

**SUPREME COURT OF INDIA**

Vijay A.Mittal

Vs.

Kulwant Rai

C.A.No.5177 of 2009

(Abhay M.Sapre and Indu Malhotra,JJ.,)

28.01.2019

**JUDGMENT**

**Abhay Manohar Sapre,J.,**

1. This appeal is directed against the final judgment and order dated 21.12.2007 passed by the High Court of Punjab & Haryana at Chandigarh in RSA No.1537 of 1993 whereby the Single Judge of the High Court dismissed the regular second appeal filed by the appellants herein and upheld the judgment/decreed dated 15.04.1993 of the First Appellate Court in C.A. No.7 of 15.02.1992.

2. In order to appreciate the controversy involved in this appeal, it is necessary to set out the relevant facts hereinbelow.

3. Appellant Nos.1 to 4 and 7 are the legal representatives of the original defendant No.1- Amar Nath. Appellant No.5 (Yash Pal Mittal), who was the original defendant No.2 also died and he is now represented by his legal heirs (i) Rita Mittal (ii) Akanksha and (iii) Akshay Mittal and Appellant No.6 (Sunil Mittal) is the original defendant No.3 whereas respondent No.1 (Kulwant Rai) is the original plaintiff, who also died and is now represented by his legal heirs (i) Sudesh Goel, (ii) Ajay Goel and (iii) Sanjay K. Goel and respondent No.2 (Atul Kumar) is the original plaintiff No.2 in the civil suit out of which this appeal arises.

4. In short, the civil suit out of which this appeal arises was originally filed by one - Kulwant Rai as plaintiff No.1 and Atul Kumar as plaintiff No.2 against the defendants, namely, (1) Amar Nath, (2) Yash Pal Mittal, (3) Sunil Mittal and (4) Bal Kishandas.

5. During the pendency of the civil suit, Kulwant Rai (Plaintiff No.1), Amar Nath (defendant No.1) and Yashpal Mittal (defendant No.2) died and, therefore, their legal representatives, on whom the right to sue devolved as detailed above, were brought on record in places of the original plaintiff/defendants in the civil suit to enable them to continue the lis on behalf of those who died.

6. As mentioned above, two aforementioned plaintiffs (respondents herein) filed a civil suit against the aforementioned four defendants (appellants herein) on 19.03.1982 claiming a relief of specific performance of the agreement dated 12.06.1979 in relation to the suit property (as detailed in the plaint) situated at Narain Dass Building, Durga Charan Road, Ambala Cantt.

7. The suit was founded on the agreement dated 12.06.1979 entered into between the plaintiffs and the defendant No.1 (Amar Nath) for sale of the suit property for a sum of Rs.46,000/-. According to the plaintiffs, they paid a sum of Rs.5,000/- by way of earnest money to defendant No.1 (Amar Nath) and the sale deed in relation to the suit property was to be executed on or before 31.12.1979 by defendant No.1 (Amar Nath) in favour of the plaintiffs on paying the balance consideration before the sub-Registrar.

8. It was alleged that defendant No.1 (Amar Nath) instead of selling the suit property to the plaintiffs in terms of agreement dated 12.06.1979 sold it to defendant Nos. 2 and 3 on 27.11.1981. The plaintiffs alleged that they were ready to perform their part of the agreement but it was defendant No.1 (Amar Nath) who failed to perform his part and committed breach by selling the suit property to defendant Nos. 2 and 3 on a higher price and, therefore, the plaintiffs were constrained to file the suit for seeking specific performance of the agreement dated 12.06.1979.

9. Defendant No.1 (Amar Nath) died and, therefore, he could not file his written statement. His legal representatives, however, filed the written statement. Their defense was three-fold.

10. First - Amar Nath (defendant No.1) was not the absolute owner of the suit property because the suit property was a Joint Hindu Family property; Second, Amar Nath (defendant No.1) was, therefore, not competent to enter into an agreement to sell the suit property; and the Third, the sale in question was not for any legal necessity and, therefore, it was bad in law and not binding on the legal representatives because their consents were not obtained by Amar Nath (defendant No.1) prior to entering into an agreement of sale.

