

(2010) 09 CHH CK 0040
In the Chhattisgarh High Court
Case No : Second Appeal No. 376 of 2001

Yugal Prasad Dewangan	Vs	APPELLANT
Smt. Kanakbati and Others		RESPONDENT

Date of Decision : 07-09-2010

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 100
Constitution of India, 1950 — Article 136
Limitation (Amendment) Act, 1962 — Article 58, 65

Citation : (2011) 1 CG.L.R.W. 46 : (2011) 1 CGLJ 415

Hon'ble Judges : T.P. Sharma, J

Bench : Division Bench

Judgement

T.P. Sharma, J.

Second Appeal u/s 100 of Code of Civil Procedure

1. By this Second Appeal, the Appellant has challenged the legality & propriety of the judgment and decree dated 10.9.2001 passed by the Additional District Judge, Bastar at Kanker, in Civil Appeal No. 13-A/96, affirming the judgment and decree of dismissal of the suit and decreeing the suit filed on behalf of Respondents No. 1 to 5/Plaintiffs for partition and separate possession dated 8.10.96 passed by the Civil Judge Class-II, Narayanpur, in Civil Suit No. 4-A/91.

2. The present appeal is admitted for consideration on the following substantial questions of law:

i) Whether the Courts below have fallen into error by passing a decree regarding the validity of the deed of settlement dated 22.6.1971 (Ex.D-1) in the absence of any prayer made in the plaint or any issue having been framed in this regard?

ii) Whether the Plaintiffs' suit was barred by limitation?

3. As per pleadings of the parties i.e. Respondents No. 1 to 5, predecessor-in-title of Respondents No. 1 to 5 deceased Janak Prasad Dewangan and Appellant

Yugal Prasad Dewangan are sons of Neelkanth Dewangan. Total 38.46 acres of the land was held by Neelkanth Dewangan situated at village Narayanpur. The property was ancestral property. The present Appellant and Janak Prasad Dewangan (since deceased) were entitled for half of the share of the property left by Neelkanth Dewangan. Janak Prasad Dewangan was in Government service and was posted in the places other than Narayanpur. The Appellant was residing with his father. Father of the Appellant had given 12.59 acres of the land bearing khasra Nos. 2151, 2157, 569/1, 2251/1 and 2259 to Janak Prasad Dewangan for agricultural only on the ground that he is not in a position to cultivate the entire land or substantial part of the land. Fourteenth years prior to filing of the suit dated 26.2.91, properties were not partitioned between both brothers. Neelkanth Dewangan died in the year 1983. During his life time, Neelkanth Dewangan has executed one document in the style of Vavasthapatra relating to 25.57 acres of the land in the name of the Appellant which does not give any right and title to him. No partition was possible by the said Vavasthapatra. The Appellant succeeded and mutated his name in the revenue record relating to 25.41 acres of the land, but the same does not give any right or title to the Appellant. Cause of action arose in the year 1983 after death of his father when the Appellant refused to give share to Janak Prasad Dewangan. Then suit for partition and possession was filed on 26.2.1991. By filing written statement the present Appellant denied adverse allegation made in the plaint and has specifically claimed that during lifetime of Neelkanth Dewangan vide registered Vavasthapatra dated 22.6.1971 has given 25.57 acres of the land to Appellant out of 31.46 acres of total land. Properties were self-acquired of Neelkanth Dewangan and he was entitled to give the land to the Appellant by Vavasthapatra. Name of the Appellant was mutated in the revenue record and he is in possession over the land since 22.6.1971 despite the objection of Janak Prasad Dewangan. Again in the year 1976 Janak Prasad Dewangan has filed an application for mutation of his name in the revenue record which was dismissed on account of compromise vide order dated 14.2.1977. On the basis of averments made by the parties, issues were framed and after providing opportunity of hearing to the parties, learned Civil Judge Class-II, Narayanpur has decreed the suit and declared that Janak Prasad Dewangan is entitled for half of the share and possession over the entire property of 38.46 acres of the land recorded in the name of Neelkanth Dewangan. Same was challenged in the appeal. By the judgment and decree impugned, the lower appellate Court has dismissed the appeal.

