

HIGH COURT OF CHHATTISGARH, BILASPUR**Second Appeal No.94 of 2003**

1a) Smt. Runjhuniya, Wd/o Late Chandan, aged about 40 years,

1b) Chamaru Singh S/o Late Chandan, aged about 20 years,

1c) Aan Sai, S/o Late Chandan, aged about 15 years, Minor through Natural Guardian & Mother Smt. Runjhuniya Wd/o. Late Chandan

All R/o. Village Bhafauli, Tahsil Ambikapur, District Surguja (CG)

1d) Kalavati W/o Amar Sai, D/o. Late Chandan, aged about 22 years, R/o. Village Kairda, Tehsil Bhaiyathan, District Surguja (CG)

2. Mst. Bifaiya w/o Shankarram, age 44 years, R/o Village Bhafauli, Tehsil Ambikapur, Distt. Surguja (CG)

---- Appellants

Versus

1a. Jawahir Lal Thakur S/o Dhanikesh, aged about 50 years, R/o Bhafauli, Tahsil-Ambikapur, District-Surguja (CG)

2. Lalsay S/o Nan Kanwar, age 30 years, r/o village Bhafauli, Tehsil Ambikapur, Distt. Surguja (CG)

3. The State of M.P. (Now C.G.) through Collector, Surguja (CG)

---- Respondents

For Appellants	: Mr.A.K.Prasad, Advocate
For Respondent No.1a	: Mr.R.V. Rajwade, Advocate
For Respondent No.3	: Mr.Rahul Tamaskar, P.L.

Hon'ble Shri Justice Sanjay K. Agrawal

Judgment on Board

05/10/2018

1. The substantial question of law involved, formulated and to be answered by this Court in this defendants No.3 and 4 second appeal is as under:-

“Whether the Appellants would have the right of protection, as is envisaged under Section 41 of the Transfer of Property Act, over the suit property by virtue of they being *bona fide* purchaser of the suit property ?”

2. The imperative facts required for determination of above-stated substantial question of law are as under:-

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

(2.1) Original plaintiff-Mst.Janakiya brought a suit for declaration and partition in relation to the lands described in Schedule A annexed with the plaint stating inter-alia that one Budul Kanwar was having five sons namely, Birbal, Bharat, Dhani, Dakal and Amar Sai. The plaintiff is real daughter of Amar Sai. Dhani Ram got the suit lands by partition. Original defendant-Mst. Shyam Kunwar was the wife of Dhani Ram. It is the case of the plaintiff that she was adopted by Dhani Ram as adopted daughter. Dhani Ram died in the year 1956 and his property was succeeded by his wife defendant No.1-Shyam Kunwar and his adopted daughter plaintiff-Janakiya. It is further case of the plaintiff that Shyam Kunwar died on 20.7.1985 and the plaintiff was dispossessed by defendants No.1 and 2. After death of Dhani Ram, original defendant No.1- Shyam Kunwar transferred the suit lands in the name of defendant No.2-Lal Sai and said Lal Sai sold some portion of the suit land to defendants No.3 and 4 through registered sale deed dated

18.2.1985 (Ex.P/7) and 15.4.1985 (Ex.P/8) and that gave rise to cause of action to file the instant suit for above-stated reliefs.

(2.2) Defendants No.2 to 4 filed their written statement and denied the plaint averments stating inter-alia that the plaintiff was never adopted by Dhani Ram. It was further pleaded that defendant No.1-Shyam Kunwar has adopted defendant No.2-Lal Sai. Defendant No.2 was living with defendant No.1 and after death of Dhani Ram, defendant No.1 gave all her properties including the suit lands to defendant No.2-Lal Sai and his name was also recorded and mutated in revenue records. Defendant No.2 has rightly sold some portion of the suit land to defendants No.3 and 4 through registered sale deeds dated 18.2.1985 (Ex.P/7) and 5.4.1985 (Ex.P/8), as such, defendants No.3 and 4 are *bona fide* purchasers of the suit land and they are protected by Section 41 of the Transfer of Property Act, 1882 (hereinafter called as "TP Act").

(2.3) The trial Court after appreciating oral and documentary evidence available on record by its judgment and decree dated 19.3.1999 decreed the suit in favour of the plaintiff in part holding that the plaintiff is entitled for possession of the lands mentioned in Schedule A of the plaint except the lands of Schedule B and C and further held that defendants No.3 and 4 are *bona fide* purchasers and sale is protected by Section 41 of the TP Act.

