
(2013) 05 AHC CK 0403
In the Allahabad High Court
Case No : Second Appeal No. 36 of 2010

Vidhyawati Verma

APPELLANT

Vs

Amita Srivastava and Others

RESPONDENT

Date of Decision : 01-05-2013

Acts Referred:

Citation : (2013) 8 ADJ 750 : (2013) 99 ALR 205 : (2013) 6 AWC 6184

Hon'ble Judges : Sudhir Agarwal, J

Bench : Single Bench

Advocate : Ashok Kumar Singh and Dr. Vinod Kumar Rai, for the Appellant; A.K. Dave, Abhishek Mishra and K.N. Mishra, for the Respondent

Final Decision : Dismissed

Judgement

Sudhir Agarwal, J.—This is a plaintiffs second appeal filed u/s 100 C.P.C. After hearing this appeal under Order 41 Rule 11 C.P.C. this Court formulated following substantial question of law on 30.4.2010:

(i) Whether the transaction regarding sale of house was fair, proper and transparent and defendant respondent No. 1 took advantage of her relationship from the plaintiff, who was mother?

(ii) Whether the factum of sale consideration is proved from the oral and documentary evidence produced before the Court below or the findings in this regard are based on presumption?

(iii) Whether the Courts below have committed illegality in not recording the finding regarding formation of a valid contract and payment of sale consideration?? between the parties?? and the impugned judgments of the Courts below are vitiated on account of misreading of evidence on record.

Sri Ashok Kumar Singh, learned counsel appearing for appellant and Sri K.N. Mishra and Sri A.K. Dave, Advocates for respondents have advanced their submissions on aforesaid questions.

2. To appreciate the above issue, the bare facts necessary for adjudication of aforesaid questions I may refer to the case set up by parties before the Courts below.

3. The plaintiff-appellant, Smt. Vidhyawati Verma instituted Original Suit No. 12 of 2006 in the Court of Civil Judge (Senior Division), Allahabad for cancellation of sale-deed dated 17.11.1997 registered on 16.12.1997 in respect to House No. 1027, G.T.B. Nagar Kareli Scheme, Allahabad and for a decree of injunction and possession.

4. The plaint case set up by her is that she herself was working as Nurse in the medical department under Central Government and retired therefrom in 1992. The disputed house was allotted to her by U.P. Awas Evam Vikas Parishad (hereinafter referred to as the "Parishad") pursuant where to an agreement for sale was executed on 25.3.1980 and possession was delivered to plaintiff on the same day. She paid all the installments/consideration to Parishad, whereafter a sale-deed was executed in her favour on 28.7.1997. The plaintiff initially had two sons and two daughters but her younger son, Raju Verma died in 1994 leaving only one son, Sudhir Verma. The names of her daughters are Reeta Srivastava and Amita Srivastava.

5. Her son Sudhir Verma was married in 1996 and was appointed in Accounts Department of CDA Pension in 1997. He was allotted a Government accommodation and started living therein. Her daughter, Reeta Srivastava is residing with her husband at Preetam Nagar, Allahabad. Her younger daughter, Amita Srivastava, whose husband is an employee in HYDLE Department is also living separately with him. However plaintiff had extra affection to her younger daughter, Amita Srivastava who used to visit and serve her (plaintiff) in various ways. Taking advantage thereof the younger daughter and her husband manipulated and got a forged sale-deed executed on 17.11.1997, registered on 16.12.1997, though no consideration was paid to her. The sale-deed is forged and fictitious.

6. The suit was contested by defendants. Besides, they also lodged a counter claim for execution of sale-deed, alleging that despite and payment of entire consideration, the plaintiff is not delivering possession of disputed house and, therefore, possession thereof be directed to be handed over to them.

7. The Trial Court formulated eleven issues in all but for the purpose of present appeal the issues No. 1, 2 and 3, relevant, are reproduced as under:

1. Whether the sale-deed executed in favour of Amita Srivastava, registered on 22.2.2007, deserves to be cancelled?

2. Whether the building in litigation, particulars whereof have been mentioned at the bottom of the plaint, warrants an order of permanent injunction against the Defendants? If yes, its effect?

3. Whether the building in litigation, particulars whereof have been mentioned at

the bottom of the plaint, warrants a decree for occupancy to be passed in favour of the lady Plaintiff, the eviction of the Defendants from its ground floor rooms and possession thereof to be handed over to the lady Plaintiff?

