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**(2012) 01 CHH CK 0055**  
**In the Chhattisgarh High Court**  
**Case No : First Appeal No. 85 of 2011**

Atal Shrivastava

APPELLANT

Vs

Devprasad and Another

RESPONDENT

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**Date of Decision :** 23-01-2012

**Acts Referred:**

Civil Procedure Code, 1908 (CPC) — Order 1 Rule 10, 96

Registration Act, 1908 — Section 17

Transfer of Property Act, 1882 — Section 122, 123, 41, 43, 6(a)

**Citation :** AIR 2012 Chh 117 : (2012) 1 CG.L.R.W. 503 : (2012) 1 CGBCLJ 411

**Hon'ble Judges :** Satish K. Agnihotri, J; R.S. Sharma, J

**Bench :** Full Bench

**Advocate :** Pawan Kesharwani, for the Appellant; Ravi Maheshwari and M.P.S. Bhatia, Deputy Govt. Advocate, for the Respondent

**Final Decision :** Dismissed

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## Judgement

Radhe Shyam Sharma, J.—The instant appeal, preferred by the plaintiff, u/s 96 of the Code of Civil Procedure, 1908, is directed against judgment and decree dated 5-2-2011 passed by 1st Additional District Judge, Bilaspur in Civil Suit No. 19-A/2009, whereby the suit, filed by the plaintiff/appellant for declaration of title and permanent injunction, has been dismissed. Brief facts, as projected by the plaintiff/appellant, are that Manohar, son of Mangat Suryavanshi was owner of a piece of land bearing Khasra No. 259/3, are 0.50 acre (0.202 hectare), situated at Village Mangla, P.H. No. 21, R.I. Circle Bilaspur (henceforth "the suit land"), which was subsequently purchased by Smt. Jotkunwar, widow of Nandram Satnami, resident of Sakri through a registered sale-deed dated 21-3-1975 and as such she became owner of the suit land and came into possession thereof. During her lifetime, she gifted the suit land to Smt. Yashoda Bai, W/o Dhanaram Satnami through a gift-deed dated 3-2-1989. Since the suit land was received vide the gift-deed. Smt. Yashoda Bai could not get her name recorded in the revenue records and after her death, her legal heirs, namely, Ganesh and Dinesh inherited the suit land and later on they executed agreement

dated 8-6-2004 in favour of Kadaram, S/o Ramkhilawan Jangde. Kadaram was grand son of the original owner Shri Jotkunwar. As such, the suit land got mutated in the name of Kadaram. Kadaram sold out the suit land to the appellant/plaintiff through registered sale-deed dated 15-9-2004 and handed over him ownership and possession thereof. By virtue of the sale-deed, the appellant/plaintiff became owner of the suit land. On his making an application for mutation in the revenue records, an objection was raised by brothers of Kadaram, namely, Vikram and defendant No. 1 Devprasad. The objection was allowed and the suit land was mutated in the name of Vikram, defendant No. 1 Devprasad and Kadaram. Subsequently, on getting their shares out of the consideration of the sale, Vikram and defendant No. 1 Devprasad executed consent-deeds dated 28-10-2004 and 22-1-2008, respectively, in favour of the appellant/plaintiff and as such the appellant/plaintiff became owner of the suit land and came in possession thereof from the date of its sale. Since, the suit land was mutated in the name of defendant No. 1 Devprasad along with two others and he, even after executing consent-deed dated 22-1-2008 in favour of the appellant/plaintiff, was trying to sell out the suit land, therefore, the appellant/plaintiff preferred the civil suit for declaration of title and permanent injunction over the suit land.

