

(2014) 07 AHC CK 0182

In the Allahabad High Court

Case No : Civil Misc. Writ Petition No. 20807 of 2014

Zahir

APPELLANT

Vs

Shimbhoo

RESPONDENT

Date of Decision : 28-07-2014

Acts Referred:

Evidence Act, 1872 — Section 137, 17, 4, 54, 63

Uttar Pradesh Land Revenue Act, 1901 — Section 34

Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950 — Section 229B

Citation : (2014) 8 ADJ 306

Hon'ble Judges : Ram Surat Ram (Maurya), J

Bench : Single Bench

Advocate : Subhash Kumar and B.D. Mishra, Advocate for the Appellant; M.N. Singh, Ramesh Pundir and S.K. Upadhyay, Advocate for the Respondent

Judgement

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Ram Surat Ram (Maurya), J.—Heard Sri Chaudhary Subhhsh Kumar, assisted by Sri B.D. Mishra, for the petitioner and Sri K.R. Sirohi, Senior Advocate, assisted by Sri Ramesh Pundir, for the contesting respondent-1. This writ petition has been filed against the orders of Sub-Divisional Officer, Dadri, Gautam Budh Nagar, dated 23.6.2006, decreeing Suit No. 5 of 2004 filed by Shimbhoo (respondent-1), Additional Commissioner, dated 27.8.2007, dismissing the appeal of the petitioner and Board of Revenue U.P. dated 30.10.2013, dismissing second appeal of the petitioner, in the proceeding arising out of suit under Section 229-B of U.P. Zamindari Abolition and Land Reforms Act, 1950 (hereinafter referred to as the Act).

2. The dispute between the parties is in respect of land of plots 225 (area 2-17-0 bigha), 226 (area 1-6-0 bigha), 227 (area 2-5-0 bigha), 228 (area 2-1-0 bigha), and 229 (area 0-11-0 bigha), (total area 9-0-0 bighas) of village Salarpur Khader, tahsil Dadri, district Gautam Budh Nagar. Shimbhoo (respondent-1) filed an application under Section 34 of U.P. Land Revenue Act, 1901, for mutation of

his name over the land in dispute, on the basis of registered sale-deed dated 16.7.1975. Tahsildar, by order dated 4.8.1976, allowed the mutation application and directed for recording the name of respondent-1 over the land in dispute. The petitioner and his brothers filed an appeal from the aforesaid order, which was allowed by Sub-Divisional Officer, by order dated 2.3.1979. Respondent-1 filed a revision against the aforesaid order, in which the parties entered into compromise and agreed for recording the name of respondent-1. Additional Commissioner, by his order dated 27.11.1984 submitted reference to Board of Revenue U.P., for allowing the revision in terms of compromise. However, Board of Revenue U.P. by its order dated 6.5.1997, did not accept the compromise and remanded the matter to Additional Commissioner, for deciding the revision on merit. After remand, Additional Commissioner, by order dated 28.2.2000, dismissed the revision

3. Shimbhoo (respondent-1) then filed a suit (registered as Suit No. 5 of 2004) under Section 229-B of the Act, for declaring him as "bhumidhar with transferable right" and for deleting the names of Zahir, Nazir, Shamim and Sagir sons of Aziz from the land in dispute. It has been stated by respondent-1 that land in dispute was originally belonged to Alladiya. After his death, it was inherited by his two sons Aziz and Jan Mohd. Jan Mohd. executed a sale-deed dated 14.7.1969, in respect of his 1/2 share, transferring 1/6 share in favour of Jaggu, Prakash and Mahendra sons of Sarupa and 1/3 share in favour of his sons Shabbir and Kaluwa. Shabbir and Kaluwa executed a sale-deed dated 18.2.1976 of their 1/3 share to Shimbhoo. Jaggu, Prakash and Mahendra sons of Sarupa and Aziz son of Alladiya jointly executed a sale-deed dated 16.7.1975 in respect of remaining share in the land in dispute (i.e. 1/6 share of Jaggu, Prakash and Mahendra sons of Sarupa and 1/2 share of Aziz) in favour of Shimbhoo, thus he had become sole bhumidhar of the land in dispute. Three sons of Aziz signed sale-deed dated 16.7.1975 as witnesses. However, Additional Commissioner, and Sub-Divisional Officer illegally dismissed his mutation application.