11. So far as defendant Nos. 2 to 4 are concerned, they filed their written statement. They admitted that the suit property belonged to Amar Nath (defendant No.1). They averred that they purchased the suit property from Amar Nath pursuant to the agreement, which they had entered into with him somewhere in the year 1978. They alleged that they had no knowledge of the agreement of the plaintiffs and, therefore, they were bona fide purchasers of the suit property.

12. The Trial Court by judgment/decreed dated 22.11.1991 dismissed the suit. It was held that the agreement dated 12.06.1979 is proved; the plaintiffs were ready and willing to perform their part of the agreement but since Amar Nath was not competent to enter into the agreement with the plaintiffs because the suit property was a Joint Hindu Family property and Amar Nath was only a Karta; and lastly, the Plaintiffs failed to aver that the sale was for the legal necessity and for the benefit of the family.

13. The plaintiffs felt aggrieved and filed appeal before the First Appellate Court. By judgment/decreed dated 15.04.1993, the First Appellate Court allowed the appeal, set aside the judgment/decreed of the Trial Court and decreed the plaintiffs' suit.

14. The First Appellate Court held that the sale deed executed by Late Amar Nath in favour of defendant Nos. 2 and 3 was bad in law inasmuch as the same was obtained by a collusion so as to deprive the plaintiffs of the fruits of their agreement dated 12.06.1979. It was also held that defendant Nos. 2 and 3 were not bona fide purchaser of the suit property. It was also held that the suit property was Joint Hindu family property and Amar Nath was its Karta. It was also held that the agreement of sale entered into by Amar Nath was binding on all coparceners.

15. The defendants, therefore, felt aggrieved and filed the second appeal before the High Court. By impugned order, the High Court dismissed the second appeal and upheld the judgment/decreed of the first Appellate Court.

16. It was held that Amar Nath executed the agreement dated 12.06.1979 as a Karta of Joint Hindu Family. It was also held that the agreement was binding on Amar Nath and his legal representatives.

17. It is against this order, the defendants have carried the matter to this Court in special leave to appeal.

18. Having heard the learned counsel for the parties and on perusal of the record of the case, we find no merit in this appeal.

19. In the first place, in our considered opinion, when the three Courts below have held against the defendants and in favour of the plaintiffs that the plaintiffs were ready and willing to perform their part of the agreement, this finding was binding on the High Court and also on this Court.

20. Indeed, the Trial Court had already recorded this finding in plaintiffs' favour but since the Trial Court dismissed the suit on other grounds, the defendants had a right to challenge this finding by filing cross objection before the First Appellate Court in plaintiffs' appeal but the defendants did not do so and accepted this finding. The First Appellate Court while decreeing the plaintiffs' suit upheld this finding being not under challenge and the High Court upheld it by dismissing defendants' second appeal.

21. A finding on the issue of readiness and willingness is one of the important and relevant findings in a suit for specific performance of an agreement. It is a finding based on facts and once it is recorded, it becomes a finding of fact.

22. In this view of the matter, unless such finding is found to be against the pleadings or contrary to the evidence or the law governing the issue, it is binding on the High Court and also on this Court.

23. Learned counsel for the appellants was not able to point out any infirmity or illegality in this finding. It is apart from the fact that the appellants (defendants) failed to challenge its legality and correctness at the first appellate stage in an appeal filed by the plaintiffs, which was the appropriate stage to challenge. It is, therefore, binding on this Court.

24. The other argument of learned counsel for the appellants (defendants) was that since the respondents (plaintiffs) got impleaded only some legal representatives out of eight legal representatives of late Amar Nath in their first appeal and remaining legal representatives were not impleaded, the decree of the Trial Court dismissing the civil suit qua those legal representatives, who were not made parties in the appeal, had become final.

