

(2008) 02 MP CK 0114

In the Madhya Pradesh High Court

Case No : Second Appeal No. 341 of 1993

Mahadev Prasad Khare deceased through LRs. Parwati Bai
Khare and others

APPELLANT

Vs

Mst. Rambai deceased through LRs. Anil Kumar Khare and
others

RESPONDENT

Date of Decision : 26-02-2008

Acts Referred:

Registration Act, 1908 — Section 58

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 31, 96

Citation : (2008) 3 MPJR 130 : (2008) 3 MPLJ 57

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

Bench : Single Bench

**Advocate : Ajay Raizada, for the Appellant; V.K. Shrivastava for Respondent
Nos. 1 to 4 and T.M. Dhamdar for Respondent No. 5, for the Respondent**

Final Decision : Allowed

Judgement

A.K. Shrivastava, J.

Feeling aggrieved by the judgment and decree dated 6-7-1993 passed by learned Additional District Judge, Parma in Civil Appeal No. 70-A/92, whereby the judgment and decree passed by learned trial Court dismissing the suit of plaintiff has been set aside by allowing the appeal of plaintiff and decreeing her suit, this second appeal has been filed by defendant No. 1 Mahadev Prasad Khare.

A suit was filed by the plaintiff to cancel the sale deed dated 26-7-1976 executed between plaintiff and defendant No. 1 Mahadev Prasad Khare with a further relief to deliver possession of the suit property which is agricultural land and the description whereof has been mentioned in the plaint.

According to the plaintiff she is an illiterate person and is widow for the last 20 years. There is no male member in her family to look after her property. Defendant No. 1 Mahadev Prasad Khare happened to be her cousin brother and

she was having faith in him. According to the plaintiff, since, defendant No. 1 is her brother in distinct relation, therefore, the suit property was given to him on the basis of crop share w.e.f. 1975. Defendant No. 1 on 25-7-1976 pacified her that for agricultural purpose he has to contact several revenue authorities and, therefore, there is need of power of attorney and the same be executed by the plaintiff in his favour by getting that document registered. The plaintiff became ready and went to the office of Sub Registrar on 26-7-1976. A document was written but the same was not read over and explained to her and under the pretext of power of attorney, without getting the document read over and explained to her the same was executed and she put her signature on the document.

In paras 1 and 6 of the plaint specific averment of the plaintiff is that she is an illiterate lady and cannot read.

Defendant No. 1 was sharing the crop with her every year, but ultimately all of a sudden the same was stopped in May, 1990 and when she inquired the matter, she came to know that fraudulently the document of sale-deed was got executed by taking undue advantage of her being an illiterate lady. According to the plaintiff, the value of the suit property on 26-7-1976 when the alleged sale-deed was got executed was not less than Rs. 50,000/- and, therefore, the same could not be sold on meagre amount of consideration of Rs. 2,500/- only and even this amount was not paid to her by defendant No. 1.

According to the plaintiff, defendant No. 1 is illegally possessing the suit property w.e.f. May-June, 1990 and she is entitled to get back possession of the suit property. On these premised pleadings, the present suit has been filed by the plaintiff for the reliefs which I have mentioned hereinabove.

Defendant No. 1 whose LRs. are appellants, by filing written statement refuted the plaint averments and specifically denied that plaintiff is an illiterate lady. According to him, plaintiff is an educated and healthy lady. Specifically it has been denied by defendant No. 1 that he is the brother of plaintiff from any angle. He is also not the resident of the village of plaintiff. The factum of giving land on crop share basis has been specifically denied by him in para 3 of his written statement. According to him, he is a Central Government employee holding the post of "Post Master" and he retired from this post on 31-7-1979. Since he was posted out-side district of Panna, therefore, the question of cultivating the land on behalf of plaintiff on crop share basis w.e.f. 1975 does not arise.

The averment of plaintiff that under the pretext of getting the document of power of attorney executed the sale-deed was executed, has been specifically denied by defendant in para 5 of his written statement. Further it has been pleaded by defendant No. 1 that plaintiff is an literate lady and she has also executed several sale-deeds and other documents. According to defendant No. 1, after having sold the suit property to him, he is possessing the same. The value of the suit property was not Rs. 50,000/- on the date of execution of the sale-

deed nor the same is even on the date of filing of written statement (written statement was filed on 1-10-1990). The plea of limitation was also raised by the defendant.

Learned trial Court, on the basis of the averments made in the plaint and the denial in the written statement framed necessary issues and after recording the evidence of the parties, dismissed the suit not only on the merit but while deciding issue No. 6-A held that the suit is also barred by time.

The appeal which was filed by the plaintiff before learned first Appellate Court has been allowed and the suit of plaintiff has been decreed.

In this manner the present second appeal has been filed.

