

HIGH COURT OF MADHYA PRADESH, JABALPUR

Second Appeal No.566/2016

APPELLANT : Ramcharan

-Versus-

RESPONDENTS : Damodar and Others

Shri Vinod Kumar Dubey, Advocate for the appellant.

Shri Devendra Shukla, Panel Lawyer for the respondent No.4/State.

PRESENT : Hon'ble Shri Justice Anurag Shrivastava.

Whether approved for reporting: Yes/No.

J U D G M E N T
(21.04.2017)

The appellant/plaintiff has filed this second appeal under Section 100 of Civil Procedure Code, being aggrieved by the judgment and decree dated 03.02.2016 passed by First Additional District Judge, Satna in regular Civil Appeal No.31-A/2015, whereby the judgment and decree dated 08.07.2014 passed by Civil Judge, Class-I Satna, (hereinafter referred to as 'trial Court') in Civil Suit No.45-A/2010 has been affirmed and confirmed and the suit filed by the appellant for declaration of title, possession and permanent injunction has been dismissed.

2. The facts giving rising to filing of this appeal briefly stated are that the plaintiff instituted a suit before trial Court, stating that the father of the plaintiff/appellant, Sahdev was the owner of the disputed land Khasra No.231/2 area 0.031 hect. situated in

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village Kherbasani, Tahsil Maihar, District Satna. In his life time he remained in possession of the land and after his death plaintiff RamCharan became owner and is in continuous possession of the land. This land has never been sold by Sahdev to Purushottam. The sale deed dated 05.04.1962 alleged to have been executed by Sahdev in favour of Purushottam is null and void as forged document. It is further pleaded that in the month of December, 2008 plaintiff came to know that defendants No.1 to 3 are trying to sell the disputed land. He obtained the copies of Khasra Panchashalla on 16.12.2008 wherein the name of defendants No.1 to 3 were recorded as Bhumiswami (owner) of the land. On perusal of the revenue record, it is revealed that Purushottam, who was the father of defendant No.1 and 3, had got his name recorded as Bhumiswami on the disputed land on the basis of forged sale deed dated 05.04.1965, in collusion with revenue authorities. After death of Purushottam the names of his wife and children (defendant Nos. 1 to 3) was mutated in revenue records on the disputed land. The defendant No.1 had sold this land to defendant No.5 vide sale deed dated 20.07.2009 without any right and authority. As the plaintiff is owner and in possession of the disputed land, therefore, plaintiff filed the suit for seeking relief of declaration of his title and possession on the disputed land and also declaration that the sale deed dated 05.04.1965 and 20.07.2009 as null and void and permanent injunction to restrain defendants to interfere with the possession of the plaintiff.

3. The defendants/respondents No.1 to 4 remained ex-parte and they did not file written statement.

4. Defendant/respondent No.5 in her written statement averred that Late Sahdev was the owner of the land. He had sold

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this land to late Purushottam by executing sale deed dated 05.04.1962 and delivered the possession of the land. The land was mutated thereafter on the name of Purushottam. After his death, his wife Smt. Mohani (D-2) and son Damodar (D-1) and daughter Siya Bai (D-3) became owner of the land. The land was always remained in possession of them as owner. Plaintiff's father Sahdev had never raised any objection against the aforesaid sale deed and mutation in his life time. Now the disputed land was purchased by defendant No.5 Smt. RamBai from Damodar, defendant no.1 vide registered sale deed dated 20.07.2009. RamBai is owner of disputed land. The plaintiff has not raised any objection against the mutation in revenue records. The defendants have also perfected their title on the basis of adverse possession. Therefore, the suit is time barred and liable to be dismissed.

