



**AFR**

**HIGH COURT OF CHHATTISGARH, BILASPUR**

**FA No. 157 of 2020**

Dr. Chandrakant Bagh, Aged About 62 Years, S/o Late Dr. Ramchandra Bagh R/o Bus Stand Rajim Road, Abhanpur, Tahsil Abhanpur, District Raipur Chhattisgarh.

**---- Appellant**

**Versus**

1. Arvind Bagh, Aged About 61 Years, S/o Late Dr. Ramchandra Bagh, R/o Near Shiv Mandir, Gali No. 02 , Anand Nagar , Raipur , Tahsil And District Raipur Chhattisgarh.
2. Omprakash Ahuja, Aged About 55 Years, S/o Late Kunwarmal Ahuja R/o 30 Anand Nagar, Raipur, Tahsil And District Raipur Chhattisgarh.
3. Smt. Neeta Athwani, Aged About 46 Years, W/o Shankar Athwani R/o Near Kanhaiya Cloth Stores, Sarthi Chowk, Lakhe Nagar, Raipur, Tahsil And District Raipur Chhattisgarh.
4. Mohit Athwani, Aged About 24 Years, S/o Shankar Athwani R/o Near Kanhaiya Cloth Stores, Sarthi Chowk, Lakhe Nagar, Raipur, Tahsil And District Raipur Chhattisgarh.
5. Prakash Bagh, Aged About 65 Years, S/o Late Dr. Ramchandra Bagh R/o Behind Usha Building, Tikrapara, Bilaspur, Tahsil And District Bilaspur Chhattisgarh.
6. Smt. Vasanti Barhad Pandey, Aged About 58 Years D/o Late Dr. Ramchandra Bagh Address C/o Officer Commercial Tax, Circle No. 07, Krishna Glory Nai Duniya Building, Sai Nagar Raipur, Tahsil And District Raipur Chhattisgarh.

**---- Respondents**

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For appellant – Shri Manish Upadhyay, Advocate.

For respondent No.1- Shri Rishikant Mahobia, Advocate.

For respondent No.2-Shri Prafull N. Bharat, Sr. Advocate with Shri Akash Pandey, Advocate.

For respondents No.3 & 4 – Shri Arvind Shrivastava, Advocate.

For respondent No.5- Shri Shivam Mishra, Advocate appears on behalf of Shri Akhilesh Kumar, Advocate.

For respondent No.6 – Shri T.K. Jha, Advocate with Shri Tapan Kumar Chandra, Advocate.

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**Hon'ble Shri Justice Goutam Bhaduri &**  
**Hon'ble Shri Justice Radhakishan Agrawal**  
**Judgment on Board**

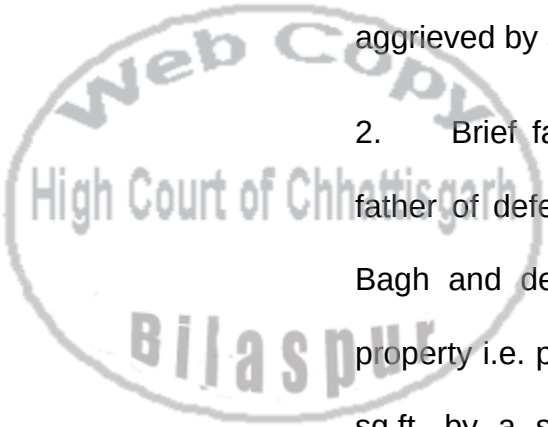
**Per Goutam Bhaduri, J.**

**12/03/2024**

Heard.

1. Instant appeal is against the judgment and decree dated 07/02/2020 passed by the District Judge, Raipur in Civil Suit No. 60-A/2017 whereby suit preferred by the plaintiff/appellant claiming partition and cancellation of the sale deed was dismissed. Being aggrieved by such order, the present appeal.

