

HIGH COURT OF CHHATTISGARH, BILASPUR

Second Appeal No.430 of 2001

1. Phoolobati (Died and deleted)
2. Rajkumar, S/o Lalu Ram, aged 35 yr.
3. Vinod Kumar, S/o Lalu Ram, Caste Mahkool, R/o Ambadand, Th. Bagicha, Distt. Raigarh.

(Defendants)
---- Appellants

Versus

1. Khirobati, W/o Trilochan, aged 40 yrs., R/o Ambadand, Th. Bagicha, Distt. Raigarh.
2. Jemabati (Died and deleted)
3. Sari Bai (Died and deleted)

(Plaintiffs)

4. State of C.G., through Collector, Raigarh.

---- Respondents

For Appellants: Mr. A.K. Prasad, Advocate.

For Respondent No.1: -

Mr. H.B. Agrawal, Senior Advocate with Mr. J.K. Saxena, Advocate.

For Respondent No.4 / State: -

Mr. Arun Sao, Deputy Advocate General.

Hon'ble Shri Justice Sanjay K. Agrawal

Judgment On Board

06/12/2018

1. The following substantial question of law was framed while admitting the appeal on 7-1-2016: -

“Whether the learned Courts below were justified in holding the sale deed dated 16/02/94 (Ex.P/15) as null and void, having held that the three widows, including Phoolobati (the seller) were entitled to 1/3rd share in the property of deceased Kurso and after death of Kurso in 1973, partition by meets and bounds had taken place amongst the widows in the year 1993, prior to execution of sale deed dated 16/02/94”?

2. After hearing learned counsel for the parties at length and with the consent of the parties, the substantial question of law is re-framed as under: -

“Whether the learned Courts below were justified in holding the sale deed dated 16-2-1994 (Ex.P-15) as null and void, having held that the three widows, including Phoolobati (the seller) were entitled to $\frac{1}{3}^{\text{rd}}$ share in the property of deceased Kurso and after death of Kurso in 1973, partition had taken place amongst the widows in the year 1993, by order of the Revenue Officer dated 27-9-1993 (Ex.P-14)?”

3. The suit property was originally held by Kurso who died in the year 1973. He had three wives – Punibai (plaintiff No.3), Phoolowati (defendant No.1) and Jamawati (plaintiff No.4). Saribai (plaintiff No.2) was his daughter out of the wedlock with Punibai and Khirowati (plaintiff No.1) is also his daughter out of the wedlock with his third wife Jamawati. All the four plaintiffs brought the suit for declaration that the sale deed dated 16-2-1994 (Ex.P-15) executed by Phoolowati (defendant No.1) in favour of defendants No.3 & 4 alienating 3.85 acres of land, is null and void and claimed shares in the suit property.
4. It is pertinent to mention here that plaintiffs No.2 & 3 were transposed as defendants No.5 & 6, respectively, on 12-8-1996 by the order of the trial Court.
5. Defendant No.1 Phoolowati in the written statement pleaded that the suit property has already been partitioned among three widows and the Tahsildar had partitioned the suit property vide Ex.P-14 dated 27-9-1993, as such, she has rightly sold the part of the suit property which has fallen in her share, in favour of defendants No.3 & 4 and the suit be dismissed with cost(s).
6. The trial Court by its judgment & decree dated 27-2-1998 held that the

revenue court has already partitioned the suit property on 27-9-1993 vide Ex.P-14 and all the three widows in total will get $\frac{1}{3}$ rd share of the total property; the two daughters – plaintiff No.2 and Khirowati (plaintiff No.1) will get $\frac{1}{3}$ rd share each in the suit property; and the sale deed executed by defendant No.1 in favour of defendants No.3 & 4 is null and void, as Phoolowati could not have alienated her share in favour of defendants No.3 & 4.

