

(2013) 03 RAJ CK 0054

In the Rajasthan High Court

Case No : SB Civil Regular First Appeal No. 86/90

Shri Nrusinh Sanskrit Pathshala

APPELLANT

Vs

State of Rajasthan

RESPONDENT

Date of Decision : 15-03-2013

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 1, Order 41 Rule 27, Order 41 Rule 27(1), 80, 96
Evidence Act, 1872 — Section 116
Registration Act, 1908 — Section 17, 49
Transfer of Property Act, 1882 — Section 54

Citation : (2013) 03 RAJ CK 0054

Hon'ble Judges : Bela M. Trivedi, J

Bench : Single Bench

Advocate : R.D. Rastogi, for the Appellant; S.D. Khaspuria, GC, for the Respondent

Final Decision : Dismissed

Judgement

Bela M. Trivedi, J.—The present appeal has been filed by the appellant-plaintiff u/s 96 read with Order XLI Rule 1 of CPC challenging the judgment and decree dated 19.1.90 passed by the Addl. District Judge, Dholpur (hereinafter referred to as "the trial court") in Civil Suit No. 13/79, whereby the trial court has dismissed the suit of the appellant-plaintiff filed against the respondent-defendant-State of Rajasthan. As per the case of the appellant-plaintiff before the trial court, the residents of the town Bari, were running a school known as "Shri Nrusinh Sanskrit Pathshala" and the management of the said Pathshala was being done by the executive committee. At the relevant time of the filing of the suit, Shri Ishwar Dutt Vaidhya was the president of the said Executive Committee, through whom the suit was filed. According to the appellant-plaintiff, though the said Pathshala was got registered under the Rajasthan Societies Registration Act, 1958, on 3.1.76, the activities of the Pathshala were being carried on in a rented building prior thereto. As per the further case of the

appellant-plaintiff, the Pathshala had also purchased a piece of land from the Municipal Board Bari for Rs. 337.50/- on 30.9.57 and the said Municipal Board Bari had issued the certificate as regards the handing over of the possession of the said piece of land. According to the appellant-plaintiff, subsequently, the Pathshala had also got the permission from Municipal Board, Bari on 28.11.57, for the construction of the building over the said plot and thereafter the construction of some rooms, temple, water-hut etc was also made by the said Pathshala with the help of the funds of certain donors. It was further case of the appellant-plaintiff that the respondent-defendant-State was running a primary school in the said town of Bari, in the house of one Jamna Das Shivcharan Lal, however the said person having got the decree of eviction against the defendant-State, the defendant vacated the said house in the year 1965-66. Since the defendant required some premises for running their school, the then Headmaster of the School Shri Vedariya Ram Dixit had approached the authorities of the plaintiff-Pathshala and requested them to provide some space for running the school temporarily. The office bearers of the plaintiff-Pathshala therefore considering the interest of students allowed the defendant to run the school in one "Chhapar" shown and marked as "E" in the map annexed to the plaint. However, thereafter in the year 1970-71 the officers and authorities of the said school of the defendant occupied some more rooms, Verandah etc., as shown and marked as "f, g, h & j" annexed to the plaint, without the permission of the plaintiff. The plaintiff, therefore, filed the suit against the defendant after serving a notice u/s 80 of CPC, seeking possession of the premises marked as "e, f, g, h & j" in the map annexed to the plaint and also seeking mesne profits from the defendants.

