
(2019) 04 MP CK 0070

In the Madhya Pradesh High Court

Case No : Second Appeal No.199 Of 2002

Laxmi Narayan And Others

APPELLANT

Vs

Diwan Singh And Another

RESPONDENT

Date of Decision : 04-04-2019

Acts Referred:

Code Of Civil Procedure, 1908 — Section 27

Registration Act, 1908 — Section 17

Indian Succession Act, 1925 — Section 2(h)

Transfer Of Property Act, 1882 — Section 122, 123

Citation : (2019) 04 MP CK 0070

Hon'ble Judges : G.S. Ahluwalia, J

Bench : Single Bench

Advocate : K.N. Gupta, R.S. Dhakad, Tej Singh Mahadik

Final Decision : Allowed

Judgement

1. This Second Appeal under Section 100 of CPC has been filed against the judgment and decree dated 21/2/2002 passed by Third Additional District Judge, Vidisha in Civil Appeal No.20-A/2002, thereby affirming the judgment and decree dated 4/7/2000 passed by the Second Civil Judge, Class-II, Vidisha in Civil Suit No.202-A/1994, by which the suit filed by the plaintiff/respondent no.1 was decreed.

2. The Second Appeal has been admitted on the following substantial questions of law:-

1. "Whether the learned courts below in the facts and circumstances of the case, committed error in dismissing the application filed under order XLI Rule 27 C.P.C.?"

2. "Whether the learned courts below committed error in flouting the directions of the Hon'ble High Court in civil revision no.288/95?"

3. "Whether the learned courts below committed error in not holding that the

document (Ex.P/1) as a gift deed?"

3. The necessary facts for disposal of the present appeal in short are that plaintiff/respondent no.1 and the defendant no.1 Manphool and Motiram are the real brothers. Appellant no.1 is the son of Manphool, who died during pendency of the suit, whereas appellants no.2 and 3 are the sons of Motiram, who had also expired prior to institution of the suit. It is the case of plaintiff/respondent no.1 that survey nos.21, 22, 23, 83, 90, 92, 150, 203, 204, 233, 236, 240, 242 and 250, total area 12.835 hectare situated in village Gehunkhedi, Thasil and District Vidisha was the self acquired property of his father Rajaram, who during his lifetime had bequeathed the property in dispute to the plaintiff/respondent no.1 by Will dated 12/11/1994. It was further pleaded that the father of the plaintiff/respondent no.1 has expired about 30 years' back. By virtue of the Will executed by Rajaram, the plaintiff/respondent no.1 became the sole owner of the property in dispute and from thereafter, he is in exclusive possession of the same. The defendants/appellants filed an application before the Court of Tahsildar claiming that they have 2/3rd share in the property, whereas the plaintiff/respondent no.1 has 1/3rd share in the property and the property has not been partitioned so far, therefore, the same may be partitioned. The plaintiff/respondent no.1 filed an objection that since their father has already executed a Will in his favour, therefore, he is the sole owner of the property in dispute. However, by order dated 1/5/2018 the objection raised by the plaintiff/respondent no.1 was rejected. Being aggrieved by the order of the Tahsildar, the plaintiff/respondent no.1 filed a revision before the court of Collector, Vidisha and the said appeal by order dated 28/9/1985 was allowed and the order of the Tahsildar was set aside and the plaintiff/respondent no.1 was directed to obtain the decree of declaration from the Court of competent jurisdiction. Accordingly, the suit for declaration of title and permanent injunction was filed on the basis of Will.

4. Defendants no.1 to 4 (defendant no.4-Mungobai, Wd/o Motiram has also died) filed their written statement and disputed that Rajaram had executed any Will in favour of plaintiff/respondent no.1. On the contrary, it was pleaded that Rajaram had also expired prior to 1954, therefore, it was not possible for him to execute a Will on 15/11/1954.

5. The trial court by judgment and decree dated 4/7/2000 decreed the suit by holding that Rajaram had executed a Will dated 15/11/1954 in favour of plaintiff/respondent no.1 and accordingly, the respondent no.1 is the sole owner and in possession of the property in dispute.

6. Being aggrieved by the judgment and decree passed by the trial court, the appellants filed an appeal, which too has suffered dismissal by judgment dated 21/2/2002 passed by the Third Additional District Judge, Vidisha in Civil Appeal No.20-A/2002.

