

**IN THE HIGH COURT OF MADHYA PRADESH
AT JABALPUR
BEFORE
HON'BLE SHRI JUSTICE DWARKA DHISH BANSAL
SECOND APPEAL No. 146 of 1995**

Between:-

**1. BRAHSPATI KUMAR SON OF
BUDDHSENRAM, AGED 33 YEARS**

**2. RAMLAKHAN SON OF BUDDHSENRAM,
AGED 30 YEARS**

**3. KAILASH PRASAD SON OF BUDDHSENRAM,
AGED 26 YEARS**

**4. RAMNARESH SON OF BUDDHSENRAM,
AGED 34 YEARS**

**5. KESHAV PRASAD SON OF BUDDHSENRAM,
AGED 22 YEARS,**

**ALL ARE RESIDENT OF VILLAGE: SATOHARI,
TEHSIL GOPADBANAS, DISTRICT SIDHI, M.P.**

**6. MAHESH PRASAD SON OF BUDDHSENRAM,
AGED 28 YEARS, R/O SATOHARI, TEHSIL
GOPADBANAS, DISTRICT SIDHI, M.P..**

.....APPELLANTS

***(BY SHRI RAVISH AGRAWAL, SENIOR COUNSEL WITH MS. SANJANA
SAHNI-ADVOCATE)***

AND

1. SARJU PRASAD, SON OF SALIKRAM, AGED 30 YEARS

2. UMASHANKER SON OF SALIKRAM, AGED 25 YEARS,

BOTH RESIDENT OF VILLAGE SATOHARI, TEH. GOPADBANAS, DISTRICT SIDHI, M.P.

3. STATE OF M.P., THROUGH COLLECTOR, SIDHI, M.P.

.....**RESPONDENTS**

.....
Reserved on : 02/11/2022

Delivered on : 09/11/2022
.....

This appeal coming on for final hearing on this day, the court passed the following:

J U D G M E N T

This second appeal has been preferred by the plaintiffs challenging the judgment and decree dated 24.11.1994 passed by 2nd Additional Judge to the Court of District Judge, Sidhi in Civil Appeal No.136-A/1992 reversing the judgment and decree dated 06.07.1982 passed by Civil Judge Class II, Sidhi in Civil Suit No.26-A/1978, whereby learned trial Court decreed the suit, which in appeal filed by legal heirs of original defendant Shalikram, has been dismissed.

2. In short the facts are that the plaintiffs/appellants instituted a suit for redemption of mortgage and in alternative for recovery of possession on the basis of title as well as for mesne profits. It is alleged that the land khasra no.213 area 7.83 acre situated in Village Satohari, Tahsil Gopadbanas, was owned and possessed by Ganeshram, who died in the year, 1960 leaving behind him, his son Chandramani Prasad, who being in need of money mortgaged the land for consideration of Rs.150/- in the year, 1952 by executing unregistered mortgage deed with the assurance that upon refund of Rs.150/-, defendant's father Mahaveer Ram shall hand over possession to Chandramani Prasad, who died issueless in the year, 1969 leaving behind him only successor, his wife Mst. Mundi. It is alleged that Chandramani Prasad was uncle of plaintiffs and after death of Chandramani Prasad in the year 1969, his wife Mst. Mundi started residing with the plaintiffs, who were taking care of Mst. Mundi. Due to this reason, Mst. Mundi executed a registered Will in favour of plaintiffs on 13.02.1975, on the basis of which name of plaintiffs was mutated over the land in question vide order dated 20.09.1977. It is also alleged that due to poverty, Chandramani Prasad could not repay the amount of Rs.150/- and thereafter, Mst. Mundi also could not pay the amount of mortgage and she died on 02.12.1975 after executing registered Will, therefore, plaintiffs are entitled for redemption of mortgage and for restoration of possession on the basis of title. It is alleged that when in the Month of June, 1977 plaintiffs demanded possession from the defendant after making payment of Rs.150/-, then defendant contended that the land was

sold to his father by Chandramani Prasad and refused to handover possession, whereas the land was never sold to defendant's father. It is alleged that on the basis of unregistered mortgage deed, defendant's father or defendant does not get any right and he had also got mutated his name on the basis of alleged sale of land, which is illegal and ineffective. It is alleged that the defendant does not get any right on the basis of unregistered sale deed and the plaintiffs are entitled for possession on the basis of title also. On inter alia allegations the suit was filed.

