
(2019) 08 MP CK 0119
In the Madhya Pradesh High Court
Case No : First Appeal No. 34 Of 2003

Sarita Sharma

APPELLANT

Vs

State Of Madhya Pradesh And Others

RESPONDENT

Date of Decision : 26-08-2019

Acts Referred:

Evidence Act, 1872 — Section 65, 65(a), 65(b), 65(c), 67, 68, 114, 114(g), 120
Code Of Civil Procedure, 1908 — Section 96, Order 18 Rule 4, Order 41 Rule 27
Code Of Criminal Procedure, 1973 — Section 80

Citation : (2019) 08 MP CK 0119

Hon'ble Judges : Anand Pathak, J

Bench : Single Bench

Advocate : K.N. Gupta, R.S. Dhakad, Rajkumar Mishra, Abhishek Singh
Bhadouriya

Final Decision : Dismissed

Judgement

With consent, heard finally.

1. The instant first appeal under Section 96 of Code of Civil Procedure has been preferred at the instance of appellant (hereinafter referred as "plaintiff") being crestfallen by the judgment and decree dated 25.11.2002 passed by VI Additional District Judge, (Fast Track Court), Gwalior, whereby suit preferred by the appellant/plaintiff has been dismissed.

2. Precisely stated facts of the case are that appellant/plaintiff filed a suit against the respondents (hereinafter referred as "defendants") for declaration of title, possession and permanent injunction in respect of suit property situate at Municipal Corporation bearing Nos.32/752, 32/752/1 and 35/752/2. As per the pleadings, plaintiff purchased the first plot vide registered sale deed dated 03.10.1981 from Smt. Anuradha Pathak and Smt. Minakshi Sharma, second plot vide registered sale deed dated 12.04.1982 from Smt. Minakshi Sharma and third plot vide registered sale deed dated 12.11.1987 from Brij Kishore. At the time of purchase, they were the owners of the disputed suit property and their names

were mentioned in Municipal Corporation, Gwalior as owners. It is further submitted that foundation had been laid over the property in question and one room had been constructed.

3. It is further pleaded that on 24.04.1989, employees of defendant No.1 (State of M.P. through Collector) with the help of defendants No.2 and 3 (Commissioner Municipal Corporation and Administrator Municipal Corporation, Gwalior) had tried to remove the construction and interfere in the peaceful possession. Some goods lying over the plot were also taken forcibly.

4. Through the amendment in the plaint, it was added by the plaintiff that defendants No.2 and 3 (Commissioner & Administrator, Municipal Corporation, Gwalior) gave permission for construction vide permission letters dated 08.08.1989, 12.10.1990 and 20.01.1995, which demonstrate that property is under the domain of Municipal Corporation. Nazul Department had no relation whatsoever with the property. Therefore, Nazul Department does not have any right to interfere in the suit property. With these pleadings, suit for declaration, title, possession and permanent injunction was preferred.

5. Defendant No.1 filed the written statement and denied the claims of the plaintiff. It was the submission of the State Government that disputed property is not of ownership and possession of plaintiff, but is of State Government and plaintiff, in fact, has encroached upon the land which has been removed before 2.05.1989 and no possession of plaintiff exists over the suit property. It is further submitted that if plaintiff has taken permission for construction from Municipal Corporation, Gwalior in respect of the suit property, then it does not give any benefit to the plaintiff regarding her title. Since the plaintiff has indirectly accepted her encroachment, therefore, encroacher cannot be given any relief in the way she sought. The objection in respect of non-compliance of Section 80 of Cr.P.C. was also raised.

6. Defendants No.2 and 3 (Commissioner & Administrator, Municipal Corporation, Gwalior) also denied the allegations and raised the objection regarding non receipt of any notice prior to filing of suit.

7. Trial Court framed as many as 11 issues for adjudication on which the evidence had to be led by the parties. Issues No.6 and 7 were regarding title of the plaintiff and plaintiff had to prove the said issues before establishing her claim over the suit property.

