

RAJASTHAN HIGH COURT

Ganpat Mal Dhariwal

Vs.

Sukhraj

S.B. Civil First Appeal No. 101 of 1983

(Bhagwati Prasad,J.)

18.04.2001

JUDGMENT

Bhagwati Prasad, J.

1. This appeal arises out of the decision of the learned District Judge, Jodhpur dated 20.4.83 passed in Civil Original Case No. 37/1975 whereby the learned District Judge dismissed the suit and refused to grant the decree infavour of the plaintiff-appellant for partition.

2. The case of the plaintiff-appellant in the suit was that there is an ancestral house belonging to their deceased father ChandanmalJi. The mother has also died. The plaintiff has a share in the ancestral house and the movable property. The appellant-plaintiff claimed that he has one third share because there are three brothers, each one is entitled to have his share in the movable and immovable property.

3. The defendants contested the suit and said that the appellant has relinquished his title by Ex. A1 and they further came with the case that they have acquired right in the property by adverse possession.

4. From the a fore said pleadings of the parties, the following issues were framed by the learned trial court :-

1. Whether the plaintiff has no share in the movable and immovable properties, described in paras 2, 3 and 4 of the plaint and has relinquished hisrights, as detailed in para 3 of the written-statement?

2. Whether the defendant No. 2 is in adverse possession of the disputed house property?

3. Whether the suit is barred by time?
4. Whether the defendant No. 2 is entitled to compensatory costs from the plaintiff?
5. Whether at the time of the death of the parties' mother there was movable property worth Rs. 20,000/- and the immovable property worth Rs. 25000/-?
6. Whether the release-deed, dated 19.6.65, is inadmissible in evidence for want of registration and for want of proper stamp-duty?
7. Relief?

5. Issue No. 6 related to the basic document which is the bone of contention in the suit. issue No. 6 was decided by the trial court as a preliminary issue. The trial court held in relation to issue No. 6, that the deed of relinquishment. Ex. A1 is neither properly stamped nor is registered one, so it is in-admissible in evidence. However, the learned trial court has observed that it may be looked into for determining the nature of the possession i.e. only for collateral purpose. The trial court was of the opinion that collateral purpose i.e. for showing the nature and character of possession, the document is admissible in evidence despite the fact that the document is un-registered one. There were two defects in the document Ex. A1, one is that it was not properly stamped, and second, it was un-registered. The defect regarding stamps was ordered to be removed by the trial court by order dated 22.5.76 and a penalty was levied under the Stamps Act.

6. The trial court proceeded to decide the suit after recording of the evidence. A reading of the judgment in question shows that the issues have been decided by the trial court treating Ex.A1 to be a document which had the effect of divesting the plaintiff of his rights in the property of his father.

7. Learned counsel for the appellant has urged that reading of the document Ex.A1 was available for limited purpose as per order dated 22.5.76. The Court has read it to the effect that it has the effect of divesting the plaintiff of his rights in the ancestral property. This kind of reading cannot be said to be the one limited to collateral purpose. Reading it as such means, to read the document as a conveyance. Section 49 of the Registration Act makes a document necessarily registerable where rights are affected in an immovable property.

8. Section 49 reads as under :

Effect of non-registration of documents required to be registered - No document required by Section 17 (or by any provision of the Transfer of Property Act, 1882 (4 of 1882),) to be registered shall-

- (a) affect any immovable property comprised therein, or
- (b) confer any power to adopt, or
- (c) be received as evidence of any transaction affecting such property or conferring such power, unless it has been registered.

9. The learned counsel for the plaintiff has, thus, asserted that the whole approach of the trial court had been erroneous when document was treated to be one having the effect of divesting the plaintiff of his rights.

