

(2013) 07 UK CK 0060

In the Uttarakhand High Court

Case No : F.A. No. 102 of 2011 in Stay Application No. 9348 of 2011

Ramesh Chand Agarwal

APPELLANT

Vs

Smt. Hema Agarwal

RESPONDENT

Date of Decision : 03-07-2013

Acts Referred:

Citation : (2013) 100 ALR 92 : (2013) 100 ALR 570 : (2013) 120 RD 829

Hon'ble Judges : Prafulla C. Pant, J

Bench : Single Bench

Advocate : Siddhartha Singh, for the Appellant; N.S. Negi, for the Respondent

Final Decision : Dismissed

Judgement

Prafulla C. Pant, J.—This appeal, preferred u/s 96 of Code of Civil Procedure, 1908, is directed against the judgment and decree dated 29.8.2011 passed by Civil Judge (Senior Division) Rishikesh, in Original Suit No. 204 of 2008 whereby said Court has dismissed the suit filed by the plaintiff for injunction against the respondent. Heard learned Counsel for the parties, and perused the Lower Court record.

2. Brief facts of the case are that plaintiff Ramesh Chand Aggarwal filed a Suit No. 204 of 2008 before Civil Judge (Senior Division) Rishikesh, seeking perpetual injunction against the defendant for issuance of direction that she be restrained from interfering in peaceful possession of plaintiff over land in suit. It is pleaded in the plaint filed by the plaintiff that the plaintiff purchased land in suit vide sale-deed dated 2.4.2002 for a consideration of Rs. 6,72,000/-. It is further pleaded that amount of only Rs. 50,000/- was contributed by his son Devendra Kumar Agarwal (since died) in the consideration paid to the seller. As such, the share of son of the plaintiff was only 6.7%. The plaintiff further pleaded that he is in possession of the land in suit. It is also pleaded that Devendra Kumar Agarwal, son of the plaintiff died on 31.10.2007. Defendant Hema Agarwal is widow of Devendra Kumar Agarwal. It is alleged in the plaint that after the death of

Devendra Kumar Agarwal, the defendant implicated the plaintiff in frivolous criminal proceedings. It is further alleged that she wants to forcibly grab the land in suit.

3. The defendant contested the suit and filed her written statement. She admitted that the land in suit was purchased through the sale-deed dated 2.4.2002 and 6.5.2002, but as to the small contribution of her husband, she stated that her husband Devendra Kumar Agarwal was a Civil Engineer, and he was doing the business of building construction. It is further stated in the written statement that after 1994, when Devendra Kumar Agarwal took over the business, the plaintiff almost stopped doing business. It is also pleaded in the written statement that it was Devendra Kumar Agarwal, who used to earn and pay to his father Ramesh Chand Agarwal out of love and affection. It is also pleaded that in 1997 Ramesh Chand Agarwal left the house, and could be traced in the year 2000, whereafter, his wife Ramwati died, and the plaintiff started living in the house with one Junita Pradhan. It is also pleaded in the written statement that the defendant Hema Agarwal got married to Devendra Kumar Agarwal in April, 2001, and a son-named Devansh born out of the wedlock on 12.2.2002. It is admitted that on 31.10.2007, Devendra Kumar Agarwal died in Global Hospital, Hyderabad, due to cardiovascular attack. The defendant further pleaded that it was Devendra Kumar Agarwal, who got constructed the house over the part of the land in suit. It has been specifically pleaded that this suit is instituted by the plaintiff to deprive Master Devansh of his share after the death of his father. It is also pleaded in the written statement that the suit is barred by the Benami-Transactions (Prohibition) Act, 1988. It is also pleaded that the plaint is liable to be rejected under Order VII, Rule 11 of C.P.C., 1908.

4. On the basis of the pleadings of the parties following issues were framed by the Trial Court:

- (i) Whether the plaintiff is owner in possession of the land in suit, as alleged?
- (ii) Whether the defendant is attempting to interfere in the peaceful possession of the plaintiff over the disputed land?
- (iii) Whether the plaint is liable to be rejected under Order VII, Rule 11 of C.P.C., 1908?
- (iv) To what relief, if any, the plaintiff is entitled?
- (v) Whether the suit is barred by Benami Transactions (Prohibition) Act, 1988, if so its effect?