2. The said suit was resisted by the respondent-defendant by filing the written statement denying the allegations made in the plaint and further contending inter alia that there was no Sanskrit Pathshala being run in the town Bari as alleged and hence the question of managing the same through the plaintiff or the Executive Committee did not arise. It was further contended that the plaintiff was not the owner of the plot or the suit premises. There was no registered sale-deed executed by the Municipal Board in favour of the plaintiff, and if any certificate was issued by the said Municipal Board in that regard, the same was illegal and not binding to the defendant. The respondent-defendant also contended that the primary school was being run by the defendant in the Mohalla Gumat Sherganj since 1948 till 1965 and the said school was thereafter being run in the part of the disputed premises since August, 1965. It was further contended that in fact, as per the authorisation given by the then office bearers of the Sanskrit Pathshala and by the reputed persons of the town, the defendant had started the primary school in part of the disputed premises in the year 1965-66 and had carried out the construction and renovation in the rooms in which the school was being run, with the help of public funds and the donation given by various persons. According to the defendant, the plaintiff did not have any right to file the suit and seek possession of the premises in which the

primary school was being run by the State Government to serve the public purpose and public demand in the town. It was also contended that the plaintiff wanted to grab the entire plot under the guise of running Sanskrit Pathshala, and to make a commercial use by constructing shops thereon.

3. The trial court after framing as many as 9 issues dismissed the suit of the appellant-plaintiff. Out of the said 9 issues, the trial court decided Issue No. 2 in favour of the plaintiff and rest of the issues against the plaintiffs. Being aggrieved by the said judgment and decree passed by the trial court, the appellant-plaintiff has preferred the present appeal.

4. In the instant appeal, the appellant had submitted an application being No. 31665/07 on 4.12.07 seeking permission to produce certain documents under Order XLI Rule 27 of CPC. The court vide order dated 29.1.08 had directed the said application to be heard at the time of hearing of the appeal. Thereafter, during the course of final arguments of the appeal, the appellant again had sought to submit two applications, being No. 4124/13 on 14.2.13 for taking certain facts on record and the application being 4930/13 on 21.2.13 for the production of additional documents under Order XLI Rule 27 of CPC. The said application having been filed during the course of arguments, the same are hereby decided alongwith the appeal.

5. It was sought to be submitted by the learned counsel Mr. R.D. Rastogi for the appellant-plaintiff that the documents sought to be produced by the appellant under Order XLI Rule 27 were very much relevant for the purpose of deciding the appeal and the said documents could not be produced before the trial court as the same were not found in the office of the appellant at the relevant time. According to Mr. Rastogi the appellant-plaintiff was a philanthropic institution running a Sanskrit Pathshala with a view to promote the Sanskrit language, and the construction on the plot allotted by the Municipal Board to the said Pathshala, was carried out with the donations/funds of the local donors, however, the same was being managed by the office bearers of the appellant-Pathshala. He further submitted that the Municipal Board had issued the certificate with regard to the sale of the disputed land in favour of the Pathshala which is on record as Ex. 2 and that the said Pathshala thereafter sought the permission to raise the construction thereon, which was also granted by the Municipal Board, Bari on 28.11.57 which is on record as Ex. 3. According to Mr. Rastogi, the request having been made on behalf of the Headmaster of the primary school run by the respondent-State, one "Chhapar" was given to the said school for one year, however subsequently the authorities of the school run by the respondent had started making encroachment over the said plot by raising unauthorised construction, which necessitated the appellant-plaintiff to file the suit. Pressing into service the provisions contained in Section 116 of the Evidence Act, the learned counsel submitted that the licensee could not be permitted to deny the title of the person, who had permitted the licensee to occupy the premises. In this regard Mr. Rastogi has relied upon the decision of the Apex Court in case of

Sri S.K. Sarma Vs. Mahesh Kumar Verma, and in case of Maroti Vs. Tulsiram and Another, Mr. Rastogi has also relied upon the decision of this court in case of Shri Subendu Dixit and Others Vs. The Rajasthan Agriculture University and Another, to submit that an admission by a party is a substantive evidence of the fact admitted and admissions duly proved are admissible evidence irrespective of whether the party making them appeared in the witness box or not. According to Mr. Rastogi, the respondent-defendant not only had admitted in their written statement, but the witnesses examined on behalf of the defendant had also admitted that the then office bearers of the Nrusinh Sanskrit Pathshala had permitted the defendant to run the Primary School in part of the disputed land and, therefore, the defendant was estopped from challenging the title of the appellant-Pathshala. According to him, when the trial court had decided the Issue No. 2 in favour of the appellant-plaintiff, it had committed an error in not directing the respondent-defendant to handover the possession of the disputed premises. Mr. Rastogi fairly conceded that no activity or course was being conducted by the plaintiff-Pathshala since 2007.

