

Shiv Ram Vs. Thakar Dutt

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Court : Himachal Pradesh

Decided On : Sep-14-1972

Reported in : AIR1973HP62

Judge : R.S. Pathak, C.J.

Acts : [Code of Civil Procedure \(CPC\) , 1908](#) - Order 13, Rule 4; ;[Evidence Act, 1872](#) - Section 45; ;[Registration Act, 1908](#) - Section 17(1)

Appeal No. : Second Appeal No. 5 of 1960

Appellant : Shiv Ram

Respondent : Thakar Dutt

Advocate for Def. : R.K. Gupta and; D. Gupta, Advs.

Advocate for Pet/Ap. : A.C. Sud and; K.D. Sud, Advs.

Disposition : Appeal dismissed

Judgement :

K.S. Pathak, C.J.

1. This is a defendants' appeal arising out of a suit for a declaration of the plaintiffs' share in joint property.

2. One Unchab had four sons. Kesru, Bahau alias Gobind Ram, Musaddi and Chaudhry who were owners of the land in dispute. Upon the death of Kesru his share in the land was mutated in the name of his three sons Anant Ram (defendant No. 11) Thakar Dutt (plaintiff), and Shiv Ram (defendant No. 12). Bahau died without issue and his share was mutated in the names of his brothers. Musaddi and Chaudhry and the sons of his deceased brother, Keshri. Chaudhry died, and his share was mutated in favour of his widow, sons and daughters who are defendants nos. 1 to 10. Musaddi also died without issue. He had gifted his share to defendant no. 1. The plaintiff alleged that he was entitled to 9/24 share in the entire land on the basis that Bahau had appointed him his heir and also that the gift by Musaddi in favour of defendant no. 1 was invalid.

3. The trial court held that the gift by Musaddi in favour of Sita Ram could not be assailed. It also held that the plaintiff was entitled to the entire interest of Bahau in the land. Accordingly, it granted a declaration that the shares of the parties were as follows:--

Plaintiff40/120
Defendant No. 1.33/120
Defendants 2 to 10
.....3/120 each
Defendant No. 11.10/120
Defendant No. 12.
.....10/120

An appeal was filed against that decree by some of the defendants but the appeal has been dismissed by the learned District Judge. Mahasu. And now this second appeal has been preferred by the defendants.

4. As before the lower appellate court, the only contention raised before me is that the document (marked 'X') which purports to have been executed by Bahau in favour of the plaintiff cannot be taken into account and therefore the lower appellate court erred in declaring that the plaintiff was entitled to a 40/120 share in the land. The document is challenged on a number of grounds.

5. It is urged that no endorsement was made by the trial court on the document as required under Order 13 rule 4 of the Code of Civil Procedure and it should not have been considered at all in evidence. Order 13 Rule 4 of the Code requires that a document which has been admitted in Evidence should bear an endorsement by

the Judge as to the number and title of the suit, the name of the person producing the document, the date on which it was Produced and a statement of its having been so admitted. It is submitted by learned counsel for the appellants that a document is admitted when the Judge makes an endorsement of admission thereon, and as there is no such endorsement the document cannot be considered to have been admitted in evidence. In my opinion, the contention is without substance. It is not correct to say that the endorsement by the Judge brings about the admission of the document. On the contrary, as is plain from Order 13 Rule 4. the endorsement presupposes that the document has already been admitted in evidence. The document must first be admitted in evidence and then follows the endorsement under Order 13 rule 4. See *Gopal Dass v. Sri Thakurji* AIR 1943 PC 83; *Mukhi Ram v. Firm Kamta Prasad Balam Das*, AIR 1937 Pat 222; *Pitamber Das v. Raimata Shanti Devi*, AIR 1957 Him Pra 23 and (*Mishrimal v. District Cooperative Growers' Association Ltd. Balaghat*) AIR 1961 Madh Pra 6. Learned counsel refers to *Sadik Husain v. Hashim AH* AIR 1916 PC 27. In that case, the Privy Council merely deprecated the failure of the presiding Judge to comply with the provisions of Order 13 rule 4 to endorse in his own hand that a document was proved against or admitted by the person against whom it was used. The Judicial Committee did not hold that in the absence of the endorsement contemplated by Order 13 rule 4 the documents before it could not be treated as having been admitted in evidence. They did observe that they would refuse to read or permit to be read or used any document not endorsed in the manner required. but that was, as the Judicial Committee clearly stated, 'with a view to insisting on the observance of the wholesome provisions of the statutes.'