(English translation by the Court)

8. In respect to issue No. 1 the Trial Court, from the evidence of parties, found that the plaintiff admitted to have visited the office of Sub-Registrar for the purpose of registration. The part payment of consideration was made through cheque and payment thereof credited in the accounts of plaintiff as was found proved by Trial Court. It also found that the plaintiff has signed the instrument of sale and on this aspect also there was no dispute. The witnesses to the sale-deed were also relatives to both parties. DW-2, Sri Umesh Prakash Singh proved the case of defendants. Though the plaintiff set up case of fraud and misrepresentation but could not adduce any evidence whatsoever, except of her oral statement as well as statement of her son Sudhir Verma as PW-1 and PW-3.

9. PW-2, Smt. Vidyawati though claimed to be an independent witness but her deposition also did not support the case of plaintiff. Instead it proved that her relations with son Sudhir Verma were strange and he used not to take care and maintain his mother. The plaintiff denied of having receipt of any amount whatsoever but Rs. 55,000/- in all were paid through three cheques and all were found credited in the bank account of plaintiff which clearly belie her case and prove that she was making a false statement. It is in these facts and circumstances, the Trial Court decided issue No. 1 against plaintiff and in that view of the matter the issues No. 2 and 3 were also decided against her. With respect to possession it found that plaintiff being mother of defendant No. 1 and mother-in-law of defendant No. 2, there was nothing uncommon if there was an agreement between parties that despite sale of disputed house, the plaintiff may continue to stay therein. The suit was consequently dismissed by Trial Court vide judgment and decree dated 24.2.2009 and thereagainst the plaintiffs appeal has been dismissed by Lower Appellate Court giving concurrent findings vide judgment and decree dated 9.10.2009.

10. Learned counsel for the appellant endeavour to show that defendants having failed to produce the passbook of their bank Account No. 17106 of Punjab National Bank of the relevant date and year as was summoned by plaintiff and in respect whereof an order was also passed by Trial Court, it was incumbent upon it to draw an inference against defendant No. 1 that she did not possess requisite funds to make payment as claimed by her and, therefore, there was no evidence that Rs. 40,000/-, i.e., the balance towards consideration was actually paid to plaintiff.

11. It is no doubt that the defendants though were required to produce pass book of bank Account No. 17106 of Punjab National Bank of the year 1997 but the said pass book was not produced. The question would be, whether this very fact, even if an adverse inference is drawn against defendants, would be

sufficient to entitle the plaintiff to have her suit decreed whereby she has sought to cancel sale-deed 17.11.1997.

12. Even if no evidence or no contest is made by defendants still suit straightaway cannot be decreed unless the plaintiff proves its case. The sale-deed in question was sought to be cancelled on the ground of fraud and misrepresentation. It is not a case of Pardanashin lady or illiterate rural folk so as to tilt or shift onus to prove the aforesaid facts upon defendants in view of Section 16(3) of Contract Act. Here the plaintiff is a well educated lady, capable to maintain herself, having served in a Government department and at the time of execution of sale-deed, was a retired employee. The receipt of partial consideration through bank's transaction, credit whereof were shown in plaintiff's bank account was attempted to explain that aforesaid amount was subsequently refunded to defendant No. 1 but this alleged refund, as a matter of fact, has not been proved at all. Rs. 55,000/- through cheques were paid to plaintiff and this fact was found proved through the bank account statement of plaintiff. So far as remaining 40,000/- is concerned, the said amount is said to have been paid at the time of registration. It is not disputed that registered sale-deed contains endorsement of Sub-Registrar about the compliance of requirements of Registration Act, 1908 (hereinafter referred to as the "Act, 1908") as also the statement made before Sub-Registrar that vendor has received consideration money from vendee. Section 60(2) of Act, 1908 also provides a statutory presumption in favour of endorsement made by Sub-Registrar on the registered sale-deed and such statutory presumption can be negated or ignored only when there are cogent and credible evidence to show something otherwise. No such evidence has been adduced before the Courts below and none referred to before this Court. The mere fact that defendants did not adduce pass book of her own bank account, by itself, therefore, would not have turned anything in the case. A suit could have been decreed only if the plaintiff succeeds in proving her/his case and not on the weakness of defence taken by defendants. It is no doubt true that even if no written statement is filed and the defendants have not contested the matter yet the plaintiff is not entitled for decree of suit inasmuch as he/she is under an obligation to prove his/her case and only then he/she can be granted relief and not otherwise.

