

Baratkunwar Vs Dular Singh

Second Appeal No. 222 Of 2009

Court: Chhattisgarh High Court

Date of Decision: Sept. 14, 2022

Acts Referred:

Code Of Civil Procedure, 1908 " Section 11, 100#Specific Relief Act, 1963 " Section 34

Hon'ble Judges: Narendra Kumar Vyas, J

Bench: Single Bench

Advocate: H.S. Patel, R.S. Patel, Malay Jain, Ishwari Ghritlahre

Final Decision: Dismissed

Judgement

1. The appellant/defendant No.1 has filed the Second Appeal under Section 100 of the Code of Civil Procedure, 1908 being aggrieved by the judgment

and decree dated 31-01-2009 passed by learned Additional District Judge Sarangarh, District Raigarh in Civil Appeal No. 18-A/2006 affirming the

judgment and decree dated 2-12-2003 passed by the F Civil Judge, Class-2, Sarangarh, District Raigarh, in Civil Suit No. 24-A/2002.

2. This appeal was admitted on 9-10-2015 by this court on the following substantial question of law.

“Whether the findings of, the First Appellate Court that the judgment and decree passed in Civil Suit No., 8A/87 dated 26-10-1993 is not binding to

the plaintiffs is perverse?”

Thereafter, on 20-2-2020 following additional substantial question of law is framed by this court.

“Whether the First Appellate Court was justified in holding that the plaintiffs are in possession of the suit land and their suit is maintainable and not

hit by proviso to Section 34 of the Specific Relief Act, 1963 by reversing finding of the trial Court?”

3. The brief facts as reflected from the records are that the plaintiffs filed a civil suit before Civil Judge, Class II, Raigarh for declaration of title,

possession and declaration that subsequent judgment and decree passed in Civil Suit No. 8A/1987 dated 26.10.1993 is not binding upon the plaintiff

mainly contending that the plaintiffs and defendants No. 1 to 4 belong to one family and genealogy tree was also described in the plaint. It has been

contended that the land bearing Khasra No.29 area 18.20 dismil, situated at village Timralaga, Patwari Halka No.28, Tahsil Sagangarh, District

Raigarh is jointly owned by the plaintiff's father Chhotelal and elder uncle Jhaduram. The plaintiff's uncle died in the year 1973, therefore,

legal representatives namely defendants No.1 and 2 have taken the land in their possession. The partition between the plaintiff's father and father

of defendants No. 1 and 2 has taken place prior to 50 years, according to their partition, they are in possession of their respective shares, though

partitions were taken place in the year 1979, the properties were recorded jointly in the revenue record. It has been further contended that after

partition, plaintiff's father is in possession of the suit property, he died prior to 12 years, therefore, being legal representatives of their father, they

are utilizing the land and doing the agricultural work. They are in possession of the suit property peacefully. The suit property has been described in

Schedule-A of the plaint. The defendant No.2 after partition with plaintiff's father prior to 1979 was already separated after taking his share which has

been described in Schedule-C of the plaint and executed sale deed on 14-8-1978. It has been contended that after partition of plaintiff's father

Chhotelal and defendants No. 1 and 2 property which has been given to defendant No.4 has been adjusted by the defendants No.1 and 2 in their

account. It has also been contended that after partition, the defendants No.1 and 2 have sold the property to defendant No.3 who is wife of defendant

No.2, fraudulently separated revenue records and presently the defendants No. 1 and 2 are having less property in the land account.

4. It has been contended that the defendant No.2 without consent of defendant No.1 has filed a civil suit for partition for the property described in

Schedule-B of the plaint before Civil Judge, Class II, Sarangarh which was registered as Civil Suit No.8A/87. The learned Civil Judge, Class-II,

decided the said civil suit on 26-10-1993, wherein decree was passed and according to which defendants No.1 and 2 are entitled to get half of the

share of the suit property. It has also been decided in the suit that the defendant No.2 is affected by transfer deed dated 14-08-1978, 26-09-1979 and

9-01-1987, against which the appeal was preferred which has been affirmed by the Appellate Court. Defendant No.1 in pursuance of the judgment

and decree passed by the trial court has moved an application for partition on 17-4-2000 before the Additional Tahsildar, Sarangarh, who directed for

partition of property owned by the plaintiff mentioned in Schedule-A of the plaint described as Schedule-E of the plaint, which has caused reduction of

share of the property. It has also been contended that after partition on 25-9-1979 revenue records should have been rectified, but the same have not

been rectified, but due to mistake of the Patwari, no correction in the revenue record was carried out which has caused reduction of share of the

plaintiffs whereas the property mentioned in Schedule-A of the plaint and property mentioned in the account of defendants No.1 and 2 should have

been equally divided.

