

(2006) 07 MP CK 0057

In the Madhya Pradesh High Court

Case No : Second Appeal No. 1050 of 2000

Smt. Chandravati Devi

APPELLANT

Vs

Premlal @ Popa Kachi and Others

RESPONDENT

Date of Decision : 25-07-2006

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 27, 28, 29
Evidence Act, 1872 — Section 62

Citation : AIR 2007 MP 35

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

Bench : Single Bench

Advocate : D.K. Dixit, for the Appellant; Jaishree Mukherjee, for the Respondent No. 5, for the Respondent

Judgement

A.K. Srivastava, J.—This second appeal has been filed at the instance of plaintiff who has lost from both the Courts below.

2. The plaintiff filed suit for declaration and injunction in respect of the suit property, the description whereof has been mentioned in Para 1 of the plaint. The contention of plaintiff in the plaint is that the said house was owned by one Premlal (defendant No. 1) who has sold the suit property to plaintiff by registered sale deed dated 19-10-1984 (Ex. P-I). In Para 2 of the plaint, it has been specifically pleaded that by virtue of relinquishment deed dated 7-7-1964 executed by Ram Bai (defendant No. 3), Premlal (defendant No. 1) has derived, right, title and interest in the suit property and in this manner Premlal became owner of the suit property and he sold it to the plaintiff. During the pendency of the suit, defendant No. 3 Ram Bai died and her name was directed to be deleted from the cause title of the plaint.

3. Except, defendant No. 5 Smt. Mangi Bai, all other defendants after service did not appear as a result of which the suit was proceeded in exparte against them. In Para 2 of the written statement, Smt. Mangi Bai (defendant No. 5) did not specifically deny the due execution of relinquishment deed dated 7-7-1964 in

favour of defendant No. 1 Premlal.

4. The Trial Court after framing necessary issues dismissed the suit of plaintiff. While deciding issue No. 2, Trial Court specifically held and decided that though pleadings in regard to the relinquishment deed in favour of Premlal has been pleaded by the plaintiff but that pleading has not been substantiated by filing the document of relinquishment deed. Though the Trial Court in Para 7 of its judgment has held that a photocopy of the relinquishment deed dated 7-7-1964 is on record but the same has not been proved by summoning the original, and therefore, the Trial Court held that Premlal was not the owner of the suit property and, therefore, the plaintiff did not get any right, title and interest by virtue of sale deed dated 19-10-1984 which was executed by Premlal in favour of the plaintiff. The Trial Court eventually dismissed the suit.

5. An appeal was filed by plaintiff before the learned First Appellate Court. In the appeal, she filed an application under Order 41 Rule 27, CPC along with the certified copy of the relinquishment deed. In the application, it has been specifically stated that the document of relinquishment deed dated 7-7-1964 is a registered document. A photocopy of the said document was also placed on record in the Trial Court but the said document was not proved though there was no denial in the written statement about the execution of relinquishment deed. In Para 4 of the application, it has been stated that the said document is a registered document and as such the authenticity and the execution of that document cannot be doubted.

6. This application was opposed by defendant No. 5 by filing reply.

(A.K. Shrivastava, J.)

The learned First Appellate Court by the impugned judgment and decree dismissed the application as well as the appeal. Hence, this second appeal.

7. This Court while admitting the appeal framed following substantial questions of law:

(1) Whether, in the facts and under the circumstances of the case, order of the learned First Appellate Court rejecting the application filed by the appellant under Order 41 Rule 27, CPC is erroneous ?

(2) Whether the finding arrived at by the Courts below that the appellant/plaintiff cannot claim any right, title or interest in the disputed house on the basis of the sale deed (Ex. P-I), is perverse and thus unsustainable in law ?

8. I have heard Shri D.K. Dixit, learned Counsel for appellant and Smt. Jaishree Mukherjee, learned Counsel for respondent No. 5.

