

Smt. Padma Devi and Another Vs. Smt. Soma Devi

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Court : Himachal Pradesh

Decided On : Jun-13-2011

Judge : Deepak Gupta

Appeal No. : RSA No. 279 of 2000

Appellant : Smt. Padma Devi and Another

Respondent : Smt. Soma Devi

Judgement :

DEEPAK GUPTA, J.

Briefly stated the facts of the case are that the respondent (hereinafter referred to as the 'plaintiff') filed a suit against the defendants for declaration and consequential relief of injunction. The plaintiff claimed that she was owner in possession of the suit property measuring 6 biswas situate in Phati Dhalpur, Kothi Maharaja, Tehsil and District Kullu and two storeyed house built thereon to the extent of 1/3rd share.

The undisputed facts of the case are that this property was owned by Sh.Swaru, father of the plaintiff and the plaintiff used to reside in the house situated over the suit property with her father. Sh.Swaru Ram unfortunately died. Sh.Swaru was survived by his widow Smt.Besru, the plaintiff Soma Devi and her brother and each got 1/3rd share in the property. Smt.Besru expired later on and the

plaintiff and her brother remained in the care and custody of Sh.Puran Chand, defendant No.1 who is their uncle. The plaintiff got married sometime in the month of February, 1992. According to the plaintiff, she was a minor at that time but according to the defendants, she was a major but that does not have much bearing on the case.

The case of the plaintiff is that on 24.5.1992, the defendant No.1 met the plaintiff and represented to her that the property of her mother was to be mutated in her name and she was required to come to Tehsil Office on 25.5.1992 for this purpose. She was told that she could either engage a counsel or could ask defendant No.1 to appear on her behalf to get the mutation attested in her name. The plaintiff was in the family way and appointed the defendant No.1 as her attorney. Her case is that defendant No.1 was appointed as her attorney only for the purpose of getting the mutation attested in her name. This power of attorney was executed on 25.5.1992 on which date a number of signatures of the plaintiff were obtained on various papers and registers and thereafter, she was sent back with the assurance that all formalities in this behalf are completed.

In March 1997, the plaintiff expressed her desire to reside in the suit property along with her husband and children since she wanted to admit her children in a better school. Again defendant No.1 advised her to educate her children in the village itself. The defendant No.1 was in a position to dominate the mind of the plaintiff since he had brought her up.

In the year 1997 itself, the plaintiff came to know that somebody had come to serve court summons upon her. The plaintiff thereafter met defendant No.1 who expressed his ignorance about any case but assured the plaintiff that he would look-after the matter. The plaintiff now suspected something was amiss and she went to the Court and found out that a partition case had been filed against her and her brother by the defendant No.1. On further enquiry, it was revealed that defendant No.1 acting as the attorney of the plaintiff had sold her 1/3rd share which worked out to 2 biswas to his wife, defendant No.2 who was the real aunt of the plaintiff and mutation No.3599 in this regard was also attested in the

name of defendant No.2. Accordingly the plaintiff claimed that the defendants have played fraud on her and the defendant No.1 had got the power of attorney executed from her by playing fraud on her and that he had executed a sale deed in favour of defendant No.2 without any consideration. The plaintiff claimed to be owner in possession of the suit property.

The defendants contested the suit. According to the defendants, after the death of the parents of the plaintiff, the plaintiff and her brother were looked-after and maintained by them. According to defendant No.1, he spent a huge amount on the maintenance and marriage of the plaintiff. The case of the defendants is that no fraud was played by them on the plaintiff and that the plaintiff had agreed to sell the suit property to defendant No.2 and for this purpose she had executed the power of attorney since at that time the entire sale consideration was not readily available with defendant No.2.

Both the Courts below came to the conclusion that the power of attorney was got executed from the plaintiff by defendant No.1 by playing fraud and misrepresenting the facts to her. They also held that the sale deed is without any consideration. Accordingly the suit of the plaintiff was decreed.