6. However, the learned Government Counsel Mr. S.D. Khaspuria vehemently submitted that the appellant-plaintiff was not the owner of the premises in question and that the suit at the instance of the plaintiff was not maintainable in the eye of law. According to Mr. Khaspuria, the certificate Ex. 2 did not convey or transfer any ownership rights in favour of the appellant-plaintiff, more particularly when the said document was not got registered and when there was no Samiti or Society in existence at the relevant time. He further submitted that though initially in the year 1965-66, i.e. before the registration of the plaintiff-Pathshala, part of the disputed premises was given by the then office bearers of the Nrusinh Sanskrit Pathshala and other reputed persons of the town, the other constructions of the rooms and the administrative building were carried out by the respondent-defendant with the help of donations and funds given by the local people. Hence, such constructions in which the school of the respondent-defendant was being run did not belong to the appellant-plaintiff. Mr. Khaspuria further relying upon the provisions contained in Section 36 of the Rajasthan Town Municipalities Act, 1951, submitted that the Municipal Board could not have issued any such certificate like Ex. 2 in respect of the immovable property without the previous sanction of the Government, and even otherwise there being no registered document in existence, the appellant-plaintiff could not be said to be the owner of the disputed premises. He also submitted that the respondent being not the tenant or licensee of the disputed premises, Section 116 of the Evidence Act, would not apply to the facts of the present case. He lastly submitted that the appellant-plaintiff was not running any Sanskrit Pathshala as sought to be contended by the learned counsel for the appellant and that there was no authority or elected body of the appellant-plaintiff as on today. Mr. Khaspuria has also relied upon certain judgments of the Apex Court and this court in support of his submissions, which shall be dealt with hereinafter as and when found necessary.

7. So far as the applications filed by the appellant under Order XLI Rule 27 are concerned, it may be stated that the law pertaining to production of additional evidence at the appellate stage under Order XLI Rule 27 is quite well settled by the Apex Court, to the effect that the parties to an appeal cannot produce the additional evidence either oral or documentary in the appellate court, as a matter of right, unless the circumstances enumerated in clause (a), (aa) or (b) of Rule 27(1) of Order XLI exist. Apart from the fact that when the court had refused to admit the evidence which ought to have been admitted or the party notwithstanding the exercise of due diligence could not produce the documents before the trial court, the additional evidence could also be permitted when the appellate court requires any document to be produced or any witness to be examined to enable it to pronounce the judgment or for any other substantial cause. The Apex Court in the latest decision in case of Union of India (UOI) Vs. Ibrahim Uddin and Another, while holding that an application under Order XLI Rule 27 should be considered at the time of hearing of appeal on merits, so as to find out whether the documents and/or the evidence sought to be adduced have any relevance/bearing on the issues involved, further held in para 37 as under:-

37. To sum up on the issue, it may be held that application for taking additional evidence on record at a belated stage cannot be filed as a matter of right. The court can consider such an application with circumspection, provided it is covered under either of the prerequisite condition incorporated in the statutory provisions itself. The discretion is to be exercised by the court judicially taking into consideration the relevance of the document in respect of the issues involved in the case and the circumstances under which such an evidence could not be led in the court below and as to whether the applicant had prosecuted his case before the court below diligently and as to whether such evidence is required to pronounce the judgment by the appellate court. In case the court comes to the conclusion that the application filed comes within the four corners of the statutory provisions itself, the evidence may be taken on record, however, the court must record reasons as on what basis such an application has been allowed. However, the application should not be moved at a belated stage.