5. It has also been contended that defendants No. 1 while filing the suit against the defendant No.2 to 4 has not examined this aspect of the matter

which has caused mistake in the description of the suit property. The plaintiffs have raised objection before the Tahsildar, Sarangarh which was

rejected. It has also been contended that neither the plaintiffs were party to the suit nor any relief was sought by the defendant No.1 with regard to

plaintiffs' property mentioned in Schedule-A. It has also been contended that the defendants No. 2 to 4 without disclosing the correct facts before

Civil Judge, Sarangarh have obtained decree, therefore, decree suffers from fraud, therefore, the decree is not binding upon the plaintiffs. It has also

been contended that the defendants No.2 to 4 are well aware of the mistake committed by them with regard to Khasra number. still they have not filed

any application for correction and due to this, the plaintiffs' title over the suit property mentioned in Schedule-E of the plaint has been adversely

affected. When the defendants No. 2 to 4 filed an application for division of the accounts then only the fact has been brought to the notice of the

plaintiffs that property mentioned in Schedule E which is owned by the plaintiffs has also been included in the division. As such, the judgment and

decree passed by the learned Civil Judge is no binding upon the plaintiffs and the order of partition dated 17.04.2000 passed by the Additional

Tehsildar Sarangarh, is null and void.

6. The defendants have filed their written statement denying the allegations made in the plaint and also genealogy submitted by the plaintiffs mainly

contending that though the partition has already been taken place between Chhotelal and Baratkunwar or Pokhram defendant No. 1 & 2, but accounts

were not divided and as per the agreement/partition deed dated 25.09.1979 defendant No.1 & 2 were given 7.12 acres, whereas plaintiffs's father

Chhotelal was given 11.08 acres of Pokhram and Chhotelal, a sale deed was executed in favour of Chandrashekhar S/o Pokhram. As such, 7.12

acres of land has been recorded in the name of Baratkunwar and in the name of Chandrasekhar, 3 acres and 11.08 acres of land was recorded in the

name of the Chhotelal. It has been specifically contended that the suit property mentioned in Schedule -A bearing Khasra no. 1681, 1682 and 1922

area measuring 22 & 18 dismil and 1.11 acres total comes to 1.51 dismil land was left out as this land were already sold by Dular Singh. The property

mentioned in Schedule E has wrongly been claimed by the plaintiffs as the property described in Schedule- E belongs to defendant Nos. 1 and 2 and

the plaintiffs have no right over the suit land. It is specifically denied that there is mistake with regard to description of Khasra number in the earlier

suit and the decree passed by the Trial Court is incorrect. It has been specifically contended that defendant No. 2 to 4 have not disclosed incorrect

facts before the Civil Judge class 2 and learned Trial Court has rightly passed the judgment and decree and when the correct facts are within

knowledge of the plaintiffs, they have not filed the appeal. The present suit is barred by limitation and it has been filed to harass the defendants,

therefore, the present suit deserves to be dismissed by this Court. It has also been contended that as per the judgment and decree passed by the

learned Trial Court, the order passed by the Naib Tehsildar for partition is just and proper and the suit filed by the plaintiffs be kindly dismissed.

7. On the pleadings of both the parties the Trial Court framed as many as 10 issues. The plaintiffs to substantiate their contention have exhibited the

documents Exh. P/1 to P/3 Kishtabandi Khatauni, right of revenue records (Exh. P/4 to P/6), correction register (Exh. P/7 to P/9), the judgment and

decree passed by the learned Additional District Judge Raigarh in civil appeal No. 41/93 decided on 20-07-99 (Exh. P/10), sale deed (Exh. P/11 &

P/12), order of Additional Tehsildar Sarangarh (Ex.P/13), judgment and decree passed by the Civil Judge Class 2 Sarangarh dated 26.10.1993

(Exh.P/14), Kishtabandi Khatauni (Exh. P/15), certified copy of revenue records (Exh. P/16), Kishtabandi Khatauni (Exh. P/17), objection raised by

the plaintiffs (Exh P/18, P/19 & P/23), application submitted by defendant (Exh.P/20), objection submitted by Dhvajaram (Exh. P/21), list of property

(Exh. P/22) and list of property partitioned (Exh. P/24).

