

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

RSA No.2730 of 2012 (O&M)

Date of decision : 08.01.2019

Kapil Kumar

...Appellant

Versus

Naresh Kumar and others

...Respondents

CORAM: HON'BLE MR. JUSTICE ANIL KSHETARPAL.

Present: Mr. Sanjiv Gupta, Advocate for the appellant.

Mr. Vijay Kumar Jindal, Sr. Advocate with
Ms. Janya Sirohi, Advocate for the respondents.

ANIL KSHETARPAL, J.

CM No.6962-C of 2016

For the reasons stated in the application, which is duly supported by an affidavit, legal heirs of respondent No.4-Kaushal Jain as mentioned in para 2 of the application are ordered to be brought on record for the purpose of prosecuting the present appeal.

Application is allowed.

Amended memo of parties is taken on record, subject to all just exceptions.

CM No.7376-C of 2012

For the reasons stated in the application, which is duly supported by an affidavit, delay of 41 days in filing the present appeal is

condoned.

Application is allowed.

Main case

Defendant No.4 is in the Regular Second Appeal against the concurrent findings of fact arrived at by both the Courts below while decreeing the suit filed by plaintiff-respondent No.1 herein for declaration to the effect that the plaintiff and defendant Nos.1, 5 to 11 are the joint owners in joint possession of ½ share and other defendants are owners of their respective shares, as also, the Will allegedly executed on 05.06.1976 by Shiv Narain, is illegal, null and void and consequently, the sale deed dated 06.10.1997 executed by defendant Nos.1 to 3 in favour of defendant No.4 is also illegal, null and void and not binding on the rights of the plaintiff, as also for decree of separate possession of the property alongwith decree for permanent injunction.

In the considered view of this Court, the following substantial question of law arises for determination:-

1. Where it is undisputed that two or more vendees in the sale deed have contributed the sale amount in different proportion, what would be their respective share in the property, so purchased?

The facts in detail have been noticed by the Courts below, however, to complete the narration, it would be appropriate to notice some facts.

Late Sh. Ram Chander was having four sons namely Shiv Narain, Amar Nath, Jagan Nath and Sham Narain. Ram Chander, Shiv

Narain and Jagan Nath purchased the property in dispute vide registered sale deed dated 25.11.1926. At that time, Shiv Narain and Jagan Nath, both sons of Ram Chander were minors. It is recorded in the sale deed that Shiv Narain and Jagan Nath have contributed ₹4800/- out of sale consideration of ₹5300/-. Thus, Shiv Narain and Jagan Nath paid ₹2400/- each whereas Ram Chander contributed ₹500/-.

The plaintiff-Naresh Kumar son of Jagan Nath has filed this suit claiming that the property in dispute was purchased by Ram Chander alongwith Shiv Narain and Jagan Nath in equal share and, therefore, all of them were owners to the extent of $1/3^{\text{rd}}$ each. It is alleged that Ram Chander bequeathed through a registered Will his share of $1/3^{\text{rd}}$ property in favour of Sham Narain and Amar Nath. Thereafter, Sham Narain gifted his share in the property in favour of his wife Smt. Sushila vide registered gift deed dated 20.08.1949. It is also alleged that Jagan Nath also mortgaged his $1/3^{\text{rd}}$ share in the property in favour of M/s Telu Ram Gainda Mal Timber Merchant, Ambala Cantt.

Amar Nath is said to have died in the year 1950 leaving behind his son namely Shugan Chand-defendant No.18. Shiv Narain is stated to have died issueless on 09.12.1983. It is claimed by the plaintiff that Harish Kumar son of Jagan Nath (brother of the plaintiff) and Rajeev Kumar and Sanjeev Kumar sons of Harish Kumar have wrongly executed the sale deed on 06.10.1997 with respect to the area measuring 946 square feet on the basis of the alleged Will of Shiv Narain dated 05.06.1976.

On the other hand, defendant Nos.1 to 3 and 4 contested the

suit. Defendant No.4 claimed that he is a bona fide purchaser for valuable sale consideration.

After framing of the issues, learned trial Court decreed the suit while giving following reasons:-

1. The proportion of sale consideration paid by the three vendees would not determine the share owned by them in the property.
2. In subsequent documents namely registered Gift deed executed by Sham Narain and mortgage deed executed by Jagan Nath, it is apparent that the vendees treated that they had 1/3rd share in the property.
3. Shiv Narain had no share in the suit property at the time the alleged Will dated 05.06.1976 was executed.
4. The Will dated 05.06.1976 has not been proved as none of the attesting witness has been examined.

Learned First Appellate Court also affirmed the judgment passed by the learned trial Court. Strangely, the trial Court set aside the sale deed executed in favour of defendant No.4 by defendant Nos.1 to 3.

Defendant Nos.1 to 3 are the successors-in-interest of Jagan Nath as defendant No.1 is son of Jagan Nath. Undisputedly, Jagan Nath is one of the purchaser of the property purchased vide registered sale deed dated 03.12.1926.

Both the Courts have noticed and not been disputed before this Court that in the sale deed, it is specifically recorded that Shiv Narain and Jagan Nath had contributed ₹2400/- each (₹4800/- in total) out of the total

sale consideration of ₹5300/-. Thus, Sh. Ram Chander only contributed ₹500/-.

Now the stage is set for answering the question of law framed earlier.

1. Where it is undisputed that two or more vendees in the sale deed have contributed the sale amount in different proportion, what would be their respective share in the property, so purchased?

