

IN THE HIGH COURT OF UTTARAKHAND AT NAINITAL

(1) Second Appeal No.6 of 2015

Smt. Kusum Devi & another **Appellants**

Versus

Anil Kumar & others **Respondents**

*Mr. Siddhartha Singh, Advocate for the appellants.
Mr. Neeraj Garg, Advocate for respondent no.7.*

(2) Second Appeal No.7 of 2015

Smt. Kusum Devi & another **Appellants**

Versus

Anil Kumar & others **Respondents**

*Mr. Siddhartha Singh, Advocate for the appellants.
Mr. Neeraj Garg, Advocate for respondent no.7.*

(3) Second Appeal No.8 of 2015

Smt. Kusum Devi & another **Appellants**

Versus

Anil Kumar & others **Respondents**

*Mr. Siddhartha Singh, Advocate for the appellants.
Mr. Neeraj Garg, Advocate for respondent no.7.*

(4) Second Appeal No.9 of 2015

Smt. Kusum Devi & another **Appellants**

Versus

Anil Kumar & others **Respondents**

*Mr. Siddhartha Singh, Advocate for the appellants.
Mr. Neeraj Garg, Advocate for respondent no.7.*

Hon'ble Servesh Kumar Gupta, J.

All the above-titled appeals have arisen out of same judgment, hence are being taken up for admission together.

2. Having heard the learned counsel of either party, it transpires that the dispute amongst them, viz. plaintiffs and defendants, pertains to the genuineness of

two identical registered agreements to sale dated 14.11.1990 executed by Smt. Surji (widow) in favour of plaintiffs, who are none other but the real brothers/nephews of her husband Telu Ram. Smt. Surjee is said to be a scheduled caste infirm, old, illiterate and rural background lady, who was persuaded by her son-in-law Narendra Kumar to arrange some money for solemnization of marriage of his sister. So, she executed these two agreements. She never intended to sell her land in question but the deed was bestowed in the colour of an agreement to sale, while, in fact, it was a deed of security for loan of Rs.17,500/- against the demand of Rs.20,000/-. A sum of Rs.15,000/- was paid at the time of execution of these agreements while the sale deed had to be executed within two years by 13.11.1992 after payment of remaining consideration of Rs.2,500/-. When the sale deed was not so executed as per terms, notice was issued on 17.12.1992 asking Smt. Surji to execute the sale deed. In non-compliance of such notice, two separate identical suits were filed on 20.7.1994.

3. It was urged on behalf of learned counsel for the appellants that Anil Kumar/respondent no.1 is a clerk in Haridwar Judgeship, so by abusing the position of his office, he manipulated the service upon Smt. Surji, with the result, the suit proceeded *ex parte*. It was also decreed *ex parte* against Smt. Surji for specific performance on 28.9.1994. Soon after such decree, the execution took place and the Court executed the sale deed in compliance of such decree on 28.12.1994.

4. After lapse of a considerable time, say years, when the facts came into the notice of Smt. Surji, assisted by her daughter and son-in-law during

consolidation proceedings, then the application under Order 9 Rule 13 C.P.C. was moved by Smt. Surji for cancellation of *ex parte* decree. This application was allowed on 31.5.2000. Revision, where-against, was dismissed in February, 2002. Writ petition filed by the plaintiff/respondent was also dismissed.

5. It was also contended on behalf of the appellants that by virtue of allowing application under Order 9 Rule 13 C.P.C., the sale deed executed on 28.12.1994, in compliance of *ex parte* order, had become *non est*.

6. For contesting the suit on merits, the written statement was filed by Smt. Kusum Devi on 13.9.2002 because she and her husband Narendra Kumar had been substituted in the matter because of death of Smt. Surji on 11.4.2002. They also filed two counter claims for cancellation of agreements to sale separately in both the suits. The Trial Court dismissed both the Suits and allowed both the counter claims. Four appeals were filed; two challenged the dismissal of suit and rest of two challenged the allowing of counter claim.

7. Learned First Appellate Court has allowed all the four appeals directing the revival of sale deed dated 28.12.1994. Feeling aggrieved, Smt. Kusum Devi and Narendra Kumar have come up in these second appeals before this Court.

8. It was argued on behalf of the defendants/ appellants that there was no reason for the plaintiffs /respondents to keep the execution of sale deed pending just for the remaining meager consideration of Rs.2,500/- after making payment of Rs.15,000/- at the

time of execution of agreement to sale dated 14.11.1990. Settling two years' time for payment of such relatively very less money and waiting for execution of sale deed goes to reflect that the true nature of this deed was not depicted in its language, but, in fact, it was a deed written as security for the advance taken by Smt. Surji for marriage of sister of her real son-in-law Narendra Kumar.

9. It was further argued that in both the suits, the only witness, which was examined by the plaintiffs, was Sri Buddh Singh, the real uncle and brother of rest of the plaintiffs.

10. On the other hand, it was argued by learned counsel for the plaintiffs that Mr. Narendra Kumar was a marginal witness in the registered agreement to sale dated 14.11.1990.

11. Taking all the facts and circumstances into consideration cumulatively, the Court admits all these four appeals for hearing on the following substantial questions of law: -

- A. *“Whether the learned lower Appellate Court has not erred in law by allowing the appeal of plaintiffs without setting aside the detailed findings recorded by learned Trial Court?”*
- B. *Whether the impugned judgment is not vitiated due to non consideration of material facts and evidence available on record vis-à-vis (a) signing of disputed deed by Sri Anil Kumar as agent for his brothers Sri Virendra Kumar, Sri Sunil Kumar, Srikant and Sri Satish Kumar in absence of any authority, (b) variance between alleged facts of*

payment of earnest money in disputed deed and oral evidence of PW1, (c) formally not proving the disputed deed by examining the marginal witness and/or the scribe, (d) close relationship between the parties and illiteracy of deceased defendant/ executant, (e) issuance of alleged notice on 17.12.1992 after the last date i.e. 13.11.1992 fixed for execution of sale deed and filing of suit on 20.07.1994?

C. *Whether the written statement and the evidence of the substituted defendants can be discarded only on the ground that deceased defendant and the substituted defendants lived at different places?"*

12. Issue notices to un-served respondents, wherefor the steps shall be taken within two weeks.

13. Also, call for the L.C.R.

14. List all the four appeals together thereafter.

15. Meanwhile, it is hereby ordered that both the parties shall maintain *status quo* as regards the nature of property, in question. They will also not create any third party interest nor they will transfer the same in any manner whatsoever, regardless of the fact whether in the Revenue Court, the land has been mutated in the names of plaintiffs or defendants.

16. Stay applications (CLMA 365/2015, 366/2015, 367/2015 and 368/2015) stand disposed of accordingly.

**(Servesh Kumar Gupta, J.)
14.01.2015**