

HIGH COURT OF CHHATTISGARH, BILASPUR**Second Appeal No.295 of 2002****Judgment reserved on :12.10.2018****Judgment delivered on: 24.10.2018**

1. Parmila Bai D/o late Shyam Sunder Kalar, aged about 22 years,
2. Smt. Sukbati, Widow of Shyam Sunder Kalar, aged about 50 years,
Both R/o Village Sidesar, Tahsil and District Kanker (CG)

---- Appellants**Versus**

1. Shri Narad Ram, S/o Sonsai Teli, aged about 51 years,
2. Hangaru Ram S/o Mulchand Kalar, aged about 56 years,
3. Ankalu S/o Mulchand Kalar, aged about 41 years,
All R/o Village Sidesar, Tahsil and District Kanker (CG)
4. State of Chhattisgarh through the Collector Kanker, Distt. Kanker (CG)

---- Respondents

For Appellants	:	Mr.Vishnu Koshta, Advocate
For Respondents No.1 to 3	:	None present though served
For Respondent No.4	:	Mrs.Ashtha Shukla, P.L.

Hon'ble Shri Justice Sanjay K. Agrawal**C.A.V. Judgment**

1. The substantial questions of law involved, formulated and to be answered in the plaintiffs' second appeal are as under:-

“1. Whether the first appellate Court has committed an error of law in holding that the appropriate Court fees as per provision of Section 7 (IV) (a) of the Court Fee Act has not been affixed ?”

“2. Whether the first appellate Court was justified in holding that the partition in the joint family had not been taken particularly when the defendant No.1 to 3 in their

written statement have admitted the fact that there was the family settlement and the members of the family had already accepted the family settlement and the property was partitioned accordingly with the respective members of the family ?”

[For the sake of convenience, the parties would be referred hereinafter as per their status shown in the suit before the trial Court].

2. It is the case of the plaintiffs that Moolchand Kalar had three sons namely Hagru, Ankalu and Shyam Sunder. Parmilabai, widow of Shyam Sunder and Sukbati, daughter of Shyam Sunder, both filed a civil suit for declaration of their title and also seeking declaration that sale deed dated 2.1.1995 (Ex.P/1) executed by defendants No.1 & 2 in favour of defendant No.3-Narad Ram is null and void as the suit property fell in the share of Shyam Sunder in partition and defendants No.1 & 2 had no right and interest over the suit property and sale made/alienation made is void and not binding on them.
3. Defendants No.1 to 3 filed their joint written statement stating inter-alia that in the family partition, the suit land fell in the share of defendants No.1 & 2 and they have rightly sold the suit land in favour of defendant No.3, as such, the suit is liable to be dismissed.
4. The trial Court after appreciating oral and documentary evidence available on record held that the suit land was the property of Shyam Sunder, husband of plaintiff No.1 and father of plaintiff No.2 and defendants No.1 & 2 had no right to sell the suit property in favour of defendant No.3.

5. In appeal preferred by the defendants, the First Appellate Court reversed the judgment and decree of the trial Court holding that the suit property is joint family property of the plaintiffs and defendants No.1 & 2 and since they have sold the property to defendant No.3, to that extent their share will be reduced and further held that the plaintiffs were required to pay ad-valorem court fee as per Section 7 (iv) (a) of the Court Fees Act, 1870 (hereinafter referred to as “the Act of 1870”).
6. Questioning legality and validity of the judgment and decree passed by the First Appellate Court, this second appeal under Section 100 of the CPC has been filed by the plaintiffs, in which substantial questions of law have been framed by this Court, which have been set-out in opening paragraph of this judgment.
7. Mr.Vishnu Koshta, learned counsel for the appellants/plaintiffs, would submit that since the plaintiffs were not party to sale deed executed by defendants No.1 & 2 in favour of defendant No.3, therefore, they were not required to pay ad-valorem court fees relying upon a decision of this Court in the matter of **Raju Tiwari and others v. Baishakhin Bai and another**¹. He would further submit that the First Appellate Court has committed illegality in dismissing the suit after having held that the suit property is the property of Hindu undivided family. Therefore, the judgment and decree passed by the First Appellate Court deserves to be set aside.
8. None present for respondents No.1 to 3 though served. However,

¹ AIR 2017 Chhattisgarh 17

State of Chhattisgarh is formal party in this appeal.