2. In his written statement, defendant No. 1 Devprasad stated that he was owner of the suit land and was in possession thereof. He had inherited the suit land from his grand mother Smt. Jotkunwar. His ancestors were cultivating the suit land and earning livelihood there from for the last 30-40 years. After their death, he was cultivating the suit land for the last 20-25 years. The suit land was purchased by Nandram, husband of Smt. Jotkunwar from his agricultural income in the name of Smt. Jotkunwar from Manohar, son of Mangat Suryavanshi. Therefore, Smt. Jotkunwar did not have right to gift the suit land. After death of Smt. Jotkunwar, her legal heirs were entitled to inherit the suit land. Smt. Jotkunwar did not have right to execute gift-deed of the suit land in favour of her daughter Yashoda Bai only. There were two sons of Smt. Jotkunwar, namely, Mohitram and Ramkhilawan. After death of Mohitram, his son defendant No. 1 Devprasad and widow Kainabai and after death of Ramkhilawan, his sons Kadaram, Bhagbali and Vikram and daughters Kanchan, Sulochana, Pushpa, Ashlata, Hemlata were jointly cultivating the suit land and their names were jointly recorded in the revenue records. The suit land is ancestral and joint property, therefore, Kadaram alone did not have right to execute its sale-deed dated 15-9-2004 registered in favour of the plaintiff. Sale deed dated 15-9-2004 is void. Since, gift-deed dated 3-2-1989 was unregistered, therefore, Smt. Yashoda Bai did not acquire any right by virtue thereof. Gift-deed dated 3-2-1989 was an unregistered deed, therefore, u/s 122 of the Transfer of Property Act, 1882 (hence forth "the Act, 1882") the same is void. After death of Smt. Jotkunwar, her two sons, Mohitram and Ramkhilawan were her legal heirs. After death of Mohitram, his son defendant No. 1 Devprasad and wife Kainabai (DW-3) are his legal heirs. After death of Ramkhilawan, his sons Kadaram, Vikram and

Bhagbali and daughters Pushplata, Ashlata and Hemlata etc. are legal heirs and they are necessary parties. The plaintiff has not made them party to the suit, therefore, the suit is not maintainable. Defendant No. 1 Devprasad neither gave any consent nor executed any consent-agreement in favour of the plaintiff. Therefore, the suit filed by the plaintiff deserves to be dismissed.

3. The trial Court framed as many as ten issues and after appreciation of the evidence and documents available on record, recorded its findings that the plaintiff did not prove that Smt. Jotkunwar executed gift-deed in favour of Smt. Yashoda Bai. The said gift-deed was an unregistered deed and it was not proved by the plaintiff. The trial Court further arrived at the finding that Smt. Jotkunwar was owner of the suit land and the suit land is ancestral property. Kadaram alone did not have right to sell the suit land to the plaintiff. On the basis of sale-deed dated 15-9-2004, the plaintiff did not acquire any title over the suit land. The trial Court further held that the plaintiff did not implead the necessary party to the suit, therefore, the suit was not maintainable and accordingly dismissed the suit.

4. The question for determination of this appeal is whether the findings recorded by the trial Court are erroneous and illegal?

5. Learned counsel for the appellant submitted that in ordinary course it is not open to the appellate Court to substitute its own exercise of discretion for that of the trial Court, but if it appears to the appellate Court that discretion is not exercised judicially or trial Court ignored relevant facts, it would be certainly open to the appellate Court. In the instant case, learned trial Court has wrongly appreciated the evidence. He further argued that the documents Ex. P-2, consent letter and Ex. P-3, agreement are duly proved by the appellant. The sale deed executed by Kadaram in favour of the appellant is valid. Kadaram has right to transfer his share. Therefore, the appellant acquires title over the suit land. Respondent No. 1/defendant No. 1 did not raise any objection to the sale deed dated 15-9-2004 within three years of its registration. The name of Kadaram is mutated in revenue records. It means, respondent No. 1 and other co-sharers have relinquished their rights over the suit land. He further argued that learned trial Court wrongly held that the suit is not maintainable for want of non-joinder of necessary parties. If there was non-joinder of necessary parties and on that ground the suit was not maintainable, it was necessary for the trial Court to afford opportunity to the appellant for impleading those persons as party to the suit. The plaintiff in a suit, being dominus litis, may choose the person against whom he wishes to litigate and he cannot be compelled to sue a person against whom he does not seek any relief. Learned counsel further argued that learned trial Court committed error in law and fact by ignoring that the registered sale deed was executed by Kadaram Jangde and later on the respondent No. 1/defendant No. 1 Devprasad had consented for the same through his consent-deed and as such defendant No. 1 Devprasad is now estopped from questioning the transaction. The learned trial Court committed error in law in not accepting