2. Brief facts of this case are that, one Dr. Ramchandra Bagh, the father of defendant No.1 namely Arvind Bagh, defendant No.5 Prakash Bagh and defendant No.6 Smt. Vasanti Barhad Pandey purchased a property i.e. plot no.31 comprised in khasra No.305/2 admeasuring 80x50 sq.ft. by a sale deed dated 25/01/1969 (Ex.P-15). According, to the plaintiff, the house was constructed over the said plot in 1971. Subsequently, Dr. Ramchandra Bagh died intestate on 17/06/1977. Thereafter, on the said house, Usha Bagh wife of Dr. Ramchandra Bagh alongwith his son Arvind Bagh were residing. During her life time, Usha Bagh executed a sale on 19/10/2015 wherein Arvind Bagh, one of the son gave his consent. The sale deed was executed in favour of defendant No.2 Omprakash Ahuja, defendant No.3 Neeta Athwani, defendant No.4 Mohit Athwani. Usha Bagh died on 29/12/2016. After her death, the plaintiff sent a notice for partition but eventually having not been acceded, after exchange of notice, civil suit was filed on 25/11/2017 whereby Dr.



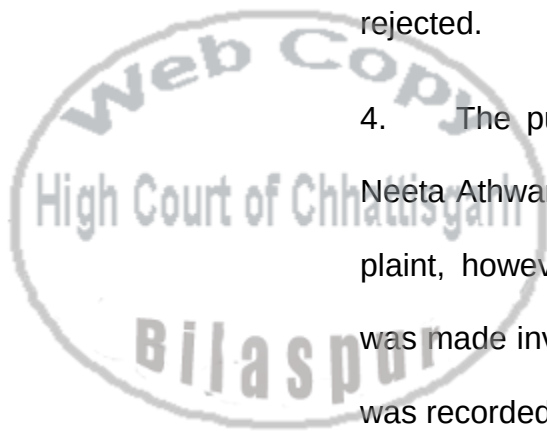


Chandrakant Bagh demanded  $\frac{1}{4}$  share and for appointment of a commissioner to carry out partition. Further the prayer was also to the extent that sale deed dated 19/10/2015 be declared null and void. The prayer was also made that permanent injunction be granted in favour of the plaintiff that the nature of property should not be changed.

3. Arvind Bagh, defendant No.1 one of the brother denied the averments of plaint and stated that the entire suit property was bequeathed in his favour by Usha Bagh by a WILL and they were residing in the said house without any protest, as such, the plaint was liable to be rejected.

4. The purchasers No.2 to 4 namely Omprakash Ahuja (D-2), Smt. Neeta Athwani (D-3) & Mohit Athwani (D-4) denied the allegations of the plaint, however, they stated that before such purchase, the publication was made inviting objection in the local newspaper and the property since was recorded in the name of Usha Bagh, after due verification of the facts, since no objection was received, they purchased the property for a valuable consideration. It was further stated that since the property was originally that of the cooperative society, in the records of the cooperative society, the name of Usha Bagh was recorded, therefore they being the bonafide purchasers, no claim can be entertained against them.

5. Defendants No.5 and 6 namely Prakash Bagh and Smt. Vasanti Barhad Pandey, brother and sister supported the contention of the plaintiff to say that no consent was obtained before such sale by mother and the property was purchased by father. They further stated that they had also asked for partition but no heed was given by defendant No.1.



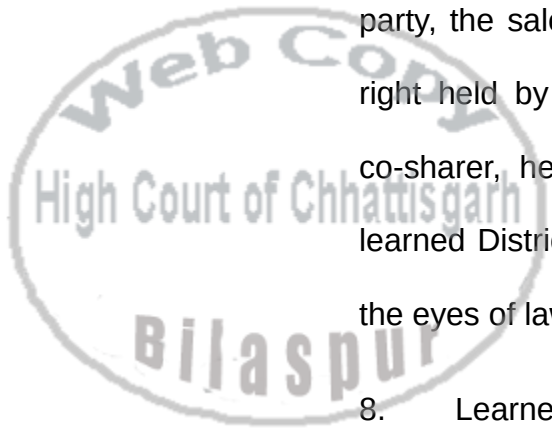


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6. On the basis of the pleading of the parties, learned District Judge framed four issues and it was held against the plaintiff/appellant. The plaintiff on its behalf examined two witnesses and defendants examined four witnesses. The learned District Judge after appreciation of the evidence and the facts, dismissed the suit. Hence, this appeal.