9. It has been contended by learned Counsel for appellant that since the pleadings of plaintiff in Para 2 of the plaint were not denied specifically in regard to the execution of the document of relinquishment deed in favour of Premlal, therefore, the plaintiff was under a bonafide impression that it is not required to

be proved. Since the learned Trial Court has decided issue No. 2 only on the ground that the relinquishment deed has not been proved, therefore, it became necessary to place the said certified copy on record with a prayer to allow appellant for adducing the additional evidence. It has also been submitted by him that since Premlal became owner of suit property by virtue of relinquishment deed dated 7-7-1964, therefore, he validly sold the suit property to the plaintiff vide registered (Ex. P-I), dated 19-10-1984 and, therefore, the two Courts below erred in substantial error of law in dismissing the suit of plaintiff.

10. Per contra Smt. Jaishree Mukherjee, learned Counsel appearing for respondent No. 5 submitted that a specific issue (issue No. 2) was framed in this regard that whether Premlal was authorized to sell the suit property to plaintiff and, therefore, it was incumbent upon the plaintiff to prove the relinquishment deed. Since, the plaintiff has failed to prove it, she cannot be permitted to fill up the lacuna in the matter by filing this type of additional document in the Appellate Court because right from very beginning the plaintiff was quite aware about the existence of this document. According to learned Counsel for respondent, none of the ingredient of Clauses (a), (aa) and (b) of Order 41 Rule 27, CPC is made out, therefore, the First Appellate Court did not commit any error in dismissing the application.

11. On merit, it has also been contended by her that Smt. Ram Bai was not having any authority to relinquish the suit property in favour of defendant No. 1 Premlal for the simple reason that she was not the exclusive owner of the suit property. The suit property was a Joint Hindu Family property. Thus, according to the learned Counsel the two Courts below did not err in dismissing the suit of plaintiff.

Regarding substantial question of law No. 1:

12. On bare perusal of the plaint, it is gathered that the plaintiff has specifically pleaded that there was a relinquishment deed dated 7-7-1964 in favour of Premlal and as such he was the owner of the suit property and therefore, he sold the suit property vide registered sale deed dated 19-10-1984 to the plaintiff. On going through the written statement, it is gathered that all these facts were not specifically denied. True, specific issue No. 2 was framed in that regard but the plaintiff may be under impression that since the document has not been denied in the pleadings, therefore, it is not necessary to prove the relinquishment deed. The document of relinquishment deed is a registered document and its authenticity and correctness cannot be doubted. In this view of the matter, in order to do justice and in order to pronounce judgment, I am of the view that the application filed under Order 41 Rule 27, CPC ought to have been allowed and accordingly the same is hereby allowed.

13. Merely because application under Order 41 Rule 27, CPC is hereby allowed and the certified copy of registered relinquishment deed dated 7-7-1964 is taken on record would not ipso facto mean that the Premlal was having right, title and

interest in the property. It is for the learned First Appellate Court to hold independently whether Premlal was having any right, title and interest to sell the property to plaintiff on the basis of the entire evidence and pleadings placed on record.