8. The plaintiffs to substantiate their averments have examined the witnesses namely Dular Singh (PW 1), Ramkishore Bhoi (PW 2), Devnarayan

(PW 3) and Mohaniya (PW 4). The defendant has himself examined Baratkunwar (DW1) and exhibited sale deed dated 09.01.1987 and right of

record of Pokhram Exh. D/2. Plaintiffs' witness namely Dular Singh (DW 1) in his Examination-in-Chief has reiterated the stand taken by him

in the plaint and in the cross examination he has admitted that as per the partition they are in possession of their share and he has also admitted that as

per partition 9.98 acres of land was given in the share of Jaduram, 11.22 dismil land has been given in the share of Chhotelal. It is further submitted

that 11 acres and 8 dismil of land has been given to Chhotelal. He has also admitted that after death of Chhotelal and Juduram their legal

representatives are in possession of their land. He has further stated that Chhotelal and Jaduram are holding 18.20 acres of land in their possession

and two and half land has been given by Jaduram to Chhotelal. He has also admitted that in the partition neither Jaduram nor Chhotelal has raised

objection nor after their death their legal representatives have raised the objection. When a specific question was posed to the witness, he has stated

that it is correct that the sale deed which was executed by Pokhram in favour of Chandrashekhhar on 14-08-97, from initial stage, it was recorded in

the name of Baratkunwar and Pokhram, it has not been recorded subsequently. He has admitted that Baratkunwar has filed a civil suit for 9 acres and

98 dismil of land. He has stated that his share of land bearing Khasra No. 305/01 area 56 dismil Khasra No. 399/1 area 45 dismil, Khasra No. 709/1

area 77 dismil Khasra No. 1134/1 area 52 dismil, Khasra 1760/1 area 42 dismil and Khasra 2030/2 area 12 dismil have been included in the suit filed

by Baratkunwar. He has also admitted that Khasra No. 305/01 before partition, it was 1.12 acre and out of which 56 dismil was in his share and 56

dismil was in share of Pokhram. Similarly, he has state that Khasra No. 399/01 was initial area of the land was 90 dismil and after partition, 45 dismil

has been credited in his share and 45 dismil in Baratkunwar and Pokhram. He has stated that Khasra No. 701/09 was before partition measuring area

1 acre 52 dismil and after partition, it has been partitioned in two shares.

9. The other witness namely Ramkishore Bhoi who was working as Patwari was examined before the Trial Court wherein he has exhibited the

documents Exh P/22 and Ex. P/24 wherein he has stated that the Tehsildar Sarangarh has ordered him to do the partition of 9 acres and 98 dismil of

land in equal two shares and he has also admitted that he has submitted the list of partition of revenue records wherein Khasra No. 305/2 area 0.227

hectares, Khasra No. 399/2 area 0.182 hectares, Khasra No. 709/2 area 0.312 hectares, Khasra No. 1707/2 area 0.174 hectare. He has stated that in

Exh. P/22 P/24 at serial No. 15 and 20, he has mentioned Khasra No. 399/2 has amended as 399/1 which area has not been changed.

10. Defendant No. 1- Baratkunwar was examined before the Trial court wherein she has stated that the property which has been given to her father

on partition they are in possession of the property and the joint property has been held by her brother Pokhram, therefore, she has filed a civil suit and

civil suit has been decided in her favour and in civil suit only 9.9 acres of land is involved and no property belonging to Dular Singh was included in the

suit property. She has again stated in examination-in-chief that the property in the partition proceedings, no property belongs to herself and her brother

Pokhram has been given to Dular Singh (plaintiff) who is in possession of the property and they have filed a suit just to harass them. This witness was

cross-examined by the plaintiff wherein she has stated that the property of Salihara Doli (Khasra No. 305/01) was only of Dular Singh and Dular

Singh is in possession of the property. She has stated that the land situated at Ganharidoli (Khasra No. 399/01), Baharadoli, belonged to the plaintiff

Dular Singh and she is in possession of the said property. She has admitted that civil suit No. 8A/87 (Baratkunwar vs. Pokhram and others) was filed

by her and the decision was given in her favour. She has admitted that neither Dular Singh was made party to the suit nor any information was given

to him, nor she demanded anything from Dular Singh.