8. After evidence of the parties being led and arguments being advanced, trial Court came to the conclusion that plaintiff could not prove her case as well her title over the suit property and therefore, dismissed the suit with cost. Against the dismissal of suit, plaintiff as appellant preferred the instant civil regular appeal before this Court.

9. Learned Senior Counsel appearing on behalf of the appellant/plaintiff submits that plaintiff has taken all permissions from the Municipal Corporation, Gwalior

and sale deeds were executed in her favour, therefore, transaction was valid and trial Court erred in coming to the conclusion that plaintiff could not prove her title and possession over the disputed property. It was the submission of learned Senior Counsel that defendant did not disclose that survey No.233 (subject matter of the suit property) is of State Government or Municipal Corporation, therefore, in absence of such evidence, it is not established that said survey number was a government land. Through two applications vide I.A. Nos.5320/2003 and 4331/2017, both the applications have been filed under Order 41 Rule 27 of CPC, plaintiff placed the Khasra entries of Samvat 2010-2014 (1953-1957) and submits that in Khasra entries, survey no.233 is reflected under the predecessor in title of plaintiff Radhiya Bai. Therefore, Khasra entries indicate that documents are proper. Learned Senior Counsel for the plaintiff also referred the sale deed dated 08.06.1954 executed by Radhiya Bai in favour of Pandit Vasudev Nandan Bhardwaj to submit that title of predecessor in title was clear and categorical. It is further submitted that contents of applications were not replied by the State.

10. It is further submitted that survey No.233 was not government land, which is clear from the perusal of judgment dated 28. 11.2003 placed by the appellant with I.A. No.4331/2017 and said judgment was in respect of the same parties decided by X Additional District Judge, (Fast Track Court), Gwalior in Civil Suit No.2-A/2003 in which it has been mentioned that survey No.233 is a private land inter se between the parties and it is not a government land, therefore, on the basis of judgment of that Court, learned Senior Counsel for the appellant submits that disputed land was private land and not the land belonging to the State Government. While resorting to the Section 120 of Indian Evidence Act, it is submitted that plaintiff need not to examine herself and since she filed suit through power of attorney, therefore, her power of attorney i.e. her husband got himself examined and therefore, husband and wife are competent witnesses. He relied upon the judgement rendered by Hon'ble Apex Court in the case of Haryana Waqf Board Vs. Shanti Sarup and other reported in 2008 (8) SCC 671 and in the case of Prembai and others Vs. Ghanshyam and others reported in 2010 (3) MPLJ 345 and to submit that trial Court ought to have appointed the Commissioner for spot inspection and while not appointing the Commissioner, trial Court erred in passing the impugned judgment.

11. Learned counsel for the defendant/State Government opposed the prayer and submits that plaintiff did not appear in witness box she gave power of attorney to her husband, therefore, she did not prove her case. In absence of any demarcation by the department or inspection by Commissioner actual land could not have been ascertained and plaintiff is trying to get the benefit of poor maintenance of land revenue record and trying to assert over the land on the basis of incomplete documents. Therefore, he prayed for dismissal of this first appeal.

12. Learned counsel for the State matched vehemence of appellant and submits

that plaintiff on the basis of incomplete set of documents trying to assert the case just to grab the land. Learned Government Advocate further submitted that Ramkrishan Sharma (PW-1) said that he has certified copy of sale deed, but did not produce the same and this omission is material and therefore, rightly taken care of by the trial Court. He relied upon the judgments rendered by the Hon'ble Apex Court in the case of Janki Vashdeo Bhojwani and another Vs. Indusind Bank Ltd. and others reported in (2005) 2 SC 217 and in the case of Man Kaur (Dead) by LRs. Vs. Hartar Singh Sangha reported in (2010) 10 SCC 512 and submits that evidence of power of attorney holder cannot be taken as gospel truth.

