gram Panchayat Dhaneli, Raipur, Tah. And Distt. Raipur, Chhattisgarh
2. Ravatpura Sarkar Lok Kalyan Trust, Bilaspur, Through Its Member Ajay Singh S/o Dr. B.S. Singh, R/o Rajkishorenagar, Lingiyadeeha, Bilaspur, Tah. And Distt. Bilaspur, Chhattisgarh
3. Ravatpura Sarkar Lok Kalyan Trust, Bilaspur, Through Its Member Praveen Shukla S/o Chandrika Prasad Shukla R/o Gandhi Nagar, Bilaspur, Tah. And Distt. Bilaspur Chhattisgarh
4. State Of Chhattisgarh Through Its Collector, Bilaspur, Chhattisgarh

---- Respondents

For Appellant	Mr. Prafull Bharat, Sr. Advocate with Mr. Harshal Chouhan, Advocate
For Respondents No. 1 to 3	Mr. Manoj Paranjape, Advocate with Mr. Vivek Mishra, Advocate
For Respondent/State	Ms. M. Asha, Panel Lawyer

Hon'ble Mr. Justice Goutam Bhaduri &
Hon'ble Mrs. Justice Rajani Dubey

Judgment on Board

Per Goutam Bhaduri, J.

08-12-2021

1. By this appeal, the appellant would call in question the legality and validity of the impugned judgment and decree dated 14-1-2013 passed by the Second Additional District Judge, Bilaspur, in Civil Suit No.05A of 2011 whereby the suit filed by the plaintiff/appellant was dismissed.
2. The facts, in brief, are that the plaintiff, who is a registered society, purchased the land bearing khasra No.15/63 by sale deed dated 8-8-2007 (Ex.P/12). It is alleged that the defendants/respondents No.1 & 2 encroached upon part of the said land and tried to disturb the possession, therefore, suit for declaration and permanent injunction was filed contending that the plaintiff is the owner of land bearing khasra No.15/63 admeasuring 0.45 acres situated at Lingiyadeeha, Bilaspur. During the course of trial amendment was incorporated in the plaint at paras 9 & 14 to the effect that on 10-7-2009 the representative of the respondent/defendant has forcibly entered into the suit land and started digging a bore well. Consequent thereto, by way of amendment a prayer was added in the plaint as para 17 (ii)(a) that the defendants No.1 & 2 be removed from the part of encroachment within a stipulated period and if such encroachment is not removed by them the plaintiff may be allowed to demolish the construction made and restore the possession to them.
3. The defendants filed their written statement and contended that they were allotted land bearing khasra No.15/45 admeasuring 1.50 acre at village Lingiyadeeha, Bilaspur on 26-2-2009, which was meant for to construct an old age home (वृद्ध-आश्रम). It was further contended that the defendants are in lawful possession of their allotted part of land bearing khasra No.15/45 whereas the khasra

number of the land of plaintiff is 15/63, therefore, the identity of the land is separate. Defendants also contended that the plaintiff does not have any right over the land bearing khasra No.15/45, therefore, they be non suited.

4. On the basis of pleadings of the parties, the issues were framed and the learned Court below came to the conclusion that the plaintiff has failed to prove the fact that the defendants have encroached upon the land bearing khasra No.15/63 and further referred to a demarcation report, which was called for by the trial Court and exhibited which purports that the defendants are in possession of khasra No.15/45 and thereby they have not encroached upon any part of land bearing khasra No.15/63. It was further observed that during demarcation, the representative of the plaintiff admitted the fact and while khasra No.15/45 was demarcated it was not objected which shows that the defendants have not encroached upon any part of the land, belonging to the plaintiff. Consequently, the Court below dismissed the suit preferred by the plaintiff.
5. Mr. Prafull Bharat, learned Senior counsel assisted by Mr. Harshal Chouhan, Advocate appearing for the appellant/plaintiff, would submit that the trial Court has failed to appreciate the fact that the demarcation report on which the trial Court heavily relied has not been proved by its author. Learned counsel would further submit that in absence of the document having been proved by its author it cannot be exhibited in evidence. He would also submit that during pendency of the suit the defendants have tried to encroach upon the part of land belonging to the plaintiff, therefore, specific amendment was carried out in the prayer clause and the plaintiff is ready and willing to pay the requisite Court fee in case the decree for possession is granted.

