

(2013) 05 BOM CK 0094
In the Bombay High Court
Case No : Second Appeal No. 47 of 1993

Bhaurao

APPELLANT

Vs

Geetabai

RESPONDENT

Date of Decision : 02-05-2013

Acts Referred:

Easements Act, 1882 — Section 60(b), 62
Evidence Act, 1872 — Section 68
Transfer of Property Act, 1882 — Section 123

Citation : (2013) 6 ABR 1001 : (2013) 4 BomCR 555 : (2013) 4 MhLj 196

Hon'ble Judges : R.K. Deshpande, J

Bench : Single Bench

Advocate : J.B. Kasat, for the Appellant; Radhika D. Raskar, for the Respondent

Final Decision : Dismissed

Judgement

R.K. Deshpande, J.—Regular Civil Suit No. 62 of 1989 filed by the plaintiff for possession of the suit premises and recovery of damages, was dismissed by the Trial Court by the judgment and order dated 18-7-1990. In Regular Civil Appeal No. 59 of 1990 preferred by the plaintiff, the Appellate Court has reversed the decision of the Trial Court on 28-9-1992 and the suit is decreed, holding that the plaintiff is entitled to recovery of the possession of the suit property and directing the defendant to hand over the vacant possession thereof to the plaintiff. The decree for damages and future mesne profits has also been passed. Hence, the original defendant is before this Court in this second appeal. This second appeal was admitted on 1-4-1993 on the substantial questions of law at serial Nos. (a) and (b) in para 17 of the memo of appeal, which are reproduced below:

(a) Whether in the absence of any proof as to the acquisition of title to the Nazul Plot in suit by the Plaintiff of her predecessor, the Additional District Judge was right in holding that the plot in suit is owned by the Plaintiff?

(b) Whether, the document Exhibit 45 which is held to be gift-deed, held to be proved when none of the attesting witnesses is examined and the attestation is

not proved?

2. The Trial Court has recorded the finding that the plaintiff Geetabai has established that Trimbakrao was the owner of the suit property. The Trial Court has, however, rejected the claim of the plaintiff for ownership of the suit property, based upon the registered release-deed dated 17-2-1987 at Exhibit 45 on the ground that the attesting witness has not been examined. The Trial Court has further held that the plaintiff has failed to establish that the defendant was occupying the suit premises as her licensee and the said licence was terminated on 31-5-1987. In respect of the claim for damages, the Trial Court has held that the same does not arise for consideration in view of the findings recorded on the aforesaid issue. The Trial Court has also rejected the contention of the defendant that he has perfected the title over the suit property by way of adverse possession.

3. In regular civil appeal, the Appellate Court has concurred with the finding recorded by the Trial Court regarding ownership of Trimbakrao. The Appellate Court has further held that the plaintiff has proved her title to the suit property on the basis of the registered document of release-deed dated 17-2-1987 at Exhibit 45. The Appellate Court has further recorded the finding that the defendant was occupying the suit premises as the licensee of the plaintiff and his licence was terminated by giving a notice dated 20-4-1987 at Exhibit 30. The Appellate Court has also concurred with the finding of the Trial Court that the defendant has failed to establish his title by way of adverse possession.

4. The finding of the Courts below regarding ownership of Trimbakrao, is based upon the certified copies of tax issued by the Gram Panchayat for the years 1962-63 to 1973-74 at Exhibit 39, the certified copy of Index No. II at Exhibit 32, and the certified copy of the resolution passed by the Gram Panchayat on 14-3-1987 at Exhibit 33. The oral evidence of PW 2 Trimbakrao Deshmukh at Exhibit 44 has also been relied upon. The finding regarding ownership of the plaintiff has been recorded on the basis of the release-deed dated 17-2-1987 executed by Trimbakrao at Exhibit 45 and the oral evidence of Trimbakrao. Thus, the finding of fact recorded by the Courts below is based upon the evidence available on record. At any rate, it is a possible view of the matter, and hence the substantial question of law at serial No. (a) does not at all arise for consideration.

5. On the substantial question of law at serial No. (b), though the Appellate Court has not recorded any finding on the question of attestation over the document in question, the fact that the document is the registered release-deed, is not disputed. The decision of the Apex Court in the case of Surendra Kumar Vs. Nathulal and Another, , relied upon by Smt. Raskar, the learned counsel for the respondents, needs to be seen. Para 12 therein being relevant, is reproduced below:

12. Section 123 of the Transfer of Property Act, 1882 provides:

123. Transfer how effected.--For the purpose of making a gift of immovable

property, the transfer must be effected by a registered instrument signed by or on behalf of the donor, and attested by at least two witnesses.

