
(2016) 09 MP CK 0005

MADHYA PRADESH HIGH COURT (GWALIOR BENCH)

Case No: S.A. No. 785 of 2004

Aga Ali Anwar

APPELLANT

Vs

Mst. Shahnaj Bano

RESPONDENT

Date of Decision: Sept. 6, 2016

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Section 100

Citation: (2016) 4 MPLJ 229

Hon'ble Judges: Vivek Agarwal, J.

Bench: Single Bench

Final Decision: Dismissed

Judgement

@JUDGMENTTAG-ORDER

Vivek Agarwal, J.—Parties through their counsel.

2. This second appeal has been filed under section 100 of Civil Procedure Code against the judgment and decree dated 13-8-2004 passed by District Judge, Datia in Civil Appeal No. 11-A/2001, thus, confirming the judgment and decree dated 27-9-2001 passed by Court of First Civil Judge, Class-I, Datia in Civil Suit No. 1-A/2001.

3. The plaintiff had filed a suit for declaration and restoration of possession claiming that old house No. 714/3A(B) situated at Shanichara Temple, Datia is the property of ownership and possession of Hakim Aga Ali Ahmad who was father of plaintiff and defendants No. 2 and 3. Plaintiff No. 3 is his widow. It was also pleaded that since Hakim Aga Ali Ahmad was not residing at Datia and was earlier posted at Chandigarh and Shrinagar, so also plaintiff No. 1 at Lucknow, therefore, after his death on 21-6-1992 plaintiffs and defendants No. 2 and 3 are the owners and possessors of the property left behind by said Hakim Aga Ali Ahmad.

4. According to the plaintiffs, since Hakim Aga Ali Ahmad was not residing at Datia, he had appointed Amir Husain @ Achhan S/o Nasir Hasan as his power of attorney

holder to take care of the properties situated in Datia. In the year 1980-81, Amir Husain @ Achhan had demanded certain amounts for maintenance of the property and at that point of time Hakim Aga Ali Ahmad was appointed at Hamdard Hospital, Shrinagar and since there was no arrangement for remitting the money, therefore, he had asked his power of attorney holder to mortgage the suit property and arrange for the funds. According to the plaintiffs on 1-12-1980 power of attorney holder Amir Husain had mortgaged the property with defendant No. 1 Smt. Mithiladevi Katariya and had taken a sum of Rs. 2000/- after execution of Bainama.

5. The dispute which has arisen in this suit is that whether the said deed which was executed by the power of attorney holder of Hakim Aga Ali Ahmad, was deed of mortgage or a deed of sale and whether the said power of attorney holder had right to execute the documents transferring interest in the suit property. Plaintiffs submitted that on 27-6-1985 a notice was published in "Dainik Datia Times" showing the intention of defendant No. 1 to seek mutation of suit property in her name on the basis of sale deed. As a result, objections were filed before the Municipal Corporation, Datia on 17-7-1985 alleging that suit property is a personal religious property being part of "Husaini Mahal" and it was never sold in favour of the defendant No. 1. As a result, on the basis of so-called sale-deed no rights accrued in favour of defendant No. 1. It is also submitted that Hakim Aga Ali Ahmad had moved an application before the M.P. Waqf Board. Defendant No. 1 filed her reply and had submitted that the suit property is not part of the religious place Imambara but is separate and distinct from Imambara. She had purchased the said property on the basis of power of attorney executed by Hakim Aga Ali Ahmad in favour of Amir Husain @ Achhan authorising him to sell the said property and accordingly she had purchased the said property through registered sale deed dated 1-12-1980 for a sum of Rs. 2000/- and since that date she had become the owner and is in possession of the suit property. Learned trial Court held that plaintiffs have failed to prove their suit and dismissed the suit holding that they are not able to prove that the sale deed executed on 1-12-1980 in favour of the defendant No. 1 was illegal. This finding of fact has been confirmed by the first appellate Court. The first appellate Court has relied on the judgment in case of **Pannalal v. Bhawaniram, reported in 1982 MPWN 360**, wherein it has been held that a party which is trying to take advantage of certain pleadings, then the onus is on such a party to prove those pleadings. Relying on this judgment it has been held that onus was on the plaintiffs to prove that power of attorney executed in favour of Amir Husain @ Achhan did not authorise him to sell the property. In fact, no such burden was discharged. Power of Attorney was not filed before the Court below to show that Amir Husain was not having right to sell the property in question. It has also discarded the document Ex. P/17 special power of attorney as it was neither signed by deceased Hakim Aga Ali Ahmad, nor was notarized by registry in the office of Sub-Registrar. It has also discarded document P/2 so called agreement to nullify the sale deed as it was not only denied by defendant No. 1, even the specialist DW/2 had

opined that it did not contain signatures of defendant No. 1. Relying on the judgment in the case of **Gwalior Ceramic and Potteries Pvt. Ltd. v. Karamchand Thapar and Brothers Coal Sales Ltd., Gwalior, as reported in 1996 M.P.L.J. 772** it has been held that merely exhibiting a document will not prove its contents. In the present case it has been held that since power of attorney holder Amir Husain and defendant No. 1 had not signed on Ex. P/2, it will not create any right in favour of the plaintiff and the defendants No. 2 and 3. In view of this fact, the first appeal has been dismissed. There is no material on record to rebut these findings of fact so as to give rise to any substantial question of law.

6. There are concurrent findings of facts regarding execution of sale deed in favour of defendant No. 1 by the power of attorney holder of Hakim Aga Ali Ahmad which docs not call for any interference in this second appeal.

7. Thus, this second appeal fails and is dismissed.