



**IN THE HIGH COURT OF MADHYA PRADESH**

**AT GWALIOR**

**BEFORE**

**HON'BLE SHRI JUSTICE G. S. AHLUWALIA**

**ON THE 21<sup>st</sup> OF JULY, 2025**

**SECOND APPEAL No. 245 of 2015**

***RAMESH CHAND SHIVHARE AND ANOTHER***

*Versus*

***BHAROSILAL SHIVHARE (DEAD) THR. LRS ASHOK SHIVHARE  
AND OTHERS***

---

**Appearance:**

Shri Vikas Singhal, Advocate for the appellants.

Shri Sunil Kumar Jain, Advocate for respondent Nos. 1 & 3.

---

**JUDGMENT**

Before considering the facts and circumstances of the case, this Court would like to mention that in respect of the same property Bharosilal Shivhare had filed Civil Suit No. 7A/2008 against Suresh Chand Shivhare (appellant No. 2 in present appeal) and Civil Suit No. 8A/2008 against Ramesh Chand Shivhare (appellant No. 1 in present appeal) for eviction from the suit premises. Similarly, appellants had filed Civil Suit No. 6A/08 against Bharosilal Shivhare for declaration of title. All the three civil suits



were consolidated and decided by II Civil Judge Class I, Morena and by common judgment and decree dated 31/7/2008, Civil Suit Nos. 7A/2008 and 8A/2008 which were filed by Bharosilal for eviction were dismissed. So far as Civil Suit No. 6A of 2008 filed by appellants is concerned, the same was returned back on the ground that the suit was not properly valued and the trial court has no pecuniary jurisdiction to decide the same.

2. Being aggrieved by the judgment and decree passed by the trial court in Civil Suit Nos. 7A/2008 and 8A/2008, Bharosilal Shivhare filed Civil Appeal Nos. 11A/2014 and 12A/2014 respectively. Similarly, appellants filed Civil Appeal Nos. 9A/2014 and 10A/2014. Civil Appeal No. 9A/2014 was filed by the appellants against rejection of their plaint, whereas Civil Appeal No. 10A/2014 was filed by them against the findings recorded by the trial court. All the civil appeals were consolidated and have been decided by common judgment and decree dated 7/5/2015 passed by IV Additional District Judge, Morena. Civil Appeal Nos. 11A/2014 and 12A/2014 filed by Bharosilal were dismissed, whereas Civil Appeal Nos. 9A/2014 and 10A/2014 filed by appellants were partially allowed and it was directed that the appellants shall not be dispossessed without following due process of law and till then the defendant shall not interfere with the possession of the appellants either by himself or through his agents.

3. Although in the cause title of this Second Appeal it is mentioned that this appeal is being filed against judgment and decree passed by the appellate court in Civil Appeal Nos. 9A/2014, 10A/2014, 11A/2014, and 12A/2014, but in fact this appeal is against the judgment and decree passed by the appellate court in Civil Appeal Nos. 9A/2014 and 10A/2014



4. Facts necessary for disposal of present appeal, in short, are that appellants and Bharosilal / original defendant are real brothers. As Bharose Lal died during the pendency of Civil Appeal, therefore his legal heirs were brought on record and this second appeal is being contested by the legal heirs of Bharosilal. Appellants filed a civil suit for declaration of title and permanent injunction on the ground that Kunjilal was the father of appellants and original defendant, who has already expired. The details of the house in dispute were mentioned in Paragraph 2 of the plaint. It is the case of appellants that the aforesaid house was purchased by Kunjilal from earlier owner Ochha by registered sale deed dated 25.01.1993 in the name of defendant. However, it was claimed that the appellants as well as Puniya Bai had 1/4 share in the property and in equal proportion plaintiffs, defendant as well as Puniya Bai had spent their money for repair and renovation of the house. Defendant by registered sale deed dated 5.11.1969 alienated 1/4 share in the property to his mother Puniya Bai. Thus after the share was alienated by defendant No. 1, Puniya Bai became owner of 1/2 share in the house whereas plaintiffs had 1/4 share each in the said house. Since Puniya Bai was in need of money for construction of house, therefore, she in the capacity of guardian of plaintiffs mortgaged the property with Ramdayal and accordingly a registered document was executed on 13.2.1970 by Puniya Bai. The house was mortgaged for an amount of Rs.5000/-. Bharosilal was a clever person and he did not extend any financial support to plaintiffs as well as his mother Puniya Bai for bearing the marriage expenses of his sisters. Plaintiffs were minor and Puniya Bai was an illiterate lady. Puniya Bai had refunded Rs.100/-, 700/-, 300/-, 1000/- and 400/- in the months of April 1970, June 1971, April 1972, October 1972, November 1972 and December 1972. It was the case of appellants/plaintiffs that Puniya Bai had never



