

**IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH**

-.-

RSA No. 5038 of 2010

Date of decision: 13.01.2016

Mahender Singh

.....Appellant

Versus

Vir Bhan and others

.....Respondents

Coram: Hon'ble Mrs. Justice Rekha Mittal

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Present: Mr. Mani Ram Verma, Advocate
for the appellant

Mr. Sumit Sangwan, Advocate
for respondent No. 1

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1. Whether Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporter or not?
3. Whether the judgment should be reported in the Digest?

Rekha Mittal, J.

The present appeal has been directed against the judgment and decree dated 15.06.2010 passed by the Additional District Judge, Bhiwani, accepting the appeal filed by respondent No. 1 and setting aside the judgment and decree dated 10.04.2007 passed by the Additional Civil Judge (Senior Division) Charkhi Dadri and as a consequence dismissing the suit filed by the appellant/plaintiff.

The facts relevant for disposal of the present appeal are that Sukhbir son of Sumitra-respondent No. 3 (minor) was owner in possession of land measuring 8 kanals, Khewat No. 137 Khatoni No. 206 as per jamabandi for the year 1993-94. The land was mortgaged with possession

for a sum of Rs.72,000.00 in favour of Mahender son of Subha Chand. Smt. Sumitra, the next friend/guardian of the minor filed an application dated 17.01.1995 and obtained permission on 10.11.1995 to sell land of the minor. Respondent No. 3 accordingly sold 4 kanal of land comprised in killa No. 103/14 (8-0), Khewat No. 137, Khatoni No. 206 in favour of Vir Bhan and Suraj Bhan sons of Sultan, for a sale consideration of Rs.75,000.00 vide sale deed No. 419 dated 13.06.1996. Rs.3,000.00/- were paid in cash while Rs.72,000.00 were adjusted towards mortgage money. Sukhbir executed a sale agreement in favour of the appellant qua 4 kanals of land falling in Killa No. 103/14, for a sale consideration of Rs.85,000.00. Rs.35,000.00 were paid in cash at the time of agreement and remaining Rs.50,000.00 were agreed to be paid at the time of execution of sale deed on 15.07.1999. It was also agreed that respondent No. 3 shall get the land redeemed from mortgage by 15.06.1999. It is further averred that father of minor Sukhbir namely Jag Ram in collusion with respondents No. 1 and 2 moved an application on 19.09.1997 for permission to sell 16 kanals of land out of land measuring 57 kanals 7 marlas of khewat No. 140/157, Khatoni No. 205 which was granted on 29.01.1998. Respondents No. 1 and 2 fabricated factitious sale deed No.1441 dated 03.09.1998 qua 4 kanals of land out of 8 kanals of khewat No. 137 khatoni No. 206 without any permission to sell that land, executed by Jag Ram. Sale deed No. 1441 is not binding on the rights of the appellant.

Respondent No. 1 filed the written statement and in turn denied the agreement to sell. It is averred that land in respect of which permission was taken, had already been sold before the sale deed was executed in favour of the appellant on 15.07.1999. The appellant has no right, title or

interest in the suit land. He has further challenged maintainability of the suit, locus standi of the appellant to file the suit and the suit being not properly valued for the purpose of Court fee.

Respondents No. 2 and 3 did not contest the proceedings and were proceeded against ex-parte.

The controversy between the parties led to framing of following issues by the learned trial Court:-

- 1) *Whether the plaintiff is owner of the suit land by virtue of registered sale deed No. 1724 dated 15.07.1999?OPP*
- 2) *Whether the impugned sale deed No. 1441 dated 03.09.1998 is illegal null and void, result of fraud and not binding on the rights of the plaintiff?OPP*
- 3) *If issues No. 1 and 2 are decided in favour of the plaintiff, then, whether the plaintiff is entitled for the possession of the suit land?OPP*
- 4) *Whether the suit is not maintainable as the plaintiff has no cause of action to file the present suit?OPD*
- 5) *Whether the suit is bad for want of proper court fee?OPD*
- 6) *Whether the suit is false and frivolous?OPD*
- 7) *Relief.*

To establish his claim, the appellant examined Sumer Chand, Deed Writer (PW1), Udai Singh, Deed Writer (PW2), Ram Singh son of Chet Ram (PW3) and he himself appeared in the witness box as PW4.