13. Under Order VIII Rule 10 C.P.C. the Court has been enabled to proceed to deliver a judgment where defendants or one of several defendants have chosen not to contest the suit by filing written statement but it does not mean that plaintiff is absolved from his obligation to prove the case. The procedure prescribed therein is discretionary. In the context of Order VIII Rule 10 C.P.C. the Apex Court has considered the matter in Balraj Taneja and Another Vs. Sunil Madan and Another, and observed:

30. As pointed out earlier, the Court has not to act blindly upon the admission of a fact made by the defendant in his Written Statement nor the Court should proceed to pass judgment blindly merely because a Written Statement has not

been filed by the defendant traversing the facts set out by the plaintiff in the plaint filed in the Court. In a case, specially where a Written Statement has not been filed by the defendant, the Court should be a little cautious in proceeding under Order 8 Rule 10 CPC. Before passing the judgment against the defendant it must see to it that even if the facts set out in the plaint are treated to have been admitted, a judgment could possibly be passed in favour of the plaintiff without requiring him to prove any fact mentioned in the plaint. It is a matter of Court's satisfaction and, therefore, only on being satisfied that there is no fact which need be proved on account of deemed admission, the Court can conveniently pass a judgment against the defendant who has not filed the Written Statement. But if the plaint itself indicates that there are disputed questions of fact involved in the case regarding which two different versions are set out in the plaint itself, it would not be safe for the Court to pass a judgment without requiring the plaintiff to prove the facts so as to settle the factual controversy. Such a case would be covered by the expression "the Court may, in its discretion, require any such fact to be proved" used in Sub-rule (2) of Rule 5 of Order 8, or the expression "may make such order in relation to the suit as it thinks fit" used in Rule 10 of Order 8.

14. The above quote in Balraj Taneja and another (supra), has been followed recently in C.N. Ramappa Gowda Vs. C.C. Chandregowda (Dead) by L.Rs. and Another, , wherein also it has been held that Court is duty bound to adjudicate even in the absence of complete pleadings or in absence of pleadings of one or more party. In para 14 of the judgment, the Court said that effect of nonfiling of written statement and proceeding to try the suit is clearly to expedite disposal of the suit. It is not penal in nature wherein the defendant has to be penalised for non filing of written statement by trying the suit in a mechanical manner by passing a decree. Apex Court reiterated its earlier observations in following words:

....We wish to reiterate that in a case where written statement has not been filed, the Court should be a little more cautious in proceeding under Order 8 Rule 10 CPC and before passing a judgment, it must ensure that even if the facts set out in the plaint are treated to have been admitted, a judgment and decree could not possibly be passed without requiring him to prove the fact pleaded in the plaint. It is only when the Court for recorded reasons is fully satisfied that there is no fact which needs to be proved at the instance of the Plaintiff in view of the deemed admission by the Defendant, the Court can conveniently pass a judgment and decree against the Defendant who has not filed the written statement. But, if the plaint itself indicates that there are disputed questions of fact involved in the case arising from the plaint itself giving rise to two versions, it would not be safe for the Court to record an ex parte judgment without directing the Plaintiff to prove the facts so as to settle the factual controversy. In that event, the ex parte judgment although may appear to have decided the suit expeditiously, it ultimately gives rise to several layers of appeal after appeal which ultimately compounds the delay in finally disposing of the suit giving rise

to multiplicity of proceeding which hardly promotes the cause of speedy trial. However, if the Court is clearly of the view that the Plaintiff's case even without any evidence is prima facie unimpeachable and the Defendant's approach is clearly a dilatory tactic to delay the passing of a decree, it would be justified in appropriate cases to pass even an uncontested decree. What would be the nature of such a case ultimately will have to be left to the wisdom and just exercise of discretion by the trial Court who is seized of the trial of the suit.

15. The above two authorities have been referred to and followed recently by this Court in *Maharaji Kunwar v. Sheo Shanker*, Second Appeal No. 2276 of 1977, decided on 10.4.2013.

16. On behalf of plaintiff reliance has been placed on Apex Court's decisions in *Ishwar Dass Jain (Dead) Thr. Lrs. Vs. Sohan Lal (Dead) By Lrs.*, ; *Rajendra Kumar Vs. State of Rajasthan*, ; and, *Late Sohan Lal and Others Vs. Sabhajeet*, .

17. Having gone through the aforesaid authorities very carefully, I do not find as to how they can advance the case of plaintiff-appellant.

