

HIGH COURT OF CHHATTISGARH, BILASPURSecond Appeal No.92 of 2009

Lakhanlal Kurre, aged about 60 years, son of late Sukhau Kurre, resident of New Mangal Bazar, Gudhiyari, Raipur, Tahsil and District Raipur (CG)
(plaintiff)
---- Appellant

Versus

1. Smt. Sarita Santwani, aged about 49 years, wife of Shri Goverdhan Das Santwani, resident of LIG-69, Janta Colony, Gudhiyari, Raipur, Tahsil and District Raipur (CG)
(Defendant No.2)
2. State of Chhattisgarh through Collector, Raipur, District Raipur (CG)
---- Respondents

And

Second Appeal No.118 of 2009

Smt. Sarita Santwani, Aged about 49 years, W/o. Goverdhan Das Santwani, R/o LIG 69, Janta Colony, Gudhiyari, Raipur, Tahsil & District Raipur (CG)
(Defendant No.2)
---- Appellant

Versus

1. Lakhanlal Kurre, Aged about 60 years, S/o. Late Sukhau Kurre, R/o. Naya Mangal Bazar, Gudhiyari, Raipur, Tahsil & District Raipur (CG)
(Plaintiff)
2. State of Chhattisgarh through Collector, Raipur, (CG)
---- Respondents

For Plaintiff	:	Mr.H.B.Agrawal, Senior Advocate with Mr.Pankaj Agrawal, Advocate
For Defendant NO.2:	:	Mr.Anurag Singh, Advocate
For Res.No.2/State:	:	Mr.Ravi Bhagat, Dy.Govt.Advocate
Amicus Curiae	:	Mr.Abhijit Mishra, Advocate

Hon'ble Shri Justice Sanjay K. Agrawal

Judgment On Board

13/11/2019

1. This plaintiff's second appeal (S.A.No.92 of 2009)
under Section 100 of the CPC was admitted for

hearing by formulating the following substantial question of law: -

“Whether the lower appellate Court has erred in holding that the sale deed executed by Sukhwantin Bai is valid up to the extent of her share ?”

1A. Connected appeal preferred by defendant No.2 being Second Appeal No.118 of 2009 under Section 100 of the CPC was admitted for hearing by formulating the following substantial question of law: -

“Whether the lower appellate Court has erred in holding that sale deed dated 6.10.2005 is not valid in relation to interest and share of respondent No.1?”

(For the sake of convenience, parties hereinafter will be referred as per their status shown and ranking given in the plaint before the trial Court.)

2. Since both the appeals have arisen from Civil Suit No.155A/2008 and common judgment of the first appellate Court, therefore, both are clubbed together, heard analogously and are being disposed of by this common judgment.

3. Plaintiff-Lakhanlal Kurre and defendant No.1-Smt.Sukhwantin Bai are son and mother. The suit property was registered in their joint names. It is the case of the plaintiff (son) that defendant No.1 (his mother) on the basis of his forged general power of attorney dated 23.8.2005 sold the suit

land in favour of defendant No.2 on 6.10.2005 and defendant No.2 got his name mutated in revenue records on 28.10.2005 necessitating the filing of suit for declaration that sale deed dated 6.10.2005 executed by defendant No.1 in favour of defendant No.2 is not binding on him and defendant No.2 be restrained from interfering with his peaceful possession.