9. I have heard learned counsel for the appellants/plaintiffs, perused the judgment and decree impugned and records of both the Courts below with utmost circumspection.
10. Sale deed dated 2.1.1995 (Ex.P/1) was executed by defendants No.1 & 2 in favour of defendant No.3 in which the plaintiffs were not party. It is case of the plaintiffs that sale deed is void and it is not binding on them. The plaintiffs have not sought relief of setting aside of execution of sale deed.
11. Court fee in the State of Chhattisgarh is governed by the provisions contained in the Court-Fees Act, 1870. Section 6 of the Act of 1870 provides that no document of any of the kinds specified as chargeable in the Second Schedule to this Act annexed shall be filed, exhibited or recorded in any Court of Justice, or shall be received or furnished by any public officer, unless the court-fee indicated therein is paid. Entry 17(iii) of Schedule II of the Act requires payment of fixed fee to obtain a declaratory decree, where no consequential relief is prayed. However, where the suit is for declaration and consequential relief of possession and injunction, court-fee therein is governed by Section 7(iv) (c) of the Act, which states as under:-

“7. Computation of fees payable in certain suits.-The amount of fee payable under this Act in the suits next hereinafter mentioned shall be computed as follows:-

xxx	xxx	xxx
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(iv) in suits-

xxx	xxx	xxx
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(c) **for a declaratory decree and consequential relief.**-to obtain a declaratory decree or order, where consequential relief is prayed.

according to the amount at which the relief sought is valued in the plaint or memorandum of appeal;

In all such suits the plaintiff shall state the amount at which he values the relief sought.”

- 12.** The issue regarding payment of court fee in a suit for declaration that sale deed executed is null and void was considered by the Supreme Court in Suhrid Singh alias Sardool Singh v. Randhir Singh & others². It was observed as under:-

“6. Where the executant of a deed wants it to be annulled, he has to seek cancellation of the deed. But if a non-executant seeks annulment of a deed, he has to seek a declaration that the deed is invalid, or non-est, or illegal or that it is not binding on him. The difference between a prayer for cancellation and declaration in regard to a deed of transfer/conveyance, can be brought out by the following illustration relating to ‘A’ and ‘B’ -- two brothers. ‘A’ executes a sale deed in favour of ‘C’. Subsequently ‘A’ wants to avoid the sale. ‘A’ has to sue for cancellation of the deed. On the other hand, if ‘B’, who is not the executant of the deed, wants to avoid it, he has to sue for a declaration that the deed executed by ‘A’ is invalid/void and non-est/ illegal and he is not bound by it. In essence both may be suing to have the deed set aside or declared as non-binding. But the form is different and court-fee is also different. If ‘A’, the executant of the deed, seeks cancellation of the deed, he has to pay ad-valorem court fee on the consideration stated in the sale deed. If ‘B’, who is a non-executant, is in possession and sues for a declaration that the deed is null or void and does not bind him or his share, he has to merely pay a fixed court fee of Rs. 19.50 under Article 17(iii) of Second Schedule of the Act.”

- 13.** Thus, from the provisions of the Act of 1870 and the law laid down by the Supreme Court in Suhrid Singh (supra), it is quite lucid that if the executant of a document wants a deed to be

² AIR 2010 SC 2807

annulled, he has to seek cancellation of the deed and to pay ad valorem court fees on the consideration stated in the said sale deed, but if a non-executant seeks annulment of deed i.e. when he is not party to the document, he has to seek a declaration that sale deed is invalid, non est, illegal or that it is not binding upon him. In that eventuality, he has to pay the fixed Court fee as per Article 17(iii) of the Second Schedule of the Act, but if the non-executant is not in possession and he seeks not only a declaration that sale deed is invalid, but also a consequential relief of possession, he has to pay the ad valorem court fee as provided under Section 7(iv) (c) of the Act and such valuation in case of immovable property shall not be less than the value of the property as calculated in the manner provided for by clause (iv) of Section 7 of the Act.

