

Hans Raji (Smt)

Vs

Yosodanand

Civil Appeal No. 11236 of 1995

(B. P. Jeevan Reddy, S. B. Majmudar JJ)

24.11.1995

JUDGMENT

S. B. MAJMUDAR, J. –

1. Leave grated.

2. This appeal is moved by the original plaintiff who had filed Regular Civil Suit No. 223 of 1976 in the court of learned Munsif, Gonda for cancellation of sale deed dated 7-4-1975 said to have been executed by her in favour of the respondent-defendant. The suit came to be dismissed by the trial court. Appellant lost her appeal before the appellate court and further appeal being second appeal before the High Court. That is how she has invoked this Court's jurisdiction under Article 136 of the Constitution of India. Notice was ordered to be issued to the respondent on 20-1-1995 by a Division Bench of this Court consisting of S. Mohan, J. and one of us S.B. Majmudar, J. It was also stated therein that notice to go on additional grounds as well. We will advert to the additional grounds permitted to be urged by the appellant pursuant to the notice aforesaid a little later. Respondent has appeared through his learned counsel. We have heard learned counsel for both the parties. We tried to explore the possibility of a settlement but as no settlement could be arrived at despite adjournment of this petition on number of occasions, ultimately the petition was finally heard on merits and the appeal pursuant to the same is being disposed of by this judgment.

3. A few relevant facts are necessary to be noted at the outset to appreciate the grievance of the appellant-plaintiff. According to her she is an illiterate Harijan woman and a childless widow. On the death of her husband who was a Railway servant she was given employment on compassionate ground in Railways by Railway authorities. She had inherited the house which belonged to her husband situated in Gonda town in Gonda District of Uttar Pradesh. Respondent, who was known to her came to Gonda town and as he was in need of accommodation, the appellant accommodated him in her house. That happened about three years prior to filing of the suit from which the present proceedings arise, that is, somewhere in the year 1973 as the suit was filed in 1976. Thereafter according to the appellant-plaintiff her brother came to Gonda in 1975 and on his persuasion she agreed to executed a Will in favour of her brother's sons as she was a childless widow. It is her further case that at that time respondent was also present and he undertook to get the necessary Will executed by the appellant in favour of her brother's sons. But instead of doing so, he dishonestly and fraudulently told the appellant that before the Will is executed permission of the District Magistrate will have to be obtained and accordingly made her sign some blank documents and later on took her to the office of Registrar for getting the Will executed. However, it was found that instead of getting the Will executed the respondent got a sale deed executed in his favour by practising fraud and misrepresentation on the appellant.

4. The respondent resisted the suit and contended that as the appellant was a Railway servant residing at Pachperwa Railway Station and as she was a childless widow she was no longer in need of the suit house and, therefore, she agreed to sell the same to him on having accepted a consideration of Rs 2500.

5. The learned trial Judge after permitting the parties to lead evidence, both oral and documentary, and on an appreciation of the same came to the conclusion that the appellant had failed to establish her case of fraud and misrepresentation on the part of the respondent and that the sale deed was duly executed by the appellant in favour of the respondent. The suit was, therefore, dismissed. As noted earlier she failed also in appeal as well as in the second appeal.

6. Learned counsel appearing for the appellant vehemently submitted that the alleged sale deed was a result of fraud and misrepresentation on the part of the respondent. That she was an illiterate Harijan lady and the respondent misused the trust reposed by her on him and fraudulently got the document executed as the sale deed while she was all the while under impression that a Will was being executed by her. He submitted that it is true she does not deny her signature on the document but according to him she never executed a sale deed in favour of the respondent. It was next contended that she did not receive any consideration from the respondent and the appellate court has simply conjectured about the same and which conjecture has been erroneously accepted by the High Court. He also contended that the respondent had not examined attesting witness to the document and that the High Court was in error in taking the view that proviso to Section 68 of the Indian Evidence Act was applicable to the facts of the present case. He lastly submitted placing reliance on the additional grounds permitted to be raised by this Court while issuing notice on the special leave petition as aforesaid, that the ground for cancellation of the sale deed was in spirit based on the defence of non est factum as the appellant's signature on the sale deed was never made for the purpose of sale deed and consequently the transaction was void. The learned counsel for the respondent refuted these contentions and submitted that all the courts below have concurrently found as a matter of fact that the appellant had willingly executed the sale deed and had taken a consideration of Rs 2500 prior to the execution of sale deed and that there was no question of the transaction suffering from non est factum.

