

# **Brahamdatt Sharma .....Plaintiff/ vs Smt. Neelam Malik And Another on 6 July, 2022**

**Author: Sharad Kumar Sharma**

**Bench: Sharad Kumar Sharma**

IN HIGH COURT OF UTTARAKHAND  
AT NAINITAL  
Second Appeal No.87 of 2019

Brahamdatt Sharma

Vs.

.....Plaintiff/Appell

Smt. Neelam Malik and Another

....Defendant/Respondent

Advocate: Mr. Pankaj Kumar, Advocate for the appellant.  
Mr. Siddhartha Singh, Advocate for the respondents.

Hon'ble Sharad Kumar Sharma, J.

The brief controversy as it emanates for consideration before this second appellate in the present second appeal, is arising out of the concurrent judgments which had been rendered by both the courts below on 29.04.2019, it was while dismissing the appeal of plaintiff/appellant herein being Civil Appeal No.160 of 2016 Brahamdatt vs. Neelam Malik; as well as the judgment of the learned trial court dated 25.10.2019 rendered in Suit No.454 of 2008 Brahamdatt vs. Neelam Malik, which too stood dismissed in which the plaintiff/appellant herein had put a challenge to the registered sale deed which was executed in favour of the defendants by the registered owner of the property described in it i.e. by Ishwar Chand on 17.06.2008. The plaintiff/appellant herein on 08.08.2008 had instituted a suit before the court of Civil Judge (Sr. Div.) Rishikesh, District Dehradun, Brahamdatt vs. Neelam Malik, wherein he has sought a degree for declaration of the sale date as executed in favour of the defendants on 17.06.2008 in relation to the property more appropriately described at the foot of the plaint constituting a property bearing Municipal No.7 and 8 lying on the ground floor constituting of six rooms, toilet, bathroom, kitchen, as well as the construction which existed on the first floor constituting of one room, toilet as well as open area of 55 x 28 feet, the prescient of which were described at the foot of the plaint. The details of the property, which was the subject matter of the sale deed executed in favour of the defendant on 17.06.2008 is given hereunder:-

^^ % fooj.k fookfnr lEifRr la[;k&2 % % & lkses'oj uxj] Fkkuk&iksLV o rglhy  
\_f'kds'k ftyk& nsgjknwu mRrjk[k.M esa fLFkr lEifRr la[;k&07 o 08 ftlesa Hkwry ij 6  
dejs] ySV<sup>a</sup>hu ckFk:e o jlksbZ rFkk izFke ry ij ,d dejk o ySV<sup>a</sup>hu 'kkfey gS tks 55 QqV x  
28 QqV oxZ {ks=Qy esa fLFkr gS ftldh lhek;sa fuEu izdkj gSa%& iwoZ esa % lEifRr@  
edku nhipUnA if'pe esa % lEifRr xk;=h fuoklA mRrj esa % iaokj th dh tehuA nf{k.k  
esa % jksM@lMda^^

2. In the suit in question the nature of the decree, which was formulated, to be procured from the court was to the effect that the sale deed under question therein may be declared, as to be a fraudulent document, which has been obtained by hatching a conspiracy against the plaintiff/appellant, on the ground that in relation to the same set of property, there already existed an unregistered prior transfer deed of 28.01.2005, which is said to have been executed on Rs.100 stamp paper, which admittedly and even as per evidence on record was an unregistered document alleged to be executed in favour of the plaintiff/appellant, under the strength of which they claimed themselves to hold the title over the property in question. The suit thus instituted for the aforesaid relief, there was an amendment carried and by virtue of an amendment, a degree of permanent injunction was also sought as against the defendant for creating a restraint against them from forceful interference over the property, which was said to be the subject matter of sale deed of 17.06.2008, which had exchanged hand between Late Mr. Ishwar Chand and the defendants on the exchange of sale consideration as given therein in the sale deed to the tune of Rs.4,34,000/-.

3. The suit was contested by defendant no.1 by filing the written statement apart from denying the plaint averments, the defendants have contended, that they are the bona-fide purchaser under the register document which was executed in their favour by the recorded owner of the property, which stood registered before the Sub Registrar and hence their rights stood crystallized by the execution of the registered sale deed and any claim, which has been raised by the plaintiff/appellant to the contrary under the strength of unregistered agreement for sale would be barred by the provisions contained under Section 17 to be read with Section 49 of The Registration Act to be read in evidence for determining a right. In the written statement, it was contended, that the very foundation of the plaint in fact it suffered from the vices, that there was no cause of action, as such for them and hence the suit ought to have been dismissed by invoking the provisions contained under Order 7 Rule 11 of C.P.C.