13. Counsel for Municipal Corporation also matched the vehemence of plaintiff and submits that sale deeds are not matching with the land in question. No sale deed has been referred particulars of land in respect of survey No.233 which is subject matter of suit property and that's why paragraph 24 of judgment of the trial Court referred this fact that Bandobast of survey No.234 has been tried to be projected by the plaintiff as of survey No.233 and act of this misrepresentation is observed by the trial Court and rejected in categorical terms. It is submitted by the learned counsel for the Municipal Corporation that all predecessors in title are of same family and therefore, transactions are doubtful and it appears that family members executed the sale deeds in such a fashion wherein they have tried to grab the land without having perfect title over it. The fact that predecessors in title have received the land from erstwhile owners was not proved and on the basis of misrepresentation of facts, plaintiff is trying to get the benefit.

14. It is submitted that plaintiff did not appear in witness box and therefore, adversity has been caused in the case. He relied upon the judgment rendered by Hon'ble Apex Court in the case Vidhyadhar Vs. Manikrao and another reported in (1999) 3 SCC 573 .

15. So far both the applications under Order 41 Rule 27 of CPC are concerned, it is submitted that photocopies of the documents have been placed with the applications and documents have not been filed in original. Therefore, these documents are not admissible in evidence. Even otherwise, these documents do not show the exact ownership of the plaintiff vis-a-vis predecessors in title. Learned counsel also raised the point that sale deed dated 26. 09.1981 (Ex.P/26), sale deed dated 12.04.1982 (Ex.P/4), sale deed dated 16.12.1984 (Ex.P/27), sale deed dated 09.07.1986 (Ex.P/28) and sale deed dated 12.10.1987 (Ex.P/5), all carry different outer boundaries (prqZlhek). For reference, he referred the sale deed dated 16.12.1984 (Ex.P/27) by which Smt. Anuradha Pathak has sold the suit land to the owner Subhash Apte and Subhash Apte sold the property to Brij Kishore Sharma vide sale deed dated 09.07.1986 (Ex.P/28) and Brij Kishore Sharma sold the property vide sale dated 12.10.1987 (Ex.P/5) to plaintiff. The chain of transactions is in respect of same property ad-measuring 600 sq.ft. but outer boundaries are different from Ex.P/27 to Ex.P/5.

16. This anomaly itself creates doubt and the intention of the plaintiff to grab the

land some how on the pretext of the other. Therefore, learned counsel for the Municipal Corporation prayed for dismissal of this appeal.

17. Heard learned counsel for the parties at length and perused the record.

18. This is the case where plaintiff had filed the suit for declaration and permanent injunction in respect of the suit property as referred in paragraph No.1 of the plaint on the basis of permission taken from the Municipal Corporation for construction of the house. The very pleadings as reflected in the applications under Order 41 Rule 27 of CPC (I.A. Nos5320/2003 & 4331/2017) that the suit property is a part of survey No.233 of Village Lalitpur and Pandit Vasudev Nandan Bhardwaj was recorded as Bhumiswami of the land. Therefore, Vasudev Nandan Bhardwaj has purchased the land from one Radhiya Bai who was Pakka tenant over the land in question and this fact has been tried to be demonstrated by the plaintiff through Khasra entries of year 1953 to 1957. Therefore, source of title is to be ascertained whether the line of titles was clear and perfect.

19. As per the submission of the plaintiff through the applications under Order 41 Rule 27 of CPC filed by the plaintiff before this Court it is apparent that Radhiya Bai was Pakka tenant in survey No.219/1 of Village Lalitpur and Vasudev Nandan Bhardwaj in Khasra No.11, 12 and 13 has been referred as subsequent land holder in survey No.219/1. Khasra entry No.233 as referred by the plaintiff does not appear to be the entries written in Hindi numerical, it is in fact written in English numerals, whereas all other entries (in numbers) are written in Hindi numerals. Therefore, entries appear to be either interpolated or inserted at any subsequent stage. This suspicion gets accentuated because of the fact that photocopy of the Khasra entries are being filed alongwith with application and not the original copy or at least certified copy. Therefore, these documents are not material documents and cannot be taken into consideration for remanding the matter back to the trial Court.

