
Shiv Ram and Others Vs Lakshman and Others

Second Appeal No. 172 of 1978

Court: Allahabad High Court

Date of Decision: Feb. 4, 2013

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) â€” Section 145, 146#Evidence Act, 1872 â€” Section 13, 91#Registration Act, 1908 â€” Section 17, 17(1)(d), 17(2)(v), 40, 45#Transfer of Property Act, 1882 â€” Section 53A

Citation: (2013) 6 ADJ 348

Hon'ble Judges: Sudhir Agarwal, J

Bench: Single Bench

Advocate: K.K. Bajpai, G.K. Maurya, Ramesh Rai and V.K. Bajpai, for the Appellant; A.N. Bhargava, R.K. Tiwari and Manoj Bhargava, for the Respondent

Final Decision: Dismissed

Judgement

Sudhir Agarwal, J.

Heard Sri Ramesh Rai, learned counsel for the appellants and Sri R.K. Tiwari, Advocate holding brief of Sri A.N.

Bhargava, learned counsel for the respondents. Following two substantial questions of law have been raised before this Court for adjudication:

(1) the document dated 13.7.1970 which was unregistered was discarded for the purpose of the defence of the defendant appellants, could have

been read against the defendant for the purpose of decreeing the suit when the said document was not accepted by both the Courts below to have

proved the case of either of the parties.

(2) Whether the trial Court as well as the appellate Court were justified in proceeding to decree the suit on the basis of the weakness of the

defence when the appreciation of the oral evidence according to the Courts below indicated contradictory evidence.

2. Original suit No. 383 of 1972 instituted by Lachhman seeking declaration that he is the sole owner of house in question described at the

bottom of plaintiff and defendants have no right or concern with the same. He also sought injunction restraining defendants from interfering in

peaceful possession, enjoyment etc. of property in dispute.

3. The case set up by plaintiff is that house was constructed by his brother Makhan, who died unmarried and issueless on 18th July, 1970.

Makhan had executed a Will on 13th July, 1970 stating that plaintiff shall succeed the aforesaid house after his death. He also recognised

possession of plaintiff.

4. The suit was contested by defendants No. 1, 2 and 3 namely Sheo Ram, Sheo Lal and Smt. Majia @ Maharajia, widow of Shiv Dulare by filing

written statement and they pleaded that plaintiff never had any possession on the house in question and therefore no injunction can be granted.

5. The defendants No. 4 to 6 filed their joint written statement taking a stand similar to that of defendants No. 1 to 3 while defendants No. 7 and 8

filed their joint written statement supporting the case of the plaintiff.

6. Death of Makhan on 18th July, 1970 was admitted. Execution of Will by Makhan on 13th July, 1970 was pleaded in para 25 of written

statement but not in favour of the plaintiff but Majia and defendants No. 1 and 2. It is said that plaintiff has prepared a forged and fictitious

document claiming to be a Will executed by Makhan in his favour. The copy of the Will relied by defendants No. 1, 2 and 3 was exhibited before

Trial Court as Exhibit A9 and that relied by plaintiff was marked as Exhibit A2. The Trial Court discarded the document Exhibit A9 relied by

defendants on the ground that contents thereof show that it is not a Will but a Gift-deed and being unregistered, it is not admissible in evidence in

view of Section 17 of Registration Act, since a gift-deed ought to have been registered and in absence of registration, it is inadmissible by virtue of

Section 49 of Registration Act, 1908 (hereinafter referred to as ""Act, 1908""). It has also been held that even if the document is not registered and

therefore will not be admissible in evidence for the purpose of proving transfer of property thereunder but other contents of document still can be

looked into, and for this purpose he relied on Ram Kishore Vs. Ambika Prasad, .

7. Exhibit A9 admits that house in question owned and belonged to Sri Makhan. It was a property solely owned by him. That being so, issue No.

2, whether house in question was ancestral property of Late Zandu stood negatived and has been so decided by both the Courts below.

