

(2013) 04 AHC CK 0280**Allahabad High Court****Case No:** Second Appeal No. 397 of 1996

Shiv Shanker Singh and Others

APPELLANT

Vs

Smt. Mahraji Kunwar (Dead)
through L.Rs. and Others

RESPONDENT

Date of Decision: April 10, 2013**Citation:** (2013) 99 ALR 575 : (2014) 123 RD 231 : (2013) 120 RD 502**Hon'ble Judges:** Sudhir Agarwal, J**Bench:** Single Bench**Advocate:** M.D. Singh "Shekhar", Suresh Chandra Varma and Arvind Kumar Singh, for the Appellant; Ram Niwas Singh and V.K. Chandel, for the Respondent**Final Decision:** Dismissed**Judgement**

Sudhir Agarwal, J.

Heard Sri Arvind Kumar Singh, Advocate has put in appearance on behalf of defendants-appellants and Sri Ram Niwas Singh, Advocate, has appeared on behalf of plaintiff-respondents. This is defendant's appeal u/s 100, C.P.C. After hearing this appeal under Order XLI, Rule 11, C.P.C., this Court formulated following substantial questions of law:

- (i) Whether the sole allegation made by the plaintiff-respondent in the plaint that Smt. Ramdei had died in October, 1986 is barred by the principle of res judicata in pursuance of the judgment and decree passed in O.S. No. 227/1969 and the judgments and decrees passed by this Court in Civil Misc. Writ Petitions No. 1085/69 and 1328/69, 1329/69 and 1330/69?
- (ii) Whether the suit of the plaintiff-respondent is barred by the judgment and decree against which second appeal No. 2276 of 1977 is pending before this Court in which basic claim of the plaintiff-respondent that Smt. Ramdei died in October, 1966 was found incorrect?

(iii) Whether the suit of plaintiff-respondent could be decreed by giving the reasoning that Smt. Ramdei was not produced by the defendant while there was no such application at any time filed by the plaintiff nor any such order was passed by the Court concerned?

(iv) Whether the finding recorded by the Lower Appellate Court on the basis of the presumption that the death of Smt. Ramdei could be presumed on the date of sale-deed while there was evidence filed by the defendant-appellant that Smt. Ramdei died only in the year 1980?

2. The defendant-appellants for brevity hereinafter referred to "defendant" while plaintiff-respondents for brevity hereinafter referred to "plaintiff".

3. The facts in brief giving rise to the dispute in question are as under:

4. The plaintiff Smt. Mahraji Kun-war (now deceased and substituted by her legal heirs and legal representatives) i.e., Plaintiff (respondents No. 1/1 to 1/4) instituted original suit No. 98 of 1976 vide plaint dated 1.3.1976 for cancellation of sale-deed dated 5.4.1975 registered on 14.4.1975. She also sought a decree for permanent injunction restraining defendants from interfering in possession of plaintiff over the land in dispute. It was pleaded that defendant No. 1, by impersonating his mother Smt. Dulari Devi as Ramdei Kunwar, got the impugned sale-deed dated 5.4.1975 executed and registered in favour of defendants which was liable for cancellation on the ground that Smt. Ramdei Kunwar had already died and was not alive on the date when sale-deed in question was executed and registered. Hence the sale-deed dated 5.4.1975 is the result of a fraud and misrepresentation hence void and liable to be revoked/cancelled.

5. The suit was contested by defendants filing collective written statement denying factum that Smt. Ramdei was not alive on the date when the sale-deed in question was executed and registered. The suit was dismissed by Trial Court i.e., IIIrd Munsif, Azamgarh vide judgment and decree dated 29.9.1981 but it has been allowed by Lower Appellate Court i.e., Civil Judge, Azamgarh (hereinafter referred to as "L.A.C.") by allowing Civil Appeal No. 564 of 1981 of plaintiffs and decreeing the suit, it has revoked sale-deed dated 5.4.1975.

6. The Court below referred to the proceedings in an earlier Suit No. 227 of 1969 wherein similar dispute was raised by plaintiff Smt. Maharaji Kunwar, in respect to sale-deed executed on 12.10.1966. Therein Trial Court held that Smt. Ramdei was not proved to be not alive on 12.10.1966 when the sale-deed, disputed therein, was executed and that being so, in absence of any complaint of Smt. Ramdei against the said sale-deed, no suit for its cancellation can be decreed and it accordingly dismissed the suit which judgment was confirmed by L.A.C. by dismissing appeal preferred by plaintiff therein u/s 96 C.P.C. The aforesaid judgment has also been confirmed by this Court by dismissing plaintiff's appeal u/s 100 vide judgment, of date, passed in Second Appeal No. 2276 of 1977, Maharaji Kinwar v. Sheo Shanker.