- 14.** A careful perusal of plaint in light of provisions contained in Section 7(iv) of the Act of 1870 and in light of judgment of the Supreme Court in Suhrid Singh (supra) would reveal that the plaintiffs were not party to sale deed and the property has been held to be the property of Hindu undivided family consisting of the plaintiffs and defendants No.1 & 2 and therefore, they have simply sought relief that sale deed dated 2.1.1995 (Ex.P/1) executed by defendants No.1 & 2 in favour of defendant No.3 is null and void and not binding on them, but the plaintiffs had not sought any relief of cancellation of sale deed, therefore, they were required to pay court-fee under Entry 17(iii) of Schedule II of the Court-fees Act and they are also not required to pay court-fee under Section 7 (iv) (c) of

the Court-Fees Act, as such, the First Appellate Court is absolutely unjustified in holding that the plaintiffs ought to have valued the suit for cancellation of sale deed dated 2.1.1995 executed by defendants No.1 & 2 in favour of defendant No.3 and ought to have paid court-fees on such prayer for cancellation of sale deed. This substantial question of law is answered accordingly.

15. Coming to the next substantial question of law, the First Appellate Court has reached to the conclusion that the suit property is joint family property of the parties (plaintiff and defendants No.1 & 2), but further held that sale to be valid by holding that share of defendants No.1 & 2 on partition would be reduced accordingly at the time of partition. The said finding recorded by the First Appellate Court is perverse & contrary to well settled law in this regard.

16. It is well settled that purchasers of undivided share in a joint family property are not entitled to possession of the land what they have purchased (See M.V.S. Manikayala Rao v. M. Narasimhaswami³).

17. In the matter of Ramdayal v. Manakla⁴, Full Bench of the Madhya Pradesh High has clearly held that purchaser of an undivided interest of coparcenary property can only obtain under the sale an undivided interest of the alienating coparcener and a right to claim general partition by way of suit and purchaser of an undivided interest of coparcenary property have right to retain exclusive possession of coparcener property on the basis of sale in his

³ AIR 1966 SC 470

⁴ AIR 1973 Madhya Pradesh 222

favour. The said decision has been followed with approval by the Madhya Pradesh High Court in Maharu and others v. Dhansai and other respondents⁵. Paras 10 and 11 of Maharu's case (supra) state as under:-

“10. From the statement of law by the Full Bench it can no longer be a subject of debate that the present purchasers could only obtain under the sale an undivided interest of the alienating coparcener and a right to claim general partition by way of suit. The purchaser only steps into the shoes of the transferor and is invested with all the rights and is subject to all the disabilities of the transferor. He at best, is entitled to only joint possession with the non-alienating co-owners and if resisted he may recover joint possession by a suit. He is, in fact, only bound by the arrangements, if any, as to exclusive possession by different co-owners entered into, before he acquired the interest in the joint property. In this case there is nothing on record to show that his vendor, under a mutual arrangement amongst the coparceners was in exclusive possession of the land transferred by him. Even under the principles of Section 44 of the Transfer of Property Act the transferee from a co-owner acquires the transferee's right to joint possession or other common or part enjoyment of the property and to enforce a partition of the same and subject to the conditions and liabilities affecting, at the date of transfer, the share or interest transferred to him. The aforesaid section also only assures to transferee's right to joint possession or common enjoyment of the property but does not confer on the transferee any right to exclusive possession even where the transferor was in such a possession. There are a few cases such as Sukh Dev v. Pari, AIR 1940 Lahore 473-474 and Chanderbhan v. Jailal, AIR 1964 Punjab 435 which take a view that if there existed any arrangement inter se between the coparceners or co-owners under which one of them is in exclusive possession of a portion of joint property, a transferee from him, is entitled to enjoy the benefits of exclusive possession by virtue of the transfer in his favour.

