

(2016) 08 AHC CK 0086
In the Allahabad High Court
Case No : Writ B No. 34481 of 2006

Mohd. Iqbal

APPELLANT

Vs

Board of Revenue U.P. At Allahabad

RESPONDENT

Date of Decision : 22-08-2016

Acts Referred:

Constitution of India, 1950 — Article 226

Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950 — Section 209, 229 B

Citation : (2016) 133 RD 20

Hon'ble Judges : Ram Surat Ram (Maurya), J.

Bench : Single Bench

Advocate : H.O.K. Srivastava and Bhanu Bhushan Jauhari, Advocates, for the Petitioner; C.S.C and R.N. Singh and V.K. Chandel and R.N. Chandel and V.K. Singh, Advocates, for the Respondent

Final Decision : Allowed

Judgement

Ram Surat Ram (Maurya), J.—Heard Sri Bhanu Bhushan Jauhari, for the petitioners and Sri Ram Niwas Singh, for respondent-6.

2. This petition has been filed against the orders of Additional Commissioner dated 13.09.1995 and Board of Revenue U.P. dated 28.02.2006, passed in suit under Section 229-B/209 of U.P. Zamindari Abolition and Land Reforms Act, 1950 (hereinafter referred to as the "Act").

3. Hafizuddin (the father of the petitioners) filed a suit (registered as Suit No. 27/100 of 1986-87) under Section 229-B/209 of the Act, on 29.07.1985, for declaring him as "bhumidhar with transferable right" of plot 51 (area 16 biswa 15 dhur) of village Daniyalpur, tahsil Chail, district Allahabad (at present Kaushambi). Later on, he filed an application dated 23.05.1989 for amendment of the plaint, seeking relief for ejectment of defendant-1 from the disputed land and delivery of possession over it. He took plea that he was bhumidhar in possession of the disputed land, in which he had planted 30 trees of guava, 7 neem, one kathal, two awala, one jamun, 3 gular, one lisoda, 8 mango and one

kaban kachnar and had been taking fruits of the trees continuously. In the year 1983, Alimuddin threatened to take possession over disputed land, then he filed O.S. No. 709 of 1983, for permanent injunction, restraining Alimuddin from interfering in his possession over it, which is pending before Civil Court. During pendency of O.S. No. 709 of 1983, he came to know that Alimuddin got a sale deed dated 23.05.1978 executed, in his favour through some imposter of the plaintiff, which is void. On the basis of sale deed dated 23.05.1978, name of Alimuddin was recorded in revenue record, without any notice to the plaintiff. On these allegations suit has been filed.

4. Alimuddin filed his written statement and contested the suit. He denied plaintiff allegations and stated that Hafizuddin was in need of money and voluntarily executed sale deed dated 23.05.1978, after taking sale consideration of Rs. 6000/- and handed over possession over disputed land. After obtaining sale deed various other trees were also planted by him. As the plaintiff was not in possession as such he could not give correct numbers of the trees. According to him there were 48 trees of guava, 9 neem, 2 kathal, two awala, 4 jamun, 2 gular, one lisoda, 3 mango, one ber, one sharifa, one jungle jalebi and one juhi and he had been taking fruits of the trees continuously, from the date of sale deed. He specifically denied that sale deed was procured through some imposter and stated that sale deed contains signatures of Hafizuddin, who himself presented the sale deed for registration before Sub-Registrar. Mutation of the name of Alimuddin was done after due proclamation of notice, which was personally served upon Hafizuddin. Since the sale deed, he had been in possession and taking fruits of it.