(2.4) In an appeal preferred by the plaintiff, the First Appellate Court

allowed the appeal and held that the plaintiff is owner of the suit land of Schedule A, B and C of the plaint and sale & consequent possession of defendants No.3 and 4 is not protected under Section 41 of the TP Act.

(2.5) Being aggrieved and dissatisfied with the judgment and decree passed by the First Appellate Court, this second appeal under Section 100 of the CPC has been filed by the appellants/defendants No.3 and 4, in which substantial question of law has been framed by this Court, which has been set-out in opening paragraph of this judgment.

3. Mr.A.K.Prasad, learned counsel for the appellants/defendants No.3 and 4, would submit that defendants No.3 and 4 were *bona fide* purchasers of the suit lands, as such, they are protected by Section 41 of the TP Act. He would further submit that the First Appellate Court is absolutely unjustified in reversing the well reasoned finding of the trial Court holding defendants No.3 and 4 to be *bona fide* purchasers and therefore, the judgment and decree of the First Appellate Court deserves to be set aside.

4. Mr.R.V.Rajwade, learned counsel for legal representative of the plaintiff, would support the impugned judgment and decree of the First Appellate Court.

5. Mr.Rahul Tamaskar, learned Panel Lawyer for respondent No.3 has made submissions and brought to notice of this Court the legal position *qua* Section 41 of the TP Act.

6. I have heard learned counsel for the parties and considered their rival submissions made herein-above and also went through the records with utmost circumspection.

7. The question for consideration would be whether defendants No.3 and 4 are *bona fide* purchasers of the suit land as they have purchased the suit land from defendant No.2-Lal Sai by registered sale deeds dated 18.2.1985 (Ex.P/7) and 15.4.1985 (Ex.P/8).

8. At this stage, it would be appropriate to notice Section 41 of the TP Act which states as under:-

“41. Transfer by ostensible owner.”-Where, with the consent, express or implied, of the persons interested in immovable property, a person is the ostensible owner of such property and transfers the same for consideration, the transfer shall not be voidable on the ground that the transferor was not authorised to make it :

Provided that the transferee, after taking reasonable care to ascertain that the transferor had power to make the transfer, has acted in good faith.”

9. From a careful perusal of the aforesaid provision, it is evident that to avail protection available under Section 41 of the TP Act, the following requirements need to be established:-

a. The transferor is the ostensible owner of the property. Ostensible as per the Black's Law Dictionary is a word used to describe something that is apparent or obvious. Meaning thereby, ostensible owner is one who is not the real owner but an apparent or obvious owner of the property, discernible from the facts and circumstances of each case.

b. There should be consent of the real owner for the transaction, implied or express.

c. Sale is for a consideration.

d. The transferee has acted in good faith, taking reasonable care to ascertain that the transferor had power to transfer and an ostensible owner is one who has all indicia of ownership without being the real owner. It must be shown that with the consent of the true owner, the ostensible owner was able to represent himself as the owner of the property to the purchaser for value without notice.

9. In the matter of **Gurbaksh Singh v. Nikka Singh and another**¹ the Supreme Court has held that Section 41 is an exception to the general rule that a person cannot confer a better title than what he has. Being an exception the onus certainly is on the transferee to show that the transferor was the ostensible owner of the property and that the transferee had, after taking reasonable care to ascertain that the transferor had power to make the transfer, acted in good-faith.

10. Similarly, in the matter of **Crystal Developers v. Asha Lata Ghosh and others**², it has been held by the Supreme Court that where a transferee for valuable consideration seeks protection under section 41 of the T.P. Act, the transferee must show that the real owner had permitted the apparent owner either by express words, consent or conduct to transfer the property in favour of the transferee.

11. In the matter of **Anatula Sudhakar v. P. Buchi Reddy (Dead)**

¹ AIR 1963 SC 1917

² (2005) 9 SCC 375

by LRs and Ors.³ the Supreme Court has held that the party has to make specific pleadings to attract the benefit of Section 41 of the Transfer of Property Act, 1882.

