
(2012) 11 AHC CK 0038
In the Allahabad High Court
Case No : Second Appeal No. 950 of 2001

Deep Chandra

APPELLANT

Vs

Smt. Shakuntla

RESPONDENT

Date of Decision : 29-11-2012

Acts Referred:

Hindu Marriage Act, 1955 — Section 11, 5, 7
Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950 — Section 169(2),
171(1)(a), 171(1)(iv), 171(2)

Citation : (2013) 2 ADJ 263 : (2013) 4 ALJ 539

Hon'ble Judges : Sunita Agarwal, J

Bench : Single Bench

Advocate : S.C. Verma and Kamlesh Kumar Gangwar, for the Appellant; A.K. Gupta, for the Respondent

Final Decision : Dismissed

Judgement

Sunita Agarwal, J.—Heard Shri Kamlesh Kumar Gangwar, learned counsel for the appellant and Shri Dinesh Mishra holding brief of Shri A.K. Gupta, learned counsel for the respondents. The plaintiff had filed a suit for permanent injunction against the defendant. The plaintiff allegation was that she is owner in possession of the disputed land having half share in the Bhumidhari plot Nos. 269 area 0.32, 313 area 0.20, 385 area 0.18, 354 area 1.10, 415 area 0.50, 437 area 0.43, 540 area 0.15, 696 area 0.10, 711 area 0.17, 712 (M) area 0.11, 763 (M) area 0.02, 809 area 1.14, 810 area 1.10, 817 area 0.66 and 857 area 2.60 acres of village Medpur, Pargana Kampil, District Farrukhabad and plots No. 13 area 0.032, 48 area 0.174, 105 area 0.069, 211 area 0.085, 267 area 1.125 and 120 area 0.032 hectares of village Alipur, Pargana Shamshabad, West, district Farrukhabad. The plaintiff alleged that suit property initially belongs to Jai Ram who had two sons Deep Chandra and Chandra Prakash. After the death of Jai Ram, the suit property devolved upon widow Smt. Sumitra Devi and two male lineal descendant, namely, Deep Chandra and Chandra Prakash (sons of Jai Ram). The plaintiff is widow of Chandra Prakash. At the time of filing of the suit,

Jai Ram Sumitra Devi and Chandra Prakash had died. The plaintiff claimed half share in the property being widow of Chandra Prakash and on the basis of said claim she prayed for permanent injunction restraining the defendant Deep Chandra from interfering in her possession and use of disputed land.

2. The defendant resisted the suit on the basis, of registered will deed dated 9.1.1979 alleged to have been executed by his mother Sumitra Devi of her share in the immovable and moveable property. He further pleaded that plaintiff Smt. Shakuntla wife of Chandra Prakash remarried and living with her brother-in-law, namely, Dev Pal as his wife. As a result of which the defendant is owner in possession of entire suit property.

3. On the basis of pleadings, trial Court framed several issues and issue No. 1 relates to question as to whether the plaintiff is owner in possession of the disputed property and issue No. 3 was as to whether any will has been, executed by Smt. Sumitra Devi in favour of the defendant for the disputed property. Issue No. 5 related to the question as to whether the plaintiff had remarried. Documentary and oral evidences were filed by the plaintiff to contradict the execution of will and defendant filed documentary and oral evidences to establish that plaintiff had remarried and she lost her right in the disputed property. According to the provision of Section 171(1)(iv) of U.P. Zamindari Abolition and Land Reforms Act, 1950 (hereinafter referred to as the "Act 1950"). The trial Court after considering the evidence on record dismissed the suit.

4. On the issue No. 5 finding recorded by the trial Court is that though marriage of the plaintiff has not been performed as per Section 7 of the Hindu Marriage Act, however the society in which the plaintiff lives gave recognition to custom "Dharauna" and plaintiff has performed "Dharauna" with her brother-in-law, therefore, that would amount to marriage under the Hindu Marriage Act.

5. On the issue No. 3 finding is that will was executed by Smt. Sumitra Devi, mother of the defendant of her share in movable and immovable property and half share in the property cannot be devolved upon the plaintiff u/s 171(1)(a) of the Act and moreover plaintiff had remarried and, therefore, she lost her right in the suit property as per Section 171(1)(iv) of the Act. On the issue No. 1 finding is recorded that though the name of the plaintiff appears in the revenue record, namely, Khasara and Khatuni copies of which were produced. However, with regard to mutation of the disputed property the dispute is pending between the parties, therefore, same has not become final and as plaintiff had failed to give boundary of the disputed property she cannot be said to be owner in possession of the property.

6. The lower appellate Court reversed the finding recorded by the trial Court and considered the issue regarding remarriage of the plaintiff as issue No. 1. The lower appellate Court has held that defendant had failed to prove that plaintiff had remarried. Admittedly the wife of Dev Pal with whom the remarriage of the plaintiff had been alleged, was alive and, therefore, in the life time of the first

wife of Dev Pal, the second marriage, if any, is null and void in accordance with the provision of Section 5 read with Section 11 of the Hindu Marriage Act. The said marriage cannot be recognised in the eye of law. The finding recorded by the trial Court that custom of "Dharauna" has been recognised as marriage in the society in which plaintiff lives and, therefore, it would be considered as marriage under the Hindu Marriage Act was reversed. The lower appellate Court found that there was no occasion for the trial Court to give such finding as no such plea was taken by the defendant in their written statement nor it was proved by the defendants in their evidence. The trial Court itself recorded the finding, which cannot be sustained.