4. I have heard learned Counsel for the parties, perused the judgment and decree impugned, judgment and decree of the trial Court and records of the Courts below.

5. Learned Counsel for the Appellant vehemently argued that in the present case, Respondents No. 1 to 5 were having definite knowledge of Vavasthapatra Ex.D/1 which was executed by Neelkanth Dewangan on 22.6.1971, the present Appellant is in possession of the suit land since 22.6.1971 and his name was

mutated in the revenue record in the year 1971 at the time of such mutation. Predecessor-in-title of Respondents No. 1 to 5 had objected the mutation by filing objection Ex.D/8 on 15.10.71, but despite the objection of Janak Prasad Dewangan, name of the Appellant was mutated in the revenue record. Again in the year 1977, Janak Prasad Dewangan applied for mutation before the revenue authority and the same was dismissed vide order dated 14.2.77 on the basis of compromise (vkielh lgefr) vide Ex.D/10. Learned Counsel further argued that as per documentary and oral evidence the present Appellant is in possession of the suit land since 22.6.1971 i.e. from the date of execution of Vavasthapatra by father of the Appellant Neelkanth Dewangan. Property held by Neelkanth Dewangan was self acquired property and he was competent to execute Vavasthapatra or dispose of his property in any manner, even in an arbitrarily manner. Vavasthapatra was well within the knowledge of Janak Prasad Dewangan. During the same time 12.59 acres of the land was given to Janak Prasad Dewangan and Janak Prasad Dewangan was in possession of that land given to him by his father and present Respondents No. 1 to 5 are his predecessor-in-title. Janak Prasad Dewangan had not challenged Vavasthapatra on the ground that same is forged document but they have pleaded in his plaint that the alleged Vavasthapatra does not give any right or title to the present Appellant. They have not claimed any relief for cancellation of Vavasthapatra or any relief relating to that Vavasthapatra. In case any grievance on account of Vavasthapatra, the Plaintiffs were required to file suit for declaration or possession within three years from the date of execution of Vavasthapatra dated 22.6.1971 or at the worst within three years from the death of Neelkanth Dewangan dated 24.11.1981, but he has not filed any suit within three years from the aforesaid death and has filed the suit on 22.6.91 after lapse of 20 years from the date of execution of such Vavasthapatra and after 10 years from the death of his father. The suit is hopelessly barred by limitation. No issues were framed relating to validity of Vavasthapatra, therefore, any suit relating to validity of Vavasthapatra, the Courts below were not competent to pass a decree regarding the validity of deed of settlement.

6. Learned Counsel for Respondents No. 1 to 5 submits that Respondent No. 1 to 5/Plaintiffs have specifically pleaded relating to deed of settlement and pleaded that the same is void and does not give any title or right upon the present Appellant and no specific claim or relief was necessary to Respondents No. 1 to 5. Even otherwise both the parties were having knowledge relating to their case. Both the parties have led their evidence and both the parties understood their case and for purpose of proving and contesting the case, therefore, absence of pleading in the plaint relating to validity of deed of settlement or absence of specific issue is of no use. Suit for partition and possession of joint family property is 12 years from the cause of action arose. In the present case, ouster or hostile possession has not been pleaded or proved by the Appellant after death of his father. When the Appellant refused to give partition, then within 12 years of such refusal, Janak Prasad Dewangan has filed suit for partition and

possession which is within limitation in accordance with Article 65 of the Limitation Act, 1962.

