REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 5415 OF 2011

SHYAM NARAYAN PRASAD … APPELLANT

VERSUS

KRISHNA PRASAD AND ORS. … RESPONDENTS

J U D G M E N T

S.ABDUL NAZEER, J.

1. Defendant No.1, Shyam Narayan Prasad is the appellant before us. In this appeal he has questioned the legality and correctness of the judgment and decree dated 15.5.2006 passed by the High Court of Sikkim in RSA No.1 of 2005.

2. One Gopalji Prasad is the common male ancestor of the parties. The appellant and Laxmi Prasad, 5th respondent herein, are the sons of Gopalji Prasad. Respondent Nos. 1 to 3 are the sons of Laxmi Prasad and respondent No.4 is the son of the 1st respondent. Respondent Nos.1 to 4 are the plaintiffs in the suit, being

Civil Suit No.10 of 2001, and the appellant and respondent Nos.5 and 6 are the defendants. No relief has been claimed against respondent No.6 (defendant No.3 in the suit). For the sake of convenience, parties are referred to by the ranking in the trial court.

3. The plaintiffs filed the aforesaid suit against the defendants for a declaration that the document dated 30.1.1990 (Exhibit P2) executed between defendant Nos. 1 and 2 is invalid and for certain other reliefs. According to them, the family property was partitioned on 31.7.1987 between Gopalji and his five sons, namely, Laxmi Prasad, Ayodhya Prasad, Shyam Narayan Prasad, Dr. Onkarnath Gupta and Suresh Kumar. In the partition Gopalji has retained some of the properties for his personal use till his death. Laxmi Prasad got his share of property along with half portion of existing two-storey RCC building situated at Singtam Bazar, East Sikkim, wherein presently a liquor shop is being run. Shyam Narayan Prasad was allotted a shoe shop at Manihari which is run on a rented premises owned by Gouri Shankar Prasad. He was also allotted other properties in the partition.

4. After the partition, the sons of Gopalji were put in possession of their share of the properties. However, Laxmi Prasad (defendant No.2) in collusion with his brother Shyam Narayan Prasad (defendant No.1) executed an agreement dated 30.1.1990 exchanging the liquor shop at Singtam Bazar, East Sikkim with the shoe shop at Manihari. It is their contention that since the property is an ancestral

property, they also have a share in the property which had fallen to the share of defendant No.2 and that he has no legal right to exchange the property with defendant No.1. It was further contented that the deed of exchange dated 30.1.1990 entered into between defendant Nos.1 and 2 is in relation to an immovable property. Since the said document has not been registered, it has no legal effect.

5. Defendant No.1 has filed the written statement stating that the suit properties are not ancestral properties. He has denied the contention of the plaintiffs that the document dated 30.1.1990 is not a valid document. It was further contended that the said document has already been given effect from the date of its execution.

6. Defendant No. 2 has filed the written statement contending that for the alleged exchange deed, defendant No. 1 had approached him for exchanging only the business of liquor shop at Sikkim with that of shoe shop at Gangtok for convenience and that he had signed the document in good faith believing that the exchange deed was only for the two businesses, and further, admitted that exchange deed was made and executed behind the back of the plaintiffs.

7. On the basis of the pleadings of the parties, the trial court has framed relevant issues. Parties have led evidence in support of their respective contentions. On appreciation of the materials on record, the trial court had come to the conclusion that the property in question is an ancestral property and that the plaintiffs being the sons and grandson of defendant No.2, they have also equal

share in the property allotted to him in the partition. The suit was accordingly decreed.

8. The first defendant challenged the said judgment and decree by filing an Appeal No.2 of 2003 before the District Judge, Sub-Division-II, Sikkim at Gangtok. The District Judge by judgment and decree dated 19.11.2004 allowed the appeal, set aside the judgment and decree of the trial court and dismissed the suit. The plaintiffs filed a Second Appeal No.1 of 2005 challenging the judgment and decree of the District Judge before the High Court. The High Court has set aside the judgment and decree of the District Judge and restored the judgment and decree of the trial court.

9. The contention of the learned counsel for the appellant/defendant No.1 is that the entire property of Gopalji was the self acquired property and he has divided the property amongst his five sons by a deed of partition dated 1.3.1988. According to the deed of settlement dated 30.1.1990 between defendant Nos. 1 and 2, only the businesses were transferred and not the buildings. Therefore, the sons and the grandson of defendant No.2 have no right to seek cancellation of the said deed. There is no exchange of immovable property as contended by the plaintiffs. Therefore, the settlement deed does not require registration. The parties have acted upon the said agreement. In the circumstances, possession of the appellant is

protected under Section 53A of the Transfer of Property Act, 1882 (for short 'the T.P. Act').

10. On the other hand, learned advocate appearing for the respondent Nos. 1 to 4/plaintiffs submits that the subject matter of the deed of settlement dated 30.1.1990 is a joint family property. The recitals of this document clearly show that there is a transfer of immovable property. The plaintiffs, being the lineal descendants of defendant No.2, are the members of the copercenary. They have a right and interest over the property in question. The settlement deed dated 30.1.1990 has not been registered. Hence, it is inadmissible in evidence. Defendant No.1 has not pleaded in his written statement that he has taken the possession of the property in part performance of the contract. Therefore, it is not open for him to claim the benefit of Section 53A of the T.P. Act. Learned counsel prays for dismissal of the appeal.

