
(1990) 11 MP CK 0020
In the Madhya Pradesh High Court
Case No : S.A. No. 490 of 1984

Smt. Kamla Bai and Another	Vs	APPELLANT
Arjan Singh and Others		RESPONDENT

Date of Decision : 23-11-1990

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 6 Rule 1
Contract Act, 1872 — Section 23

Citation : AIR 1991 MP 275

Hon'ble Judges : R.D. Shukla, J

Bench : Single Bench

Advocate : K.N. Agarwal, for the Appellant; T.C. Naik, for the Respondent

Final Decision : Allowed

Judgement

R.D. Shukla, J.—This appeal is directed against the judgment and decree dated 1-9-1984, passed in Civil Appeal No. 56A of 1982, of the Court of Additional Judge to the Court of District Judge, Sehore (arising out of Civil Suit No. 29A of 1977, decided on 31-1-1978 by the Court of Civil Judge (Class II), Sehore). whereby, while confirming the decree of the trial Court, the plaintiffs' suit for possession of 5.80 acres of land, situated in village Umarkhal, Tahsil Ichawar, District Sehore, has been decreed.

2. Brief history of the case is that the plaintiff filed a suit on 25-6-1975, with the assertion that Babal the predecessor-in-interest of defendant No. 2 Jhita, transferred the suit property to defendant No. 4, vide registered sale-deed dated 15-12-1966", and delivered possession to him. The defendant No. 4 transferred the suit land, vide registered sale-deed dated 10-6-1975, to plaintiffs and delivered possession of the land. However, the defendants 1, 2 and 3 dispossessed him on 21-6-1975. Plaintiff, therefore, prayed for declaration of title, possession and mesne profits at the rate of Rs. 2,000/- per year.

3. The defendant-appellants 1 and 2 denied the contentions of the plaintiff and

pleaded that the suit property was joint Hindu family property of Babal and defendant No. 5 Umrao. The defendant No. 4 Prahladsingh married his daughter Kamla (defendant No, 1) to Jhita (defendant No. 2). Prahladsingh (defendant No. 4) had no means of livelihood and, therefore, he was living along with his daughter. There is a custom in their caste that the father does not take and receive the financial aid from the daughter and, therefore, the suit property was transferred in his favour on a nominal price of Rs. 500/-. Therefore, Jhita continued to be in possession all alone. The document was without consideration. The defendant No. 2 improved the land after constructing Bunds and well over it and, therefore, the defendant No. 4 has no right to transfer the property in favour of plaintiffs. The defendant No. 4 did not file his written statement and remained ex parte.

The defendant No. 5 filed his written statement and, while supporting the defendants 1 and 2, further pleaded that the suit property belongs to him and his brother. There was no partition between them. Babal and he were joint owners.

4. After pleading of the defendants, plaintiffs further made an assertion that there was a partition between Bagal and Umrao (defendant No. 5). They were living separately and cultivating the land separately.

5. The trial Court held that there was a partition between the defendant No. 5 Umrao and Babal. They were cultivating the land separately and were in separate occupation of their share. Babal transferred the land to defendant No. 4 in the year 1966. Thereafter, defendant No. 4 sold it to plaintiff vide sale-deed dated 10-6-1975. The defendants are getting mesne profits at the rate of Rs. 475/-per year. They are liable to pay it back. Consequently, the plaintiffs' suit for possession and declaration was decreed.

6. On appeal, the first appellate Court confirmed the decree of the Court. Hence, this second appeal.

7. This appeal has been admitted on the following substantial question of law :--

"Whether, in the absence of the plaintiff-respondents having established that the sale-deed dated 15-12-1966 (Ext.P-2) executed by Babal in favour of defendant No. 4 was for legal necessity, the Courts below were right in finding that defendants Nos. 1 and 2 were bound by the said sale-deed?"

8. The following pedigree has been admitted by the parties :

Jora Babal Umrao (defdt. No. 5, rcsptd. No. 6) Jhita (defendant No. 2, appellt. No. 2) = Kamal (wife of Jhita) (daughter of Prahladsingh) (resptd. No. 5)

Prahladsingh (respondent No. 5) died during the pendency of the appeal in this Court and, therefore, respondents 5(a) and (b), his son and daughter, were substituted vide order of this Court dated 28-3-1989.

Umraosingh also died during the proceedings and, therefore, his legal representatives, viz., daughter-in-law and grandsons (respondents 6(a), (b) and

(c), were substituted.

9. The description of the property, as shown in the plaint, is as under:- -

Khasra No.

Area

Land Revenue

1.

52/2

0.57

00-78

2.

56/2

0.83

5-65

3.