8. Thereafter Trial Court proceeded further to hold that the disputed house would be inherited and succeeded by the plaintiff, the real brother of

Makhan and being Schedule I category 2 successor vis a vis defendants who were children of brother and schedule I category 4 successor.

9. Issue No. 3 was in relation to possession and that was also decided in favour of plaintiff. The suit, thus, was decreed by trial Court vide

judgment and decree dated 9.11.1976. The defendants No. 1, 2 and 3 preferred civil appeal No. 158 of 1976 which has been dismissed by 3rd

Additional District Judge, Fatehpur vide judgment and decree dated 8.11.1977.

10. There is a reference of proceedings u/s 145, 146 Cr.P.C. learned counsel for the appellant could not dispute that those proceedings, findings

and observations would have no bearing and cannot be read as an evidence in the suit in question.

11. The first question relates to the admissibility of an unregistered document. Section 49 bars an unregistered document to be received as

evidence of any transaction affecting such property or conferring such power but proviso (came to be inserted in 1929) thereof clearly permits

admissibility of an unregistered document as evidence in certain contingencies i.e. (a) a contract in a suit for specific performance under Chapter II

of Specific Relief Act, 1972, (b) Part performance of contract for the purpose of Section 53A of Transfer of Property Act, 1882; or, (c) Any

collateral transaction not required to be affected by registered instrument.

12. Before amendment of Section 49 of Act, 1908, provision as it stood bereft of proviso had the interpretation of Privy Council in AIR 1929 269

(Privy Council) , the plaintiff therein brought a suit for specific performance of a contract to sell an immovable of the value of more than Rs. 100/-.

The document, which incorporated the terms of this transaction was construed by the Court to amount to a deed of sale and not a mere agreement

to sell the property and not a mere agreement to sell property. Founded on this construction placed upon the deed, the Court was called upon to

answer the question whether document could be availed of for supporting a suit for specific performance. It was examined in view of the terms of

Section 49 of Act, 1908 particularly the terms "affect" and "affecting" used in Section. The Court said, if an instrument, which comes within

Section 17 as purporting to create by transfer an interest in immovable property is not registered, it cannot be used in any legal proceedings to

bring about indirectly the effect which it would have had if registered. It is not to "affect" the property and it is not to be received as evidence of

any transaction "affecting" the property. The Court further said:

In the present case the document under consideration, in addition to creating an interest in the immovable property concerned, provides as one of

the terms, and therefore as an integral part of the transfer, that the vendor should, if the vendee so requires, execute a registered sale-deed, and it is

contended for the respondent 1 that, notwithstanding the non-registration, he can sue upon this agreement, putting the document in evidence as

proof of it. Their Lordships are clearly of opinion that this is within the prohibition of the section. They think that an agreement for the sale of

Immovable property is a transaction "affecting" the property within the meaning of the section, inasmuch as, if carried out, it will bring about a

change of ownership. The intention of the Act is shown by the provisions of Section 17(2)(v) which exempts from registration, and therefore frees

from the restriction of Section 49, a document which does not itself create an interest in Immovable property, but merely creates a right to obtain

another document which will do so. In the face of this provision, to allow a document which does itself create such an interest to be used as the

foundation of a suit for specific performance appears to their Lordships to be little more than an evasion of the Act.

13. The Privy Council affirmed the view consistent with the view taken in earlier decisions in Sanjib Chandra Sanyal Vs. Santosh Kumar Lahiri and

Others, , Komiresetti Satyanarayana Vs. Yeeranki Chinna Venkatarao and Others, , and Ramling Parvataya Samble Vs. Bhagvant Sambhuappa, .

Thereafter by Transfer of Property (Amendment) Supplementary Act No. XXI of 1929, proviso was added to Section 49 of Registration Act.