In the present case there exists a registered deed of gift signed by the donor and attested by two witnesses. Therefore, the requirement of the law as incorporated in the Section is satisfied. Section 68 of the Indian Evidence Act, 1872 makes a provision regarding proof of execution of a document required by law to be attested. Therein it is laid down that:

If a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution. If there be an attesting witness alive, and subject to the process of the Court and capable of giving evidence.

The proviso to the section, which is relevant for the present purpose, reads:

Provided that it shall not be necessary to call an attesting witness in proof of the execution of any document, not being a will, which has been registered in accordance with the provisions of the Indian Registration Act, 1908 (16 of 1908), unless its execution by the person by whom it purports to have been executed is specifically denied.

(Emphasis supplied)

On a plain reading of the proviso, it is manifest that a registered deed of gift can be received in evidence without examining one of the attestors if the person who has executed the deed of gift has not specifically denied its execution. In the present case, the donor Chand Bai has specifically admitted execution of the deed of gift in favour of the appellant. Therefore, the lower appellate Court was in error in holding that the deed of gift has not been duly proved since one of the attestors has not been examined as witness. Indeed the certified copy of the registered deed of gift was produced in the trial Court along with an application filed by the plaintiff in the previous suit, Suit no. 69/70(4/76) that the same may be called for. The trial Court, being satisfied about the reason for non-production of the original document, marked the certified copy of the deed of gift as Exhibit-3.

In view of the provisions of Section 123 of the Transfer of Property Act and Section 68 of the Indian Evidence Act, the Apex Court has held that the registered gift-deed can be received in evidence without examining one of the attestors, if the person, who has executed the deed of gift, has not specifically denied its execution. In the present case, undisputedly, the release-deed at Exhibit 45 was executed by Trimbakrao, who was examined as PW 2, and he has admitted the execution of the said document. The substantial question of law at serial No. (b) is, therefore, answered, holding that it was not necessary, in the facts of this case, to examine any attesting witness to prove the lease-deed dated 17-2-1987 at Exhibit 45.

6. It is urged by Shri Kasat, the learned counsel for the appellants, that it is a

case of irrevocable licence covered by Section 60(b) of the Easements Act, 1882. He has invited my attention to the pleadings in the written statement and the evidence on record. He submits that it is an admitted position that the suit property was given to the defendant on licence and the defendant has raised a permanent construction and incurred the expenses in the execution. Though, the point was raised in the written statement regarding irrevocable licence, no issue was framed by the Trial Court. The Trial Court has dismissed the suit, rejecting the claim of the defendant for title over the suit property by way of adverse possession. There was no cross-objection by the defendant in the appeal filed by the plaintiff challenging the dismissal of the suit. The Appellate Court has also not dealt with the question of irrevocable licence.

7. In the decision of the Apex Court in *Ram Sarup Gupta (Dead) by Lrs. Vs. Bishun Narain Inter College and Others*, , relied upon by Shri Kasat, the learned counsel for the appellants, the Trial Court recorded the finding that the defendants had made permanent construction on the premises in suit, and, therefore, the licence granted to them was irrevocable u/s 60(b) of the Indian Easements Act, 1882. With this finding, the Trial Court dismissed the suit, holding that the licensor had no power in law to revoke the licence and to obtain the possession of the property. Before the High Court, the opinion was divided. Shri D.N. Jha, J. affirmed the finding of the Trial Court and opined that the licence granted was irrevocable, whereas Shri K.S. Verma, J. took the contrary view, holding that the defendants had failed to raise the requisite plea that the licence granted to them was irrevocable, as contemplated by Section 60(b) of the said Act, and further failed to produce any positive evidence to prove the terms and conditions of the licence showing that it was irrevocable. The third Judge Shri T.S. Misra, J., to whom the matter was referred, concurred with the view expressed by Shri D.N. Jha, J. and upheld the dismissal of the suit. The Apex Court specifically recorded the finding that the pleadings, evidence and the circumstances available on record have fully established that the licensor had granted licence to the School in respect of the building and the land attached to it for the purpose of imparting education and the School, in furtherance of that purpose, constructed additional buildings and incurred expenses in carrying out modifications and extensive repairs in the existing building. The licensor never objected to it and there was nothing on record to show that the licensor had retained a right to revoke the licence. It confirmed the finding recorded by the Trial Court.