the consent deed executed by defendant No. 1 Devprasad to be a substantive piece of evidence in just decision of the matter when the same was proved by primary as well secondary evidence before the learned Court. The learned trial Court committed error in law holding that the plaintiff/appellant failed to prove that Kadaram had executed a valid sale-deed in his favour without considering the presumption in favour of the validity of the registered sale-deed, even otherwise execution of the sale deed was not assailed or questioned. The learned trial Court committed error in law while holding that the opinion of the expert can never be accepted to be a substantive piece of evidence. Learned counsel submitted that civil matter does not require strict proof but decisions are made on preponderance of probabilities, thus, settled principle of law has been badly ignored by the learned trial Court. Therefore, the appeal may be allowed and a decree may be drawn in favour of the appellant or the matter may be remanded to the learned trial Court for appreciation of the matter in the light of legal position as enumerated above. Reliance was placed on Uttar Pradesh Co-operative Federation Ltd. Vs. Sunder Brothers of Delhi, The Jumma Masjid, Mercara Vs. Kodimaniandra Deviah, , Laxmishankar Harishankar Bhatt Vs. Yashram Vasta (dead) by L.Rs., , Mumbai International Airport Pvt. Ltd. Vs. Regency Convention Centre and Hotels Pvt. Ltd. and Others, Kasturi Vs. Iyyamperumal and Others, , Ramji Dayawala and Sons (P) Ltd. Vs. Invest Import, Anil Kumar Singh v. Shivanath Mishra alias Gadasa Guru, (1995) 3 SCC 147 : (1995 AIR SCW 1782) and Sumtibai and Others Vs. Paras Finance Co. Regd. Partnership Firm Beawer (Raj.) Thru Smt. Mankanwar Chordia (Dead) and Others,

6. Learned counsel for respondent No. 1 argued that the appellant utterly failed to prove that the suit land was gifted by Smt. Jotkunwar to Smt. Yashoda Bai. The appellant did not prove the gift-deed dated 3-2-1989. The said gift-deed is an unregistered deed and, therefore, it is not admissible in evidence. For validity of a gift-deed of an immovable property worth above Rs. 100/-, its registration and delivery of possession under Sections 122 and 123 of the Act, 1882 are mandatory. Because gift-deed dated 3-2-1989 is an unregistered deed and the name of Smt. Yashoda Bai was not mutated in the revenue records, therefore, Smt. Yashoda Bai could not acquire any title over the suit land. He further argued that Smt. Jotkunwar was owner of the suit land and she had two sons, Mohitram and Ramkhilawan. Respondent No. 1 is son of Mohitram and Kadaram is son of Ramkhilawan. There are other legal heirs of Ramkhilawan. The suit land is an ancestral property. Kadaram alone did not have right to alienate the suit land, therefore, the appellant did not acquire any title over the suit land. The findings recorded by the learned trial Court do not require any interference by this Court and the appeal is liable to be dismissed.

7. Now, we shall examine whether the gift of the suit land made by Smt. Jotkunwar in favour of Smt. Yashoda Bai was valid?

8. Sections 122 and 123 of the Transfer of Property Act, 1882 run thus : --

122. "Gift" defined.- "Gift is the transfer of certain existing movable or immovable property made voluntarily and without consideration, by one person, called the donor, to another, called the donee, and accepted by or on behalf of the donee.

Acceptance when to be made. -- Such acceptance must be made during the lifetime of the donor and while he is still capable of giving.

If the donee dies before acceptance, the gift is void.

