

---

**(2010) 06 SHI CK 0044**

**In the High Court Of Himachal Pradesh**

**Case No : Regular Second Appeal No. 163 of 2000**

Yashpal and Others

APPELLANT

Vs

Amar Nath and Others

RESPONDENT

---

**Date of Decision :** 21-06-2010

**Acts Referred:**

Evidence Act, 1872 — Section 90

**Citation :** (2010) 06 SHI CK 0044

**Hon'ble Judges :** Sanjay Karol, J

**Bench :** Single Bench

**Final Decision :** Allowed

---

## **Judgement**

Sanjay Karol, J.—The appeal stands admitted on the substantial questions of law.

2. The appellants herein are the original plaintiffs/their successors-in-interest but are referred to as the plaintiffs. The respondents herein are the original defendants/their successors-in-interest but are referred to as the defendants.

3. Smt. Nanaki Devi is alleged to have owned the suit land. Undisputedly, Smt. Nanaki Devi had two daughters namely Smt. Sundri Devi, Smt. Saloni Devi and one son Sh. Balaru Ram. Smt. Nanaki Devi admittedly executed a Gift Deed (Ext.PW-1/D) bequeathing her share in favour of Smt. Sundri Devi. There is also no dispute that in fact the suit property was originally not owned by Smt. Nanaki Devi but her husband Sh. Kanshi Ram. So in effect Smt. Nanaki Devi, her two daughters and son were to inherit the property as legal heirs. Smt. Sundri Devi agreed to sell the entire suit land in favour of Sh. Sant Parkash (predecessor-in-interest of the plaintiffs herein) in terms of agreement to sell dated 19.10.1976.

4. On 21.6.1993, the legal heirs of Sh. Sant Parkash filed a suit for specific performance of the agreement against the legal heirs of Smt. Sundri Devi. In the said suit, Sh. Amar Nath, present respondent No. 1, legal heir i.e. nephew of Sh. Balaru Ram, was also impleaded as a party.

5. The legal heirs of Smt. Sundri Devi as also Sh. Amar Nath opposed the suit by filing separate written statements.

6. On the basis of the pleadings, the trial Court framed the following issues:

1. Whether late Smt. Sundri Devi has executed an agreement to sell on 19.10.1976 for a sale price of Rs. 6000/-. If so to what effect? ...OPP

2. Whether Smt. Sundri Devi was the sole owner in possession of the suit property? ..OPP

3. Whether the plaintiffs are entitled for relief of specific performance of contract as prayed for? ...OPP

4. Whether the suit is not maintainable? ...OPD

5. Whether the suit is bad for mis-joinder of parties? ...OPD

6. Whether the suit is properly valued for the purpose of court fees and jurisdiction? ...OP Parties

7. Whether the suit is not maintainable in view of the operation H.P. Land Reforms and Tenancy Act? ...OPD

8. Relief.

7. Appreciating the evidence on record (oral and documentary) the trial Court decreed the plaintiffs' suit by holding that the agreement to sell executed between Smt. Sundri Devi and Sh. Sant Parkash was a valid agreement and that Smt. Sundri Devi was the owner in possession of the suit land and was, therefore, competent to execute the agreement to sell. The defendants were directed to get the requisite sale deed executed and registered in favour of the plaintiffs with respect to the land and houses comprised in Khewat No. 133, Khatauni No. 232 & Khasra Nos. 266 and 267 measuring 59.85 sq. mtrs. as per settlement/Misal Haquiyat Bandobast Jadeed for the year 1989-90, Mauza Miyan-ka-Mandir, H.B. No. 46/2, situated in Nahan City, corresponding to Khasra No. 241 of KHASRA PAIMAISH of land. Plaintiffs were directed to pay the balance sale consideration of Rs. 1000/- to the defendants. The suit was decreed in terms of judgment and decree dated 11.6.1998 passed by the Sub Judge Ist Class, Sirmaur District at Nahan H.P.

8. Legal heirs of Smt. Sundri Devi accepted the same and did not file any appeal. However, Sh. Amar Nath filed Civil Appeal No. 37-CA/13 of 1998 titled as Amar Nath v. Yash Pal and Ors. before the District Judge, Sirmaur District at Nahan H.P. The said appeal stands decided in terms of the judgment and decree dated 5.11.1999 which has been impugned therein.

9. The lower Appellate Court while allowing the appeal dismissed the plaintiffs' suit in toto for the reason that the suit was barred by limitation; the plaintiffs were not ready and willing to perform their part of contract under the agreement to sell in question; the plaintiffs had failed to prove that Smt. Sundri Devi was

the exclusive owner in possession of the entire suit land. Gift Deed (Ext.PW-1/D) executed by Smt. Nanaki Devi in favour of Smt. Sundri Devi pertained to Khasra No. 241/2 measuring 100 sq. yards and not Khasra No. 241 min, qua which the agreement to sell was executed by Smt. Sundri Devi on 19.10.1976.

10. Having heard learned Counsel for the parties, in my considered view, substantial questions of law Nos. 2 & 3 do not arise for consideration at all.

