
(2013) 08 MP CK 0078
In the Madhya Pradesh High Court
Case No : F.A. No. 199 of 2009

Om Narayan Bohre and Others

APPELLANT

Vs

Rajendra Prasad Bohre and Others

RESPONDENT

Date of Decision : 07-08-2013

Acts Referred:

Citation : (2013) ILR (MP) 1953 : (2014) 1 MPHT 401 : (2013) 4 MPLJ 634

Hon'ble Judges : S.K. Gangele, J;M.K. Mudgal, J

Bench : Division Bench

Advocate : Prashant Sharma, for the Appellant;

Final Decision : Allowed

Judgement

M.K. Mudgal, J.—The appellants/plaintiffs have filed the appeal u/s 96 of the CPC being aggrieved by the judgment and decree dated 7.7.2009 passed by the Court of VI Additional District Judge (Fast Track) Bhind (Shri S.C. Rai) the suit for declaration of title to 1/6th share to each of the co-sharers and permanent injunction against the defendants No. 1 and 2 not to deprive them of their share. In this appeal, the appellants are referred as "plaintiffs" and respondents as "defendants". The admitted facts are that Ramsiya Bohre is father of plaintiff No. 1 and 2 was real brother of plaintiffs No. 3 and 4 Brahamanand and Vasudev Sharma and defendants No. 1, 3 and 4 Rajendra Bohre, Vishambhar Dayal Sharma and Surendra Kumar Sharma. They purchased a piece of land bearing Survey No. 767 area 0.16 Hectare 70 ? 20" vide registered sale deed dated 19.3.1979 Ex.P/4 from Mardan Singh. Names of the purchasers were recorded in Khasra entries. The defendant No. 1 has executed a registered sale deed Ex.P/3 dated 24.8.2007 of the disputed property in favour of his wife defendant No. 2 and her name is recorded in the municipal record.

2. Facts, in brief, of the plaint are that after purchasing the disputed plot by Ramsiya, Brahamanand, Vasudev, Rajendra Prasad Bohre, Vishambhar Dayal Sharma and Surendra Kumar Sharma, the disputed house was constructed by all

the purchasers jointly. Every purchaser has 1/6th share in the disputed property. The plaintiffs are jointly living with the defendants in the disputed house. The plaintiffs have further pleaded that the defendant No. 1 is real uncle of the plaintiffs No. 1 and 2 but he has intentionally denied the right to the plaintiffs and has sold the disputed property to his wife vide registered sale deed dated 24.8.2007 without taking any consideration and possession has also not been delivered to her. The said sale deed does not affect the right of the plaintiffs. When this fact came to the knowledge of the plaintiffs on 25.7.2007, they lodged a report to the police, on the basis of which, a criminal case u/s 420, 467, 468 and 120B of Indian Penal Code has been registered against the defendants No. 1 and 2. Hence, the suit was filed for declaration of title, cancellation of sale deed and permanent injunction.

3. Denying the allegations made in the plaint, the defendants No. 1 and 2 have submitted that after purchasing the plot, the partition was made between all the co-sharers in the year 1990 in the presence of their father and the said plot was given to the defendant No. 1 and he became exclusive owner of the disputed plot. Thereafter, he constructed the house out of his own money. The defendants have further alleged that the defendant No. 1 sold the disputed property to the defendant No. 2 after receiving the full consideration and possession has been given to her. The plaintiffs and defendants No. 3 and 4 have no title on the disputed property. Moreover, the mutation has already been carried out in favour of the defendants No. 1 and 2 in the record of Municipality Bhind.

4. The learned trial Court after framing the issues, recording evidence of both the parties and having considered the recorded evidence, dismissed the suit filed by the plaintiffs vide impugned judgment dated 7.7.2009 holding that the disputed plot was given to the defendant No. 1 in the partition among the co-owners and the defendant No. 1 has constructed a house on the said plot.

5. The following questions arise for consideration in this appeal:

(i). Whether, the disputed plot purchased jointly by all the brothers was given in partition to the defendant No. 1?

(ii). Whether, the defendant No. 1 has constructed the house on the purchased plot with his own money?

(iii). Whether, the findings of the trial Court are based on proper reasoning?

