

(2023) 02 CHH CK 0096
In the Chhattisgarh High Court
Case No : First Appeal No. 442 Of 2018

Niharika Das

APPELLANT

Vs

Poonam Golchha

RESPONDENT

Date of Decision : 03-02-2023

Acts Referred:

Hindu Succession Act, 1956 — Section 6
Transfer of Property Act, 1882 — Section 44
Code Of Criminal Procedure, 1973 — Section 125
Evidence Act, 1872 — Section 58

Citation : (2023) 02 CHH CK 0096

Hon'ble Judges : Goutam Bhaduri, J;N.K. Chandravanshi, J

Bench : Division Bench

Advocate : Manoj Paranjape, Anurag Singh, B.P. Sharma, Vivek Chopda

Final Decision : Allowed

Judgement

1. Challenge in this appeal is to the judgment and decree dated 18-5-2018 passed by the Third Additional District Judge, Raipur, in civil suit No.115-A/2014 whereby the suit was partly allowed and ejectment to a portion of the suit house was passed. The instant appeal is by the defendant and the cross objection is also preferred by the plaintiffs.

2. A suit for possession was filed by respondents/plaintiffs in respect of house bearing No.48/1167 admeasuring 1710 sq.ft. wherein superstructure is raised over an area of 1300 sq.ft. (800 sq.ft. at ground floor, 500 sq.ft. on first floor and 500 sq.ft. is open) as also the claim for damages of Rs.1,000/- per day was made.

3. The respondents/plaintiffs filed the suit with the pleading, inter alia, that :

? they had purchased the suit property on 7-2-2014 by way of registered sale deed from Sukriti Ranjan Das for a consideration of Rs.60.00 lacs and possession was given to them;

? the appellant/defendant used to stay in the upper portion of the house with her father and after the sale deed was executed the plaintiffs were assured by the respondent that she would vacate the upper portion of house within 15-20 days.

? according to the plaint averments, the defendant was staying with her father in the house after dissolution of her marriage since 2007. The suit house was purchased by the father of the defendant from Seth Jaskaran on 23-2-1953;

? the defendant did not vacate the suit house and reports and counter reports were made to police at Mahila Police Station and it was reported that the defendant broke open the lower portion of the house; and took over the possession; and further to vacate the premises another demand of Rs.20-30 lacs was made; and

? after purchase of the suit house, the plaintiffs got their name recorded in the Nazul office and Municipal Corporation and served a notice to the defendant to vacate the premises, but the same was not vacated, therefore, the suit was filed.

4. The case of the appellant/defendant was that :

? she is in occupation of the entire suit premises and it was averred that the suit property was purchased by Late Nand Lal Das, the grand father of defendant, in the year 1953 when he retired from the service of District Excise Officer and purchase was made out of his self earned money in the name of his son Sukriti Ranjan Das, therefore, the property is ancestral one and the defendant being a co-parcener has a right in the suit premises;

? it was pleaded that Sukriti Ranjan Das, father of defendant, did not have the absolute right to sell the property. Consequently, the sale deed would be illegal and plaintiffs could not get the possession of suit premises;

? it was further stated that the father of defendant Sukriti Ranjan Das is a well known lawyer at Bemetara and defendant being daughter was not aware of the fact that her father has performed second marriage during the life time of first wife, who is the mother of the defendant namely; Ila Das. When some counselling took place at the police station after the report made by the first wife, she came to know about the second marriage of her father;

? it was stated that the mother of the defendant was residing in the suit premises and her stridhan was also used in construction of the suit house and the father was in influence of the second wife and her children as such the incident happened;

? it was further pleaded that a separate civil suit was filed bearing No.18-A/2015 by the defendant and her family members before the Court of 8th Civil Judge Class II, Raipur seeking declaration that the sale deed made by her father in favour of the plaintiffs is null and void and eventually sought for dismissal of the suit.

5. Learned trial Court framed four issues and directed the defendant to handover

possession of the ground floor portion of the suit house to the plaintiffs and directed that the defendant would be entitled to have access to the upper portion of the house without any obstruction. Thus, this appeal by the defendant.

