CASE NO.:
Appeal (civil) 3280 of 2002

PETITIONER:
N. Khosla

RESPONDENT:
Rajlakshmi (dead) & Ors.

DATE OF JUDGMENT: 06/03/2006

BENCH:
H.K. SEMA & Dr. AR LAKSHMANAN

JUDGMENT:
J U D G M E N T

H.K.SEMA,J.

Dewan Niranjan Prasad was ex-Minister and a retired Senior Judge of the High Court of Patiala. He had an ancestral kothi known as 'Nishkam' situated at 23, Bhupender Nagar Road, Patiala, Punjab. He had two sons, namely \026 Sh. K.J. Khosla and Sh. N. Khosla and three daughters namely Smt. Rajlakshmi (respondent No. 1 herein whose appeal stands abated), Smt. Nirmala and Smt. Saraswati. Since the kothi was an ancestral property, Dewan Niranjan Prasad and his two sons were the coparceners.

On 14.10.1956, Dewan Niranjan Prasad had gifted three plots of land forming part of the kothi in its rear portion to his three daughters with the consent of his wife \026 Smt. Amar Devi and his two sons. The said gift was duly recorded in the family year book known as "Dussehra Bahi." The said gift was conditional and the condition was that the beneficiaries would construct houses on the gifted plots and shall reside there. The said gift of plots to his three daughters was affirmed by Dewan Niranjan Prasad through a registered deed on 10.6.1961. However, possession was not delivered. In 1966 Smt. Saraswati died and was survived by her husband B.S. Talwani and sons, respondent No.3.

As none of the three daughters, to whom the plots were gifted, took possession and constructed the houses, Dewan Niranjan Prasad revoked the Gift Deed and resumed the plots with the express consent of his daughters, Smt. Rajlakshmi, Smt. Nirmala and Sh. B.S. Talwani \026 husband of late Smt. Saraswati and paid Rs. 10,000/- to each of them in lieu of the said plots. Receipt of the amount as consideration for resumption of the said plots was also duly acknowledged by each of the beneficiaries. Thereafter, Dewan Niranjan Prasad partitioned the entire property "Nishkam" (including the plots earlier gifted to his daughters and then resumed by him) by allotting separate shares to his two sons, namely, S/Sh.K.J. Khosla and N. Khosla. The oral partition was recorded in writing in the memo of partition dated 6.12.1974. Dewan Niranjan Prasad died on 15.1.1975 leaving behind his two sons, two daughters and legal heirs of late Smt. Saraswati.

After the death of Dewan Niranjan Prasad, a dispute arose between his sons and daughters \026 namely Smt. Rajlakshmi, Smt. Nirmala and legal heirs of Smt. Saraswati regarding the rear part of the compound of the ancestral kothi called "Nishkam". Parties to the dispute by mutual consent and by an Arbitration Agreement dated 27.10.1978 referred

the dispute to the sole Arbitrator, Dewan Ram Kishan Khosla, Sr. Advocate.

It appears that on 22.1.1977, the respondents fraudulently managed to get the mutation of the portion of the property in question recorded in the revenue records in their favour showing Dewan Niranjan Prasad, who had expired on 15.1.1975 and Smt. Saraswati, who had expired in 1966, as present and witnessing the said mutation.

The Arbitrator examined the contentious issues presented from both sides and after threadbare discussion delivered his award on 10.7.1979. The Arbitrator in his award found inter-alia that the gift in question in favour of daughters was revoked and the plots were resumed by late Dewan Niranjan Prasad with the consent of the two daughters and Sh. B.S. Tawlani \026 husband of Smt. Saraswati in lieu of cash payment received by them. The Arbitrator also found that the mutation in favour of the respondents was obtained by fraudulent means and therefore, non-est.

On 1.8.1979, S/Sh. K.J. Khosla and N. Khosla, the two sons of Dewan Niranjan Prasad filed an application under Section 14 of the Arbitration Act, 1940 for making the award a Rule of the Court. It appears that on 24.5.1981, notice of the application was issued to the respondents who filed objections contending inter-alia that the award dated 10.7.1979 created, declared, assigned, limited or extinguished right, title and interest of the value of Rs. 100 and upwards to or in immovable property and, therefore, the award was compulsorily registrable under Section 17(1)(b) of the Registration Act, 1908 (hereinafter as 'the Act' ) and since the award was not registered, it could not be made a rule of the Court. The Sub-Judge, by his order dated 25.5.1981 held that the award purports/operates to extinguish the rights of the daughters and create/declare rights, title and interest in the sons in immovable property, the value of which was more than Rupees One hundred only and thus, it compulsorily required registration under Section 17 of the Act. On this reasoning, the Sub-Judge declined to make the award as a rule of the Court. Aggrieved thereby, the two sons of Dewan Niranjan Prasad filed appeal before the Appellate Court, which was dismissed on 8.8.1983 holding the same view. Thereafter, a civil revision, namely revision No. 3064 of 1983 was preferred before the High Court, which was dismissed by the impugned order on 8.1.2001. Hence, the present appeal.