8. In case of Lachhman Singh (Deceased) through Legal Representatives and Others Vs. Hazara Singh (Deceased) through Legal Representatives and Others, the Apex Court has observed that the jurisdiction of the appellate court is to be exercised not only when clause (a) or clause (aa) of Sub-rule (1) of Rule 27 of Order XLI of the CPC is attracted, but also when such a document is required by the appellate court itself to pronounce the judgment or for any other substantial cause.

9. So far as the documents sought to be produced with the application being No. 31665/07 are concerned, the said documents are the photographs to show that the respondent had shifted the primary school from the disputed premises and had started Upper Primary (Middle School) at the said premises. In the other application, the documents sought to be produced are the photostat copies of the

certified copies of the judgments dated 26.4.62 and 6.2.65 passed in the Civil Suit No. 115/58 and Civil Appeal No. 9/62 respectively. It was sought to be submitted by the learned counsel Mr. R.D. Rastogi for the appellant that the said suit was filed by one Abdul Jabbar & Others against the Municipal Board, Bari and the present appellant-Pathshala, in which the Municipal Board, Bari had contended that the disputed land in the said suit belonged to the appellant-Pathshala. He further submitted that despite the due diligence, the said judgments were not found during the course of trial and hence he sought permission to be produced in the appeal.

10. The said submission of the learned counsel Mr. Rastogi for the appellant cannot be accepted for the simple reason that in none of the applications, the appellant has stated that despite the due diligence, the documents sought to be produced at the appellate stage were not traceable and therefore not produced before the trial court. As per clause (aa) of Rule 27(1) of Order XLI, the parties seeking to produce the additional evidence has to establish that notwithstanding the exercise of due diligence, such evidence was not within his knowledge or could not, after the exercise of due diligence, be produced by him at the time when the decree appealed against was passed. When the appellant-plaintiff had filed the suit with the averment that the defendant had started the Middle School in place of Primary School in the disputed premises, the appellant could have produced the photographs also to establish the said allegation. The judgments of the year 1962 and 1965 sought to be produced now at the appellate stage, also must be available with the appellant. There is no explanation coming fourth in the application as to why the same were not produced before the trial court. The court, therefore, without examining the issue as to whether the said judgments pertained to the land in question or not, is not inclined to accept the said applications filed by the appellant under Order XLI Rule 27 of CPC.

11. So far as the merits of the appeal are concerned, it appears from the submissions made by the learned counsels for the parties and from the impugned judgment and decree passed by the trial court that the trial court had framed as many as nine issues from the pleadings of the parties, out of which the trial court had decided Issue No. 2 in favour of and rest of the issues against the appellant-plaintiff. The trial court while deciding the Issue No. 2 held that the disputed land was purchased from Nagar Palika, Bari on 30.9.57 for Nrusinh Sanskrit Pathshala, however while deciding the Issue No. 3 held that the said sale was illegal. The trial court while deciding the other issues further held interalia that the appellant-plaintiff had failed to prove that the Nrusinh Sanskrit Pathshala was being managed and run by the Executive Committee and that Shri Ishwar Dutt Vaidhya was the president of the said Pathshala. The trial court also held that the plaintiff was not the owner of the temple and other constructions raised in the disputed land and that the respondent-defendant had not encroached upon the disputed land as alleged by the plaintiff. The trial court had also observed that the appellant-plaintiff was not the recognised institution and there was no existence of any Sanskrit Pathshala as alleged by the plaintiff and,

therefore, the plaintiff was not entitled to get any relief in the suit. The trial court accordingly dismissed the suit of the appellant-plaintiff.

12. The bone of contention raised by the learned counsel Mr. Rastogi for the appellant was that the then Secretary of Nrusinh Sanskrit Pathshala had purchased the disputed land from the Municipal Board, Bari on 30.9.57, the sale certificate thereof was on record at Ex. 2, and therefore the appellant was the legal owner of the disputed land. According to him, in the year 1965-66, since the respondent-defendant required some space for running their Primary School, the then office bearers of the Pathshala had granted permission to the respondent to run the Primary School in one "Chhapar" which was part of the disputed land, for one year, however thereafter the respondent-defendant encroached upon the other part of the disputed land and put up illegal constructions.

