

KIRPAL KAUR

v.

JITENDER PAL SINGH & ORS.

(Civil Appeal No. 2820 of 2015)

July 14, 2015

[V. GOPALA GOWDA AND C. NAGAPPAN, JJ.]

Partition – Decree of partition – Claim of, by plaintiff-daughter-in-law against defendant-father-in-law, of the joint family properties seeking her late husband's share – Dismissed by trial court as also first appellate court – On appeal, held: Courts below erred in not granting share to the plaintiff in the schedule 'B' property despite the positive and substantive evidence of the defendant that the property was a joint family property and the plaintiff's husband had contributed towards the construction of the property – Further, as regards gift deed allegedly executed by first defendant in favour of the second defendant-second son in respect of the schedule 'B' property during the pendency of the proceedings and before the expiry of the period of limitation for filing SLP, said gift deed is hit by s. 52 – Second defendant who claimed to be the beneficiary of the said property did not seek leave of the court as donee – In absence thereof, it would not affect the relief sought by plaintiff during the pendency of the proceedings before this Court – Also gift deed is invalid – It could not have been acted upon by defendants as plaintiff was in possession of the second floor of the said property in her husband's independent right – Thus, s. 8 of the Act, 1956, would come into operation in respect of the said property – Upon the death of first defendant, his property would devolve upon the husband of the plaintiff along with second defendant and other daughters of the deceased – Plaintiff and each one of the defendants assigned 1/4th share equally in the

A *said property – Transfer of Property Act, 1882 – s.52 – Code of Civil Procedure, 1908 – Or. 22 r. 10 – Hindu Succession Act, 1956 – s. 8.*

Allowing the appeal, the Court

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HELD: 1.1 The concurrent finding of fact recorded by both the trial court as well as the first appellate court on the contentious issue No.4 are not only erroneous in law but also suffer from error in law for the reason that there is a positive and substantive evidence elicited by the deceased-first defendant during the course of his cross examination before the trial court, wherein he had in unequivocal terms admitted in his evidence that he, his sons and daughters have an ancestral property in his village and the same has not been divided between them and that he used to get the income from the said agricultural land and the same was utilized by him for the construction of the building-schedule 'B' property; and that he had received money for the construction of the said building from the plaintiff's husband while he was in Kuwait. Therefore, it amounts to putting the said property in the hotchpot of joint family property. Both the trial court and the first appellate court erred in their decisions in not granting a share to the plaintiff in the schedule 'B' property by recording an erroneous finding even though she is legally entitled for the same. [Para 14, 17] [65-G-H; 66-A-C; 67-E-F]

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1.2 Having regard to the fact that immediately within two weeks from the date of disposal of the first appeal by the High Court and before the expiry of the period of limitation for filing special leave petition before this Court challenging the impugned judgment, the gift deed was allegedly executed by the deceased-first defendant in favour of the second defendant-second son

which was made available for perusal only after this Court directed the second defendant's counsel to do so. The execution of the alleged gift deed is hit by Section 52 of the Transfer of Property Act, 1882, as the said deed was executed during the pendency of the proceedings and before the expiry of the period of limitation for filing SLP. Further, during the pendency of these proceedings, the second defendant, who claimed to be the alleged beneficiary of the suit schedule 'B' property on the basis of alleged gift deed should have sought leave of this Court as the donee and brought the said fact of execution of the alleged gift deed in respect of 'B' schedule property by the deceased first defendant, which property devolved in his favour, to the notice of this Court as provided u/Or. 22 r. 10 C.P.C. and defended his right as required under the law. Leave can be obtained only by that person upon whom interest has devolved during the pendency of the suit, otherwise, there may be preposterous results, as such a party might be unaware of the pending litigation and the same would not be consequently feasible. If a duty is cast upon him then in such an eventuality he is bound by the decree even in case of failure to apply for leave. Therefore, as a rule of prudence, the initial duty lies upon the person on whom such an interest has devolved upon any such property to apply for leave of the court in case the factum of devolution was within his knowledge or with due diligence could have been known by him. [Para 17-19] [67-F-G; 68-C-E; 69-G-H; 70-A-B]

1.3 The factum of the said alleged gift deed was not made known to this Court by the second defendant who is the beneficiary of the said gift deed till the last stage of conclusion of submission by the counsel. The absence of any leave sought by the second defendant

A on the ground that his interest has devolved upon the
schedule 'B' property of the deceased-first defendant,
would not affect the relief sought by the plaintiff during
the pendency of the proceedings before this Court when
no application was submitted either by the plaintiff or by
B the second defendant in this regard. [Para 20] [70-C; 72-
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1.4 The gift deed is invalid as it is evident from the
factual and legal aspect of the case that the gift deed of
C the schedule 'B' property was executed by the deceased
first defendant in favour of the second defendant during
the pendency of the proceedings and the same could
not have been acted upon by the defendants as the
D plaintiff was in possession of the second floor of the said
property in her husband's independent right. The same
is also not acted upon by the parties for the reason that
the plaintiff was in physical possession of the second
E floor of the 'B' suit schedule property and therefore, in
fact, she could not have delivered the possession to the
second defendant and acted upon the same, hence,
Section 8 of the Hindu Succession Act, 1956, would
come into operation in respect of the said property. The
said property of the deceased-first defendant would
F devolve upon the deceased husband of the plaintiff
along with the second defendant and the other
daughters of the deceased-first defendant as they are
the joint owners of the said property by virtue of being
Class I legal heirs of the deceased-first defendant as per
G the schedule to 1956 Act, upon the death of the first
defendant. [Para 25] [76-H; 77-A-D]