3. Defendant appeared and filed written statement denying the plaint allegations, although admitted execution of mortgage deed in Samvat 2009 for consideration of Rs.150/-. It is contended that Chandramani Prasad died 7 years ago but his wife did not reside with the plaintiffs and no document was executed by her in favour of the plaintiffs, who got mutated their name wrongly and upon getting knowledge, he preferred an appeal before the S.D.O. Chandramani Prasad has also executed unregistered sale deed on 08.03.1957 in favour of father of defendant and after execution of sale deed, there is no question of redemption of mortgage. Denying title of the plaintiffs, it is contended that they have no right to file the suit either for redemption of mortgage or for restoration of possession, because on the basis of sale deed, name of defendant is already there in the revenue record. It is contended that no cause of action has arisen to the plaintiffs. On inter alia contentions, the suit was prayed to be dismissed.

4. On the basis of pleadings, learned trial Court framed as many as 12 issues and

recorded evidence of the parties. Vide judgment and decree dated 06.07.1982, learned trial Court held that the land was mortgaged with possession in favour of father of the defendant in the year 1952 by Chandramani Prasad, who died in the year 1969 and his wife Mst. Mundi had executed registered Will on 13.02.1975 (Ex.P/1) in favour of plaintiffs and the entry of the name of defendant in the revenue record is wrong because no sale was made in favour of the defendant's father and the plaintiffs are entitled for decree of redemption of mortgage after payment of amount of mortgage of Rs.150/- and are entitled for recovery of possession.

5. Upon appeal filed by legal heirs of original defendant Shalikram, learned first appellate Court vide its judgment and decree dated 24.11.1994 held that the Will in question dated 13.02.1975 cannot be said to be a proven document because the original Will has not been placed on record and no attesting witness has been examined to prove the Will. On the basis of statement of Kashiprasad (DW-2), learned first appellate Court held that Chandramani Prasad executed unregistered sale deed (Ex.D/2) in favour of defendant's father, therefore, holding the defendant to be in possession w.e.f. 08.03.1957 held that the defendant has acquired title by adverse possession after the year 1969, in which year the mortgagor Chandramani Prasad had died. With the aforesaid findings, learned first appellate Court dismissed the suit in its entirety.

6. This Court vide order dated 28.11.1995 admitted the second appeal on the following substantial question of law:-

" Whether under the facts and in the circumstances of the case the suit of the plaintiffs for redemption of mortgage was rightly dismissed and whether the first appellate Court was justified in holding that the defendants have perfected their title by adverse possession despite holding that undisputedly the mortgage deed was executed between the parties ?"

7. Learned counsel for the appellants/plaintiffs submits that learned first appellate Court has erred in reversing the findings with regard to proof of Will executed by Chandramani's wife Mst. Mundi in favour of the plaintiffs on 13.02.1975 (Ex.P/1). Even if the original Will was not placed on record, the same does not affect the rights of the plaintiffs because the Will is a registered document and certified copy of which was placed and exhibited on record, which was never objected, therefore, learned first appellate Court was not right in holding against the Will. By placing reliance on the decisions of Supreme Court in the case of **R.V.E. Venkatachala Gounder Vs. Arulmigu Viswesaraswami & V.P. Temple and another (2003) 8 SCC 752; Smt. Dayamathi Bai Vs. K.M. Shaffi (2004) 7 SCC 107; and Sonu @ Amar Vs. State of Haryana AIR 2017 SC 3441** (Para 22-28), and of coordinate bench of Allahabad High Court in S.A. no.1717/1986 (Hamid and Ors. Vs. Kanhaiya) decided on 27.07.2004 (MANU/UP/2331/2004), learned counsel for the appellants submits that the objection

with regard to proof of Will could not have been raised at the appellate stage and certified copy of will was rightly considered by learned trial Court. He further submits that first appellate Court after holding the sale deed (Ex.D/2) inadmissible in evidence, was not right in considering the same for the purpose of acquiring title by adverse possession. He further submits that even if the Will is not found to be proved and is discarded, then the plaintiffs being nephews of Chandramani Prasad and Mst. Mundi, are entitled for possession of the land in question on the basis of title. With these submissions, he prays for allowing the second appeal.

8. Heard the learned senior counsel for the appellants and perused the record.

9. Although creation of usufructuary mortgage in the year 1952 by Chandramani Prasad in favour of father of defendant namely Mahaveer Ram, is an undisputed fact but admittedly, the mortgage deed (Ex.D/1) is for the security of money of Rs. 150/- and is an unregistered document, which as per Section 59 of the Transfer of Property Act, 1882 is required to be registered compulsorily, as such for want of registration it is not admissible in evidence for any purpose and is a void document. Section 59 of the Act is quoted as under:-

“59. Mortgage when to be by assurance.

Where the principal money secured is one hundred rupees or upwards, a mortgage [other than a mortgage by deposit of title deeds] can be affected only by a registered instrument signed by the mortgagor and attested by at least two witnesses.