To rebut evidence of the appellant, respondent No. 1 tendered into evidence certified copy of order dated 10.11.1995, EX.DW1/A, attested photo copy of sale deed No. 419 dated 13.06.1996, EX.DW1/B, attested copy of sale deed No. 1461 dated 01.10.1996, Ex. DW1/C and mark DA.

The trial Court, after having heard counsel for the parties and on appreciation of pleadings and evidence adduced determined issues No. 1 to 4 and 6 in favour of the appellant whereas issue No. 5 was stated to be rendered infructuous as the appellant had made good the court fee and as a consequence, the suit of the appellant was decreed, sale deed No. 1441 dated 03.09.1998 (Ex. P3) was declared to be without consideration and not binding on the rights of the appellant and was ordered to be cancelled.

Feeling aggrieved by the judgment and decree passed by the trial Court, Vir Bhan-respondent No. 1 preferred the appeal.

The appellate Court, in view of the reasoning adopted in para 14 of the judgment differed with the findings recorded by the learned trial Court, accepted the appeal of respondent No. 1, set aside the judgment and decree passed by the trial Court and the suit of the appellant was ordered to be dismissed by holding that sale deed No. 1274 dated 15.07.1999, Ex.P2, being illegal is set aside whereas sale deed No. 1441 dated 03.09.1998, Ex.P3 is legal and binding on the rights of both the parties. However, the parties were left to bear their own costs.

Feeling dissatisfied with the judgment passed by the appellate Court, the appellant is in appeal before this Court.

Counsel for the appellant has urged that Smt.Sumitra, as the next friend and guardian of minor Sukhbir filed an application dated 17.01.1995 mark B and DA seeking permission to sell 8 kanals of land bearing khasra No. 103//14 Khewat No. 137 Khatoni no. 202 depicted in the jamabandi for the year 1988-89 and said application was allowed by the Guardian Judge on 10.11.1995 vide order Ex.P6. On the basis of permission granted by the Court, Smt. Sumitra executed a sale deed in

regard to 4 kanals of land out of khasra No. 103//14 in favour of Vir Bhan and Suraj Bhan vide sale deed No. 419 dated 13.06.1996, Ex P4 for a sale consideration of Rs.75,000.00. Smt. Sumitra executed sale deed in respect of remaining 4 kanals of land out of khasra No. 103//14 in favour of the appellant vide sale deed No. 1274 dated 15.07.1999, Ex.P2 in pursuance of agreement to sell dated 16.07.1998, Ex.P1. Jagram, father of minor Sukhbir and husband of Smt. Sumitra filed application mark A in August 1997 seeking permission to alienate land measuring 16 kanals comprised in khewat No. 140/137 min, khatoni No. 205, kitta No. 11 total measuring 57 kanals 7 marlas situated in the revenue estate of village Chirya Tehsil Charkhi Dadri, District Bhiwani, belonging to minor Sukhbir which was allowed by the Guardian Judge, Bhiwani vide order dated 29.01.1998, Ex.P7. Jagram neither applied for permission to sell land comprising khasra No. 103//14 nor he was so permitted to sell land of said khasra number in respect whereof permission had already been granted to Smt. Sumitra, mother of the minor vide order dated 10.11.1995. It is argued with vehemence that as Jagram was not permitted by a Court to sell land of the minor comprised in khasra No. 103//14 (8-0), he was not competent to sell land comprised in khasra No. 103//14 in favour of respondent No. 1 vide sale deed No. 1441 dated 03.09.1998, Ex.P3, and thus, any sale affected by Jagram qua said khasra number is not binding upon the rights of the appellant who purchased 4 kanals of land out of khasra no. 103//14 from Smt. Sumitra on behalf of minor Sukhbir vide sale deed No. 1274 dated 15.07.1999 Ex.P2.