7. Learned counsel for the appellant would submit that the property in question was purchased by Dr. Ramchandra Bagh who was the original owner and one of the co-owner has executed the sale in respect of the entire property and the plaintiff and the other brother and sister being not a party, the sale cannot be held valid to the extent over and above to the right held by late mother. He would submit that the plaintiff being the co-sharer, he was entitled for a partition, therefore the finding of the learned District Judge is completely perverse and cannot be sustained in the eyes of law.

8. Learned counsel for respondent No.1, Arvind Bagh would submit that he is a formal party and would submit that judgment and decree of the court below is well merited. Learned counsels for respondents No.2, 3 and 4, the purchasers would submit that the pleading and evidence of the defendants specially DW-3 would show that they were the bonafide purchasers and the consent letter of the Arvind Bagh also which is filed before this Court would show that he was agreeable to the consent to the sale deed. It is further stated that the property having been mutated in the name of only Usha Bagh, after verification of the records, the property was purchased. Referring to the evidence of PW-1, the counsel would submit that when the notice was issued in 2013, the clouds over the title came



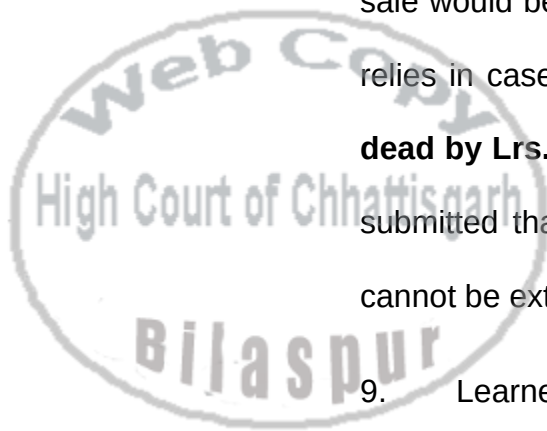


into being and the suit having been filed on 25/11/2017, the suit would be barred under Article 58 of the Indian Limitation Act. Further they would submit that no objection was raised while the publication was made and subsequently the sale deed was executed. They would submit that when the plaintiff allowed the construction to be carried out and even after publication, before purchase when no objection was raised, they would be estopped to raise any ground to agitate their right. Learned counsel further would submit that the objection having not been made consequent to the publication, thereby the implied consent would be deemed to be given and sale would be saved under Section 41 of the Transfer of Property Act. He relies in case reported in **(2005) 9 SCC 374** in between **A. Ambikamba dead by Lrs. & Anr. Vs. B. Ranagaswamy dead by Lrs.** and it is further submitted that only plaintiff has claimed such share, therefore that right cannot be extended to nullify the entire sale deed.

9. Learned counsel for the respondents No.5 and 6 namely Prakash Bagh and Smt. Vasanti Barhad Pandey, the brother and sister of the plaintiff supported the contention of the plaintiff and would submit that without their consent the sale having been executed, therefore the sale to the extent of share held by them is void.

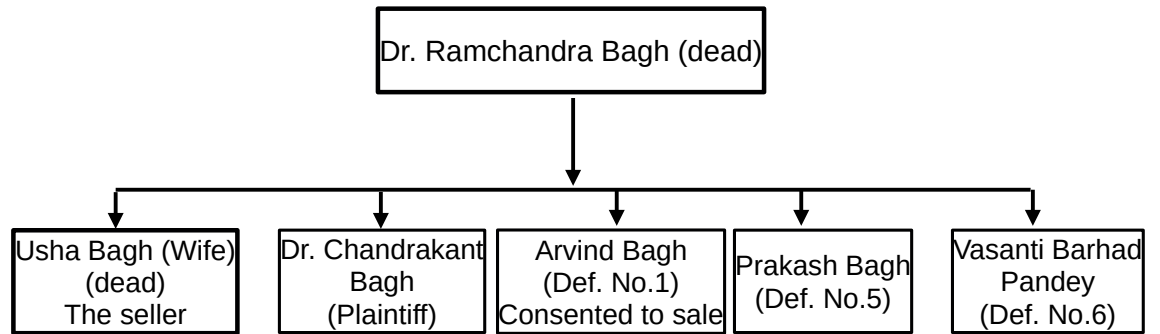
10. We have heard the learned counsel for the parties at length and perused the pleading and the evidence.