Sh.Bhupender Gupta, learned Senior Advocate appearing on behalf of the defendants-appellants submits that in the plaint no details of the fraud allegedly played by the defendants on the plaintiff were pleaded. He further submits that the plaintiff was present at the time when the power of attorney was executed and the endorsement made on the same by the Registrar shows that the same was read over and explained to the executant and, therefore, the plaintiff cannot be permitted to state that she did not know what were the documents on which she had affixed her signatures. Sh.Gupta made specific reference to Section 60 of the Registration Act. To appreciate the rival contentions of the parties, it would be pertinent to refer Sections 58 and 60 of the Registration Act which read as follows:-

58. Particulars to be endorsed on documents admitted to registration.

(1) On every document admitted to registration, other than a copy of a decree or order, or a copy sent to a registering officer under Section 89, there shall be endorsed from time to time the following particulars, namely: -

(a) The signature and addition of every person admitting the execution of the document, and, if such execution has been admitted by the representative, assign or agent of any person, the signature and addition of such representative, assign or agent;

(b) The signature and addition of every person examined in reference to such document under any of the provisions of this Act; and

(c) Any payment of money or delivery of goods made in the presence of the registering officer in reference to the execution of the document, and any admission of receipt of consideration, in whole or in part, made in his presence in reference to such execution.

(2) If any person admitting the execution of a document refuses to endorse the same, the registering officer shall nevertheless register it, but shall at the same time endorse a note of such refusal.

60. Certificate of registration.

(1) After such of the provisions of sections 34, 35, 58 and 59 as apply to any document presented for registration have been complied with, the registering officer shall endorse thereon a certificate containing the word "registered," together with the number and page of the book in which the document has been copied.

(2) Such certificate shall be signed, sealed and dated by the registering officer, and shall then be admissible for the purpose of proving that the document has been duly registered in manner provided by this Act, and that the facts mentioned in the endorsements referred to in Section 59 have occurred as therein mentioned."

Sh.Gupta has placed reliance on the judgment of the Judicial Commissioner, Himachal Pradesh reported in AIR 1955 (42) NUC (Him. Pra) 4304 Mt.Jhumko and another Vs. Sadh wherein it was held that what is stated in the mutation record carries with it the presumption of truth.

He has also placed reliance on the judgment of a learned Single Judge of this Court delivered in Kripa Ram Vs. Maina 2002 (2) SLC 213 wherein the learned Single Judge relied upon the endorsement made by the Tehsildar. It would however, be pertinent to mention that in the said case, the Sub Registrar was examined as DW/3.

In the present case, the plaintiff examined herself as PW/1. The defendant No.1, Puran Chand appeared as DW/1 and no other evidence was led by the parties. The question which arises is whether without examining the Registrar, can reliance be placed on the endorsement made on the document to hold that the document was read over and explained to the plaintiff? This is the only question of law which arises in this case. The Apex Court in Shiv Lal and others Vs. Chet Ram and others, 1970 (2) SCC 773 dealt with a case where reliance was placed on the statement recorded in the mutation proceedings and a copy of the mutation was also placed on record. The Apex Court held as follows:-

“Its original has not been produced. No witness has been examined to speak to the fact that the persons who are shown to have signed the original have in fact signed the same or those persons were the mortgagors or their representatives. The signature on the original cannot be proved by production of a certified copy. Nor can the courts raise any presumption under Section 90 of the Evidence Act in that regard- See Harihar Prasad Singh and another Vs. Mst. of Munshi Nath Prasad and others. The High Court and the 1st Appellate Court erroneously though that they could presume that the persons mentioned as the executants in the copy have signed the original on the strength of Section 44 of the Punjab Land Revenue Act and Section 114 (e) of the Evidence Act. Section 44 of the Punjab Land Revenue Act deals with the presumption as regards an entry in the record of rights. We are concerned with the genuineness of the signature in the original of Ext.P-5 and the identification of the persons who signed it. Hence that

section affords no aid. Section 114(e) of the Evidence Act says that court may presume that judicial and official acts have been regularly performed. Herein we are not concerned with the regularity of the performance of any official act. The identification of an executant or genuineness of a signature in a statement filed before an official has nothing to do with the regularity of his act unless it is shown that he had a duty to identify the person who signed it and further to take the signature in his presence. Therefore, Ext.P-5 cannot serve as an acknowledgment of the mortgage. (AIR 1956 SC 305)”

