
(2011) 07 MP CK 0067

In the Madhya Pradesh High Court

Case No : Second Appeal No. 1443 of 2010

Kawal Singh and another

APPELLANT

Vs

Sembai and another

RESPONDENT

Date of Decision : 15-07-2011

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 1 Rule 3B, 100, 107
Constitution of India, 1950 — Article 227
Evidence Act, 1872 — Section 45, 47, 67

Citation : (2012) 1 JLJ 411 : (2011) 4 MPHT 470 : (2011) 3 MPJR 107

Hon'ble Judges : A.K.Shrivastava, J

Bench : Single Bench

Final Decision : Allowed

Judgement

Hon"ble Mr. A.K. Shrivastava, J.—This second appeal has been filed at the instance of defendants. The suit of plaintiff for declaration of Bhumiswami right and injunction in respect to certain agricultural land has been decreed by learned Trial Court and the first appeal, which was filed by defendants has been dismissed by the impugned judgment and decree.

2. No exhaustive statements of fact are required to be narrated for the purpose of disposal of this appeal. Suffice it to say that a suit for declaration and injunction in respect to certain agricultural land, which is the subject matter of the suit and description whereof has been mentioned in the plaint, has been filed by the plaintiff on the averments that she never gave any consent in the Revenue Court to get the name of defendant Kawal Singh mutated in the Revenue record. It has also been pleaded by plaintiff that illegally the order has been obtained by the defendants for partition from the Revenue Court and the said order be set aside. A decree of injunction has also been sought that the defendants should not interfere in the possession of plaintiff-Sembai.

3. The suit was resisted by defendant Nos. 1 and 2 by filing a joint written statement.

4. The State of Madhya Pradesh has been arrayed as formal defendant in view of Order I Rule 3-B, CPC.

5. In the written statement filed by appellant-defendant No. 2, it has been pleaded that plaintiff Sembai gave her consent in the Revenue Court by putting her thumb impression on the necessary application filed in that Court and hence, they cannot be decreed.

6. Learned Trial Court framed necessary issues and after recording the evidence of the parties, dismissed it.

7. The first appeal which has been filed by the defendants has been dismissed by the impugned judgment and decree.

8. In this manner, this second appeal has been filed by the defendants.

9. This appeal has been admitted on the following substantial question of law :-

Whether learned Trial Court erred in substantial error of law in dismissing the application u/s 45 of the Evidence Act of the defendants praying to get the documents (Exhs. D-4 and D-5) bearing thumb impression of the plaintiff giving consent to mutate the names of defendants, examined by handwriting expert ?

10. The contention of learned Counsel for the appellants is that plaintiff Sembai gave her consent in the Revenue Court to get the suit property recorded in the name of defendants, but, by disowning her evidence as well as thumb impression on the consent application (Exhs. D-4 and D-5) she has filed the present suit. Learned Counsel submits that an application u/s 45 of the Evidence Act was submitted by defendants in the Trial Court to get the thumb impression of the plaintiff Sembai examined by handwriting expert, but, that application has been illegally rejected by learned Trial Court, vide its order dated 27-4-2009. Learned Counsel further submits that against the said order, a petition under Article 227 of the Constitution of India was submitted by the defendants, which was registered as W.P. No. 5090/2009 Kanwal Singh and Mali Singh Vs. Smt. Same Bai and State of M.P.. This petition was withdrawn on 14-5-2009 with liberty to assail this point in appeal. Learned Counsel has invited my attention to the said order, copy of which has been filed in this Court. Learned Counsel further submits that in pursuance to the order passed by the Division Bench of this Court in the aforesaid petition dated 14-5-2009, the defendants in appeal filed another application u/s 45 of the Evidence Act. before learned First Appellate Court praying to get the thumb impression examined by the handwriting expert, but the said application has been dismissed by learned First Appellate Court and appeal has also been dismissed.

11. Learned Counsel for the appellants further submits that there are several modes to prove a document and one of the modes to get the document proved is to examine the handwriting expert. Hence, it has been put forth by learned Counsel that because learned two Courts below in arbitrary manner have rejected the application u/s 45 of the Evidence Act. therefore, it has been prayed

that by allowing the said application, this appeal be allowed and the case be sent back to learned Trial Court to provide an opportunity to the defendants to prove the thumb impression of plaintiff on material documents (Exhs. D-4 and D-5).

12. On the other hand, learned Counsel for the respondents argued in support of the impugned judgment and submitted that rightly the application u/s 45 of the Evidence Act has been rejected by learned two Courts below.

13. Having heard learned Counsel for the parties and after going through the record, I am of the view that this appeal deserves to be allowed and case is required to be sent back to learned Trial Court to pass a fresh judgment after permitting the defendants to get the documents (Exhs. D-4 and D-5) examined by the handwriting expert.