6. Mr. Manoj Paranjape, learned counsel appearing with Mr. Vivek Mishra, learned counsel for the defendants/respondents No.1 to 3, would submit that the plaintiff has not valued the suit properly. Learned counsel would further submit that despite the fact that the amendment was carried that defendants have encroached upon the land of the plaintiff and when the dispossession was claimed, the plaintiff should have valued the suit and paid the ad valorem Court fee on the suit property inasmuch as the prayer was made to demolish the existing structure, which has been raised and to restore the possession in favour of the plaintiff. He would also submit that the caption of the suit was simplicitor for declaration and permanent injunction and when there is demand on the part of the plaintiff that it has been dispossessed, the simplicitor suit would not lie as per mandate of Section 34 of the Specific Relief Act, 1963 (for short 'the Act, 1963'), therefore, the impugned judgment and decree of the trial Court is well merited, which do not call for any interference of this Court.
7. We have heard learned counsel for the parties at length and perused the record.
8. Perusal of the record would show that the suit was filed for declaration and permanent injunction. In paras 9 & 14 of the plaint, specific averments have been made that the defendants have encroached upon the land of the plaintiff. Specific averment was made that on 10-7-2009 few representatives of the defendants forcibly entered into the land of the plaintiff and started digging bore well and subsequent thereto certain construction has been raised. The amendment was incorporated in the plaint on 19-8-2011 adding a prayer by para 17(ii)(a) wherein it was prayed that the defendants and their representatives be removed from the encroachment and the construction be removed. The plaintiff also prayed that in case the defendants failed to remove their construction, the plaintiff be allowed to remove the same.

9. Bare perusal of the pleading would show that it was well within the knowledge of the plaintiff that the defendants have encroached upon the suit land and have raised certain construction. The caption of the suit would show that the suit was only simplicitor for declaration and permanent injunction and the valuation of the suit was Rs.13,00,000/-. However, Court fee of Rs.5,600/- (Rs.5,000/- for declaration & Rs.600/- for permanent injunction) was paid. It is well settled that when the amendment was incorporated in prayer clause claiming possession of title over the suit land then the ad valorem Court fee was required to be paid over the value of the land. The plaintiff cannot take a chance by addition of a prayer of possession and reserve his right subsequent to it and claim that in case decree for possession is ordered then the Court fee would be paid. Thus, *prima facie*, it is manifestly clear that the suit was not properly valued. Apart from the new pleading made by the plaintiff that they have been dispossessed, the suit continued with only for declaration and permanent injunction.
10. The Hon'ble Supreme Court in ***Union of India v Ibrahim Uddin and Another***¹ has held that when a suit for declaration of title and ownership is filed without claiming possession of the suit property it would be barred by the provisions of Section 34 of the Act, 1963 and the same is required to be dismissed on that ground.
11. In view of the above, we are of the view that the trial Court has rightly dismissed the suit.
12. Now reverting back to the further issue as to whether the plaintiff was able to prove his case before the Court below, the averments of the plaint and the documents exhibited are examined. The entire case of the plaintiff was that the defendants have encroached upon their land bearing khasra No.15/63 and they are the owner thereof by virtue of sale deed (Ex.P/12). As a counter

¹ (2012) 8 SCC 148

to it, the case of defendants was that they are in possession of the land bearing khasra No.15/45 by virtue of grant of lease (Ex.D/8).

13. Perusal of Ex.D/8 would show that it is a lease granted by the State to the defendant for a period of 30 years. The map appended to this deed would show that part of khasra No.15/45 was given to them, which is highlighted with red ink. To ascertain the identity of plot, the trial Court vide its order dated 7-1-2010 has directed the Tahsildar to carry out the demarcation of the area to find out whether the land i.e. khasra No.15/63, which is claimed by the plaintiff is a part of khasra No.15/45 or not. The other query was raised whether khasra No.15/63, claimed by the plaintiff, is adjacent to khasra No.15/45, which is a grant made to the defendant and also a query was made whether the grant has been made to the defendants. The demarcation report (Ex.D/2, D/3, D/4 & D/5) was submitted to the Court by the Tahsildar, which is evident from the order sheet dated 11-4-2011. On perusal of the report, it is apparent that khasra No.15/45 was allotted to the defendants by the State. The said demarcation report is further fortified by the statement of PW-1, Father Fabiyanus Minj wherein at para 42 he has admitted that while the demarcation was carried out by the Tahsildar on 18-3-2011 he was personally present and has appended his signature in the document Ex.D/2. So the plaintiff's representative was present when the demarcation of land of defendants was made and adverse inference is to be drawn in favour of defendants. Reading of para 43 further would show that certain encroachment cases are also pending before the Tahsildar against the plaintiff institution. During course of evidence, document Ex.P/17 has also been proved by the plaintiff and perusal of Ex.P/17 would show that it was pursuant to certain direction to find out the encroachment over the Government land, it was found that the plaintiff institution is in illegal possession of one of part of khasra No.15/45.

14. To conclude, the inference can very well be drawn that though the plaintiff claimed that defendants have encroached upon their land bearing khasra No.15/63, but it was not brought to the notice of the Court below to establish those facts instantly while the demarcation was carried. The existence of khasra No.15/63 was never asserted at any point of time by placing cogent evidence. Consequently, the plaintiff failed to prove its case by any evidence that the defendants have encroached upon their land bearing khasra No.15/63.
15. In the result, we are of the considered opinion that the judgment and decree passed by the Court below do not call for any inference of this Court. The same is well founded on the facts and evidence, which is on record.
16. Accordingly, the appeal, *sans* merit, is liable to be and is hereby dismissed. The appellant shall bear cost of the defendants.

Sd/-

(Goutam Bhaduri)
Judge

Sd/-

(Rajani Dubey)
Judge

Gowri