11. Before we go into the facts, the family tree would be necessary which is as under:-

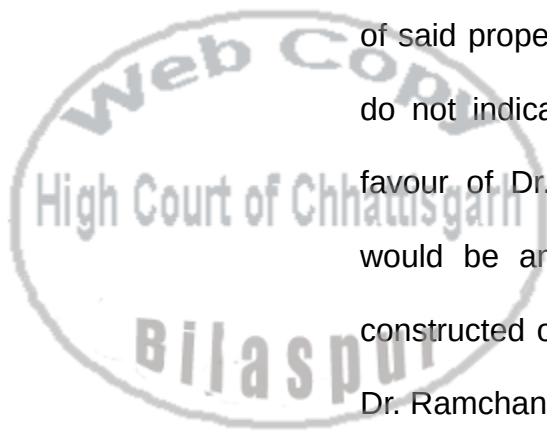




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12. Dr. Ramchandra Bagh purchased the suit property by a sale deed dated 25/01/1969 (Ex.P-15). The sale deed would show that the purchase was exclusively in the name of Dr. Ramchandra Bagh and the possession of said property was handed over to him by virtue of sale. The sale deed do not indicate involvement of any other person and exclusive sale in favour of Dr. Ramchandra Bagh appears to have been executed and would be an absolute owner of property. Thereafter, the house was constructed on suit scheduled property. Admittedly, the original purchaser Dr. Ramchandra Bagh died on 17/06/1977. After death of Dr. Ramchandra Bagh the suit scheduled property was recorded in the revenue records in the name of Usha Bagh, the mother of the plaintiff and wife of Dr. Ramchandra Bagh. It is no body's case that any WILL was executed by Dr. Ramchandra Bagh whereby the suit scheduled property was bestowed exclusively on his wife Usha Bagh. Therefore, Dr. Ramchandra Bagh having died intestate, leaving behind his wife and four children, the right over property would be governed by section 8 of the Hindu Succession Act, 1956. Section 8 postulates that the property of a Hindu dying intestate shall devolve amongst the heirs, being the relatives specified in class I of the Schedule. Class I of the Schedule of the Hindu Succession



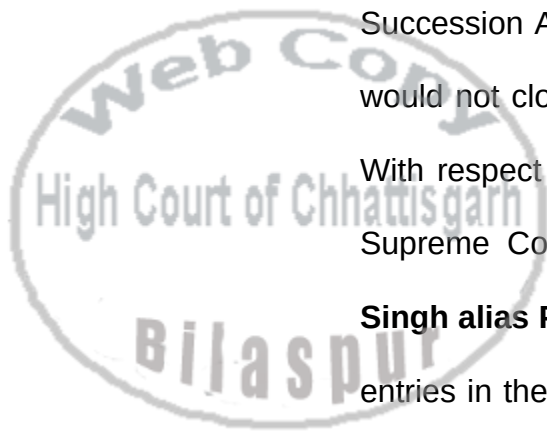


Act takes into sweep the son, daughter and widow, therefore the said property left by Dr. Ramchandra Bagh shall further be devolved equally according to Section 9 of the Act of 1956 and they would take simultaneously to the exclusion of others. This brings us to the fact that after death of Dr. Ramchandra Bagh, the property were equally held by five remaining heirs i.e. wife, three sons and one daughter.

13. Property though was recorded in the name of Usha Bagh in the revenue and the other records but it would not bestow her with the exclusive title over property shelving the section 8 and 9 of the Hindu Succession Act, 1956. The mutation of the name in the revenue records would not cloth wife Usha Bagh with the exclusive title over the property.

With respect to the mutation of name in revenue records as held by the Supreme Court in case of **Municipal Corporation, Gwalior v. Puran Singh alias Puran Chand and others** reported in **AIR 2014 SC 2665** that entries in the revenue record do not convey the title to the person whose name has been recorded in revenue record. The Court held referring to section 35 of Evidence Act that revenue entries are only relevant for paying land revenue and has nothing to do with the ownership.