25. It was, therefore, urged that the First Appellate Court by allowing the appeal filed by the plaintiffs and decreeing their suit has passed two conflicting decrees—one against some which has decreed the suit and other against some which has resulted in dismissal of the suit. It is not legally permissible.

26. This submission was dealt with by the High Court while answering 5th substantial question and was rejected. In our view, the High Court was right for the following reasons.

27. First, all the legal representatives of late Amar Nath were already on record in the Trial Court in the suit and all had taken similar defense in support of their case against the plaintiffs. In other words, there was no conflict of interest amongst them either inter se or qua the plaintiffs.

28. Second, those legal representatives, who filed the written statement, had filed a joint and common written statement whereas those, who did not file the written statement, had given their power of attorney in favour of the legal representatives, who had filed the written statement.

29. Third, one legal representative, who did not file his written statement remained ex-parte. In these circumstances, it was not necessary to implead him as party respondent in the first appeal.

30. Fourth, it is a trite law that if out of all the legal representatives, majority of them are already on record and they contested the case on merits, it is not necessary to bring other legal representatives on record. The reason is that the estate and the interest of the deceased devolved on the legal representatives is sufficiently represented by those who are already on record.

31. Fifth, the defendants, who were respondents in the first appeal, did not raise any objection before the First Appellate Court. Had such objection been raised, the appellants (plaintiffs) would have cured the defect by impleading them as party respondents before the First Appellate Court.

32. As rightly argued by the counsel for the respondents, the reason for not impleading some legal representatives in the first appeal was that their names were not shown in the decree of the Trial Court. It was for this reason, the first appeal was filed by the plaintiffs only against those legal representatives whose names were shown in the decree.

33. In the light of this factual scenario and the reasons set out above, we are of the considered opinion that no case was made out by the appellants to challenge the decree before the High Court on the ground that the impugned decree has resulted in passing any conflicting decree by the First Appellate Court - one of dismissal of the suit by the Trial Court and the other decreeing the suit by the First Appellate Court.

34. Learned counsel for the appellants (defendants) then argued that the two Courts below were not justified in declaring the sale made in favour of defendant Nos. 2 and 3 by defendant No.1 as bad in law. According to the learned counsel, it should have been held to be a bona fide sale for consideration without notices to the agreement of the plaintiff with defendant No.1.

35. We find no merit in this submission for more than one reason. First, the finding on this issue being a concurrent finding of fact recorded against the appellants by the Appellate Court and the High Court, the same is binding on this Court.

36. Second, the finding apart from being concurrent is otherwise not liable to be interfered with for the reason that the sale made by defendant No.1 in favour of defendant Nos. 2 and 3 was on the face of it, a collusive sale made to avoid the agreement of the plaintiffs.

37. Third, defendant Nos. 2 and 3 did not adduce any evidence to prove that their agreement was prior in point of time as against the agreement of the plaintiffs and, therefore, they were entitled to get the sale deed executed pursuant to their prior agreement.

38. Fourth, the legal representatives of Amar Nath having stepped into his shoes were entitled to raise that defense which was available to Amar Nath against the plaintiffs in addition to one which was appropriate to their character as legal representatives as provided under Order 22 Rule 4(2) of the Code of Civil Procedure, 1908.

39. Fifth, the plaintiffs were only entitled to prove the existence of the valid agreement with the defendant No.1 - Amar Nath and its performance by the plaintiffs qua him. This finding of readiness and willingness was recorded in plaintiffs' favour throughout.

40. The Trial Court had framed two Issues (7 and 8) on the questions as to whether the suit property was a Joint Hindu Family property of Amar Nath and, if so, whether Amar Nath was its Karta or not. The Trial Court held that the suit property was the Joint Hindu Family property of which Amar Nath was its Karta.

41. This Court in a case *Sunil Kumar & Anr. vs. Ram Parkash & Ors<sup>1</sup>*, examined the status and the powers of a Karta while dealing with the Joint Hindu Family property in the following words.