7. The issue of will alleged to have been executed by Sumitra Devi dated 9.1.1979 was considered as issue No. 2. The lower appellate Court while considering the same had observed that burden was upon the defendant to prove that will was executed by his mother. Neither original will nor the attested copy of the said will has been filed by the defendant in the suit. The records of the suit u/s 229(B) were summoned in which the fingerprint expert's report 86 Ga was filed. According to the report of the finger print expert the thumb impression of Sumitra Devi on the alleged will are different from her admitted thumb impression on the plaint and vakalatnama filed in suit u/s 229(B).

8. The contention of the defendant is that the thumb impression on plaint and vakalatnama are of right hand whereas in the will it is of left hand according to registration manual, and, therefore, such difference was found by the expert. While considering the said contention, the lower appellate Court had recorded that no evidence has been filed by the defendant to establish that the thumb impression of Sumita Devi exist on the disputed will. Whatever the evidences are, those are filed by the plaintiff only. It is not mentioned on the alleged will as to whether the thumb impression was of right hand or of left hand, therefore, no presumption can be drawn that the will was executed by Sumitra Devi herself though it is registered will deed. The presumption can be drawn as to the existence of the will being registered documents but not as to whether the same was executed by the Sumita Devi. The plaintiff had discharged her burden by producing the finger print expert report 86-Ga filed in suit u/s 229(B) categorically denying the execution of will by Sumitra Devi. The said issue was decided against the defendant.

9. The issue of ownership in possession over the disputed land was considered as issue No. 3 and was decided in favour of the plaintiff as there was nothing on record to establish that plaintiff had ever been evicted from the suit property. The property devolved after the death of her husband Chandra Prakash, who predeceased Sumitra Devi. The entries in Khatuni and Khasra in the name of plaintiff were produced by her to establish her ownership and possession over the suit property.

10. Learned counsel for the appellant urged two issues raised before the second appellate Court for the purposes of admission of the present appeal. The

question of law raised by the learned counsel for the appellant is that whether the plaintiff will not lose her right of inheritance in agricultural Bhumidhari land of husband on her re-marriage. The other question of law raised is that in view of the registered will dated 9.1.79 executed by Sumitra Devi, no permanent injunction could have been granted by the Court below and there being no suspicious circumstances surrounding the will, finding recorded by the lower appellate Court is legally unjustified.

11. Learned counsel for the appellant placed reliance on the judgment in *Geeta Devi v. Deputy Director of Consolidation Red Bareilly*, passed by this Court submitted that there is no rider for a widow to execute will with omission of Section 169(2) of the Act 1950 by U.P. Act No. 30 of 1975. Now widow can be bequeath her holding/land by executing will being Bhumidhar of the same.

12. Learned counsel for the plaintiff/respondent submits that judgment of lower appellate Court is on the basis of evidence on record and it has not come in the evidence that plaintiff had re-married, therefore, she had right of ownership of her 1/3 share. Copies of Khatuni and Khasra were brought on record. The lower appellate Court recorded the finding on the basis of entries in the revenue record, which were illegally ignored by the trial Court.

13. In view of the specific finding of fact recorded by the lower appellate Court that plaintiff had not re-married, the share of the husband of the plaintiff in the suit property would devolve upon her by way of inheritance u/s 171(2) of the Act 1950. The custom of "Dharauna" cannot be recognised under the Hindu Marriage Act, and in view of undisputed fact that Chandra Prakash; husband of the plaintiff and son of Jai Ram predeceased Sumitra Devi, it cannot be accepted that plaintiff had lost her rights in the property. There is no dispute about the proposition relied by the counsel of the appellant that there is no rider for the widow to execute will as Bhumidhari. However, in case any will had been executed by the Sumitra Devi the same could have been executed only for her 1/3rd share in the suit property.

14. At this stage the written submission filed by the appellant may be referred in which it has been admitted that will dated 9.1.1979 was only for her share. In this view also plaintiff cannot be ousted from the suit property to the extent of share of her husband. Moreover finding of fact has been recorded that neither original will was produced nor certified copy of the same was produced before the Court. The finger print expert's report filed by the plaintiff which was given in the proceedings u/s 229(B) also establishes that there was difference in the admitted thumb impression and thumb impression of Sumita Devi on the alleged will. It may be noted that in the present suit the relief sought for permanent injunction and not division of the share in the property, therefore, lower appellate Court confined itself to the ownership and possession of the plaintiff over the disputed property so as to find out as to whether relief of permanent injunction can be granted to her. The findings recorded by the lower appellate Court are finding of fact and detailed reason given by the lower appellate Court after

considering the document on record holding that plaintiff is owner in possession over the disputed property.

15. In view of the specific finding of fact given by the lower appellate Court on the basis of evidence on record and in the absence of any evidence to the contrary, finding of the lower appellate Court cannot be said to be perverse or based on inadmissible evidence. No substantial question of law arises for consideration of this Court. Before concluding, it may be added that it is neither possible nor permissible for this Court to take different view specially in the absence of any substantial question of law arising for consideration.

16. The appeal lacks merit and is dismissed. Parties shall bear their own cost.