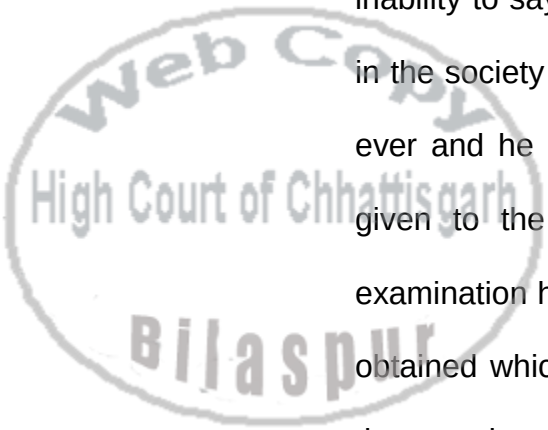
14. Be that as it may, by Ex.P-16 on 19/10/2015 the property was sold in it's entirety by Smt. Usha Bagh alone. In such sale the defendant No.1 Arvind Bagh appeared as consenting party. The description of the property would show that the said seller had not only sold their share of property but the whole of property was sold. The sale deed though describes that all the legal heirs have consented to the sale but we do not find any actual consent on the sale deed Ex.P-16.





15. Apart from the said fact, we went through the evidence led by the parties to determine whether such consent by co-sharer was there. Statement of DW-3 Omprakash Ahuja who is the purchaser though in the cross-examination para 11 has stated that the suit property was recorded in Anand Nagar Society in the name of Usha Bagh but no document to substantiate the same were produced. Cross-examination of said witness at para 18 it further shows that he has not enquired about how many legal heirs apart from Usha Bagh are there and the source of property was also not enquired by him. Evidence further would show that he expressed his inability to say as to how the exclusive name of Usha Bagh was recorded in the society document. He did not had a dialogue with seller Usha Bagh ever and he also expressed his inability to say whether any notice was given to the daughter of Usha Bagh. Further at para 11 of cross-examination he states that in respect of the property no search report was obtained which reflects that nucleus of the property was not enquired by the purchaser. Statement of PW-1 shows that during the cross-examination a suggestion was given that consent was given by one of the brother who was defendant No.5 i.e. Prakash Bagh which was denied, meaning thereby consent has not come to fore. The suggestion was further given to him that the consent letter was executed but it has not been produced, it is not before the Court but such suggestion having been given, this fact was established that the purchasers were in know of the fact that apart from Usha Bagh other heirs of Dr. Ramchandra Bagh also exists.

16. The purchaser tried to advance the theory of section 41 of sale by







the ostensible owner. For this we would like to consider important precedent in the matter.

17. The Supreme court in the matter of **Hardev Singh v. Gurmail Singh**, reported in **(2007) 2 SCC 404** has held at para 9 & 10 which is reproduced as under:-

“9. Application of Section 41 of the Act is based on the law of estoppel to the effect that if a man has represented that the transferor consents to an act which has been done and that he would not offer any opposition thereto, although the same could not have been lawfully done without his consent and he thereby induces others to do that from which they might have abstained, he could not question the legality of the act he had so sanctioned, to the prejudice of those who have so given faith to his words or to the fair inference to be drawn from his conduct.

10. The ingredients of Section 41 of the Act are:

(1) the transferor is the ostensible owner;

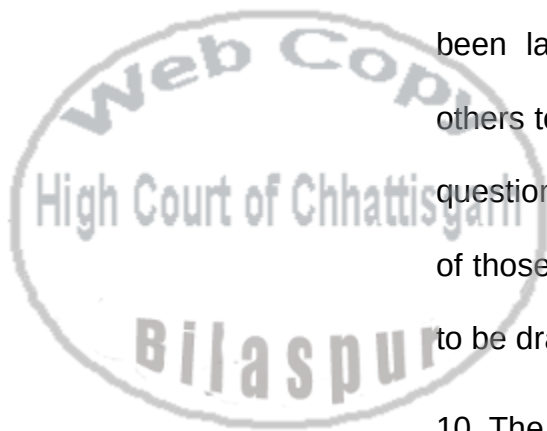
(2) he is so by the consent, express or implied, of the real owner;

(3) the transfer is for consideration;

(4) the transferee has acted in good faith, taking reasonable care to ascertain that the transferor had power to transfer.”

