

(2013) 05 AHC CK 0253
In the Allahabad High Court
Case No : Second Appeal No. 2178 of 1977

Tej Narain Singh	Vs	APPELLANT
Mahendra Chaubey and Another		RESPONDENT

Date of Decision : 21-05-2013

Acts Referred:

Citation : (2013) 05 AHC CK 0253

Hon'ble Judges : Arun Tandon, J

Final Decision : Dismissed

Judgement

Arun Tandon, J.—Heard Sri K.M. Singh, learned counsel for the appellant and Sri A.N. Bhargava, learned counsel for respondent no.1.

This second appeal has been filed against the judgement and order dated 6th July, 1977 passed by the District Judge, Ballia in Civil Appeal No. 7 of 1976 arising out of judgement and decree dated 18th February, 1976 passed by the Civil Judge, Ballia in Original Suit No. 45 of 1971 (Mahendra Chaubey vs. Atma Singh and Another).

This present second appeal was admitted on 7th January, 1978. However, no substantial questions of law were framed at the time of admission of the second appeal. Before this Court two questions have been pressed, as substantial questions of law, which arise for consideration in the present second appeal:

"1. Whether according to the plaint allegations read with the statement of the appellant as witness, the suit is time barred?

2. Whether the court below erred in failing to draw the presumption of correctness of the reports of the stamp clerk of the stamp office, when the appellant failed to summon the register of stamp vendor to prove the genuineness of the date of purchase of stamp by the appellant?"

Before turning to the aforesaid substantial questions of law, it would be appropriate to record following facts, as borne out from the records of the

present second appeal:

Defendants to the suit are real brothers and members of joint hindu family. Defendant no. 1 being the Bhumidhar of the agriculture land detailed at the foot of the plaint entered into a contract with the plaintiff for the sale of the land, for which a sum of Rs. 3,000/ was paid as premium at the time of execution of agreement, out of total agreed amount of Rs. 8,000/. Saledeed was to be executed after getting the property mutually partitioned within three years. Under the agreement, it was provided that the seller shall get the property partitioned amongst his brothers within three years and thereafter he shall execute a saledeed of his share in favour of the plaintiff. This agreement was executed on a stamp paper of Rs. 2/. Since the defendant no.1 failed to execute the saledeed, the plaintiff filed original suit no. 45 of 1971 for specific performance of the contract to sell dated 15th April, 1966. In paragraphs 7 and 8 of the plaint it has been stated as follows:

On notice being issued to the defendants, they filed their written statement and 8 issues were framed by the trial court on the basis of the pleading of the parties.

The Trial Court under judgement and order dated 18th February, 1976 dismissed the suit. Not being satisfied with the judgement of the trial court, plaintiff filed Civil Appeal No. 7 of 1976. The appeal has been allowed by the District Judge, Ballia under judgement dated 6th July, 1977. It is against this judgement of the District Judge that the present second appeal has been filed.

Appellant has pressed two submissions before this Court, (a) the suit on simple reading of the plaint was itself time barred and therefore, even if such plea was not pressed before the trial court or before the first appellate court, it will not debar the appellant from raising such plea before this Court and this Court may adjudicate upon the same on merits.

It is the case of the appellant that from the plaint it was established that the saledeed in respect of the holding subject matter of agreement to sell was transferred by way of saledeed in favour of one of the brothers of defendant no.1, who had executed the agreement to sell on 23rd March, 1967, the cause for filing of the suit arose on 23rd March, 1967, as with the transfer of the subject property in favour of the brother, execution of the sale deed in favour of the plaintiff became an impossibility. The period of limitation would therefore, start running from the said date i.e. 23rd March, 1967. Under Article 54 of the Limitation Act, the period of limitation prescribed for filing of the suit for specific performance of contract is 3 years from the date of refusal of such performance. In the facts of the case, the starting point for the said limitation would be 23rd March, 1967. The suit could have been filed upto the year 1970. Suit was filed in the year 1971 and therefore, it was liable to be dismissed under Section 3 of the Limitation Act as barred by limitation.

It is further contended that it was the case of the defendant that the agreement to sell had been ante dated, inasmuch as the stamp paper had been purchased

on a subsequent date with reference to the date mentioned in the document. This plea had found favour with the trial court, but has wrongly been reversed by the first appellate court.

I have considered the submissions made by the learned counsel for the parties and have examined the records of the present second appeal.

So far as the first contention raised on behalf of the appellant is concerned, it is worthwhile to refer to paragraphs 7 and 8 of the plaint which have been quoted above.

On simple reading of the aforesaid paragraphs, it is apparently clear that plaintiff had stated that saledeed has been executed by the defendant to the suit in 1967 but it was only just before filing of the suit that he had refused to execute the saledeed. It was nobody's case that plaintiff had knowledge of the saledeed of 1967 at any point of time prior to refusal to execute the saledeed in favour of the plaintiff.

Although the learned counsel for the appellant has contended that since the date of execution of the saledeed has been mentioned in the aforesaid paragraphs, it shall be presumed that the plaintiff had knowledge of the execution of the saledeed on the same date. Therefore, the period of limitation would start running from the date of knowledge of the saledeed. In my opinion, such plea is not borne out from the simple reading of the plaint nor it was so pleaded in the written statement filed by the appellant. As a matter of fact, the trial court after framing issue on the question of limitation being issue no.5 in its conclusion recorded as follows:

"Issue No. 5

Learned counsel for the defendant has failed to advance any argument on this point. There appears to be no question of limitation in the instant suit. Issues answered in the negative."

For the reasons best known to the defendant, in the first appeal filed against the said judgement, no such plea of limitation was pressed and consequently, there is no finding by the First Appellate Court on the issue of limitation nor the finding of the trial court has been reversed.

In the facts and circumstances of the case, this Court is satisfied that the issue of limitation as canvassed before this Court is basically a mixed issue of law and fact. In absence of said issue having been pressed, both before the trial court as well as before the first appellate court, the defendantappellant cannot be permitted to raise a mixed question of law and fact for the first time in the second appeal, as substantial question of law arising out from the judgements of the courts below.

So far as the second question of law as pressed is concerned, this Court may record that the first appellate court has dealt with the evidence which was led for

establishing the defence. It has considered in detail that the agreement to sell has been executed, on the stamp paper purchased for the purpose. The First Appellate Court, after considering the evidence as borne out from the records, has reversed the finding of fact as recorded by the trial court. The conclusion drawn by the first appellate court are based on appreciation of evidence. No substantial question of law in that regard arises.

In my opinion, no substantial question of law much less a substantial question of law arises in the present second appeal. The present second appeal is accordingly dismissed. Interim order, if any, stands discharged.