Another submission made by counsel for the appellant is that the Court in appeal committed a grave error by taking into consideration

the land sold vide sale deed No. 1461 dated 1.10.1996, Ex.DW1/C in order to hold that Smt. Sumitra had already exhausted her right to sell 8 kanals of land belonging to minor Sukhbir in the light of permission granted to her vide order dated 10.11.1995, Ex.P6.

To bring home his contention, counsel has invited my attention to sale deed No. 1461 dated 01.10.1996, Ex.DW1/C executed by Smt. Sumitra in respect of 4 kanals of land of minor Sukhbir wherein sale was made in respect of land comprised in Killa No. 103/3/2 (3-10) and 103/26 (1-2). It is further argued that as sale deed No. 1461 executed on 01.10.1996 (Ex.DW1/C) does not pertain to khasra No. 103//14 (8-0) in respect of which permission was granted to Smt. Sumitra, the said sale can not be taken into cognizance to hold that Smt. Sumitra had already exhausted the permission granted vide order dated 11.10.1995, Ex.P6.

Counsel for respondent No. 1, on the contrary, has supported the judgment passed by the appellate Court with the submissions that as Smt. Sumitra had already sold 8 kanals of land belonging to the minor vide sale deeds No. 419 dated 13.06.1996 and No. 1461 dated 01.10.1996 in favour of Vir Bhan and another, she had no right to sell another 4 kanals of land belonging to minor Sukhbir in favour of the appellant vide sale deed No. 1274 dated 15.07.1999, Ex.P2, even on the basis of agreement to sell dated 16.07.1998 propounded by the appellant.

Counsel has raised a legal issue that the application filed by Smt. Sumitra seeking permission to sell land belonging to the minor was not maintainable during life time of Jagram, father of the minor, in view of the provisions of Section 6 of the Hindu Minority and Guardianship Act, 1956 (in short, the 1956 Act). For this purpose, he has referred to judgment of

Hon'ble the Supreme Court ***Githa Hariharan v. Reserve Bank of India, 1999(2) RCR (Civil) 59 (SC)*** and judgment of the Andhra Pradesh High Court ***M. Venkata Mani Kanthu and another v. Unknown, 2005(4)RCR (Civil)697.***

I have heard counsel for the parties and perused the records.

The substantial questions of law which arise for adjudication are:-

- i) *whether Smt. Sumitra was not competent to alienate land measuring 8 kanals belonging to the minor Sukhvir despite she was granted permission by the Guardian Judge vide order dated 10.11.1995 (Ex.P6)?*
- ii) *If question (i) is determined in favour of the appellant, whether Smt. Sumitra had already exhausted her authority to sell land measuring 8 kanals by executing sale deeds No. 419 dated 13.06.1996 and No. 1461 dated 01.10.1996, Ex. P2 and Ex.DW1/C respectively?*

Smt. Sumitra, mother of minor Sukhbir filed an application mark B and DA seeking permission to sell land measuring 8 kanals comprised in khasra No. 103//14, allowed by the Guardian Judge, Bhiwani vide order dated 10.11.1995 (Ex.P6). The order passed in favour of Smt. Sumitra permitting her to sell the land belonging to the minor has attained finality as it was neither challenged in any separate proceedings nor in the present lis.

The question which now arises for consideration is '*whether Smt. Sumitra can be held to be incompetent to sell land of the minor in the light of what has been held by Hon'ble the Supreme Court in Githa*

Hariharan's case (supra)?'

