
(2008) 06 MP CK 0030

Madhya Pradesh High Court (Gwalior Bench)

Case No: None

Kallu and Others

APPELLANT

Vs

Antulal and Others

RESPONDENT

Date of Decision: June 20, 2008

Acts Referred:

- Evidence Act, 1872 - Section 40, 41, 42, 43

Citation: (2008) ILR (MP) 2381 : (2008) 5 MPHT 62 : (2008) 3 MPJR 210 : (2008) 4 MPLJ 332

Hon'ble Judges: S.M. Samvatsar, J

Bench: Single Bench

Final Decision: Dismissed

Judgement

Subhash Samvatsar, J.

This appeal is preferred by the defendant being aggrieved by the judgment and decree dated 15-7-1998 delivered by First Additional District Judge, Gwalior in Civil Appeal No. 9-A/98 whereby the First Appellate Court has affirmed the judgment and decree dated 27-2-1998 passed by Civil Judge Class II, Gwalior in Civil Suit No. 46-A/90.

Brief facts of the case are that the respondents plaintiffs filed a civil suit for declaration of title, injunction and return of possession against the present appellants defendants alleging that father of the plaintiffs was the owner of the House No. 7/15 new number 42/5 situated at Tatiya Pakhre Ki Payga near Saligram Darji Ki Bagiya, Taraganj, Lashkar, Gwalior. According to the plaintiffs their father constructed the said house in the year 1934 and the property was his self acquired property. Father of the plaintiff died in the year 1974 and after the death of father of the plaintiffs, plaintiffs became the owner of the property by succession. It is alleged that defendants being cousins of the plaintiffs, were allowed to reside in the property and their possession was permissive possession. They have no right to continue in possession. Hence, the present suit was filed on these premises.

On notice, the defendants filed their written statement alleging that the property was owned by one Jasoda. Jasoda had executed a Will in their favour. The defendants also claimed that they have acquired right in the suit property by adverse possession.

The two Courts below have concurrently found that the Will executed by Jasoda is not proved and plea of adverse possession is also not proved and decreed the suit. Hence, this second appeal.

This appeal was admitted by this Court on 24-3-1999 the following substantial question of law:

Whether on the pleading that the property is ancestral and in the absence of any evidence in respect of partition, the finding that the plaintiffs are exclusive owners of the property is perverse?

The gist of the said question is whether the property in question is ancestral and in the absence of any evidence in respect of partition, the finding that the plaintiff is exclusive owner is perverse.

From perusal of the pleadings of the parties, I find that this question in fact does not arise for consideration in the present appeal. None of the parties has pleaded that the property was ancestral. In such circumstances, the question framed by this Court does not arise for consideration.

Shri Raja Sharma, the learned Counsel for the appellants defendants submitted that even though there is a finding by the two Courts below that the Will executed by Jasoda is not proved, still there is a judgment and decree dated 30-9-1999 in Civil Suit No. 32-A/99 (Antulal and Ors. v. Mahila Mohaniya) wherein it was held that Jasoda had executed a Will in respect of the property. Said judgment and decree is filed by the appellants alongwith an application I.A. No. 5463/2000 under Order XLI Rule 27 of CPC.

Now the question is whether the said judgment and decree can be taken on record.

Shri Raja Sharma, learned Counsel for the appellants defendants contended that as in the said judgment, it is held that Jasoda had executed a Will and the said judgment was delivered during the pendency of this appeal on 30-9-1999, the same can be taken on record.

Shri learned Counsel for the respondents-plaintiffs, on the other hand, contended that the said judgment and decree is not relevant and therefore, cannot be taken on record. He invited attention of this Court to Sections 40, 41, 42 and 43 of the Indian Evidence Act, 1872.

Section 40 of the Evidence Act provides that the previous judgment is relevant to bar a second suit or trial. It provides that the existence of any judgment, order or decree which by law prevents any Courts from taking cognizance of a suit or holding a trial

is a relevant fact when the question is whether such Court ought to take cognizance of such suit or to hold such trial. This section, thus, provides that previous judgment can be considered to create a bar for the second suit such as *res judicata*.

In the present case, from perusal of the copy of the judgment filed by the appellants defendants alongwith their application under Order XLI Rule 27 of CPC, it appears that the present appellants were not parties to the said suit, hence, the question of *res judicata* or any other bar does not arise.

Section 41 of the Evidence Act provides that final judgment order or decree of a Competent Court, in the exercise of probate matrimonial admiralty or insolvency can be relevant for the insubsequent suit. From perusal of the judgment and decree filed by the appellant in Civil Suit No. 32-A/99 alongwith the application under Order XLI Rule 27 of CPC it is apparent that said judgment and decree was not passed either in matrimonial proceedings, probate case or insolvency proceedings, but is passed in a suit for ejectment. Hence, provisions of Section 41 of the Evidence Act are also not applicable in the present case.

Section 42 of the Evidence Act provides that judgments, orders or decrees other than those mentioned in Section 41 are relevant, if they relate to matters of public nature. Judgment and decree filed by the appellants defendants does not relate to public nature, and therefore, this provision also will not be applicable.

Section 43 further provides that judgments, orders or decrees other than those mentioned in Sections 40, 41 and 42 are irrelevant unless the existence of such judgment, order or decree, is a fact in issue, or is relevant under some other provisions of this Act. As the judgment and decree filed by the appellants defendants is not covered by Sections 40, 41 and 42 of the Evidence Act, said Section is irrelevant and therefore, cannot be taken into consideration.

In such circumstances, I find that the judgment and decree filed by the appellants defendants alongwith the application I.A. No. 5463/2000 under Order XLI Rule 27 of CPC cannot be allowed and the judgment and decree cannot be taken on record. Hence, I dismiss the application I.A. No. 5463/2000.

As the question which has been framed by this Court at the time of I admission does not arise from the judgments and decrees passed by the two Courts below, I hold this appeal to be without any merit and is dismissed without any order as to costs.