7. Challenging the judgments and decrees passed by the courts below, it is submitted by the counsel for the appellants that a specific objection was raised

by the appellants with regard to the admissibility of the Will, Ex.P/1. On 2/3/1995 during examination of Diwan Singh (PW-1) when he tried to exhibit the so called Will as Ex.P/1, a specific objection was raised that the said document is not a Will because it is mentioned that the property is given to the plaintiff on the very same day of the execution of the will, therefore, in fact it is a gift deed and not a Will and as the said gift deed has not been executed on a properly stamped paper and is also not registered, therefore, it is not admissible in evidence. The said objection was overruled by the trial court on the ground that since the title of the document is Will and, therefore, the it has to be treated as a Will and since the Will is not required to be registered as well as not required to be executed on a stamped paper, therefore, the same is admissible. It appears that being aggrieved by the rejection of the objection with regard to the admissibility of the so called Will, Ex.P/1, the appellants field a Civil Revision No.288/1995. The said Civil Revision was allowed by this Court by order dated 10/4/1995 by holding that the order under challenge is an interlocutory order and was passed during the examination of a witness and, therefore, it will not be proper for this Court to express any opinion at this stage as to whether the document is a Will or a gift, as it will finally embarrass the trial court. Accordingly, this Court left this question to be decided by the trial court at the time of disposal of the case on merits and the parties were allowed to adduced arguments on this point and it was directed that the trial court will decide this point alongwith the case. It appears that the trial court did not take note of order dated 10/4/1995 passed by this Court in Civil Revision No.288/1995. The order passed by this Court in civil revision was a bi party order. From the order-sheets of the trial court it does not appear that the final order of this Court in the civil revision was ever produced before it, however, from order dated 4/4/1995 passed by the trial court it is clear that the trial court was aware of the fact of pendency of this revision, in spite of that it appears that the trial court did not try to verify the final outcome of this revision. Although the order in civil revision was a bi party order, but it appears that even the counsel for none of the parties brought this order to the knowledge of the trial court. Accordingly, the trial court while passing the final judgment observed that so far as the question of nature of document is concerned, the same has already been decided by it at the time of exhibiting the said document. However, the High Court had already directed the trial court to decide the objection afresh with regard to the nature of the document. Unfortunately, the trial court did not take note of this fact.

8. Being aggrieved by the judgment and decree passed by the trial court, the appellants filed an appeal and in the appeal the following ground was specifically taken:-

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"9. Thus, a ground was specifically raised before the appellate court that the objection with regard to the nature of the document has been directed to be decided afresh and since the so called Will, Ex.P/1, is in the nature of gift deed, therefore, it was required to be registered. It appears that the appellate court did not consider this point and dismissed the appeal. Under these circumstances, it is submitted by the counsel for the appellants that since no finding has been given with regard to the nature of the so called Will, Ex.P/1, therefore, this Court may either decide the nature of the document on its own or may remand the matter back for adjudication of the same by the trial court.

10. Considered the submissions made by the counsel for the parties.

11. The civil suit was filed in the year 1986. 33 long years have already passed. In the year 1995 a direction was also given by this Court to the trial court to decide the nature of the so called Will, Ex.P/1, at the time of final disposal of the suit, but neither the trial court paid any heed to the directions given by this Court nor the appellate court tried to deal with the ground no.9 raised by the appellants in the memo of appeal. Under these circumstances, this Court is of the considered opinion that no fruitful purpose would be served by remanding the matter back to the trial court for adjudication of the nature of the so called Will, Ex.P/1.

Section 17 of the Registration Act, 1908 provides that the instrument of gift of immovable property is required to be registered and thus, the registration of the gift deed is compulsory. Therefore, the moot question for consideration is that-

"Whether the document, Ex.P/1, is a Will or is a gift deed?"

12. Ex.P/1 reads as under:-

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13. From the plain reading of the document Ex.P/1, it is clear that the said document came in force with immediate effect from the date of execution of the said document. Will has been defined in Section 2(h) of the Succession Act, 1925, which reads as under:-

"Will" means the legal declaration of the intention of a testator with respect to his property which he desires to be carried into effect after his death."

Section 122 of the Transfer of Property Act defines gift, which reads as under:-

"122. "Gift" defined. - "Gift" is the transfer of certain existing moveable or immoveable property made voluntarily and without consideration, by one person, called the donor, to another, called the donee, and accepted by or on behalf of the donee."