11. Learned Trial Court after appreciating the evidence, material on record dismissed the suit filed by the plaintiff. The plaintiffs have preferred first

appeal before the learned Additional District Judge, Sarangarh which was registered as Civil Appeal No. 18A/2006. The learned First Appellate Court

vide its judgment and decree dated 31.01.2019 has allowed the appeal by recording its finding that the plaintiff was not party to the Civil Suit No. 8A/

87 dated 26-10-1993, therefore, the judgment and decree passed in Civil Suit No. 8A/87 is not binding upon the plaintiff, as such the learned Trial

Court has decided the issue No.2 incorrectly. Learned Appellate Court also recorded a finding that since the judgment and decree passed in earlier

suit is not binding upon the plaintiff they have filed the suit for declaring the order dated 17-04-2000 passed by the Tehsildar to be null and void. The

suit was filed on 02-11-2000 when by the order dated 17.04.2000 the Khasra No. 399/1, 305/1, 709/1, 1134/1, 1070/1 and 2030/2 have been recorded

in the name of defendants No. 1 & 2. This was the date of information which was received by them, therefore, the suit is within limitation. Learned

Appellate Court has also recorded the finding that as per the application submitted by the defendant-Pokhram and Exh.P/19, the land bearing Khasra

No. 1134/1, 2030/2 and 743/1 belongs to Dular Singh and others as well as amended record Ext. P/5 and Kishtabandi Khatauni (Exh. P/ 3 & P/15),

the suit property is in title of the plaintiffs and it is in their possession and since when their father was alive and after division of accounts on 25-09-

1979 till today, as such, the suit for title and possession is maintainable and accordingly, the first Appellate Court has set aside the judgment and

decree.

12. Being aggrieved with the judgment and decree passed by the first Appellate Court, the defendant No.1 Barat Kunwar has preferred the second

appeal before this Court. This appeal has been admitted by this Court on the substantial question of law framed by this Court on 09-10-2015 and 20-

02-2020 as mentioned in foregoing paragrapyh.

13. To decide the substantial question of law No.1 “Whether the findings of the First Appellate Court that the judgment and decree passed in Civil

Suit No. 8A/87 dated 26-10-1993 is not binding to the plaintiffs is perverse?”, learned Counsel for the appellant defendant would submit that the

judgment and decree passed in Civil Suit No. 8A /87 is binding upon the plaintiff as in the suit No. 8A /87 defendant Barat Kunwar/ present appellant

has filed Civil Suit for claiming her share of half of the property and also filed civil suit that the sale deed executed by defendants No. 1 and 2

Pokhram and Bed Kunwar is not binding upon the plaintiff Baratkunwar. In the suit Barat Kunwar has clearly pleaded that the suit property belongs to

father of plaintiff and defendant No.1 and after death of her father Jaduram, they are in possession of the property being legal heirs and accordingly,

their names have been recorded in the revenue records. Defendant No.1 without consent of the plaintiff and without consideration has transferred the

property in the name of his minor son Chandrasekhar. Later on, defendant No.2 has sold Khasra No. 1922/2 area 0.89 hectares to defendant No.4

and bearing Khasra No. 81/1 measuring 0.23 hectares to defendant No.5 which has affected the title of the plaintiff therefore, she has filed the suit

for declaration that she is entitled to get half of the share of the property. The learned Trial Court after appreciating the evidence and material on

record has granted decree wherein it has been recorded a finding that the plaintiff is entitled to get half share of the property and sale deed executed

on 14-8-1978, 26-9-1979 and 9-1-1987 is not binding on the plaintiff and also directed that the suit property may be partitioned and half of the share in

4.99 acres be handed over to the plaintiff by the defendant within a period of one month. Accordingly, the partition was carried out and name of the

plaintiff in Civil Suit No. 8A/87 that is present appellant Barat Kunwar was recorded in the revenue records. Thereafter, the subsequent suit was filed

by the defendant Dular Singh wherein Dular Singh/ present plaintiff has filed suit for declaration that the land situated at Timralaga Patwari Halka No.