18. Further Supreme court in the matter of **Suraj Rattan Thirani and others v. Azamabad Tea Co. Ltd. And others** reported in **AIR 1965 SC 295** has held at para 14 & 15 which is reproduced as under:-

**14.** The next point urged was based on Section 41 of the Transfer of Property Act. It was said that Ismail was by reason of the entry in the revenue registers which the co-heirs did nothing to correct,

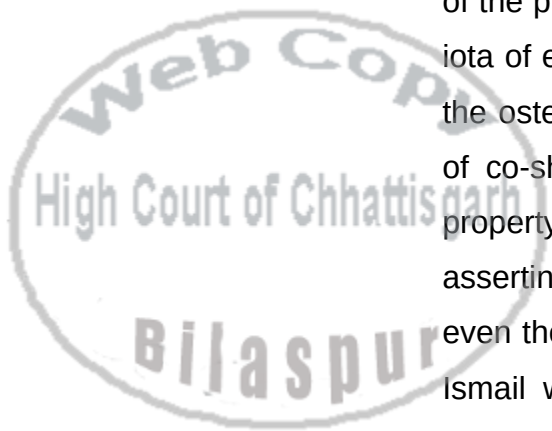




ostensibly the full owner of the property and hence the mortgage by him as full owner and the sale in court auction in execution of the decree by National Agency Co. Ltd, passed the full title to the Tea Estate and that the co-heirs, were consequently estopped from disputing the defendant's right to the full 16 as share in the property.

**15.** In order that Section 41 of the Transfer of Property Act could be attracted, the respondents should prove that Ismail was the ostensible owner of the property with the consent of his co-sharers and besides that they took reasonable care to ascertain whether Ismail had the power to make a transfer of the full 16 as interest. Now, the facts however were that except the property being entered in the revenue records in Ismail's name, and that the management of the property was left by the co-sharers with Ismail, there is not an iota of evidence to establish that Ismail was put forward by them as the ostensible owner of the property. It is manifest that the conduct of co-sharers in permitting one of them to manage the common property does not by itself raise any estoppel precluding them from asserting their rights. The learned Judges have also pointed out that even the least enquiry by the mortgagee would have disclosed, that Ismail was not the full owner and this finding was not seriously challenged before us. In this view it is unnecessary for us to consider the submissions made to us by Mr Desai that Section 41 was inapplicable to cases of sales in court auctions for the reason that what the court is capable of selling and what is sold in execution of a decree is only the right, title and interest of the judgment-debtor and nothing more. We, therefore, hold that the learned Judges of the High Court rightly held that Section 41 of the Transfer of Property Act afforded no defence to the respondents.

19. Therefore, the evidence of the parties which is on record shows that purchaser had not taken proper due care and had not exercised reasonable care and made enquiry about ownership. Even otherwise, since the sale was made by one of the co-sharer, plea of sale by ostensible owner cannot be invoked under section 41 of the Transfer of

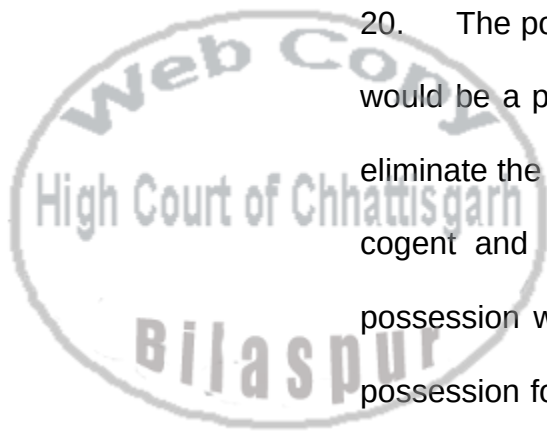




Property Act and the conduct of the other co-sharer namely the plaintiff, permitting one of the co-sharer to manage the common property would not raise by itself the ground of estoppel precluding them from asserting their right. This proposition further has been laid down in case of **Suraj Rattan Thirani** (supra). Further no iota of evidence is on record that reasonable due care was taken. Therefore, application of section 41 of the Transfer of Property Act would not be applicable, when one of the co-sharer was in possession of the property which cannot be taken to be exclusion of the others.