7. Learned Counsel placed reliance in the matter of Sree Swayam Prakash Ashramam and Anr. v. G. Anandavally Amma and Ors. in which the Apex Court has held that absence of pleadings in plaint regarding implied grant of easementary right in relation to pathway concerned and passing of decree on the basis of conclusion as to said implied grant is not liable to be interfered with as despite absence of specific issue, parties had understood their case and for purpose of proving and contesting implied grant, had adduced evidence. Learned Counsel further placed reliance in the matter of Bhuri Bai and Ors. v. Ramnarayan and Ors. in which the Apex Court has held concurrent finding of both the Courts below relating to allotment and possession of the property is pure questions of fact and appreciation of evidence and no substantial question of law is involved. Learned Counsel also placed reliance in the matter of Sneh Gupta v. Devi Sarup and Ors. in which the Apex Court has held that a suit cannot be withdrawn by a party after it acquires a privilege and right to withdraw a suit of the party bringing the suit would be unqualified, if no right has been vested in any other party.

8. On the other hand, learned Counsel for Respondent No. 6/State supported the judgment and decree impugned.

9. In the present case, as per Ex.D/1 alleged deed of settlement, the same was executed by father of the Appellant in the style of Vavasthapatra on 22.6.1971 by which it has been specifically mentioned that by the deed of settlement, the Appellant become owner and possessor of the land and father of the Appellant has divested from ownership upon the suit land. Ex.D/6 shows khata No. 182 bearing 38.46 acres of the land in the name of Neelkanth Dewangan in the year 1964-65. Exs.D/8 and D/9 objection filed on behalf of Janak Prasad Dewangan and reply filed by the Appellant reveal that Janak Prasad Dewangan has objected the mutation proceeding before the Tahsildar for mutation of the land in the name of the Appellant relating to aforesaid 25.57 acres of the land on the basis of Vavasthapatra on the ground that his father has without any advise from him confidentially executed Vavasthapatra in the name of the present Appellant which was well relied by the Appellant and finally name of the Appellant was mutated in the revenue record. In the year 1976-77, again Janak Prasad Dewangan has filed an application for mutation of his name but proceeding was dismissed on the ground that both the parties do not want to prosecute and they have decided their dispute amicably. The proceeding was dismissed on 14.2.77 vide Ex.D/10.

10. Both the parties led their evidence. Present Respondents No. 1 to 5 have examined Ku. Bindu Dewangan, Smt. Kanakvati, Surajram Dewangan and Sayyad Nawab Ali who have deposed in their evidence that 12.81 acres of the land was given to Janak Prasad Dewangan and the Appellant has succeeded in execution of Vavasthapatra from his father. On the basis of documentary and oral evidence, both the Courts below have arrived at a finding that the property was

self acquired of Neelkanth Dewangan. Learned Civil Judge Class-II, Narayanpur has arrived at a finding relating to Vavasthapatra that three pieces of stamp were purchased and out of three pieces of stamp, one stamp was purchased in the name of Neelkanth and two pieces of stamp were purchased in the name of the Appellant. Para 8 of judgment of the trial Court further reveals that Ex.D/1 is not registered document which is admittedly not proved.

11. Present Respondents No. 1 to 5 have not pleaded that the alleged deed of settlement is not genuine and has obtained by fraud, they have not pleaded that it does not give any right or title to the Appellant, they have not disputed the genuineness of execution of the document but they have pleaded relating to its effect. They have not claimed any relief relating to cancellation or bindingness of the document upon them. No specific issue has been framed by the trial Court or lower appellate Court but issue No. 2"B" was framed by the trial Court that whether the Defendant i.e. present Appellant is entitled for + of the share upon the land given to the Plaintiff i.e. Janak Prasad Dewangan which is decided as positive.

12. While dealing with the question of necessity of specific pleading and specific issue for proving the fact and contesting the claim, the Apex Court in the matter of Sree Swayam Prakash Ashramam and Anr. (supra) has held that if the parties had understood their case and for purpose of proving and contesting implied grant, had adduced evidence, absence of any specific issue is not required. Paras 30 and 31 of the said judgment read as under:

30. The learned Counsel for the Appellant raised an argument that since no case was made out by the Respondent-Plaintiffs in their plaint about the easementary right over the B Schedule pathway by implied grant, no decree can be passed by the courts below basing their conclusion on implied grant. We have already noted the findings arrived at by the trial court, on consideration of pleadings and evidence on record on the right of easement over B Schedule pathway by implied grant.

