

(2023) 06 MP CK 0105
In the Madhya Pradesh High Court
Case No : Second Appeal No. 30 Of 2016

Abdul Muttallik

APPELLANT

Vs

Abdul Wahid And Others

RESPONDENT

Date of Decision : 30-06-2023

Acts Referred:

Code Of Civil Procedure, 1908 — Section 100

Citation : (2023) 06 MP CK 0105

Hon'ble Judges : Pranay Verma, J

Bench : Single Bench

Advocate : Sadashiv Krishna Pawnekar

Final Decision : Dismissed

Judgement

Pranay Verma, J

1. This appeal under Section 100 of the CPC has been preferred by the appellant Abdul Mutallik being aggrieved by the judgment and decree dated 15.12.2015 passed in Regular Civil Appeal No.43/2014 by the Additional District Judge, Susner, District Shajapur, arising out of the judgment and decree dated 21.08.2014 passed in Civil Suit No.80-A/2013 and 81-A/2013 by the Additional Civil Judge, Susner, District Shajapur.

2. The facts of the case in brief are that the appellant Abdul Mutallik and respondent No.1 Abdul Wahid are real brothers and respondent No.2 Akhtar Jahan is their sister. Their father was Abdul Rauf, who died on 09.01.2008. Their mother was Jubeda Khatun, who died on 19.08.1990. On 11.01.2011, respondent No.1 Abdul Wahid instituted an action before the trial Court for declaration of his title over half share in the suit lands, for permanent injunction restraining the defendants from interfering with his possession over the same and for mesne profits at Rs.25,000/-. He submitted that the mother of the parties namely Jubeda Khatun was the owner of the suit lands and upon her death 20 years ago the same devolved equally upon him and the appellant and

their father Abdul Rauf. Upon death of Abdul Rauf he and the appellant have become the owners of half share each in the suit lands. He demanded his share from the appellant but he refused to do so upon which he acquired knowledge that he has got himself recorded over the entire suit lands by order dated 24.05.1991 passed in Namantaran Panji No.15 dated 18.06.1991. He has thereafter started denying his title to the suit lands.

3. The claim was contested by the appellant submitting that during his life time Abdul Rauf had given his entire property to his wife Jubeda Khatun. On 10.06.1991 Jubeda Bee, respondent No.1 Abdul Wahid and their sister Akhtar Jahan had executed a Hibanama in his favour with respect to the entire suit lands and had thus transferred the same in his favour. He consequently became the sole owner of the suit lands. He also claimed title to the suit lands by virtue of adverse possession and submitted that the claim is barred by time. He also filed a counter claim for declaration of his title to the suit lands and for permanent injunction restraining the defendants from interfering with his possession over the same. Respondent No.3 Akhtar Jahan also contested the claim by filing her written statement taking almost the same pleas as taken by the appellant in his written statement.

4. Thereafter on 17.11.2011 the appellant instituted his separate suit for declaration of his title to the suit lands and for permanent injunction restraining the defendants therein from interfering with his possession over the same. Respondent No. 1 Abdul Wahid, who was a defendant to the suit contested the same by filing his written statement taking the pleas as had been taken by him in the suit instituted by him. Respondent No.3 Akhtar Jahan filed her written statement admitting the claim. Both the suits were consolidated by the trial Court and common issues were framed therein and common evidence was led by the parties.

5. The trial Court by judgment and decree dated 21.08.2014 held that the appellant has failed to prove that a Hibanama with respect to the suit lands was executed by Jubeda Khatun in his favour on 10.06.1991. It further held that he has illegally got himself recorded over the entire suit lands in their revenue records. Upon death of Abdul Rauf and Jubeda Khatun the appellant and respondent No.1 both have 2/5th share each in the suit lands and respondent No.2 Akhtar Jahan has 1/5th share therein. It also held that the suit of respondent No.1 is within time. Consequently, it partly decreed the claim of respondent No.1 and dismissed the counter claim of the appellant and also dismissed the claim of the appellant. The said judgment and decree have been maintained by the lower appellate Court in appeal preferred by the appellant. Hence this appeal.