The High Court, in our view, erroneously dismissed the Civil Revision affirming the orders passed by the Trial court and Appellate Court. The High Court dismissed the civil revision with the following reasoning:

(1) the award took away some rights from the sisters by giving a declaration that the donees did not comply with the condition of the gift and in this way, the sisters were divested of some rights and those rights were created for the first time in favour of the brothers by the award;

(2) as the Arbitrator observed that the mutation of the land in favour of the daughters was of no value, it cannot be said in such a situation that the award only declared a pre-existing right in favour of the sons;

(3) by the award itself, an adjudication has been made by the Arbitrator that the gift created by the father in favour of his

daughters was not enforceable because it was never accepted by the donees and it was never acted upon as per the conditions of the gift. One of the conditions was that the daughters should construct their houses. Thus, the document of award declares and creates rights in favour of the brothers by taking it from the sisters and when those rights are created in praesenti, then such document/award requires registration and such an award without registration cannot be acted upon as it does not confer any right, title or interest in favour of the brothers;

(4) the rights were created for the first time through the award itself and, therefore, this award required registration;

(5) the present award is a declaration vide which certain rights of the Respondents were extinguished and rights in favour of the Petitioner (and Respondent No. 5) were created by making them the owners of the disputed plots by rejecting the defence and contentions of the sisters and thus the award is squarely covered by the provisions of Section 17(1)(b) of the Registration Act."

During the pendency of this appeal, an application was taken out for substitution of respondent No. 1 \026 Smt. Rajlakshmi by her legal representatives. This Court, on 11.7.2005 rejected the substitution application on ground of delay. Accordingly, the appeal stood abated as far as deceased respondent No. 1 is concerned. Therefore, the question whether on abatement of the appeal in respect of deceased respondent No. 1, the appeal is maintainable qua the other respondents also poses for consideration.
The questions posed for determination in this appeal are:
A. Whether with abatement of appeal in respect of deceased Smt. Rajlakshmi, the whole appeal qua other respondents abated or not?

B. Whether the award of the Arbitrator dated 10.7.1999 purports or operates to create, declare, assign, limit or extinguish in praesenti or in future any right, title or interest of the value of one hundred rupees and upwards to or in immovable property which requires registration under Section 17 (1)(b) of the Registration Act, 1908?

A. Abatement of appeal in respect of deceased Smt. Rajlakshmi & maintainability of the appeal qua other respondents

Mr. C.A. Sundram, learned Senior counsel, appearing on behalf of the appellant strenuously contended that the Gift Deed in respect of the daughters, which had been revoked, was distinct and separate and therefore, the decree is distinctly and severally executable on the abatement of appeal in respect of Smt. Rajlakshmi and, therefore, the appeal qua other respondents does not abate and is maintainable. Per contra, Mr.Manish Vasisth, learned counsel appearing on

behalf of the respondents contended that the issue is common and when the appeal against one of the respondents abated, the whole appeal qua other respondents also abated.

To answer this question, we may refer to the Gift Deed dated 14.10.1956 executed by Dewan Niranjan Prasad. The aforesaid Gift Deed was entered in the Dussera Bahi of the family. The partition portion of the Gift Deed in the Dussera Bahi reads as under:

"On this auspicious occasion, on my behalf and on behalf of both brothers I offer by way of present one piece of land in the rear portion of "Nishkam" to all the three sisters, which has a breadth of three hundred feet. All three sisters will get a front of 100 feet each. The length will be 150-160 feet i.e. up to the contractor's hut, that is up to the middle of the rons (walk) on which it stands. Bibi Saraswati's plot will be towards Narrn house, Nirmal's towards Lola Atka Rao and Raj's in the middle."

As already noticed, the Gift Deed was revoked by a memorandum dated 10.5.1971 and the two daughters and husband of the deceased daughter were paid Rs. 10,000/- each in lieu of the plots. It appears from the record that on 2.9.1971 Smt. Rajlakshmi and Sh. B.S. Talwani, husband of Smt. Sarswati had written a letter to Dewan Niranjan Prasad that they have received the full amount of Rs. 10,000/- as their share.