11. There is no doubt that the plaintiffs had failed to show that Khasra No. 241/2 and Khasra No. 241 min are same and similar or arise out of the original khasra number. Even though Sh. Amar Nath has urged that he is owner in possession of 50% of the suit land by virtue of will executed by Sh. Balaru Ram in his favour but however this question is not being adverted to for the simple reason that it was for Sh. Sant Parkash to show the extent of the land which Smt. Nanaki Devi was owning at the time when a valid gift deed was executed in favour of Smt. Sundri Devi. Obviously Smt. Sundri Devi could not have entered into an agreement to sell land of which she was not even an owner. Undoubtedly Sh. Amar Nath has admitted in his cross-examination that the suit land was transferred by Smt. Nanaki Devi in favour of Smt. Sundri Devi in terms of Gift Deed (Ext.PW-1/D), but however this statement cannot be read in isolation as from his statement read in entirety it is evident that he in fact is disputing the ownership of Smt. Nanaki Devi on the entire suit land.

12. While addressing the Court Ms. Jyotsna Rewal Dua, learned Counsel for Sh. Amar Nath fairly stated that her client would have no objection if a decree with respect to 50% of the suit land is passed in favour of the plaintiffs. She invited my attention to the fact that even though there is no finding with regard to the possession of the parties on the suit land but however there are revenue entries recording Sh. Amar Nath to be the owner in possession of 50% of the suit land.

13. The Court below dismissed the plaintiffs' suit holding the same to be barred by limitation. Now, in my considered view this could not have been done without affording any opportunity of hearing or considering the entire material on record. No issue with respect to limitation was got framed by the parties. The issues were struck in the presence of the parties. Even the lower Appellate Court did not afford any opportunity to the parties to lead any evidence on this aspect. Record does not suggest the suit to be barred by limitation. No such plea is also taken herein. Hence, the findings returned by the Court below dismissing the suit on the point of limitation are set aside.

14. The lower Appellate Court, in my considered view, has further erred in holding that Gift Deed (Ext.PW-1/D) could not be looked into for the reason that as on the date when the suit was filed the document was less than 30 years of age. In this regard, Section 90 of the Indian Evidence Act, 1872 is evidently clear. The age of the document is to be seen as on the date when it is produced in the Court and not on the date when the suit is filed. In this behalf Shri Karan Singh Kanwar, learned Counsel for the plaintiffs has invited my attention to the

following decisions rendered by different High Courts;

Babu Nandan and Others Vs. The Board of Revenue and Others, ; Sarat Chandra Mondal and Others Vs. Panchanan Mondal and Another, .

15. Having gone through the statements of the relevant witnesses on record (Smt. Krishna Devi (PW-1), Smt. Krishna Devi (PW-2), Sh. Mohan Singh (PW-3), Sh. Rattan Singh (PW-4), Sh. Amar Nath (DW-1) & Sh. Suresh Kumar (DW-2)), I find that the Court below has seriously erred in holding that the plaintiffs were not ready and willing to perform their part of the agreement. In fact the matter was pursued and only upon the defendants' refusal to abide by the terms of the agreement the plaintiffs filed the suit.

16. The lower Appellate Court seriously erred in dismissing the plaintiffs' suit in toto.

17. In view of the aforesaid findings the judgment and decree passed by the Court below is partly set-aside and the plaintiffs suit is partly decreed.

18. There is no dispute that old khasra numbers have changed and new khasra numbers have been assigned. As per order dated 21.4.1999 in case No. 2 of 1999 passed by the Settlement Collector, Shimla Division, the position which emerges on record is as under:

Sr.No.

Kh/Kh. No.

Name of owner

Name Kastkar

Kh. No./old

Kh. No. New

Land with category

1.

137

Smt. Sundri d/o Kanshi Ram s/o Nathu @ Amar Nath s/o Sunder Singh s/o Shish Ram

Possessi on self Amar Nath Hisadar

241 min

266

28-35 Jaye safed

137/232

Permanent residents

SantParkash s/o Shankar Lal s/o Munshi Ram

241 min

267

31-50 Gair mumkin makan pucca one floor residenti al.

19. Smt. Sundri Devi and Sh. Amar Nath are recorded to be owners in possession of the suit land. Sh. Amar Nath is in exclusive possession of new Khasra No. 266 measuring 28-35 sq. mtrs. and Sh. Sant Parkash is in possession of new Khasra No. 267 measuring 31-50 sq. mtrs.

20. As such, the plaintiffs suit qua new Khasra No. 267 measuring 31-50 sq. mtrs. with structure built thereupon is decreed. Balance sale consideration as directed by the trial Court is directed to be paid to the legal heirs of Smt. Sundri Devi upon execution of the Sale Deed. The legal heirs of Smt. Sundri Devi are directed to execute the Sale Deed in terms of agreement dated 19.10.1976. Qua new Khasra No. 266 measuring 28-35 sq. mtrs. which is in ownership and possession of Sh. Amar Nath, the suit is dismissed.

21. The appeal is accordingly allowed and the substantial questions of law are answered accordingly.