5. After recording the evidence, and hearing the parties, the Trial Court decided issue Nos. 1 and 2 against the plaintiff. Issue No. 3 was decided in favour of the plaintiff, rest of the issues were decided against the plaintiff, and suit was dismissed. Aggrieved by judgment and decree dated 29.8.2011, passed by Civil Judge (Senior Division) Rishikesh, in Suit No. 204 of 2008, this appeal is filed by the plaintiff.

6. There are two points of determination on which the learned Counsel for the plaintiff argued the appeal which are as under:

(i) Whether the Trial Court has erred in law in ignoring the provision contained in section 45 of the Transfer of Property Act, 1882?

(ii) Whether the Trial Court has erred in law in making out a third case beyond the pleadings of the parties?

Point of determination No. 1.--

7. Section 45 of Transfer of Property Act, 1882, reads as under:

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 is 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.

8. From the plaint itself, it is clear that plaintiff admits that the land in suit was purchased not only in his own name, but also in the name of his son Devendra Kumar Agarwal. But he has pleaded that the contribution on the part of his son was only Rs. 50,000/- which comes out to be 6.7%. However, perusal of the copy of the sale-deed dated 2.4.2002, shows that there is no mention as to what was the part of consideration paid by the plaintiff, and what part was the amount paid by his son Devendra Kumar Agarwal. Both of them has been shown as two purchasers without specifying their shares purchased in the property. P.W. 1 Ramesh Chand Agarwal has supported the plaint case alleging the contribution of his son was only 6.7%, as he paid only Rs. 50,000/- out of the total consideration, but there is no direct documentary evidence of said fact. Attention of this Court is drawn to the copies of the statement of Bank Account of plaintiff, but from the said papers it is not clear as to what was the actual contribution made by the plaintiff. On the other hand, Paper No. 26-C/29, copy of statement of Bank Account of Devendra Kumar Agarwal, relating to his Account with Bank of Maharashtra shows that on 3.12.2005 Rs. 6,80,000/- was transferred in the Account of his father. In the circumstances, it is difficult to say that actual share of the plaintiff in the property in suit is 93%. Copy of the Khatauni Paper No. 26-C/5 shows that the land in the suit (Khata Khatauni No. 00674) the names of both father and son (Ramesh Chand Agarwal and Devendra Kumar Agarwal).

9. In the above circumstances, this Court is of the view that the Trial Court has committed no error of law in deciding the issues No. 1 and 2 against the plaintiff. Point of determination No. 1 is decided accordingly holding that the Trial Court has not erred in law in interpreting section 45 of Transfer of Property Act, 1882, while deciding the case.

Point of determination No. 2.--

10. It is argued on behalf of the appellant that the Trial Court has developed the third case regarding share of Devansh (minor grandson of the plaintiff) who was neither a party in the suit, nor any relief was claimed against him, But on carefully going through the evidence on record, this Court finds that no third case has been made out by the Trial Court. In fact, it is the plaintiff who has concealed the fact that at the time of death of his son Devendra Kumar Agarwal, his minor son Devansh was living with his mother (defendant Hema Agarwal). As such, at the time of death of Devendra Kumar Agarwal his share was inherited not only by the widow, but also by the minor son. It has come on the record that during the pendency of the suit defendant Hema Agarwal got remarried with one Naresh Gupta and lives with him in Gurgaon alongwith Devansh (minor son born out of the first wedlock).

11. Therefore, this Court finds that in fact the plaintiff by filing the suit only against the widow of his deceased son attempted to deprive his minor grandson, from his rightful share in the property in suit. On the day of institution of the suit defendant was also co-sharer in the land in suit with her minor son, as she had not remarried by then. The plaintiff could not have maintained the suit for injunction against co-sharer without claiming relief of partition. In the opinion of this Court, the plaintiff has not come up with clear hands. As such, the discretionary and equitable remedy is rightly refused by the Trial Court to the plaintiff as against the defendant (who is now remarried to a third person).

12. Accordingly, the point of determination No. 2 also stands answered against the plaintiff. For the reasons as discussed above, this appeal has no force which is liable to be dismissed. Accordingly, the appeal is dismissed with costs.