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Court : Allahabad

Decided On : Aug-02-2010

Judge : Prakash Krishna, J.

Acts : Code of Civil Procedure (CPC) (C.P.C) - Order 7 Rule 11; Specific Relief Act - Section 34

Appeal No. : WRIT - B No. - 58463 of 2008

Appellant : Mangey Ram.

Respondent : Mangey Ram.

Advocate for Def. : C.S.C.; S.K. Kulshrestha; V.K. Singh, Advs.

Advocate for Pet/Ap. : B. Malik, Adv.

Judgement :

1. Khasra No. 833 A area 2 Bigha 10 Biswa 1 Biswansi and Khasra No. 433 B area 16 Biswa 6 Biswansi, total 2 plots and total area 3 Bigha 8 Biswa 7 Biswansi are subject matter of the present writ petition. These plots were recorded in the name of Ajab Singh as his Bhumidhari land. The land was acquired through three registered sale deed dated 9th December, 1951, 17th September, 1954 and 21st January, 1967 jointly with Kehari Singh, grand father of the petitioner, Kaley Singh, father of the petitioner and Yash Pal, uncle of the petitioner.

2. The present writ petition arises out of suit instituted by Somesh and Mange Ram on the allegations that on 11th March, 1985 Ajab Singh, who has died on 27th April, 1985 executed a registered will deed in their favour. Ajab Singh was unmarried and had no issue. After death of Ajab Singh, the original copy of the will was filed before Revenue Court in mutation proceedings where from it was lost. The cause of action for filing suit arises as the Tahasildar by his order dated 7th May, 1985 instead of mutating the holdings left by Ajab Singh in the plaintiffs' name ordered the mutation in favour of Mool Chand S/o Prithvi who died during pendency of proceedings. The names of the defendants No. 3 to 6 were ordered to be substituted. The suit was contested by the defendants private respondents herein 2

3. By disputing the will in favour of the plaintiffs. The other pleas were also raised, which are not relevant for the decision of the present writ petition.

Parties led evidence in support of their respective cases.

4. The trial court by its judgment and decree dated 30th April, 2001 dismissed the suit on the ground as the original will dated 11th March, 1985 was not filed. The matter was carried in first appeal. The appellate court accepted the explanation that the original will was filed in the mutation proceedings before the Tehsildar where from it has been lost vide order dated 28th November, 2004. The said order was challenged in Second Appeal No. 6 of 2001-02 filed under Section 100 C.P.C. before the Board of Revenue, U.P. at Allahabad.

5. The second appellate court vide impugned judgment and order dated 25th September, 2008 dismissed the appeal but at the same time also remanded the matter back to the trial court to get examined the thumb impression of the testator by an independent finger print expert. It was also found that two experts examined the thumb impression have given contradictory reports. Therefore, the matter should be referred to third independent expert.

6. Challenging the said order dated 25th September, 2008, the present writ petition is at the instance of Mange Ram alone. Sri. B. Malik, learned counsel for the petitioner submits that the evidence led by both the parties including that of the

experts was considered by the first appellate court. No error could be pointed out by the second appellate court in the appreciation of the evidence done by the first appellate court. There being no error in the appreciation of evidence as was done by the first appellate court, there was no occasion to refer the matter to third expert. It was also submitted that the judgment of the Board of Revenue is contradictory in as much as it dismissed the second appeal but at the same time in the body of the judgment opined that the matter should be referred to the third independent expert. Considered the submissions of the learned counsel for the petitioner.

7. A perusal of the judgment of the second appellate court would show that it framed the following three substantial questions of law for decision in the appeal:

1. Whether will dated 11.3.1985, in absence of original documents can be proved and has been proved by the plaintiff ?

2. Whether the suit of plaintiff barred by Order 7 Rule 11 C.P.C. and Section 52 of the Transfer of Property Act ?

3. Whether the suit is barred by Section 34 Specific Relief Act.?

8. It was found that the suit is not barred by Order 7 Rule 11 C.P.C. or by Section 52 of the Transfer of Property Act. It was also held that the suit is not barred by Section 34 of the Specific Relief Act. In other words question Nos. 2 and 3 were answered in the favour of the petitioner.

