

Pushp Raj Vs. Manga Ram @ Mangilal

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Court : Rajasthan

Decided On : Sep-10-2009

Reported in : 2009(3)WLN594

Judge : Gopal Krishan Vyas, J.

Appellant : Pushp Raj

Respondent : Manga Ram @ Mangilal

Disposition : Appeal dismissed

Judgement :

Gopal Krishan Vyas, J.

1. In this second appeal filed under Section 100, C.P.C., the appellant-plaintiff is challenging the judgment and decree dated 28.05.1992 passed by the District Judge, Balotra in Civil Appeal No. 10/87, whereby, the learned first appellate Court reversed the judgment and decree dated 05.08.1987 passed by the Civil Judge, Balotra in Civil Suit No. 20/83 and dismissed the suit with cost.

2. Brief facts of the case are that a suit for specific performance of contract was filed by the appellant-plaintiff before the Civil Judge, Barmer (Camp Balotra), in which, it is stated that he is adopted son of late Keshari Mal Oswal who died on 19.06.1981 and, during his life-time, respondent Manga Ram @ Mangilal executed

an agreement to sell his share of khatedari land and, for the same, sale consideration of Rs. 7,000/- was fixed, out of which, Rs. 6,000/- were paid by late Kesharimal on 21.12.1979 and rest of the amount i.e., Rs. 1,000/- was agreed to be paid at the time of registry of the sale-deed.

3. In the suit, it is specifically stated that father of respondent Mangaram, Budhaji was having agricultural land and, in the suit for partition, in all, 29 and a half bigha and 2 biswa land was to come to the share of the respondent and said suit for partition was decided on 18.02.1980 after execution of the aforesaid agreement on 21.12.1979.

4. As per appellant-plaintiff, he was ready and willing to pay the rest of the amount but, inspite of demanding to execute the sale-deed, respondent-defendant refused to execute the sale-deed in his favour. It is also stated that after partition, the land in question was also mutated in the name of the respondent situated in village Jasol.

5. After death of his father, appellant-plaintiff preferred suit being adopted son of late Kesharimal Oswal, in which, it is prayed that respondent-defendant may be directed to execute the sale-deed in his favour in pursuance of the agreement to sale of the land executed on 21.12.1979.

6. Before the trial Court, after issuing notice, reply was filed by the respondent-defendant and all the averments made in the plaint were denied and only assertion was made that there was transaction between late Kesharimal and defendant and some amount was due and, for the said purpose, a document was written upon which probably his thumb impression was got by the father of the plaintiff. It is also alleged in the reply that the land in question was already mortgaged with the Bhoomi Vikas Bank, therefore, by fraud, if any thumb impression is obtained, then, he has no knowledge because prior to decree for partition the land was undivided land for which no agreement was to be executed, therefore, while denying the agreement, reply was filed by the defendant before the trial Court.

7. Learned trial Court after framing six issues recorded oral evidence from both the sides, in which, P.W.-1 Pushpraj, P.W.-2 Champalal, P.W.-3 Narayan Das were

examined from the side of the plaintiff; and, in defence, evidence of D.W.-1 Mangilal was recorded. Learned trial Court after taking into consideration the evidence on record decreed the suit in favour of the appellant-plaintiff and directed the defendant-respondent that he shall execute the sale-deed in favour of the plaintiff in pursuance of the said agreement arrived at in between late father of the plaintiff, Kesharimal and defendant and, further, appellant-plaintiff was directed to deposit remaining amount of Rs. 1,000/- and defendant-respondent was directed to give possession and all the documents to the plaintiff.

8. Against the said judgment and decree passed by the learned Civil Judge, first appeal was preferred before the learned District Judge, Balotra. The learned District Judge, Balotra after hearing both the parties, reversed the judgment and decree passed by the trial Court and set aside the judgment and decree dated 05.08.1987 passed in Civil Suit No. 20/83 and further passed decree for dismissal of the suit filed before the trial Court, against which, this second appeal is preferred by the appellant.

9. While attacking the finding of the learned lower appellate Court, learned Counsel for the appellant vehemently argued that the judgment of the trial Court was perfectly in consonance with the provisions of law and, so also, based on consideration of the entire pleadings and evidence adduced by both the parties in right perspective; but, the learned lower appellate Court reversed the finding of the trial Court which is perverse and finding of the lower appellate Court is based upon ignorance of material evidence.