4. After the exchange of pleadings where the respondents/defendant have specifically contented in the written statement of 20.04.2009, that a valid right has been created in their favour on the basis of the registered sale deed, executed based on a suit for a specific performance, could have been instituted as the same would be barred by the provisions contained under Section 38 to be read with Section 41 of The Specific Relief Act of 1963. It is based upon the aforesaid rival contentions, where the plaintiff/appellant, was claiming his rights over the property in question on the basis of the unregistered notarized sale deed dated 28.01.2005 vis-a-vis the sale deed of the respondents, which was registered on 17.06.2008 the learned trial court after the exchange of pleadings had framed the following issues on 10.09.2009 to the following effect:-

^ ^1&D;k fodz; i= fnukafdr 17&06&2008 okni= esa of.kZr dkj.kksa ds vk/kkj ij diViw.kZ] QthZ] 'kwU; ,oa fu"izHkkoh ?kksf"kr gksus ;ksX; gS\ 2&D;k oknh dk vkns'k 7 fu;e 11 lhoiholho ds izko/kkuksa ls ckf/kr gS\ 3& D;k oknh dk okn fof'k"V vuqrks"k vf/kfu;e ds izko/kkuksa ls ckf/kr gS\ 4& D;k oknh dks dksbZ okn dkj.k izkIr ugha gS\ 5&D;k oknh }kjk okn dk ewY;kadu de dj U;k; 'kqYd de vnk fd;k x;k gS\ 6& D;k oknh dk okn lEifRr varj.k vf/kfu;e ds izko/kkuksa ls ckf/kr gS\ 7&D;k oknh okafNr vuqrks"k izkIr djus dk vf/kdkjh gS\ ^ ^

5. At this stage, so far as the present second appeal is concerned, the subject matter which would be of prime consideration, would be the findings which has been recorded on issue no.1 and issue no.3, which related to, as to whether at all the sale deed of 17.06.2008 executed by the record recorded owner in favour of the defendant/respondents, which stood registered before the Sub Registrar could be treated as to be a fraudulent document and could be declared to be null and void by the Civil Court.

6. The third issue was as to whether at all the plaintiff/appellant, who claimed their right on the basis of an unregistered deed of conveyance, which otherwise was required mandatorily to be registered under Section 17 of The Registration Act, place the suit for cancellation of the registered deed at the behest of the plaintiff/appellant who claimed his right on the basis of unregistered document, would be barred by the provisions of The Specific Relief Act.

7. In support of the rival contentions, the plaintiff/appellant had adduced the list of document by Paper No.7-Ga, wherein he has produced the agreement Paper No.10 Ga, the Will 11-Ga and the findings of the Suit No.17 of 2006 and the written statement filed therein. Apart from it, he has also produced on record the notices which were issued to the Nagar Palika, the publication made thereof and various other such documents to substantiate their claim.

8. But so far as the defendant/respondents is concerned, the defendant/respondents had produced their evidence by producing the tax receipts and the document of deed of conveyance, executed in their favour, which was registered and accordingly the learned trial court while deciding issue no.1 & 6, which dealt with the issue; as to whether the sale deed of 07.06.2008, was validly executed and whether the suit was at all barred by the provisions contained under The Transfer of Property Act, after considering the statement recorded of P.W.1 Brahamdutt Sharma and the rival evidence adduced and by the defendant/respondents of Smt. Neelam as D.W.1 had arrived at a conclusion, with its findings recorded in para 24 as to what would the "sale" mean as defined under Section 54 of The Transfer of Property Act and it had observed that on the basis of the principles which had been laid down by the various judgment of the Hon'ble Apex court particularly having reference to the judgment reported in (2012) 3 Civil Court Cases 42 (Andhra Pradesh) Kapu Anasuyamma vs. V.K. Malla Reddy and Others, which was considering the impact of Section 49 of The

Registration Act as well as the effect of Section 35 of The Stamp Act. In fact it has been observed that new document, which is foundation of claim which is an unregistered document and unstamped or insufficiently stamped, cannot be taken into consideration by way of evidence in view of the bar created by Section 49 of The Registration Act, so was the finding returned by the courts below concurrently, with regards to the effect, as to what would actually the term sale mean under the given set of circumstances, particularly when the claim is based upon an unregistered deed of conveyance, which is a fact not disputed by the plaintiff/appellant herein or at any stage of the proceedings before the court below.