6. Learned counsel appearing for the appellant/defendant would submit that :

? on appreciation of evidence the trial Court has come to a conclusion that the suit property was purchased by grandfather of defendant in the name of Sukriti Ranjan Das out of his self earned money and thus the defendant being the granddaughter is a co-parcener and has share in the suit house in view of amendment carried out in Section 6 of the Hindu Succession Act;

? Sukriti Ranjan Das was a co-sharer cannot be allowed to put the vendee in absolute possession;

? Section 44 of the Transfer of Property Act, 1882 would govern the field as one of the co-sharer when sells his share the transferee would only acquire share or interest and in order to get a separate possession of the property he has to resort to a partition suit;

? learned counsel would place reliance upon the decision rendered by the High Court of Madhya Pradesh in the matter of Devendra Singh Thakur v Smt. Shantibai and others 2004 (4) MPLJ 327 to submit that since the purchasers/ plaintiffs are not the family members and the suit property being a dwelling house the joint possession cannot be allowed to be with transferee;

? according to the learned counsel, the decree to the extent of directing to give possession of the ground floor cannot be sustained;

? further attacking the cross-objection, learned counsel would submit that the suit is partly decreed meaning thereby partly dismissed and therefore, the recourse open to the plaintiffs was to file a regular appeal; and

? learned counsel would place reliance upon the decision rendered by the Supreme Court in the matter of Subhodkumar and Others v Bhagwant Namdeorao Mehetre and Others (2007) 10 SCC 571 to submit that the father of the defendant being a karta could not have sold the property and nothing is on record to prove that the sale was for any legal necessity and burden has not been discharged by the alienee.

7. Learned counsel appearing for the respondents/plaintiffs would submit that :

- the suit was for eviction and mesne profit;
- referring to the additional plea, learned counsel would submit that as per the plaint the property in question was purchased by Sukriti Ranjan Das to be his absolute property and it is the liability of seller to disclose all materials in respect of the suit property and to give possession of the property which would be a symbolic one in absence of physical possession;
- the defendant daughter was in permissive possession of the suit property by his

father, as the property was in the name of her father and she being daughter was allowed to stay and, as such, it cannot be said to be a co-parcenary property;

- referring to Ex.D-33, the reply filed by father of defendant in a proceeding under section 125 by mother of defendant, learned counsel would submit that the defendant was not a party in the proceedings under Section 125 Cr.P.C. in between husband (Sukriti Ranjan Das) and wife (Ila Das), therefore, no inference can be drawn;

- it is further submitted that to cancel the sale deed a separate suit has been filed before the Civil Judge which is pending, therefore, the Court could not have travelled beyond the scope of the suit as per the plaint;

- no counter claim was made during the trial by defendant, therefore, the trial Court is required to operate within limited arena;

- referring to the law laid down by the Supreme Court in the matter of Bachhaj Nahar v Nilima Mandal and Another (2008) 17 SCC 491,

- learned counsel would submit that no amount of evidence can be looked into, which was not pleaded and the Court cannot make out a case only on the basis of evidence;

- in a suit for ejectment the prayer of co-sharer cannot be considered and declaration & finding can be given and even the admission of witness cannot be used which was not fact in issue in the instant case; and

- it is contended that the judgment and decree of the Court below to the extent of ejectment is just and proper and the finding with respect to the co-sharer that of the defendant is absolutely wrong and the same is required to be corrected by allowing the cross-objection.

8. We have heard learned counsel appearing for the parties, perused the pleadings and the evidence available on record.

9. The plaint averments and the evidence adduced shows that the plaintiffs have stated that they purchased the suit house by registered sale deed dated 7-2-2014. Sale deed is marked as Ex.P/6. The subject of purchase is suit house bearing No.48/1167, Nazul, Block No.17, Plot No.17/2, area of 1710 sq.ft. wherein superstructure is raised over an area of 1300 sq.ft. (800 sq.ft. at ground floor, 500 sq.ft. on first floor and 500 sq.ft. is open). The said property was sold by Sukriti Ranjan Das in favour of the plaintiffs. Nucleus of title of acquisition in the sale deed shows that it was purchased on 23-2-1953 from one Seth Jaskaran Daga by seller. In the sale deed, the age of the seller Sukriti Ranjan Das is shown as 80 years. So consequently on the date of purchase on 23-2-1953 his age would be 18-19 years (approx.).

