

Smt. Hamida Vs. Smt. Humer and Others

Smt. Hamida Vs. Smt. Humer and Others

SooperKanoon Citation : sooperkanoon.com/455754

Court : Allahabad

Decided On : Aug-06-1992

Reported in : AIR1992All346

Judge : B.L. Yadav, J.

Acts : [Registration Act, 1908](#) - Sections 17, 17(1) and 49; [Transfer of Property Act, 1882](#) - Sections 53A; [Evidence Act, 1872](#) - Sections 73; [Code of Civil Procedure \(CPC\), 1908](#) - Sections 100

Appeal No. : S.A. No. 1715 of 1981

Appellant : Smt. Hamida

Respondent : Smt. Humer and Others

Advocate for Def. : B.N. Asthana, Adv.

Advocate for Pet/Ap. : Haji Iqbal Ahmad, ;S.M. Chaturvedi, ;B.D. Madhyan, ;Satish Chandra Srivastava and ;A.N. Bhargava, Adv.

Judgement :

ORDER

1. This is the plaintiff's Second Appeal under Section 100 of the Code of Civil Procedure, 1908, (for short the Code), in a suit for permanent injunction restraining the defendant respondents from interfering with peaceful possession of the plaintiff

over plot No. 103 measuring 0.72 acre situated in village Tanda, Tahsil Suar, district Rampur.

2. The case of the plaintiff appellant was that she is the Bhumidhar in possession on the basis of sale deed dated 7-8-1969 executed by Smt. Fatma in her favour. She has constructed a pucca/ house on a part of it and has laid foundation on a different part and remaining part of the land is used for agricultural purpose. The plaintiff is in exclusive possession, but the defendants, without any right are trying to interfere with her possession. Hence the suit was filed.

3. The defence was total denial of the plaintiff's allegations. It was alleged that the plaintiff was not in possession. The land was valued more than Rs. one lakh. A deed was executed on 22-3-75 by the plaintiff in favour of defendants. The plaintiff had put her thumb impression on the same. There was another admission of plaintiff dated 4-9-78; and that the sale deed in favour of plaintiff dated 7-8-1969 was fraudulent and that the plaintiff has no title and the defendants were entitled to protect their possession.

4. The trial court decreed the suit holding that on the basis of documentary evidence, including extracts of Khasra and Khatauni, Exts. 2 and 3, land revenue receipts statements of P. Ws. particularly P.Ws. Bheem Sen and Bhagwan Das and the Handwriting and Finger Print Expert examined in support of plaintiff's case, her title and possession was proved. Surprisingly enough the defendants respondents did not cross-examine the witnesses examined by the plaintiff. The statements of P.Ws thus remained unchallenged. The sale deed dated 7-8-69 in favour of plaintiff was held to be legal and was proved according to law; and that the execution of deed of agreement dated 22-3-75 in favour of defendants was not proved; and that the defence witnesses were unreliable; that the agreement deed dated 22-3-75 in favour of defendants was not registered, hence it could not be read in evidence in view of Section 17 of the Indian Registration Act, (for short the Act), and the alleged agreements (Papers 123-Ga, 124-and 125-Ga) were fictitious and fabricated.

5. The defendants preferred appeal before the lower appellate court, which was allowed by judgment and decree dated 22-5-81. The present appeal has been filed

by the plaintiff against the decree of the lower appellate court.

6. Sri A. N. Bhargava, learned counsel for the appellant urged that the documents pertaining to agreements dated 22-3-75 (papers 123-Ga, 124 and 125-Ba) were not registered, even though they purported or operated to create, declare, assign, limit or extinguish the title or interest and the value of property was more than Rs. 100/-, hence unless it was registered under Section 17 of the Act, the same could not be read in evidence, and the defendants were not entitled to the protection of Section 53A of the Transfer of Property Act, and that the documents in their favour was not proved, nor the same was in the form of contract as contemplated by Section 53A of the Transfer of Property Act and the findings about possession recorded by the lower appellate court were based on no evidence and that the lower appellate court could not act as an expert for comparing the thumb impression of the plaintiff appellant over the sale deed and other documents including the agreement, particularly when the trial court relied upon oral evidence, and lower appellate court without any justification or sufficient cause, interfered with the appraisal of oral evidence made by the trial court.