12. Reverting to the facts of the present case in the light of principles of law laid-down by the Supreme Court in the above-stated judgments (supra) with regard to applicability of Section 41 of the TP Act, it is quite apparent that the trial Court after considering the documents Exs.P/2, P/3, P/4 and P/6 has held that Shyam Kunwar, original defendant No.1, who was real owner, had given consent for mutation of suit land in the name of defendant No.2-Lal Sai in revenue records in her place, she was present during the course of mutation and has also put her thumb impression and mutation order was also passed way back on 29.4.1978 and in Ex.P/6, endorsement has been made to that effect, and sale deeds were executed during life-time of Shyam Kunwar without any opposition or objection on her behalf, meaning thereby, she has impliedly consented for sale of suit land as sale deeds were executed by defendant No.2-Lal Sai in favour of defendants No.3 and 4 on 18.2.1985 (Ex.P/7) and on 15.4.1985 (Ex.P/8) and Shyam Kunwar did not object the execution of sale deeds by defendant No.2-Lal Sai in favour of defendants No.3 and 4 sale deeds and she died on 20.7.1985. Thus, the trial Court relied upon the mutation in favour of defendant No.2-Lal Sai during her life-time and execution of sale deeds that too

3 (2008) 4 SCC 594

during life-time of Shyam Kunwar holding the implied consent of Shyam Kunwar. The trial Court further relied upon the fact that defendants No.3 and 4 have also published notice for purchase of property and having received no objection, purchased the suit property, therefore, benefit of Section 41 of the TP Act can be extended to defendants No.3 and 4. However, on an appeal being preferred by the plaintiff, the First Appellate Court has also held that mutation and execution of the suit property was done in favour of Lal Sai during the life-time of Shyam Kunwar and sale deeds were also executed by defendant No.2 in favour of defendants No.3 and 4 and recorded a finding that she has impliedly consented for sale of the suit land in favour of defendants No.3 and 4. The First Appellate Court has also found that all requirement for invoking Section 41 is fully met, but thereafter interfered with the said finding on the ground that Dhani Ram, husband of Shyam Kunwar, expired in the year 1956 before coming into force of the Hindu Succession Act, 1956 (hereinafter called as “the Act of 1956”), therefore, Shyam Kunwar has limited ownership over the property of Schedule A, B and C of the plaint. It was further held that since Shyam Kunwar herself had limited ownership over the property in question, she could not have conferred unlimited rights over the property to defendant No.2-Lal Sai and further held that sale deeds executed by defendant No.2-Lal Sai cannot be allowed to stand after demise of Shyam Kunwar.

13. At this stage, it would be appropriate to notice Section 14 (1) of

the Act of 1956, which states as under:-

“14. Property of a female Hindu to be her absolute property.—(1) Any property possessed by a female Hindu, whether acquired before or after the commencement of this Act, shall be held by her as full owner thereof and not as a limited owner.

Explanation.—In this sub-section, “property” includes both movable and immovable property acquired by a female Hindu by inheritance or devise, or at a partition, or in lieu of maintenance or arrears of maintenance, or by gift from any person, whether a relative or not, before, at or after her marriage, or by her own skill or exertion, or by purchase or by prescription, or in any other manner whatsoever, and also any such property held by her as *stridhana* immediately before the commencement of this Act.

(2) xxx xxx xxx.”

14. In the matter of V. Tulasamma and others v. Shesha Reddy (dead) by L.RS.⁴ the Supreme Court after exhaustive consideration of authorities on the question of interpretation of Section 14(1) and (2) of the Act of 1956, concluded as under:-

“62. We would now like to summarise the legal conclusions which we have reached after an exhaustive considerations of the authorities mentioned above on the question of law involved in this appeal as to the interpretation of Section 14(1) and (2) of the Act of 1956. These conclusions may be stated thus:

(1) The Hindu female's right to maintenance is not an empty formality or an illusory claim being conceded as a matter of grace and generosity, but is a tangible right against property which flows from the spiritual relationship between the husband and the wife and is recognised and enjoined by pure Shastric Hindu Law and has been strongly stressed even by the earlier Hindu jurists starting from Yajnavalkya to Manu. Such a

⁴ (1977) 3 SCC 99

right may not be a right to property but it is a right against property and the husband has a personal obligation to maintain his wife and if he or the family has property, the female has the legal right to be maintained therefrom. If a charge is created for the maintenance of a female, the said right becomes a legally enforceable one. At any rate, even without a charge the claim for maintenance is doubtless a pre-existing right so that any transfer declaring or recognising such a right does not confer any new title but merely endorses or confirms the pre-existing rights.