28 which has been described in Schedule-A of the plaint ie., the land area 4.43 hectares be declared that they are title holders and in possession of the

suit property. Defendant Dular Singh has also filed the present suit contending that earlier suit bearing 8A/87 is not binding upon the plaintiff. Dular

Singh has pleaded that oral partition of the property was done between Chhote Lal and Jaduram in the lifetime of Chhote Lal and Jaduram 50 years

ago and as per the description of the property described in Schedule-A the same belongs to Chhote Lal and the property mentioned in Schedule -B

belongs to Jaduram and thereafter, the plaintiff and Dular Singh are in possession of their share and accounts have also been partitioned prior to 1979,

as such, the plaintiff Dular Singh should have proved that the partition between Chhote Lal and Jaduram was done prior to 50 years and the learned

Trial Court has framed specific issue on the point i.e. whether the plaintiff's father Chhote Lal and defendant No.2 Pokhram prior to partition with

mutual consent have registered the property in the name of Chandrasekhar while deciding the issue No.6. Leaned Counsel for the defendant/

appellant would submit that the subsequent suit filed by the plaintiff is barred by res judicata as the issue involved in the case in order to constitute a

matter of res judicata is fulfilled in the present facts of the case. According to him there must be two suits one former suit and the other subsequent

suit, the Court which decided the former suit must be competent to try the subsequent suit, the matter directly and substantially in issue must be the

same either actually or constructively in both the suits, the matter directly and substantially in issue in the subsequent must have been heard and finally

decided by the Court in the former suit, the parties to the suits or the parties under whom they or any of them claim must be the same in both the suits,

the parties in both the suits must have litigated under the same title, therefore, the suit is not maintainable and the finding recorded by the learned First

Appellate Court is contrary to well settled position of law as such issue No.1 framed by this Court on 09-10-2015 deserves to be answered in favour

of defendant by answering that the suit is binding upon the plaintiff.

14. On the other hand learned counsel for plaintiff Dular Singh would submit that the ingredients for application of principle of res judicata the

following ingredients have to be examined by the learned Trial Court (i) there must be two suits one former suit and the other subsequent suit, (ii) the

Court which decided the former suit must be competent to try the subsequent suit, the matter directly and substantially in issue must be the same

either actually or constructively in both the suits, (iii) the matter directly and substantially in issue in the subsequent must have been heard and finally

decided by the Court in the former suit, (iv) the parties to the suits or the parties under whom they or any of them claim must be the same in both the

suits, (v) the parties in both the suits must have litigated under the same title and would submit that the plaintiff Dular Singh was not party in the Civil

Suit No. 8A/87, as such subsequent suit filed by Dular Singh is not barred by res judicata therefore, he would submit that the finding recorded by the

learned First Appellate Court that the subsequent suit is not binding upon the plaintiff Dular Singh is just and proper and substantial question of law

deserves to be answered in favour of the plaintiff Dular Singh. In support of his submission he would refer to the judgment of Hon'ble Supreme Court

in the case of Kewal Singh vs Smt. Lajwanti reported in 1980 (1) SCC 290 wherein Hon'ble the Supreme Court has held as under.

“..... It is well settled that one of the essential conditions of res judicata is that there must be a formal adjudication between the parties after full

hearing. In other words, the matter must be finally decided between the parties. Here also at a time when the plaintiff relinquished her first cause of

action the defendant was nowhere in the picture, and there being no adjudication between the parties the doctrine of res judicata does not

apply.....”

15. Further, in the case of M/s. ITC Ltd. Vs. Commissioner, reported in 2005 AIR (SC) 1320, Hon'ble the Supreme Court has held in para 18 which

reads under:

“.....where it is said that the foundation of the plea of res judicata must be laid in the pleadings. If this was, not, done, no party

would, be permitted to raise it for the first time at the stage of the appeal.....”

16. Further, in the case of, Khetrabasai Biswal vs. Ajay Kumar Barat, reported in 2004 (1) SCC 316 Hon'ble Supreme Court has held as under:

“..... The, procedural law as well as the substantive law both mandates that in the absence of a necessary party, the order

passed is a nullity and does not have a binding effect.....”

17. For understanding the issue raised in this appeal it is expedient for this Court to examine Section 11 of CPC which deals with res judicata which

reads as under.

“11. No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former

suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try

such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court.

Explanation I- The expression "former suit" shall denote a suit which has been decided prior to the suit in question whether or not it was instituted

prior thereto.

Explanation II.- For the purposes of this section, the competence of a Court shall be determined irrespective of any provisions as to a right of appeal

from the decision of such Court.

Explanation III.- The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or

impliedly, by the other.

Explanation IV.- Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been

a matter directly and substantially in issue in such suit.