6. Reference has also been made to *Kolli Eranna v- Bellamkonda Thim-maiah*. AIR 1966 Andh Pra 184. There also the question was whether the document under consideration had been admitted in evidence. The Court referred to the absence of the endorsement required by Order 13 rule 4 and also other evidence on the record to show that the document had not in fact been admitted in evidence. The learned Judges did not lay down that the endorsement contemplated by Order 13 rule 4 has the effect of admitting the document. On the contrary they considered the presence of such an endorsement as evidence merely that the document had been admitted in evidence. The next casp placed

before me is Prithi Rai v. Hans Rai. (1969) 71 Pun LR 177 = (AIR 1969 Puni 256). It was held by the learned Judge in that case that when a document is exhibited, the particulars mentioned in Order 13 rule 4 of the Code have to be endorsed on the said document and if that has not been done it cannot be said that the document was exhibited in accordance with law, Finally reliance is placed on. Imam-ud-Din v. Sri Ram Perbhu Dial. AIR 1928 Lah 142. In that case also it was not laid down by the learned Judges that the omission to make the endorsement required by Order 13 rule 4 must be regarded as precluding the consideration of the document from evidence.

7. In the Present case, an objection was raised to the admissibility of the document before the trial court, and the trial court after considering the evidence on the record including the 'oral testimony of a number of witnesses, came to the conclusion that the document was duly proved and was admissible in evidence, and accordingly it directed the document be marked Ex. P-X. In my opinion the first contention raised by learned counsel for the appellants has no force and must be rejected.

8. The second ground urged by learned counsel is that the document is not a genuine document. A number of circumstances have been adverted to. It is said that it is a fabricated document and reference has been made to the circumstance that in the list of 'reliance' it is entered in ink different from that in which the other documents have been referred to. Then it is said that in the statement before the revenue authorities Anant Ram did not refer to that document at all while in the statement of Thakar Datt it is mentioned that a gift was made to him. A number of other circumstances have also been alluded to showing that the document should ordinarily have been produced on different occasions but was not produced, and therefore it should be held that the document was prepared for the purposes of the suit only and cannot be regarded as genuine. After hearing learned counsel at length and upon a consideration of the material on the record I am unable to hold that the finding of the courts below is erroneous that the document is a genuine document. It is also stated that an oral prayer was made to the lower appellate court for referring the document to an expert for an opinion as to its genuineness. It seems that the prayer was made orally during arguments, and it was rejected

orally. A complaint has been made of this in one of the grounds in the memorandum of appeal. It seems to me that little regard can be paid to this when no application was made making out a case for referring the document to an expert. A request made in passing during arguments before the court that the document should be referred to an expert cannot be treated with the same regard as a proper application setting out the facts and grounds upon which that prayer is made. Accordingly. I would affirm the findings of the courts below as to the genuineness of the document marked 'X'.

9. The last ground put forward by learned counsel for the appellants is that the document was compulsorily registrable under the Indian Registration Act. and no effect can be given to it as it was not registered. It is urged that the document is a gift deed inasmuch as it purports to transfer in praesenti the interest of Bhau in favour of the plaintiff. Section 17 (1) (a) of the Indian Registration Act provides for the compulsory registration of instruments of gift of immovable property. There is nothing to show that the terms of the document create a gift. All that it says is that Bhau sets down in writing that all his property should devolve on Thakar Datt. There is a further recital that he would not change his mind in that regard. This demonstrates that there was no transfer of interest in praesenti because if that was so there would have been no occasion for considering a subsequent change of intention. It is also urged that the document would fall Under Section 17 (a) (b) of the Indian Registration Act as it is an adoption deed. An adoption deed is mentioned in entry 3 of Schedule 1 to the Indian Stamp Act. An adoption deed is referred to there as an instrument (other than will) recording an adoption or conferring Or purporting to confer an authority to adopt. A document recording an adoption presupposes that an adoption has already taken place. It is the record of a transaction already effectuated. See *Vishvanath Ramji v. Rahibai Ramji*, AIR 1931 Bom 105. A document recording a transaction which has already taken effect is not a document which creates any rights so as to fall within Section 17 (1) (b) of the Indian Registration Act. This contention must also fail

No other contention has been raised before me. The appeal fails and is dismissed with costs.

