

(1997) 03 AHC CK 0205

Allahabad High Court

Case No: Second Appeal No. 878 of 1996

Smt. Rasheedan

APPELLANT

Vs

Amar Singh and Others

RESPONDENT

Date of Decision: March 20, 1997**Acts Referred:**

- Civil Procedure Code, 1908 (CPC) - Section 9
- Specific Relief Act, 1963 - Section 34, 41
- Uttar Pradesh Consolidation of Holdings Act, 1953 - Section 4, 5(2)
- Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950 - Section 153, 226, 229B, 229C, 331

Hon'ble Judges: S.K. Phaujdar, J**Bench:** Single Bench**Final Decision:** Dismissed

Judgement

S.K. Phaujdar, J.

The matter was heard on 18.2.97 on the point of admission in presence of the Defendant-Appellant and the Plaintiff Respondents appearing as a caveators. The concerned suit was filed by the Respondents for setting aside a sale-deed and for permanent injunction. It was stated that the sale-deed was obtained by impersonation and the Plaintiffs had not executed it. There was no agreement for sale between the Plaintiffs and the Defendant. Accordingly. The prayer for cancellation was made together with an injunction against the Defendant to restrain them from disturbing the possession of the Plaintiffs.

2. It was the defence case that the Plaintiffs had no cause of action as the suit property was sold away to Defendant No. 1 by a sale-deed dated 21.4.89 which was duly executed by the Plaintiffs. The Defendant No. 1, from the date of the aforesaid sale, became a bhumidhar with transferable right and was in possession of the suit property by cultivation. The suit was stated to be barred u/s 34, Specific Relief Act. The suit was also

not maintainable u/s 331 the U.P.Z.A. & L.R. Act. The Munsif decreed the suit and cancelled the concerned sale-deed and issued the injunction order as was prayed for.

3. The first appellate court confirmed the findings of the trial Judge and dismissed the Civil Appeal preferred by the present Appellant. Only thereafter the present appeal was filed and the parties were directed to maintain status quo as on 17.10.96 in respect of the suit property. The Respondents failed a counter-affidavit and made a prayer for vacation of stay order and the matter was heard as indicated above,

4. In the memo of appeal the Appellant raised certain questions as a substantial questions of law. It was urged that the Plaintiffs should have filed a suit u/s 229B of the U.P.Z.A. & L.R. Act as the revenue records were not in their names. It was further urged that as the Plaintiffs were found out of possession and no relief for possession was sought, the suit could not have been decreed for permanent injunction. It was stated that the two handwriting experts examined in the case came with diverse opinions and the court acted illegally to sit as an expert. It was further stated that the judgments were against the weight of evidence adduced. The suit was basically one for cancellation of a sale-deed on the ground of impersonation and absence of execution by the Plaintiffs. The learned Counsel took me through a series of decisions as to the authority of the civil Judge to take up such a suit.

5. In the case between [National Insurance Co. Ltd. Vs. Manjula Ben and Others](#), it was held by the Allahabad High Court that a suit for injunction in respect of agricultural land was cognizable only by the revenue court and the suit was not maintainable before the civil court. The order was passed in exercise of the writ jurisdiction of the High Court. The trial Judge had returned the plaint on the ground that the civil court has no jurisdiction. The order was challenged in the appellate court and the order was confirmed. The writ petition too was dismissed upholding the views of the civil court. It was out and out a suit for injunction and such suit is envisaged u/s 153 of the U.P.Z.A. and L.R. act and, according to the High Court in this case, the civil court could have Jurisdiction u/s 9, CPC except for such suits cognizance of which is expressly or impliedly barred. In view of the provisions of U.P.Z.A. and L.R. Act such cognizance by the civil court for that nature of the suit was held barred. In another case reported 1994 ACJ 911, the High Court was approached in a writ petition Tejbhan Singh and Ors. v. IInd Additional District Judge, Jaunpur. It was a suit for cancellation of a sale-deed. According to the averments in the plaint the document was void. The Plaintiffs were not recorded in the revenue papers. It was held that the Plaintiffs had to seek declaration in their favour u/s 229B of the U.P.Z.A. and L.R. Act as upon cause of action pleaded the suit was cognizable by the revenue court. In this judgment reference was made to a decision of a Full Bench of the Allahabad High Court reported in 1989 ACJ 1.