Section 45 of the Transfer of Property Act, 1882 deals with a situation when two or more persons jointly purchased immovable property for consideration. Section 45 of the Transfer of Property Act, 1882 is extracted as under:-

“45. Joint transfer for consideration - Where immovable property is transferred for consideration to two or more persons and such consideration is paid out of a fund belonging to them in common, they are, in the absence of a contract to the contrary, respectively entitled to interests in such property identical, as nearly as may be, with the interests to which they were respectively entitled in the fund; and, where such consideration is paid out of separate funds belonging to them respectively, they are, in the absence of a contract to the contrary, respectively entitled to interests in such property in proportion to the shares of the consideration which they respectively advanced.

In the absence of evidence as to the interests in the fund to which they were respectively entitled, or as to the shares which they respectively advanced, such persons shall be presumed to be equally interested in the property.”

On careful reading of Section 45, it is apparent that three eventualities have been envisaged by the aforesaid provision:-

- i) If the consideration has been paid out of a joint fund belonging to them in common, they are, in absence of a contract to the contrary, respectively entitled to interests in such property identical to their share in the common (joint) fund.
- ii) Where the sale consideration is paid out of separate funds belonging to them respectively, they are, in absence of a contract to the contrary, respectively entitled to interests in such property in proportion to the shares of the consideration which they respectively contributed.
- iii) In absence of evidence or clarity, as to their respective contribution to the sale consideration and any contract to the contrary, such vendees shall be presumed to be co-sharer/co-owner in the property purchased equally.

As noticed above, both the Courts have noticed that Shiv Narain and Jagan Nath had jointly contributed ₹4800/- whereas Ram Chander had contributed only ₹500/-. In such a situation, Shiv Narain would be owner to the extent of $\frac{24}{53}$ rd share, Jagan Nath would be entitled to $\frac{24}{53}$ rd share and Ram Chander would be entitled to $\frac{5}{53}$ rd share. Thus, both the Courts erred in declaring that Ram Chander, Jagan Nath and Shiv Narain were owners to the extent of $\frac{1}{3}$ rd share each. It would be noted that the contribution made by each of them is specifically recorded in the sale deed which is part of the record and not disputed by the learned counsel for the plaintiff. However, learned counsel for the plaintiff has submitted that Shiv Narain and Jagan Nath were minors and,

therefore, they could not have contributed any amount. He further submitted that in the subsequent documents namely Will executed by Ram Chander, mortgage deed executed by Jagan Nath and gift deed executed by Sham Narain, all the three co-sharers are shown as having equal share.

This Court has considered the submissions of the learned counsel representing plaintiff-respondent, however, do not find substance therein. The Will executed by Ram Chander is not a document of title in the facts of the present case. Similarly, through mortgage deed, Jagan Nath who was owner of larger share had mortgaged 1/3rd share in the property. Still further, the gift deed executed by Sham Narain in favour of his wife Sushila is on the basis of the Will executed by Ram Chander and, therefore, such document cannot be used to arrive at a conclusion or resulted in reduction of share of Jagan Nath and Shiv Narain in the immovable property. Accordingly, question No.1 is answered in favour of appellant-defendant No.4.

Now let us deal with the reasons given by the trial Court while decreeing the suit.

First reason, that the shares of the vendees are not determined by the proportion of the sale amount respectively contributed by them, is against Section 45 of the Transfer of Property Act.

Second reason assigned by the Court is also without any basis as Shiv Narain had purchased 24/53rd share in the property.

Learned Courts further erred in setting aside the sale deed executed by defendant Nos.1 to 3 in favour of defendant No.4. Father of

defendant No.1 Jagan Nath had admittedly purchased 24/53rd share through sale deed dated 03.12.1926. Jagan Nath had died intestate on 05.01.1992. He had left behind nine class-I heirs (four sons and five daughters). Thus, the sale made by Harish Kumar, in absence of any testament executed by Shiv Narain, would be owner of 1/9th share in the share of Jagan Nath i.e. 24/53 equivalent to the plaintiff. Thus, the sale made by Harish Kumar to the extent of 1/9th share in the property left behind by Jagan Nath would be valid.

It may be further significant to note here that on the day, Shiv Narain died, his one brother Amar Nath had pre-deceased him. Thus, Shiv Narain who died issueless had left behind two class-II heirs namely Jagan Nath and Sham Narain, his brothers. Share of Shiv Narain i.e. 24/53rd would be inherited by Jagan Nath and Sham Narain equally. Thus, Jagan Nath who was already owner of 24/53rd share would additionally get 12/53rd share on the death of Shiv Narain and Sham Narain, similarly, would get 12/53rd share apart from what he got as per the registered Will of Ram Chander i.e. 1/2 in the share of Ram Chander i.e. 5/53rd share.

It is not disputed that no attesting witness of the Will allegedly executed by Shiv Narain has been examined. Thus, the Will has not been proved in accordance with law.

Learned counsel appearing for the appellant although strenuously argued that defendant No.4-appellant is a bona fide purchaser, however, it is well settled that no one can transfer better title than what he himself has. In the present case, Harish Kumar-Vendee is owner to the

extent of 1/9th share in the share of Jagan Nath i.e. 24/53 + 12/53 (received on the death of Shiv Narain by way of natural succession) i.e. 36/53. Hence, the sale deed to the extent of 4/53rd share executed by Harish Kumar in the entire property is valid.

Accordingly, the judgments and decrees passed by both the Courts below are set aside. The preliminary decree is passed to the extent that the plaintiff is entitled to 4/53rd share i.e. 1/9th of the share of Jagan Nath in the property and the sale deed in favour of defendant No.4-appellant is declared valid upto 4/53rd share.

In view of the above, the present Regular Second Appeal is partly allowed.

All the pending miscellaneous applications, if any, are disposed of, in view of the abovesaid judgment.

08.01.2019

Pawan

**(ANIL KSHETARPAL)
JUDGE**

Whether speaking/reasoned:- Yes/No

Whether reportable:- Yes/No