6. Assailing the findings recorded by the trial Court Learned counsel for the appellant submits that the approach of the trial Court in assessing the evidence is not up to mark as the alleged mutual partition document Ex.D/8 was neither pleaded by the defendants No. 1 and 2 in the written statement nor a copy of the document was produced on record along with the written statement. In spite of this fact the Court has relied on the said document. Learned counsel further submits that for proving the Ex.D/8 except the statement of the defendant No. 1 Rajendra Prasad, no other witness has been produced on behalf of the defendant

in this regard. Moreover, the said document is prepared on plain paper which is not only ante dated but also a fake and forged document. Name of the scribe is not mentioned in the document and the statement of the scribe has not got been recorded by the defendant No. 1. The document was notarized by the advocate but statement of the notary was not got recorded. Learned counsel further submits that the said document was prepared after the closure of the plaintiff evidence as well as the evidence of the defendant No. 1 was over and deliberately the names of the deceased persons have been mentioned as witnesses on the document. Learned trial Court has not considered the evidence meticulously. The findings given by the learned trial Court are not only perverse but also arbitrary and are against the recorded evidence. Nevertheless, no statement of the persons by whom the house was constructed as per the statement of Rajendra Prasad (DW/1) have not been got recorded by the defendant. Hence, the impugned judgment of the learned trial Court deserves to be set aside and the suit be decreed in favour of the plaintiff.

7. Before appreciating the evidence of both the parties, an application (I.A. No. 16655/10) dated 28.9.10 under Order 26 Rule 10A of the CPC filed by the appellants/plaintiffs whereby the appellants/plaintiffs have requested that they may be permitted to examine the signatures of Ramsiya father of plaintiffs No. 1 and 2, plaintiffs No. 3 and 4 and defendants No. 3 and 4 on the alleged mutual partition deed Ex-D/8 with their standard signatures by the handwriting expert is to be considered. It is true that no reply of this application has been filed by the defendants No. 1 and 2. However, why the said application was not tiled before the trial Court and no proper explanation in this regard has been given by the plaintiffs. Besides, the document Ex-D/8 was in the knowledge of the plaintiffs during pendency of the suit. The said prayer could have been made very well before the trial Court It is true that an additional evidence can be produced in appeal under Order 41 Rule 27 of the Code of Civil Procedure, nonetheless, the said prayer is not accepted in a routine manner. A party that desires to produce additional evidence before the appellate Court has to satisfy that it could not get the evidence with due diligence during pendency of the suit before the trial Court. In the instant case, the appellants have not made out any case for which, the application may be allowed. Thus, I.A. No. 16655 of 2010 is hereby rejected.

8. Indisputably, the disputed plot was purchased by six brothers Ramsiya, Bramhanand, Vasudev, Rajendra, Vishamvar Dayal and Surendra Kumar jointly vide registered sale deed dated 19.3.1979 Ex-P/4, on the basis of which, each purchaser has title to 1/6th share in the purchased property. The defendant No. 1 has also admitted this fact in para 9 of his statement, however he has claimed his exclusive ownership in the disputed property on the basis of oral partition as well as mutual relinquishment deed dated 25.11.90 Ex-D.8. In such a situation, burden of proof is shifted on the defendant No. 1 to prove the alleged partition as he has stated in the written statement.

9. As held in Thiruvengada Pillai Vs. Navaneethammal and Another, , the Hon''ble

Apex Court held that when the execution of an unregistered document put forth by the plaintiff was denied by the defendants, the ruling that it was for the defendants to establish that the document was forged or concocted is not a sound proposition. The first appellate Court proceeded on the basis that it is for the party who asserts something to prove that thing; and as the defendants alleged that the agreement was forged, it was for them to prove it. But the first appellate Court lost sight of the fact that the party who propounds the document will have to prove it. It was the plaintiff who had come to Court alleging that the first defendant had executed an agreement of sale in his favour. The defendant having denied it, the burden was on the plaintiff to prove that the defendant had executed the agreement and not on the defendant to prove the negative.

10. The learned trial Court having discussed the evidence in para 7 to 9 of the impugned judgment has found the alleged mutual partition deed proved in favour of the defendant No. 1. This Court has to consider whether the findings of the trial Court are based on proper appreciation of the recorded evidence. On perusal of written statement dated 15.12.07 filed by the defendant No. 1 and 2, it becomes clear that the defendants have pleaded in special plea of para 1 and 2 that the said plot was exclusively given by his father to the defendant No. 1 by oral partition in the year 1990. At that time, no pleading was made regarding the mutual partition deed dated 25.11.90 Ex-D/8 nor the copy of the said document was produced on record. Not only this, the document Ex-D/8 was never tendered to the plaintiffs' witnesses during their cross-examination. This document was brought on record on 25.04.09 after closure of the plaintiffs' evidence on 10.8.08. It is pertinent to mention here that the defendant No. 1 Rajendra Sharma's statement under Order 18 Rule 4 of the C.P.C. was filed on 17.6.08, but on that date, the Ex-D/8 was not produced on record. The cross-examination of the said witness was completed on 24.7.08. Prior to it, the existence of said document was not revealed by the defendant No. 1 who submitted it on record belatedly on 25.4.09. No proper reason has been given in this regard as to why it was not pleaded earlier and the copy of the document was not filed along with the written statement. Moreover, it was deliberately concealed during the plaintiffs' evidence when their statements were recorded. Further, it was not even brought on record at the time of defendant No. 1's own statement when it was recorded. When the unregistered document Ex.D/8 put forth by the defendants No. 1 and 2 was disputed by the plaintiffs, it was obligatory on the part of the defendants No. 1 and 2 to prove the execution of Ex.D/8 beyond suspicion, but they did not do so.