This Court while admitting the second appeal on 6-10-1993, framed the following substantial question of law:

Whether sale deed dt. 26-7-1976 Ex.D-2 is a genuine document and confers title on the appellants?

The contention of Shri Ajay Raizada, learned counsel for the appellants is that the learned trial Court has assigned elaborate reasons for holding that the sale-deed was executed by plaintiff Smt. Rambai in favour of defendant Mahadev Prasad Khare. The learned trial Court further came to hold that defendant No. 1 was not crop sharer of plaintiff and was not providing half share of crop to her; the registered sale-deed dated 26-7-1976 was not executed by playing any fraud and the suit has also been found to be barred by time and in this manner dismissed the suit on merit as well as on the ground of limitation. Further it has been contended that learned first Appellate Court by paying heed to irrelevant considerations and by taking advantage of certain weakness of defendant No. 1 came to hold that fraudulently the sale-deed Ex.D-2 was executed in favour of defendant No. 1 and hence by allowing the appeal of plaintiff decreed her suit.

By placing heavy reliance on the decision of the Supreme Court *Ishwar Dass Jain (Dead) Thr. Lrs. Vs. Sohan Lal (Dead) By Lrs.*, it has been argued by learned counsel for the appellants that there is presumption of correctness of endorsement made by Sub-Registrar in the registered document u/s 58 of Registration Act, 1908 and that presumption can be rebutted only by placing very strong evidence to the contrary and since by strong evidence said presumption has not at all been rebutted by the plaintiff, the sale-deed Ex.D-2 cannot be set aside. Further it has been argued by learned counsel that the factum of execution of registered document has been admitted by the plaintiff in the pleadings as well as in her testimony and, therefore, merely because it is her case that fraudulently the sale-deed got executed, the sale-deed should not be held to be a fraudulent document and merely on the saying of plaintiff the learned first Appellate Court should not lightly interfere in the findings of learned trial Court holding the document of sale-deed to be a valid document.

On the other hand, Shri V. K. Shrivastava, learned counsel for respondents 1 to 4

argued in support of the impugned judgment and has submitted that learned first Appellate Court did not err in not holding that fraudulently the sale-deed was executed under the false pretext of execution of power of attorney and if that is the position, for no rhyme or reason, the judgment of learned first Appellate Court should be set aside and this appeal of defendant be dismissed.

Having heard learned counsel for the parties, I am of the view that this appeal deserves to be allowed.

Regarding substantial question of law:

Before answering the substantial question of law it would be relevant to mention here that the specific finding of learned trial Court while deciding issue No. 6-A is that the suit is ex-facie barred by time and the reasons have been given by the trial Court in that regard. In this context para 11 of the judgment of learned trial Court may be seen. In this paragraph learned trial Court has categorically held that since execution of sale-deed has been found to be proved, the same cannot be challenged after 15 years. On going through the entire judgment of learned first Appellate Court nowhere it is gathered that there is any whisper in the judgment that when the fact of alleged fraudulent act of defendant No. 1 came into the knowledge of plaintiff. Even for the sake of arguments, as stated by the learned counsel for the respondents that document of Ex.D-2 was obtained fraudulently by defendant No. 1, to me, it was incumbent upon the plaintiff to prove that when and on which date the fraud came into her knowledge and there should be finding in that regard of learned first appellate Court because specific finding of learned trial Court is that the suit is ex-facie barred by time. Since learned appellate Court did not come to a particular finding that on a particular date alleged fraudulent act of defendant No. 1 came into the knowledge of plaintiff and from three years of the date of said knowledge, present suit for cancellation of sale-deed was filed hence it is within limitation, I am of the view that judgment of learned first appellate Court cannot be allowed to remain stand. In this context it would be fruitful to put emphasis on Article 56 of Limitation Act. According to this Article the period of limitation is three years from the date when the issue or registration becomes known to the plaintiff. Thus it was incumbent upon the learned first appellate Court to have arrived at a finding that alleged fraudulent act when and on which date came into the knowledge of plaintiff first. Since judgment of learned first appellate Court is totally silent on this point and how the judgment of learned trial Court holding the suit to be barred by time is vitiated, to me, the impugned judgment cannot be allowed to remain stand. According to me, the learned first appellate Court was duty bound to meet out the findings of learned trial Court holding the suit to be time barred. The learned first appellate Court was further duty bound to assign its own reasonings in order to hold that the suit is within limitation. Since learned first appellate Court has failed to discharge this legal duty, it had deviated itself from the powers conferred to it u/s 96 and Order XLI, Rule 31, Civil Procedure Code.