(2) Section 14(1) and the Explanation thereto have been couched in the widest possible terms. and must be liberally construed in favour of the females so as to advance the object of the 1956 Act and promote the socio-economic ends, sought to be achieved by this long needed legislation.

(3) Sub-section (2) of Section 14 is in the nature of a proviso and has a field of its own without interfering with the operation of Section 14(1) materially. The proviso should not be construed in a manner so as to destroy the effect of the main provision or the protection granted by Section 14(1) or in a way so as to become totally inconsistent with the main provision.”

15. Likewise, in the matter of **Gulwant Kaur and another v. Mohinder Singh and others**⁵, the Supreme Court has held as under:-

“13. We may finally refer to a recent decision of this Court in Jagannathan Pillai v. Kunjithapadam Pillai⁶ where Thakkar and Ray, JJ. pointed out : (SCC pp. 576-77, para 5)

On an analysis of Section 14(1) of the Hindu Succession Act of 1955, it is evident that the legislature has abolished the concept of limited ownership in respect of a Hindu female and has enacted that any property possessed by her would thereafter be held by her as a full owner. Section 14(1)

⁵ (1987) 3 SCC 674

⁶ (1987) 2 SCC 572

would come into operation if the property (sic) at the point of time when she has an occasion to claim or assert a title thereto. Or, in other words, at the point of time when her right to the said property is called into question. The legal effect of section 14(1) would be that after the coming into operation of the Act there would be no property in respect of which it could be contended by anyone that a Hindu female is only a limited owner and not a full owner. (We are for the moment not concerned with the fact that sub-section (2) of Section 14 which provides that Section 14(1) will not prevent creating a restricted estate in favour of a Hindu female either by gift or will or any instrument or decree of a civil court or award provided the very document creating title unto her confers a restricted estate on her.] There is nothing in Section 14 which supports the proposition that a Hindu female should be in actual physical possession or in constructive possession of any property on the date of the coming into operation of the Act. The expression 'proposed' has been used in the sense of having a right to the property or control over the property. The expression 'any property possessed by a Hindu female whether acquired before or after the commencement of the Act' on an analysis yields to the following interpretation:

(1) Any property possessed by a Hindu female acquired before the commencement of the Act will be held by her as a full owner thereof and not as a limited owner.

(2) Any property possessed by a Hindu female acquired after the commencement of the Act will be held as a full owner thereof and not as a limited owner. (emphasis in original)."

The above referred judgments have been further relied upon by the Supreme Court in the matters of Subhan Rao and others v. Parvathi Bai and others⁷ and Jupudhy Pardha Sarathy v. Pentapati Rama Krishna and others⁸.

⁷ (2010) 10 SCC 235

⁸ (2016) 2 SCC 56

17. Coming to the facts of the present case, it is quite vivid that the date of demise of Dhaniram is irrelevant as the sale deeds were executed by defendant No.2-Lal Sai on 18.2.1985 (Ex.P/7) and on 15.4.1985 (Ex.P/8) during lifetime of Shyam Kunwar as on that day, she had already become full owner of the property of Schedule B and C of the plaint by virtue of provision contained in Section 14(1) of the Act of 1956 interpreted by the Supreme Court in above-stated judgments (supra), which are subject-matter of the present appeal. Therefore, the finding recorded by the First Appellate Court that Shyam Kunwar was limited owner of the suit property in question and was incapable of transferring better title to defendant No.2-Lal Sai and that alienation made in favour of the present appellants/defendants No.3 and 4 will not be covered under the protection of Section 41 of the TP Act is erroneous and liable to be set aside. It is held that the First Appellate Court committed grave legal error in reversing the well reasoned finding of the trial Court in relation to the lands of Schedule B and C annexed with the plaint. It is also held that defendants No.3 and 4 are entitled for protection under Section 41 of the TP Act and sale deeds dated 18.2.1985 (Ex.P/7) and 15.4.1985 (Ex.P/8) are fully protected.

18. As a fallout and consequence of the above-stated discussion, the substantial question of law is answered in favour of defendants No.3 and 4 and against the plaintiff. The judgment and decree passed by the First Appellate Court partly reversing the judgment and decree of the

trial Court is hereby set aside and judgment and decree of the trial Court is hereby restored.

19. The second appeal is allowed to the extent indicated hereinabove.

No cost(s).

20. A decree be drawn up accordingly.

Sd/-

(Sanjay K.Agrawal)
Judge

B/-