
(2011) 04 AHC CK 0201
In the Allahabad High Court
Case No : First Appeal No. 805 of 2000

Ahasan Ali

APPELLANT

Vs

Shashi Kant Jain and Others

RESPONDENT

Date of Decision : 06-04-2011

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 58, 11, 151, 47
Specific Relief Act, 1963 — Section 34

Citation : (2011) 4 ADJ 925

Hon'ble Judges : Yatindra Singh, J; Abhinava Upadhyay, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

1. This is an appeal against the judgment and decree dated 22.5.2000 passed by the 1st Additional Civil Judge (Senior Division), Moradabad in Original Suit No. 1260 of 1995.

THE FACTS

2. The Plaintiff-Appellant filed a suit for declaration that he is the owner of the property in dispute and the Defendants have no concern with the same. The allegations in the plaint are as follows:

Rahim Bux, father of the Plaintiff-Appellant was the owner of the property in dispute described in the end of the plaint. He had orally gifted the property in dispute to the Plaintiff on 14.8.1972. He was minor at that time and the gift was accepted on his behalf by his mother;

The father of the Plaintiff was working as a labourer in the shop of Defendants No. 1 and 2 (Respondents No. 1 and 2 in the present appeal). He had developed bad habits and started taking loan from them;

The Defendants No. 1 and 2 by taking undue advantage of the father of the Plaintiff, got his thumb impression on the papers by committing fraud;

The Defendants No. 1 and 2 filed original suit No. 25 of 1975 against the father of the Plaintiff, which was dismissed by the trial Court on 30.11.1977. However, the appeal filed against the dismissal of the suit was allowed for alternative relief on 19.5.1978.

The father of the Plaintiff had nothing to do with the property in dispute after gifting the same to the Plaintiff. However, he and Defendants No. 1 and 2 colluded with each other and the father of the Plaintiff did not look after the proceeding in the appeal properly because of which the appeal was allowed;

The Defendants have illegally obtained the possession over the property in dispute;

The Plaintiff was minor. He came to know about the fraudulent act when he became major and he inspected the file of original suit No. 25 of 1975. Thereafter he requested the Defendants to take the money owed by his father and return the house to him. However, it was refused then he is filing the present suit.

3. In the aforesaid suit, written statement was filed by Defendants No. 1 and 3, (Respondents No. 1 and 3 in the present appeal). The defence in the written statement is as follows:

The Original Suit No. 25 of 1975 and Civil Appeal No. 11 of 1978 was contested by the father of the Plaintiff;

The decree in the aforesaid proceedings were not satisfied by the father of the Plaintiff and thus, the execution proceeding No. 27 of 1978 was filed;

In the execution proceeding, objection u/s 47 was filed. After it was rejected, the execution proceeding was finalised and auction was held. It was settled in favour of Defendant No. 3 (Respondent No. 3 in the present appeal). This auction was confirmed on 1.8.1981;

The possession of the property in dispute was also handed over to Defendant No. 3 through the Court on 16.1.1981 and since then he is in possession of the property in dispute;

The suit is barred by principles of estoppel and acquiescence as well as barred by time.;

No cancellation of the decree in Civil Appeal No. 11 of 1978 has been sought in the suit. It is binding upon the Plaintiff. The suit is barred u/s 11 of the Code of Civil Procedure.

4. The Plaintiff examined the following witnesses:

Ahsan Ali, Plaintiff, P.W. 1;

Rais Ahmad, P.W. 2.

No documentary evidence was filed by the Plaintiff.

5. The Defendants examined the following witnesses:

Shashi Kant Jain, D.W. 1;

Mohd. Haneef, D.W. 2.

6. Apart from other documents, the Defendants filed the following documents:

Copy of judgment in Civil Appeal No. 11/78 (Ext. Kha- 1);

Copy of order sheet in Suit No. 9/81 (Ext. Kha-11);

Copy of application u/s 151 CPC in Case No. 9/81 (Ext. Kha-9);

Copy of affidavit on behalf of Smt. Chando in Case No. 9/81 (Ext. Kha-10);

Copy of affidavit on behalf of Smt. Chando in Case No. 3/79 (Ext. Kha-7);

Copy of application on behalf of Smt. Chando Under Order 21 Rule 58 in Case No. 3/79 (Ext. Kha-4);

Copy of order sheet in case No. 3/79 (Ext. Kha-7);

Copy of objection u/s 47 CPC on behalf of Rahim Bux in Case No. 14/79 (Ext. Kha-8);

Copy of order sheet in Case No. 72/80;

Copy of application Under Order 21 Rule 58 and Section 151 CPC in Case No. 72/80 (Ext. Kha-12);

Copy of affidavit on behalf of Smt. Chando in Case No. 72/80 (Ext. Kha-13);

Copy of statement of Rahim Bux in Case No. 25/75 (Ext. Kha-3);

Copy of written statement of Rahim Bux in Case No. 25/75 (Ext. Kha-2).