At the outset, the answer appears to be in the negative. In *Githa Hariharan's case (supra)*, Hon'ble the Supreme Court was seized of the matter to decide the constitutional validity of Section 6(a) of the 1956 Act when tested on the touchstone of Articles 14 and 15 of the Constitution of India which do not permit any discrimination on the basis of sex. The Hon'ble Court in para 8 has posed a question what would happen 'when the mother acts as guardian of the minor during the life time of the father without the matter going to the Court, and validity of such an action is challenged on the ground that she is not the legal guardian of the minor in view of section 6(a) of 1956 Act. In paras 9 and 10, the observations made by the Apex Court, reads as follows:-

“9. Is that the correct way of understanding the section and does the word 'after' in the Section mean only 'after the life time'? If this question is answered in the affirmative, the section has to be struck down as unconstitutional as it undoubtedly violates gender-equality, one of the basic principles of our Constitution. The HMG Act came into force in 1957, i.e., six years after the Constitution. Did the Parliament intend to transgress the constitutional limits or ignore the fundamental rights guaranteed by the Constitution which essentially prohibits discrimination on grounds of sex ? In our opinion - No. It is well settled that if on one construction a given statute will become unconstitutional, whereas on another construction, which may be open, the statute remains within the constitutional limits, the Court will prefer the latter on the ground that the Legislature is presumed to have acted in accordance with the Constitution and courts generally lean in favour of the

constitutionality of the statutory provisions.

- *10. We are of the view that the Section 6(a) (supra) is capable of such construction as would retain it within the Constitutional limits. The word 'after' need not necessarily mean 'after the life time'. In the context in which it appears in Section 6(a) (supra), it means 'in the absence of', the word 'absence' therein referring to the father's absence from the care of the minor's property or person for any reason whatever. If the father is wholly indifferent to the matters of the minor even if he is living with the mother or if by virtue of mutual understanding between the father and the mother, the latter is put exclusively in charge of the minor, or if the father is physically unable to take care of the minor either because of his staying away from the place where the mother and the minor are living or because of his physical or mental incapacity, in all such like situations, the father can be considered to be absent and the mother being a recognized natural guardian, can act validly on behalf of the minor as the guardian. Such an interpretation will be the natural outcome of harmonious construction of Section 4 and Section 6 of HMG Act, without causing any violence to the language of Section 6(a) (supra)."*

In the case at hand, firstly, sale deeds by Smt. Sumitra in respect of sale deeds No. 419 dated 13.06.1996, 1461 dated 01.10.1996 and 1274 dated 15.07.1999, executed by Sumitra have not been challenged. The suit has been preferred by the appellant to challenge sale deed No. 1441 dated 03.09.1998 executed by Jagram, husband of Smt. Sumitra. Secondly, the husband of Smt. Sumitra, guardian of the minor has never challenged legality and validity of order dated 10.11.1995 passed by the Guardian Judge, Bhiwani. Hon'ble the Supreme Court in para 10 has categorically

held that the words 'after' need not necessarily means 'after the life time'. It means 'in the absence of', the words 'absence' refers to the father's absence from the care of the minor's property or person for any reason whatever. If the father is wholly indifferent to the matters of the minor even if he is living with the mother or if by virtue of mutual understanding between the father and the mother, the latter is put exclusively in charge of the minor, in such like situation, the father can be considered to be absent and the mother being a recognized natural guardian can act validly on behalf of the minor as the guardian.

As the father of the minor never challenged validity of his wife to act as guardian of the minor for selling 8 kanals of land comprised in khasra No. 103//14, it can be held by necessary inference that Smt. Sumitra filed an application seeking permission to sell land in respect of the aforesaid khasra number by virtue of mutual understanding between the father and mother of the minor. I stand fortified in my observations from the fact that in the application filed by Jagram seeking permission to sell 16 kanals of land out of land measuring 57 kanals 7 marlas comprised in khewat No. 137/140 min khewat No. 205 in 11 Kitta does not include the land of khasra No. 103//14, reflected in the jamabandi for the year 1993-94 (Ex.P5). In this view of the matter, I am unable to accept contention of the respondent that Smt. Sumitra was not competent to sell land measuring 8 kanals in respect of which, one sale deed was executed in favour of Vir Bhan and Suraj Bhan respondents No. 1 and 2 vide sale deed No. 419 dated 13.06.1996 and other sale deed No. 1274 dated 15.07.1999 has been executed in favour of appellant qua 4 kanals of land each.