11. Having regard to the contentions urged, the first question for consideration is whether the property allotted to defendant No.2 in the partition dated 31.07.1987 retained the character of a coparcenary property. Admittedly, Gopalji Prasad and his five sons partitioned the property by a deed of partition dated 31.07.1987. It is clear from the materials on record that Gopalji Prasad retained certain properties in the partition. Certain properties had fallen to the share of defendant No.2 who is the father of plaintiff Nos. 1 to 3 and grandfather of plaintiff No. 4. Certain

properties had fallen to the share of the first defendant. The trial court has held that the properties are ancestral properties. The High Court has confirmed the finding of the trial court. We do not find any ground to disagree with this finding of the courts below.

12. It is settled that the property inherited by a male Hindu from his father, father's father or father's father's father is an ancestral property. The essential feature of ancestral property, according to Mitakshara Law, is that the sons, grandsons, and great grandsons of the person who inherits it, acquire an interest and the rights attached to such property at the moment of their birth. The share which a coparcener obtains on partition of ancestral property is ancestral property as regards his male issue. After partition, the property in the hands of the son will continue to be the ancestral property and the natural or adopted son of that son will take interest in it and is entitled to it by survivorship.

13. In **C. Krishna Prasad** v. **C.I.T, Bangalore**, 1975 (1) SCC 160, this Court was considering a similar question. In the said case, C. Krishna Prasad, the appellant along with his father Krishnaswami Naidu and brother C. Krishna Kumar formed Hindu undivided family up to October 30, 1958, when there was a partition between Krishnaswami Naidu and his two sons. A question arose as to whether an unmarried male Hindu on partition of a joint Hindu family can be assessed in the status of undivided family even though no other person besides him is a member of

the family. It was held that the share which a coparcener obtains on partition is ancestral property as regards male issue. It was held as under:

> "**The share which a coparcener obtains on partition of ancestral property is ancestral property *as regards his male issue*. They take an interest in it by birth, whether they are in existence at the time of partition or are born subsequently. Such share, however, is ancestral property only as regards his male issue**. *As regards other relations*, it is separate property, and if the coparcener dies without leaving male issue, it passes to his heirs by succession (see p. 272 of *Mulla's Principles of Hindu Law*, 14th Ed.). A person who for the time being is the sole surviving coparcener is entitled to dispose of the coparcenary property as if it were his separate property. He may sell or mortgage the property without legal necessity or he may make a gift of it. If a son is subsequently born to him or adopted by him, the *alienation*, whether it is by way of sale, mortgage or gift, will nevertheless stand, for a son cannot object to alienations made by his father before he was born or begotten".
>
> (emphasis supplied)

14. In **M. Yogendra and Ors.** v. **Leelamma N. and Ors.** 2009 (15) SCC 184, it was held as under:

> "**It is now well settled in view of several decisions of this Court that the property in the hands of a sole coparcener allotted to him in partition shall be his separate property for the same shall revive only when a son is born to him**. It is one thing to say that the property remains a coparcenary property but it is another thing to say that it revives. The distinction between the two is absolutely clear and unambiguous. In the case of former any sale or alienation which has been done by the

> sole survivor coparcener shall be valid whereas in the case of a coparcener any alienation made by the karta would be valid."
>
> (emphasis supplied)

15. In **Rohit Chauhan** v. **Surinder Singh and Ors.** 2013 (9) SCC 419, a contention was raised by the defendant No. 1 that after partition of the joint Hindu family property, the land allotted to the share of defendant No. 2 became his self acquired property and he was competent to transfer the property in the manner he desired. It was held that the property which defendant No. 2 got by virtue of partition decree amongst his father and brothers was although separate property qua other relations but it attained the characteristics of coparcenary property the moment a son was born to defendant No. 2. It was held thus:

> "A person, who for the time being is the sole surviving coparcener as in the present case Gulab Singh was, before the birth of the plaintiff, was entitled to dispose of the coparcenary property as if it were his separate property. Gulab Singh, till the birth of plaintiff Rohit Chauhan, was competent to sell, mortgage and deal with the property as his property in the manner he liked. Had he done so before the birth of plaintiff, Rohit Chauhan, he was not competent to object to the alienation made by his father before he was born or begotten. **But, in the present case, it is an admitted position that the property which Defendant 2 got on partition was an ancestral property and till the birth of the plaintiff he was the sole surviving coparcener but the moment plaintiff was born, he got a share in the father's property and became a coparcener**. As observed earlier, in view of the settled legal position, the property

> in the hands of Defendant 2 allotted to him in partition was a separate property till the birth of the plaintiff and, therefore, after his birth Defendant 2 could have alienated the property only as karta for legal necessity. It is nobody's case that Defendant 2 executed the sale deeds and release deed as karta for any legal necessity. Hence, the sale deeds and the release deed executed by Gulab Singh to the extent of entire coparcenary property are illegal, null and void. However, in respect of the property which would have fallen in the share of Gulab Singh at the time of execution of sale deeds and release deed, the parties can work out
> their remedies in appropriate proceeding."
>
> (emphasis supplied)

16. Therefore, the properties acquired by defendant No.2 in the partition dated 31.07.1987 although are separate property qua other relations but it is a coparcenary property insofar as his sons and grandsons are concerned. In the instant case, there is a clear finding by the trial court that the properties are ancestral properties which have been divided as per the deed of partition dated 31.07.1987. The property which had fallen to the share of defendant No.2 retained the character of a coparcenary property and the plaintiffs being his sons and grandson have a right in the said property. Hence, it cannot be said that the suit filed by the plaintiffs was not maintainable.