11. On perusal of the Ex-D/8 dated 25.11.90, it becomes clear that it has been prepared on plain paper and has not been got registered and even it is not written on stamp paper. If a document is registered, it shall be presumed that the document is executed on a particular date and time which is mentioned on the document whereas a document can easily be prepared on plain paper antedated.

12. In para 1 and 10 of the defendant Rajendra Prasad's statement, it has come on record that his father made a family partition on 25.11.1990 and thereby the said plot was given to him. The defendant Rajendra Prasad (DW-1) has not specifically deposed that the said partition was made with the consent of other co-sharers. In para 1 and 2 of the special pleas, it has been pleaded that the partition was made orally by his father in year 1990. No specific date of partition has been mentioned in the written statement without any further mention of the Ex.D/8. No witness except the statement of defendant No. 1 has been produced to prove the oral partition. The father of the plaintiffs No. 3 and 4 and the defendants No. 1, 3 and 4 was not the owner of the plot which was jointly purchased vide Ex. P/4 by Six brothers. They had only right to make the partition of the disputed property but the defendant No. 1 has neither pleaded nor proved the partition in the said manner. The learned trial court has given the findings in para 8 in the impugned judgment that the document Ex.D/8 is not a partition deed but only an acknowledgment of the earlier partition and thus, the document was not required to be registered. If this had been the fact, the defendant No. 1 ought to have proved the earlier partition made among the co-sharers and that was acknowledged by the Ex.D/8. But in the instant case the defendant No. 1 had utterly failed to have proved the oral partition.

13. As regards the propriety of the Ex.D/8, it was neither pleaded in the written statement nor produced on record earlier. During the cross-examination in para 11 of the statement in this respect, the defendant No. 1 has deposed that he got it recorded in the written statement. But why it has not come on record, he can not say anything about it. It appears that there was no such mutual partition in existence and that is why, it was not pleaded and produced. If the Ex.D/8 had been in existence earlier, it would have been mentioned outrightly in the pleadings as well as in the statement of the defendant No. 1.

14. As per statement of Rajendra Prasad (DW/1) mutual partition of the disputed plot was made by his father but his signature is not thereon. In these circumstances, it is inferred that the said story is entirely false and fabricated. In para 18 of the defendant No. 1's statement, it has come on record that the Ex.D/8 was scribed by his cousin Satyanarayan Sharma, Advocate who is still alive. But his statement was not got recorded by the defendant No. 1. No explanation has been further given as to why he was not produced for proving the Ex.D/8. Moreover, the name of the Satyanarayan Sharma has not been mentioned in the Ex.D/8 as the scribe of the document Satyanarayan Sharma has put his signature on the back side of the Ex.D/8 for the purpose of identifying the defendant No. 1 before the Notary who was also not examined by the defendant No. 1.

15. In para 17 of the defendant No. 1's statement, it has come on record that both the witnesses Moogaram and Jagdish are no more. Even the signatures of the said witnesses were not got identified by any of their family members. From the manner in which, the document Ex.D/8 was produced after recording the

statement of the defendant No. 1 himself, it appears that the Ex.D/8 has been prepared falsely and fabricatedly and that is why the names of the deceased Moongaram and Jagdish have been shown as witnesses so as to avoid the possibility of producing them before the Court.

16. All the four plaintiffs' witnesses have unequivocally deposed in their statements that after purchasing the plot, all six brothers jointly constructed the house, in which, four rooms, Varandah, Tin-shed, Kitchen, stairs, latrine and bathroom were built by them. Though, no statement regarding expenditure of money spent in construction of the said house has been produced on record by the plaintiffs, but on this ground, their testimony can not be discarded, since the defendant No. 1 and 2 have also not produced any statement of expenditure.