5. The trial Court after completion of pleadings framed the issues and recorded the evidence adduced by both the parties. After hearing the parties the trial Court passed the impugned judgment dated 03.02.2016 and dismissed the suit on the ground that Sahdev had sold the disputed land to Purushottam vide sale deed dated 05.04.1962 (Ex.D/7) and thereafter Purushottam became owner of the land. After his death the land devolved to defendants No.1 to 3. The sale deed dated 20.07.2009 executed by defendant No.1 in favor of defendant No.5 is valid and lawful. The possession and title of plaintiff is not found proved. The suit is time barred. Against this judgment and decree the plaintiff preferred First Appeal before First Additional District Judge, Maihar, District Satna (M.P) which is also dismissed by recording concurrent findings.

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6. In Second Appeal, it is submitted by learned counsel for the appellant/plaintiff that Courts' below have failed to appreciate the evidence on record in its correct perspective, which has resulted in erroneous findings and consequent decree. The defendants have not examined any witness to prove execution of the disputed sale deed dated 05.04.1962, the trial Court wrongly drawn a presumption under Section 90 of Evidence Act and held the sale deed valid. There was no evidence to show that the disputed sale deed had been executed by Sahdev in favor of Purushottam, therefore it is not proved according to secs. 68 and 69 of Evidence Act. The mutation proceedings had been carried out without notice to Late Sahdev or his son plaintiff RamCharan. The Courts below have ignored the evidence regarding possession of the plaintiff on the disputed property. The right and title of the plaintiff is duly proved by evidence, therefore, the appeal may be allowed.

7. Considering the rival contentions of the learned counsel for the parties, and on perusal of record, the first question arises for consideration is that whether the Courts below have rightly drawn the presumption of execution of sale deed Ex.D-7 dated 05.04.1962 under Section 90 of Evidence Act. Section 90 of Evidence Act reads as under:-

"Section 90. Presumption as to documents thirty-years old- *Where any document, purporting or proved to be thirty-years old, is produced from any custody which the court in the particular case considers proper, the court may presume that the signature and every other part of such document, which purports to be in the handwriting of any particular person, is in that person's handwriting, and, in the case of a document executed or attested, that it was duly executed and attested by the persons by whom it purports to be executed and attested."*

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Explanation-Documents are said to be in proper custody if they are in the place in which, and under the care of the person with whom, they would naturally be; but no custody is improper if it is proved to have had a legitimate origin, or if the circumstances of the particular case are such as to render such an origin probable.

This Explanation applies also to Section 81."

The principle under Section 90 is that if a document, thirty-years old or more, is produced from proper custody and is on its face free from suspicion, the Court may presume that it has been duly executed and attested. The section empowers that Court to presume the signature and every other part of a document thirty-years old, which purports to be in handwriting of any particular person as in that person's handwriting, and in the case of a document executed or attested that it was duly executed and attested by the persons by whom it purports to be executed and attested. To attract the presumption under Section 90 of Evidence Act it should be proved that (a) the document is more than thirty years old (b) it is produced from proper custody and (c) on its face free from suspicion. To draw the presumption is not mandatory and it is left with discretion of the Court to raise presumption.

8. In the present case, it is not disputed that Sahdev was the owner of the disputed property. It is claimed by defendant that Sahdev had sold the disputed property to Purushottam by executing registered sale deed dated 05.04.1962. Defendant No.1 Damodar is son of Purushottam. Damodar (DW-3) in his evidence produced the sale deed dated 05.04.1962 Ex.D-7. This is a registered sale deed which shows that the disputed property was sold by Sahdev to Purushotta for consideration of Rs.100/-. The sale deed was attested by Lal Mohammad and Jwala Prasad and

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there was thumb impression of Sahdev affixed on it. This document is undisputedly more than thirty-years old.

9. Damodar (DW-3) in his statement deposed that Sahdev had executed the sale deed Ex.D-7 and sold disputed property to his father Purushottam. There is signature of Purushottam at place A to A on sale deed, the attesting witnesses Lal Mohammad and Jwala Prasad have expired some 14-15 years back. It is also not disputed that Sahdev and Purushottam are also no more. Defendant Rambai (DW-1) and witness Rammitra (DW-2) have also deposed in the same way and stated that both the parties and attesting witnesses to sale have expired now. In rebuttal the plaintiff's witnesses do not say that anyone of the attesting witnesses are still alive. Therefore, from aforesaid evidence, the findings of Courts below are correct that executants of the disputed sale deed and its attesting witnesses are not alive. Therefore no adverse inference can be drawn against defendant for not examining attesting witnesses.