10. Further, it is argued by learned Counsel for the appellant that the learned first appellate Court while passing the impugned judgment and decree proceeded in its own manner and style. Hence, the judgment of the lower appellate Court is hit by Order XLI Rule 31, C.P.C., therefore, while admitting the appeal, substantial question of law was framed whether judgment and decree passed by the first appellate Court is in violation of the mandatory provisions of Order XLI Rule 31, C.P.C. As per learned Counsel for the appellant, the impugned judgment is not in conformity with Order XLI Rule 31, C.P.C. Therefore, the judgment of the lower appellate Court deserves to be set aside.

11. It is further argued that with regard to second substantial question of law formulated by this Court, it is submitted that the most important document which is agreement, Ex.-2 and its admissibility viz-a-viz statement of plaintiffs witness Narayan Das, P.W.-3, it is clear that defendant Mangilal was examined in the Court as D.W.-1 and he clearly admitted the document while saying that, ^esjk vWaxqBk dHkh fy;k gksxk rks /;ku ughA^^. In this view of the matter, the learned lower appellate Court committed gross error while reversing the finding upon the admissibility of document Ex.-2, agreement. Learned Counsel for the appellant argues that the existence of the document stands proved by cogent evidence of P.W.-3 Narayan Das while giving oral evidence.

12. It is further argued by learned Counsel for the appellant that the appellant does not claim that he is eye-witness of the agreement Ex.-2 as it was executed by the defendant-respondent in favour of the appellant's deceased father; but, the scribe of the document P.W.-3 Narayan Das has clearly proved not only the document but signature of the defendant-respondent and also testified the correctness of the agreement so signed in his presence. Therefore, the learned lower appellate Court has committed error while discrediting the testimony of such trustworthy witness. It is also argued by learned Counsel for the appellant that learned lower appellate Court discarded the statement of P.W.-3 Narayan Das by spelling out irrelevant circumstances and considerations against document Ex.-2 which were neither pleaded in the written statement nor argued before the trial Court so much so that even in the memo of appeal before the learned lower appellate Court it was not raised nor argued before the Court.

13. While inviting attention towards para 16 of the judgment, it is submitted that the whole thrust of the appellate Court is that the front page of the document bears thumb mark of the defendant while the endorsement of stamp vendor about sale of stamp bears signature of the purchaser, therefore, it has been assumed that he did not purchase the stamp and as such the document is not proved. It is strange that this contention is not raised at any time in presence of the appellant. If, at all, this contention would have been raised the appellant would have clearly established that the respondent is literate person inasmuch as he executed a mortgage-deed with respect to the land in favour of the Land Development Bank

which bears signature of the respondent. Likewise, despite the suit having been decreed, the respondent has executed a sale-deed in favour of one Devi s/o Sita Ram ji Purohit on 12.03.1991 through registered sale-deed. Copies of the sale-deed and mortgage-deed were filed along with application filed under Order XLI Rule 27, C.P.C., therefore, the finding recorded by the learned first appellate Court is wholly bad.

14. It is further argued that so far as the finding about non-production of Nemichand is concerned, that is wholly irrelevant in view of the fact that statement of P.W.-3 Narayan Das, scribe of the document. Another reason given by the learned Court below for reversing the finding is that the appellant should have got compared the thumb mark of the defendant on document Ex.-2 by hand-writing expert. It is submitted that the observation of the lower appellate Court is wholly bad for the reason that since an eyewitness was available and was examined by the appellant before the Court, therefore, in view of the production of best evidence who has seen the defendant put his thumb mark on the agreement Ex.-2, it was unnecessary to have the document examined by an expert.

15. While inviting attention towards certain documents filed along with application under Order XLI Rule 27, C.P.C. in this appeal, it is submitted that in order to clear all doubts, the document can be perused, in which, it is revealed that respondent executed the sale-deed during the pendency of the appeal under his own signature as contra-distinguished from thumb-mark. It is all the more necessary that even now the appellant may be permitted to have the document Ex.-2 examined by some hand-writing expert for verification of the thumb-mark of the respondent-defendant by way of additional evidence.

16. Further, it is argued that factum of respondent being literate came to light with certainty only during the pendency of appeal when respondent executed the sale-deed in the year 1991. In this view of the matter, it is submitted that the lower appellate Court has granted unwarranted sympathy without examining the finding of the learned trial Court which is based upon cogent evidence. The denial of execution of Ex.-2 by respondent is not trustworthy because he is admitting the thumb-impression but is saying that those thumb-impressions were not given for

agreement to sale but may be obtained during the transactions by late Kesarimal, father of the appellant; but, this fact is totally wrong and not based upon any cogent material on record, therefore, the question formulated by this Court in the present second appeal with regard to document Ex.-2 is required to be answered in favour of the appellant and this second appeal deserves to be allowed.