6. The above view was taken by the Allahabad High Court also in the case of Indrapal v. Jagannath 1992 RD 231. It was a suit for cancellation of a sale-deed. The sale-deed was void and there was a prayer for declaration of a right. The court found that adjudication of

the title was in substance the main question involved in the suit even though no express prayer was made. It was held that the suit was triable by the revenue court and not by the civil court.

7. Regarding cancellation of a document, the Supreme Court judgment in the case of [Gorakh Nath Dube Vs. Hari Narain Singh and Others](#), in my view, has settled any conflict over the matter. A question arose before the Supreme Court whether a civil proceeding would arise under the provisions of Section 5(2) of the U.P. Consolidation of Holdings Act after publication of the notification u/s 4 of the said Act. The civil proceeding was in the nature of a suit for cancellation of a sale-deed. The Supreme Court, in this case, made a distinction between a case where a document was wholly or partially invalid so that it could be disregarded by any court or authority and one where it has to be actually set aside before it ceases to have legal effect. It was observed that an alienation made in excess of power to transfer would be to the extent of the excess of power invalid. An adjudication on the effect of such a purported alienation would be necessary in the decision of a dispute involving conflicting claims to rights or interests in lands which are subject-matter of consolidation proceedings. The existence and quantum of rights claimed or denied will have to be declared by the consolidation authorities which would be deemed to be invested with jurisdiction by necessary implication of the statutory powers to adjudicate upon such rights and interest in land, to declare such documents effective or ineffective, but where there is a document the legal effect of which can only be taken away by setting it aside or its cancellation, authorities have no power to cancel the sale-deed and, therefore, it must be held to be binding on them so long as it is not cancelled by a court having the power to cancel it.

In the case before the Supreme Court the Plaintiff had claimed that the sale of his half share by his uncle was invalid, inoperative and void. Such a claim could be adjudicated upon by the consolidation courts. The Supreme Court confirmed in this case a decision of the Allahabad High Court reported in 1969 ALJ 768 to hold that it is the substance of the claim and not its form which is decisive.

8. From the dicta as discussed above. It can be inferred that there cannot be a general rule that whenever it is a suit for cancellation of a sale-deed. It must not be cognizable by a revenue court or it must not be taken up by a civil court. The jurisdiction of the revenue court or the civil court depends on the substance of the allegation and if the deed is void on the face of it, it requires no cancellation or declaration as being void, the revenue court, in such a case, could proceed to determine the rights of the parties. But when a deed is not void and it becomes void only on proof of certain facts, the intervention of the civil court is necessary as a decision declaring it void could be made by the civil court only.

9. In the case at our hands, the Plaintiffs suit was for cancellation of the deed on the ground that it was obtained by impersonation and the Plaintiff had Plaintiff to make the sale-deed is not to be determined as both the parties proceed from the position that the

Plaintiff had the right over the suit property. It is really the manner of execution of the sale-deed which is in question without involvement of the rights of the parties on the date of the sale. It is thus a document which awaits a declaration that it was void and was not a document void on the face of it. In terms of the decision of the Supreme Court. It would be a document cancellation of which could be made by the civil court only.

10. It was also the contention of the learned Counsel for the Appellant that the suit should have been filed u/s 229B of the U.P.Z.A. & L.R. Act. This section deals with declaratory suits by persons claiming to be the asami of a holding or part thereof. It reads as follows.

229B. Declaratory suit by person claiming to be an asami of a holding or part thereof.-(1) Any person claiming to be an asami of a holding or any part thereof, whether exclusively or jointly with any other person, may sue the landholder for a declaration of his rights as asami in such holding or part, as the case may be.

(2) In any suit under Sub-section (1) any other person claiming to hold as asami under the landholder shall be impleaded as Defendant.

(3) The provisions of Sub-sections (1) and (2) shall mutatis mutandis apply to a suit by a persons claiming to be a (bhumidhar) with the amendment that for the word "landholder" the words "the State Government and the (Gaon Sabha) are substituted thereon.