92/2

1.14

1-56

4.

255

0.37

00-50

5.

256

2.20

5-62

6.

257

0.69

1-56

Total

10. The learned counsel for the appellants has submitted that it was the joint family property of Babal and Umrao and, therefore, Babal has no right to transfer it except for legal necessity. In the alternative, since it was ancestral property, Babal and Jhita being the coparceners, were the joint owners and, therefore, Babal could not transfer it for illegal purpose.

11. The transfer of the land in favour of father of Kamabai, was for consideration for giving her in marriage to Jhita and, therefore, the contract was immoral and void u/s 23 of the Contract Act. The suit property is fetching the profit of nearly Rs. 2,000/- per year and, therefore, the sale in favour of the plaintiff appears to be unconscionable and must have been under duress.

12. Learned counsel for the respondents, on the other hand, has submitted that though the land was in the joint Khata of Babal and Umrao, but they were separate and during the transfer by Babal in favour of Prahladsingh, Umrao consented to it by appending his thumb impression. There is a custom in the caste whereby father of bride is paid substantial amount.

The transfer of land in favour of Prahladsingh, father-in-law of Jhita, was for the welfare of Jhita and, therefore, he could not repudiate it.

13. The learned trial Court has held that Babal and Umrao were separate. This finding has been confirmed by the first appellate Court. The learned trial Court has further held that the land in dispute was the joint family property of Babal and Jhita. This fact has also not been reversed by the first appellate Court and, therefore, stands confirmed.

14. It is established principle of law that the second appellate Court does not disturb the finding of fact unless there has been perverse finding, misreading of evidence or rejection of admissible evidence. If the trial Court and appellate Court have failed to consider relevant evidence available on record, that can also be raised as substantial question of law.

15. The document of transfer in favour of Prahladsingh, executed by Babal (Ex. P-2), has been proved by the plaintiffs. The execution of the document has not been assailed before me, This document contains a recital that Babal had transferred his own share which was in his possession and ownership. Umrao has also appended his thumb impression and was present at the time of execution of the document (Ex.P-2).

16. D.W. 2 Umrao has stated in para 5 of his statement that they were living separately. They were separate in food and residence. However, with respect to agricultural land, he has stated that they were cultivating it jointly and sharing the profit.

17. The plaintiffs' witnesses, viz., P.W. 1 Daryao" P.W. 7 Bhagwatsingh and P.W. 8 Umrao, have stated that there was a mutual partition between Umrao and Babal. This fact has been found by the trial Court and confirmed by the first appellate Court and, therefore, now it would not be proper to reverse that finding. Though this Court can come to a different conclusion on close scrutiny of evidence, there is documentary evidence that Khata was in the joint name of Umrao and Babal. They were living separately, still they could own joint family property, but it would not be proper to reappreciate the evidence.

18. It is an admitted fact that the agricultural land in possession of Babal and Umrao was ancestral property and, that is why, the Khata was in the joint name of Umrao and Babal. Jhita being the grandson of Jora (father of Babal), acquired interest by birth and, therefore, the suit property would be deemed to be the coparcenary property between Babal and Jhita. This has been held proved by the trial Court while answering Issue No. 5, which has been confirmed by the first appellate Court. It has not been assailed before me, therefore, this finding does not call for interference.

19. Parties are Hindus. Each son upon his birth takes an interest equal to that of his father in ancestral property, whether it be movable or immovable. It is very important to note that the right which the son takes at his birth in the ancestral property is wholly independent of his father.

20. A Hindu father has special powers of alienating coparcenary property which no other coparcener has. In exercise of these powers, he may make a gift of his ancestral property and may sell or mortgage his ancestral property, including the interest of his sons, grandsons and great grandsons therein, for the payment of his own debt. (Except as aforesaid, a father has no greater power over coparcenary property than any other manager, that is to say, he cannot alienate coparcenary property except for legal necessity or for the benefit of the family).

(Note No. 256 of Hindu Law by Mulla, 15th Edn. at page 345).