Explanation V.- Any relief claimed in the plaint, which is not expressly granted by the decree, shall, for the purposes of this section, be deemed to

have been refusedExplanation VI- Where persons litigate bona fide in respect of public right or of a private right claimed in common for themselves

and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.

Explanation VII.- The provisions of this section shall apply to a proceeding for the execution of a decree and reference in this section to any suit, issue

or former suit shall be construed as references, respectively, to proceedings for the execution of the decree, question arising in such proceeding and a

former proceeding for the execution of that decree.

Explanation VIII.-An issue heard and finally decided by a Court of limited jurisdiction, competent to decide such issue, shall operate as res judicata in

as subsequent suit, notwithstanding that such Court of limited jurisdiction was not competent to try such subsequent suit or the suit in which such issue

has been subsequently raised.

18. Now, this Court has to see whether subject matter of the subsequent suit was the matter of the first suit and whether property belonging to

plaintiff Dular Singh a bearing Khasra No. 399/1, 305/1, 709/1, 1134/1, 1707/1 and 2030/2 falls within the share of Barat Kunwar and her brother

Pokhram. Defendant No.2 Barat Kunwar in para 15 of her written statement has categorically pleaded that the plaintiff Barat Kunwar has filed suit

with regard to property of defendant No.1 of that suit which has been described in Schedule-B of the property and in the present suit also defendant

Barat Kunwar and Pokhram have not disputed the pleadings made by Dular Singh in paragraph 11 of the plaint that the property falls within share of

plaintiff's father as mentioned in Schedule A and property described in Schedule B which belongs to defendant No. 1 and 2 have been incorrectly

mentioned in the suit property and this information has been received by them when the partition proceeding was initiated before the Tehsildar and

they have raised objection which has also been rejected which necessitated them to file present suit. This clearly, reflects that the property has been

wrongly mentioned in the name of appellant Barat Kunwar. Therefore, learned First Appellate Court has rightly recorded a finding that the judgment

and decree passed in Civil Suit No. 8A/87 is not binding. Learned First Appellate Court has also assigned the reason that the plaintiff was not made

party to the case and the defendant Barat Kunwar has not claimed over the property of the plaintiff. As such, the judgment and decree passed by the

learned Trial Court is not binding upon the present suit. The defendant Baratkunwar in her cross-examination has also admitted in para 9 of the cross-

examination that the property described in Baharadoli and Salihardoli belonged to the plaintiff-Dular Singh. She has also admitted that the plaintiff was

neither informed about the civil suit No. 8A/1987 nor was party nor she has claimed anything against Dular Singh. This clearly reflects that the

ingredients to attract the principle of res judicate or the binding effect of earlier judgment and decree passed in a civil suit in Civil Suit No. 8A/1987,

are missing.

19. Hon'ble Supreme Court in the case of Jamia Masjid vs K.V. Rudrappa (since dead) by Lrs and others, reported in 2021 SCC Online SC 792, has

examined the issue of Res judicata and has held in para 60 and 60.1 which read as under.

¶60. The High Court dismissed the second appeal holding that the courts conclusively decided on the title to the suit property in the first suit (OS

92/1950 -51) and that any subsequent suit on the same issue of title would be barred by the principles of res judicata. In view of the discussion above,

this finding arrived at by the High Court is erroneous. While holding that the judgment in the first suit has conclusively decided that the title over the

suit property belongs to Abdul Khuddus, the High Court has lost sight of the observations in paragraph 7 and 10 of the PART E judgment of the trial

court. It has been specifically held there that the suit property was a Khazi service Inam and that Abdul Khuddus has a prima facie right to the suit

property. There was no adjudication to the effect that Abdul Khuddus had an absolute title to the suit property. Additionally, the decision of the courts

in the first suit was delivered before the suit property was notified as a wakf property in view of Notification No. MWB 19(11) dated 6 July 1965. The

principle of res judicata can thus not be applied without taking into consideration this changed circumstance.

60.1. We are also of the opinion that the High Court has committed an error in applying the principle of res judicata based on the judgment in the

second suit. It was observed by the High Court that the second suit that was decreed in terms of the compromise was intended to put the litigation to

an end and would thus bar any subsequent suit on the title to the suit property by virtue of the principle of res judicata. For this purpose, reliance was

placed on a two judge bench decision of this court in Byram Pestonji Gariwala (supra) where it was held that a challenge to a consent decree six

years later was vitiated by reason of delay, estoppel, and res judicata. However, the High Court lost sight of the fact that the compromise deed was

entered into specifically with regard to the handing over of possession of the suit property by the lessee at the end of the lease and no compromise on

the title to the suit property was arrived at.