10. At para 11 of cross-examination PW-3 Sukriti Ranjan Das has stated that in a proceeding of maintenance, which was in between him and his first wife (Ila Das), in a reply he stated that the house in question was purchased by his father

and thereafter, volunteered that it was acquired from his self earned money. Document Ex.D-33, which is reply filed by Sukriti Ranjan Das, in a proceeding under Section 125 Cr.P.C. preferred by his first wife, Sukriti Ranjan Das stated that in 1958 he settled down for practice at Bemetara. He admitted that in the year 1953 his father when retired from the post of District Excise Officer at that time the suit house was purchased from Seth Jaskaran Daga by his father and in cross-examination he admitted that in the year 1953 he was studying in B.Sc. Previous. In the subsequent cross-examination, the witness tried to explain the source of income by oral evidence to have earned money by sale of car, but nothing has been placed to substantiate that the seller Sukriti Ranjan Das had any income or had any car. Therefore, the fact of purchase of property by Sukriti Ranjan Das would be deemed to an admission under Section 58 of the Indian Evidence Act, 1872 that purchase of suit house was by father of Sukriti Ranjan Das. No plausible explanation has been given against such admission in the cross-examination. Apart from admission in cross-examination this fact of purchase of suit house by father of Sukriti Ranjan Das is corroborated by the plea taken in defence in a judicial proceeding under Section 125 of the Cr.PC before the Court by seller.

11. Further analysis of the evidence would show that Sukriti Ranjan Das was student at the time of purchase of house and though tried to state about the source of income by sale of car in subsequent part of evidence, but that explanation cannot be accepted as plausible in absence of any clear evidence in rebuttal of those admission and oral explanation appears to be shrouded with ambiguity and falsehood. The evidence further would show that entire family members including the sisters of Sukriti Ranjan Das were residing in the said suit house, which would lead to establish that Sukriti Ranjan Das was not the absolute owner, but purchase was made by his father. Even otherwise, if it is held that the sale was executed as a Manager or Karta of Hindu Family, legal necessity is required to be established.

12. Perusal of the sale deed shows that Sukriti Ranjan Das exposed himself to be the sole and absolute owner and the entire sale consideration of Rs.60.00 lacs was received by him in person and sale deed purports that property is sold for the reason that he is getting a good price. In the sale deed, further statement was made that since money is required for domestic and other purposes of Sukriti Ranjan Das, the sale deed is executed. So the sale was not in capacity of Manager or Karta of a joint family.

13. The Supreme Court in the matter of Subhodkumar (supra) has dealt with the like issue wherein it held that when such kind of evidence comes to fore to show sale by Karta, the burden would shift on the alienee to prove that there was legal necessity and he made proper and bona fide enquiry as to the existence of such necessity. Evidence of the plaintiffs nowhere discloses such effort of enquiry or legal necessity whether was enquired by purchaser before the purchase made. In Subhodkumar (supra) the Supreme Court reiterated the view taken by it in the

matter of Sunil Kumar and another v Ram Prakash and others AIR 1988 SC 576.

14. In Sunil Kumar (supra) the Supreme Court held as under :

24. Although the power of disposition of joint family property has been conceded to the manager of joint Hindu family for the reasons aforesaid, the law raises no presumption as to the validity of his transactions. His acts could be questioned in the Court of law. The other members of the family have a right to have the transaction declared void, if not justified. When an alienation is challenged as being unjustified or illegal it would be for the alienee to prove that there was legal necessity in fact or that he made proper and bona fide enquiry as to the existence of such necessity. It would be for the alienee to prove that he did all that was reasonable to satisfy himself as to the existence of such necessity. If the alienation is found to be unjustified, then it would be declared void. Such alienations would be void except to the extent of manager's share in Madras, Bombay and Central Provinces. The purchaser could get only the manager's share. But in other provinces, the purchaser would not get even that much. The entire alienation would be void. [Mayne's Hindu Law 11th ed. para 396].