7. The judgment & decree of the trial Court was assailed by defendant No.1 and purchasers – defendants No.3 & 4 before the first appellate Court in which they remained unsuccessful and have questioned the judgment & decree of the first appellate Court before this Court. During the pendency of second appeal, defendant No.1 Phoolowati died. The question of law has been framed which has been set-out in the opening paragraph of this judgment.
8. Mr. A.K. Prasad, learned counsel for the appellants / defendants No.3 & 4, would submit that both the Courts below are unjustified in holding that defendant No.1 was not entitled to alienate the suit property in favour of defendants No.3 & 4 in view of the fact that both the Courts have concurrently recorded a finding that the revenue court has already partitioned the suit property vide Ex.P-14 and defendant No.1 had only sold the part of suit property which fell in her share, as such, the finding recorded by the two Courts below is contrary to law and is liable to be set aside.
9. Mr. H.B. Agrawal, learned Senior Counsel appearing for respondent No.1 / plaintiff No.1, would support the impugned judgment & decree.
10. I have heard learned counsel for the parties and considered their submissions and went through the records with utmost

circumspection.

11. It is not in dispute that vide Ex.P-14, by the order of the revenue court dated 27-9-1993, the suit land bearing Khasra No.84, area 2.12 acres; Khasra No.86/6, area 0.20 acres; and part of Khasra No.88/1, area 1.53 acres, fell in the share of Phoolowati, but thereafter, though actual partition by metes and bounds has not taken place, yet, vide Ex.P-15, the aforesaid three pieces of land which had fallen in the share of Phoolowati was sold by her vide Ex.P-15 to defendants No.3 & 4.

12. The question is, whether Phoolowati being one of the co-sharers and property had fallen in her share though partition has not taken place by metes and bounds, was entitled to sell the property.

13. 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. Narasimhaswami¹).

14. In the matter of Ramdayal v. Manakla², a Full Bench of the Madhya Pradesh High Court 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. The said decision has been followed with approval by the Madhya Pradesh High Court in the matter of Maharu and others v. Dhansai and other respondents³. 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

1 AIR 1966 SC 470

2 AIR 1973 Madhya Pradesh 222

3 AIR 1992 Madhya Pradesh 220

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, 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.”

15. In the matter of Hardeo Rai v. Sakuntala Devi and others⁴ 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.

4 (2008) 7 SCC 46

He acquires a right to sue for partition.”

16. In the matter of Gajara Vishnu Gosavi v. Prakash Nanasaheb

Kamble and others⁵, 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 vendee 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-sharers.”

17. The principle of law laid down in Gajara Vishnu Gosavi (supra) has been followed with approval by the Supreme Court in the matter of Syscon Consultants Private Limited v. Primella Sanitary Products Private Limited and another⁶.

18. Thus, the crystallised legal view is that an undivided share of a coparcener can be a subject-matter of sale/transfer, but possession cannot be handed-over to the vendee unless the property is partitioned by metes and bounds or by decree of court in partition suit.

19. Reverting to the facts of the present case, in the instant case, it is quite vivid that partition has taken place by order of the revenue court vide Ex.P-14 and the suit land fell in the share of Phoolowati, but thereafter, partition has not taken place by metes and bounds or by any other permissible mode of partition, but the fact remains that Phoolowati in whose share the suit land fell, was entitled to alienate the suit property. Alienation is not barred by law so declared by Their Lordships of the Supreme Court in above-stated judgment. What has been barred is, possession of such holder of undivided interest in the property cannot be handed-over unless partition by metes and bounds by decree of the court in partition suit or by settlement among co-

5 (2009) 10 SCC 654

6 (2016) 10 SCC 353

sharers takes place. In the instant case, what the two courts below have held is, Phoolowati could not have sold the property after her share is defined by the revenue court in favour of defendants No.5 & 6 which is clearly unsustainable in law, as the crystallised legal view is that a coparcener can alienate even undivided share in the property definitely, but he cannot deliver the possession of specific portion.

20. In view of the above, the finding recorded by the two courts below to the extent that the alienation made by defendant No.1 in favour of defendants No.3 & 4 through registered sale deed dated 16-2-1994 (Ex.P-15) is null and void, is hereby set aside. The second appeal is allowed in part. Judgment & decree of the trial Court as affirmed by the first appellate Court to that extent is hereby set aside and the plaint to that extent stands dismissed. In other words, judgment & decree of the first appellate Court as contained in para 31.2 is set aside and remaining part of the judgment will remain intact. The substantial question of law is answered accordingly. There will be no order as to cost(s).

21. A decree be drawn-up accordingly.

Sd/-
(Sanjay K. Agrawal)
Judge