10. The trial court was right when it held that the document being an un-registered document is inadmissible in evidence. But, the trial court was in clear error when it has observed that it may be looked into, to find out the nature and character of the possession i.e. for the collateral purpose. Further, the trial court, while deciding the suit, has exceeded the limits put on itself by the order dated 22.5.76, whereby it was held that the document will be looked into only for collateral purpose. The trial court in its decision dated 3rd October, 1979 has treated this document to be a document showing that it had the effect of divesting the plaintiff of his rights. The learned counsel for the appellant has further relied on the provisions of Section 91 of the Evidence Act. Section 91 of the Evidence Act reads as under:-

Evidence of terms of contracts, grants and other dispositions of property reduced to form of document - When the terms of a contract, or of a grant, or of any other disposition of property, have been reduced to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms of such contract, grant or other disposition of property, or of such matter, except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions hereinbefore contained.

11. He has canvassed that the document was required to be registered and when it was required to be registered, no other evidence could be led or admitted in evidence apart from what is admissible under Section 91 of the Evidence Act. Learned counsel for the

appellant has urged that the appellant has denied the execution of Ex. A1. It was not properly stamped and it was un-registered, therefore, it could not have been read in evidence for any purpose. He has relied upon in support of his contention the following decisions of various courts.

12. Placing reliance on decision in *Ratan Lal & Ors v. Hari Shanker & Ors.*,¹ he has relied on the following observations made in the decision.

"Collateral purpose" referred to under Section 49 Registration Act has a limited scope and meaning. The term would not permit the party to establish that the deed created or declared or assigned or limited or extinguished a right to immovable property. Therefore, a deed treated either as Partnership Deed of Family Arrangement needed to be registered and an unregistered one could not be used even to prove that there was a partition and oral evidence regarding partition on the basis of such document could not be led as it was barred by Section 91 Evidence Act."

13. It has been asserted on behalf of the appellant that the relinquishment of his right in the property couldn't have been read from Ex. A1. He has relied on the decision of this court in *Harshvardhan Singh v. Ranveer Singh & Ors.*,² wherein this court has held as under:

"In the instant case also original document is not before the trial court and without properly appreciating the legal position, the trial court permitted the secondary evidence to be exhibited. This court in *Nihal Singh v. Singh Ram and Ors.* set aside in revision, the trial court's order holding a document as admissible in evidence for collateral purpose, it was held that an unstamped and unregistered document required under law to be stamped-and registered cannot be admitted in evidence even for collateral purpose."

14. It has further been canvassed by the counsel for the appellant that an un-registered document cannot be admitted in evidence even for collateral purpose and the finding of the trial court on Issue No. 6 deserves to be quashed.

15. Learned counsel for the appellant has further relied on a Supreme Court decision in *Sait Tarajee Khimchand & Ors. v. Yelamarti Satyam & Ors.*,³ where in Supreme

Court has held that:

"The plaintiffs wanted to rely on Exhibits A-12 and A-13, the pay book and the ledger respectively. The plaintiffs did not prove these books. There is no reference to these books in the judgments. There mere marking of an exhibit does not dispense with the proof of documents. It is common place to say that the negative cannot be proved. The proof of the plaintiffs books of account became important because the plaintiffs accounts were impeached and falsified by the defendants case of larger payments than those admitted by the plaintiffs. The irresistible inference asses that the plaintiffs books would not have supported the plaintiffs."

16. It has been stressed that the documents would not themselves prove the truth of the statements contained therein particularly because of the issues in suit. This, reliance could not be placed by the trial court on document inquestion.

17. Learned counsel for the appellant has further relied on decision of this court in *Smt. Jamna Bai v. Tulsi Ram*,⁴ where in this court has held as follows:

It may be stated at the very outset that the document in question was register able and it ought to have been written on proper stamps. The document, therefore, neither registered nor written on stamp papers. It cannot be gain said that under Section 49 of the Registration Act, a document can be allowed to be admitted in evidence for a collateral purpose or to determine the nature and character of possession and there cannot be any dispute regarding the correctness of this proposition. However, in the present case, the document suffers from second infirmity , namely, it was not written on proper stamps. Hence, provisions of Section 35 of the Stamps Act come into play and Section 35 provides that the document cannot be admitted in evidence for any purpose. What is the exact connotation of the words "for the purpose"? This question came for interpretation before Allahabad High Court Mst. Bibo's case and it was held by Allahabad High Court that the phrase undoubtedly implies each and every purpose whatsoever without any exception and it matters little whether the purpose is the main purpose or a collateral one. In *Nihal singh v. Singhraj & Ors.* case (supra) this court concurred with the Allahabad High Court's view. In fact, the present case falls squarely within the ration decidendi of the Nihalsingh's case. In that case also the document in question was neither