20. The position of the co-sharer who is in the possession of a property would be a permissive possession by the other co-sharer and in order to eliminate the right of the other, here the sellers should have established by cogent and convincing evidence to show the hostile animus and the possession was adverse to the knowledge of the real owners and mere possession for howsoever length of time does not result in converting into permissive possession. Perusal of the evidence and sale deed would show that the seller were in know of the fact that other co-sharer of property also exist. Therefore, unless there is a disclaimer relinquishment of right by a registered deed by the other co-sharer, the right cannot be eliminated. The Supreme Court further in **Ram Nagina Rai Vs. Deo Kumar (deceased) by Legal representatives (2019) 13 SCC 324** held that the plea of adverse possession and co-ownership cannot go together.

21. The pleading and evidence on record therefore would show that after death of Dr. Ramchandra Bagh despite five co-sharer existed, two of





them executed sale of the entire property which enveloped the others right too. The sale was therefore executed in excess of the right vested in the co-sharer i.e. mother Usha Bagh and son Arvind Bagh. By such sale, the purchasers were put in to possession of the entire property.

22. The Supreme Court in the matter of **Ramdass v Sitabai & Ors.**<sup>1</sup>, 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)

<sup>1</sup> AIR 2009 SC 2735



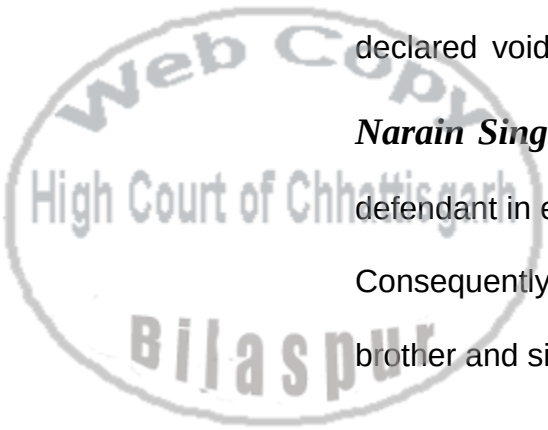
23. Further the Supreme Court in the matter of *Kailash Pati Devi v Bhubneshwari Devi and Others*<sup>2</sup> has decided that what will be purchaser's right when the joint family property is purchased. It held that he has the right to file a general suit for partition against the members of the joint family and, indeed, that may be the proper remedy for him to adopt to effectuate his purchase.

24. Applying the aforesaid principles in this case, since the suit was for partition as also to declare the sale deed as null and void, the sale in excess of the right over property, the sale deed would not be wholly declared void and as it has been held in *Gorakh Nath Dube v. Hari Narain Singh* reported in (1973) 2 SCC 535 an alienation made by the defendant in excess of the power to transfer to the extent would be invalid. Consequently, the plaintiff and the defendants No. 5 and 6, the other brother and sister shall be entitled to a partition and separate possession.

25. The counsel for the respondent also tried to raise contention with regard to limitation but in our opinion, the averments of the question of limitation is completely absurd as the possession of the co-sharer over property cannot be held to be prejudicial to the other co-sharer. Sale having been made on 19/10/2015 and the suit was filed on 25/11/2017 the suit was very much within limitation.

26. Since the partition has already been claimed and the appointment of the Commissioner has been prayed for, in the facts of this case, the judgment and decree of the learned District Judge cannot be sustained. Accordingly, we set aside the judgment and decree dated 07/02/2020

<sup>2</sup> 1984 AIR (SC) 1802





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passed by the District Judge, Raipur in Civil Suit No.60-A/2017. It is ordered that the sale in excess of their power by Usha Bagh and Arvind Bagh would not be binding on other sharer i.e. remaining brother and sister. The plaintiff would be entitled to partition his share in respect of the suit property and the defendants No. 5 and 6 who are the brother and the sister as a beneficiary may also join in the event, in case the partition is effected by meets and bounds.

27. Accordingly, the appeal is allowed.

A decree be drawn accordingly.

Sd/-  
(Goutam Bhaduri)  
Judge

Sd/-  
(Radhakishan Agrawal)  
Judge