1.5 The concurrent finding recorded by both the
trial court and the first appellate court on issue no.4 is
H set aside. The courts below failed to exercise their
jurisdiction and power properly, thereby causing a grave

miscarriage of justice to the rights of the plaintiff upon the 'B' schedule property. The judgments and decree passed by the trial court and the first appellate court are set aside, as regards 'B' schedule property. The plaintiff and each one of the defendants are assigned 1/4th share equally in the suit schedule "B" property. [Para 23, 26] [76-D; 77-F-G]

Dhurandhar Prasad Singh v. Jai Prakash University & Ors. 2001 (3) SCR 1129:(2001) 6 SCC 534; *Rikhu Dev Chela Bawa Harjug Dass v. Som Das (deceased) Through Chela Shiama Dass* 1976 (1) SCR 487:(1976) 1 SCC 103; *Jagan Singh v. Dhanwanti* 2012 (2) SCR 303:(2012) 2 SCC 628 – referred to.

Case Law Reference

2001 (3) SCR 1129	Referred to.	Para 18
1976 (1) SCR 487	Referred to.	Para 18
2012 (2) SCR 303	Referred to.	Para 21

CIVILAPPELLATE JURISDICTION : Civil Appeal No. 2820 of 2015.

From the Judgment and Order dated 31.10.2012 in RFA (OS) No. 41 of 2011 of the High Court of Delhi, at New Delhi.

J. P. Cama, Ravi Bhushan, Mayan Prasad, Gopal Singh for the Appellant.

Rakhi Ray, S. S. Ray, Vaibhav Gulia, Rishi Raj Jaiswal for the Respondents.

The Judgment of the Court was delivered by

V. GOPALA GOWDA, J. 1. This appeal is directed against the impugned judgment and order dated 31.10.2012

A passed by the High Court of judicature of Delhi at New Delhi (the First Appellate Court) in Regular First Appeal (OS) No.41 of 2011, whereby the First Appellate Court has confirmed the judgment and decree dated 21.1.2011 passed by the learned single Judge of the High Court (hereinafter called as "the trial court") in CS(OS)No. 2172 of 2003 and dismissed the suit filed by the appellant. In this appeal, the appellant has questioned the correctness of the impugned judgment and order urging various facts and legal contentions and prayed for granting of the decree of partition of her share in the 'B' suit schedule property.

2. In this judgment, for the sake of convenience, we will advert to the rank of the parties as assigned to them before the trial court in C.S. No. 2172 of 2003. The brief facts of the case are stated hereunder for the consideration of the case with reference to the rival legal contentions urged on behalf of the parties.

3. The plaintiff (the appellant herein) filed civil suit No.2172 of 2003 before the trial court against the defendants (the respondents herein) for the partition of the following properties in favour of her late husband's share, contending thereby that all the properties are jointly owned by the family:-

F	A	Agricultural land at village Jahgirpur and at village Patial
	B	Property bearing No.45, Sant Nagar, East of Kailash, New Delhi
G	C	Property situated at Kothi No.56, Giani Zail Singh Nagar, Ropar

The said civil suit was contested by the defendants wherein they have pleaded in their written statement that the suit schedule properties mentioned in the schedules 'A' & 'C'

have already been partitioned amongst themselves, therefore, the plaintiff is not entitled for any further share in the suit properties. In so far as the 'B' schedule property, bearing No. 45, Sant Nagar, East of Kailash, New Delhi, is concerned, it is stated by them that the same cannot be a subject matter of partition as it is the self acquired property of the deceased-first defendant (who is the father-in-law of the plaintiff) as he had acquired the same out of his self earned savings from his employment and he has constructed the building on the said property out of his own funds. Therefore, it is pleaded that the plaintiff is not entitled for the reliefs as prayed by her in respect of the suit schedule 'B' property. It is further contended by them that the deceased-first defendant was working in the defence department. While he was in employment, he had purchased the said property in the year 1954 vide sale deed dated 22.3.1954 for a sum of Rs.400/-. In the year 1954, he was getting the salary of Rs.201/- per month i.e. Rs.120/- + (9 increments X 9 = 81). At that time, admittedly, the husband of the plaintiff (since deceased) was only seven years old.