Now I shall advert to the substantial question of law. The plaintiff has come

forward with a case that she is an illiterate lady and by taking undue advantage of her illiteracy, under the false pretext of getting a document of power of attorney executed, sale-deed was executed by defendant No. 1 and this fact came into her knowledge in the month of May, 1990. In paras 1, 6 and 10 repeatedly the plaintiff has pleaded that she is an illiterate lady. However, when the plaintiff appeared in witness box as P.W. 1, nowhere she has stated that she is an illiterate lady though the pivot of her plaint and the basis of her suit is her illiteracy which has not at all been proved by adducing evidence in that regard. Thus the factum of illiteracy of plaintiff is not at all proved. Apart from this, on going through plaint as well as document of sale-deed Ex.D-2 this Court finds that plaintiff has signed the plaint as well as she has put her signature on sale-deed Ex.D-2. Though in para 6 of the plaint it has been stated by her that she is literate up-to the extent that she can put her signature only, but in absence of any evidence to prove this pleading in her testimony it cannot be said that she is literate up-to that extent only that she can sign. Since entire suit of plaintiff is based on her illiteracy, it was incumbent upon her to say in her testimony in that regard. There is no whisper in her testimony that she is literate up-to the extent that she can put her signature only. Thus entire stand of the plaintiff that she is an illiterate lady stands not proved.

By putting emphasis on the sale-deed Ex.D-2, the certified copy of which is Ex.P-1, this Court finds that there is an endorsement of Sub-Registrar that vendor i.e. plaintiff is admitting that she is executing a sale-deed for a consideration of Rs. 2,500/- and, therefore, there is strong presumption of execution of the document of sale-deed in favour of defendant No. 1. In this context decision of Ishwar Dass Jain (supra) placed reliance by Shri Raizada, learned counsel for the appellant, governs the field.

Apart from this, on going through certified copy of mutation register Ex.D-3 it is gathered that plaintiff Rambai Khare gave her consent before the revenue authority to get the name of defendant No. 1 mutated on the basis of said sale-deed and accordingly on 30-5-1977 the name of Mahadev Prasad has been mutated. This material document and material piece of evidence clearly shows that plaintiff was well acquainted of execution of document of sale-deed and this material piece of evidence going to the root of the matter has been very lightly taken by learned first appellate Court and did not give due weightage to this material piece of evidence and discarded this material document on irrelevant consideration that whether the consent was given oral or in writing it is not mentioned in Ex.D-3. In the mutation register the Authority is not obliged to write whether consent was orally given or in writing. The approach of learned first appellate Court is thus based on irrelevant consideration.

The next strong circumstance to hold that plaintiff executed the sale-deed is the certified copy of application dated 12-8-1981 Ex.D-1 written by plaintiff Rambai Khare which was submitted by her in the office of Nirashrit Pension. In column No. 6 of this application plaintiff has stated that she is having no means of her

livelihood. If she was under impression that she never sold the suit property to defendant No. 1 on 26-7-1976 she must have not stated in the said application Ex.D-1 on 12-8-1981 that she has no means of her livelihood. To me, submitting of application Ex.D-1 to obtain pension by indicating that plaintiff is having no means goes to show and it can be inferred that she already sold the suit property.

I may further add that Division Bench, of this Court in the case of 1970 CriLJ 1176 (M.P.) has categorically held that where the vendor admitted receipt of full consideration in the sale-deed and non-payment of consideration is later on disputed, the burden lies heavily on the vendor to explain the admission made in the sale-deed and to prove non-receipt of consideration. The bald statement of plaintiff that on the date of execution of sale-deed which is 26-7-1976 (Ex.D-2) the value of the suit property was Rs. 50,000/-, cannot be accepted in absence of any documentary evidence placed on record. It was the duty of plaintiff to have filed relevant sale-deeds of the nearby vicinity of that period in order to demonstrate that the value of the suit property was Rs. 50,000/-. The bald statement of plaintiff in that regard and the oral testimony of P.W.4 Jagannath cannot be accepted. Even this witness of plaintiff is not saying that the suit property fetches value of Rs. 50,000/-. According to P.W.4 the value of the suit property is between Rs. 30,000 to Rs. 32,000/- and that too on the date when he entered in the witness box (evidence of PW-4 Jagannath was recorded on 10-1-1991). Thus it is difficult to hold that value of the suit property was Rs. 50,000/- and not Rs. 2,500/- which is the sale price mentioned in the sale-deed Ex.D-2 dated 26-7-1976.