7. According to us appellant has made out no case for our interference in this appeal. It may be noted at the outset that all the courts below have concurrently found that the appellant had on her own and without any fraud or misrepresentation on the part of the respondent had executed the sale deed in question. Said finding is based on appreciation of evidence and is a pure finding of fact which is not required to be interfered with in this appeal. The first appellate court in particular has relied upon the evidence of respondent DW 1 and his witness Ambika Prasad, DW 2 and another neighbour Om Prakash, DW 3. The court has also found that the appellant had herself applied to the District Magistrate for permission to sell the house and thereafter the sale deed was executed. The appellate court has also noted that the version put forward by the appellant that she was made to understand that she was executing the Will in favour of her nephews, could not be accepted as her brother had made no effort to take any interest in getting the Will executed in favour of his sons and that when the respondent was entrusted with that task in 1975 as alleged by the plaintiff, it was strange that her brother did not make any efforts in seeing to it that the respondent got the Will executed accordingly by the appellant, though appellant's brother was a school teacher and was not an ignorant or illiterate person. These are pure findings of fact which remain well supported by evidence on record. It must, therefore, be held that there was no misrepresentation or fraud perpetrated by defendant-respondent in getting the sale deed executed by the appellant.

8. So far as the question of consideration is concerned, the first appellate court as a final court of fact has held that as the appellant had herself permitted the respondent to stay in her house since about three years prior to the suit and as he was well known to her there was every possibility of the respondent having paid Rs 2500 to the appellant even prior to the execution of the sale deed. The High Court also was not inclined to take any contrary view on this question as the learned Single Judge of the High Court noted in the impugned judgment that even though in para 12 of the plaint it is vaguely alleged that the sale deed was without consideration, no issue was framed by the court and no effort was made by the plaintiff to get such an issue framed and agitated.

9. So far as the contention that the plaintiff was an illiterate Harijan woman and was a childless widow and hence was like a 'pardanashin' lady goes, it has rightly been rejected by the High Court by observing that she was already serving in Railways and there was nothing on record to show that she was suffering from any ignorance or illiterate or mental deficiency and she could not be compared to a 'pardanashin' lady.

10. So far as the applicability to the proviso to Section 68 is concerned, it must be noted that there was no occasion for the respondent to examine any attesting witness to the document in question as it was a sale deed which never required any attestation and even if some 'marginal' witnesses had attested the document the document did not attract Section 68 of the Evidence Act which in term applies to the proof of execution of document required by law to be attested. It reads as under :

"68. Proof of execution of document required by law to be attested. - If a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the Court and capable of giving evidence :

Providing that it shall not be necessary to call an attesting witness in proof of the execution of any document, not being a will, which has been registered in accordance with the provisions of the Indian Registration Act, 1908 (16 of 1908), unless its execution by the person by whom it purports to have been executed is specifically denied."

Therefore, Section 68 would not cover such a transaction. Hence there would remain no occasion to invoke the proviso to Section 68 with a view to finding out whether the execution of such a document was specifically denied by the adverse party or not. Consequently all the main contentions canvassed before the High Court which are repelled by the High Court cannot be said to be wrongly repelled.

11. Now remains the question of additional ground which was permitted by this Court while issuing the notice in these proceedings. It is of course true that such additional ground was permitted to be raised in support of the special leave petition from which this appeal arises. However, the said contention raises a mixed question of law and fact, namely, whether both the parties were ad idem or not and whether the appellant had put her signature on the document thinking that it is a Will and not a sale deed. This is a question which is linked up with the intention of the executant for which there should be pleading and evidence. On this aspect neither any pleading nor any evidence is put forward by the appellant in courts below. On the contrary, no such argument has been canvassed before the High Court or before the first appellate court which was the final court of facts. So far as the judgment of the first appellate court is concerned, it has noted that the only point for

determination in the appeal was as to whether the sale deed has been got executed by the defendant in his favour through fraud and misrepresentation as alleged by the plaintiff-appellant. Save and except this point no other point appears to have been urged before the first appellate court. Consequently on the facts as found on the record and in the light of the evidence as led by the parties the aforesaid contention covered by the additional ground cannot be effectively supported or made out by learned counsel for the appellant. Even otherwise when it has been concurrently found by all courts below on evidence on record that the document was executed as a sale deed by the appellant, the aforesaid additional ground pales into insignificance. For all these reasons there is no substance in this appeal. It, therefore, fails and is dismissed. In the facts and circumstances of the case, however, there will be no order as to costs.