8. In para 12 of the said decision in *Ram Sarup Gupta's* case, cited supra, the Apex Court referred to the decisions of the various High Courts, wherein it was held that the three conditions are required to be fulfilled u/s 60(b) of the Indian Easements Act to prove that the licence is irrevocable, and those are-(i) that the licensee executed work of a permanent nature, (ii) that he did so acting upon the licence, (iii) that he incurred expenses in doing so. It was held in these decisions that the onus of proving these facts lay upon the licensee and in the absence of any evidence on these questions, the licence could not be revocable u/s 60(b) of

the said Act. The Apex Court, however, did not comment upon the correctness of this view, but has held that in the case before it, all the three conditions were fulfilled, showing that the licence was irrevocable.

9. Smt. Raskar, the learned counsel for the respondents, has relied upon the decision of this Court in the case of *Tukaram Sawant Vs. Mangalalaxmi Chinubhai Shah and Others*, . The relevant portion contained in para 9 of the said decision, is reproduced below:

9... The important question is not as to the nature of the work that has been done by the Appellant. The major hurdle that he has to cross is whether the work was done by him by acting upon the licence. A licensee is not entitled to plead irrevocability because he has carried out a work of permanent nature by incurring expenditure. He has to show that what he has done viz. executing a work of permanent nature, is pursuant to a right granted to do upon the land of the grantors something which would be unlawful in the absence of such a right. To quote from AIR 1936 77 (Privy Council) :

A man does not "act upon a licence" if he does work and incurs expense upon his own property. That he can do without anyone's licence. Work done by the licensee on his own land may be done without the knowledge of the licensor, and the alleged licensor's land cannot be held to be bound in perpetuity (subject to section 62) as the result of some work done by the alleged licensee on his own property of which the former was unaware.

This Court has taken a view that the licensee is not entitled to plead irrevocability because he has carried out a work of permanent nature by incurring expenses and he has to show that what he has shown is pursuant to a right granted to do upon the land of the grantors something which would be unlawful in the absence of such a right.

10. The question as to whether the licence granted was irrevocable in terms of Section 60(b) of the Indian Easements Act, is essentially a question of fact, which is required to be pleaded and proved. The burden is upon the person, who claims the benefit of Section 60(b) of the said Act to establish the three things- (i) that he has executed the work of a permanent character, (ii) that he did so acting upon the licence, and (iii) that he has incurred the expenses in doing so. Merely because there is a work of permanent character executed by incurring expenses, would not by itself be enough to establish that the licence was irrevocable, but a third condition that it was so done by acting upon the licence, is also required to be established. The terms and conditions may be express or implied or even oral, which can be gathered from the nature and purpose for which the licence is granted. The conduct of the parties and the circumstances may also be the relevant factors to establish the facts. If the construction is carried out and the expenses are incurred without knowledge and consent of the licensor or behind his back, then the benefit u/s 60(b) of the Indian Easements Act would not be available to the licensee, as he would be failing to establish that

he has "acted upon the licence".

11. With the assistance of the learned counsels appearing for the parties, I have gone through the pleadings and evidence available on record. Except one-line pleading that the licence was irrevocable u/s 60(b) of the Indian Easements Act and the defendant has acted on the basis of the licence, the facts regarding the purpose of granting licence and the terms and conditions of such licence, are conspicuously absent. Apart from this, there is absolutely no evidence brought on record by the defendant to show that the work of a permanent nature was carried out and the expenses were incurred by acting upon the licence. In the decision of the Apex Court in Ram Sarup Gupta's case, cited supra, relied upon by Shri Kasat, the learned counsel for the appellants, turns upon the findings of fact recorded by the Trial Court, which were ultimately confirmed by the Apex Court, holding that the pleadings, evidence and the circumstances available on record establish that the licence was granted in respect of the building and land attached to it for the purpose of imparting education and the construction of additional buildings and the expenses incurred thereon were without any objection from the licensor. The decision of this Court in Tukaram Sawant's case, relied upon by Smt. Raskar, the learned counsel for the respondents, clearly supports the proposition that the licensee has to show that what he has done is pursuant to a right granted to him upon the land of the grantors. In view of this, the claim for irrevocable license, is not substantiated. In the result, the second appeal is dismissed.