Regarding Substantial Question of Law :

14. The case of defendants is that plaintiff-Sembai gave her consent to get the suit property mutated in their names and in that regard she submitted two consent applications before the Revenue Court, which are Exhs. D-4 and D-5, praying to get the entire holding partitioned in two equal portions and further to mutate the names of the parties in the Revenue record accordingly. Needless to say that as per the pleadings of the defendants, these documents contain the admission of plaintiff-Sembai that she and defendant-Kawal Singh had agreed to partition the entire holding in two equal portions on which they are possessing respectively and accordingly their names be recorded in the Revenue record. These two documents (Exhs. D-4 and D-5) contain the thumb impression of plaintiff-Sembai. The pleading of defendants-appellants in the written statement is in reply to the averments made in the plaint that by keeping the plaintiff in dark the defendants got their names mutated in the Revenue record. Thus, the pivotal question to be decided is, whether plaintiff-Sembai ever executed the Sahmati Patra (consent application), Exhs. D-4 and D-5 before the Revenue Court. Although the plaintiff has denied the execution of these documents, but, the defendants cannot be debarred from adducing the evidence by getting these two documents examined by handwriting expert in order to prove their case. Under Sections 47 and 67 of the Evidence Act, no particular mode to prove a document has been prescribed by the Legislature, however, a document can be proved in any one or more of the following modes :-

- (i) By calling a person who signed or wrote a document;
- (ii) By calling a person in whose presence the documents are signed or written;
- (iii) By calling handwriting expert;
- (iv) By calling a person acquainted with the handwriting of the person by whom the document is supposed to be signed or written;
- (v) By comparing in Court, the disputed signatures or handwriting with some admitted signatures or writing;

(vi) By proof of an admission by the person who is alleged to have signed or written the document that he signed or write it;

(vii) By the statement of a deceased professional scribe, made in the ordinary course of business, that the signature on the document is that of a particular person;

A signature is also proved to have been made, if it is shown to have been made at the request of a person by some other person, e.g., by the scribe who signed on behalf of the executants;

(viii) By other circumstantial evidence.

In this context, I may profitably place reliance on the decisions of this Court in *Kishan Prasad Vs. M.P. Government through Collector, Vidisha*. 1983 JLJ 474, and earlier decision of this Court in *Ramibai Vs. Life Insurance Corporation of India*, 1981 JLJ 388.

15. According to me, learned two Courts below erred in substantial error of law in dismissing the application of defendants u/s 45 of the Evidence Act to get the documents (Exhs. D-4 and D-5) examined by handwriting expert. Indeed, when the order of learned Trial Court, dated 27-4-2009 dismissing the application was assailed by defendants by filing petition under Article 227 of the Constitution of India, before Division Bench of this Court, although the petition was dismissed as withdrawn, but, liberty was given to the defendants to assail this point before the First Appellate Court and indeed the defendants not only assailed and pressed this point before learned First Appellate Court but also filed a separate application u/s 45 of the Evidence Act before the said Court, although they already filed such type of application in the Trial Court, which was arbitrarily rejected by the said Court on 27-4-2009.

16. Hence, I am of the view that in arbitrary manner the aforesaid application of the defendants has been rejected resulting into prejudice to them as they have been debarred from adducing material evidence in order to demonstrate that these two documents (Exhs. D-4 and D-5) contained the thumb impression of the plaintiff.

17. Needless to say, since it is well settled in law that the Legislature had empowered the Appellate Court u/s 107, CPC, the same powers and to perform nearly as may be, the same duties as are conferred and imposed by this Code to the Courts of original jurisdiction in respect of suits. Because, the appeal, either first or second, is the continuation of the suit and therefore, in order to determine a suit finally this Court while exercising jurisdiction u/s 100, CPC can examine the legality and propriety of any order of Trial Court going to the root of the case, which has been arbitrarily passed and can set aside the said order under this provision by applying these tests in the present factual scenario of the case, since the order dated 27-4-2009 of learned Trial Court dismissing the application of defendants u/s 45 of the Evidence Act to get the documents (Exhs.

D-4 and D-5) examined by the handwriting expert, which according to them bear the thumb impression of the plaintiff, has been passed in improper and arbitrary manner, the same is hereby set aside and the said application of defendants is hereby allowed.

18. The substantial question of law is, thus, answered in affirmative and it is hereby held that learned Trial Court erred in substantial error of law in dismissing the application u/s 45 of the Evidence Act and learned First Appellate Court also committed the same error.

19. Resultantly, this appeal succeeds and is hereby allowed. The impugned judgment and decree is set aside and case is sent back to learned Trial Court to provide opportunity to the defendants to get the documents (Exhs. D-4 and D-5) examined by handwriting expert in order to ascertain whether it bears the thumb impression of plaintiff-Sembai or not. The defendants after submitting the report of the handwriting expert may also examine the handwriting expert in the Court to prove its report.

20. This appeal is accordingly allowed with cost. Respondent No. 1-plaintiff shall bear the cost of this appeal. Counsel fee of Rs. 2,000/-, if pre-certified.