20. So far as other documents i.e. sale deed dated 08.06.1954 is concerned that it is also a photocopy filed by the plaintiff. Even otherwise it refers the sale transaction of two parts of survey No.233/1/2. Which part has been sold to Pandit Vasudev Nandan Bhardwaj is not clear. Therefore, survey No.233 might be a big parcel of land and part of it might have been sold by the Pakka tenant to the predecessor in title Vasudev Nandan Bhardwaj. Therefore, trial Court rightly concluded that it is not survey No.233, but plaintiff is trying to cover up the case under the garb of survey No.234 and trying to assert over that land as Survey No.233. Hence, instant documents also is of no help to the plaintiff.

21. Even otherwise, it is settled principle of law that such documents by ways of additional evidence, cannot be permitted to fill up the lacuna. The provisions of Order 41 Rule 27 of the CPC has not been engrafted in the Code, so as to patch up the weak point in the case and to fill up the omission in the Court of appeal. It does not authorize any lacuna or gaps in evidence to be filled up at the stage of

appeal. (See; N. Kamalam (Dead) and another Vs. Ayyasamy and another reported in (2001) 7 SCC 503). No additional evidence ought to be permitted to be taken on record, which was well within the knowledge of plaintiff during trial and it could have been adduced during trial. When PW-1 during examination categorically admitted that he had the certified copy of the sale deed on which plaintiff placing her reliance in application under Order 41 Rule 27 of CPC, then it cannot be inferred that the additional evidence sought to be taken on record was based on due diligence. Hon'ble Apex Court in the case of State of Gujarat and another Vs. Mahendra Kumar Parshottambhai reported in (2006) 9 SCC 772, dwelled upon this issue and considered the aspect of due diligence. It is the duty of the litigating party to show due diligence.

22. Interestingly, in the present case sale deed which the appellant is placing reliance did not match with the sale deed of plaintiff/vendor because in the sale deed of plaintiff/vendor, no survey number has been mentioned, therefore, they cannot claim any reliance over the sale deed sought to be adduced. This Court has taken into consideration this aspect in the succeeding paragraphs also.

23. It is also settled principle of law that in the application under Order 41 Rule 27 they could have produced the certified copy of sale deed or original, but did not choose to file the same and produced only the photocopies contrary to the fact that only certified copies of sale deed can be filed as secondary evidence and not the photocopies, if permitted to adduce the secondary evidence. In the present case when the appellant neither produced the primary evidence by way of original documents nor sought permission to adduce the secondary evidence by virtue of moving application under Section 65 of Evidence Act and has not filed the certified copy, then on the basis of photocopies, this aspect cannot be looked into it. Similarly judgment dated 28.11.2003 by X Additional District Judge, Gwalior does not further the cause of appellant because those findings cannot be borrowed here to establish the claim of appellant over suit property.

24. Cumulatively, applications filed by the appellant did not bear any merit and to be accepted and therefore, both these applications are hereby rejected.

25. Sale deed being private document is required to be proved in accordance with the provisions of Evidence Act and unless it is so proved the same cannot be acted upon. In the present case nobody related to the sale deed was examined and therefore, sale deed on the basis of which plaintiffs claim title are not proved. Although counsel for the plaintiffs/appellant has raised the submission with the aid of Section 120 of Evidence Act and tried to contend that husband of the plaintiffs is the competent witness, but here it does not suit the preposition in light of the fact that boundaries of his predecessors like Ex-P/27 and Ex-P/28. Hon'ble Apex Court in the case of Vidhyadhar Vs. Manikrao and another reported in (1999) 3 SCC 573 has held as under:-

"16. Where a party to the suit does not appear in the witness-box and states his own case on oath and does not offer himself to be cross-examined by the other

side, a presumption would arise that the case set up by him is not correct."

26. In the series of judgments right from Privy Council *Sardar Gurbakhsh Singh Vs. Gurdial Singh* and another reported in AIR 1927 Privy Council 230 and followed by Lahore High Court in *Kirpa Singh Vs. Ajaipal Singh* and others reported in AIR (1930) Lahore 1 and Bombay High Court in *Martand Pandharinath Chaudhari Vs. Radhabai Krishnarao Deshmukh* reported in AIR (1931) Bombay 97 and Madhya Pradesh High Court in the case of *Gulla Kharagjit Carpenter Vs. Narsingh Nandkishore Rawat* reported in AIR 1970 MP 225, the constant judicial opinion is that if a party abstains from entering the witness box, it would give rise to an inference adverse against him and presumption under Section 114 of the Evidence Act would go against the party who did not enter into the witness box.