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4. When the first phase of construction of the ground floor on the said property was made in the year 1957, the husband of the plaintiff was only ten years old. The second phase of construction of the said building was done between October 1980 and December 1981. The case of the deceased-first defendant before the trial court was that he retired from his employment in September, 1980. He has reconstructed the aforesaid property using his retirement benefits such as gratuity and provident fund and he had also borrowed some amount as loan from various friends and relatives and he also used the old building materials for the construction of the building. He also produced receipts at Ex.DW1/5 to DW 1/18 as evidence to substantiate his case that he had borrowed some loan amount from M/s Sahara Deposits and Investments (India) Ltd. which amount was repaid

A by him to it, in instalments. It was specifically mentioned by the deceased-first defendant that the husband of the plaintiff did not contribute any amount either towards the purchase of the said suit schedule property or for the construction of the building upon the said property.

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5. When the construction of the said building was in progress between October 1980 and December 1981, the plaintiff's husband was in the process of settling himself at Kuwait and he did not have sufficient money to send to the deceased-first defendant for the purpose of construction of the building. The total amount spent on the construction of the building was Rs. 1,42,451.60. It has been contended by the defendants that no proof of contribution of money made by the deceased husband of the plaintiff towards the construction of the said building is produced by the plaintiff before the trial court to justify her claim. The second defendant was also examined in the case as DW-2 in support of the case of the deceased-first defendant with regard to the suit schedule 'B' property. The trial court on the basis of the pleadings made before it, has framed certain issues for its determination and the same are answered against the plaintiff by it on the basis of the evidence produced by the parties on record.

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6. The case of the plaintiff is that the dispute arose between the plaintiff's husband and the defendants when her husband returned from Kuwait to Delhi. With the intervention of relatives and well-wishers of the parties, it was decided between them that the basement, ground floor and second floor of the Sant Nagar property will devolve upon him and the rent earned from the same will also be paid to him. The deceased-first defendant had purchased a plot of land in Saini Farms in the name of the late husband of the plaintiff. The said plot was sold by the deceased-first defendant who gave an amount of only Rs. 1,82,000/- to the husband of the plaintiff while the

balance amount from Rs.6,00,000/- was distributed amongst A
defendant Nos.1 to 4 and the wife of defendant No.2.

7. In so far as the ancestral property of the agricultural B
land at Ropar District is concerned, it is stated in the written
statement of the deceased-first defendant that the aforesaid
ancestral property was divided between him, his two brothers
and one sister and during the division of that property, a piece
of land measuring about 8 kanals and 18 marlas situated in
village Patial, District Ropar came to the share of the
deceased-first defendant in the year 1972. The said land was C
given on Batai for cultivation and the deceased-first defendant
used to get 50 sears of Wheat in May and 30 sears of Maize
in October every year out of the said agricultural produce from
the said agriculture land which was used for consumption by
the family. No cash amount was received by the deceased- D
first defendant in respect of the said agricultural property.

8. On the basis of the pleadings of the parties and the
evidence on record, the trial court had framed five issues for
its determination. Issue No.4 is most relevant for the purpose E
of examining the rival legal submissions made on behalf of
the parties with a view to find out the correctness of the
concurrent findings of fact recorded by the First Appellate Court
on the above contentious issue. The issue no. 4 reads thus:

“(iv)Whether the property bearing No.45, Sant Nagar, F
East of Kailash, New Delhi, has been constructed out of
joint family funds or out of funds received by the first
defendant from late Shri R.D. Singh, the husband of the
plaintiff?” G

The trial court has answered the said contentious issue
no.4 against the plaintiff and in favour of the deceased-first
defendant in so far as the claim of share by the plaintiff in the
schedule 'B' property bearing No. 45, Sant Nagar, East of H

A Kailash, New Delhi is concerned. The suit of the plaintiff was dismissed by it by holding that the said property is the self acquired property of the deceased-first defendant.

9. In so far as the suit schedule 'A' property is concerned, the trial court has further partially decreed the same in favour of the plaintiff by granting 1/5th share in the agricultural land in the village Patial. A preliminary decree for partition was passed by the trial court on 21.1.2011 holding that the plaintiff has got the 1/5th share in the agricultural land, measuring about 8 kanals and 18 marlas. However, she was not granted any share in the suit schedule 'B' property, holding that it is the self acquired property of the deceased first defendant.

10. Aggrieved by the same, the plaintiff filed Regular First Appeal(OS) No.41 of 2011 before the Division Bench of the High Court under Section 96 of the Civil Procedure Code, 1908 ("C.P.C.") read with Section 10 of the Delhi High Court Act, 1966, against the judgment and decree dated 21.1.2011 passed by the trial court in so far as the dismissal of the suit in respect of the suit schedule 'B' property is concerned, urging various legal grounds in justification of her claim. The First Appellate Court, after adverting to the various rival legal submissions urged on behalf of the parties and on re-appreciation of the evidence on record, examined the correctness of the findings recorded on issue No.4 by the trial court in its judgment dismissing the suit of the plaintiff and not granting any share in the suit schedule 'B' property to her, has held that the said property is the self acquired property of the deceased-first defendant and declined to interfere with the judgment of the trial court in respect of the said property.