This brings the Court to the second question as to whether Smt.

Sumitra had exhausted her authority to sell 8 kanals of land by executing sale deeds No. 419 dated 13.06.1996 and 1461 dated 01.10.1996 in respect of 4 kanals land each in favour of respondents No. 1 and 2.

The appellate Court while holding in favour of the respondent did not bother to examine the contents of sale deed No. 1461 dated 01.10.1996 (Ex.DW1/C). A plain reading of said sale deed would leave no manner of doubt that Smt. Sumitra sold land comprised in khasra No. 103/3/2(3-10), 103/26(1-2) total measuring 4 kanals 12 marlas to the extent of 4 kanals in favour of the respondents. The said sale deed, though makes reference to the application dated 17.01.1995 filed by Smt. Sumitra for seeking permission and the order dated 10.11.1995 passed in the said application, but as a matter of fact, Smt. Sumitra was never permitted by any Court to sell land of the minor consisting of khasra numbers, subject matter of sale deed No. 1461 dated 01.10.1996 (Ex.DW1/C). The matter would have been different, had Smt. Sumitra sought permission to sell 8 kanals of land belonging to the minor without reference to any specific khasra number because in that eventuality, the arguments raised by counsel for the respondent would have been worth consideration, may be, acceptance. As Smt. Sumitra was never permitted to sell land of khasra number subject matter of the sale executed on 01.10.1996, the respondent cannot be heard to say that Smt. Sumitra had already exhausted her authority/permission to sell land measuring 8 kanals comprised in khasra No. 103//14 by executing second sale deed No. 1461 dated 01.10.1996. As a matter of fact, sale deed No. 1461 dated 01.10.1996 was executed by Smt. Sumitra without any permission by a competent Court of law. In this view of the matter, I have no hesitation to hold that finding of the appellate Court that Smt. Sumitra

had already exhausted her authority granted by the Court vide order dated 10.11.1995 by way of execution of two sale deeds executed in the year 1996, is untenable.

Jagram, father of the minor sought permission to sell 16 kanals of land out of land measuring 57 kanals 7 marlas with a specific reference to khewat No. 140/137 min, khatoni no. 205 comprised in 11 kittas. Perusal of the jamabandi for the year 1993-94 (Ex.P5) would make it evident that the said land was comprised in 11 different khasra numbers other than khasra No. 103/14 (8-0) in respect whereof, permission had already been granted in favour of Smt. Sumitra. As Jagram was never permitted by the Court to alienate land comprised in khasra No. 103//14, khewat no. 141, khatoni no. 206, he was not competent to execute sale deed No. 1441 dated 03.09.1998(ExP3). On the contrary, sale deed No. 1274 dated 15.07.1999 (ExP2) executed by Smt. Sumitra in view of agreement to sell dated 16.07.1998 (Ex.P1) in favour of the appellant was rightly and validly executed by Smt. Sumitra in favour of the appellant in consonance with the permission granted in her favour by the Court vide order dated 10.11.1995. In this view of the matter, contentions raised by counsel for the appellant are meritorious and liable to be accepted. The findings recorded by the appellate Court are the result of non-application of mind, misreading of evidence and failure to understand the legal and factual issues correctly and in right perspective. As such, the judgment and decree passed by the appellate Court cannot be allowed to sustain and liable to be set aside.

In view of the above, both the questions formulated are answered in favour of the appellant and against respondents No. 1 and 2.

As a result, the appeal is accepted, the judgment and decree dated

15.06.2010 passed by the Additional District Judge, Bhiwani is set aside and that of the trial Court is restored with costs throughout. The suit filed by the appellant stands decreed.

(Rekha Mittal)
Judge

January 13, 2016
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