9. The learning trial court has observed that if the provisions contained under Section 17 and 49 of The Registration Act is read in correlation to the provisions contained under Section 107 of The Transfer of Property Act, in fact the very foundation of their claim, which they submitted that they had been in possession over disputed property on the basis of unregistered document of conveyance, that cannot be read in evidence and even for the collateral purposes, as in the instant case happens to be where a registered sale date of 17.06.2018, which was the subject matter of consideration. Even this court is of the view that the law has specifically provided under Section 17(1)(b) of the Act, the classification of the document, which are mandatorily required to be registered, and if they are not registered as such where a compulsory registration is mandatory. Hence, in the light of the judgment of the Hon'ble Apex Court reported in [2006 (65) ALR 233] Jaiveer vs. Raghunandan and others particularly the observations which had been made in para 12 of the said judgment, no valid title or right could have been conveyed on the basis of unregistered document because of the implications of Section 14 to be read with section 49 of The Registration Act and such a document cannot be treated as to be a deed of conveyance in view of the provisions contained under Section 54 to be read with Section 107 of the Transfer of Property Act. Para 12 of the said judgment is extracted hereunder:-

"12. Sri. A.N. Srivastava, Advocate, has cited a decision of the Apex Court M. Kallappa Setty v. M.V. Lakshminarayana Rao, wherein the Apex Court held that on the strength of possession, the plaintiff can resist interference from the defendant, who has no better title than the plaintiff and get injunction restraining the defendant from disturbing his possession. Extract of paragraph No. 5 of the said decision is quoted below:-

Once it is accepted, as the trial court and the first appellate court have done, that the plaintiff was in possession of the property ever since 1947 then his possession has to be protected as against interference by someone who is not proved to have a better title than himself to the suit property. On the findings arrived at by the fact finding courts as regards possession, the plaintiff was entitled to the second relief asked for by him even if he had failed to prove his title satisfactorily."

10. Consequently while returning its finding the learned trial court while making a reference to a judgment reported in [2006 (65) ALR 233] Jaiveer vs. Raghunandan and others had held that once the title remained unestablished based on a genuine document, which could be at all read in evidence, which is a burden required to be discharged by the plaintiff when he claims a right over an immovable property based on a deed of conveyance and that is not discharged then the inference is to be drawn to the contrary to the plaintiff/appellant claim as agitated in the plaint.

11. Accordingly, the suit in question was dismissed by the court of Civil Judge (Sr. Div.) Rishikesh by one of the impugned judgment of 25.10.2016. Being aggrieved against the said judgment, the plaintiff/appellant had filed an appeal being Civil Appeal No.160 of 2016. If the memorandum of appeal which was preferred by the appellant, before the court below if that is taken into consideration which stood instituted on 26.11.2016, in fact the tenacity of argument which has been sought to be impressed upon by the learned counsel for the plaintiff/appellant before this Court with regards to non framing of an appropriate issues for the purposes of deciding the issue of the suit for cancellation of the sale deed, in fact it had never constituted as to be a principal ground of challenge, at the first available opportunity, before the first appellate court. Hence, this contention about the non framing of an appropriate issue, is not available to be addressed by the plaintiff/appellant, to the second appeal, particularly when the interest of the parties to the civil proceedings are protected by the provisions contained under Order 14 Rule 5 of C.P.C. because if the court has framed an issue and either of the parties to the proceedings are dissatisfied with the nature of the issue, which has been framed, it has always been made as a prerogative of the parties to the proceedings to request the court to frame an issue accordingly. But if the memorandum of appeal itself is taken into consideration, no such plea of non framing of an appropriate issue ever constituted as to be a ground taken in the appeal, while putting a challenge to the judgment of the trial court. Ultimately the appeal thus registered before the court of II 2nd Additional District Judge, came up for consideration before the District Judge on 29.04.2019 and the learned District Judge while exercising its powers under Order 41 Rule 31 of C.P.C. had formulated the following point of determination which is extracted hereunder:-