11. We have taken into consideration the relevant facts pleaded by the plaintiff that her husband had sent money from Kuwait to the deceased-first defendant for construction of the building situated at No.45, Sant Nagar, East of Kailash, New

Delhi during the period of October, 1980 and December, 1981. A
Further, as per the document produced at Ext.P-5, an amount
of Rs.1 lakh was sent by the husband of the plaintiff to his father
by way of bank draft and cash. Out of that an amount of
Rs.17,350/- was given to the plaintiff and the remaining amount
of Rs.82,650/- was left with the deceased-first defendant which B
amount was utilised by him for construction of the building.
The First Appellate Court with reference to the above said plea
and on the basis of the evidence placed on record by the
plaintiff has held that no cogent evidence was produced by C
the plaintiff to prove the fact that the said amount sent by her
deceased husband to the deceased-first defendant was utilised
by him for carrying out the second phase of construction of the
building at No.45, Sant Nagar, New Delhi between the period D
October, 1980 to December, 1981 and therefore, the same
would not entitle the deceased husband of the plaintiff to a
share in the said property, as the plot mentioned in schedule
'B' property was purchased by the deceased-first defendant
out of his own earnings in the year 1954. Undisputedly, the
sale deed was in the name of the deceased-first defendant E
who had purchased the same for Rs.400/-, out of his own funds.
Further, the First Appellate Court has held that there is no title
document either in favour of the husband of the plaintiff or in
her name as the deceased-first defendant had purchased the
property in his name exclusively, from his own funds and mere F
use of the money sent by either the deceased husband of the
plaintiff or the funds provided by other family members for the
purpose of raising the second phase of construction of the
said building would not give them the right for the share in that
property. Thus, the First Appellate Court has held that the G
deceased husband of the plaintiff could not have become the
co-owner of the said property. Therefore, the First Appellate
Court has concurred with the finding of fact recorded on the
contentious issue No.4 by the trial court and accordingly, it has
answered the other issues by recording its reasons in the H

A impugned judgment in favour of the defendants. Further, it has been held by the First Appellate Court that at best, the plaintiff would be entitled for refund of the amount which was sent by her deceased husband to the deceased-first defendant for the construction of the building upon the schedule 'B' property with interest or compensation. The First Appellate Court in its penultimate paragraph of the impugned judgment has observed that to bring the curtains down and to obviate any further litigation before the Supreme Court, the second defendant has made an offer to pay Rs. 15 lakhs to the plaintiff, provided that she undertakes not to litigate the case any further and vacate and hand over the possession of the second floor of the schedule 'B' property to the deceased-first defendant or his nominee which offer was rejected by the plaintiff.

D 12. We have examined the correctness of the findings recorded by the First Appellate Court on the contentious issue no.4 with reference to the evidence on record. During the cross-examination of the deceased-first defendant by the plaintiff's counsel before the trial court, he has categorically admitted certain facts and elicited the following relevant positive evidence on record which supports the plaintiff's case. The English translation of certain admitted portions of the evidence of the deceased-first defendant furnished by the plaintiff's counsel is recorded and extracted hereunder for our consideration and examination of the findings of fact recorded on the contentious issue No.4:-

G "Evidence of PW-1 Shri Ram Singh, the father-in-law of the plaintiff:

2 The house at Sant Nagar was built from his retirement benefits of Rs.1 lakh and loans from friends.

H 3. Admits that he had received Rs. 82,000/- from the

Plaintiff's husband but say it was not used for building his house.

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4. Admits the existence of the agricultural land and agricultural income received out of it. The land was the ancestral property. He also admits that this income was used for construction of the said house. Immediately thereafter, he claims that it was used for his illness.

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6. He retired in September, 1980 and started reconstruction of the house in October 1980.

7. Relations with appellant's husband became strained when he misappropriated Rs. 6 lakhs for the sale of the plot at Saini Enclave.

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8. That the plot at Saini Enclave was sold for Rs.6 lakhs.

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9. Admits that according to document at Exh. P-7 (which is in his own handwriting) Rs. 6 lakhs were distributed amongst various personnel including R.D. Singh.

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10. Denies that Rs.6 lakhs were distributed to the various persons mentioned in Exh.P/7.

11. Admits receiving money from R.D. Singh from Kuwait as per Exh.P.2 to P.3 but denies the quantum suggested.

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15. Admits that the Plaintiff was staying with him from

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A the date of marriage. Further, that on his return from Kuwait, R.D. Singh had been separated from the deceased father and started staying on the 2nd floor.

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B 17. He admits in his statement before the learned ADJ to the effect that he had received Rs. 82,000/- in the shape of bank draft and cash from the Plaintiff's husband. He further admits that the statement made before the learned ADJ was correct. Immediately thereafter he denies it.

C 18. That the ancestral land consisted of 8 kanal and 18 marla.

D 19. He further admits that the plaintiff's husband (R.D. Singh) had a share in his 1/4th share in the ancestral land.

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E 21. He further admits that he has no documentary proof that the appellant's husband had received Rs. 6 lakhs from the sale of plot at Saini Enclave.

F 22. He states that he spent approximately Rs. 1,42,000/- on the construction of the house in Sant Nagar i.e. basement, ground, first and second floor together one common store on the 3rd floor.