10. The plaintiff has filed revenue records Khasra Panchsala Ex.P-1 to Ex.P-7 continuously of the years 1963-64 to 1997-98, which shows that Sahdev was recorded as Bhumiswami of the disputed land in the year 1962. Thereafter, in the year 1964, the land was mutated and recorded on the name of Purushottam on the basis of sale deed. This fact is also corroborated by certified copy of mutation (Namantaran-Panji) Ex.P-8, wherein it is mentioned that Sahdev had sold the disputed land to Purushottam for Rs.100/- vide sale deed dated 05.04.1962 and thereafter, the name of Purushottam as Bhumiswami was recorded. The Khasra- Panchsalas Ex.P1 to Ex.P-7 show that after purchasing of property, Purushottam was in possession of

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disputed land as Bhumiswami continuously from 1964 till 1997-98. Khasra Panchsala Ex.P-9 of the years 2008-10 shows that after the death of Purushottam the disputed land was recorded on the names of his son Damodar Prasad, daughter Siyabai and widow Smt. Mohini Bai. Thus, from revenue records the presumption of possession of Purushottam since 1962 to 1997-98 and thereafter, his legal representatives till the years 2008 and 2009 as Bhumiswami of the disputed land can be raised.

11. The defendant Rambai (DW-1) and her witnesses Damodar (DW-3) and Rammitra (DW-2) also deposed about the possession of Purushottam in his lifetime and thereafter, his legal representatives on the disputed land. In the rebuttal, the plaintiff Ramcharan (PW-1) deposed that he did not know whether his father Sahdev had executed the disputed sale deed in favour of Purushottam. In the year 1962, he was aged about 13-14 years. He also admits that there was no dispute over the disputed land in the lifetime of Sahdev. Sahdev did not raise any objection against the mutation and recording of the disputed land in revenue records on the name of Purushottam in his lifetime. Even plaintiff did not raise any objection in this regard before Revenue Authorities. Plaintiff Ramcharan (PW-1) has admitted that after the death of his father, his other lands were mutated on the name of his brother and himself. In cross-examination para 23, this witness deposed that after the death of his father, he had got mutation of the disputed land on his name alongwith other lands of his father. In cross-examination para 26, he deposed that in the year 1974-75 when he found the disputed land was not mentioned in *Rinpustika* then he had made an application for its correction. But neither that application for correction of *Rinpustika* is produced nor any revenue record is produced which shows that

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the disputed land was ever recorded on the name of plaintiff. Therefore, it appears that neither Sahdev nor plaintiff had ever tried to get the disputed land mutated on their names, nor they had raised any objection against recording of name of Purushottam in revenue records as Bhumiswami . It is not believable that the since more than 50 years plaintiff had no knowledge of the fact that the land was recorded on the name of Purushottam.

12. As far as the possession is concerned, plaintiff Ramcharan (PW-1) in para 16 admits that he has never cultivated the disputed land. At present the land is used by Rambai (D-5) for storing his crops. He also admits that the disputed land is an open land which is not used for cultivation. Other plaintiff witness Baliram (PW-2) in cross para 11 admits that he cannot say who is in possession of the disputed land. At present Rambai has stored his crops on it. Dwarka Prasad (PW-3) also admits that he is a labourer and he has no land around or nearby the disputed land. Therefore, from plaintiff's evidence, which is vague and very weak, it cannot be believed that on the disputed land, plaintiff's father Sahdev and thereafter, plaintiff were continuously remained in possession. The presumption of possession under Section 117 of M.P. Land Revenue Code, on the basis of Khasra Panchsala Ex.P-1 to Ex.P-7 and Ex.P-9 can be raised in favour of defendant.