Section 123 of the Transfer of Property Act reads as under:-

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

For the purpose of making a gift of moveable property, the transfer may be effected either by a registered instrument signed as aforesaid or by delivery.

Such delivery may be made in the same way as goods sold may be delivered."

14. It is clear from Section 2 (h) of the Succession Act as well a Section 122 of the Transfer of Property Act, that where a document declares the intention of the testator with respect to the property which he desires to be carried into effect after his death, then the said document would be a Will and if the donor wants to transfer his movable or immovable property without any consideration to another, then it would be a gift. In the present case, the use of words "?? ?? ??", i.e. from today itself, are of great importance, which the trial court has wrongly ignored by saying that if the words "?? ?? ??" are read alongwith other contents of the document, then the document, Ex.P/1, can be said to be a Will. The words "vkt ls gh", i.e. from today itself, clearly show that Rajaram had transferred his immovable property without consideration to the respondent no.1/plaintiff Diwan Singh and thus, by no stretch of imagination it can be said that by using the words "?? ?? ??", i.e. with immediate effect, the intention of the executant of the document, Ex.P/1, was that this document would come in operation after his death. Furthermore, the words "?? ?? ??" have been further clarified by another sentence, i.e. in case if Rajaram recovers from his illness, then he would get the

name of plaintiff/respondent no.1 mutated in the revenue records. Thus, the words "?? ?? ??" mean that the property was transferred without consideration as the same has been further clarified by the sentence that in case if he recovers from his illness, then he would get the name of plaintiff/respondent no.1 mutated in the revenue records. Thus, by document, Ex.P/1, Rajaram had in fact had transferred his immovable property without any consideration to the respondent no.1/plaintiff. Thus, undisputedly Ex.P/1 was not a Will and it was a gift deed. Under these circumstances, this Court is of the considered opinion that the trial court has committed material illegality by ignoring the material aspects of the document merely by saying that if the words "?? ?? ??" are read along with the remaining parts of the document, Ex.P/1, then it would be a Will. It further appears that the trial court was impressed by the use of word "Will" as the title of the document. The Supreme Court in the case of *Bunga Daniel Babu Vs. Sri Vasudeva Constructions and others* reported in (2016) 8 SCC 429 has held as under:-

"18. It is worthy to note that in the said case a stand was taken by the respondent that the agreement was a "collaboration agreement" as it was so titled. Emphasis was laid on the fact that the agreement showed the intention to collaborate and, therefore, it was a joint venture. The Court ruled that the title or caption or nomenclature of the instrument/document is not determinative of the nature and character of the instrument/document, though the name usually gives some indication of the nature of the document and, therefore, the use of the words "joint venture" or "collaboration" in the title of an agreement or even in the body of the agreement will not make the transaction a joint venture, if there are no provisions for shared control of interest or enterprise and shared liability for losses....."

The Supreme Court in the case of *B.K. Muniraju vs. State of Karnataka and others* reported in (2008) 4 SCC 451 has held as under:-

"18. The document in question which is filed as Annexure P-3, has been styled or titled as "certificate of grant". In order to know the real nature of the document, one has to look into the recitals of the document and not the title of the document. The intention is to be gathered from the recitals in the deed, the conduct of the parties and the evidence on record. It is settled law that the question of construction of a document is to be decided by finding out the intention of the executant, firstly, from a comprehensive reading of the terms of the document itself, and then, by looking into-to the extent permissible-the prevailing circumstances which persuaded the author of the document to execute it. With a view to ascertain the nature of a transaction, the document has to be read as a whole. A sentence or term used may not be determinative of the real nature of transaction. Reference in this regard can be made to the following cases i.e. *Vidhyadhar v. Manikrao*, *Subbegowda v. Thimmegowda* and *Bishwanath Prasad Singh v. Rajendra Prasad*."

15. Thus, it is clear that in fact the title of the document would not decide the

nature of the document, but in fact the contents of the document would decide the nature of the document and since this Court has already come to a conclusion that by using the words "vkt ls gh", i.e. from today itself, Rajaram had transferred the immovable property to the respondent no.1/plaintiff without any consideration and thus, it was a gift deed and was not admissible in evidence, as the same was not executed on a properly stamped paper and was not registered.