“6. In this appeal we are called upon to decide the only question whether a suit for permanent injunction restraining the Karta of the joint Hindu family from alienating the house property belonging to the joint Hindu family in pursuance of the agreement to sell executed already in favour of the predecessor of the appellants, Jai Bhagwan, since deceased, is maintainable. It is well settled that in a Joint Hindu Mitakshara Family, a son acquires by birth an interest equal to that of the father in ancestral property. The father by reason of his paternal relation and his position as the head of the family is its Manager and he is entitled to alienate joint family property so as to bind the interests of both adult and minor coparceners in the property, provided that the alienation is made for legal necessity or for the benefit of the estate or for meeting an antecedent debt.

The power of the Manager of a joint Hindu family to alienate a joint Hindu family property is analogous to that of a Manager for an infant heir as observed by the Judicial Committee in *Hunoomanpersaud Panday v. Mussumat Babooee Munraj Koonweree* (1856) 6 Moo Ind App 393”

42. Keeping in view the aforementioned principle of law and applying the same to the facts of the case at hand, we are of the considered opinion that the Courts below were justified in holding that the agreement dated 12.6.1979 was binding on the legal heirs of Amar Nath for the following reasons:

43. First, no issue was framed on the question of “legal necessity”. In our opinion, it should have been framed; Second, yet the First Appellate Court while allowing the plaintiffs’ appeal recorded a categorical finding that one son of Amar Nath had signed the agreement in question and, therefore, it was a case where legal representatives of Late Amar Nath were aware of the existence of the agreement and also had given their consent; and Third, this finding was upheld by the High Court while dismissing the defendants’ appeal.

44. One cannot dispute the power of a Karta to sell the Joint Hindu Family property. It is, indeed, inherent in him. However, it is subject to certain restrictions, namely, the sale should be for the legal necessity and for the benefit of the family.

45. It is clear that Amar Nath had obtained the consent of the legal heirs before entering into an agreement for sale of the suit property to the plaintiffs. The very fact that one son of Amar Nath was a signatory to the agreement was sufficient to draw a presumption that the agreement to sell was made by Amar Nath with the consent of other coparceners. It is also for the reason because none of the coparceners had raised any objection till the filing of written statement in the suit. The very fact that Amar Nath sold the suit property to defendant Nos. 2 and 3 and which was not objected to by his legal heirs showed that the plea regarding legal necessity had no factual basis to sustain.

46. It is for all these reasons, we are of the view that the appellants (defendants) have failed to make out any case so as to call for any interference in the impugned judgment.

47. This takes us to examine another question which arises in this case but was not taken note of by the Courts below while decreeing the suit. It relates to the nature of decree to be passed in this case.

48. The question arises in this way. The effect of the decree passed in this case is that the original defendant No.1, now represented by his legal representatives (Appellant Nos.1-4 & 7) along with legal representatives of original defendant No. 2, i.e., (i) Rita Mittal, (ii) Akanksha and (iii) Akshay Mittal, and defendant No. 3 (Appellant No.6 herein) are required to execute the sale deed in favour of legal representatives of original plaintiff No.1, i.e., respondent No.1(i) Sudesh Goel, (ii) Ajay Goel and (iii) Sanjay K. Goel and Atul Kumar, plaintiff No.2 (respondent No.2 herein) jointly.

49. Yet another effect of the decree is that the transaction of sale of suit property between original defendant No.1, now represented by his legal representatives (Appellant Nos.1-4 & 7) and defendant No.2 (Appellant No.5 herein), now represented by his legal representatives and defendant Nos.3(Appellant No.6 herein) is declared bad in law and stands nullified. As a consequence thereof, legal representatives of defendant No.1(Appellant Nos.1-4 & 7) are required to return Rs.48,000/- to original defendant No.2 (appellant No.5 herein), now represented by his legal representatives and defendant No.3 (appellant No.6 herein) in the absence of any contract to the contrary in this behalf between the parties. The reason being that once the sale is declared bad, the transaction of sale fails and, therefore, the seller(defendant No.1) has no right to retain the sale consideration with himself and has to refund the sale consideration to the buyers(defendant Nos.2 & 3) [See Section 65 of the Indian Contract Act].