G 23. That the loan from Sahara investment was to the tune of Rs. 30,000/- . A further loan of Rs. 30,000/- was obtained from one Mr. Harydaya....”

H 13. In the light of the above admissions made by the deceased-first defendant in his statement of evidence deposited before the trial court, the most important fact that has

come to light in his admission is that he had received money from the plaintiff's husband while he was in Kuwait. He has also admitted that the plaintiff's husband had a share in the ancestral property that consists of 8 kanals and 18 marlas. Further, the deceased-first defendant has admitted in his statement of evidence before the Additional District Judge on 11.12.2003 in another proceeding between the parties that he had received an amount of Rs.1 lakh by way of bank draft and cash from the deceased husband of the plaintiff, while he was working in Kuwait which amount was utilised by the deceased-first defendant for the reconstruction of the building in the 'B' suit schedule property. In view of the above evidence elicited from the deceased-first defendant, the First Appellate Court was not right in making an observation in the impugned judgment that the plaintiff is only entitled for the refund of the said amount from the deceased first defendant even though there is substantive and positive evidence on record to the effect that the amount sent by the deceased husband of the plaintiff was utilised by the deceased first defendant for the purpose of construction of the building upon the suit schedule 'B' property.

14. Both the trial court as well as the First Appellate Court have misread and mis-directed themselves with regard to the positive and substantive evidence placed on record in justification of the claim of the plaintiff and they have not appreciated and re-appreciated the same in favour of the plaintiff in the proper perspective to record the finding of fact on her claim for the division of the share in her favour in respect of the schedule 'B' property. Therefore, the concurrent finding of fact recorded by both the trial court as well as the First Appellate Court on the contentious issue No.4 are not only erroneous in law but also suffer from error in law for the reason that there is a positive and substantive evidence elicited by the deceased-first defendant during the course of his cross

A examination before the trial court, the relevant portion of which
is extracted above, wherein he had in unequivocal terms
admitted in his evidence that he, his sons and daughters have
an ancestral property in his village and the same has not been
divided between them and that he used to get the income from
B the said agricultural land and the same was utilized by him for
the construction of the building at Sant Nagar, i.e. schedule 'B'
property. Therefore, it amounts to putting the said property in
the hotchpot of joint family property. The non-consideration of
C the above positive and substantive evidence by the trial court
as well as the First Appellate Court in justification of the claim
of the plaintiff in respect of the schedule 'B' property has
rendered the concurrent finding recorded by it as erroneous in
law and therefore, the same are liable to be set aside.

D 15. We have heard both the learned senior counsel Mr.
J.P. Cama on behalf of the plaintiff and the learned counsel
Ms. Rakhi Ray on behalf of the defendants. On 11.3.2015, when
the arguments were concluded on merits, we directed the
parties to file a compilation of the pleadings. The fact
E regarding the will/gift deed was brought to our notice by the
learned senior counsel on behalf of the plaintiff only at the time
of concluding his submissions in this appeal, at the stage of
final disposal of the SLP. The said fact has not been disclosed
F by the second defendant before this Court and he has also not
requested for a leave before this Court by filing an application
as required under Order 22 Rule 10 CPC to defend his claim
that the schedule 'B' property was devolved upon him on the
basis of the said gift deed. Therefore, the defendants' counsel
G was directed by us to produce the copy of the will/gift deed,
alleged to have been executed after the passing of the
impugned judgment by the First Appellate Court, in favour of
the second defendant by the deceased first defendant in
respect of the schedule 'B' property and before the filing of
H special leave petition by the plaintiff. The same was produced

by the defendants' counsel by way of compilation of the documents including the copy of the alleged 'Will' dated 1.10.2004 along with the gift deed dated 8.02.2011, purported to have been executed by the deceased-first defendant in favour of the second defendant-J.P. Singh in respect of the suit schedule 'B' property. The learned counsel for the defendants has also furnished copies of the judgments upon which she has placed reliance in support of the case of the defendants.

16. This Court on 16.8.2013 issued notice on the prayer of the plaintiff for condonation of delay on the special leave petition as the same was barred by limitation. The learned counsel for the defendants, Ms. Rakhi Ray accepted the notice who entered a caveat on behalf of defendant Nos.2 to 4 and sought six weeks time to file the reply affidavit. On 16.9.2013, the application for condonation of delay was allowed and deletion of the name of deceased-first defendant from the array of parties from the cause title of the SLP was also allowed at her request.

17. After the perusal of pleadings of the parties and the material evidence on record, we find that both the trial court and the First Appellate Court have gravely erred in their decisions in not granting a share to the plaintiff in the schedule 'B' property by recording an erroneous finding even though she is legally entitled for the same. Having regard to the fact that immediately within two weeks from the date of disposal of the first appeal by the High Court and before the expiry of the period of limitation for filing special leave petition before this Court challenging the impugned judgment, the gift deed was allegedly executed by the deceased-first defendant in favour of the second defendant (the second son) which was made available for our perusal only after this Court directed the second defendant's counsel to do so. The said gift deed was executed by the deceased-first defendant in favour of the

A second defendant reciting certain factually incorrect facts regarding the physical delivery of possession of the suit schedule 'B' property to him, as it is an undisputed fact that the plaintiff has been in peaceful possession of the second floor of the said building ever since she and her husband had started living separately from the defendants.