11. Section 331 of the U.P.Z.A. & L.R. Act bars cognizance by a civil court of a suit covered in Schedule II of the Act. A suit for declaration of a right under Sections 229, 229B and 229C finds place in this Schedule and it is stated that such suit would lie before the Assistant Collector only. From a reading of the Sections 229B and 331, it does not appear that a suit for mere cancellation of a sale-deed which is not in substance a suit for declaration of right could be filed before the revenue court. The Supreme Court judgment dictates that the substance of the relief is to be seen and not the form. It is reiterated that in the present case, the suit is substantially one for a declaration that a sale-deed was obtained by impersonation and was, as such, void, the civil court alone could have taken up such a suit as it was not void on the face of it.

12. It was urged that the Plaintiffs were found out of possession and in the absence of a relief of possession prayed for, the suit could not have been decreed for permanent injunction. Issue No. 2 was definitely directed on the question of possession. On issue No. 2 the court found that on the suit property the Plaintiff was not in possession. The trial court framed issues No. 3 and 5 on the question of grant of relief. It was urged before the court of first instance that when the Plaintiff was not in possession of the suit property, his suit was barred under Sections 34 and 41 of the Specific Relief Act. The issue was decided against the Defendant regarding grant of relief. The court was of the view that although the suit was for cancellation of the sale-deed and a permanent injunction could have been granted on the basis of possession but as the sale-deed was found forged and fake, the Defendant was simply a trespasser and an injunction could have been issued.

13. The first appellate court also took up discussion on the issues framed by the court of first instance. It is found from the appellate judgment that the finding of possession was challenged by the Respondent-Plaintiffs in the first appeal. The appellate court discussed the evidence on the question of possession. He discarded the evidence of the defence on the question of possession as these witnesses were disbelieved on the question of execution of the document. It was clearly found that when the D.W. 1 and D.W. 3 were disbelieved on the question of execution of the document, no reliance could be placed on the version of these very witnesses on the point of possession. He further found that there were material contradictions on the point of possession between the statement of the defence witnesses. He had referred to the statement of D.W. 1 who had stated that on the date of the deed, the land lay fallow for 6 to 7 years and there was no crops standing thereon. D.W. 2 had stated that after purchase the Defendant had cultivated sugarcane. D.W. 3 had stated that cultivation of wheat was made first. The D.W. 1 was the Defendant herself and D.W. 3 was her son-in-law. The court below had discussed the statements of the witnesses produced by the Plaintiffs. They were residents of the same village and they had supported the claim of the Plaintiffs to say that the Plaintiffs had been in possession of the suit property. He had also looked to the findings of the court of first instance who had rejected the statement of P.W. 3 on the ground that he had failed to name the neighbouring cultivators. The appellate court was of the view that the evidence could not have been rejected only on that ground. The appellate court was of the view that when possession was claimed on the basis of the sale-deed only and the sale-deed was a forged one, it was the only conclusion that possession was never transferred.

14. If there be a finding of fact by the court of first instance and the first appellate court does not discuss it but reverses it, the judgment would be bad in law. But in the instant case, the appellate court had taken up issue No. 2 afresh, discussed the evidence on record and had reversed the findings of the court of first instance and rejected the plea of possession of the suit property as claimed by the Defendant. This finding of fact may not be interfered with in this second appeal as this Court is not supposed to reappraise the evidence in the absence of allegation of perversity.

15. On the question of the trial Judge sitting as an expert, I am of the view that when two handwriting experts had given two diagonally opposite opinions, the court had to appreciate the evidence on record, keeping in view the other evidence on that point. Expert evidence is always an opinion evidence and is open to scrutiny by the court like evidence of any other person. Section 73 of the court normally seeks assistance of an expert to help in appreciation of evidence. Mere examination of an expert does not divest the court from making a comparison and more so when the experts had deferred. By mere comparison, the court does not take the seat of an expert.

16. Upon the aforesaid discussion, it must be held that there is no force in the appeal and it is accordingly dismissed.