27. In the present case, when the material documents were having different outer boundaries and omission of survey number/exact location is writ large, then it was the duty of the plaintiffs to enter into witness box. The Division Bench of this Court in the case of *Smt. Rekha Rana and others Vs. Smt. Ratnashree Jain* reported in AIR 2006 MP 107, Division Bench was constituted to answer a reference specifically with respect to sale deeds and it was held as under:-

"The second step is to prove the execution of the deed (whether what is produced in the original or certified copy or other secondary evidence thereof given under Clause (a), (b) or (c) of Section 65) as required by Section 67 of the Act, where the document is not one which is required by law to be attested or as required by Section 68 of the Act where the document is one which by law is required to be attested. This is because registration is not proof of execution. A private document cannot be used in evidence unless its execution is admitted by the party against whom it is intended to be used, or it is established by proof that it is duly executed. Due execution is proved by establishing that the signature (or mark) in token of execution was affixed to the document by the person who is stated to have executed the document. This is normally done either (i) by examining the executant of the document; or (ii) by examining a person in whose presence the signature/mark was affixed to the document; or (iii) by referring the document to a handwriting expert and examining such expert; or (iv) by examining a person acquainted with handwriting/signature of the person who is supposed to have written/signed the document; or (v) by requesting the Court to compare the signature of the executant in the document with some admitted signature of the person shown as executant; or (vi) by proving admission by the person who is said to have signed the document, that he signed it."

28. So far as the submission recorded under Section 120 of the Evidence Act is concerned, the same would have stood to the legal scrutiny provided husband of the plaintiffs in his affidavit under Order 18 Rule 4 of CPC would have stated that he is giving the statement in capacity of her husband and therefore, he is the competent witness to give evidence not as plaintiff's witness but as plaintiff

himself. No such fact has been mentioned in the affidavit under Order 18 Rule 4 of CPC i.e. Chief Examination. Therefore, it appears that plaintiffs did not choose to proceed with the aid of Section 120 of the Evidence Act and plaintiff chosen to execute a power of attorney in favour of her husband and therefore, proceeded under Order III of CPC and plaintiff authorized him to make statement in Court by virtue of the said document. If the husband was acting under Section 120 of the Act then for that purpose power of attorney was not required to be executed. Hon'ble Apex Court in the case of Man Kaur (Dead) by LRs Vs. Hartar Singh Sangha reported in 2010 (10) SCC 512 has delineated the principle and the proposition which are reproduced for ready reference:-

"18. We may now summaries for convenience, the legal position as to who should give evidence in regard to matters involving personal knowledge:

(a) An attorney holder who has signed the plaint and instituted the suit, but has no personal knowledge of the transaction can only give formal evidence about the validity of the power of attorney and the filing of the suit.

(b) If the attorney holder has done any act or handled any transactions, in pursuance of the power of attorney granted by the principal, he may be examined as a witness to prove those acts or transactions. If the attorney holder alone has personal knowledge of such acts and transactions and not the principal, the attorney holder shall be examined, if those acts and transactions have to be proved.

(c) The attorney holder cannot depose or give evidence in place of his principal for the acts done by the principal or transactions or dealings of the principal, of which principal alone has personal knowledge.

(d) Where the principal at no point of time had personally handled or dealt with or participated in the transaction and has no personal knowledge of the transaction, and where the entire transaction has been handled by an attorney - holder, necessarily the attorney-holder alone can give evidence in regard to the transaction.

This frequently happens in case of principals carrying on business through authorised managers/attorney-holders or persons residing abroad managing their affairs through their attorney-holders.

(e) Where the entire transaction has been conducted through a particular attorney holder, the principal has to examine that attorney holder to prove the transaction, and not a different or subsequent attorney holder.