17. The execution of the alleged gift deed by the deceased-first defendant in favour of the second defendant is also hit by Section 52 of the Transfer of Property Act, 1882, as the said deed was executed during the pendency of the proceedings and before the expiry of the period of limitation for filing SLP. Further, during the pendency of these proceedings, the second defendant, who has claimed to be the alleged beneficiary of the suit schedule 'B' property on the basis of alleged gift deed should have sought leave of this Court as the donee and brought the aforesaid fact of execution of the alleged gift deed in respect of 'B' schedule property by the deceased first defendant, which property has been devolved in his favour, to the notice of this Court as provided under Order 22 Rule 10 of the C.P.C. and defended his right as required under the law as laid down by this Court in a catena of cases. In the case of *Dhurandhar Prasad Singh v. Jai Prakash University & Ors.*¹, this Court has interpreted Order 22 Rule 10 of the C.P.C. after adverting to its earlier decision in the case of *Rikhu Dev Chela Bawa Harjug Dass v. Som Das (deceased) Through Chela Shiama Dass*² in support of the proposition of law that the trial of a suit cannot be brought to an end merely because the interest of a party in the subject-matter of the suit has devolved upon another during the pendency of the suit but that suit may be continued against the person acquiring the interest with the leave of the court. The relevant paragraph from the said decision of *Dhurandhar Prasad Singh* case (*supra*) reads thus:

H ¹ (2001) 6 SCC 534

² (1976) 1 SCC 103

"9. In the case of *Rikhu Dev, Chela Bawa Harjug Dass v. Som Dass* while considering the effect of devolution of interest within the meaning of Order 22 Rule 10 of the Code, on the trial of a suit during its pendency, this Court has laid down the law which runs thus:

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"8. This rule is based on the principle that trial of a suit cannot be brought to an end merely because the interest of a party in the subject-matter of the suit has devolved upon another during the pendency of the suit but that suit may be continued against the person acquiring the interest with the leave of the court. When a suit is brought by or against a person in a representative capacity and there is a devolution of the interest of the representative, the rule that has to be applied is Order 22 Rule 10 and not Rule 3 or 4, whether the devolution takes place as a consequence of death or for any other reason. Order 22 Rule 10 is not confined to devolution of interest of a party by death; it also applies if the head of the mutt or manager of the temple resigns his office or is removed from office. In such a case the successor to the head of the mutt or to the manager of the temple may be substituted as a party under this rule."

(emphasis laid by this Court)

19. Likewise, where the interest of the second defendant has devolved upon the suit schedule 'B' property on the basis of the alleged gift deed referred to supra, the suit may be continued against such second defendant and for the sake of continuance of the suit against the persons upon whom such interest has devolved during the pendency of the suit, leave of the court has to be obtained. Leave can be obtained only by that person upon whom interest has devolved during the pendency of the suit, otherwise, there may be preposterous results, as such a party might be unaware of the pending

- A litigation and the same would not be consequently feasible. If a duty is cast upon him then in such an eventuality he is bound by the decree even in case of failure to apply for leave. Therefore, as a rule of prudence, the initial duty lies upon the person on whom such an interest has devolved upon any such
- B property to apply for leave of the court in case the factum of devolution was within his knowledge or with due diligence could have been known by him.

20. The factum of the said alleged gift deed was not
- C made known to this Court by the second defendant who is the beneficiary of the said gift deed till the last stage of conclusion of submission by the learned counsel. Reliance has been placed upon the decision of this Court in the case of
- D ***Dhurandhar Prasad Singh*** (supra) at paras 6, 7 and 8 with regard to the above said proposition of law, the relevant paras from the above judgment are extracted hereunder:

- E “6. In order to appreciate the points involved, it would be necessary to refer to the provisions of Order 22 of the Code, Rules 3 and 4 whereof prescribe procedure in case of devolution of interest on the death of a party to a suit. Under these Rules, if a party dies and right to sue survives, the court on an application made in that behalf is required to substitute legal representatives of the
- F deceased party for proceeding with a suit but if such an application is not filed within the time prescribed by law, the suit shall abate so far as the deceased party is concerned. Rule 7 deals with the case of creation of an
- G interest in a husband on marriage and Rule 8 deals with the case of assignment on the insolvency of a plaintiff. Rule 10 provides for cases of assignment, creation and
- H devolution of interest during the pendency of a suit other than those referred to in the foregoing Rules and is based on the principle that the trial of a suit cannot be brought

to an end merely because the interest of a party in the subject-matter of the suit has devolved upon another during its pendency but such a suit may be continued with the leave of the court by or against the person upon whom such interest has devolved. But, if no such step is taken, the suit may be continued with the original party and the person upon whom the interest has devolved will be bound by and can have the benefit of the decree.....