Despite this amendment, Madras High Court in Venkadari Somappa Vs. The Official Receiver of Bellary, , took the view that proviso would be

applicable where there is separate contract found in unregistered document purporting to effect the transfer or is otherwise proved and not to cases

where there is no such contract. This decision was doubted subsequently in Nidasanametla Venkata Seshayya Vs. The District Board, and the

matter was considered by Full Bench in N.M.S.S. Subramanian Chettiar Vs. S.M.A.M. Arunachalam Chettiar and Others, , who did not agree

with the view taken in Venkadari Somappa v. Venkadari Somappa (supra). The Court said as under:

The decisions of this Court which preceded the introduction of the proviso to Section 49, no longer have application, and we do not agree that an

unregistered instrument affecting immovable property is not sufficient to support a suit for specific performance. In such a suit, the production of the

document and its proof will be sufficient to support the plaintiffs case if it embodies the whole agreement between the parties and there are no other

factors to be taken into consideration. The proviso in express terms says that it may be received as evidence of a contract in a suit for specific

performance.

(Emphasis added)

14. Section 49 of Act, 1908 came to be considered time and again. A Full Bench of Madras High Court in Muruga Mudaliar (Deceased) and

Others Vs. Subba Reddiar, , held by a majority that an unregistered agreement of lease which is required by law to be registered is admissible as

evidence of the agreement in a suit for damage for its breach. A Division Bench of Nagpur High Court in AIR 1955 306 (Nagpur) , said:

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 can 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 of the Evidence Act. This is S. 91 of that Act. In the instant case, secondary evidence is not

admissible as the document itself is before the Court. Exhibit P-5 is compulsorily registrable also u/s 17(1)(d). Registration Act. Section 49 of that

Act provides that no document required by Section 17 or by any provision of the Transfer of Property Act to be registered shall affect any

immovable property comprised therein, or be received as evidence of any transaction affecting such property, unless it has been registered. There

is, however, a proviso to this section under which a document so required to be registered may be received as evidence of a contract in a suit for

specific performance or as evidence of part performance of a contract for the purposes of Section 53A, T.P. Act, 1882, or as evidence of any

collateral transaction not required to be effected by a registered instrument. It is thus manifest that the unregistered lease deed Ex. P-5 is

inadmissible in evidence in view of Section 40. Registration Act except for the limited purposes specified therein, and S. 91, Evidence Act forbids

other evidence to prove the lease or its terms.

15. In Rattan Chand deceased represented by his widow Smt. Satya Devi and Another Vs. L. Bhagirath Ram deceased represented by his

widows Smt. Saraswati Devi and Smt. Sharda Devi and Others, , a Division Bench of Punjab High Court, in para 7 of the judgment, said:

It is clear that the first part of the proviso expressly contemplates a situation where a document required to be registered by law but not so

registered may still be received as evidence of a contract if specific performance of the contract is sought, so that it is not at all right to say that an

unregistered document can never be looked at for any purpose connected with the property mentioned by the unregistered document. It is also

clear from the third part of the proviso that as evidence of a collateral transaction an unregistered document is equally admissible in evidence. It is

common ground now that an agreement to sell Immovable property is not required by law to be registered and although there may have been some

doubt about this matter prior to 1927, no doubt is left in that connection by the Explanation to Section 17 of the Registration Act which was put

into the Act in 1927, and that expressly provides that an agreement to sell immovable property is not required to be registered. Mr. Agarwal's

argument in substance is that an agreement to sell Immovable property is a transaction affecting that property because it refers to and deals with the

property. There is, however, no indication in Section 49 of the Registration Act to support the view that every transaction, which may happen to

concern immovable property, is a transaction "affecting" such property, and it would not in the ordinary sense be so. What is apparently shut out

by Section 49 is the proof through an unregistered document of a transaction which has effect, direct and immediate, on some immovable

property. An agreement to sell Immovable property has as such and by itself no effect on the immovable property comprised in the agreement. It is

only an agreement and like any other agreement capable of being enforced and equally capable of being the basis of a suit for damages in case

breach occurs. It is significant to note in this connection that Section 45, as it is worded, does not make an unregistered document, even if it "affects"

immovable property, wholly inadmissible in evidence put only rules it out for certain specific purposes and the prohibition cannot, of course, be

extended by implication. As I read Section 49 in the light of the proviso, there is, I find, nothing in it to prevent a party from showing from an

unregistered document that an agreement to sell immovable property had actually been reached between the parties, even if that document be a

deed of sale and consequently useless for proving the sale itself.