4. The petitioner and his brothers (respondents-12 to 14) contested the aforesaid suit and filed their joint written statement. They denied the plaint allegations and stated that Aziz had already sold his 1/2 share through sale-deed dated 18.8.1969 in the land in dispute, alongwith plots 144 (area 0-9-0 bigha), 145 (area 0-18-0 bigha) and 146 (area 0-12-0 bigha) of village Salarpur Khader, in favour of Harsharan, Motiram, Pitam Singh and Jalkesh Singh (respondents-2 to 5) in respect of 1/6 share and in favour of his sons Zahir, Nazir, Shamim and Sagir (the petitioner and respondents 12 to 14) in respect of 1/3 share. Thereafter, their father Aziz has not executed any sale-deed in favour of any one and the sale-deed dated 16.7.1975 relied upon by respondent-1 has been dishonestly procured by committing fraud. The sons of Aziz did not sign the sale-deed dated 16.7.1975 as witnesses. After execution of the sale-deed dated 18.8.1969, Aziz left with no interest in the land in dispute and by sale-deed dated 16.7.1975, no interest could be transferred by him in the land in dispute in favour of respondent-1. On the basis of sale-deed dated 16.7.1975,

respondent-1 could not get possession over the land in dispute. Respondent-1 produced a forged compromise dated 20.11.1984 in the revision arising out of mutation proceeding, before Additional Commissioner, however, it was not accepted by Board of Revenue, U.P. and ultimately his mutation application was dismissed by Additional Commissioner, by order dated 28.2.2000. The contesting defendants, were in possession of 1/2 share of Aziz, on the basis of his sale-deed dated 18.8.1969 as well as on the basis of inheritance.

5. The suit was tried by Sub-Divisional Officer. Respondent-1 examined himself as PW-1, and filed certified copy of sale-deed dated 16.7.1975, apart from other documentary evidence. The petitioner examined himself as DW-1 and one Rashid Khan as DW-2. Sub-Divisional Officer, after hearing the arguments of the parties, by his judgment dated 23.6.2006, held that sale-deed dated 16.7.1975 was signed by sons of Aziz, as witnesses. The sons of Aziz did not file any application for mutation of their names on the basis of sale-deed dated 18.8.1969, over the land in dispute. The petitioner and his brothers could not adduce any evidence to show their possession over the land in dispute. On these findings the suit was decreed and the names of the petitioner and his brothers were directed to be deleted and name of respondent-1 was directed to be recorded over the land in dispute.

6. The petitioner and his brothers filed an appeal (registered as Appeal No. 23 of 2005-06) from the aforesaid decree. The appeal was heard by Additional Commissioner, who by his judgment dated 27.8.2007, held that a perusal of photostat copy of sale-deed dated 16.7.1975 shows that it was signed by Aziz and his sons as such this sale-deed cannot be said to be a forged document. The petitioner and his brothers did not file any application for mutation of their names on the basis of sale-deed dated 18.8.1969, over the land in dispute. On these findings, the appeal was dismissed by judgment dated 27.8.2007.

7. The petitioner alone filed a second appeal (registered as Second Appeal No. 13 of 2007-08) from the aforesaid decree. His three brothers namely respondents-12 to 14, who had signed the sale-deed dated 16.7.1975 as witnesses did not join as the appellant in the second appeal nor filed their separate second appeal. In the second appeal, apart from other grounds, one ground and substantial question of law was raised that the appellant has specifically pleaded that sale-deed dated 16.7.1975 was a forged document but the sale-deed was not filed nor its execution was proved and in the absence of said document, judgment could not be passed in favour of respondent-1, on its basis. The second appeal was heard by Board of Revenue, U.P., who by order dated 30.10.2013, held that certified copy of sale-deed dated 16.7.1975 was filed before Trial Court, which was admitted in evidence. A perusal of sale-deed dated 16.7.1975 shows that it was signed by Aziz and his sons, who were present before Sub-Registrar at the time of registration. The petitioner took plea that sale-deed dated 16.7.1975 was forged document but did not take any step for its cancellation. The petitioner and his brothers did not file any application for

mutation of their names on the basis of sale-deed dated 18.8.1969. Court below have not committed any illegality, in decreeing suit of respondent-1. On these findings, second appeal was dismissed. Hence this writ petition has been filed.