4. Defendant No.1 by filing written statement supported the claim of the plaintiff stating inter-alia that the plaintiff has not executed any power of attorney in her favour and it is defendant No.2 who has prepared forged general power of attorney, whereas defendant No.2 has filed separate written statement and supported the power of attorney as well as sale deed executed by defendant No.1 in her favour.
5. The trial Court after appreciating oral and documentary evidence available on record, by its judgment and decree dated 13.8.2008, decreed the suit holding that the plaintiff has not executed any general power of attorney in favour of defendant No.1 to alienate the suit property in favour of defendant No.2 and held that sale deed dated 6.10.2005 executed by defendant No.1 in favour of defendant No.2 is void, which was challenged by defendant No.2 by filing first appeal

under Section 96 of the CPC. The first appellate Court by the impugned judgment and decree upheld finding of the trial Court qua issue No.1 holding that the plaintiff has not executed any general power of attorney in favour of defendant No.1 to alienate the suit land in favour of defendant No.2, however, partly allowed the appeal filed by defendant No.2 holding that since general power of attorney was not executed in accordance with law and it appears to be doubtful, therefore, sale deed dated 6.10.2005 executed by defendant No.1 in favour of defendant No.2 is valid to the extent of her share as the plaintiff and defendant No.1 both were joint owners of the suit land. Questioning the judgment and decree of the first appellate Court, the plaintiff and defendant No.2 both have prepared second appeals under Section 100 of the CPC before this Court, in which substantial questions of law has been formulated which have been set-out in the opening paragraph of this judgment.

6. Mr.H.B.Agrawal, learned Senior Counsel with Mr.Pankaj Agrawal, learned Counsel for the plaintiff/appellant herein, would submit that the first appellate Court is absolutely unjustified in partly granting the appeal preferred by defendant No.2, it ought not to have interfered with the judgment and decree of the trial Court holding the

sale deed to be void as general power of attorney was never executed by the plaintiff in favour of defendant No.1 to alienate the suit land in favour of defendant No.2, as such, the judgment and decree of the first appellate Court deserves to be set aside and that of the trial Court be restored. He relied upon the judgment of the Supreme Court in the matter of Mohammad Hafizullah and others v. Javed Akhtar and others¹.

7. Mr.Anurag Singh, learned counsel for defendant No.2, would submit that the first appellate Court ought to have allowed the appeal in toto and could have held that alienation made in favour of defendant No.2 by defendant No.1 is in accordance with law.
8. Mr.Abhijit Mishra, learned Amicus Curiae, has brought legal position before this Court.
9. I have heard learned counsel for the parties and considered their rival submissions made hereinabove and went through the record with utmost circumspection.
10. Admittedly, the plaintiff and defendant No.1 i.e. son and mother are joint owners/co-owners of the suit property. It is the case of the plaintiff that he has not executed any general power of attorney in favour of his mother to alienate the

¹ (2015) 5 SCC 650

suit land in favour of defendant No.2, which the mother/defendant No.1 has also supported by filing written statement, but the trial Court after appreciating oral and documentary evidence available on record has clearly held that general power of attorney dated 23.8.2005 was doubtful. In appeal preferred by defendant No.2, such a finding has been affirmed by the first appellate Court. Such a finding recorded by the trial Court as well as by first appellate Court is a finding of fact based on evidence available on record. Even otherwise, defendant No.2 has neither proposed any substantial question of law on that finding nor it has been formulated by this Court, as such, finding that general power of attorney executed by the plaintiff in favour of defendant No.1 to alienate the suit land in favour of defendant No.2 was doubtful and that finding has become final.

11. Now, the question for consideration in both second appeals would be, whether the first appellate Court after having affirmed finding of the trial Court that general power of attorney executed by the plaintiff in favour of defendant No.1 was doubtful, was justified in holding that it confers valid title in relation to the extent of share held by defendant No.1/mother in the suit property ?

12. It is not in dispute that that defendant

No.1/mother had 1/2 share in the suit property and she was also co-owner of the suit property (she died during pendency of first appeal). Even otherwise, both the Courts below have held that general power of attorney was doubtful, as such, both the Courts below have not accepted general power of attorney executed by the plaintiff in favour of defendant No.1, but the first appellate Court has affirmed title to the extent of 1/2 share on the premises that admittedly defendant No.1/mother was co-owner and title-holder of the suit property and as such, title of defendant No.2 is protected under Section 44 of the Transfer of Property Act, 1882 (hereinafter called as 'the Act of 1882').