The facts, as adumbrated above, would clearly show that each of the daughters had a distinct and separate share by metes and bounds and also that each one of them had received Rs. 10,000/- in lieu of the plots of land and therefore, it cannot be held that abatement of respondent No. 1 would abate the appeal qua the other respondents.

In Sardar Amarjit Singh Kalra (Dead) by LRs. (appellant) v. Pramod Gupta (Smt.)(Dead) by LRs. & Ors. (respondents) (2003) 3 SCC 272 a Constitution Bench of this Court, after considering various decisions held, at page 305 SCC, that whether an appeal partially abates on account of the death of one or the other party on either side has to be considered depending upon the fact as to whether the decree obtained is a joint decree or a severable one. It was further held that in case of a joint and inseverable decree if the appeal abated against one or the other, the same cannot be proceeded with further for or against the remaining parties as well. If otherwise, the decree is a joint and several or separable one, being in substance and reality a combination of many decrees, there can be no impediment for the proceedings being carried with among or against those remaining parties other than the deceased. Finally, this Court held in paragraph 34, at page SCC 307 as under:

"34. In the light of the above discussion, we hold:-

(1) Wherever the plaintiffs or appellants or petitioners are found to have distinct, separate and independent rights of their own and for purpose of convenience or otherwise, joined together in a single litigation to vindicate their rights the decree passed by the Court thereon is to be viewed in substance as the combination of several decrees in favour of the one or the other parties and not as a joint and inseverable decree. The same would be the position in the case of defendants or

respondents having similar rights contesting the claims against them.

(2) Whenever different and distinct claims of more than one are sought to be vindicated in one single proceedings as the one now before us, under the Land Acquisition Act or in similar nature of proceedings and/or claims in assertion of individual rights of parties are clubbed, consolidated and dealt with together by the Courts concerned and a single judgment or decree has been passed, it should be treated as a mere combination of several decrees in favour of or against one or more of the parties and not as joint and inseparable decrees.

(3) The mere fact that the claims or rights asserted or sought to be vindicated by more than one are similar or identical in nature or by joining together of more than one of such claimants of a particular nature, by itself would not be sufficient in law to treat them as joint claims, so as to render the judgment or decree passed thereon a joint and inseverable one.

(4) The question as to whether in a given case the decree is joint and inseverable or joint and severable or separable has to be decided, for the purposes of abatement or dismissal of the entire appeal as not being properly and duly constituted or rendered incompetent for being further proceeded with, requires to be determined only with reference to the fact as to whether the judgment/decree passed in the proceedings vis-a-vis the remaining parties would suffer the vice of contradictory or inconsistent decrees. For that reason, a decree can be said to be contradictory or inconsistent with another decree only when the two decrees are incapable of enforcement or would be mutually self-destructive and that the enforcement of one would negate or render impossible the enforcement of the other."

In the case of Shahazada Bi and Ors. v. Halimabi (since dead) By her LRs. (2004) 7 SCC 354, during the pendency of the suit, defendant No. 4 had died. This Court, after considering various decisions of this Court on the provision of Order 22 Rule 4 C.P.C., held that the Rule does not provide that by the omission to implead the legal representatives of a defendant, the suit is abated as a whole. This Court further held that whether the defendant represented the entire interest or only a specific part is a fact that would depend on the circumstances of each case. If the interests of the co-defendants are separate, as in case of co-owners, the suit will abate only as regards the particular interest of the deceased party.
In that case the 4th defendant, who died on 8.5.87, was in possession of one of the seven rooms, which were let out to defendant No. 5. The trial court found different rooms to be in possession of different defendants who claimed to be tenants-in-common in possession of each of the seven rooms and therefore, in those circumstances, this Court held that the death of the 4th defendant would not abate the suit qua the other defendants.

Learned counsel for the respondents relied on the decision of this Court in Badni (Dead) by LRs. & v. Siri Chand (Dead) by LRs. & Ors. (1999) 2 SCC 448. In that case the fact of adoption of one Ratan Singh, plaintiff was the common issue. The High Court dismissed the appeal on the ground that the legal heirs of one Shiv Lal, one of the appellants, were not brought on record. The High Court was also of the view that on abatement of Shiv Lal's appeal, other appeals also stood abated because of the common issue regarding the adoption of the plaintiff's pre-deceased interest (Ratan Singh). There cannot be two conflicting decrees. The adoption issue being common and decisive in all the appeals pending before the High Court, dismissing one appeal alone on the ground of abatement and allowing the other appeals on merits might result in conflicting decrees in case other appeals are accepted on merits. The facts of that case are not applicable to the facts of the case at hand. Here, no common issues among the sisters arise because as already said all the sisters had different and distinct share by metes and bounds. Therefore, the said decision is of no assistance to the respondents.