14. On going through the record of the Trial Court, it is gathered that photocopy of registered relinquishment deed dated 7-7-1964 was filed. It appears that on account of carelessness of learned Counsel appearing for plaintiff v/hd did not take pain to submit the original document or in case it was not available by summoning the copy of the same from the office of Sub-Registrar document bearing the signature of the executant. The carbon copy of the original document which bears the signature of the executant and the witnesses and which is kept in the record of Sub-Registrar is a primary evidence within the meaning of Section 62 Exception I of the Evidence Act. In that regard, it shall be fruitful to rely the decision of Supreme Court Prithi Chand Vs. State of Himachal Pradesh, , and Single Bench decision of this Court Gulam Mohammad v. Alihussain Mullaji and Anr. 1973 ILJ (27). The document of relinquishment deed is an important document as it would help the Court in deciding the case effectively and to do the justice that whether Premlal was having any authority to sell the suit property to plaintiff. Since photocopy of the said document is already on record, it cannot be said that the defendants/respondents are taken by surprise. According to me, it was due to mistake of learned Counsel appearing for the plaintiff/appellant before learned Trial Court. In this regard it will be fruitful to place reliance on the decision of this Court Munnawwar Khan v. Hariram and Ors. 1996 RN 27. In the case of Subhash Khan and Ors. v. Raheem Khan and Ors. 1995 RN 433, an application under Order 41 Rule 27, IPC, was filed in this Court in second appeal seeking permission for the production of order passed by Naib Tehsildar on the strength of which Patta was issued. In that situation, this Court allowed the application by taking the additional evidence on record on the ground that it was necessary for proper adjudication of the question involved in that appeal. Similarly, in the present case also, for proper adjudication whether Premlal was duly authorized to sell the suit property to plaintiff, for the ends of justice and proper adjudication of the issue, it is necessary to take the additional evidence on record. In the case of Sarada (Smt.) v. Manikkoth Kombra Rajendran 1996 (2) MPWN 106 (decision has been reproduced in toto) a document of agreement was produced as an additional evidence under Order 41 Rule 27, CPC before the Appellate Court which was rejected. The second appeal was dismissed by the High Court. The Apex Court held that the case of appellant is that T. Sekharan has sold the suit property as a collateral security and when the agreement subsequently entered into clearly mentioned receipt of Rs. 35,000/- as consideration of the property, it would indicate that the parties had the sale. Under these circumstances, it was held by the Supreme Court that Appellate Court ought to have received the agreement dated January 4, 1983 as an additional evidence and considered the effect thereof. The Apex Court further held that without receipt of the document and the evidence in consideration

thereof, it would not be possible to render fair justice between the parties. The Supreme Court allowed the appeal by setting aside the judgment of High Court and Appellate Court and remitted the case back. This decision is squarely applicable in the present case.

15. The substantial question of law No. 1 is thus answered accordingly that in the facts and circumstances, the First Appellate Court erroneously rejected the application under Order 41 Rule 27, CPC.

16. Since, I have allowed the application filed under Order 41 Rule 27, CPC, which was rejected by learned First Appellate Court, the First Appellate Court shall take this document on record and will permit the appellant to adduce oral evidence by submitting the original relinquishment deed on record or if the plaintiff is not possessing the same, she would file an application to summon the copy from the office of Sub-Registrar documents to prove its execution in her favour, since the same is also a primary evidence. If such an application is filed, the same shall be allowed by learned Appellate Court and the document shall be summoned from the office of Sub-Registrar at the time of examination of plaintiff. The respondent No. 5 shall be free to file any document or to adduce any oral evidence in rebuttal. Let the evidence be recorded itself by the First Appellate Court and thereafter by following procedure as contemplated under Sections 28 and 29, CPC may pass a judgment afresh.

17. Before parting with the case, I would like to mention again at the cost of repetition that this Court has not expressed any opinion in regard to the merit of the case nor it has been held that the judgment of the Trial Court is erroneous. The First Appellate Court shall be free to take its own decision on the basis of the entire evidence placed on record.

18. Since the matter is quite old, learned First Appellate Court is hereby directed to conclude the matter as far as possible, on or before 30th November, 2006. The First Appellate Court shall fix a date for recording the evidence if it is so prayed on behalf of the appellant. No further adjournment shall be granted to her except in case the document is not received in Court from the office of Sub Registrar. The parties are directed to appear before the First Appellate Court on 14-8-2006. Registry is hereby directed to send the record posthaste so as to reach before the First Appellate Court on or before 14-8-2006. After recording of the evidence of the appellant/plaintiff, the Appellate Court shall permit respondent/defendant No. 5 to adduce her evidence.

19. Since the matter is being remanded back to the First Appellate Court, I am not deciding the substantial question of law No. 2.

20. Resultantly, the appeal is partly allowed to the extent indicated hereinabove. The judgment and decree of the First Appellate Court is hereby set aside. The First Appellate Court shall re-decide the appeal afresh on its own merit. The parties are directed to bear their own costs.