The Apex Court in Bhagat Ram and another Vs. Suresh and others, 2003 (12) SCC 35 while dealing with a similar issue held as follows:-

“20. A Registrar, of Deeds before he be termed an attesting witness, shall have to be called in he witness box. The court must feel satisfied by his testimony hat what he did satisfies the requirement of being an attesting witness. This is the view taken by the High Court of Punjab in the several decisions cited by the learned counsel for the appellants and also in the Division Bench of the High Court of Calcutta in Earnest Bento Souza v. Johan Francis Souza and Ors., AIR 1958 Calcutta 440, and of the Orissa High Court in Kotni R.N. Subudhi v. V.R.L. Murthy Raju, AIR 1961 Orissa 190.

21. Registration of a document does not dispense with the need of proving the execution and attestation of a document which is required by law to be proved in the manner as provided in Section 68 of the Evidence Act. Under Section 58 of the Registration Act the Registrar shall endorse the following particulars on every document admitted to registration:

- (1) the date, hour and place of presentation of the document for registration;
- (2) the signature and addition of every person admitting the execution of the document, and, if such execution has been admitted by the representative, assign or agent of any person, the signature and addition of such representative, assign or agent;

(3) the signature and addition of every person examined in reference to such document under any of the provisions of this Act, and

(4) any payment of money or delivery of goods made in the presence of the registering officer, in reference to the execution of the document, and any admission of receipt of consideration, in whole or in part, made in his presence in reference to such execution.

22. Such particulars as are referred to in Sections 52 and 58 of the Registration Act are required to be endorsed by Registrar along with his signature and date on document under Section 59 and then certified under Section 50. A presumption by reference to Section 114 (Illustration (e)) of the Evidence Act shall arise to the effect that the events contained in the endorsement of registration, were regularly and duly performed and are correctly recorded. None of the endorsements, require to be made by the Registrar of Deeds under the Registration Act, contemplates the factum of attestation within the meaning of Section 63(c) of the Succession Act or Section 68 of the Evidence Act being endorsed or certified by the Registrar of Deeds. The endorsements made at the time of registration are relevant to the matters of the registration only (See: Kunwar Surendra Bahadur Singh and Ors. v. Thakur Behari Singh and Ors., A.I.R. 1939 Privy Council 117). On account of registration of a document, including a will or codicil, a presumption as to correctness or regularity of attestation cannot be drawn. Where in the facts and circumstances of a given case the Registrar of Deeds satisfies the requirements of an attesting witness, he must be called in the witness box to depose to the attestation. His evidence would be liable to be appreciated and evaluated like the testimony of any other attesting witness.”

In *Benga Behera and another Vs. Braja Kishore Nanda and others*, 2007 (9) SCC 728 again while dealing with a similar issue, the Apex Court held as follows:-

“34. A question has also been raised as to whether a certificate by Sub-Registrar at the time of registration proves attestation. A Sub-Registrar in the matter of registration of a document acts under the provisions of the Registration

Act, 1908 (1908 Act). Section 52 of the 1908 Act prescribes the duty of Registering Officer when document is presented in terms thereof. The signature of every person presenting a document for registration is required to be endorsed on every such document at the time of presentation. Section 58 prescribes the particulars to be endorsed on documents admitted to registration, such as:

"(a) Signature of the person admitting the execution of the document;

(b) Any money or delivery of goods made in presence of Registering Officer in reference to the execution of the document shall be endorsed by the Registering Officer in the document presented for Registration.