alienated the property to Ramdayal but the house in question was mortgaged with Ramdayal and possession always remained with plaintiffs / appellants and Puniya Bai. Ramdayal was a clever person and was fond of litigation. Similarly Bharosilal was also a man of similar nature. With an intention to cause irreparable loss to the plaintiffs, Ramdayal filed Civil Suit No. 32/73 for eviction and recovery of rent on the basis of sale deed dated 13.2.1970 executed by Puniya Bai. Puniya Bai also filed her written statement and claimed that the suit premises was never alienated but it was mortgaged. Ramdayal got his suit dismissed for want of prosecution on 21.10.1986. Ramdayal by registered sale deed dated 24.6.1986 alienated the property to Bharosial. Plaintiffs came to know about the sale deed only when suit for eviction and recovery of arrears of rent was filed. The civil suit filed by Bharosial against appellant No. 1 was registered as Civil Suit No. 8A of 2008 and the civil suit against appellant No. 2 was registered as Civil Suit No. 7A of 2008. Accordingly, appellants also filed the present suit for declaration of title (It is not out of place to mention here that the present suit was filed in the year 1998 and it was registered as Civil Suit No. 58A/98 whereas Bharosilal had filed Civil Suit Nos. 7A/2008 and 8A/2008 on 24.6.1997). Thus it was the case of appellants that Puniya Bai had never executed the sale deed in favour of Ramdayal, therefore, Ramdayal had no right or title to execute the registered sale deed dated 24.6.1986 in favour of Bharosial and accordingly the suit was filed for declaration that the sale dated 13.2.1970 is a mortgage deed and not a sale deed and title may be declared and it was also sought that Bharosilal is not entitled to get the decree of eviction in Civil Suit No. 7A of 2008 which was originally as 24/97 and 8A of 2008 which was originally numbered as 23/97 and permanent injunction was also sought.

Defendant Bharosilal filed his written statement and admitted the



family tree. It was claimed that the entire property belongs to defendant and plaintiffs have no right or title. On some part of the property plaintiffs are in possession in the capacity of tenant. It was claimed that defendant had purchased the house in question from Ochha from his own self-earned salary. It was also pleaded that on 13.2.1970 Puniya Bai had alienated the entire suit house and also handed over its possession to Ramdayal. Plaintiffs had filed Civil Suit No. 61/74 for declaration of sale deed dated 13.2.1970 as null and void and on 25.10.1986 plaintiffs formally got the suit dismissed for want of prosecution. It was further claimed that Bharosilal has purchased the property by registered sale deed dated 24.6.1986 after making payment of entire consideration amount of Rs. 20,000 to Ramdayal. All other adverse pleadings were denied.

The trial Court after framing issues and recording evidence dismissed the suit of the appellants on the ground of limitation as well as valuation and the plaint was returned back. However, it was also observed by the trial Court that registered document dated 13.2.1970 executed by Puniya Bai in favour of Ramdayal was a mortgage deed. As already pointed out Bharosilal also filed civil appeals against dismissal of his two civil suits instituted separately against appellant No. 1 Ramesh Chand and appellant No. 2 Suresh Chand. Similarly, appellants also filed two civil appeals i.e., Civil Appeal Nos. 9A/2014 and 10A/2014.

The appellate Court held that registered document dated 13.2.1970 executed by Puniya Bai in favour of Ramdayal was not a mortgage deed but it was out-and-out sale deed. However, the finding recorded by the trial court with regard to improper valuation of suit was set aside.



5. It is submitted by counsel for appellants that registered document dated 13.2.1970 was a mortgage deed and not a sale deed and, therefore, the possession of property remained with appellants and Puniya Bai and thus it was claimed that Ramdayal had no right or title to alienate the property in favour of Bharosilal.

6. *Per Contra*, counsel for respondents have supported the findings recorded by the Court below.

7. Heard learned counsel for the parties.

8. The trial Court had found that the civil suit filed by appellants is barred by limitation. However, the aforesaid finding recorded by the trial court was reversed by the appellate court. It is not out of place to mention here that under Order 41 Rule 33 CPC appellate Court has power to pass any decree 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. As already pointed out, appellants had claimed that they came to know about the execution of sale deed by Ramdayal in favour of Bharosilal in the year 1997 only when the suit for eviction was filed by Ramdayal.

