

Before Anil Kshetarpal, J.

KAPIL KUMAR—Appellant

versus

NARESH KUMAR AND OTHERS—Respondents

RSA No.2730 of 2012

January 08, 2019

Transfer of Property Act, 1882—S. 45—Joint transfer for consideration—Where it is undisputed that two or more vendees in sale deed have contributed sale amount in different proportion, what would be their respective share in property, so purchased—Held, they are, in absence of a contract to the contrary, in the case of

Joint fund identical to their share in such fund.

Separate fund- in proportion to share contributed.

Unspecified amounts- presumed to be co sharer or co owner in equal share.

Held that, on careful reading of Section 45, it is apparent that three eventualities have been envisaged by the aforesaid provisions:

- 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.

(Para 19)

Sanjiv Gupta, Advocate
for the appellant.

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

ANIL KSHETARPAL, J.

CM No.6962-C of 2016

(1) 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.

(2) Application is allowed.

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

CM No.7376-C of 2012

(4) 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.

(5) Application is allowed.

Main case

(6) 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.

(7) 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?

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

(9) 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 Rs.4800/- out of sale consideration of Rs.5300/-. Thus, Shiv Narain and Jagan Nath paid Rs.2400/- each whereas Ram Chander contributed Rs.500/-.

(10) 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 1/3rd each. It is alleged that Ram Chander bequeathed through a registered Will his share of 1/3rd 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 1/3rd share in the property in favour of M/s Telu Ram Ganda Mal Timber Merchant, Ambala Cantt.

(11) 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.

(12) 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.

(13) 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.

(14) 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.

(15) 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.

(16) 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 Rs.2400/- each (Rs.4800/- in total) out of the total sale consideration of Rs.5300/-. Thus, Sh. Ram Chander only contributed Rs.500/-.

(17) 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?

(18) 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.”

(19) 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.

(20) As noticed above, both the Courts have noticed that Shiv Narain and Jagan Nath had jointly contributed Rs.4800/- whereas Ram Chander had contributed only Rs.500/-. In such a situation, Shiv Narain would be owner to the extent of 24/53rd share, Jagan Nath would be entitled to 24/53rd share and Ram Chander would be entitled to 5/53rd share. Thus, both the Courts erred in declaring that Ram Chander, Jagan Nath and Shiv Narain were owners to the extent of 1/3rd 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.

(21) 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 $1/3^{\text{rd}}$ 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.

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

(23) 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.

(24) Second reason assigned by the Court is also without any basis as Shiv Narain had purchased $24/53^{\text{rd}}$ share in the property.

(25) 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 $24/53^{\text{rd}}$ 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 $1/9^{\text{th}}$ 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 $1/9^{\text{th}}$ share in the property left behind by Jagan Nath would be valid.

(26) 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. $24/53^{\text{rd}}$ would be inherited by Jagan Nath and Sham Narain equally. Thus, Jagan Nath who was already owner of $24/53^{\text{rd}}$ share would additionally get $12/53^{\text{rd}}$ share on the death of Shiv Narain and Sham Narain, similarly, would get $12/53^{\text{rd}}$ 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. $5/53^{\text{rd}}$ share.

(27) 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.

(28) 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 $1/9^{\text{th}}$ 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 $4/53^{\text{rd}}$ share executed by Harish Kumar in the entire property is valid.

(29) 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 $4/53^{\text{rd}}$ share i.e. $1/9^{\text{th}}$ of the share of Jagan Nath in the property and the sale deed in favour of defendant No.4- appellant is declared valid upto $4/53^{\text{rd}}$ share.

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

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

Ritambhara Rishi