Therefore this is the only duty cast on the Registering authority to endorse on the will, i.e. to endorse only the admission or execution by the person who presented the document for registration. The compliance of this provision leads to the legal presumption that the document was registered and nothing else.."

35. If an authority in performance of a statutory duty signs a document, he does not become an attesting witness within the meaning of Section 3 of the Transfer of Property Act and Section 63 of the Succession Act. The term 'attestation' means:

"to 'attest' is to bear witness to a fact. The essential conditions of valid attestation are (i) two or more witnesses have seen the executant sign the instrument (ii) each of them has signed the instrument in presence of the executant.

36. "Animus attestandi" is a necessary ingredient for proving the attestation. If a person puts his signature in a document only in discharge of his statutory duty, he may not be treated to be an attesting witness."

Thus it is obvious that the statement recorded in the mutation proceedings or otherwise or the endorsement made by the Registrar have to prove in accordance with law and cannot be read in evidence.

Though this Regular Second Appeal was admitted on other questions of law, in my view, only the following questions of law arise in this appeal:-

1. Whether endorsement made on a registered document in terms of Section 60 is itself evidence of the facts stated in the endorsement or they have to be proved in accordance with law or evidence?
2. Whether the particulars of fraud are not specifically pleaded by the plaintiff, if so, its effect?

As far as question No.1 is concerned, in view of the law laid down by the Apex Court, the same is decided against the plaintiff and in favour of the defendants.

Coming to the second question, in my view, detailed facts were given. One cannot lose sight of the fact that the plaint was filed in a remote area and sometimes pleadings are not very detailed. In any event, as is apparent from the facts stated above, fairly detailed particulars of fraud had been given. The finding on the issue of fraud is a pure finding of fact and not of law.

The Apex Court in *Bellachi (dead) by LRs Vs. Pakeeran*, 2009 (12) SCC 95 held as follows:-

"14. This Court in *Afsar Sheikh and Anr. Vs. Soleman Bibi and Ors.* reported in [1976 (2) SCC 142] held as under:

"4. In his written statement, Afsar defendant denied the allegations of fraud and misrepresentation. He averred that his grandmother was the sister of the plaintiff's mother. The defendant's father died when he was an infant. The plaintiff brought him up as a son. Since his very infancy, the defendant has been living with the plaintiff, managing his affairs and treating him as his father. The defendant further stated that the plaintiff has transferred 10 to 12 bighas of land to his natural son and an equal area to his second wife.

Out of love and affection, the plaintiff conferred a similar benefit on the defendant and voluntarily executed the *hiba-bil-ewaz* after receiving from the donee a dhoti as a symbolic consideration therefor. He denied that the plaintiff

at the time of the gift was too old and infirm. According to him, the plaintiff was not more than 75 years of age. He further averred that he was in possession of the suit lands ever since the execution of the hiba."

It was observed: (Afsar Sheikh case) "20. It is well-settled that a question whether a person was in a position to dominate the will of another and procured a certain deed by undue influence is a question of fact, and a finding thereon is a finding of fact, and if arrived at fairly, in accordance with the procedure prescribed. Is not liable to be reopened in second appeal (Satgur Prasad v. Har Narain Das; Ladli Prasad Jaiswal v. Karnal Distillery Co. Ltd.)."

15. It is not the case of the appellant that the finding of the first appellate court on the question of fraud, undue influence etc. is vitiated by any illegality, omission or error or defect as envisaged under Section 100 of Code of Civil Procedure."

Both the learned Courts below have given a finding of fact that the sale deed was without any consideration and that the power of attorney was got executed from the plaintiff by the defendant No.1 fraudulently and by exercising undue influence. These findings of fact cannot be interfered with in second appeal under Section 100, CPC.

In view of the above discussion, I find no merit in the appeal which is accordingly dismissed with costs assessed at Rs.5000/-.

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