
(2009) 01 AHC CK 0042
In the Allahabad High Court

Kamala Pati Tiwari and Another

APPELLANT

Vs

Smt. Lalita Devi and Others

RESPONDENT

Date of Decision : 15-01-2009

Acts Referred:

Evidence Act, 1872 — Section 58
Registration Act, 1908 — Section 49

Citation : (2009) 2 AWC 1072 : (2009) 3 CivCC 498 : (2010) 8 RCR(Civil)
1979 : (2009) 106 RD 384

Hon'ble Judges : Sanjay Misra, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

Sanjay Misra, J.—Heard Sri A.B. Singh, learned Counsel for the appellants and Sri Vashishtha Tiwari, who has appeared on behalf of the contesting respondents.

2. This is a plaintiffs' second appeal filed against the impugned judgment and decree dated 20.1.2000 passed in Civti. Appeal No. 177 of 1971, Shiv Nath Tripathi and Ors. v. Smt. Lalita Devi and Ors. by the IInd Additional District Judge, Deoria, whereby the lower appellate court has affirmed the judgment and decree of the trial court, which had dismissed the suit for cancellation of the sale deed dated 18.8.1969 executed by the defendant Smt. Lalita Devi and had decreed the suit partly with respect to the sale deed dated 25.8.1995 and for permanent injunction against the defendants No. 1 to 4 relating to the land 125/2 Area 67 decimals towards east 134/1 area 65 decimals towards west and 141 area 8 decimals as well as the half southern portion of the house Ka, AA, DA, THA and its sahen towards east mentioned in Schedule A of the plaint.

3. Learned Counsel for the appellants has assailed the finding of the trial court on issue No. 3 to state that the family settlement dated 15.5.1952 was never denied by the defendant No. 1 either in any written pleadings or in the oral statement and, therefore, in view of the provisions of Order VIII. Rule 5 of the Code of Civil Procedure, the facts alleged in the plaint would be deemed to be

admitted and require no further proof and the suit of the plaintiffs-appellants could not have been dismissed for cancellation of the sale" deed. According to him the family settlement dated 15.5.1952 was not required to be registered under the Indian Registration Act and since it was not denied any formal proof of the same by producing the scribe or other evidence, was not required and as such the findings of the trial court as affirmed by the lower appellate court require to be set aside, particularly when u/s 58 of the Indian Evidence Act it does not require to be proved under such circumstances.

4. In so far as the findings recorded on Issue No. 1 regarding the share of the plaintiffs and defendants in the property in question is concerned, the trial court has found that the suit property was jointly owned by the parties and there was no family partition effected between them. Learned Counsel for the appellants submits that he is not assailing the said finding on Issue No. 1 recorded by the trial court and as affirmed by the first appellate court.

5. Learned Counsel for the respondents on the other hand has submitted that the finding on Issue No. 3 is in accordance with law, because the family settlement alleged to be 15.5.1952 was not a registered document and hence, in view of Section 49 of the Indian Registration Act it cannot be relied upon. According to him the said family settlement dated 15.5.1952 was not proved by the plaintiff nor any evidence was led by him regarding the family settlement and therefore, on being not registered and not duly proved, it was rightly rejected by the trial court as affirmed by the lower appellate court. He also states that the alleged family settlement dated 15.5.1952 was not acted upon as entries of the same were not made for more than 15 years in the relevant revenue records to indicate that the rights of the deceased Sri Vishwa Nath Tiwari and his widow the defendant No. 1 had in any manner been extinguished from the property in question. In so far as the finding on Issue No. 1 is concerned, learned Counsel for the respondents states that the said findings are in accordance with law and no partition between co-sharers had taken place and the defendant No. 1 being the widow of late Vishwa Nath Tiwari, who was the nephew of the plaintiff Sri Shiv Nath Tiwari has inherited only these rights in the property that can be claimed under the family settlement.

6. Upon considering the submissions of learned Counsel for the parties and going through the impugned judgments it will be seen that the issue No. 3 was as to whether the defendant is a co-sharer in all the properties in dispute and is in possession as such. While deciding the said issue, the trial court found that the plaintiff has not been able to prove that a partition had taken place between the recorded co-tenure holders of the agricultural land and the house in dispute. The trial court was of the view that since the family settlement dated 15.5.1952 (Ex. 26) had not been proved nor the marginal witnesses or scribe have been examined and since the document was not registered, it could not extinguish the title of the defendant No. 1 Smt. Lalita Devi or her deceased husband late Vishwa Nath Tiwari.