7. Learned Counsel for the defendants contended that once aforesaid suit ultimately has been dismissed holding that Smt. Ramdei was not dead on 12.10.1966, when the sale-deed in question in Original Suit No. 227 of 1969 was executed, the said finding shall operate as res judicata in the present case also and, therefore, the suit in question also cannot succeed. The Trial Court rightly dismissed the suit but L.A.C. has committed patent error in allowing the appeal.

8. The short question up for consideration, in the case in hand, whether L.A.C., which is the last Court of fact, has committed any patent and material illegality or irregularity etc. in reversing judgment of Trial Court and whether the decision in earlier Suit No. 227 of 1969 can help defendant in the case in hand.

9. So far as earlier proceedings are concerned, judgment of this Court, of date, in Second Appeal No. 2276 of 1977, Maharaji Kinwar v. Sheo Shanker itself demonstrates that matter was investigated by Revenue Authorities in certain proceedings in respect to disputed property and there was an inspection report of revenue authority verifying that Smt. Ramdei was alive in 1966. It is in these facts and circumstances, none of the Courts found any basis or substance to interfere and cancel sale-deed executed on 12.10.1966 which was assailed only on the ground that vendor was not alive though, as a matter of fact, this fact, in the context of date of execution of sale-deed, was not found to be correct.

10. In the present case, the sale-deed in question, has been executed on 5.4.1975. There is almost eight and a half years difference between the two transactions. The case of plaintiff is that Smt. Ramdei was not alive on 5.4.1975 when the alleged sale-deed was executed, and on 14.4.1975 when it was registered. On the contrary, defendants' claim that Smt. Ramdei actually died sometimes in 1980 and was alive in 1975.

11. It is an admitted case that according to defendants, even on the date when original suit was instituted i.e., 1976, Smt. Ramdei was alive and she died just a few months before the suit was actually decided by Trial Court on 29.9.1981. However, no attempt or effort was made by defendants to produce Smt Ramdei before Trial Court. The earlier proceedings, which related to the period of October, 1966, cannot be said to be equally applicable for state of affairs in 1975.

12. Record also shows that initially, when the suit in question was instituted, Smt. Dulari was also impleaded as defendant No. 6. In the written statement, defendants 1 to 5 pleaded that defendant No. 6 Smt. Dulari had died in February, 1966 and therefore, a dead person was illegally impleaded. On this aspect, Trial Court heard the matter on 13.9.1979 observing that Smt. Dulari is not a necessary party in the suit at all therefore, plaintiff may take appropriate steps for deletion of her name from the array of parties. The Court, however, observed that impleadment of Smt. Dulari, if not necessary, but proper for the reason that ground for seeking cancellation of sale-deed was that Smt. Dulari impersonating as Smt. Ramdei

executed sale-deed, therefore, question, whether she was also dead or alive on the date of execution of sale-deed in question would be of utmost importance and therefore parties shall lead evidence on this aspect also. The L.A.C. in reversing the decree of Trial Court, besides other, has given following reasons:

- (i) Plaintiff, Smt. Maharaji Kun-war, has proved to be daughter of Smt. Ramdei.
- (ii) Smt. Ramdei was never produced before Trial Court though she was alive at the time of filing of written statement and also thereafter inasmuch as according to defendant's own case, she died in April, 1980.
- (iii) The defendant's witnesses were found to have played fraud in the Court proceedings by impersonation etc. and therefore their conduct and statement was not found reliable.

13. All this has been discussed in paras 40 and 41 of the judgment. It has also held that mere fact that Smt. Ramdei was alive in October, 1966 so as to uphold document executed in 1966 would not ipso facto be a correct so as to hold that she was also alive in April, 1975 when the sale-deed in question was executed and registered.

14. The L.A.C. also found that sale-deed itself shows that it was without any consideration. It was executed during a period when consolidation proceedings were going on in the village concerned but no permission was obtained from consolidation authorities before executing the said deed. Reason for not obtaining such permission was not given. The Court in these facts and circumstances proceeded to rely on well established principle that best evidence must have been adduced by the parties before Court below and the person who has withheld the best evidence, would have to suffer as if he has failed to prove his point. The question as to how and in what circumstances principle of res judicata would apply, has already been discussed in detail in my judgment of date in Second Appeal No. 2276 of 1977, Maharaji Kinwar v. Sheo Shanker and in view thereof, I have no hesitation in holding that on the question, whether Smt. Ramdei had died in October, 1966 or not, judgment passed in Original Suit No. 227 of 1969 would operate as res judicata and since it has been held therein that Smt. Ramdei was alive in 1966, this finding shall hold good in the present case also but this fact by itself would not help defendants in any manner for the reason that crucial and moot question up for consideration in the present case is whether Smt. Ramdei was alive in April, 1975 or not. Mere fact that a person was alive 8 or 10 years back cannot hold true to treat him/her alive unless proved by cogent evidence particularly when there is a dispute on this aspect and the best evidence, if the incumbent is alive, is to produce the incumbent himself/herself.