Where the principal money secured is less than one hundred rupees, a mortgage may be affected either by [a registered instrument] signed and attested as aforesaid or (except in the case of a simple mortgage) by delivery of the property.”

As such the mortgage deed in question being for the security of money of more than one hundred rupees, cannot be said to be complete and enforceable, until it is registered as contemplated under the law and if it is not registered, it cannot operate as a mortgage. Resultantly, suit for redemption of mortgage could not be decreed, on the basis of unregistered mortgage deed, it being not enforceable.

10. Similarly, learned Courts below have also held the unregistered sale deed dtd. 08.03.1957 (Ex.D/2) to be inadmissible in evidence but learned first appellate Court has held the sale deed to be a proven document. 'B' to 'B' signagure of Chandramani Prasad on the unregistered sale deed (Ex.D/2) has been admitted by the plaintiffs' witness Ramkhelawan (PW4) in para 2 of his statement.

11. In view of the aforesaid, it is clear and undisputed fact that father of defendant Mahaveer Ram came in possession of the suit land firstly on the basis of unregistered document of usufructuary mortgage. Thereafter, he started claiming title and possession on the basis of unregistered sale deed dtd. 08.03.1957 (Ex.D/2) and even according to the case of plaintiffs, he refused to return possession to the plaintiffs relying upon unregd. sale deed. It is also undisputed fact that in the lifetime, neither owner of the property namely Ganeshram nor Mortgagor Chandramani Prasad initiated any proceeding to recover possession from the defendant or his father Mahaveer Ram. Even after death of her husband (as per para 4 of the plaint, Chandramani Prasad died in the month of March, 1969), Mst. Mundi also did not initiate any proceeding to recover

possession or to get redeemed the alleged mortgage.

12. Apparently, the plaintiffs have brought the suit for redemption of mortgage and thereafter, by way of amendment, in the alternative, they sought relief of recovery of possession on the basis of alleged title. However, in the entire plaint, nothing has been alleged about filing of the suit on the basis of succession/title but the plaintiffs have come to the Court for the relief of possession on the basis of certified copy of regd. Will (Ex.P/1) allegedly executed by Mst. Mundi in favour of plaintiffs. As has rightly been held by learned first appellate Court that, in presence of original Will, certified copy of Will is not admissible in evidence and for the reasons best known to the plaintiffs, they have also not examined any attesting witness to prove execution and attestation of the Will in question, as per mandatory requirement of section 63 of the Indian Succession Act and section 68 of the Evidence Act.

13. It is also well settled position of law that in presence of primary evidence, secondary evidence is not admissible, regarding which also the plaintiffs have not made any foundation on record. Ramlakhan (PW1) has in para 10 of his statement admitted that the original will is in his possession, which is at his home. The judgment in the case of Hamid and Ors. (supra) relied upon by learned senior counsel on behalf of the appellants is on the point of proving contents of original document/will, which does not give any help to the case of the appellants regarding proof of Will, on the basis of which the plaintiffs have instituted the suit. However, other judgements also, cited by him are

distinguishable on existing facts and circumstances of the present case.

14. It is relevant to mention here that the plaintiffs came on the basis of will executed by Mst. Mundi in their favour and only on that basis they applied for mutation, which was done vide order dtd. 20.9.1977 (Ex.P/2), but as per para 12 of statement made by Ramlakhan (PW1), Mst. Mundi had died on 2.12.1977. This admitted date of death also makes the order of mutation doubtful, effected certainly during the life time of Mst. Mundi.

15. Since beginning, the defendant has said that he is owner of the suit property on the basis of unregistered sale deed (Ex.D/2) and as per the pleadings made in plaint, the plaintiffs are well aware about the case of defendant, but the plaintiffs have not taken care to file the suit for declaration of title, which in the existing facts and circumstances of the case was necessary as has been held by Supreme Court in the case of **Anathula Sudhakar Vs. P. Buchi Reddy (Dead) By Lrs and others (2008) 4 SCC 594**. Relevant para 13 is quoted as under :

“13. The general principles as to when a mere suit for permanent injunction will lie, and when it is necessary to file a suit for declaration and/or possession with injunction as a consequential relief, are well settled. We may refer to them briefly.

13.1. Where a plaintiff is in lawful or peaceful possession of a property and such possession is interfered or threatened by the defendant, a suit for an injunction simpliciter will lie. A person has a right to protect his possession against any person who does not prove a better title by seeking a prohibitory injunction. But a person in wrongful possession is not entitled to an injunction against the rightful owner.

13.2. Where the title of the plaintiff is not disputed, but he is not in possession, his remedy is to file a suit for possession and seek in addition, if necessary, an injunction. A person out of possession, cannot seek the relief of injunction simpliciter, without claiming the relief of possession.