^^12- izLrqr vihy ds fuLrkj.k ds fy, fuEufyf[kr vo/kk;Z fcUnq ¼Points for determination½ fojfr fd;s tkrs gS% ¼1½ D;k izfrokn la[;k 2@izR;FkhZ la[;k 2 }kjk lEifRr la[;k 8 lkses'oj uxj dks] oknh@vihykFkhZ dh iRuh dks fnukad 28-01-2005 dks fodz; dh x;h Fkh vkSj mlh lEifRr dks izfrokn la[;k 2 }kjk] iqu% izfrokn la[;k 1 dks fodz; foy[k fnukafdr 17-06-2008 }kjk fodz; fd;k x;k\ ¼1½ 2½ D;k vihykFkhZ@oknh] fookfnr lEifRr la[;k 2 ¼lEifRr la[;k 7 lkses'oj uxj ,oa lEifRr la[;k 8 lkses'oj uxj½ dk Lokeh ,oa dkfct gS\^^

12. No other point of determination was ever pressed by the parties.

13. In fact the first point of determination, was as to whether in relation to the disputed property, which the plaintiff/appellant contends, that it was sold to the wife of the plaintiff on 28.01.2005, whether the predecessor owner could have at all executed the subsequent sale deed in favour of the defendant/respondents on 17.06.2008 or not? The learned appellate court while deciding the point of determination no.1 with regards to the competence of the predecessor owner Ishwar Chand; to sell the property has recorded its categoric finding in para 17 of the impugned appellate judgment to the effect that if the two documents, which were subject matter of consideration before the appellate court the sale deed of 17.06.2008, would have a better evidentiary value, since being a registered document and the sale deed which was executed by Ishwar Chand, in favour of the wife of the plaintiff/appellant on 28.01.2005 in relation to the property in dispute, the subsequent sale deed will have precedence over the earlier unregistered sale deed and since the earlier sale deed cannot be read in evidence devolving a valid title or ownership at all, it would be a document in nullity which would be not conferring any valid title on the plaintiff/appellant as such since being contrary to the Registration Laws.

14. In fact after an appreciation of evidence, which was adduced before the trial court, the appellate court too has returned its finding on point of determination no.1 to the effect that the sale deed, which is said to have been executed in favour of defendant no.1/respondent on 17.06.2008 was in fact a valid document which stood executed in the light of the provisions contained under Section 17 of The Registration Act and which cannot be permitted to be diluted on the ground of defence taken by the plaintiff/appellant on the suit based on an unregistered document. So were the findings, which had been recorded in relation to the question of title, which was decided by the appellate court in relation to the finding recorded by the learned trial court while deciding issue no.7. The finding returned by learned trial court the title of the defendant/respondents was upheld based on the sale deed of 17.06.2008, holding that the sale deed, that is Paper No.8 Ga, as to be a valid document, which is recognizable under the eyes of law and could be read in evidence for substantiating the right over an immovable property, as it would be falling to be a sale under Section 54 of The Transfer of Property Act.

15. Apart from the question, which has been argued by the learned counsel for the appellant with regards to the affect of non-framing of proper issue by the learned trial court, the other substantial question of law which has been framed, with regards to the impact of Section 49 and the effect of the will, which is said to have been executed on 28.08.2006, deciding the sale of the property in favour of Kamlesh Sharma by Ishwar Chand, will have no relevant bearing in view of the provisions contained under The Registration Act, so far it related to the creation of right in favour of the defendant/respondents and their right created by the sale deed of 17.06.2008, will not be clouded by the alleged violation of General Rule Civil, as sought to be pressed by formation of the substantial question of law pertaining to the impact of Rule 52,

53, 54 and 55 of the General Rule Civil, which is only procedural in nature and not a substantive law.

16. In that eventuality and in view of the concurrent findings of fact recorded by both the courts below, based on an appreciation of evidence on record and particularly as per the opinion of this Court, to that regards the unregistered deed of conveyance in relation to an immovable property, it cannot be permitted to be preceded to have a binding effect as against the register document, which has got a legal significance under the statute particularly as that contained under the provisions of Registration Act and the Transfer of Property Act. As such the second appeal is concluded by the concurrent finding of facts, which do not at all call for any interference by this Court in the exercise of its jurisdiction under Section 100, as it does not entail consideration of any of the substantial question of law, which has been framed in the memorandum of second appeal, which otherwise had never been a subject matter of the contention of the plaintiff/appellant in the proceedings before the court below.

Hence, the second appeal lacks merits as concluded by concurrent finding of facts, hence it fails and is accordingly dismissed.

(Sharad Kumar Sharma, J.) 06.07.2022 Arti