21. Now, therefore, we have to see whether the transfer by Babat was for legal necessity. D.W. 1 Daryao has clearly stated in para 1 of his statement, in answer to question by the counsel for the defendant, that no consideration passed at the time of transfer in favour of Prahladsingh. The following question and answer is relevant:--

iz"u %& rqEgsa tc bl ckr dk Kku Fkk fd tc izgykn flag us bl tehu dh dksbZ dher ckcyflag dks ugha nh gS] rks rgeus tehu dSls [kjnhh\\

m?kj %& yMdh rks nh gSA chl gtkj dh budh tkr 10-10 gtkj] 20-20 gtkj esa yMdh nsrs gSaA

P.W. 3 Chitapi has stated in para 2 of his statement that Prahladsingh demanded Rs. 4,000/-/5,000/- for marrying his daughter Kamlabai with defendant Jhita and, therefore, in lieu of money, land was transferred. P.W. 4 Babusingh has very clearly stated that Prahladsingh married his daughter Kamlabai with Jhita and the

land" in suit was transferred to him in lieu thereof. It has been further" stated by him that the husband of Kamlabai was alive, but was not present at that time. P.W. 5 Harisingh has also given statement to that effect. P.W. 1 Daryaosingh, the grandfather of plaintiffs, in para 7 and P.W. 4 Babusingh, in para 2 of their statements have admitted that Kamlabai's married husband was alive at the time of sale in favour of Prahladsingh. Babusingh has further stated that it was agreed that, in case of dispute being raised by the husband of Kamlabai, Jhita will meet it.

Thus, it is clear that there was no divorce between Kamalabai and her husband.

22. Ex. P. 1 is an agreement, which also shows that the husband of Kamalabai was alive and the land in dispute was transferred in lieu of Kamlabai being given to Jhita. This fact has not been considered by the Courts below.

Thus, following facts emerge from the evidence itself:--

(i) that, Kamalabai was married to somebody, her husband was alive. There was no divorce;

(ii) that, Kamalabai's father Prahladsingh agreed to send Kamalabai with Jhita; without obtaining proper divorce;

(iii) that, Babal, father of Jhita, transferred the land as a consideration for getting Kamalabai for his son. Thus, the marriage of Kamalabai with Jhita was performed after transfer of land to his father Prahladsingh.

23. Learned counsel for the respondent has referred to Note No. 429 of Hindu Law and submitted that Pat marriage is recognised under the Hindu Law. Said Note runs as follows:--

"A Pat-marriage of a Hindu widow, in the absence of any evidence to show payment to the bride's relations is to be regarded as marriage in an approved form".

But, in this case, the payment was made to bride's relation, i.e., Prahladsingh, father of Kamlabai.

A woman cannot marry another man while her husband is alive, except where her marriage has been dissolved by divorce and, therefore, the transfer of suit property in favour of Prahladsingh was for immoral purposes and was against the public policy. It is settled law that a marriage brokerage contract where a third person intervenes and wants to make money out of the marital relationship between the two partners is against public policy and not enforceable by a Court of law.

24. u/s 23 of the Indian Contract Act contract against public policy is void and, therefore, the transfer in favour of Prahladsingh is void and illegal and it has no force in the eye of law.

Counsel for the respondents has submitted that such type of marriage and

payment to father or other relation is a recognised custom in the caste of defendants 1, 2, 4 and 5. Be it that, but this being immoral and opposed to public policy, cannot be given effect to.

25. It has been found by the two Courts below that Prahadsingh was handed over possession of the suit land after execution of the sale-deed (Ex.P-2) and continued to be in possession till sale by him in favour of the plaintiff vide registered sale-deed dated 30-5-1975 (Ex.P-6). Since the transfer in favour of Prahadsingh was void and illegal, it did not pass title in his favour and, therefore, he has no saleable title at the time of execution of the document (Ex.P-6). Prahadsingh entered into possession under the permission of Babal, therefore, his possession was permissive.

26. Even otherwise, the transfer of possession in favour of Prahadsingh was effected on 15-12-1966 and, as per the allegations in the plaint, the defendants dispossessed the plaintiffs on 21-6-1975 and, therefore, though the possession of Prahadsingh was illegal and may have been hostile, but he did not perfect his title by prescription, as he was not in possession for more than twelve years,

27. It may also be mentioned here that P.W. 1 Daryao, father of the plaintiffs, has himself admitted that the suit property was fetching mesne profits of Rs. 2,000/- per year. Sale of such immovable property for a meagre amount of Rs. 3,500/-, appears to be unconscionable. In my opinion, therefore, no title passes in favour of the plaintiffs and they are not entitled to get back possession of the suit property.

28. - It has been submitted by the learned counsel for the respondents that there is no specific pleading of transfer without legal necessity, or that transfer was for illegal or immoral purposes and, therefore, all those points cannot be taken into consideration. I do not agree with this contention. Where a contract or transaction is illegal, there need be no pleading of the parties raising the issue of illegality and the Court is bound to take judicial notice of it. (Please see : Smt. Surasaibalini Debi Vs. Phanindra Mohan Majumdar, (para 23).

29. As a result, the appeal succeeds and the plaintiffs' suit is dismissed with costs. Counsel's fee Rs. 200/-, if certified.