18. In *Ishwar Dass Jain (supra)* a suit was filed for redemption of usufructuary mortgage dated 15.4.1969 and for possession. It was dismissed by Trial Court, Appellate Court as well as High Court. The High Court observed that notwithstanding the fact the defendants executed registered mortgage dated 15.4.1969, the real relationship between parties was that of landlord and tenant and the defendants, thus, could not have been evicted except under Rent Control Law. Before Apex Court one of the question raised, whether there was a substantial question of law arisen from the case so as justify hearing of appeal after issuing notice to respondents-defendants. It was contended that a vital evidence which could have led to a different conclusion was omitted or if inadmissible evidence was relied on which if omitted could have led to a different conclusion, would have given rise to a substantial question of law for the purpose of justifying interference of High Court in appeal u/s 100 C.P.C. even though there are concurrent findings of facts or findings of facts arrived at by Lower Appellate Court. As a proposition of law if the contingencies, as noticed above, exist it would have justified interference by the Second Appellate Court u/s 100 C.P.C. The Apex Court in paras 11 and 12 of the judgment, after relying on its earlier decisions in *Dilbagrai Punjabi Vs. Sharad Chandra*, , *Sundra Naicka Vadiyar (dead) by LRs. and another Vs. Ramaswami Ayyar (dead) by his LRs.*, ; *Mehrunnisa (Smt) and Others Vs. Visham Kumari (Smt) and Another*, ; and, *Sri Chand Gupta Vs. Gulzar Singh and another*, , said:

11. There are two situations in which interference with findings of fact is permissible. The first one is when material or relevant evidence is not considered which, if considered would have led to an opposite conclusion. This principle has been laid down in a series of judgments of this Court in relation to Section 100 CPC after the 1976 amendment.....

12. The second situation in which interference with findings of fact is permissible

is where a finding has, been arrived at by the appellate Court by placing reliance on inadmissible evidence which if it was omitted, an opposite conclusion was possible....

19. Having said so this Court finds that the question of proving a document would have arisen if its execution is denied. That question does not arise in the present case inasmuch as the sale-deed in question was admittedly a registered instrument and it was before the Court. The signature on the registered instrument were not disputed by plaintiff though she tried to explain that the same were obtained by giving her an impression that this is a document of will and not sale-deed, This explanation had to be proved by plaintiff but she failed. This explanation would not result doubting the very existence and factum of execution of instrument but would have justified only a suspicion against such document, if such explanation would have been proved. However, the plaintiff failed to prove this explanation.

20. Then comes the third question, whether an oral evidence is admissible u/s 91(1) of Evidence Act to prove that a document though executed was a sham document. It cannot be doubted that terms and conditions settled in a document cannot be contradicted by oral evidence but the factum about the circumstances in which a document was executed etc., for that purpose oral evidence is admissible. There is no doubt about it and if any authority is required I may refer to the decision in Smt. Gangabai Gilda Vs. Smt. Chhabubai Gandhi, .

21. However, that itself would not result in any benefit to the plaintiff-appellant in the present case for the reason that the oral evidence has been discussed by Trial Court and after discussion it has found that plaintiff has miserably failed to prove her case. The Lower Appellate Court has also recorded a concurrent finding. In the discussion of Courts below about oral evidence adduced by plaintiff-appellant, no illegality, irregularity, inconsistency or perversity has been shown or pointed out. The only thing hammered repeatedly by counsel for plaintiff-appellant is that defendants did not produce her own bank's passbook and, therefore, a conclusive inference should have been drawn in favour of plaintiff to prove her case and the suit ought to have been decreed. This assumption per se is fallacious and misconceived. Therefore, the entire judgment in Ishwar Dass Jain (supra) I find is of no help to plaintiff-appellant at all.

22. Coming to the next authority, i.e., Krishna Mohan Kul @Nani Charon Kul (supra), I find that there also the Court has discussed as to what a substantial question of law would be and upon whom the burden of proof lie with reference to Sections 101, 104 and 111 of Evidence Act. There the Court has very clearly held that the initial burden to prove the case would lie upon plaintiff.

23. The decision of this Court in Late Sohan Lal (supra) also lends no support to plaintiff-appellant inasmuch as if the two circumstances, as discussed above, are satisfied which permits interference with the findings of fact, there is no doubt that u/s 100 CPC this Court can interfere but the moot question is, whether these

circumstances actually exist in a particular case or not. In the present case both these circumstances do not exist at all.

24. In view of above, I answer all the three questions against plaintiff-appellant and hold that the plaintiff not only failed to prove that sale of house was not fair, proper and transparent but also that the defendants-respondents took advantage of their relationship with plaintiff. Similarly, I hold that the factum of sale consideration having been paid to plaintiff stand proved and otherwise case set up by plaintiff, she failed to prove. In the result, the appeal, being devoid of merit, is dismissed with costs throughout.