9. In the present case, the moot question for consideration is as to whether the present suit filed by appellants for declaration of registered document dated 13.2.1970 as a mortgage deed and not sale deed was within the period of limitation or not?

10. Plaintiffs / appellants are guilty of suppression of material facts. Defendant Bharosilal had taken specific stand in paragraph 4 of written statement that plaintiffs had filed civil suit for declaration of sale deed dated



13.2.1970 as null and void which was registered as Civil Suit No. 61/74 and the said civil suit was dismissed for want of prosecution on 25.10.1986. Thus, it is clear that the appellants were already aware of the fact that Puniya Bai had already executed registered document dated 13.2.1970 which is in the form of sale deed, whereas according to the appellants the said document was mortgage deed and not sale deed. Therefore, it is clear that the suit filed by appellants which was registered as Civil Suit No. 61/74 stood dismissed for want of prosecution on 25.10.1986. The present suit has also been filed for similar relief. Now the question for consideration is as to whether the present suit is barred in the light of dismissal of first suit for want of prosecution or not?

11. The suit filed by appellants was dismissed by order dated 25.10.1986 (Ex.D/5). From this order, it is clear that on the said date neither the counsel for appellants / plaintiffs was present nor counsel for defendant was present. Therefore, the suit can be treated to have been dismissed under Order 9 Rule 3, CPC. Order 9 Rule 4, CPC provides that plaintiffs may bring a fresh suit if the earlier suit was dismissed under Order 9 Rule 3 CPC, subject to law of limitation. As already pointed out, appellants were aware of document dated 13.2.1970 and accordingly they had filed a suit in the year 1974 for declaration of said document as null and void. Therefore, appellants/plaintiffs were aware of the aforesaid document at least in the year 1974 and suit was dismissed under Order 9 Rule 3 CPC on 25.10.1986. The period of limitation is 3 years. Even after dismissal under Order 9 Rule 3 CPC, fresh suit can be filed subject to period of limitation. The present suit was filed by the plaintiffs in the year 1998 i.e. after 12 years of dismissal of the first suit under Order 9 Rule 3 CPC. Thus, the suit filed by appellants for



declaration that document dated 13.2.1970 was not a sale deed but was a mortgage deed, was hopelessly barred by limitation. It is not the case of appellants that they had perfected their title by way of adverse possession. Once the appellants / plaintiffs had failed to establish that the sale deed dated 13.2.1970 was not a sale deed but it was a mortgage and had already got their suit dismissed for want of prosecution by order dated 25.10.1986 (Ex.D/5), this Court is of considered opinion that the present suit for declaration of title as well as for declaration of registered document dated 13.2.1970 as mere mortgage deed and not sale deed, was barred by time. Furthermore, in view of Section 92 of the Evidence Act, oral evidence as regards the contents of a document, cannot be given. However, the aforesaid provision of law would not apply to a case where the document is claimed to be a sham document. Merely by claiming that document dated 13.2.1970 was a mortgage deed and not a sale deed, this Court is of considered opinion that the said verbal submission made by appellants is not sufficient to hold that the document dated 13.2.1970 is a sham document as mortgage deed. Even otherwise, if the plaintiffs were of the view that document dated 13.2.1970 is a mortgage deed, then they should have filed a suit for redemption of mortgage because according to the plaintiffs suit house is still under mortgage and the mortgage has not been redeemed.

12. Under these circumstances, this Court is of considered opinion that the appellate court did not commit any mistake by holding that the registered document dated 13.2.1970 executed by Puniya Bai in favour of Ramdayal was a sale deed and not a mortgage deed.

13. As no substantial question of law arises in the present appeal, this Court is of considered opinion that the judgment and decree passed by IV





Additional District Judge, Morena in Civil Appeal Nos. 9A of 2014 and 10A of 2014 are hereby affirmed.

14. So far as the question of dismissal of civil suit filed by Bharosilal against the appellants for their eviction is concerned, the said civil suit was dismissed on the ground that Bharosilal had failed to establish landlord-tenant relationship. Therefore, dismissal of suit filed by Bharosilal against appellants for eviction would not come in the way of findings recorded by this Court with regard to nature of registered document dated 13.2.1970 executed by Puniya Bai in favour of Ramdayal.

15. Accordingly, this appeal fails and is hereby dismissed.

**(G. S. AHLUWALIA)**  
**JUDGE**

(and)