15. In these facts and circumstances I have no hesitation in answering the questions No. (i) and (ii) accordingly and hold that despite fact that factum of being alive of Smt. Ramdei in October, 1966 in O.S. No. 227 of 1969 would operate res judicata to

that extent, that would not help defendant-appellant to hold that she was also alive in April, 1975 hence judgment in Original Suit No. 227 of 1969 as affirmed by this Court in Second Appeal No. 2276 of 1977 (supra) would render no help to the defendants in any manner.

16. Now coming to the third and forth question, I find that L.A.C. has not decided the issue on mere presumption that since Smt. Ramdei was not produced, therefore, it cannot be said that she was alive on 5.4.1975 or 14.4.1975, as the case may be. In arriving at ultimate inference to hold that aforesaid sale-deed is liable to be revoked, L.A.C. had given certain other reasons also which are of considerable importance and this Court has not been addressed by defendants on these aspects to show that the same were irrelevant or illegal. One of the basic principle to uphold a sale-deed is that a transaction of sale would be valid if there is a consideration for said purpose. Love and affection is not a valid consideration for the purpose of sale of immoveable property except where it is a case of gift.

17. At this stage learned Counsel for defendants drew my attention to paper No. 7C1, copy of the sale-deed dated 5.4.1975/14.4.1975 to point out that consideration was Rs. 25,000/- and it is mentioned therein that Rs. 10,000/- was already received by vendor in advance and Rs. 15,000/- was received before Sub-Registrar. Therefore, finding of L.A.C. that sale-deed was without any consideration is perverse. Here I find something very interesting. Copy of sale-deed, which is on record as paper No. 7C1, consideration, as stated by learned Counsel for defendants is clearly mentioned therein but there is another aspect which shows that it is a bogus and fictitious document. This deed is in four sheets having stamp paper of Rs. 3 (one sheet), paise 75 (two sheets) and paise 50 (one sheet). On the back of all four stamp papers, date of purchase mentioned by stamp vendor is 29th April, 1975. When the stamp itself was purchased on 29th April, 1975, it is beyond any comprehension, how a sale-deed could be executed on 5.4.1975 and registered on 14.4.1975.

18. It is then pointed out that aforesaid document is not original one but a true copy prepared on 2.5.1975, as is evident from last sheet of the document. But then a moot question would crop up immediately as to what happened to the original document and why it was not adduced before Court below. If the parties were permitted to lead secondary evidence, there in nothing to demonstrate that such procedure as required u/s 65 of Evidence Act, 1972 was observed. Even otherwise, when a document was registered on 14th April, 1975 what was the occasion to have a true copy prepared on 2nd May, 1975 itself is also not understandable. Besides this, in the sale-deed itself, on one hand, on sheet one, while disclosing the amount of consideration of Rs. 25,000/-, it is also said that entire amount is due, but on the next sheet, it is said that Rs. 10,000/- has already been taken in advance and Rs. 15,000/- is being received before Sub Registrar. Both these statements are self contradictory in the same document. The reason for this contradiction could not be explained. It is also stated that if there is any change in number of plots in

consolidation operations, the same would be treated to be so in respect to plot numbers mentioned in the sale-deed and it is fortified that document was sought to be executed during consolidation proceedings but no permission, admittedly, had been obtained from the consolidation authorities at all.

19. In the entirety of the facts and circumstances discussed above, in the case in hand, I do not find any illegality on the part of L.A.C. in passing impugned judgment of reversal.

20. In respect to questions (iii) and (iv), this Court is clearly of the view that the same, as such, do not arise in the case in hand or otherwise have to be answered against defendants for the reason, firstly, the sale-deed has been cancelled for more than one reason, and, secondly, that defendants having failed to adduce best evidence, are bound to fail, as is the principle of Evidence Act and the L.A.C. therefore has rightly allowed the appeal vide the impugned judgment. In the result, I find no merit in this appeal. It is accordingly dismissed. No costs.