7. The aforesaid finding has been assailed by the appellants on two main grounds; first is that the document was not registrable under the Indian Registration Act in view of the fact that the registration of such document was required only after enforcement of U.P. Act No. 27 of 1994 with effect from 23.9.1994 and the document being of the year 1952 did not require any registration. The second ground is that there was no denial regarding the existence of family settlement dated 15.5.1952 by the defendant, in view of the fact that the pleading regarding the family settlement was brought in the plaint by a subsequent amendment after the defendant No. 1 had alienated the property by the sale deed executed in the year 1969 and further that there was no denial of the family settlement dated 15.5.1952, even in the pleading of the defendants and as such by virtue of the provisions of Order VIII, Rule 5 of the CPC the plaintiff was not required to lead any further evidence for proving the family settlement dated 15.5.1952 and the courts below have erred in rejecting the same.

8. Learned Counsel for the appellant has placed reliance on the decisions of the Hon"ble Supreme Court in the case of Kale and Ors. v. Deputy Director of Consolidation and Ors. 1976 (2) AIM 173 and in the case of Tek Bahadur Bhujil Vs. Debi Singh Bhujil and Others, , to support his submission that the document dated 15.5.1952 being family settlement required no registration. He has placed reliance on a decision of Hon"ble Supreme Court in the case of M. Venkataraman Hebbar v. M. Rajagopal Hebbar and Ors. 2007 ACJ 1775 : 2007 (6) AWC 5468 (SC), on the argument raised in view of Order VIII, Rule 5 Code of Civil Procedure.

9. From the aforesaid submissions and upon perusal of the impugned judgment the fact on record is that Sri Shiv Nath Tiwari, Sri Shiv Poojan Tiwari and Sri Raghu Nath Tiwari were real brothers all being sons of Sri Gokul Tiwari, Raghu Nath Tiwari admittedly died issueless. The defendant Sri Vishwa Nath Tiwari was the son of Sri Shiv Poojan Tiwari and therefore, relationship between the plaintiff and late Sri Vishwa Nath Tiwari was of uncle and nephew. During the pendency of the suit Sri Vishwa Nath Tiwari died and in his place Smt. Lalita Devi was brought as defendant No. 1. The defendants No. 2 to 5 are the vendees of the defendant No. 1 in pursuance of the sale deed dated 18.8.1969 executed by Smt. Lalita Devi during the pendency of the suit. The said sale deed compelled the plaintiffs to amend his plaint from a suit for injunction, which was filed initially against his nephew, to a suit for injunction as also for cancellation of sale deed dated 18.8.1969 executed by Smt. Lalita Devi, the widow of defendant late Sri Vishwa Nath Tiwari. It is at the stage after amendment that the plaintiffs alleged in paragraph 15C of the amended plaint regarding family settlement dated 15.5.1952, according to which he claims that late Vishwa Nath Tiwari had relinquished his claim over the property in question and had agreed for himself and his wife Smt. Lalita Devi a right of residence and maintenance alone. On the basis of this family settlement the plaintiffs assailed the sale deed dated 18.8.1969 and stated that Smt. Lalita Devi had no right or title in the property in

question, apart from the right of residence and maintenance to which they were entitled by family settlement dated 15.5.1952.

10. The trial court had framed the issues and held that the properties are jointly owned by the parties and there was no partition between the plaintiff and the husband of the defendant No. 1, i.e., late Vishwa Nath Tiwari. Both the courts below have recorded categorical findings of fact that there was no partition between the plaintiffs and late Vishwa Nath Tiwari and the joint nature of the property in question has continued. Such concurrent findings of fact of the courts below have not been assailed by the appellants in this second appeal and therefore, the finding regarding jointness of the property in the absence of any family partition requires no interference by this Court particularly since the findings are based on the evidence on record but also are not disputed by the appellants.