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7. Under Rule 10 Order 22 of the Code, when there has been a devolution of interest during the pendency of a suit, the suit may, by leave of the court, be continued by or against persons upon whom such interest has devolved and this entitles the person who has acquired an interest in the subject-matter of the litigation by an assignment or creation or devolution of interest pendente lite or suitor or any other person interested, to apply to the court for leave to continue the suit. But it does not follow that it is obligatory upon them to do so. If a party does not ask for leave, he takes the obvious risk that the suit may not be properly conducted by the plaintiff on record, and yet, as pointed out by Their Lordships of the Judicial Committee in *Moti Lal v. Karrabuldin* he will be bound by the result of the litigation even though he is not represented at the hearing unless it is shown that the litigation was not properly conducted by the original party or he colluded with the adversary. It is also plain that if the person who has acquired an interest by devolution, obtains leave to carry on the suit, the suit in his hands is not a new suit, for, as Lord Kingsdown of the Judicial Committee said in *Prannath Roy Chowdry v. Rookea Begum*, a cause of action is not prolonged by mere transfer of the title. It is the old suit carried on at his instance and he is bound by all proceedings up to the stage when he obtains leave to carry on the proceedings.

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A 8. The effect of failure to seek leave or bring on record
the person upon whom the interest has devolved during
B the pendency of the suit was the subject-matter of
consideration before this Court in various decisions. In
the case of *Saila Bala Dassi v. Nirmala Sundari Dassi*
C T.L. Venkatarama Aiyar, J., speaking for himself and on
behalf of S.R. Das, C.J. and A.K. Sarkar and Vivian Bose,
JJ. laid down the law that if a suit is pending when the
transfer in favour of a party was made, that would not
affect the result when no application had been made to
be brought on the record in the original court during the
pendency of the suit.”

(emphasis laid by this Court)

D The legal principles laid down in the aforesaid paragraphs
from the judgment referred to supra would clearly go to show
that this Court has laid down the legal principle to the effect
that the absence of any leave sought by the second defendant
on the ground that his interest has devolved upon the schedule
E ‘B’ property of the deceased-first defendant, would not affect
the relief sought by the plaintiff during the pendency of the
proceedings before this Court when no application has been
submitted either by the plaintiff or by the second defendant in
this regard.

F 21. The legality of the alleged gift deed executed in
favour of the second defendant by the deceased-first defendant
in respect of the schedule ‘B’ property has been further
examined by us and the same is hit by Section 52 of the of the
Transfer of Property Act, 1882, in the light of the decision of
G this Court in the case of *Jagan Singh v. Dhanwanti*³, wherein
this Court has laid down the legal principle that under Section
52 of the Transfer of Property Act, 1882, the ‘lis’ continues so
long as a final decree or order has not been obtained from the
Court and a complete satisfaction thereof has not been
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³ (2012) 2 SCC 628

rendered to the aggrieved party contesting the civil suit. It has been further held by this Court that it would be plainly impossible that any action or suit could be brought to a successful termination if alienations *pendente lite* were permitted to prevail. The relevant paras of the aforesaid decision read thus:

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“32. The broad principle underlying Section 52 of the TP Act is to maintain the status quo unaffected by the act of any party to the litigation pending its determination. Even after the dismissal of a suit, a purchaser is subject to *lis pendens*, if an appeal is afterwards filed, as held in *Krishanaji Pandharinath v. Anusayabai*. In that matter the respondent (original plaintiff) had filed a suit for maintenance against her husband and claimed a charge on his house. The suit was dismissed on 15-7-1952 under Order 9 Rule 2, of the Code of Civil Procedure, 1908 for non-payment of process fee. The husband sold the house immediately on 17-7-1952. The respondent applied for restoration on 29-7-1952, and the suit was restored leading to a decree for maintenance and a charge was declared on the house. The plaintiff impleaded the appellant to the darkhast as purchaser. The appellant resisted the same by contending that the sale was affected when the suit was dismissed. Rejecting the contention the High Court held in para 4 as follows:

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“... In Section 52 of the Transfer of Property Act, as it stood before it was amended by Act 20 of 1929, the expression ‘active prosecution of any suit or proceeding’ was used. That expression has now been omitted, and the Explanation makes it abundantly clear that the ‘lis’ continues so long as a final decree or order has not been obtained and complete satisfaction thereof has not been rendered. At p. 228 in Sir Dinshah Mulla’s ‘*Transfer of Property Act*’, 4th Edn., after

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A referring to several authorities, the law is stated thus:

'Even after the dismissal of a suit a purchaser is subject to "lis pendens", if an appeal is afterwards filed.' If after the dismissal of a suit and before an appeal is presented, the 'lis' continues so as to prevent the defendant from transferring the property to the prejudice of the plaintiff, I fail to see any reason for holding that between the date of dismissal of the suit under Order 9 Rule 2 of the Civil Procedure Code and the date of its restoration, the 'lis' does not continue.'