50. The question arose before this Court in the case of *Lala Durga Prasad & Anr. Vs. Deep Chand & Ors*<sup>2</sup>., as to what form of decree should be passed in the case of specific performance of contract where the suit property is sold by the defendant, i.e., the owner of the suit property to another person and later he suffers a decree for specific performance of contract directing him to transfer the suit property to the plaintiff in term of contract.

51. The learned Judge-Vivian Bose, J. examined this issue and speaking for the Bench in his inimitable style of writing, held as under:

“Where there is a sale of the same property in favour of a prior and subsequent transferee and the subsequent transferee has, under the conveyance outstanding in his favour, paid the purchase-money to the vendor, then in a suit for specific performance brought by the prior transferee, in case he succeeds, the question arises as to the proper form of decree in such a case. The practice of the Courts in India has not been uniform and three distinct lines of thought emerge. According to one point of view, the proper form of decree is to declare the subsequent purchase void as against the

prior transferee and direct conveyance by the vendor alone. A second considers that both vendor and vendee should join, while a third would limit execution of the conveyance to the subsequent purchaser alone. According to the Supreme Court, the proper form of decree is to direct specific performance of the contract between the vendor and the prior transferee and direct the subsequent transferee to join in the conveyance so as to pass on the title which resides in him to the prior transferee. He does not join in any special covenants made between the prior transferee and his vendor; all he does is to pass on his title to the prior transferee.”

52. We, therefore, consider it just and proper and with a view to end this litigation between the parties, which is pending since 1982 and also to balance the equities amongst the parties that defendant No.1 through his legal representatives (Appellant Nos. 1-4 & 7 herein) would return a sum of Rs.48,000/- to the legal representatives of defendant No.2 (Appellant No.5 herein) and defendant No. 3 (Appellant No.6 herein). This direction we give by taking recourse to our powers under Article 142 of the Constitution of India to do complete justice between the parties to the lis because we do not want another round of litigation to go on for years in future between the defendants inter se for recovery of this amount.

53. In the light of the foregoing discussion, the appeal is disposed of by modifying the judgment and decree as under:

(i) The legal representatives of defendant No.1 (Appellant Nos.1-4 and 7) shall deposit a sum of Rs. 48,000/- in the executing Court for being paid to the legal representatives of defendant No.2, i.e.,

(i) Rita Mittal, (ii) Akanksha and (iii) Akshay Mittal and Defendant No.3 (Appellant No.6 herein) within three months as an outer limit.

(ii) The legal representatives of original Plaintiff No.1,(respondent No.1 herein) i.e., (i) Sudesh Goel,

(ii) Ajay Goel, and (iii) Sanjay K. Goel and Atul Kumar, plaintiff No.2 (respondent No.2 herein) shall deposit in the executing Court a sum of Rs.41,000/- for being paid to the legal representatives of original Defendant No.1 (Appellant Nos.1 to 4 and 7 herein) within three months as an outer limit.

(iii) The original defendant No.1, now represented by his legal representatives (Appellant Nos.1-4 & 7) along with legal representatives of original defendant No. 2 and defendant No. 3 (Appellant No.6 herein) will jointly execute the sale deed in favour of legal representatives of original plaintiff No.1, i.e., respondent No.1 herein (i) Sudesh Goel, (ii) Ajay Goel and (iii) Sanjay K. Goel and Atul Kumar, plaintiff No.2 (respondent No.2 herein) and hand over the possession of the suit property to them simultaneously and then will withdraw the money deposited for them in Court.

54. The executing Court will ensure completion of proceedings within the time fixed and record due satisfaction of the decree in accordance with law. In case of any default, the parties will be entitled to put the decree in execution for enforcement of the terms of the decree of this Court amongst the defaulting parties.

55. In view of the foregoing discussion, the appeal stands disposed of.

**Judgment Referred.**

<sup>1</sup>(1988) 2 SCC 0077

<sup>2</sup>AIR 1954 SC 0075