One important fact which cannot be marginalized and blinked away and which has also been put emphasis by learned counsel for the appellant that appellant/defendant No. 1 on the relevant date of execution of sale-deed i.e. 26-7-1976 was serving on the post of "Post Master" in the Post Office and was a Central Government employee and from where he retired on 31-7-1979. This has also been so pleaded in the written statement by defendant No. 1 and has also proved this pleading in his testimony. (See para 4 of testimony of DW-1 Mahadev Prasad Khare). There is no cross-examination on this point that he did not retire on 31-7-1979 from the post of Post Master. Thus if defendant No. 1 was a Central Government employee and was holding a responsible post of post Master, for no stretch of imagination he would enter and would agree to cultivate the agricultural land of plaintiff on crop share basis by leaving his government job. Thus the stand of plaintiff that under the false pretext to execute the document of power of attorney defendant No. 1 Mahadev Prasad Khare fraudulently got the sale-deed Ex.D-2 executed, cannot be accepted. The learned first appellate Court has paid much heed to the conduct of the defendant No. 1 that he did not produce relevant document in order to show that he withdrew a sum of Rs. 3,000/- from the Post Office to purchase the suit property, as well as according to defendant he purchase the suit property for Rs. 3,000/- while the consideration was Rs. 2,500/-. It is a matter of common knowledge that a purchaser is required to purchase stamps etc. for getting the sale-deed executed

and is also required to pay registration charges in cash and, therefore, even if it is stated by the defendant No. 1 that he purchased the suit property for Rs. 3,000/- it cannot be stretched up-to the extent that consideration was Rs. 3,000/- particularly when specific stand of plaintiff is that she never executed sale-deed. Similarly the documentary proof of withdrawing the amount from Post Office to purchase the suit property, if not has been produced by the defendant No. 1 the case of plaintiff would not become strong and proved, because plaintiff cannot take advantage of weakness of the defendant and in a suit for possession the plaintiff is required to prove her own case on the basis of her pleadings and placing strong evidence. I may place reliance on *Moran Mar Basselios Catholicos and another vs. Most Rev. Mar Poulouse Athanasius and others*, AIR 1954 SC 526 and AIR 1946 59 (Privy Council) in this regard.

I am not at all impressed by the finding of learned first Appellate Court that defendant No. 1 did not obtain any permission from the department to purchase the suit property. Even if this finding is taken into account that defendant No. 1 has not taken permission from his department, it cannot be said that sale-deed was not executed in his favour by the plaintiff. Learned counsel for the appellant by inviting my attention to Rule 18(2) of Central Civil Services (Conduct) Rules, 1964 has contended that defendant No. 1 Mahadev Prasad Khare was only required to inform the department and no previous permission was required to be obtained. Even for the sake of argument it is held that department was not informed or prior permission was not obtained from the department, it was the business between defendant No. 1 and his department and plaintiff is totally stranger to the said action and on this basis it cannot be held that valid sale-deed was not executed by plaintiff in favour of defendant No. 1.

The other ground on which the learned first appellate Court has put emphasis is that PW-4 Jagannath, who is one of the attesting witness to the sale-deed has stated that it was not agreed between the parties to sell the suit property and the document of power of attorney was executed. However, this witness has stated that simply he put his signature and he was not at all aware what type of document was being executed. The other attesting witness to the sale-deed is DW-4 Kalla, who has specifically stated that disputed property was sold by plaintiff Rambai. Paras 3 and 10 of the testimony of D.W.4 may be seen. All these things are being stated here because learned trial Court who was having advantage of enjoying demeanour of the witnesses and before whom the witnesses were examined, came to hold that document Ex.D-2 is out right sale and was not obtained by playing fraud by defendant No. 1. The Supreme Court in the case of *Madhusudan Das Vs. Smt. Narayanibai (Deceased)* by Lrs. and Others, has held that in an appeal against a trial Court decree, when the appellate Court considers an issue turning on oral evidence it must bear in mind that it does not enjoy the advantage which the trial Court had in having the witnesses before it and of observing the manner in which they gave their testimony. The Supreme Court further came to hold that when there is a conflict of oral evidence on any matter in issue and its resolution turns upon the

credibility of the witnesses, the general rule is that the appellate Court should permit the findings of fact rendered by the trial Court to prevail unless it clearly appears that some special feature about the evidence of a particular witness has escaped the notice of the trial Court or there is a sufficient balance of improbability to displace its opinion as to where the credibility lies. In order to arrive at such a finding, learned Apex Court placed reliance on two decisions of Privy Council *W. C. Macdonald vs. Fred Latimer*, AIR 1929 PC 15 and AIR 1949 32 (Privy Council) .

Even on the basis of oral evidence placed on record if two views are possible, according to the decision of Supreme Court in the case of *Nizamuddin Ahmed vs. Narmada Prasad and others*, 1976 JLJ 6 the view taken by the trial Court should be given weightage and should not be disturbed unless there are strong reasons to differ.

The substantial question of law is thus answered that sale-deed dated 26-7-1976 Ex.D-2 is a genuine document and confers title on the appellants.

For the reasons stated hereinabove, this appeal is allowed, the judgment and decree passed by learned first appellate Court is hereby set aside and the judgment and decree passed by learned trial Court is hereby restored. The appellants shall be entitled to realize the cost of this appeal from respondents 1 to 4/plaintiffs. Counsel's fee Rs. 2,000/-, if pre-certified.