9. So far as the question No. 1 is concerned, it was noticed that the will dated 11th March, 1985 is a registered document. One of the attesting witnesses Sri. Mahak Singh, who is related to both the parties, was examined and he proved the execution of the will. It also accepted the explanation furnished by the plaintiffs regarding the lose of the original will. The original will was filed before the Tehsildar and it was lost there from. The attesting witness Mahak Singh and another witness Maam Chand proved the Will in question. There was a dispute as to whether the Will contained the thumb impression of Ajab Singh, the testator of the Will or not The disputed thumb impression of Ajab Singh was got examined by

the parties with his admitted thumb impression. 10. Sri. V.S. Chaudhary, finger print expert was examined by the plaintiffs to prove the thumb impression of Ajab Singh on the Will in question. The defendants examined Sri. Balraj Singh Tomar in support of their case that the thumb impression on the disputed will is not that of Ajab Singh.

11. The first appellate court considered the evidence of the parties and also conflicting reports of the handwriting experts and reached to the conclusion that the Will was duly executed by Ajab Singh. In other words Ajab Singh has put his thumb impression mark on the Will in question. Noticeably, the Board of Revenue without finding any error in the appreciation of evidence as done by the first appellate court observed that in view of two conflicting reports of handwriting experts, opinion of third handwriting expert is called for. The said approach of the second appellate court in view of restricted jurisdiction as provided under Section 100 C.P.C., cannot be approved. The parties have led evidence in support of their respective cases. The court examined the issue on the basis of evidence available on record. In such disputes, it is a matter of common experience that the experts support stand of the parties on whose behalf they are examined. But it does not follow that the matter necessarily be referred to a third handwriting expert. The scope of interference in second appeal under Section 100 C.P.C. is very limited. The interference is possible only when the appeal involves a substantial question of law. It has not touched or reversed the finding of the first appellate court holding that the execution of Will is proved.

12. The first appellate court found that the execution of the Will in dispute is proved. It is a registered document and first appellate court preferred to rely upon the evidence produced by the plaintiffs. No error could be pointed out in the said approach by the second appellate court. The second appellate court was not justified in observing that it is not possible to draw inference in the present fact situation that the Will is proved.

13. The other aspect of the case is whether the remand order passed by the Board of Revenue, if it is so construed, is justified. In P. Venkateswarlu versus Motor & General Traders, AIR 1975 1409 the Apex Court has held that if a finding is

required on a particular issue then the entire order of the trial court should not be set aside. A finding on the said issue may be called for from the Trial Court.

14. The Apex Court in Ashwinkumar K. Patel versus Upendra J. Patel and others AIR 1999 SC 1125 has held that the High Court should not ordinarily remand a case under Order 41 Rule 23 CPC to the lower court merely because it considered that the reasoning of the lower Court in some respects was wrong. Such remand orders lead to unnecessary delays and cause prejudice to the parties to the case. When the material was available before the High Court, it should have itself decided the appeal one way or other. It could have considered the various aspects of the case mentioned in the order of the trial Court and considered whether the order of the trial Court ought to be confirmed or reversed or modified. It could have easily considered the documents and affidavits and decided about the prima facie case on the material available.

15. Apex Court in P. Purushottam Reddy and another versus Pratap Steels Ltd. 2002 (48) A.L.R 319 considered the powers of the appellate Court as conferred on it under Order 41 Rules 23, 23-A and 25 of the Civil Procedure Code. While setting aside the order of remand passed by the High Court, it has been laid down that the High Court was to examine whether such finding of the trial court was sustainable or not in eyes of law and on facts. Even otherwise also the question could have been gone into by the High Court and a finding could have been recorded on the basis of available material in as much as the High Court being the court of first appeal, all the question of fact and law arising in the case were open before it for consideration and decision.

16. In view of the discussions, the order of the Board of Revenue so far as it relates to remand is concerned, cannot be allowed to stand. The said order is, hereby, set aside.

17. In the result, the writ petition succeeds and is allowed and the judgment and order of the first appellate court is, hereby, confirmed.