

(2012) 01 AHC CK 0480
In the Allahabad High Court
Case No : Second Appeal No. 389 of 1976

Bhartu

APPELLANT

Vs

Nawal @ Chhote

RESPONDENT

Date of Decision : 24-01-2012

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 100
Transfer of Property Act, 1882 — Section 54

Citation : (2012) 5 ADJ 526 : AIR 2012 All 91

Hon'ble Judges : Sibghat Ullah Khan, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

Sibghat Ullah Khan, J.—Heard Learned Counsel for the parties.

2. This is defendant's second appeal arising out of O.S. No.449 of 1970. Original plaintiff-respondent filed suit for cancellation of sale deed dated 11.05.1970 shown to have been executed by him in favour of the appellant. The suit was decreed by 6th Additional Munsif, Meerut on 16.07.1975. Against the said decree defendant-appellant filed Civil Appeal No.181 of 1975 which was dismissed on 27.11.1975 hence this second appeal.

3. The case of the plaintiff was that defendant had brought him up as his son and had earlier executed a registered gift deed of the property in dispute which initially belonged to him defendant in favour of the plaintiff on 26.02.1979, however afterwards he got the sale deed in question of the same property executed by the plaintiff, while the plaintiff was under the impression that he was executing a power of attorney in favour of the defendant.

4. Both the courts below decreed the suit for cancellation of sale deed on two grounds:-Firstly plaintiff was minor at the time of execution of the sale deed and Secondly no sale consideration was paid to him. As by the time when this second appeal was admitted Section 100 CPC had not been amended hence there was

no occasion to frame substantial question of law at the time of admission of this second appeal. In this second appeal the following two substantial questions of law are involved:

1. Whether the finding of the courts below that plaintiff was minor at the date of the execution of the sale deed is erroneous in law?
2. Whether the finding of the courts below that no sale consideration was paid by the defendant to the plaintiff hence sale deed was void is erroneous in law?

First Question of Law :

5. In his oral statement plaintiff clearly admitted that he was 18 or 19 years of age when the sale deed dated 11.05.1970 was executed. However, the courts below still held him to be a minor at the time of execution of the sale deed on the ground that in the earlier gift deed dated 26.02.1969 he was described as 14 years of age. This finding is patently erroneous in law as defendant had denied execution of the gift deed and the courts below did not record any finding regarding that. When defendant asserted that gift deed was not his voluntary act, without deciding that gift deed was in fact executed, no statement made in the gift deed including the statement about the age of the plaintiff the donee could be taken as amounting to admission of the defendant. Defendant in his written statement pleaded that he never brought up the plaintiff and that some people took him to the office of Sub Registrar for getting the power of attorney executed on 26.02.1969, however in place of power of attorney they got executed the gift deed of the property in dispute in favour of the plaintiff.

6. The lower appellate court brushed aside the own statement/ admission of the plaintiff regarding his age on the ground that he appeared to be totally idiot person who had absolutely no idea of age.

7. The finding of the minority of the plaintiff on the date in the execution of the sale deed is patently erroneous in law as extremely relevant piece of evidence i.e. admission of the plaintiff himself has illegally been discarded and irrelevant piece of evidence i.e. recital in the gift deed of 1969 has been taken into consideration. The gift deed is irrelevant and inadmissible for the reason that inspite of denial of its execution by the defendant no finding has been recorded about its genuineness. In such situation finding becomes erroneous in law and is liable to be set aside in second appeal vide:

1. State of Punjab Vs. Mohinder Singh,
2. Abdul Raheem Vs. The Karnataka Electricity Board and Others,
3. U.R. Virupakshaiah Vs. Sarvamma and Another,
4. Dinesh Kumar Vs. Yusuf Ali,

Accordingly, first question of law is decided in favour of the appellant and against the respondent.

Second Question of Law:-

8. As far as second question of law regarding payment of sale consideration is considered both the courts below have given very cogent reasons for holding that no sale consideration was paid by the defendant to the plaintiff. In the sale deed the sale consideration of Rs.5,000/- was shown to have been paid earlier in advance in the village. In order to prove the payment of sale consideration defendant examined one Mukandi Lal as D.W.2 who stated that plaintiff had borrowed a sum of Rs.5,000/- from him and this amount was paid to him by the plaintiff. Defendant stated that after taking the amount of Rs.5,000/- from him the plaintiff had repaid the loan of Mukandi Lal. Three paragraphs of the judgment of lower appellate court dealing with this aspect of the matter are quoted below:-

The lower appellate finding given in the paragraph three which is quoted below very cogent reasons for disbelieving this version.

Mukandi Lal has filed the pronote and receipt alleged to be executed by the plaintiff for Rs.5,000/- in his favour. This pronote and receipt show that the amount was borrowed by the plaintiff and the defendant jointly. He has also stated that after his loan was repaid he returned the pronote and receipt to the plaintiff. However, in the court he filed the said pronote and receipt and said that the same has been given to him by the defendant. If the loan was taken by the plaintiff and the amount was repaid by him and the pronote and receipt was returned to the plaintiff, there was no question of the pronote and receipt being with the defendant or with Mukandi Lal D.W.2. I, are therefore, unable to believe the statement of Mukandi Lal (D.W.2).

Beside this it also appear from the pronote and receipt that the amount of loan of Rs.5,000/- was not borrowed by the plaintiff alone. This amount was barred by the defendant along with plaintiff. Therefore, the defendant was also liable to pay this amount. As such if this loan of Rs.5,000/- was repaid it cannot be said that the payment was made of the sale consideration to the plaintiff. It was the liability of the defendant also to pay this loan. Therefore, even if the statement of Mukandi Lal is accepted, it is clearly shown that no consideration was in fact paid to the plaintiff.

Lastly it may also be mentioned that this fact has not been pleaded in the written statement by the defendant. If the plaintiff took Rs.5,000/- to repay the loan of Mukandi Lal the defendant should have pleaded this fact in the written statement.

9. I fully agree with each and every word of the learned lower appellate Court in the above paragraphs.

10. Sale is defined u/s 54 of the Transfer of Property Act as follows:

"Sale" is a transfer of ownership in exchange for a price paid or promised or part-paid and part-promised.

11. Accordingly, mere non-payment of sale consideration does not vitiate the sale provided that it is promised to be paid. However, if in the sale deed the consideration is said to have already been paid but this assertion is found to be incorrect then the transaction does not amount to sale in the eye of law as per the definition of the sale (*supra*).

12. Accordingly, second question of law is decided in favour of the respondent and against the appellant. The net result is that even though plaintiff was major at the time of execution of the sale deed and the sale deed cannot be set aside on this ground, however, sale deed is to be set aside (and has rightly been set aside by the courts below) on the ground that no sale consideration was paid and the assertion that sale consideration had been paid was wrong.

13. Accordingly, second appeal is dismissed.