Learned counsel for the respondents also referred to the decision in Pandit Sri Chand & Ors. v. M/s. Jagdish Parshad Kishan Chand & Ors. (1966) 3 SCR 451. In that case the parties agreed to the decree jointly and severally and Basant Lal, one of the appellants died on 18.10.1962. The counsel also referred the case in Ram Sarup & Ors. v. Munshi & Ors. AIR 1963 SC 553 in which case the issue was a pre-emption decree which was indivisible. Both these cases are not applicable to the facts of the case in hand.

In the facts and circumstances of the present case and the well settled position of law, as referred to above, we are of the view that the abatement of appeal in respect of Smt. Rajlakshmi would not abate the appeal qua other respondents. We hold that the appeal qua other respondents is maintainable.

B. Whether the award of the Arbitrator dated 10.7.1999 purports or operates to create, declare, assign, limit or extinguish in praesenti or in future any right, title or interest of the value of one hundred rupees and upwards to or in immovable property which requires registration under Section 17 (1)(b) of the Act?

We may first notice the provisions of Section 17(1)(b) of the Act:

17. Documents of which registration is compulsory.-

(1) The following documents shall be registered, if the property to which they relate is situate in a district in which, and if they have been executed on or after the date on which, Act No.XVI of 1864, or the Indian Registration Act, 1866, or the Indian Registration Act, 1871, or the Indian Registration Act, 1877, or this Act came or comes into force, namely:-

(a)\005\005..

(b) other non-testamentary instruments which purport or operate to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent, of the value of one hundred rupees and upwards, to or in immovable property;

(c)-(e)\005\005\005"

(emphasis supplied)

Clause (b) of Section 17(1) enjoined registration of non-testamentary instruments which purport or operate to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent, of the value of one hundred rupees and upwards, to or in immovable property. This section speaks of creating rights or extinguishing rights in praesenti or in future. Any right created or extinguished in the past is conspicuously absent. The creation of any right or extinguishment of any right is expressly excluded by the Act itself.

It is contended by Mr. Sundram, learned Senior counsel for the appellant that the award of the Arbitrator does not create any right or extinguish any right in praesenti or in future. He further submitted that the award of the Arbitrator noticed the pre-existing facts of a Gift Deed dated 14.10.1956 registered on 10.6.1961 and the revocation of Gift Deed on 10.5.1971 and payment of consideration amount received in lieu of gift of plot. He, therefore, argued that by no stretch of imagination it can be held that the award created any rights or extinguished any rights in praesenti or in future which would require registration under the Act. Per contra, learned counsel for the respondents contended that the award created rights in favour of the sons and extinguished the rights of the daughters in the immovable property and therefore, the award would require registration under the Act.

To answer this question, it would be necessary to examine the award of the Arbitrator.

Before we examine the award of the Arbitrator, we may at this stage notice the mutual agreement entered into between the parties referring the dispute to the Arbitrator. The dispute, which was referred to the Arbitrator by the parties, was with regard to Gift Deed and the resumption of the property gifted in favour of his three daughters \026 Smt. Rajlakshmi, Smt. Nirmala and Smt. Sarsaswati survived by her husband, B. C. Talwani. After the parties filed the written statements and documents in support of their respective claims, the Arbitrator framed the following issue:

"Whether the gift of the three plots in favour of the daughters still stand and was not revoked and the plots were not resumed by their father?"

The Arbitrator, after examining the issues, came to the following conclusion:

1. That the gift was made in 1956 on condition that the daughters would build houses and settle there. No houses were built during this long period. Even the possession was neither delivered by the donor nor was possession taken by the donees. A document dated 10.05.1971, Ex. K-5 is clear.

2. That the gift was not acted upon even the Gift Deed remained in possession of the donor, their father throughout.

3. That Dewan Niranjan Prasad the donor revoked the gift and resumed the three plots at the instance and with the consent of the donees, the daughters, who agreed to the resumption of the plots on the ground that the plots were not of any remuneration value and agreed to convert the plots into cash. They accepted the cash in lieu of the plots as mentioned in Ex. K04 and Ex. K-5 and in written statements.