13. Thus, from the evidence of both the parties, it appears that Sahdev had sold the disputed land to Purushottam vide sale deed Ex.D-7 dated 05.04.1962. After the sale, Purushottam got the land mutated on his name in the year 1964 vide mutation record Ex.P-8 in the year 1964 and thereafter, this land is continuously recorded on the name and possession of Purushottam as

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Bhumiswami and after his death, his legal representatives defendants D-1 to D-3. It is also proved that the land is in possession of the defendants since 1962. No reason has been given by the plaintiff, as to why they have not taken any objection against the entries of revenue records made in favour of Purushottam and defendants. Thus, the above facts clearly establishes that the disputed land was sold by Sahdev to Purushottam.

14. The disputed sale deed Ex.D-7 is a registered document more than thirty years old. All the witnesses of this document have been died. The document is produced from proper custody. From other evidence adduced by the parties, it appears that the disputed land was sold by Sahdev to Purushottam. There is no evidence which shows that Sahdev used to make signature. There is endorsement of the register also to show that Sahdev had executed the sale deed and got it registered after verifying the same before Registrar. The endorsement of Registrar is a factor, which can be taken into account for considering whether presumption under Section 90 should be raised. The Late Purushottam and after his death defendants no.1 to 3 were possessing the land as owner since more than 50 years . Thus, the document is free from suspicion. Therefore, the Courts below have rightly drawn the presumption of its execution. Where the discretion has been exercised with due care and the presumption under law has been made, an appellate Court should be slow to interfere with such discretion.

15. Honble Apex Court in case law **Vidhyadhar Vs. Manikrao (1993) 3 SCC 573:AIR 1999 SC 1441** held as under:-

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"Concurrent findings of fact recorded by trial Court and first appellate Court could not have been legally upset by High Court in second appeal unless such findings are shown to be perverse being based on no evidence or on evidence on record no reasonable person could have come to such conclusion."

Hon'ble Supreme Court in **Damodar Lal Vs. Sohan Devi, reported in 2016(4) MPLJ 57** had held as under:-

"Concurrent findings of trial Court and first Appellate Court on a pure question of fact. Even if finding of fact is wrong, that by itself will not constitute a question of law. Wrong finding should stem out of a complete misreading of evidence or it should be based only on conjectures and surmises."

16. It is argued by the learned counsel for the appellant that earlier the plaintiff's suit was decreed by the trial Court vide judgment dated 12.09.2012 holding that the possession of plaintiff over the disputed land and declaring that the mutation order dated 17.03.1964 in favor of Purushottam is null and void. Against this judgment the defendant preferred Civil Appeal No.54-A/2012, wherein the appellate Court allowed the application under Order 41 Rule 27 of CPC of defendant/appellant and remanded the case for hearing to trial Court after setting aside the decree. Thereafter, the trial Court has wrongly passed the present decree dated 08.07.2014 ignoring the findings of Court passed in earlier decision dated 12.09.2012. Therefore, finding of trial Court is erroneous.

17. This argument cannot be accepted. The earlier judgment and decree dated 12.09.2012 passed by trial Court was set aside by the Appellate Court and case was remanded to trial Court for hearing. Therefore, the present appellant/plaintiff cannot take support of findings of earlier judgment and decree which has

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been set aside by the Appellate Court. The plaintiff has not preferred any appeal against the earlier judgment dated 16.08.2013 of Appellate Court passed in Civil Appeal No.54-A/2012. Therefore, in present appeal, the legality and propriety of earlier order of Appellate Court dated 16.08.2013 cannot be considered.

18. The findings recorded by Courts below is correct and no illegality or perversity is found in it. The plaintiff/appellant has failed to prove his rights and title on the disputed land. Therefore, no substantial question of law arises for consideration in this second appeal. Thus, the appeal is devoid of substance and is hereby **dismissed**. The appellant has to bear the cost of appeal of respondent No.5.

(Anurag Shrivastava)
Judge

Vin**