16. It is submitted by the counsel for the respondent no.1 that since in the document Ex.P/1 it is nowhere mentioned that the gift deed was exhibited by the donee/ respondent no.1/plaintiff, therefore, the courts below have rightly construed the said document as a Will.

17. Considered the submissions made by the counsel for the respondent no.1.

18. Unfortunately the above submission has been made by the counsel for respondent no.1 without going through the provisions of Section 122 of the Transfer of Property Act, which has already been reproduced. Thus, it is clear that where the gift is not accepted by the donee, then the said gift would be a void document. If the plaintiff had not accepted the gift deed executed by his father Rajaram, then the same would become void and would not assume the nature of a Will after the death of Rajaram. Accordingly, relying upon the submission made by the counsel for the respondent no.1/plaintiff himself, it is held that as there is nothing in the gift deed to indicate that the plaintiff/ respondent no.1 had accepted the gift deed executed by his father Rajaram, therefore, the same is held to be void in the light of provisions of Section 122 of the Transfer of Property Act.

19. It is further submitted by the counsel for the appellants that the trial court committed material illegality by ignoring the order passed by this Court in civil revision No.288/1995 and has erroneously mentioned in paragraph 8 of its judgment that the nature of the document has already been decided by the trial court at the time of examination of the witness. Thus, it is submitted that the judgment passed by the courts below are liable to be set aside.

20. Considered the submissions made by the counsel for the parties.

21. From the order-sheets of the trial court it appears that although the trial court was aware of the pendency of the civil revision, but it is not reflected from the order-sheets that the final order was ever communicated to the trial court, although the order passed by this Court was a bi party order. Even the order of the High Court does not find place in the record of the trial court. It is really surprising and cannot be presumed that after the final order was passed by this Court in civil revision even the appellants would not file the certified copy of this order before the trial court. Be that as it may, but one thing is clear that the appellants in their memo of appeal had specifically raised ground no.9 in which it was mentioned that in spite of the order of the High Court it has not been considered by the trial court. Surprisingly, the appellate court while deciding the appeal did not consider the ground no.9 and has not mentioned even a single

word about ground no.9. It is expected of the appellate court to consider all the arguments raised by the parties before it. It is not known that whether this ground was pressed by the appellants during the course of arguments or not, but once it was mentioned in the grounds that in spite of the direction by this Court, the trial court has not considered the nature of the document, then the appellate court should have directed the parties to produce the copy of the order of the High Court. In the considered opinion of this Court, this aspect was ignored by the appellate court and this conduct of the appellate court cannot be appreciated. Once an order has been passed by this Court issuing certain directions to the trial court, then it is the duty of the trial court not to flout the orders of the High Court. From order dated 11/2/2002 passed by the appellate court, it appears that on the said date the counsel for respondent no.1 had produced the original copy of the document Ex.P/1. The document Ex.P/1 was already on record, therefore, it was not necessary for the respondents to file the copy of the original Will before the appellate court. Thus, it appears that the question with regard to nature of the document must have been raised by the appellants during the course of arguments, but unfortunately the Presiding Judge also did not pay any heed to the ground No.9 raised by the appellants in their memo of appeal. Thus, this Court is of the considered opinion that the trial court as well as the appellate court have flouted the order dated 10/4/1995 passed by this Court in Civil Revision No.288/1995. Accordingly, the substantial questions of law nos.2 and 3 are answered in affirmative.

22. It is not known that whether the Judicial Officers, who have dealt with the trial as well as appeal, are still in service or not, therefore, the Principal Registrar (Vigilance), Jabalpur is directed to look into the matter and to fix the liability for flouting the orders of this Court.

23. As the substantial questions of law nos.2 and 3 have been answered in affirmative, therefore, this Court is of the considered opinion that it is not necessary to consider the substantial question of law no.1.

24. Accordingly, it is held that the document Ex.P/1 was not a Will, but in fact it was a gift deed, which was not admissible for the simple reason that it was executed on an insufficiently stamped paper as well as it was an unregistered document. Accordingly, the judgment and decree dated 21/2/2002 passed by Third Additional District Judge, Vidisha in Civil Appeal No.20-A/2002 and the judgment and decree dated 4/7/2000 passed by the Second Civil Judge, Class-II, Vidisha in Civil Suit No.202-A/1994 are hereby set aside. The suit filed by the plaintiff/respondent no.1 is hereby dismissed.

The appeal succeeds and is hereby allowed.