17. This takes us to the next question as to whether the exchange deed at Exhibit P2 is admissible in evidence or not. The transfer of ownership of their respective properties by defendant Nos. 1 and 2 was done through Exhibit P2 deed of

exchange. It was contended by defendant No.1 that the exchange was only of the businesses. However, a careful perusal of Exhibit P2 clearly shows that the RCC building is also a subject matter of the deed of exchange. The value of RCC building exceeds Rs. 100/- which is not in dispute. Section 118 of the TP Act defines 'exchange' as under:

> "**118**. **"Exchange" defined**.-When two persons mutually transfer the ownership of one thing for the ownership of another, neither thing or both things being money only, the transaction is called an "exchange".
>
> A transfer of property in completion of an exchange can be made only in manner provided for the transfer of such property by sale".

18. It is clear from this provision that where either of the properties in exchange are immovable or one of them is immovable and the value of anyone is Rs.100/- or more, the provision of Section 54 of the TP Act relating to sale of immovable property would apply. The mode of transfer in case of exchange is the same as in the case of sale. It is thus clear that in the case of exchange of property of value of Rs. 100/- and above, it can be made only by a registered instrument. In the instant case, the exchange deed at Exhibit P2 has not been registered.

19. Section 49 of the Registration Act, 1908 provides for the effect of non-registration of the document which is as under:

> "**49**. **Effect of non-registration of documents required to be registered**.-No document required by section 17

> {or by any provision of the Transfer of Property Act, 1882 (4 of 1882)}, to be registered shall-
>
> (a) affect any immovable property comprised therein, or
>
> (b) confer any power to adopt, or
>
> (c) Be received as evidence of any transaction affecting such property or conferring such power,
>
> Unless it has been registered:"

20. Section 17(i)(b) of the Registration Act mandates that any document which has the effect of creating and taking away the rights in respect of an immovable property must be registered and Section 49 of the Registration Act imposes bar on the admissibility of an unregistered document and deals with the documents that are required to be registered under Section 17 of the Registration Act. Since, the deed of exchange has the effect of creating and taking away the rights in respect of an immovable property, namely, RCC building, it requires registration under Section 17. Since the deed of exchange has not been registered, it cannot be taken into account to the extent of the transfer of an immovable property.

21. In **Roshan Singh & Ors.** v. **Zile Singh & Ors.** 1988 (2) SCR 1106, this Court was considering the admissibility of an unregistered partition deed. It was held thus:

> "……Section 17(i)(b) lays down that a document for which registration is compulsory should, by its own force, operate or purport to operate to create or declare some right in immovable property……Two propositions must therefore flow:

> (1) A partition may be affected orally; but if it is subsequently reduced into a form of a document **and that document purports by itself to effect a division and embodies all the terms of bargain, it will be necessary to register it. If it be not registered, S.49 of the Act will prevent its being admitted in evidence**. Secondary evidence of the factum of partition will not be admissible by reason of S.91 of the Evidence Act, 1872."
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> (emphasis supplied)

22. It is clear from the above judgment that the best evidence of the contents of the document is the document itself and as required under Section 91 of the Evidence Act the document itself has to be produced to prove its contents. But having regard to Section 49 of the Registration Act, any document which is not registered as required under law, would be inadmissible in evidence and cannot, therefore, be produced and proved under Section 91 of the Evidence Act. Since Exhibit P2 is an unregistered document, it is inadmissible in evidence and as such it can neither be proved under Section 91 of the Evidence Act nor any oral evidence can be given to prove its contents. Therefore, the High Court has rightly discarded the exchange deed at Exhibit P2.

23. The last contention of the learned counsel for the appellant is in relation to application of Section 53A of the T.P Act. It is well settled that the defendant who intends to avail the benefit of this provision must plead that he has taken possession of the property in part performance of the contract. Perusal of the

written statement of the first defendant shows that he has not raised such a plea. Pleadings are meant to give to each side, intimation of the case of the other, so that, it may be met to enable courts to determine what is really at issue between the parties. No relief can be granted to a party without the pleadings. Therefore, it is not open for the first defendant/appellant to claim the benefit available under Section 53A of the T.P. Act.

24. In the result, this appeal fails and it is accordingly dismissed. There will be no order as to costs.

…..……...J.
(ABHAY MANOHAR SAPRE)

……..……J.
(S. ABDUL NAZEER)

New Delhi;
July 02, 2018.