properly stamped nor registered. The party wanted its reception in evidence for the collateral purpose of proving the nature and character of possession. It was held that such a document cannot be admitted in evidence even for a collateral purpose. I fully agree with this rule."

18. Stressing on the law laid down in the aforesaid cases by the courts, the learned counsel for the appellant has said that the document should not have been admitted in evidence even for collateral purpose, as has been laid down by the courts.

19. Learned counsel for the appellant has further relied on a decision of this court in *Smt. Keshar v. State of Raj.*, RLR 1996(1) 516, wherein it has been held asunder:

"Suffice it to say in this regard that a conjoined reading of Section 91 of Indian Evidence Act and Section 49 of India Registration Act after Rajasthan Amendment Act No. 18 of 1989 lead towards an irresistible conclusion that a party cannot be allowed to prove the terms of unregistered agreement to sell accompanied with possession either by oral evidence or by producing such unregistered agreement accompanied with possession. Section 91 of the Indian Evidence Act excludes oral evidence in proof of the terms of such agreement to sell which requires registration whereas Section 49 of Registration Act prohibits its receivability in evidence."

20. Learned counsel for the appellant has further relied on the decision of Patna High Court in *Sobharam Mahto v. Raja Mahton & Ors.*⁵ It has been held as under:

"An amalnama, creating raiyati settlement, requires registration and if it is not registered, it is inadmissible and, no evidence could be given as to its terms and its contents could not be used for that purpose AIR 1955 Supreme Court 328 Foll AIR 1941 Patna 577, AIR 1946 Patna 407 and AIR 1952 Patna 384 held correctly decided."

21. Learned counsel for the appellant has relied on a Division Bench decision of this court in *Pukhraj Surana v. Jawerchand & Ors.*, AIR 1957 (Raj.)47. It has been held as under:-

"Section 35 Stamp Act not only makes instruments, which do not bear the requisite stamp, inadmissible but also Incapable of being acted upon by the court. AIR 1932 Madras 693 and AIR 1947 Madras 422 and ILR 18 Bombay

369 Disting, AIR1933 Mad 177 and AIR 1934 Lahore 606 Fool."

22. Learned counsel for the appellant has relied on a Division of Saurashtra High Court in *Kanbi Karshan Jaram & Ors., v. Kanbi Harkha Hari & Ors.*,⁶ wherein it has been held as under:

Apart from the application of the doctrine of part performance to Ex. 17, the document is admissible to show the nature of the respondents possession. The proviso to Section 49 which was added by the Amending Act of 1929 says in clear terms that an unregistered document affecting immovable property and required by the Registration Act to be registered may be received in evidence as evidence to be effected by registered instrument. Collateral transaction means a transaction which does not create rights in immovable property, therefore though Ex. 17 cannot be used as evidence of the sale, it can be used to show that nature of Gordhan's entry and the subsequent continued possession by him and his heirs.

23. Learned counsel for the appellant on the strength of the law laid down in aforementioned cases and facts obtaining in the case has asserted that the document in question was neither admitted by the appellant nor it was properly stamped and further it was not registered. Thus, this could not have been read for collateral purpose also, basing its decision on the strength of this document, the trial court has fallen in error and the whole judgment is, therefore, vitiated.