4. Smt. Nirmala's plea that Rs. 5000/- were paid back to her on account of the loan, advanced by her husband to Naval her brother, has not been substantiated. She did not mention in her letter dated 17.08.1973 Ex. K-2, that it was a loan. The other item of Rs. 5,000/- has also not been proved that it was due to her otherwise.

5. The mutation of the land in favour of the daughters has no value. The entries are wrong. Dewan Niranjan Prasad and Smt. Saraswati, who are recorded as present, had died long before the mutation was sanctioned. No notice appears to have been issued to any party.

6. That the execution of the Memorandum of Partition, which is a subsequent act of the Late Dewan Niranjan Prasad, impliedly shows also that the gift to the three daughters was revoked.

I give my award in favour of Shri Krishen Jiwan and Shri Naval Jiwan and hold that the gift was revoked and plots were resumed by the Late Dewan Niranjan Prasad at the instance and with the consent of the second part in lieu of cash payment received by them."

The award of the Arbitrator, as quoted above, would clearly show that by the award the Arbitrator simply recorded the finding on the basis of the pre-existing facts, namely, the Gift Deed, the revocation of the gift and the partition of the property between his sons subsequent to the revocation of Gift Deed. It is a declaration of pre-existing rights. It neither creates any right nor extinguishes any right in praesenti or in future. What Section 17(1)(b) of the Act requires is the creation of rights by decree in praesenti or in future. In the present case the award of the Arbitrator, as noted above, clearly delineated the pre-existing facts, on the basis of which the award was passed.

In Capt. (Now Major)Ashok Kshyap (appellant) v. Mrs. Sudha Vasisht & anr. (respondents) AIR 1987 SC 841, the award of the Arbitrator, though declared the share of the parties in the property, it created a right by itself, in favour of one party to get particular sum from another party and right to obtain the payment and on payment the obligation of relinquishment of right or interest in the property. This Court held on an analysis of the award that it did not create any right in any immovable property and as such it was not compulsory to register it.

This Court in the case of Sardar Singh v. Krishna Devi (Smt.) and Anr. (1994) 4 SCC 18 held in paragraph 12 page 26 (SCC) as under:

"It is, thus, well settled law that the unregistered award per se is not inadmissible in evidence. It is a valid award and not a mere waste paper. It creates rights and obligations between the parties thereto and is conclusive between the parties. It can be set up as a defence as evidence of resolving the disputes and acceptance of it by the parties. If it is a foundation, creating right, title and interest in praesenti or future or extinguishes the right, title or interest in immovable property of the value of Rs. 100 or above it is cumpulsorily registrabie and non-

registration render it inadmissible in evidence. If it contains a mere declaration of a pre-existing right, it is not creating a right, title and interest in praesenti, in which event it is not a compulsorily registrable instrument. It can be looked into as evidence of the conduct of the parties of accepting the award, acting upon it that they have pre-existing right, title or interest in the immovable property.

(emphasis supplied)

To buttress his contention, learned counsel for the respondents has referred to the decision of this Court in Ratan Lal Sharma v. Purshottam Harit (1974) 1 SCC 671. In that case the award expressly created or purported to create rights in immovable property in favour of the appellant, which required registration. This is not the position in the facts of the present case.

Looking at the award of the Arbitrator and the law laid down by this Court the arguments of learned counsel for the respondents that the award created any right or extinguished any right in praesenti or in future which would require registration under the Act is noted only to be rejected.

In the result, all the decisions of the courts below are patently erroneous and are set aside. This appeal is allowed. The award of the Arbitrator is made the Rule of the Court.

It is clear from the record that Dewan Niranjan Prasad died on 15.1.1975 and Smt. Saraswati also in 1966. The respondents fraudulently obtained mutation on 22.1.1977 showing Dewan Niranjan Prasad and Smt. Saraswati as present. Fraud clocks everything.

Fraud avoids all judicial acts. A decree obtained by playing fraud is a nullity and it can be challenged in any court, even in collateral proceedings. (See S.P. Chengalvaraya Naidu (Dead) By LRs. V. Jagannath (Dead) by LRs. & Ors. (1994)1 SCC 1.

It is open to the appellant to file a suit against the legal heirs of Smt. Rajlakshmi, whose appeal has been abated. If the suit is filed within two months from today, it shall not be dismissed as being barred by limitation. With the aforesaid directions, the appeal is allowed. Parties are asked to bear their own costs.