17. In para 10 of the defendant Rajendra Kumar (DW1)'s statement, it has come on record that he had constructed the house in the year 1990 but in para 15, the witness has admitted that his appointment was made in the year 1991. From this statement, it is inferred that the defendant was unemployed in the year 1990 and he had no source of income to build the house. Though the defendant has tried to say that he earned money by labouring but this explanation appears to be false and concocted as he was just 27 years old in the year 1990 and no document has been produced showing that he actually had money in his possession for spending on construction of the house. Besides, no plan for construction in the house was got sanctioned by the defendants from Municipality Bhind and proved on records.

18. The defendant No. 1 deposing in para 10 has stated that he got the house constructed from Maison Vidyaram and labour Ramsanehi but their statements were not got recorded by the defendants. The witness Kamla Devi (DW3) has deposed in para 2 that she resides in Ward No. 1, Ater Road near Ranital, but she does not know in which ward the disputed house is situated as well as she does not know how many brothers Rajendra Prasad has and the name of Rajendra Prasad's father. The witness has stated in para 3 that she has no knowledge of whether the disputed plot was jointly constructed by Brahamanand and his brothers. The witness herself has admitted in the same para that she being illiterate only put her signature on the affidavit which was prepared by the counsel. In these circumstances, it appears that the contents of the statement have not been actually deposed by this witness and she does not have adequate knowledge about the disputed house. Similarly another witness Chhoti Bai (DW4) has deposed in para 2 and 3 in her statement. She has also admitted that the statement on affidavit was not got prepared by her. It might have been prepared by Rajendra Prasad and she cannot say clearly that the disputed house was jointly built by Rajendra Prasad and his brothers and so this leads to inference that the statement of both the witnesses did not have probative value to corroborate defendant's statement about the construction of the disputed house by the defendant Rajendra Prasad alone.

19. The defendant has produced the statement of another witness Vishnu Dayal

Sharma under Order 18 Rule 4 of the C.P.C., but the said witness was not produced in person for cross-examination. Therefore his statement cannot be relied upon.

20. The learned trial Court in para 9 of the impugned judgment has given the findings regarding the exclusive possession and construction made by the defendant Rajendra Prasad placing reliance on the voter's list Ex-D/3, Ration card Ex-D.4, another Ration card (year 2006) Ex-D/5, house tax receipt Ex-D/6 and receipt issued by Municipality Bhind Ex-D.7 but these documents do not confer the exclusive title upon the defendant No. 1. Apart from this, if it is presumed that the defendant No. 1 is in possession of the disputed house, it does not create any title of the defendant No. 1 as possession of one co-owner is deemed to be possession of all co-owners unless ouster is clearly pleaded and proved as held by the Hon''ble Apex Court in Darshan Singh and Others Vs. Gujjar Singh (Dead) by Lrs. and Others, that the correct legal position is that possession of a property belonging to several co-sharers by one co-sharer shall be deemed that he possesses the property on behalf of the other co-sharers unless there has been a clear ouster by denying the title of other co-sharers and mutation in the revenue records in the name of one co-sharer would not amount to ouster unless there is a clear declaration that title of the other co-sharers was denied. The said view is based on AIR 1929 337 (Oudh) .

21. It is clear from the above discussion and in view of the facts stated that the defendant No. 1 Rajendra Prasad was not the only owner of the disputed house. Therefore, he had no right to sell the disputed house vide Ex-P/3 to his wife defendant No. 2. The said sale deed Ex-P/3 is not only a bogus document but has also been deliberately executed in favour of his wife defendant No. 2 to defeat the right of co-owners-the plaintiffs and the defendants No. 3 and 4.

22. Having taken into account all the facts and recorded evidence, this Court comes to the conclusion that the findings of the learned trial Court are not only baseless but also perverse to the recorded evidence. Hence, the impugned judgment being devoid of merit and credence deserves to be set-aside. The plaintiffs/appellants are entitled to get declaration as prayed in the suit.

23. Therefore, allowing the appeal, setting-aside the impugned judgment and decreeing the suit, the title to 1/6th share, to the plaintiffs No. 1 and 2, 1/6th share to plaintiff No. 3 and 1/6th share to plaintiff No. 4 is declared in the disputed house constructed on Survey No. 767 area 0.16 Hectare 70 ? 20". The plaintiffs would get disputed house partitioned for taking possession. The defendants No. 1 and 2 are restrained from alienating or creating interest of the third party in the disputed property till partition is over. The preliminary decree is passed accordingly. The cost of this appeal and the suit would be borne by the defendants No. 1 and 2.

The decree be drawn up accordingly.