13.3. Where the plaintiff is in possession, but his title to the property is in dispute, or under a cloud, or

where the defendant asserts title thereto and there is also a threat of dispossession from defendant, the plaintiff will have to sue for declaration of title and the consequential relief of injunction. Where the title of plaintiff is under a cloud or in dispute and he is not in possession or not able to establish possession, necessarily the plaintiff will have to file a suit for declaration, possession and injunction.”

16. The plaintiffs have also failed to prove the case set up by them in para 8 of the plaint with regard to poverty of Chandramani Prasad and his wife Mst. Mundi and they have not been able to establish that in what circumstances, Chandramani Prasad and his wife Mst. Mundi or even the plaintiffs themselves did not try to repay the alleged mortgage money to the defendant or his father, in the life time of Chandramani Prasad and his wife Mst. Mundi.

17. It is well settled that who alleges has to prove, but from bare perusal of the judgment of trial Court, it is clear that learned trial Court has placed entire burden of proof on the shoulders of defendant and has decreed the suit for redemption of mortgage on the basis of weakness of the case of the defendant, just contrary to the settled law that the plaintiff has to succeed or fail on the strength of his case and cannot be given any benefit of any of the weaknesses of the case of defendant. The Supreme Court has in the case **City Municipal Council Bhalki, By Its Chief Officer Vs. Gurappa (D) By Lrs And Anr. (2016) 2 SCC 200** held as under :-

“31. It is a settled position of law that in a suit for declaration of title and possession, the onus is upon the plaintiff to prove his title. Further, not only is the onus on the plaintiff, he must prove his title independently, and a decree in his favour cannot be awarded for the only reason that the defendant has not been able

to prove his title, as held by this Court in the case of **Brahma Nand Puri v. Neki Puri** [AIR 1965 SC 1506] as under:

“.....the plaintiff's suit being one for ejection he has to succeed or fail on the file that he establishes and if he cannot succeed on the strength of his title his suit must fail notwithstanding that the defendant in possession has no title to the property.....”

The same view has been reiterated by this Court in the more recent case of **R.V.E Venkatachala Gounder v. Arulmigu Viswesaraswami & V.P. Temple & Anr.** [(2003) 8 SCC 752] as under:

“In a suit for recovery of possession based on title it is for the plaintiff to prove his title and satisfy the Court that he, in law, is entitled to dispossess the defendant from his possession over the suit property and for the possession to be restored with him. In our opinion, in a suit for possession based on title once the plaintiff has been able to create a high degree of probability so as to shift the onus on the defendant it is for the defendant to discharge his onus and in the absence thereof the burden of proof lying on the plaintiff shall be held to have been discharged so as to amount to proof of the plaintiff's title.”

18. Even as per the case pleaded in plaint para 2, Ganeshram was owner of the property but even prior to death of Ganeshram (in the year 1960) his son Chandramani Prasad mortgaged the property by executing unregd. Mortgage deed, which could not have been enforced even by Chandramani Prasad or by Mst. Mundi. As such there was no question of redemption of suit property, therefore, only relief which could have been claimed by the plaintiffs, was the relief of restoration of possession on the basis of title that too by seeking relief of declaration of title.

19. Even in the khasra entries produced by the plaintiffs, there is entry of the name of Mahaveer Ram (father of the defendant Shalik Ram) on basis of sale, which is sufficient

to infer that the plaintiffs were aware of the case set up by the defendant on the basis of unregd. sale deed. Neither Chandramani Prasad nor Mst. Mundi took any action against the defendant or his father Mahaveer Ram. Further, in khasra of the year 1965 (Ex.P/5) and in subsequent years, there is entry of the name of Mahaveer Ram along with Ganeshram showing it to be under sale, but neither Ganeshram nor Chandramani Prasad nor Mst. Mundi took any action within 12 years of such entry and the suit in question was instituted on 06.02.1978 by the plaintiffs on the basis of Will. In presence of unregd. mortgage deed and unregd. sale deed, the suit for declaration of title and recovery of possession, ought to have been filed within a period of 12 years.

20. In view of the aforesaid discussion, the substantial question of law framed by this Court on 28.11.1995 is answered against the plaintiffs and in favour of the defendant. Further, upon due consideration of the applications (I.A.No.12606/2019 and I.A.No.13103/2022) filed by the appellants under Section 100(5) of CPC, substantial questions of law proposed by the appellants do not arise in the second appeal. Accordingly, I.A.No.12606/2019 and I.A.No.13103/2022 are also dismissed.

21. Resultantly, the second appeal *fails* and is hereby *dismissed*. However, no order as to costs.

(DWARKA DHISH BANSAL)
JUDGE

sh