(f) Where different attorney holders had dealt with the matter at different stages of the transaction, if evidence has to be led as to what transpired at those different stages, all the attorney holders will have to be examined.

(g) Where the law requires or contemplated the plaintiff or other party to a proceeding, to establish or prove something with reference to his 'state of mind'

or 'conduct', normally the person concerned alone has to give evidence and not an attorney holder. A landlord who seeks eviction of his tenant, on the ground of his 'bona fide' need and a purchaser seeking specific performance who has to show his 'readiness and willingness' fall under this category. There is however a recognized exception to this requirement. Where all the affairs of a party are completely managed, transacted and looked after by an attorney (who may happen to be a close family member), it may be possible to accept the evidence of such attorney even with reference to bona fides or 'readiness and willingness'. Examples of such attorney holders are a husband/wife exclusively managing the affairs of his/her spouse, a son/daughter exclusively managing the affairs of an old and infirm parent, a father/mother exclusively managing the affairs of a son/daughter living abroad."

29. Therefore, in the considered opinion of this Court the plaintiff could not prove her case through her power of attorney holder and adverse inference can be drawn looking to the facts and circumstances of the case, against the plaintiff because she did not appear in the witness box. Trial Court rightly dismissed the suit.

30. So far as the identity of suit property and issue regarding its identity is concerned, it does not support the cause of plaintiff because plaintiff did not dispute the fact that survey No.234 belongs to the State Government and with respect to the said survey number, finding has been recorded by the trial court in paragraph 24 of its judgment, the same is recorded in revenue record as Pit (xM~<k). The said finding stood correct and even otherwise if this finding is looked in the light of original sale deed dated 26.09.1981 (Ex.P/26) executed by the Vasudev Nandan Bhardwaj in favour of Smt. Anuradha Pathak and Smt. Minakshi Sharma, it is apparent that on page 2 of the sale deed (in line 2) it is mentioned that the plot is located in Pit (xM~<k), therefore, it is clear that sale deed is not in respect of survey No. 233 but tried to be executed in respect of survey No.234. Therefore, on this count also the case of the plaintiff fails.

31. Plaintiff must stand on her own legs in which she failed because she had to demonstrate before the trial Court that she was the legitimate owner and title holder of the suit property. Her predecessors in title are different and outer boundaries as demonstrated by the counsel for the Municipal Corporation are different. Sale deed dated 16.12.1984 (Ex.P/27) has different outer boundaries, when through Subhash Apte and Brij Kishore Sharma, it went to plaintiff vide sale deed dated 12.10.1987 (Ex.P/5), then outer boundaries became different. This is an instance which demonstrates that plaintiff did not appear before the Court with clean hands or at least with clean record. The variation in the sale deed sufficiently demonstrates that plaintiff was not the owner of the suit property and on the basis of some sale deeds executed between family members trying to grab the government land.

32. Defendants have categorically submitted that land on which plaintiff laid her claim was government land and it was the part of survey No.234. In this regard

documents were filed by the defendant witness namely Rajesh Kumar Shrivastava Patwari (DW-1) and documents Ex.D/1 & Ex.D/2 were placed in this regard. Since the plaintiff nowhere submitted any document to establish the title of predecessors in title Vasudev Nandan Bhardwaj in support of her claim, therefore, trial Court rightly passed the impugned judgment and rejected the claim of the appellant/plaintiff and dismissed the suit.

33. Learned counsel for the plaintiff nowhere refuted the claim of the defendants that family members have tried to execute the sale deed inter se between them and therefore, transactions are doubtful.

34. The trial Court framed the issues No.6 and 7 in this regard and elaborately discussed the said aspects.

35. In the cumulative analysis and on the basis of discussions made above, applications preferred under Order 41 rule 27 of the CPC by the appellant san merit and therefore, rejected. Similarly, the finding given by the trial Court whereby suit of the plaintiff has been dismissed are hereby affirmed. Trial Court did not err in passing the impugned judgment.

36. Resultantly, appeal fails and is hereby dismissed.