13. The court does not find any substance in any of the submissions made by the learned counsel Mr. Rastogi for the appellant. So far as the certificate dated 30.9.57 Ex. 2 is concerned, it is pertinent to note that the said document was admitted in evidence by the trial court subject to the objection raised by the defendant, during the examination-in-chief of the PW. 1 Shri Ishwari Dutt Sharma. From the bare look at the said document it appears that there is no khasra number or survey number or property number mentioned in the said certificate. From the description and measurement of the land mentioned in the said certificate, it is difficult to hold that the said certificate pertained to the land in question only. That apart, the said document also has not been got registered as required under the provisions contained in Section 54 of the Transfer of Property Act, 1882 (hereinafter referred to as "the T.P. Act") and Section 17 of the Registration Act, 1908 (hereinafter referred to as "the Act of 1908"). It is needless to say that as per Section 54 of the T.P. Act, "sale" is a transfer of ownership in exchange for a price paid or promised, and such transfer in case of immoveable property of the value of Rs. 100/- and upwards, could be made only by a registered instrument. Admittedly the said document Ex. 2 having not been registered, it could not be said that the sale as defined u/s 54 of the T.P. Act had become complete or that the ownership with regard of land in question was transferred in favour of the appellant-plaintiff or its predecessor. Section 17 of the Act of 1908 also requires compulsory registration of the instrument purporting to create, declare or assign any right, title or interest in the immoveable property and as per Section 49 of the Act of 1908, such an unregistered document, which required compulsory registration, could not be received as evidence. Under the circumstances, the said document purporting to be the sale of the disputed land in favour of Nrusinh Sanskrit Pathshala, Bari, through its Secretary Shri Vedraj Singh Pachori could not have been and should not have been admitted in evidence by the trial court.

14. At this juncture, it is also very pertinent to note that at the relevant time in 1957, even as per the case of the appellant-plaintiff, the said Shri Nrusinh

Sanskrit Pathshala was being run and managed by the residents of the town Bari. The appellant Nrusingh Sanskrit Pathshala Parishad, Bari appears to have been registered under the Rajasthan Societies Registration Act, 1958, on 3.1.76 as per the certificate of registration at Ex. 1. Hence when the so called purchase of the disputed land from the Municipal Board, Bari was made in 1957, the appellant-society was not a society registered under any Act much less under the then Societies Registration Act, 1860 as adapted to the Pre-reorganisation of the State of Rajasthan which came to be subsequently repealed on the commencement of the Rajasthan Societies Registration Act, 1958. There is also nothing on record to suggest that the plot of land mentioned in the certificate Ex. 2 had become the property of the appellant-society on its registration under the Rajasthan Societies Registration Act, in the year 1976.

15. Though, the learned Government Counsel Mr. Khaspuria had sought to submit that the Municipal Board, Bari had sold out the disputed land as per the certificate Ex. 2, without the prior sanction of the Government as required u/s 36 of the Rajasthan Town Municipalities Act, 1951, the court cannot accept the said submission, in absence of any evidence led in that behalf by the defendant before the trial court as to whether the Municipal Board was required to take previous sanction of the Government or not or in fact such a sanction was granted or not by the Government. Suffice is to say that the appellant-plaintiff had failed to prove that the appellant had become the owner of the disputed premises on the basis of the certificate dated 30.9.57 at Ex. 2.

16. Now if the other submissions made by the learned counsel Mr. Rastogi with regard to the principles of estoppel and Section 116 of the Evidence Act, are appreciated in the light of the oral evidence adduced by both the parties, it appears that in the year 1965-66, the then office bearers and reputed persons of the town Bari, who were running Shri Nrusingh Sanskrit Pathshala, had permitted the defendant-Government to run the Primary School in the disputed premises. However, even as per the case of the plaintiff, at the relevant time the appellant-society was not a registered society and the Nrusingh Sanskrit Pathshala was being run by the group of reputed persons of the town to promote the Sanskrit language, and the construction of rooms on the disputed premises was made with the donations and funds given by the local donors. Therefore the appellant-society could not be said to be either the owner or the licensor of the disputed premises.