20. From the above stated factual and legal matrix and considering the law with regard to the principle of res judicata, it is quite clear that present

appellant Barat Kunwar has never claimed the title over the property which falls within the share of Dular Singh and Dular Singh was not made party

to earlier suit i.e. Civil Suit No. 8A/87 therefore, the substantial question of law framed by this Court on 09-10-2015 that the finding recorded by First

Appellate Court in Civil Suit No. 8A/ 87 is not binding on the plaintiff is perverse and it is against the appellant and in favour of defendant and it is held

that the finding recorded by the First Appellate Court is not perverse, legal and justified which does not warrant any interference by this Court.

21. Now, coming to substantial question of law No.2 that whether the First Appellate Court was justified in holding that the plaintiffs are in possession

of the suit land and their suit is maintainable and not hit by proviso to Section 34 of the Specific Relief Act, 1963 by reversing finding of the trial Court,

learned First Appellate Court while recording finding that the plaintiff was in possession of the suit land bearing Khasra No. 399/1, 305/1, 709/1,

1134/1, 1707/1 and 2030/2 from the lifetime of his father and they are in possession of the suit property therefore, the suit for declaration of title and

possession is maintainable.

22. Learned Counsel for the appellant would submit that though names of the plaintiffs have been recorded in the revenue records but it does not

confer any right over the property and would refer to the judgment of Hon'ble Supreme Court in the matter of Jitendra Singh and others vs State of

M.P. reported in 2021 SAR (Civ) 992 wherein Hon'ble the Supreme Court has held in para 6 and 6.1 which reads as under.

6. Right from 1997, the law is very clear. In the case of Balwant Singh v. Daulat Singh (D) By Lrs., reported in (1997) 7 SCC 137, this Court had

an occasion to consider the effect of mutation and it is observed and held that mutation of property in revenue records neither creates nor

extinguishes title to the property nor has it any presumptive value on title. Such entries are relevant only for the purpose of collecting land revenue.

Similar view has been expressed in the series of decisions thereafter.

6.1 In the case of Suraj Bhan v. Financial Commissioner, (2007) 6 SCC 186, it is observed and held by this Court that an entry in revenue records

does not confer title on a person whose name appears in record-of-rights. Entries in the revenue records or jamabandi have only a fiscal purpose,

i.e., payment of land revenue, and no ownership is conferred on the basis of such entries. It is further observed that so far as the title of the property is

concerned, it can only be decided by a competent civil court. Similar view has been expressed in the cases of Suman Verma v. Union of India, (2004)

12 SCC 58; Faquddin v. Tajuddin (2008) 8 SCC 12; Rajinder Singh v. State of J&K, (2008) 9 SCC 368; Municipal Corporation, Aurangabad v. State

of Maharashtra, (2015) 16 SCC 689; T. Ravi v. B. Chinna Narasimha, (2017) 7 SCC 342; Bhimabai Mahadeo Kambekar v. Arthur Import & Export

Co., (2019) 3 SCC 191; Prahlad Pradhan v. Sonu Kumhar, (2019) 10 SCC 259; and Ajit Kaur v. Darshan Singh, (2019) 13 SCC 70.

23. Therefore, he would submit that though names of plaintiffs have been recorded in the revenue record, but they have not produced any document to

demonstrate the title and merely recording of the names of the plaintiffs in the revenue record does not decide their possession in the suit property. As

such, the suit is hit by proviso to Section 34 of the Specific Relief Act, 1963.

24. On the other hand learned counsel for the plaintiff- Dular Singh would submit that the plaintiff in the suit has categorically pleaded that the

property owned by them as mentioned in Schedule A is undisputed property and the decree has been passed on the basis of wrong entry of Khasra

number, therefore, the judgment and decree passed by the trial Court is not binding upon him. Defendant Barat Kunwar has also not disputed in the

pleadings that the land bearing Khasra number is in their possession, therefore, finding recorded by the First Appellate Court that the plaintiff Dular

Singh was in possession of the suit property and has title holder, therefore, the suit for title and possession is maintainable.