5. Sub-Divisional Officer framed issues and recorded evidence of the parties. The petitioners examined witnesses Hafizuddin, Vishwanath, Bhullan and P.K. Tripathi (Handwriting & Finger Print Expert) and filed documentary evidence. The defendant examined Ram Kumar Kushwaha, Alimuddin, Chandrapal, Motilal, Mohd. Nasim, Advocate and Madan Mohan Kakkar (Handwriting & Finger Print Expert), as witnesses and filed his documentary evidence. Sub-Divisional Officer, after hearing the parties, by his order dated 28.06.1989 held that although Alimuddin, in his statement has stated that when Hafizuddin came to talk about the sale deed then he had asked that he had no belief in him and you come with your sons but he had not obtained signatures of the sons of Hafizuddin on the sale deed nor he took with him his own witness. Alimuddin along with Hafizuddin went for execution of the sale deed from his house but he could not take any witnesses from his village. Although Ram Kumar Kushwaha and Sharda had signed the sale deed as witness but they did not appear before Sub-Registrar although sale deed was presented for registration on the same day. Expenses of sale deed were born by seller as stated by Ram Kumar Kushwaha that Hafizuddin gave him Rs. 300/- one week prior to the sale deed and remaining amount on the date of sale deed. On every day from 18.05.1978, 19.05.1978 and 22.05.1978, stamp of Rs. 50/- were purchased one in the name of Hafizuddin and other in the name of Alimuddin although Alimuddin in his statement has

stated that he did not come to Allahabad court prior to the date of sale deed. Mohd. Nasim Advocate, in his statement has stated that Hafizuddin had signed the sale deed but he is not marginal witness. Although Alimuddin had no confidence upon Hafizuddin but he had given entire sale consideration of Rs. 6000/- without any receipt one week prior to the sale deed. Although Lade, brother's son of Alimuddin was witness of payment of sale consideration, but he was not produced as witness. Mutation proceedings on the basis of sale deed was initiated after four years. Witnesses examined by Alimuddin to prove his possession are inimical to Hafizuddin and interested witnesses. Possession of Hafizuddin was proved. Suit was within from the date of knowledge of the sale deed. As the defendant was not in possession over disputed land as such no right under Section 210 of the Act can be given to him. On these findings, suit was decreed.

6. Alimuddin filed an appeal (registered as Appeal No. 162 of 1989) from the aforesaid decree. Additional Commissioner, by order dated 03.12.1990 dismissed the appeal. Alimuddin filed a second appeal, which was allowed by Board of Revenue U.P. by order dated 11.12.1992 and the matter was remanded to Additional Commissioner, for deciding the appeal afresh. After remand, Additional Commissioner, by order dated 13.09.1995, held that P.K. Tripathi (Handwriting & Finger Print Expert), in his cross examination admitted that photographs were taken from his junior, who was not produced as witness. He further admitted that he had not compared signature of Hafizuddin from any admitted signature. Ink of ridges was blurred as such ridges could not be count. Hafizuddin had admitted that this suit was filed by his sons. Due execution of sale deed from proved from statement of Ram Kumar Kushwaha and Mohd. Naseem Advocate. From statement of Vishwanath and Bhullan possession of the plaintiff was not proved. On these finding he allowed the appeal, set aside decree of the trial court and dismissed the suit. Hafizuddin filed a second appeal (registered as Second Appeal No. 39 of 1994-95). Board of Revenue, U.P., by order dated 28.02.2006, dismissed the second appeal. Hence, this petition has been filed.

7. I have considered the arguments of counsel for the parties and examined the record. Suit was filed on the allegations that sale deed was not signed by Hafizuddin, rather it was executed by an imposer in collusion of the witnesses. In such circumstances, statement of Ram Kumar Kushwaha, marginal witness and Mohd. Nasim, Advocate, who had drafted the sale deed were liable to be examined very cautiously and corroborated with statement of Alimuddin. Alimuddin, in his statement has stated that sale consideration of Rs. 6000/- was paid at the house one week prior to execution of sale deed in presence of the family members of the plaintiff and Lade, his brother's son. He gave Rs. 800/- towards expenses of sale deed to Mohd. Nasim, Advocate. From that amount, his clerk had purchased stamp papers. Hafizuddin brought Shambhu Nath Pandey and Lal Pratap Singh, for witnessing the sale deed, who were his men. He reached at the place of Advocate at 13.30 -14.00 hours, on 23.05.1978. In 1978, there were about 60 to 70 trees in disputed land.