11. The challenge, therefore, revolves around issue No. 3 as to whether the defendant No. 1 Smt. Lalita Devi widow of late Vishwa Nath Tiwari is the co-sharer in the property in dispute and whether is in possession as such. While deciding the issue the trial court has held that family settlement dated 15.5.1952 (Ex. 26) has not been proved by the plaintiff, he has neither produced the marginal witnesses nor the scribe and no reason has been given by the plaintiff in not producing any evidence to prove the family settlement. The trial court also held that when the right of ownership and transfer of a co-sharer is alleged to be relinquished or extinguished from the property in question by virtue of the family settlement then it was compulsorily registrable under the Indian Registration Act and its nonregistration would be fatal for the plaintiff, who could not place reliance upon the same as a document of extinguishment or relinquishment of right of ownership and transfer. The lower appellate court has approved the aforesaid findings, which are under challenge before this Court primarily on the ground that when there was no denial of the family settlement dated 15.5.1952 by the defendants then in view of the provisions of Order VIII, Rule 5 of the Code of Civil Procedure, it was an admitted fact which did not require any further proof and the suit ought to have been decreed by both the courts below.

12. As mentioned above, learned Counsel for the appellant has placed reliance upon a decision of the Hon'ble Supreme Court in the case of M. Venkataraman Hebbar (supra), and states that even in the present case there was no denial of the family settlement dated 15.5.1952, which was pleaded by the plaintiff by amending his plaint and therefore, the factum of partition/extinguishment of right of late Sri Vishwa Nath Tiwari and his widow defendant No. 1 Smt. Lalita Devi was duly established. In so far as the aforesaid submission of learned Counsel for the appellants is concerned, it is not disputed that the suit was for possession based upon an alleged partition. The plea of partition was disbelieved by both the Courts and issue No. 1 was decided against the plaintiff holding that the property was joint and the parties were co-sharers in the said property. When such an issue has not been assailed by the appellants in this appeal then

this Court has to proceed on the basis that the property is Joint and the plaintiff and defendant No. 1 are co-sharers. The plea of extinguishment of right/ relinquishment by the family settlement dated 15.5.1952 was not set up in the plaint by the plaintiff at the time when late Sri Vishwa Nath Tiwari was alive and was a defendant. The family settlement was brought in the pleadings by the plaintiff by an amendment after Sri Vishwa Nath Tiwari had died, his widow Smt. Lalita Devi was brought on record and when Smt. Lalita Devi executed the sale deed dated 18.8.1969. There is no reason given by the plaintiff appellants for withholding the document of 1952 and waiting to bring it on record only upon making amendment in the plaint. In case the plaintiffs' case was that partition had been effected by virtue thereof he was required to plead the same on the evidence available with him and bring such evidence before the Court at the first instance. If the case of the plaintiff for partition as pleaded was to be proved the document dated 15.5.1952 was available with him but he brought it on record only after amending the plaint and after Sri Vishwa Nath Tiwari had died, i.e., after nearly 17 years. Not bringing such a document, which has a direct bearing on the relief of permanent injunction against the defendants in a joint family property, at the first instance could naturally raise the suspicion of the Court and the courts below, in fact have recorded the finding that the document dated 15.5.1952 appears to be a fictitious document brought on record at such a late stage in a suit for injunction only to prevent joint family property from going into the hands of defendants No. 2 to 5 by virtue of the sale deed executed by the co-sharer of the plaintiffs.

13. Such a finding recorded by the courts below are to be considered on the basis of the submissions made by learned Counsel for the appellants before this Court, which is primarily based on Order VIII, Rule 5 of the Code of Civil Procedure. Whether non-denial of the existence of the family settlement dated 15.5.1952 would entitle the plaintiff to a decree of cancellation and possession against the defendant No. 1 could have been considered by the courts below, if such family settlement was brought on record prior to amendment of the plaint. Bringing the family settlement in the pleadings after amending the plaint after the year 1969 indicates that the document had never seen the light of day and was being kept as a closely guarded secret by the plaintiffs, if at all it was executed, since the filing of the suit in the year 1965. There is no reason given by learned Counsel for the appellants to disclose as to why the document dated 15.5.1952 was not pleaded in the plaint at the first instance when the suit for injunction and possession was filed in 1965 against Sri Vishwa Nath Tiwari particularly if the plaintiffs' case was that Sri Vishwa Nath Tiwari had relinquished his right and title over the property in question and Smt. Lalita Devi his widow was only entitled to residence and maintenance. Such pleading was necessarily to be taken in the plaint at the first instance unless there was otherwise no other evidence on record to prove that any partition had ever been effected or taken place between the plaintiff and late Vishwa Nath Tiwari. The finding on Issue No. 1 is quite categorical in the following terms:

Plaintiff has failed to prove that there has been any family partition between plaintiff and Vishwanath.