8. The counsel for the petitioner submitted that Aziz had executed a sale-deed dated 18.8.1969 in respect of his 1/2 share in the land in dispute. After execution of sale-deed dated 18.8.1969, Aziz left with no interest in the land in dispute. Sale-deed dated 16.7.1975, so far as, it relate to 1/2 share of Aziz, was null and void. The petitioner specifically pleaded that sale-deed dated 16.7.1975 was forged document and specifically denied its execution. Its due execution was required to be proved, according to the provisions of Section 67 of Evidence Act, 1872. The original sale-deed dated 16.7.1975 was not filed. Grounds for filing secondary evidence as required under Section 65 of Evidence Act, 1872 have not been established as such neither certified copy nor photostat copy of the sale-deed dated 16.7.1975 were admissible in evidence. The sale-deed dated 16.7.1975, being basis of title of the plaintiff-respondent-1 and to presumption under Section 90 (as amended in U.P.) can be raised in respect of its proof. The findings recorded by Courts below, relying upon the sale-deed dated 16.7.1975 are illegal and liable to be set aside. He relied upon the judgments of Supreme Court in *Sital Das Vs. Sant Ram and Others*, , in which it has been held that the language of Section 90 of the Indian Evidence Act requires the production of the particular document in regard to which the Court is invited to make the statutory presumption. If the document produced is a copy, admissible as secondary evidence under Section 65 of the Evidence Act and is produced from proper custody and is over 30 years old, then only the signatures authenticating the copy may be presumed to be genuine; but production of a copy is not sufficient to raise the presumption of the due execution of the original. In this case no foundation was laid for reception of secondary evidence under Section 65 of the Evidence Act, nor can the copy produced be regarded as secondary evidence within the meaning of Section 63. *Kalidindi Venkata Subbaraju and Others Vs. Chintalapati Subbaraju and Others*, , in which it has been held that presumption under Section 90 is available in respect of original document and not in respect of its copy. *H. Siddiqui (dead) by L.Rs. Vs. A. Ramalingam*, , in which it has been held that the provisions of Section 65 of the 1872 Act provide for permitting the parties to adduce secondary evidence. However, such a course is subject to a large number of limitations. In a case where the original documents are not produced at any time, nor has any factual foundation been laid for giving secondary evidence, it is not permissible for the Court to allow a party to adduce secondary evidence. Thus, secondary evidence relating to the contents of a document is inadmissible, until the non-production of the original is accounted for, so as to bring it within one or other of the cases provided for in the section. The secondary evidence must be authenticated by foundational evidence that the alleged copy is in fact a true copy of the original. Mere admission of a document in evidence does not amount to its proof. Therefore, the documentary evidence is required to be proved in accordance with law. The Court has an obligation to

decide the question of admissibility of a document in secondary evidence before making endorsement thereon. Judgment of this Court in *Manjoor Ali and Another Vs. Kishmat Ali and Others*, , in which it has been held that mere production of certified copy of the sale-deed is not sufficient to draw a presumption under Section 90 of the Evidence Act. The plaintiff has to lay the foundation for admission of secondary evidence as required under Section 65 of the Evidence Act, 1872.

9. I have considered the arguments of counsel for the parties and examined the record. Second points raised by the counsel for the petitioner is considered first. In order to appreciate the arguments of the parties, in this respect, relevant provisions of Evidence Act, 1872 are quoted below:

61. Proof of contents of documents.--The contents of documents may be proved either by primary or by secondary evidence.

65. Cases in which secondary evidence relating to documents may be given.--Secondary evidence may be given of the existence, condition or contents of a document in the following cases--

(a) when the original is shown or appears to be in the possession or power--

of the person against whom the document is sought to be proved, or of any person out of reach of, or not subject to, the process of the Court, or

of any person legally bound to produce it,

and when, after the notice mentioned in Section 66, such person does not produce it;

(b) when the existence, condition or contents of the original have been proved to be admitted in writing by the person against whom it is proved or by his representative in interest;

(c) when the original has been destroyed or lost, or when the party offering evidence of its contents cannot, for any other reason not arising from his own default or neglect, produce it in reasonable time;

(d) when the original is of such a nature as not to be easily movable;

(e) when the original is a public document within the meaning of Section 74;

(f) when the original is a document of which a certified copy is permitted by this Act, or by any other law in force in [India], to be given in evidence;

(g) when the originals consist of numerous accounts or other documents which cannot conveniently be examined in Court, and the fact to be proved is the general result of the whole collection.