24. Learned counsel for the appellant the further urged that the finding on issue No. 2, whereby the question of adverse possession has been decided, is also based on the reading of Ex. A 1. No hostility of the title has been pressed into service by the court and therefore, the finding on adverse possession is also not sustainable, without there being an establishment of the animus of hostility the issue has been decided on the basis of Ex. A1. He has relied on the decision of Hon'ble Supreme Court in *Shambhu Prasad Singh v. Mst. Phool Kumari & Ors.*,⁷ wherein it has been held as under:

"Where a house belonging to co sharers was in possession of one of them and the another one residing outside that town occasionally used to visit the town and at that time reside in the house not as a guest but by asserting his title as he used to reside in the house though the relations between the co-sharers were not

on friendly terms, the facts that another co-sharer used to pay the municipal taxes and repair charges and that his name was entered in the Municipal Demand Register would not constitute adverse possession in his favour. The facts that the plea of adverse possession was taken in the written statement in a suit for the first time and that the former co-sharer to rectified the Municipal record immediately after he got the information and without any objection from the latter negative the plea of adverse possession. (B)Limitation Act (1908) Article 144 - No adverse possession against co-sharer in absence of evidence of open assertion of a hostile title coupled with exclusive possession and enjoyment by one of them to the knowledge of the other."

25. And has prayed that the findings on Issue No 692 be set aside. Consequently, the finding on Issue No. 1 will also be reversed and, therefore, the suit is liable to be decreed.

26. Per contra the learned counsel for the defendant has urged that perception of the learned counsel for the appellant regarding Ex. A1 is incorrect. Learned counsel for the appellant has wrongly relied on the ratio of law laid down by this Court in 'Pukhraj Surana vs. Jawer chand & Ors. (supra), because that case has been the subject matter of consideration of the Hon'ble Supreme Court in *Javer Chand & Ors. v. Pukhraj Surana*,⁸ and the ratio of that case has been reserved and the court has observed as under:

"Whether a question as to the admissibility of a document is raised on the ground that it has not been stamped or has not been properly stamped the party challenging the admissibility of the document has to be alert to see that the document has to be alert to see that the document is not admitted in evidence by the Court. The Court has to judicially determine the matter as soon as the document is tendered in evidence and before it is marked as an exhibit in the case. Once a document has been marked as an exhibit in the case and has been used by the parties in examination and cross examination of their witnesses, Section 36 comes into operation. Once a document has been admitted in evidence, as aforesaid it is not open either to the Trial court itself or to a Court of Appeal or Revision to go behind that order. Such an order is not one of those judicial order which are liable to be reviewed or revised by the same court or a court of superior jurisdiction. AIR 1957 Rajasthan 47 Reversed."

27. And has canvassed that once a document has been admitted into evidence, then the same is to be read and thus, the terms on which the appeal has been urged is incorrect. The document of relinquishment was a complete document showing the entitlement of the parties and was admissible in evidence in terms of the law laid down by Hon'ble Supreme Court in *Bahadur Bhujil v. Debi Singh Bhujil & Ors.*,⁹ wherein it has been held as under:

"Family arrangement as such can be arrived at orally. Its terms may be recorded in writing as a memorandum of what had been agreed upon, the memorandum need not be prepared for the purpose of being used as a document on which future title of the parties is to be founded. It is generally prepared as a record of what had been agreed upon in order that there are no hazy notions about it in future. It is only when the family arrangement is reduced in writing with the purpose of using that within as proof of what they had arranged and where the arrangement is brought about by the document as such, the document requires registration because it is then that it would amount to a document of title declaring for future what rights and in what properties the parties possess. But a document which is no more than a memorandum of what had been agreed to between the parties does not require compulsory registration under Section 17 of the Registration Act AIR 1955 Supreme Court 481 Exp. AIR 1959 Assam 109 Affirmed."

28. Learned counsel for the respondents has further urged that there is overwhelming evidence on record by the relatives of the parties establishing that Phargati, the relinquishment Ex. A1 was consciously executed by the plaintiff appellant. Relinquishment of the right of the plaintiff and execution of Ex. A1 has been established by the evidence of the defendants. Thus, it has been established by the defendant exclusively and explicitly that the plaintiff has 'divested himself from his rights in question in the property. The plaintiff has been out of the possession of property for long, he cannot claim and say that he has a subsisting right in the property. No partition can be ordered. It has been urged that defendants have been in possession of the property and the issue of adverse possession has been rightly decided.