I therefore, find, that suit properties are jointly owned by parties and there has been no family partition.

14. This finding has not been assailed in this appeal and learned Counsel for the appellants has submitted to it in express terms. Therefore, bringing on record the document alleged to have been executed in 1952 at the stage after the defendant No. 1 Sri Vishwa Nath Tiwari had already died rightly raised the suspicion of the courts below and this Court finds that such findings recorded by both the courts below regarding the factum and nature of the family settlement dated 15.5.1952 requires no interference by this Court. Particularly since there is no substantial question of law involved in the findings of fact recorded by both the courts below.

15. Under such circumstances, the findings on issue No. 3 assumes significance because even if the defendant had denied the factum of partition and an issue was framed to such effect, which was decided against the plaintiffs then the family settlement dated 15.5.1952 was a piece of evidence to be proved or disproved for the purpose of decision of Issue No. 3. Admittedly, no issue was framed regarding legality or binding nature of the family settlement dated 15.5.1952. Therefore, when the document dated 15.5.1952 was brought on record after an amendment in the plaint and was made subject-matter of judicial scrutiny it required to be proved to establish that a partition had been effected. While deciding the issue No. 3 categorical findings have been recorded by the courts below on the proposition of fact and law, affirmed by one and denied by the other party. Evidence requires proof. It was a document referred by the plaintiffs, which required to be either proved or disproved. There was no other evidence of partition worthy of credence as has been held while deciding issue No. 1.

16. Under Order VIII, Rule 5 of the CPC allegations of fact made in the plaint if not denied may be taken to be admitted. When the allegations of fact made in paragraph 15C of the amended plaint was the existence of family settlement dated 15.5.1952 to prove partition in 1952, it was a document which required to be proved or disproved. The pleadings regarding a partition had already been taken in the plaint and was specifically denied by the defendant in the written statement. Therefore, the submission of learned Counsel for the appellants that since there was no denial of the allegations made in paragraph 15C of the amended plaint, hence the document dated 15.5.1952 would be admitted under Order VIII, Rule 5 of C.P.C., cannot be accepted. There is a difference between denial of allegation of fact and proof of documents. When there is no denial of specific allegations made in the plaint, it is deemed to be admitted. But if a document is to be relied upon by the plaintiffs in support of the allegations of fact it requires to be proved. In the present case, admittedly the document forming the basis of the allegations of partition has not been proved and the

allegation of fact made in the plaint regarding partition was specifically denied by the defendant in his written statement. Consequently the very application of the provisions of Order VIII, Rule 5 of the CPC cannot be strictly made in the present case. The allegation of fact made in the plaint regarding partition was specifically denied in the written statement. The parties were co-sharers is admitted and not denied. The document of 1952 was not pleaded in the plaint in the year 1965 although it could be a vital piece of evidence for grant of injunction to the plaintiff. Allegation of fact for grant of injunction were made in the plaint. The document of 1952 was introduced by an amendment in the plaint as an evidence to prove the allegations of fact. The allegations of fact were denied and an issue was framed by the Court. When allegations of fact are specifically denied by the defendant, they cannot be presumed to be admitted. Once allegations of fact are denied, the plaintiff can succeed in the suit only if he proves them by evidence. Evidence in support of allegations of fact is to be proved and such evidence or absence of its denial in the written statement is not subject-matter of the provisions of Order VIII, Rule 5, C.P.C. when the allegations of fact have been denied by the defendant. Finding has been recorded by both the courts below and admittedly the document dated 15.5.1952 was not proved in accordance with law. Therefore, the decision in the case of M. Venakataraman Hebbar (supra) has no application on the facts of this case.

17. For the aforesaid reasons the question whether the family settlement could be rejected since it was not registered need not be gone into nor would be decisive for the reason that the findings recorded by the courts below on issue No. 3 for the second reason has been upheld by this Court.

For the aforesaid reasons, no interference is required in the impugned judgments wherein concurrent findings of fact have been recorded. The second appeal is accordingly dismissed.

There is no order as to costs.