16. In *Mst. Kirpal Kaur Vs. Bachan Singh and Others*, , the Apex Court referred with approval (1918) L.R. 46 I.A. 285 (Privy Council) , in so

far as it held that a document, which should have been registered but was not, was admissible to explain the nature of the possession of a person.

But this would apply only when such person got possession subsequent to the execution of the date of document and not otherwise.

17. In *Hari Lal Vs. Amrik Singh and Another*, , this Court reiterated that an unregistered document can be admissible for a collateral purpose even

if not registered though it is compulsorily registrable. This Court followed Apex Court authorities on this aspect in *Mattapalli Chelamayya and*

Another Vs. Mattapalli Venkataratnam and Another, , *Kale and Others Vs. Deputy Director of Consolidation and Others*, , and decisions of this

Court in *Shyam Sunder and Others Vs. Siya Ram and Another*, , *Arshad Ali Khan Vs. State of Uttar Pradesh*, and *Mangal Singh Vs. Tek Ram*

and *Others*, .

18. What a collateral purpose is explained in *Ramlaxmi Ranchhodlal Vs. The Bank of Baroda Ltd.*, . 50 and the Court held that expression

"collateral transaction" in Section 49 is used not in the sense of an ancillary transaction to the principal transaction or a subsidiary transaction to a

main transaction. The transaction recorded would be a particular or specific transaction but it would be possible to read in that transaction what

may be called the purpose of the transaction and what may be called a collateral purpose; the fulfillment of the collateral purpose would bring into

existence a collateral transaction which may be said to be a part and parcel of the transaction but nonetheless a transaction which runs together

with or on parallel lines with the same. In the context of a partition dispute, the Court in para 14 of the judgment further said:

A partition which requires to be effected by a registered instrument may be inadmissible but the severance of ""joint status which is not required to

be effected by a registered instrument would be collateral transaction evidence of which would certainly be admissible under the proviso to the

section"". An antecedent title, the nature and character of possession, an admission or an acknowledgment, relationship of parties and their state of

mind may be some of the instances of collateral purpose for which a document requiring registration may be looked into even though it is

unregistered.

19. In the present case, besides the pleadings, document in question sought to be relied on to prove the fact that house in question was not

ancestral property but it was owned and belong to Makhan. The pleadings are admissible in evidence u/s 13 of the Indian Evidence Act. As

already observed, an antecedent title, the nature and character of possession, an admission or an acknowledgement etc. are some of the instances

of collateral purpose for which such a document can be looked into.

20. In Ram Kishore Vs. Ambika Prasad, , question up for consideration was, whether kiryanama, an unregistered document, could have been

relied in a suit for recovery of rent since it did not result in creating a valid lease. It was argued that such a document is inadmissible in evidence for

any purpose whatsoever. Following an earlier decision in Lala Fateh Chand Vs. Mst. Radha Rani and Others, , this Court held that an unregistered

lease is admissible for collateral purpose, as provided in Section 49 of Registration Act. The Court further quoted with approval as to what

constitute collateral purpose and said:

What a collateral purpose is cannot be precisely defined. It must vary with the circumstances of each case. Leases which were not registered but

were required to be registered and were, therefore, inadmissible for a purpose other than a collateral one have been looked at in reported cases in

order to ascertain the nature of the possession of the tenant, the data from which the tenancy began and for determining the period of tenancy, and

for finding out what the rent reserved was. In the present case the kiryanama can be consulted for the nature of the defendant's possession and, if

it is held that he is in occupation as a tenant, for finding out the rent payable by him.