31. The trial Court on consideration of the evidence of both the parties recorded the finding that there was no evidence on record to show that either Yogini Amma or the Defendants themselves until 1982 had objected to the Plaintiff's use of B schedule pathway to access A schedule property. The trial court on consideration of the Plaintiff's evidence and when the Defendant had failed to produce any evidence, had come to the conclusion that the Plaintiff was given right of easement by Yogini Amma as an easement of grant. Considering this aspect of the matter, although there is no specific issue on the question of implied grant, but as the parties have understood their case and for the purpose of proving and contesting implied grant had adduced evidence, the trial court and the High Court had come to the conclusion that the Plaintiff had acquired a right of easement in respect of B schedule pathway by way of implied grant. Such being the position, we are not in a position to upset the findings of fact arrived at by the courts below, in exercise of our powers under Article 136 of the

Constitution of India.

13. In the present case, definitely no specific relief relating to validity of deed of settlement has been claimed by the Plaintiff, but both the parties have pleaded relating to existence/non-existence and effect of Vavasthapatra Ex.D/1. As per pleadings of Respondents No. 1 to 5, Ex.D/1 does not create any right or title upon the Appellant. As per pleadings of the Appellant, right and title has been created upon him on the basis of the alleged deed of settlement. In the light of the judgment of the Apex Court in the matter of Sree Swayam Prakash Ashramam and Anr. (supra), it is difficult to hold that both the Courts below have committed illegality. Inter alia, both the Courts below were competent to consider the validity of Ex.D/1.

14. As regards the question of validity of Vavasthapatra Ex.D/1, Respondents No. 1 to 5 and their witnesses have not adduced any evidence to show that Ex.D/1 was not genuine document or has obtained by fraud. They have pleaded and adduced evidence that in the light of the fact that property was ancestral, father of the Appellant was not competent to execute such document, therefore, it does not give any right or title to the Appellant. The trial Court has not placed reliance upon the document on the ground that the same was not registered and three pieces of stamp have been purchased by two different persons i.e. the Appellant and his father, although the document is registered document and purchasing of stamp by one of the party or both the party is not sufficient to create doubt on the genuineness of the document, as held by both the Courts below. Neelkanth Dewangan was absolute owner of the property held by him, therefore, he was competent to dispose of or alienate the property to any person, even in an arbitrarily manner. Ex.D/1 was executed by father of the Appellant on 22.6.1971. Execution of title on the basis of Ex.D/1 was objected by Janak Prasad Dewangan in the year 1971 by filing objection Ex.D/8 before the revenue authority during lifetime of his father and the same was rejected. Again Janak Prasad Dewangan filed mutation application before the revenue authority during lifetime of his father and the same was dismissed on the basis of amicably settlement between the parties.

15. Definitely as held by the Apex Court in the matter of Sneh Gupta (supra), parties are not entitled to withdraw the suit after execution of privilege or right.

16. Mutation proceeding was initiated at the instance of Janak Prasad Dewangan and the same was withdrawn by both the parties on the basis of amicable settlement. Virtually the proceeding was dismissed on the basis of amicable settlement that they do not want to prosecute the proceeding and no parties has gained any profit or privilege at the time of termination of such mutation proceeding on behalf of the Janak Prasad Dewangan (since deceased).

17. As held by the Apex Court in the matter of Bhuri Bai and Ors. (supra), allotment of the property to the Appellant in partition and he was never in possession is pure question of fact and appreciation of evidence and no

substantial question of law is involved.