8. First question arises as to whether sale consideration was paid to Hafizuddin. Sale deed contains recital of payment of sale consideration of Rs. 6000/- prior to execution of sale deed. Alimuddin, in his statement has stated that when Hafizuddin came to talk about the sale deed then he had asked that he had no belief in him and to come with his sons. Deal was finalised in presence of sons of Hafizuddin and on next day entire payment of Rs. 6000/- was made. Although Alimuddin had no confidence upon Hafizuddin but he had given entire sale consideration of Rs. 6000/- without any receipt, one week prior to the sale deed, this creates a suspicion. Sale consideration was paid in presence of Lade, who was brother's son of Alimuddin but he was not produced as witness to prove payment of sale consideration. Best evidence in this respect was withheld by the defendant. If entire sale consideration was paid, then there was no reason for waiting one week for execution of sale deed. Considering these circumstances, trial court found that payment of sale consideration was not proved. Appellate court did not consider these circumstances nor assigned any reason to take contrary view. This Court in Jagernath Mishra v. Umar Mishra, 1984 ALJ 1, Second Appeal No. 397 of 1996 Shiv Shankar Singh v. Smt. Mahraji Kunwar (decided on 10.04.2013) held that when best evidence has been withheld then adverse inference is liable to be drawn.

9. So far as proof of due execution of sale deed is concerned, Alimuddin in his statement has stated that he along with Hafizuddin went for execution of the sale deed from his house but they could not take any witnesses from his village. In cross examination, he has stated that Hafizuddin brought Shambhu Nath Pandey and Lal Pratap Singh, for witnessing sale deed, who were his men. Ram Kumar Kushwaha and Sharda were working as advocate's clerk in district court, who had signed the sale deed as witnesses. If two witnesses were there, then there could be no reason for signing by other witnesses. Similarly there is no reason for Ram Kumar Kushwaha and Sharda for not appearing before Sub-Registrar although sale deed was presented for registration on the same day. Persons, against whom, allegations were made for fabrication of sale deed, their statements were relied upon for due execution of sale deed, without considering suspicious circumstances.

10. Ram Kumar Kushwaha, in his statement, has stated that expenses of sale deed were born by seller Hafizuddin, who gave him Rs. 300/- one week prior to sale deed and remaining amount at the time of sale deed, which is not reliable as it is always the purchaser used to bear the expenses of the sale deed. His statement is not corroborated with the statement of Alimuddin, who stated that he had paid entire expenses of sale deed of Rs. 800/- to Mohd. Nasim Advocate, on date of sale deed. On every day, from 18.05.1978, 19.05.1978 and 22.05.1978, stamp of Rs. 50/- were purchased one in the name of Hafizuddin and other in the name of Alimuddin. Alimuddin in his statement has stated that he did not come to Allahabad court prior to the date of sale deed. There is absolutely no explanation for purchasing stamp papers of Rs. 50/- from 18.05.1978, 19.05.1978 and 22.05.1978 on every day. Mutation proceedings on

the basis of sale deed was initiated after four years. These were very strong reasons for raising presumption regarding fabrication of sale deed.

11. Witnesses examined by Alimuddin to prove his possession are inimical to Hafizuddin and interested witnesses. Possession of Hafizuddin was proved from statement of independent witnesses. Suit was within from the date of knowledge of the sale deed. As the defendant was not in possession over disputed land as such no right under Section 210 of the Act can be given to him.