13. At this stage, it would be appropriate to notice Section 44 of the Act of 1882, which states as under:-

"44. Transfer by one co-owner.—Where one of two or more co-owners of immoveable property legally competent in that behalf transfers his share of such property or any interest therein, the transferee acquires as to such share or interest, and so far as is necessary to give, effect to the transfer, the transferor's right to joint possession or other common or part enjoyment of the property, and to enforce a partition of the same, but subject to the conditions and liabilities affecting at the date of the transfer, the share or interest so transferred.

Where the transferee of a share of a dwelling-house belonging to an undivided family is not a member of the family,

nothing in this section shall be deemed to entitle him to joint possession or other common or part enjoyment of the house."

14. The High Court of Madhya Pradesh in the matter of Lalitha James & others v. Ajit Kumar & others² has held as under:-

"4.....a purchaser from a co-owner of a portion of undivided property is not entitled to possession of any particular part of the joint property. His right, if any, would be to joint ownership or co-ownership and not to the exclusive ownership of any particular part of the joint property. Even if it was to be assumed that the shares of two sisters of Shri P. S. Chouhan, namely, Mrs. Dayabai Lakshmanan and Mrs. Grace Pritabai Morris were half and half in the property, each of them would have the right of enjoyment and possession equal to the other. But as long as the property is not divided, neither of them would be entitled to any particular part of the property. A transferee from such a co-owner would not be in a better position than the co-owner himself and hence he would also not be entitled to claim exclusive possession of any particular part of the joint property. Section 44 of the Transfer of Property Act gives legislative sanction to this principle and provides that "where one of two or more co-owners of immovable property legally competent in that behalf transfers his share of such property or any interest therein, the transferee acquires, as to such share or interest, and so far as is necessary to give effect to the transfer, the transferor's right to joint possession or other common or part enjoyment of the property, and to enforce a partition of the same, but subject to the conditions and liabilities accepting, at the date of the transfer, the share or interest so transferred". This sanction, therefore, assures the transferee the right to joint possession or common enjoyment of the property but does not confer on the

² AIR 1991 Madhya Pradesh 15

transferee any right to exclusive possession. Since this is not a case where a co-owner was in exclusive possession of the suit property by some arrangement between them, other details of this principle need not be considered....."

15. Reverting to the facts of the present case in the light of the above-stated provision and legal position, it is quite vivid that since defendant No.1 was admittedly co-owner of the suit property and she was empowered to alienate the suit land to the extent of her share in favour of defendant No.2 as finding of the two Courts below that general power of attorney was not executed by the plaintiff in favour of defendant No.1 as it was doubtful, the first appellate Court has rightly held that alienation made by defendant No.1 in favour of defendant No.2 is valid to the extent of share held by defendant No.1 in the suit property. Said finding recorded by the first appellate Court is finding of fact based on evidence available on record, in which I do not find any illegality or perversity.

16. Mohammad Hafizullah (supra) cited by Mr.H.B.Agrawal, learned Senior Counsel, is clearly distinguishable to the facts of the present case.

17. Accordingly, appeal preferred by defendant No.2 being devoid of merit is liable to be dismissed in view of the fact that finding recorded by two

Courts below that the plaintiff has not executed any general power of attorney in favour of defendant No.1 and execution of said general power of attorney was doubtful and defendant No.2 has even not questioned that finding and no substantial question of law has been formulated in this regard. The substantial questions of law are answered accordingly.

18. For the foregoing reasons, the second appeals preferred by the plaintiff as well as defendant No.2 are deserves to be and are hereby dismissed leaving the parties to bear their own cost(s).

19. A decree be drawn-up accordingly.

20. This Court appreciates the valuable assistance rendered by Mr.Abhijit Mishra, who on short notice, prepared the case and submitted written synopsis.

Sd/-
(Sanjay K. Agrawal)
Judge

B/-