7. Sri B. N. Asthana, learned counsel for respondents, on the other hand, urged that the agreements deeds (papers 123-Ga, 124-Ga and 125-Ga), dated 22-3-75, even though not registered as required by Section 17 of the Act, could be read in evidence for collateral purposes and the defendants were entitled to the benefit of Section 53A of the Transfer of Property Act, and the findings about possession were based on evidence and the suit and appeal were liable to be dismissed.

8. Heard learned counsel for the parties. Before considering the scope of Section 17(1)(b) of the Act Section 53A of the Transfer of Property Act, what is material is the purpose of registration. Section 17, no doubt, was a disabling Section, it must be strictly construed and unless the document was brought within the ambit of the section itself, non-registration could be no bar of its being admitted in evidence. The purpose of registration is to secure that every person dealing with property may rely with confidence on the statement contained in the Register of registration as full and complete account of all transaction by which title may be effected. In the present case, I am conscious while interpreting Section 17 of the Act that it

contains a disabling provision. But in any view of the matter, as the trial court has considered the evidence of witnesses, and even the statements of P.Ws Bheem Sen and Bhagwan Das examined in support of plaintiffs case were not cross-examined, and the thumb impression of plaintiff appellant was held not to be proved on the alleged document dated 22-3-75. The statement of P. W. 7 Mohd. Tagi, who was attesting witness, was considered in detail, who stated as to how his signature as an attesting witness was obtained. But this fact has not been considered by the lower appellate court. The statement of Mst. Hameeda was also considered by the trial court and she denied her thumb impression. P.W. 6 R. P. Sinha was examined as Handwriting Expert, who stated that the thumb impression of Mst. Hameeda alleged to be on the aforesaid document was totally different and the statement of Prakash Kumar Goel, D. W. 3 examined on behalf of defendant respondents was held to be totally insufficient and unreliable. But the lower appellate court did not consider the statement of P.Ws. relied upon by the trial court. It totally forgot to take into consideration that where the appellate court considers an issue pertaining to oral statement, it must bear in mind that it does not enjoy advantage, the trial court had, in watching the demeanour of witnesses and unless it is of the view that some special feature of the statement of witnesses, had escaped the attention of the trial court, in other words, unless it has to consider the manner in which the witnesses gave their testimony, the proposition made by the trial court must be permitted to prevail and the findings rendered by the trial court must be left to be operative as final. (See *Madhusudan Das v. Smt. Naraini Bai* : [1983]1SCR851 *Sara Veeraswamy v. T. Talluri Narayya*).

9. A perusal of the judgment of the trial court would indicate that the trial court has paid attention to appreciate the oral evidence in detail, but the lower appellate court, without considering these statements, have just arrived at a conclusion (without considering the statement of witnesses of PWs Bheem sen including the PW Smt. Hameeda, who was not even cross-examined), that the plaintiff was not in possession, rather the defendants were in possession. The findings recorded by the lower appellate court about the thumb impression of Smt. Hameeda on the deeds of agreement, and possession of defendants was just based on surmises and conjectures and without considering the oral evidence and principles of its

appreciation.

10. As regards the purpose of registration, in the present case the sale deed in favour of plaintiff dated 7-8-69 was legal. The name of plaintiff-appellant was entered in revenue papers as Bhumidhar. In case the defendants wanted, they could have filed a suit for cancellation of the sale deed or rectification of instrument. But they failed to do so. That also should have been done within three years from the date of sale. But that was not done. Now it is too late in the day to challenge the registered sale deed in favour of plaintiff appellant.

11. The defendants, on the other hand, take shelter of Section 17 read with section 49 of the Act. As held above, the defendants were not in possession as I am in agreement with the discussion of oral evidence made by the trial court. Without holding that any special feature of the plaintiffs witnesses and their statement escaped the attention of the trial court, the lower appellate court could not assume otherwise, even without reverting to their statements.

12. The specific provision of Section 17 cannot be ignored on one pretext or the other. Where by a document some rights, title or interest were sought to be created and the property was more than of value of Rs. 100/-the document must have been compulsorily Registered as provided under Section 17(i)(b) of the Act, But the same was not done. There was no question of using the documents (papers 123GA 124 GA and 125 Ga) the deeds of agreement for any collateral purposes, as except an area of 18 acre, the entire land purchased by the plaintiff appellant was sought to be given by the aforesaid document.