29. I have given my thoughtful consideration to the rival submissions made at the Bar and also perused the record.

30. The basic question which arises for consideration is the question of the admissibility of the document Ex. A1 in evidence. The learned trial court, while deciding Issue No. 6 as preliminary issue by its order dated 22.5.97, has clearly held that the document is inadmissible in evidence because neither it is properly stamped nor it is registered. The learned counsel for the defendants has also not assailed this part of the order of the learned trial court. The learned trial court has held that the document can be looked into for collateral purpose.

31. What is 'collateral purpose' is the basic question which has to be gone into in this case. The legal position regarding collateral purpose has come. The legal position regarding collateral purpose has come out is that this expression does not permit the party to establish by the document in question that it created or declared or assigned or extinguished any right in the immovable property. If these things are not possible i.e. creation of rights and relinquishment of rights, then collateral purpose cannot be said to be a purpose for which the trial court has used the document. The document has been read by the trial court for the purpose of observing that Ex. A1 has extinguished the rights of the appellant.

32. The being the position, the trial court has exceeded its own limitations put on it by the order of the court dated 22.5.76. In view thereof, the approach of the trial court cannot be approved. Further, this court in Jamna Bai's case (supra) has held that such a document cannot even be admitted for collateral purpose. In Harshwardhan's case (supra) also this court had held that an unregistered document cannot be admitted in evidence even for collateral purposes and also in Smt. Keshar's case (supra) this court has held that Section 91 of the Evidence Act excludes oral evidence in proof of the terms of such agreement to sale which requires registration whereas Section 49 of Registration Act prohibits its receivability in evidence.

33. I am in respectful agreement with the law laid down by this court in the aforesaid decision and hold that the trial court was wrong while it held on 22.5.76 that the document is receivable even for collateral purposes. Thus, the document Ex. A1 could not have been received in evidence even for collateral purpose.

34. The argument of the learned counsel for the defendants that once the document is admitted in evidence then it will have to be read in evidence and use for examination and cross-examination should not be discarded, as has been held by Supreme Court in *Maver Chand & Ors. v. Pukhraj Surana* (supra) is not based on sound reasoning. The

law laid down by the Supreme Court is in relation of a document which was not stamped properly and its execution was admitted by the adverse party. The document was used for the purpose of cross examination.

35. The defect of improper stamping is a curable defect but as regards the unregistration defect, it was an incurable defect. That being the position, the law laid down by the Hon'ble Supreme Court in *Javer Chand & Ors. v. Pukhraj Surana* (supra) would be of no assistance. Therefore, it renders no help to the defendants.

36. Thus, in the ultimate analysis this court feels that the finding of the trial court on Issue No. 6 is vitiated and is, consequently, liable to be set aside. The document has been read by the trial court not only for a limited purpose but for extensive purpose for recognising the rights of the parties, that being the position, the judgment is vitiated. The findings on Issue No. 2 also proceeds on the basis of recording in writing of Ex. A1. No hostile an animus has been pressed into service. The being the position, that finding is not sustainable. The finding of Issue No. 1 needs to be disturbed. Consequently, the whole judgment deserves" to be set aside. The judgment and decree are hereby set aside.

37. Since the judgment of the trial court has proceeded on the basis of an inadmissible document, the judgment and decree are set aside. This court feels that the trial court should be once again asked to re-determine the issues in question excluding the document Ex. A1 from consideration and then decide the issue afresh.

38. In the light of the above facts, the appeal is allowed, the judgment and decree of the learned trial court is set aside. The matter is remanded back to the trial court for afresh decision in vie of the law as stated hereinabove. There will be no order as to costs.

Cases Referred.

1. AIR 1980 All
2. 1996 (1) RLR 155
3. AIR 1921 sc 1865
4. 1996 DNJ (Raj.) 717
5. AIR 1957 Pat 278

6. AIR 1953 Sau 56
7. AIR 1971 SC 1327
8. AIR 1961 SC 1655
9. AIR 1966 SC 292