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33. It is relevant to note that even when Section 52 of the TP Act was not so amended, a Division Bench of the Allahabad High Court had following to say in *Moti Chand v. British India Corpn. Ltd.*:

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"... The provision of law which has been relied upon by the appellants is contained in Section 52, TP Act. The active prosecution in this section must be deemed to continue so long as the suit is pending in appeal, since the proceedings in the appellate court are merely continuation of those in the suit."

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34. If such a view is not taken, it would plainly be impossible that any action or suit could be brought to a successful termination if alienations pendente lite were permitted to prevail. The Explanation to this section lays down that the pendency of a suit or a proceeding shall be deemed to continue until the suit or a proceeding is disposed of by a final decree or order, and complete satisfaction or discharge of such decree or order has been obtained or has become unobtainable by reason of the expiration of any period of limitation prescribed for the execution thereof by any law for the time being in force.

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35. In the present case, it would be canvassed on behalf of the respondent and the applicant that the sale has taken place in favour of the applicant at a time when there was no stay operating against such sale, and in fact when the second appeal had not been filed. We would however, prefer to follow the dicta in *Krishanaji Pandharinath* to cover the present situation under the principle of lis pendens since the sale was executed at a time when the second appeal had not been filed but which came to be filed afterwards within the period of limitation. The doctrine of lis pendens is founded in public policy and equity, and if it has to be read meaningfully such a sale as in the present case until the period of limitation for second appeal is over will have to be held as covered under Section 52 of the TP Act."

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(emphasis laid by this Court)

22. Notwithstanding the above legal principle, we have examined the legality and validity of the alleged gift deed. The recital of the gift deed, particularly, the recital clause 2 is extracted hereunder:

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"2. That since the physical possession of the said property is already with the Donee hence the proprietary possession of the same is being handed over by the Donor unto the Donee who shall enjoy the same peacefully without any interference or disturbance of the Owner/Donor or anybody claiming through him. On this the Donee shall become the absolute Owner of the said Property and shall be at liberty to deal with same in the manner he likes."

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A careful reading of the above recital would clearly go to show that the physical possession of the entire suit schedule 'B' property could not have been given to the second defendant in the light of the undisputed fact that the physical possession

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A of the second floor of the schedule 'B' property is with the plaintiff. Further, the plaintiff is in the possession of the second floor in her independent right of her husband's share after they separated from the family. Therefore, the alleged gift deed executed by the deceased-first defendant in favour of the second defendant during the pendency of the proceedings with respect to the suit schedule 'B' property is not legally correct as it is the joint family property and even otherwise the same cannot be acted upon by the parties.

C 23. On the basis of the legal submissions made by the senior counsel on behalf of the plaintiff, we have examined the case on merit in these proceedings based on proper appreciation of evidence on record and we have to reverse the concurrent finding on the contentious issue no.4 for the reasons recorded by us in the preceding paragraphs of this judgment. Accordingly, we set aside the concurrent finding recorded by both the trial court and the First Appellate Court on issue no.4. We conclude that the courts below have failed to exercise their jurisdiction and power properly, thereby causing a grave miscarriage of justice to the rights of the plaintiff upon the 'B' schedule property.

F 24. The plaintiff must succeed for one more alternate reason viz. that the deceased-first defendant died during the pendency of the proceedings and therefore, Section 8 of the Hindu Succession Act, 1956, will come into operation in respect of the suit schedule 'B' property even if it is considered that the said property is a self acquired property of the deceased-first defendant.

G 25. Therefore, we have to record the finding of fact with respect to the gift deed and hold that the same is invalid as it is evident from the factual and legal aspect of the case that the gift deed of the schedule 'B' property was executed by the deceased first defendant in favour of the second defendant

during the pendency of the proceedings and the same could not have been acted upon by the defendants as the plaintiff has been in possession of the second floor of the said property in her husband's independent right. The same is also not acted upon by the parties for the reason that the plaintiff has been in physical possession of the second floor of the 'B' suit schedule property and therefore, in fact, she could not have delivered the possession to the second defendant and acted upon the same, hence, Section 8 of the Hindu Succession Act, 1956, would come into operation in respect of the above said property. The said property of the deceased-first defendant would devolve upon the deceased husband of the plaintiff along with the second defendant and the other daughters of the deceased-first defendant as they are the joint owners of the said property by virtue of being Class I legal heirs of the deceased-first defendant as per the schedule to the Hindu Succession Act, 1956, upon the death of the first defendant. For this reason also, the plaintiff is entitled for 1/4th share in the suit schedule "B" property.

26. For the reasons stated above, we allow this civil appeal and assign equally 1/4th share to the plaintiff and each one of the defendants in the suit schedule "B" property. The impugned judgments and decree passed by the trial court and the First Appellate Court are hereby set aside, in so far as 'B' schedule property is concerned. We further allow the plaintiff to retain the second floor of the property bearing No. 45, Sant Nagar, East of Kailash, New Delhi, till the 1/4th share of the schedule 'B' property is divided by metes and bounds by following the procedure as provided under law and put her in absolute possession of the same. The trial court is directed to draw up a decree in terms of this judgment along with costs.

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