123. Transfer how effected.- For the purpose of making a gift of immovable property, the transfer must be effected by a registered instrument signed by or on behalf of the donor, and attested by at least two witnesses.

For the purpose of making a gift of movable property, the transfer may be effected either by a registered instrument signed as aforesaid or by delivery.

Such delivery may be made in the same way as goods sold may be delivered.

9. Atal Shrivastava (PW-1) deposed that the suit land belonged to Manohar, son of Mangat Suryavanshi, resident of Village Mangla. Smt. Jotkunwar purchased the suit land from Manohar by registered sale deed dated 21-3-1975. Smt. Jotkunwar had gifted the suit land to Smt. Yashoda Bai on 3-2-1989. By virtue of the said gift, Smt. Yashoda Bai became owner of the suit land. Smt. Yashoda Bai did not get her name mutated in the revenue records. After her death, her sons Ganesh and Dinesh inherited the suit land. They executed agreement dated 8-6-2004 in favour of Kadaram.

10. Atal Shrivastava (PW-1) deposed in cross-examination that it is true that after death of Smt. Yashoda Bai, the suit land was recorded in the name of Smt. Jotkunwar. Kadaram (PW-4) deposed that it is true that Smt. Jotkunwar had gifted the suit land to her daughter Smt. Yashoda Bai by an unregistered gift-deed. It is also true that even after the gift, the suit land remained recorded in the name of Smt. Jotkunwar.

11. The plaintiff did not produce the gift-deed 3-2-1989. From perusal of the evidence of Kadaram (PW-4), it appears that the so called gift-deed was unregistered.

12. In Smt. Gombibai (dead) through LRs. and others Vs. Mattulal (dead) through LRs., , the Hon'ble Supreme Court observed that it is seen that the gift of immovable property should be made only for transferring the right, title and interest by the donor to the donee by a registered instrument signed by or on behalf of the donor and must be attested by at least two witnesses. The pre-existing right, title and interest of donor thereby stand divested in the donee by operation of Section 17 of the Registration Act only when the gift deed is duly registered and thereafter the donor would lose title to the property. It must also be proved that the donee had accepted the property gifted over under the instrument.

13. It appears that said gift-deed dated 3-2-1989 was an unregistered deed. The delivery of possession of the suit land was also not proved by the plaintiff. Even after the gift of the suit land was made in favour of Smt. Yashoda Bai, the name of Smt. Jotkunwar remained recorded in the revenue records over the said land. The plaintiff did not produce any document which could show that the name of Smt. Yashoda Bai and after her death, the names of her sons, Ganesh and Dinesh were recorded in revenue records. Even the plaintiff did not produce any evidence which could show that Ganesh and Dinesh were in possession of the suit land.

14. The learned trial Court rightly held that the plaintiff failed to prove that the suit land was gifted by Smt. Jotkunwar to Smt. Yashoda Bai. Kadaram (PW-4) deposed in cross-examination in paragraph 7 that according to his knowledge, the suit land was ancestral property of his own, defendant No. 1 and co-sharers. He further deposed in paragraph 10 that it is true that the suit land was ancestral property. Therefore, the findings arrived at by learned trial Court relating to issues Nos. 1, 2, 7 and 8 are correct and based on due appreciation of evidence and documents available on record.

15. Atal Shrivastava (PW-1) deposed that Smt. Yashoda Bai had two sons, Ganesh and Dinesh Patre (PW-3). After her death, they inherited the suit land. They executed consent agreement dated 8-6-2004 in favour of Kadaram. On the basis of that agreement, the suit land was recorded in revenue records in the name of Kadaram and accordingly, Kadaram became absolute owner of the suit land. Dinesh Patre (PW-3) deposed that Kadaram was owner of the suit land and the suit land remained in his possession. This witness has not stated anything in his examination-in-chief about execution of the agreement. Witness Kadaram has also not stated anything about execution of the so-called agreement. He has only stated that he was the owner of the suit land on the date of its sale.