In cases (a), (c) and (d), any secondary evidence of the contents of the document is admissible.

In case (b), the written admission is admissible.

In case (e) or (f), a certified copy of the document, but no other kind of secondary evidence, is admissible.

In case (g), evidence may be given as to the general result of the documents by any person who has examined them, and who is skilled in the examination of such documents.

67. Proof of signature and handwriting of person alleged to have signed or written document produced--If a document is alleged to be signed or to have been written wholly or in part by any person, the signature or the handwriting of so much of the document as is alleged to be in that person's handwriting must be proved to be in his handwriting.

74. Public documents.--The following documents are public documents--

(1) documents forming the acts or records of the acts--

(i) of the sovereign authority,

(ii) of official bodies and tribunals, and

(iii) of public officers, legislative, judicial and executive, [of any part of India or of the Commonwealth], or of a foreign country;

(2) public records kept [in any State] of private documents.

77. Proof of documents by production of certified copies.--Such certified copies may be produced in proof of the contents of the public documents or parts of the public documents of which they purport to be copies.

90. Presumption as to documents thirty years old--Where any document, purporting or proved to be thirty years old, is produced from any custody which the Court in the particular case considers proper, the Court may presume that the signature and every other part of such document, which purports to be in the handwriting of any particular person, is in that person's handwriting, and, in the case of a document executed or attested, that it was duly executed and attested by the persons by whom it purports to be executed and attested.

Explanation.--Documents are said to be in proper custody if they are in the place in which, and under the care of the person with whom, they would naturally be; but no custody is improper if it is proved to have had a legitimate origin, or if the circumstances of the particular case are such as to render such an origin probable.

This explanation applies also to Section 81.

Illustrations

(a) A has been in possession of landed property for a long time. He produces from his custody deeds relating to the land showing his titles to it. The custody is

proper.

(b) A produces deed relating to landed property of which he is the mortgagee. The mortgagor is in possession. The custody is proper.

(c) A, a connection of B, produces deeds relating to lands in B's possession which were deposited with him by B for safe custody. The custody is proper.

STATE AMENDMENTS

Uttar Pradesh.--In its application to the State of Uttar Pradesh, the existing section shall be renumbered as Section 90(1), and

(a) For the words "thirty years" the words "twenty years" shall be substituted, and

(b) The following shall be inserted thereafter as a new sub-section (2):

"(2) Where any such document as is referred to in sub-section (1) was registered in accordance with the law relating to registration of documents and a duly certified copy thereof is produced, the Court may presume that the signature and every other part of such document which purports to be in the handwriting of any particular person, is in that person's handwriting, and in the case of a document executed or attested, that it was duly executed by the person by whom it purports to have been executed or attested." [Vide U.P. Act 24 of 1954].

10. Under Section 65(f) of the Evidence Act, 1872, when the original is a document of which a certified copy is permitted by this Act, or by any other law in force in India, to be given in evidence, secondary evidence is admissible. A sale-deed is a compulsorily registrable document under Section 17 of the Registration Act, 1908, read with Section 54 of Transfer of Property Act, 1882. Under the provisions of Registration Act, 1908, its record is maintained as such it is a public document within the meaning Section 74(2) of Evidence Act, 1872. Supreme Court in Madamanchi Ramappa and Another Vs. Muthalur Bojjappa, and State of Haryana Vs. Ram Singh, , held that the document in question being a certified copy of a public document need not have been proved by calling a witness. Besides, no objection had been raised about the mode of proof either in the trial Court or in the District Court. This Court in Ved Prakash Rastogi (D) through L.Rs. Vs. Nagar Palika, and in Md. Saimuddin Sheikh Vs. Abejuddin Sheikh, and Hussaini Mhto v. Hulas Mahto, 2006 AIHC 2510, held that certified copy of sale-deed is admissible in evidence. Full Bench of this Court in Ram Jas and Others Vs. Surendra Nath and Another, , held that various sections of the Evidence, 1872 are independent and not exception. If a document is not admissible in any section but is admissible in any section then it can be admitted in that section. Thus certified copy of sale-deed is admissible in evidence under Section 65(f), read with Section 74(2) and Section 90(2) as amended in U.P.