6. By order dated 16.03.2017 the instant appeal has been admitted on the following substantial questions of law :-

A . Whether the suit filed by the respondent/plaintiff was time barred ?

B. Whether the finding of the Courts below that the appellant has not proved the oral gift in his favour (Hibanama) is perverse ?

7. Learned counsel for the appellant has submitted that the Courts below have erred in partly decreeing the claim of respondent No.1 and in dismissing the claim of the appellant. The Hibanama executed by Jubeda Khatun in his favour had categorically been proved by him by way of the oral as well as documentary evidence brought by him on record which has not been appreciated in proper perspective by both the Courts below. The appellant had examined himself and his witnesses Akhtar Jahan, his sister, Mohammed Hanif and Abdul Rehman to prove the factum of execution of Hibanama by Jubeda Khatun in his favour. He also brought cogent and reliable documentary evidence on record particularly the Namantaran Panji Ex.P/7 from which also it is proved that he was recorded over the suit lands in the revenue records subsequent to death of Jubeda Khatun on the basis of Hibanama executed by her in his favour. Under the Mohammedan law a written Hibanama is not required to be executed hence Jubeda Khatun had executed oral Hibanama in favour of appellant which could be and has been proved by way of examination of witnesses in front of whom the same was executed. It is further submitted that respondent No.1 has not been in possession of the suit lands for past 40 years hence his claim was apparently barred by time as the period of limitation for institution of the suit would be 12 years from the date of his dispossession. The Courts below have however illegally held his claim to be within time. Arguments have also been advanced on other issues which had been decided by the Courts below but since they are not covered in the substantial questions of law as framed by this Court, I do not deem it necessary to dwell upon the same. Reliance has been placed on the decision of the Supreme Court in Hero Vinoth (minor) V/s. Seshammal 2007 (1) MPLJ 17, Ilahi Shamsuddin Nadaf V/s. Jaitoon Bee Makbul Nadaf 1994 (2) MPWN Note No.80 and of this Court in Azizan Bai V/s. Abdul Shakur 1984 MPWN Note No.78.

8. Per contra learned counsel for respondent No.1 has submitted that the Courts below have not committed any error in holding that appellant has not been able to prove the factum of execution of Hibanama by Jubeda Khatun in his favour. The witnesses examined by him have deposed contrary to the real facts hence have rightly been disbelieved. There were glaring contradictions in their statements. The findings as regards execution of the Hibanama is a pure finding of fact and is not liable to be interfered with in Second Appeal. The respondent No.1 is a co-owner of the suit lands hence would be deemed to have been in possession throughout up to the date of suit hence the same was well within time. It is hence submitted that the appeal deserves to be dismissed.

9. I have heard the learned counsel for the parties and have perused the record Re: Substantial question of law No.2.

10. The appellant has come with the case that on 10.06.1991 Jubeda Khatun executed an oral Hibanama with respect to the entire suit lands in his favour

hence he has become the sole owner thereof on its strength. In support he has examined himself as DW 1, Akhtar Jahan as DW 2 and Mohammed Hanif as DW 3. These witnesses have stated that Jubeda Khatun executed oral Hibanama in favour of the appellant in their presence. The appellant stated that during life time of his mother he made an application before the Tehsil office for his mutation over the suit lands. After death of his mother his sister had brought an affidavit of respondent No.1 which he had produced before the Tehsil office.