16. Atal Shrivastava (PW-1) deposed in cross-examination that he purchased the suit land vide registered sale-deed dated 15-9-2004 after recording of name of Kadaram (PW-4) in the revenue records. He also stated that he did not produce any document relating to possession of Ganesh and Dinesh over the suit land. He also stated in cross-examination that he did not produce any document relating to recording of name of Kadaram in the revenue records on the basis of agreement of Ganesh and Dinesh. He admitted that at the time when the agreement was executed by Ganesh and Dinesh, the suit land was not recorded in their names in the revenue records. It appears that the plaintiff did not produce any documentary evidence that the suit land was recorded in the names of Ganesh and Dinesh and they were in possession of the suit land.

17. Kadaram Jangde (PW-4) deposed that Ganesh and Dinesh executed an agreement in his favour on 8-6-2004 for mutation of his name in the revenue records over the suit land. Kadaram (PW-4) admitted that the suit land was ancestral property of his own and defendant No. 1. How the name of Kadaram was mutated in the revenue records, no satisfactory evidence in this regard was

led by him.

18. In *Balwant Singh and another etc. Vs. Daulat Singh (dead) by L.Rs. and others*, , the Hon"ble Supreme Court observed that be that as it may, mutation entries do not convey or extinguish any title and those entries are relevant only for the purpose of collection of land revenue. In the instant case, mere mutation of name of Kadaram in the revenue records does not render any title in his favour over the suit land. Kadaram did not become sole owner of the suit land on the basis of said mutation and right and title of defendant No. 1 did not extinguish.

19. Merely on the basis of execution of an agreement by Vikram, Ganesh and Dinesh in favour of Kadaram, Kadaram did not become absolute owner of the suit land.

20. Now, we shall examine whether sale-deed dated 15-9-2004 executed by Kadram in favour of the plaintiff is valid and the appellant/plaintiff perfected his title over the suit land?

21. Learned counsel for the appellant argued that under Sections 41 and 43 of the Act, 1882, the appellant perfected his title over the suit land and in support of his contention, he placed reliance on *The Jumma Masjid, Mercara Vs. Kodimaniandra Deviah*, ).

22. In *Jumma Masjid, Mercara* (supra), the Hon"ble Supreme Court observed that where a person transfers property representing that he has a present interest therein, whereas he has, in fact only a spes successionis, the transferee is entitled to the benefit of S. 43, if he has taken the transfer on the faith of that representation and for consideration. Such a construction of S. 43 has not the effect of nullifying S. 6(a). Section 6(a) and S. 43 relate to two different subjects, and there is no necessary conflict between them. Section 6(a) deals with certain kinds of interests in property mentioned therein, and prohibits a transfer simpliciter of those interests. Section 43 deals with representations as to title made by a transferor who had no title at the time of transfer, and provides that the transfer shall fasten itself on the title which the transferor subsequently acquires. Section 6(a) enacts a rule of substantive law, while S. 43 enacts a rule of estoppel which is one of evidence. The two provisions operate on different fields, and under different conditions, and there is no ground for reading a conflict between them or for cutting down the ambit of the one by reference to the other; both of them can be given full effect on their own terms, in their respective spheres. To hold that transfers by persons who have only a spes successionis at the date of transfer are not within the protection afforded by S. 43 would destroy its utility to a large extent. Section 43 embodies a rule of estoppel and enacts that a person who makes a representation shall not be heard to allege the contrary as against a person who acts on that representation. It is immaterial whether the transferor acts bona fide or fraudulently in making the representation. It is only material to find out whether in fact the transferee

has been misled. For the purpose of the section it matters not whether the transferor acted fraudulently or innocently in making the representation, and that what is material is that he did make a representation and the transferee has acted on it. Where the transferee knows as a fact that the transferor does not possess the title which he represents he has, then he cannot be said to have acted on it when taking a transfer. Section 43 would then have no application, and the transfer will fail under S. 6(a).