17. None appeared on behalf of the respondent-defendant despite service in this case.

18. I have gone through the entire pleadings and, so also, record of the case.

19. At the time of admitting this second appeal on 27.08.1992, following substantial questions were framed by the co-ordinate Bench of this Court:

(i) Whether the impugned judgment is in violation of the mandatory provisions of order 41 rule 31 C.P.C.?

(ii) Whether the statement of the defendant as D.W.-1 does not amount to denial of Exhibit-2 and therefore the plaintiff's evidence specially PW-3 with respect to Exhibit-2 remains unrebutted and the suit could not be dismissed?

20. With regard to question No. 1, it is worthwhile to consider the provisions of Order XLI Rule 31 of the Code of Civil Procedure which run as follows:

31. Contents, date and signature of judgment.-The judgment of the Appellate Court shall be in writing and shall state-

(a) the points for determination;

(b) the decision thereon;

(c) the reasons for the decision; and

(d) where the decree appealed from is reversed or varied, the relief to which the appellant is entitled, and shall at the time that it is pronounced be signed and dated by the Judge or by the Judges concurring therein.

21. Upon perusal of the above provision, it is obvious that as per Order XLI Rule 31, C.P.C. the judgment of the appellate Court must be on the points for determination, decision thereon, reasons for the decision and where decree appealed from is reversed or varied, the relief to which the appellant is entitled.

22. I have perused the impugned judgment passed by the learned lower appellate Court. In my opinion, the lower appellate Court has considered all aspects of the matter and, more specifically, scanned the evidence of Ex.-2 to do justice. In this case, the bone of contention of the appellant-plaintiff is that there was an agreement executed by respondent-defendant in favour of his late father Kesarimal Oswal in the year 1979, whereby, it was agreed that he will execute the sale-deed and agreed to sell his share in the agriculture land of his father. At that time, partition suit was pending and, admittedly, during the pendency of the partition suit which was ultimately decreed and share of the defendant was declared, alleged document was executed. Though the learned trial Court did not scan the document Ex.-2 but, upon perusal of the document by the appellate Court, it is revealed that for so called agreement, stamp papers of Rs. 3/- and Rs. 2/- were purchased. On the back of the stamps, there is information with regard to purchaser of the stamp, so also, the purpose for which stamp was purchased and who has purchased the stamps.

23. Learned lower appellate Court gave finding that upon perusal of the original agreement Ex.-2, it is revealed that stamp was purchased in the name of Mangilal s/o Budhaji for the purpose of agreement for money and not for sale and it bears signature of Mangilal; but, it is very strange that upon the agreement on the stamp it bears thumb-impression of Mangilal. In my opinion, the learned lower appellate Court has scanned the said document to do justice and it is evident from perusal of Ex.-2 that admittedly the said stamp was purchased under signature of one Mangilal for the purpose of agreement for money and not for sale; meaning thereby, the stamp which is said to be agreement for sale was not purchased for the purpose of transaction of money and, that, too, it bears signature of Mangilal whereas upon the document thumb-impression of Mangilal was taken by late Kesarimal. This fact speaks that assertion of respondent-defendant that some body has obtained his thumb-impression finds strength because this fact is

established from the perusal of the document.

24. It is very relevant to observe here that before the Court when statement of the defendant was recorded that he gave his thumb-impression but no cross-question was put to him by the appellant-plaintiff with regard to the fact that he is literate and also competent to give signature. In this view of the matter, now, at this stage, the appellant-plaintiff is raising voice that Mangilal was literate and competent to give signature. In fact, the case of the appellant-plaintiff fails only on the ground that so called stamps were admittedly purchased for transactions of money and not for sale and if the stamps were purchased for agreement for money transaction, then, obviously no agreement for sale can be written upon the statement, therefore, even if the contention of the appellant is accepted that Mangilal was literate and he has purchased the stamp. The fact of exhibiting the sale-deed is not established because the so called stamp upon which the alleged sale-deed Ex.-2 was written was purchased for the purpose of money transaction and not for agreement for sale. Judgment of the learned lower appellate Court does not violate the provisions of Order XLI Rule 31, C.P.C. because the judgment is elaborate bearing all reasons for adjudication made, therefore, question No. 1 with regard to Order XLI Rule 31 for violation is hereby answered in negative. It is held that the judgment is well reasoned and based upon sound ground.

25. For the reasons mentioned above, the second question is also answered in the negative and it is held that statement of the defendant as D.W.-1 amounts to denial of document Ex.-2 because Ex.-2 alleged agreement to sale cannot be termed as a legal document so as to get decree for specific performance of the agreement. In this view of the matter, there is no force in this second appeal.

26. This appeal is, therefore, accordingly dismissed.