11. In the instant case, however, there is no pleading of any such inter se arrangement between the coparceners. It is also not the case of the purchasers that the alienating member who placed them into possession,

⁵ AIR 1992 Madhya Pradesh 220

was in exclusive possession and enjoyment of the suit land sold in their favour. In a situation obtaining as in this case the purchasers, therefore, had only a right to remain in joint possession of the coparcenary property and to work out their rights by bringing a suit for general partition and claim in that suit allotment of the alienated property to the share of their vendor. The purchasers can claim no larger right than what their vendor, as member of the coparcenary, possessed.”

18. In the matter of Hardeo Rai v. Sakuntala Devi and others⁶

the Supreme Court has observed as under:-

“26. Thus, even a coparcenary interest can be transferred subject to the condition that the purchaser without the consent of his other coparceners cannot get possession. He acquires a right to sue for partition.”

19. In the matter of Gajara Vishnu Gosavi v. Prakash

Nanasaheb Kamble and others⁷, the Supreme Court has held as

under:-

“13. Thus, in view of the above, the law emerges to the effect that in a given case of an undivided share of a coparcener can be a subject-matter of sale/transfer, but possession cannot be handed over to the vender unless the property is partitioned by metes and bounds, either by the decree of a court in a partition suit, or by settlement among the co-shares.”

20. In the matter of Jai Singh and others v. Gurmej Singh⁸, the

Supreme Court has laid down the principles relating to the inter se rights and liabilities of co-sharers and held as under:-

“9. It is to be noted that the subsequent Full Bench judgment in Bhartu v. Ram Sarup⁹, the earlier decision in Lachhman Singh v. Pritam Chand¹⁰ was distinguished on facts. The principles relating to the inter-se rights and

6 (2008) 7 SCC 46

7 (2009) 7 SCC 444

8 (2009) 15 SCC 747

9 1981 PLJ 204

10 AIR 1970 P&H 304

liabilities of co- sharers are as follows:

(1) A co-owner has an interest in the whole property and also in every parcel of it.

(2) Possession of joint property by one co-owner is in the eye of law, possession of all even if all but one are actually out of possession. (3) A mere occupation of a larger portion or even of an entire joint property does not necessarily amount to ouster as the possession of one is deemed to be on behalf of all.

(4) The above rule admits of an exception when there is ouster of a co-owner by another. But in order to negative the presumption of joint possession on behalf of all, on the ground of ouster, the possession of a co-owner must not only be exclusive but also hostile to the knowledge of the other as, when a co-owner openly asserts his own title and denies, that of the other.

(5) Passage of time does not extinguish the right of the co-owner who has been out of possession of the joint property except in the event of ouster or abandonment.

(6) Every co-owner has a right to use the joint property in a husband like manner not inconsistent with similar rights of other co-owners.

(7) Where a co-owner is in possession of separate parcels under an arrangement consented by the other co-owners, it is not open to any body to disturb the arrangement without the consent of others except by filing a suit for partition.

10. It is thus evident that when a co-sharer is in exclusive possession of some portion of the joint holding he is in possession thereof as a co-sharer and is entitled to continue in its possession if it is not more than his share till the joint holding is partitioned. Vendor cannot sell any property with better rights than himself. As a necessary corollary when a co-sharer sells his share in the joint holding or any portion thereof and puts the vendee into possession of the land in his possession what he transfers is his right as a co-sharer in the said land and the right to remain in its exclusive possession till the joint holding is partitioned amongst all co-sharers. ”

21. Following the principles of law laid down by the Supreme Court and the High Court of Madhya Pradesh in the above-stated

judgments (supra), it is quite vivid that since defendants No.1 & 2 have sold their undivided interest in coparcenary property to defendant No.3, therefore, sale made/alienation made by defendants No.1 & 2 in favour of defendant No.3 is not binding on the plaintiffs, but the plaintiffs would not be entitled for decree of exclusive title in their favour. The substantial questions of law are answered accordingly.

22. For the foregoing reasons, the second appeal is partly allowed and the judgment and decree of the First Appellate Court is partly set aside and it is held that sale made/alienation made by defendants No.1 & 2 in favour of defendant No.3 is not binding on the plaintiffs. However, the plaintiffs are not entitled for decree of exclusive title over the suit land. No cost(s).

23. A decree be drawn up accordingly.

Sd/-

(Sanjay K.Agrawal)
Judge

B/-