18. In the present case, as per pleadings and evidence of both the parties, deed of settlement was executed by father of the Appellant Neelkanth Dewangan and name of the present Appellant was mutated on the basis of such deed. The present Appellant is in possession of the land given to him on the basis of such deed. About 12.59 acres of the land were given simultaneously to predecessor-in-title of Respondents No. 1 to 5 and they are in possession of such land. Acquisition of title on the basis of deed of settlement was objected by Janak Prasad Dewangan in the year 1971 and in the year 1977 during lifetime of his father but he did not succeed in his claim.

19. In the present case, land was given to the Appellant on the basis of deed of settlement and he is in possession of the land on the basis of such document. Definitely the same is pure question of fact and not substantial question of law, but in the present case, the trial Court has disbelieved the document Ex.D/1 deed of settlement that same is not registered document required registration under the Indian Registration Act. As per Ex.D/1, same is registered document. The Respondents have not pleaded and proved that document was forged or not genuine. In the absence of such pleading and evidence, finding of the Courts below that document is not legal is complete perverse finding against pleading and evidence. In these circumstances, such question becomes substantial question of law. As per pleading and evidence of the parties, Ex.D/1 was duly executed by father of and it was objected twice by Janak Prasad Dewangan during lifetime of his father before the revenue Court. Property was self-acquired property of Neelkanth Dewangan, father of Janak Prasad Dewangan and was competent to dispose of the property by way of deed of settlement or other way.

20. As regards the question of limitation, definitely the alleged deed of settlement Ex.D/1 executed on 22.7.1971 was within the knowledge of Janak Prasad Dewangan and in the year 1971 he has filed objection before the revenue authority and in the year 1977 same was dismissed. Again he has filed mutation proceeding and same was also dropped. As per pleadings of Janak Prasad Dewangan, his father died in the year 1983, but as per pleadings of the Appellant, his father died on 24.11.1981. Unless deed of settlement is declared null and void or inoperative, Janak Prasad Dewangan is not entitled for possession over self-acquired property held by his father during his lifetime or after his death. He was required to file suit for declaration of the document null and void and for possession within three years from the date of execution of the document or denial of his claim by revenue authority or death of his father when actual cause of action relating to partition arose in his favour in accordance with Article 58 of the Limitation Act, but Janak Prasad Dewangan has not filed any suit within three years from the date of execution of the document, date of denial of his claim by revenue authority or death of his father. Therefore, suit filed on behalf of Janak Prasad Dewangan was hopelessly barred by limitation. Suit was simplicitor for partition and possession, especially in the light of the alleged deed

of settlement which was not found genuine as per finding of the Courts below. In these circumstances, Janak Prasad Dewangan was under obligation to file suit for declaration of deed of settlement not binding upon him. In case it is considered that they have made sufficient averment in the pleadings and they understood their claim and have adduced evidence, therefore, specific plea and issue was not necessary to them. In these circumstances, limitation available to Janak Prasad Dewangan was 3 years under Article 58 of the Limitation Act and not 12 years under Article 65 of the Limitation Act, therefore, suit was hopelessly barred by limitation.

21. For the foregoing reasons, substantial question No. 1 is decided that on the basis of detailed pleadings and cryptic issue, the Courts below have not fallen into error regarding the finding on validity of the deed of settlement Ex.D/1 but have committed error in arriving at a finding that the deed of settlement Ex.D/1 was null and void, inter alia Ex.D/1 is valid document executed by Neelkanth Dewangan in favour of the Appellant, for which he was competent to execute the same and substantial question No. 2 is decided as positive. On the basis of aforesaid decision on the substantial questions of law formulated for the decision of this appeal, the appeal is allowed. Judgment and decree of the Courts below are hereby set aside. Suit filed on behalf of Janak Prasad Dewangan (since deceased) continued by Respondents No. 1 to 5 are liable to be dismissed and is hereby dismissed. Parties shall bear their own cost.

22. Advocate fee as per schedule.

23. A decree be drawn accordingly.