25. Before adverting to the submission made on substantial question of law No. 2, it is expedient for this Court to extract Section 34 of the Specific

Relief Act, 1963, which reads as under:-

“34. Discretion of court as to declaration of status or right.—Any person entitled to any legal character, or to any right as to any property,

may institute a suit against any person denying, or interested to deny, his title to such character or right, and the court may in its discretion make

therein a declaration that he is so entitled, and the plaintiff need not in such suit ask for any further relief:

Provided that no court shall make any such declaration where the plaintiff, being able to seek further relief than a mere declaration of title, omits to do

so.

Explanation.—A trustee of property is a “person interested to deny” a title adverse to the title of some one who is not in existence, and whom, if

in existence, he would be a trustee.

26. Considering the evidence and material on record, particularly para 9 of the defendants Baratkunwar cross examination, wherein she has admitted

that the property mentioned in this para of evidence belongs to the plaintiff and the fact that the learned Appellate Court has given its finding at para

44 of the judgment that the land bearing Khasra No. 1134/01, 2030/01, 743/01 belonged to Dular Singh and they are in possession since 25.09.1979, as

such I am of the view that the learned Appellate Court has rightly reversed the finding of the trial Court with regard to issue No. 2 and has held that

the suit was very much maintainable.

27. Hon'ble the Supreme Court in Anathula Sudhakar Vs. P. Buchi Reddy (Dead) By Lrs. & others reported in (2008) 4 SCC 594 has held at

paragraph 21 as under:-

“21. To summarize, the position in regard to suits for pro-hibitory injunction relating to immovable property, is as under:

(a) Where a cloud is raised over plaintiff's title and he does not have possession, a suit for declaration and pos-session, with or without a consequential

injunction, is the remedy. Where the plaintiff's title is not in dispute or un-der a cloud, but he is out of possession, he has to sue for possession with a

consequential injunction. Where there is merely an interference with plaintiff's lawful possession or threat of dispossession, it is sufficient to sue for an

in-junction simpliciter.

(b) As a suit for injunction simpliciter is concerned only with possession, normally the issue of title will not be di-rectly and substantially in issue. The

prayer for injunction will be decided with reference to the finding on posses-sion. But in cases where de jure possession has to be es-tablished on the

basis of title to the property, as in the case of vacant sites, the issue of title may directly and substantially arise for consideration, as without a finding

thereon, it will not be possible to decide the issue of pos-session.

(c) But a finding on title cannot be recorded in a suit for injunction, unless there are necessary pleadings and ap-propriate issue regarding title [either

specific, or implied as noticed in Annaimuthu Thevar (supra)]. Where the averments regarding title are absent in a plaint and where there is no issue

relating to title, the court will not investi-gate or examine or render a finding on a question of title, in a suit for injunction. Even where there are

necessary pleadings and issue, if the matter involves complicated questions of fact and law relating to title, the court will rel-egate the parties to the

remedy by way of comprehensive suit for declaration of title, instead of deciding the issue in a suit for mere injunction.

(d) Where there are necessary pleadings regarding title, and appropriate issue relating to title on which parties lead evidence, if the matter involved is

simple and straight-forward, the court may decide upon the issue re-garding title, even in a suit for injunction. But such cases, are the exception to the

normal rule that question of title will not be decided in suits for injunction. But persons having clear title and possession suing for injunction, should not

be driven to the costlier and more cumber-some remedy of a suit for declaration, merely because some meddler vexatiously or wrongfully makes a

claim or tries to encroach upon his property. The court should use its discretion carefully to identify cases where it will en-quire into title and cases

where it will refer to plaintiff to a more comprehensive declaratory suit, depending upon the facts of the case.”

28. In view of the above stated legal position, it is quite clear that the finding recorded by the learned first appellate court that the suit for possession

and declaration was very much maintainable and as such the substantial question of law No.2 “Whether the First Appellate Court was justified in

holding that the plaintiffs are in possession of the suit land and their suit is maintainable and not hit by proviso to Section 34 of the Specific Relief Act,

1963 by reversing finding of the trial Court?Āĉâ-, is answered in affirmative in favour of plaintiff and there is no perversity or illegality in deciding the

appeal by the learned Appellate Court warranting any interference by this Court.

29. Accordingly, the second appeal being devoid of merit is liable to be dismissed and is hereby dismissed.

30. Interim relief granted earlier by this Court on 29.04.2009 stands vacated.