15. The defendant in her written statement has shown the family tree wherein she is shown as a granddaughter of Late Nand Lal Das, the father of Sukriti Ranjan Das. These relations and family tree is not disputed. As is held earlier the suit property was not purchased by Sukriti Ranjan Das from his own earning, therefore, would not be absolute property of Sukriti Ranjan Das and according to the family tree defendant being a granddaughter of Late Nand Lal Das, would be a co-parcener by virtue of amendment to Section 6 of the Hindu Succession Act to have a vested interest.

16. Further the property being a dwelling house, Section 44 of the Transfer of Property Act, 1882 would be relevant for the reason that the transferee is not a member of the family as such sale would not entitle him to have joint possession or other common or part enjoyment of the property. Section 44 would be relevant in the facts of the case, which is quoted below :

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.

17. Now the other question comes to fore, what would be purchaser's right to claim the possession. Admittedly, there is no physical partition of the property

between co-parceners whereas one of the co-sharer Sukriti Ranjan Das (father of the defendant) has sold the property to plaintiffs and have given a symbolic possession.

18. The Supreme Court in the matter of Ramdas v Sitabai & Ors. AIR 2009 SC 2735, had an occasion to discuss this issue wherein it was held that a co-sharer cannot put a vendee in possession although such a co-sharer may have a right to transfer his undivided share. The Supreme Court further held thus in paras 15 & 16 :

15) Without there being any physical formal partition of an undivided landed property, a co-sharer cannot put a vendee in possession although such a co-sharer may have a right to transfer his undivided share. Reliance in this regard may be placed to a decision of this Court in M.V.S. Manikayala Rao Vs. M. Narasimhaswami & Ors. [AIR 1966 SC 470], wherein this Court stated as follows:

"Now, it is well settled that the purchaser of a co-parcener's undivided interest in the joint family property is not entitled to possession of what he had purchased. His only right is to sue for partition of the property and ask for allotment to him of that which, on partition, might be found to fall to the share of the co-parcener whose share he had purchased."

16. It may be mentioned herein that the aforesaid findings and the conclusions were recorded by the Supreme Court by placing reliance upon an earlier judgment of this Court in Sidheshwar Mukherjee Vs. Bhubneshwar Prasad Narain Singh & Ors. [AIR 1953 SC 487], wherein this Court held as under:-

"All that (vendee) purchased at the execution sale, was the undivided interest of co-parcener in the joint property. He did not acquire title to any defined share in the property and was not entitled to joint possession from the date of his purchase. He could work-out his rights only by a suit for partition and his right to possession would date from the period when a specific allotment was made in his favour.

(Emphasis added)

19. Further the Supreme Court in the matter of Kailash Pati Devi v Bhubneshwari Devi and Others 1984 AIR (SC) 1802 has laid down that what is purchaser's right when the joint family property is purchased. It held that purchaser has the right to file a general suit for partition against the members of the joint family and, indeed, that may be the proper remedy for him to adopt to effectuate his purchase.

20. Similarly, in the case of Devendra Singh Thakur (supra) the High Court of Madhya Pradesh held that when dwelling house belonging to undivided family, one of the co-parcener could not alienate any specific portion of the house without partition.

21. In the light of the aforesaid principles; applying the well settled law; and for

the reasons stated herein above, it is vivid that the purchaser could not be put into specific possession of the property without partition of co-parcenary property.

22. In the result, the present appeal is allowed and the impugned judgment and decree is set aside.

23. Consequently, in view of discussions above, the cross objection filed by the respondents/plaintiffs stands dismissed. No order as to cost(s).

24. A decree be drawn accordingly.