11. DW 2 Akhtar Jahan has stated that at the time of execution of the Hibanama an affidavit was prepared by an Advocate of her father, respondent No.1 and herself jointly which was produced by the appellant in the Tehsil office for purpose of mutation. However the Namantaran Panji Ex.D/7 wherein the appellant was recorded over the entire suit lands after death of Jubeda Khatun states that upon her death the appellant made the application for mutation on which her other heirs including respondents No.1 and 2 and their father Abdul Rauf have produced affidavits relinquishing their share in the suit lands. It is hence evident that mutation was sought for by the appellant not on the basis of any Hibanama but on the basis of relinquishment of their shares in the suit lands by respondents No.1 and 2 and their father. Had Jubeda Khatun transferred the entire suit lands in favour of the appellant by way of Hibanama then mutation would have been sought for and allowed on that basis and not on the basis of relinquishment of their shares in the suit lands by the other co-owners. If the Hibanama had been executed there would not have been any necessity for furnishing of any affidavits before the Tehsildar relinquishing share in the suit lands.

12. The appellant has stated that he had made an application for recording of his name in the Tehsil office during life time of his mother but since his mother expired in the meanwhile he was directed to file a fresh application. However, the Namantaran Panji Ex.D/7 does not record that any application was made by the appellant for recording of his name over the suit lands on the basis of any Hibanama executed by Jubeda Khatun. It only states regarding furnishing of affidavits by the other co-owners relinquishing their shares.

13. In the record there is no application which was filed by the appellant in the Tehsil office seeking recording of his name over the suit lands on the basis of Hibanama executed in his favour by Jubeda Khatun. On the contrary mutation application was made by him only after death of Jubeda Khatun. There is no proof that at the time of her death any previous application for mutation was pending and a new application was filed thereafter. The statement of appellant that he had applied for his mutation on the basis of Hibanama prior to death of Jubeda Khatun is hence not proved.

14. The respondent No.2 as DW 2 has stated that her mother had been making statements since 24-25 years to the effect that she would give the suit lands by way of Hibanama to the appellant. She had made such a declaration prior to marriages of appellant and respondent No.2 which took place around the year

1986. The alleged Hibanama is of the year 1991. The declaration by Jubeda Khatun appears to have been made much prior thereto. The statement of DW 2 has hence rightly not been relied upon by the Courts below.

15. DW-3 Mohammed Hanif has stated that at the time of execution of Hibanama in favour of the appellant, Jubeda Khatun had stated that she would give the two plots at Indore purchased by Mohammed Rauf in favour of respondent No.1. However, such statement has not been made by the appellant or respondent No.2 nor is there any plea in that regard. There is also discrepancy in his statement as regards funeral expenses to be borne after death of Jubeda Khatun. He has stated as regards an event taken place 24 years ago which in view of his inconsistencies has rightly not been relied upon by the Courts below.

16. There is no other evidence on record from which the factum of execution of Hibanama by Jubeda Khatun in favour of the appellant could be supported or affirmed. The oral evidence led by the appellant has not proved the said fact. The Hibanama has hence rightly not been upheld by the Courts below who have hence not committed any error in disbelieving the said Hibanama.

Re: Substantial question of law No.1.

17. Since the Hibanama in favour of the appellant has not been proved by him the necessary legal consequence of the same would be that upon death of Jubeda Khatun the appellant and respondent No.1 inherited 2/5th share and respondent No.2 inherited 1/5th share in the suit lands. They thus became co-owners and/or joint tenants of the suit lands. It is well settled that a co-owner shall be deemed to be in actual possession of the entire land even though he may not actually be physically in possession of any particular part of the land. The possession of a co-owner would also be deemed to be on behalf of all the other co-owners of the land and not exclusive. The claim of the appellant on the basis of adverse possession has been negated by both the Courts below. The cause of action for respondent No.1 to institute the suit was acquiring knowledge of exclusive recording of name of appellant over the suit lands, his refusing to give him his share in the suit lands and denying his title which as per the plaint occurred on 20.03.2010. There is no reason to disbelieve the said statement of respondent No.1. The suit hence instituted by him on 11.01.2011 was well within time as has been held by both the Courts below.

15. Thus, as a result of the aforesaid discussion both the substantial questions of law as framed are answered against the appellant and in favour of respondent No.1. The judgments relied upon by the learned counsel for the appellant are distinguishable in the facts of the case. As a consequence the appeal is found to be devoid of any merits and is hereby dismissed. The parties shall bear their own costs throughout.