12. Supreme Court in Sarju Pershad Ramdeo Sahu v. Jwaleshwari Pratap Narain Singh, AIR 1951 SC 120, held that it cannot be denied that in estimating the value of oral testimony, the trial Judge, who sees and hears the witnesses, has an advantage which the appellate court does not possess. In Santosh Hazari v. Purushottam Tiwari, AIR 2001 SC 965, held that the rule is - and it is nothing more than a rule of practise - that when there is conflict of oral evidence of the parties on any matter in issue and the decision hinges upon the credibility of witnesses, then unless there is some special feature about the evidence of a particular witness which has escaped the trial Judge's notice or there is a sufficient balance of improbability to displace his opinion as to where the credibility lie, the appellate court should not interfere with the finding of the trial Judge on a question of fact. It has been followed in Pradip Buragohain v. Pranati Phukan, (2010) 11 SCC 108.

13. Original thumb impressions and signatures of Hafizuddin were on record. Its photographs of admitted as well as disputed thumb impressions and signatures of Hafizuddin were taken for its enlargement and expert report. Appellate court has ignored report of P.K. Tripathi (Handwriting & Finger Print Expert), witness of the plaintiff on the ground that he in his cross examination admitted that photographs were taken from his junior who was not produced as witness. He further admitted that he had not compared signature of Hafizuddin from any admitted signature. Ink of ridges was blurred as such ridges could not be count. Appellate court would compared expert report from original signatures and thumb impression, which has not been done for forming opinion.

14. The duty of the appellate court in such cases is to see whether the evidence taken as a whole, can reasonably justify the conclusion which the trial court arrived at or whether there is an element of improbability arising from proved circumstances which, in the opinion of the court, outweighs such finding. Relevant part of Section 45 of Evidence Act, 1872, is quoted below:-

"45. Opinions of experts. - When the Court has to form an opinion upon a point of foreign law, or of science, or art, or as to identity of handwriting or finger impressions, the opinions upon that point of persons specially skilled in such foreign law, science or art, or in questions as to identity of handwriting or finger impressions are relevant facts. Such persons are called experts.

Illustrations

(c) The question is, whether a certain document was written by A. Another document is produced which is proved or admitted to have been written by A.

The opinions of experts on the question whether the two documents were written by the same person or by different persons, are relevant."

15. Supreme Court in *State of Gujrat v. Vinaya Chandra Chhota Lal Pathi*, AIR 1967 SC 778, held that sole evidence of a handwriting expert is not normally sufficient for recording a definite finding that the writing being of certain person or not. In *Lalit Popli v. Canara Bank*, (2003) 3 SCC 583, held that it is to be noted that under Sections 45 and 47 of the Evidence Act, the court has to take a view on the opinion of others, whereas under Section 73 of the said Act, the court by its own comparison of writings can form its opinion. Evidence of the identity of handwriting is dealt with in three sections of the Evidence Act. They are Sections 45, 47 and 73. Both under Sections 45 and 47 the evidence is an opinion. In the former case it is by a scientific comparison and in the latter on the basis of familiarity resulting from frequent observations and experiences. In both the cases, the court is required to satisfy itself by such means as are open to conclude that the opinion may be acted upon. Irrespective of an opinion of the handwriting expert, the court can compare the admitted writing with the disputed writing and come to its own independent conclusion. Such exercise of comparison is permissible under Section 73 of the Evidence Act. Ordinarily, Sections 45 and 73 are complementary to each other. Evidence of the handwriting expert need not be invariably corroborated. It is for the court to decide whether to accept such an uncorroborated evidence or not. In *Ajay Kumar Parmar v. State of Rajasthan*, (2012) 12 SCC 406, held that where there is an opinion whether of an expert, or of any witness, the court may then apply its own observation by comparing the signatures, or handwriting for providing a decisive weight or influence to its decision.

16. In view of aforesaid discussions, the writ petition succeeds and is allowed. The orders of Additional Commissioner dated 13.09.1995 and Board of Revenue U.P. dated 28.02.2006 are set aside. The matter is remanded to Additional Commissioner to decide the appeal afresh, in accordance with law after hearing the parties. Since the matter is lingering from a long time, he shall expedite hearing and shall decide it without granting unnecessary adjournments to either of the parties, preferably within period of four months from the date of producing a certified copy of this order before him.