17. Undisputedly, the respondent-defendant was not the tenant of the appellant-plaintiff. As per the submission of learned counsel Mr. Rastogi for the appellant-plaintiff, the then Headmaster Mr. Shri Vedaria Ram Dixit, of the Primary School, run by the defendant-Government, had requested the then office bearers of Shri Nrusingh Sanskrit Pathshala to permit him to run the Primary School for one year in 1965-66 and the said office bearers of the said Pathshala having granted such permission, the defendant had become the licensee in respect of the disputed premises. The said submission also does not have any force. As per Section 116

of the Evidence Act, no person who came upon any immoveable property by the licence of the person in possession thereof, shall be permitted to deny that such person had a title to such possession at the time when such license was given. In the instant case, it has neither been established that the defendant-Government was the licensee of the appellant-society nor has it been established that the appellant was in possession of the disputed premises at the relevant time in the year 1965-66. The appellant-Pathshala was registered as the society under the Rajasthan Societies Registration Act only in the year 1976, whereas the then Headmaster of the Primary School run by the defendant-Government was put in possession of the disputed premises by some informal group of persons running Sanskrit Pathshala in the year 1965-66. Though the defendant in its written statement and during the course of evidence had contended that the Primary School was permitted to run in part of the disputed premises by the then office bearers of Sanskrit Pathshala and other reputed persons of the town, the said contention could not be treated as admission on the part of the respondent-defendant that the appellant had put the respondent in possession of the disputed premises as licensee in the year 1965-66, more particularly when the appellant came into existence in the year 1976. In absence of any evidence to prove that the relationship between the appellant and the respondent was that of a licensor and licensee, the respondent-defendant could not be estopped from denying the title of the appellant, as contemplated in Section 116 of the Evidence Act. Mr. Khaspuria, the learned Government counsel for the State has rightly relied upon the decision of the Allahabad High Court in case of Bodhan Vs. Sri Bhundal Singh and Others, in which it has been held inter alia that the estoppel in Section 116 of the Evidence Act does not prevent the licensee from proving that subsequent to the license, the licensor had lost his title to the property to which the license related. In the instant case, even if it is assumed that the then office bearers of the Nrusinh Sanskrit Pathshala had permitted the defendant to run the Primary School in part of the disputed premises by way of license, the said informal group of persons running the Sanskrit Pathshala having ceased to have title over the disputed property, the defendant could not be precluded from contending that the appellant-plaintiff society was not the owner or the licensor in respect of the disputed premises.

18. As discussed earlier, except the certificate Ex. 2, which also has not been held to be admissible in evidence, there is no evidence adduced by the appellant-plaintiff to prove that the disputed land as well as the structures constructed thereon were being owned and possessed by the appellant-society after its registration under the Rajasthan Societies Registration Act. The appellant-plaintiff had also not produced any Memorandum of Association or the Rules and Regulations of the appellant-society to show as to how the affairs of the society would be managed after the registration, nor produced the list of members or trustees or the office bearers of the society or any document to show that the disputed premises was owned by the appellant-society.

19. The appellant-plaintiff had also not produced any evidence to show that the

appellant after its registration was running any Sanskrit Pathshala as recognised by the Government of Rajasthan, though the trial court had framed the Issue No. 8 specifically in that regard. The trial court after appreciating the evidence on record had come to the conclusion that the plaintiff-society was not a recognised institute to run the Sanskrit Pathshala by the Government of Rajasthan, and that such Pathshala was also not in existence since last 20-22 years. The learned counsel Mr. Rastogi had failed to point out any illegality, infirmity or perversity in the said findings recorded by the trial court. In view of the above, the court does not find any substance in the present appeal and hence the same deserves to be dismissed. The applications under Order XLI Rule 27 of CPC as well as the appeal therefore are dismissed accordingly.