7. The trial Court held that the suit was not properly valued. The Plaintiff was directed to properly value the suit by order dated 12.8.1998. After the suit was properly valued, it was dismissed on 22.5.2000. The trial Court recorded the following findings:

The suit is barred by principles of estoppel and acquiescence besides being time barred and by Section 11 of the Code of Civil Procedure;

The Plaintiff is not in possession over the property in dispute since 16.1.1980

Defendants No. 2 and 4 are unnecessary parties and the suit suffers from the misjoinder of parties;

There was no oral gift in favour of the Plaintiff and he is not in possession of the property in dispute;

There was no cause of action to the Plaintiff to file the suit and no relief can be

granted to him.

THE DECISION

8. We have heard Sri B.N. Singh holding brief of Sri Madan Singh, for the Plaintiff-Appellant and Sri T.A. Khan, Counsel for Defendant No. 3.

9. The Counsel for the Defendant-Respondent has raised the preliminary objections that

the Plaintiff-Appellant was not in possession of the property in dispute; and

the suit is barred by Section 34 of the Specific Relief Act.

10. It is not necessary to decide the preliminary objection raised by the Counsel for the Respondents as we are of the opinion that there was no gift in favour of the Plaintiff.

11. Copy of the judgment in Civil Appeal No. 11 of 1978 is on record. It shows that the Defendants 1 and 2 had filed suit for specific performance of contract and in the alternative there was a prayer for recovery of Rs. 9340/-, advanced towards the sale consideration and Rs. 1440/- as damages.

12. The aforesaid appeal was partly allowed for the recovery of money only. The following is the operative portion of the impugned order:

Appeal is allowed to the extent that Plaintiff's suit for recovery of Rs. 9718.40 is decreed along with proportionate costs throughout. Future and pendente lite interest is also allowed at the rate of Rs. 6 per cent per annum on the amount of Rs. 9340 till payment. Defendant shall bear his own costs. judgment and decree of the learned Judge are modified accordingly.

13. Rahim Bux, father of the Plaintiff" could not satisfy the decree and as such proceeding for auction of the property in dispute was taken. In this proceeding an objection was filed u/s 47 read with Order 21 Rule 58 of the CPC by Smt. Chando, mother of the Plaintiff on 10.1.1979. On this objection Case No. 3 of 1979 was registered. In this objection it was claimed by her that the property was orally gifted to her on 1.12.1977.

14. Rahim Bux also filed objection u/s 47 of the CPC on 14.7.1979, that was numbered as Case No. 14 of 1979. In this objection Rahim Bux also took up a case that he had earlier gifted the property to his wife (mother of the Plaintiff) on 1.12.1977. The order sheet of the case started on these objections is on record. These objections were dismissed in default.

15. Smt. Chando, filed second objection under Order 21 Rule 58 and Section 151 of the CPC on 5.8.1980 claiming that the property was gifted to her on 1.12.1977 by Rahim Bux. It was registered as case No. 72/80 (Ext. Kha-12). The order sheet of the case is also on record. It shows that it was also dismissed in default.

16. The auction was held on 2.3.1979. However, on the objection filed by Smt. Chando, the confirmation of the auction was stayed till the disposal of the objection. After disposal of the objection the auction was also confirmed on 1.8.1980. Copy of the certificate dated 1.8.1980 is also on record. It shows that the property was auctioned in favour of Defendant No. 2 (Respondent 2 here in the appeal).

17. It is correct that the Plaintiff has produced himself as P.W. 1 as well as Rais Ahmad as P.W. 2, who have stated that the property in dispute was orally gifted to the Plaintiff on 14.8.1972 and it was accepted by his mother Smt. Chando on his behalf.

18. However, the statements made by P.W. 1 and P.W. 2 cannot be relied as Smt. Chando and Rahim Bux had filed objection that the property was gifted to Smt. Chando on 1.12.1977. In case, the property was already gifted to the Plaintiff on 14.8.1972 then there was no question of gifting it again on 1.12.1977 to Smt. Chando. The fact that earlier case was taken by father as well as mother of the Plaintiff that property was gifted to the mother of the Plaintiff, shows that the case now set is for purposes of the suit.

19. In our opinion, the trial Court has rightly held that the case of gift to the Plaintiff has been set up merely for the purpose of the case and has no merit.

CONCLUSION

20. In our opinion, there was no oral gift by Rahim Bux in favour of the Plaintiff-Appellant. The appeal has no merit and is dismissed.