23. In the instant case, Atal Shrivastava (PW-1) specifically deposed that the suit land was purchased by Smt. Jotkunwar. Ganesh and Dinesh acquired the suit land by way of inheritance and they executed the agreement in his favour. He further deposed that Kadaram had sold him the suit land by registered sale deed dated 15-9-2004 and handed over him possession thereof. After the sale in his favour, he is in valid possession of the suit land. On his submission of an application for mutation of his name over the suit land before the Tahsildar, Vikram, brother of Kadaram and defendant No. 1 Devprasad raised objection thereto, therefore, the suit land was recorded in the revenue records in the names of Kadaram, Vikram and defendant No. 1 Devprasad. Kadaram (PW-4) deposed that accordingly to his knowledge, the suit land is ancestral property.

24. From perusal of the above evidence, it appears that the appellant/plaintiff knew that the suit land was belonging to Smt. Jotkunwar, respondent No. 1/ defendant No. 1 Devprasad was grandson (son's son) of Smt. Jotkunwar and Kadaram did not possess title over the suit land, therefore, Section 43 of the Act, 1882 would have no application and the appellant/plaintiff was not entitled for the benefit of Sections 41 and 43 of the Act, 1882.

25. Atal Shrivastava (PW-1) deposed that defendant No. 1 Devprasad executed consent-letter dated 22-1-2008, which is denied by defendant No. 1 Devprasad. Devprasad (DW-1) deposed that consent-letter dated 22-1-2008 submitted by the plaintiff is forged. He further deposed that he did not execute any consent letter. Even if defendant No. 1 Devprasad executed the consent letter, it neither convey title nor create any interest in favour of the plaintiff over the suit land. Even such consent-letter (Ex. P-2) cannot be relied upon or made the basis for mutation in revenue records.

26. Therefore, the trial Court rightly held that Kadaram alone did not have right to sell the suit land to the appellant/plaintiff and on the basis of sale deed dated 15-9-2004, the appellant/plaintiff did not acquire any title over the suit land.

27. Now, we shall examine whether the appellant/plaintiff did not implead the necessary party to the suit?

28. Devprasad (DW-1) deposed in examination-in-chief, in paragraph 3, that Smt. Jotkunwar died leaving behind her two sons Mohitram and Ramkhilawan. Mohitram died leaving behind him son Devprasad (DW-1) and wife Kainabai (DW-3). Ramkhilawan died leaving behind him sons Kadaram, Bhagbali, Vikram and daughters Ashlata, Hemlata, Pushplata etc. Kadaram (PW-4) deposed in

cross-examination, in paragraph 5, that Ramkhilawan had two sons Kadaram himself and Vikram and six daughters, namely, Shivkumari, Kanchanbai, Sulochana, Ashlata, Pushplata and Hemlata.

29. After perusal of the evidence of Kadaram (PW-4), Devprasad (DW-1) and Panchram (DW-2), it appears that Kadaram (PW-4) had brothers and sisters. They were legal heirs of Ramkhilawan also. In his written statement, defendant No. 1 Devprasad specifically pleaded that Ramkhilawan died leaving behind him sons and daughters being his legal heirs and they are necessary parties to the suit.

30. Order 1, Rule 10 of the Code of Civil Procedure, 1908 enable the Court to add any person as a party at any stage of the proceeding if the person whose presence before the Court is necessary in order to enable the Court to effectively and completely adjudicate upon and settle all the questions involved in the suit. Avoidance of the multiplicity of proceeding is also one of the object of the said provision. A necessary party is one without whom no order can be effectively made. In the instant case, the plaintiff filed the suit for declaration of title and permanent injunction. The brothers and sisters of Kadaram and mother of defendant No. 1 Devprasad are necessary parties. Therefore, the trial Court rightly held that the appellant/plaintiff did not implead necessary party to the suit.

31. We have considered all the aspects in the light of the decisions cited above. We find no infirmity in the impugned judgment and decree passed by the trial Court and, therefore, the same are affirmed.

32. The appeal is devoid of any merit; it deserves to be and is hereby dismissed. Parties shall bear their own costs. A decree be drawn-up accordingly.