21. This Court has also considered Section 49 recently in Writ Petition No. 12809 of 2003 (Mishri Lal Karak v. Sri Dinesh Chandra Agarwal and

others) decided on 1.10.2013 and in para 30 of the judgment, it has been said:

This Court finds that permitting document to be received in evidence for limited purpose as such would not have the effect of influencing the rights

of the parties vis a vis the immovable property concerned. The general legislative policy u/s 49 of Act, 1908 is contained in three clauses i.e. (a),

(b) and (c) and proviso carves out an exception in respect to clause (c) only and not (a) and (b) thereof. The inevitable conclusion vis a vis the

immovable property concerned is that, an unregistered document shall not result in affecting the right etc. over the immovable property in any

manner and also shall not confer any power to adopt it. To the extent the proviso operates, it permits that an unregistered document affecting

immovable property may be given in evidence i.e. where a document remains unregistered and title does not pass, the agreement between the

parties which preceded the ineffective document shall remains and may be received in evidence to look into the terms thereof. This by itself would

not confer any right since no such right has been conferred under the substantive law. Receiving in evidence does not mean conferment of

substantive right. The rule of evidence cannot enlarge or alter the provisions of substantive law. It cannot confer rights, if there are none under the

substantive law. In other words, such a document could be used only for the purpose permissible under proviso to Section 49 of Act, 1908 so as

to establish part-performance u/s 53A of Act, 1882 but cannot be admitted in evidence to show nature of possession, if the possession was

continuing from some date prior to the execution of unregistered deed. Here I find support from Apex Court decision in Mst. Kirpal Kaur Vs.

Bachan Singh and Others, .

22. There is thus no complete bar making an unregistered document admissible in evidence but for limited purpose it can be received in evidence.

23. Section 49 lays down a rule of substantive law but proviso comprises a rule of evidence. All it permits is that in the contingency contemplated

in proviso to Section 49, an unregistered document affecting immoveable property may be given in evidence. The object is that document, which

has not conveyed or passed title may be used as evidence of the terms. Where a document remains unregistered and title does not pass, the

agreement between the party, which preceding ineffective document still remains. In other aspects, suit for specific performance would be

regulated by Specific Relief Act and proviso only as a rule of evidence states as to what document can be received in evidence and to the extent

and purpose thereof. In other words, proviso lays down that despite prohibition contained in Section, an unregistered document can be received in

evidence in certain cases.

24. It cannot be doubted that rule of evidence cannot enlarge or alter the provision of substantive law. It cannot confer rights if there are none

under substantive law. What thus follows from section and proviso is that, for example, in respect of a suit for specific performance if it is

maintainable at law otherwise, then, in such suit, an unregistered document can be received in evidence.

25. Looking into the exposition of law, discussed above, it cannot be doubted that an unregistered gift-deed may not be admissible in evidence to

affect property in dispute but for collateral purposes the document may be admissible in evidence and the facts stated therein admitting that

property in dispute was owned and belong to Sri Makhan would be a fact for which such document cannot be said to be admissible in evidence

and has rightly been so applied by the Court below.

26. The question No. 1, therefore, is returned against appellant.

27. In view of the above discussion, it cannot be said that Courts below have decided the suit merely on weakness of defence but on the basis of

evidence supporting claim of plaintiff and preponderance of probability found in favour of the plaintiff. The suit has been decided by the Courts

below which cannot be said to be faulty, legal or otherwise, in any manner. In civil cases, degree of proof required is not like that of a criminal case

where one has to prove the case beyond doubt but here preponderance of probabilities lying in favour of one of the party is a touchstone to test as

to who has succeeded to prove case in a particular way or to justify a particular inference.

28. I, therefore, answer the second question against the appellant.

29. In view of the aforesaid, the appeal lacks merit. Dismissed.

30. Interim order, if any, stands vacated. No costs.