11. Section 137 of Evidence Act, 1872, provides as follows:

167. No new trial for improper admission or rejection of evidence.--The improper

admission or rejection of evidence shall not be ground of itself for a new trial or reversal of any decision in any case, if it shall appear to the Court before which such objection is raised that, independently of the evidence objected to and admitted, there was sufficient evidence to justify the decision, or that, if the rejected evidence had been received, it ought not to have varied the decision.

12. Privy Council in the case of AIR 1943 83 (Privy Council) and Supreme Court in Smt. Dayamathi Bai Vs. Sri K.M. Shaffi, and Shyam Lal @ Kuldeep Vs. Sanjeev Kumar and Others, , held that when the objection to be taken is not that the document is in itself inadmissible but that the mode of proof was irregular, it is essential that the objection should be taken at the trial before the document is marked as an exhibit and admitted to the record. Similarly, in Sarkar on Evidence, 15th Edn., p. 1084, it has been stated that where copies of the documents are admitted without objection in the trial Court, no objection to their admissibility can be taken afterwards in the Court of appeal. When a party gives in evidence a certified copy, without proving the circumstances entitling him to give secondary evidence, objection must be taken at the time of admission and such objection will not be allowed at a later stage.

13. A perusal of the judgment of Trial Court and memorandum of appeal filed before Commissioner show that no objection relating to admissibility of certified copy of sale-deed dated 16.7.1975 was taken by the petitioner and his brothers. It is only in the second appeal filed by the petitioner this objection was raised. In view of Section 137 of the Evidence Act, 1872 as well as aforementioned case law, the petitioner cannot be permitted to raise objection in this respect. Other wise also, Under Section 65(f) read with Section 74(2), certified copy of the sale-deed dated 16.7.1975 was admissible in evidence.

14. So far as presumption under Section 90 of Evidence Act, 1872, as amended in U.P., the presumption is available with regard to the signature of Aziz and his sons on the sale-deed dated 16.7.1975, which purports to be signed by them as executant and witnesses. By virtue of U.P. amendment, such presumption is raised for certified copy of the document, being more than 20 years old. The case law relied by the counsel for the petitioner have no application as it did not deal with law as amended in U.P. There being a statutory presumption, the Courts below have not committed any illegality in raising presumption under Section 4 of Evidence Act, 1872, regarding validity of the registered sale-deed dated 16.7.1975. Admittedly the petitioner could not adduce any evidence to rebut the presumption.

15. So far as, first point raised by the petitioner that after executing the sale-deed dated 18.8.1969, Aziz left with no interest in the land in dispute and subsequent sale-deed dated 16.7.1975 was null and void is concerned, Supreme Court in Vidyadhar v. Manikrao, AIR 1991 SC 1441, held that the definition of sale indicates that in order to constitute a sale, there must be a transfer of ownership from one person to another, i.e., transfer of all rights and interests in the properties which are possessed by that person are transferred by him to

another person. The transferor cannot retain any part of his interest or right in that property or else it would not be a sale. The real test is the intention of the parties. In order to constitute a "sale", the parties must intend to transfer the ownership of the property and they must also intend that the price would be paid either in praesenti or in future. The intention is to be gathered from the recital in the sale-deed, the conduct of the parties and the evidence on record.

16. In this case, in the year, 1969, Aziz and his brother Jan Mohd. initiated a case for their declaration as insolvent, in Civil Court. Therefore, a fake transactions were executed by them. Out of total sale consideration of Rs. 24,000/- Rs. 22,000/- was alleged to be taken earlier. Later on, insolvency proceeding was decided in terms of compromise. The sons of Aziz never applied for mutation of their names over the land in dispute. The name of Aziz continued in the revenue record and Aziz exercised his right over the land in dispute through out and executed sale-deed dated 16.7.1975 claiming himself to be owner. The sale-deed dated 16.7.1975 was countersigned by three major sons Aziz as witnesses. Thus they acknowledged the title of Aziz over the land in dispute. Thus while executing sale-deed dated 18.8.1969, there was no intention to transfer the land in dispute to the petitioner and his brothers and they never acquired title over. Aziz remained owner of the land in dispute and he transferred it to respondent-1 through sale-deed dated 16.7.1975. In view of the aforesaid discussions, I do not find any illegality in the impugned orders of Sub-Divisional Officer, Additional Commissioner and Board of Revenue U.P. and no interference is required in this Court. The writ petition has no merit and is dismissed.