13. In *Lachman Das v. Ram Lal* : [1989]2SCR250 their Lordships of the Supreme Court considering the scope of sections 17 & 49 of the Act, have held that whereby a document not merely a declaration of the preexisting right was made but creation of new right of the parties was made in that event of section 17 enjoins registration wherever the deed purports or operates to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest of the value of Rs. 100/- or upwards in immovable property.

14. In the aforesaid case of Lachhman Das, their Lordships of the Supreme Court have considered in detail the effect of sections 17 and 49 conjunctively, and held that in case the document was intended, or purports or operates to create, declare, assign, limit or extinguish, either in present or in future, right, title or interest of the property of more than Rs. 100/- registration was compulsory, otherwise it could not be read in evidence and was of no consequence in law. Applying this dictum to the present case, I am of the view that the lower appellate court erred' in not correctly interpreting section 17 of the Act. The agreement deeds dated 22-3-75 did not seek the declaration of pre-existing rights, rather it created new rights in favour of defendant respondents. It was evident by perusal of these, documents. The lower appellate court did not refer to the details and different aspects of oral evidence, particularly those discussed by the trial court. The plaintiffs witnesses and DWs were examined before the trial court, which had the advantage of watching and noticing the demeanour of witnesses. Unless the lower appellate court states as to which special feature of statement of witnesses has escaped the attention of the trial court, it shall not be justified in disbelieving the statement of PWs. The lower appellate court committed error in disbelieving the statements of PWs. As the agreement dated 22-3-75 purports to create new rights and not merely a declaration of pre-existing rights, hence its registration in view of Section 17 was inoperative.

15. Reverting to the question as to whether the respondents were entitled to the benefit of Section 53A of the Transfer of Property Act, suffice it to say that section 53A contains equitable doctrine of part performance. The doctrine was to the effect that equity considers of that as done which ought to have been done. To put it differently, equity will consider the subject matter of contract as to its consequences in the same manner as if the Act contemplated and contract has been completely executed. But before this doctrine could be applied the intendment of legislature must be complied with, inasmuch as there must be contract to transfer immovable property for consideration. It must be signed by or on behalf of the transferor, the terms of the same ought to be ascertained with reasonable certainty from the document itself and the transferee ought to be put in possession and in case he has already been put in possession, he must continue in possession and he must have done some act in furtherance of the contract and

also the transferee must have performed or must be willing to perform his part of contract. In case these conditions are fulfilled, the transferor or any person claiming under him is debarred from enforcing against the transferee and the persons claiming under him, any right in respect of such property.

16. In the present case, however, these conditions were not fulfilled. Further it was also not proved to have been executed by the plaintiff appellant, inasmuch as she has denied her signature over the same, Even the handwriting expert who was examined, deposed and gave his opinion that the thumb impression of the plaintiff appellant alleged to have been on the aforesaid documents' was entirely different than the genuine thumb impression of the plaintiff appellant. The trial Court relied upon the same, but the lower appellate court without referring to the statement including the uncontroversed oral evidence erred in holding otherwise. The lower appellate court could not act as a handwriting expert. No doubt the opinion given by the hand writing expert has to be considered in the light of other evidence by referring to his power under Section 73 of the Evidence Act. Under Section 73 of the Evidence Act no such absolute power was given to the court to act as handwriting expert. I am accordingly of the view that the lower appellate court was not justified in holding that the document dated 22-3-75 bears the thumb impression of the plaintiff appellant.

17. The next question is as to whether the appeal involves substantial question of law as required by Section 100 of the Code of Civil Procedure. The correct interpretation of Sections 17 and 49 of the Act coupled with the point that as to whether the lower appellate court could act as handwriting expert, and whether the lower appellate court could set aside the findings of the trial court which were rendered by it after appreciation of oral evidence without holding that the trial court has escaped certain special features of the witnesses, which could have been taken into account, are certainly the substantial questions of law, which justify interference by this court under Section 100 of the Code.

18. In view of the premises aforesaid and applying the principles of Aristolalean and Baconian reasonings, the present appeal succeeds and is allowed. The judgment and decree dated 22-5-81 passed by the lower appellate court is set

aside and that of the trial court is restored. The suit is decreed with costs throughout.

19. Appeal allowed.

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com