HIGH COURT OF JAMMU AND KASHMIR AT JAMMU

CSA No. 24/2003

Date of decision: 14.07.2008

Kuldeep Kumar ***Vs.*** ***Vinod Sharma***

Coram:

MR. JUSTICE J. P. SINGH, JUDGE

Appearing Counsel:

For Appellant : Mr. D.K.Khajuria, Advocate.

For Respondent : Mr. Ajay Vaid, Advocate.

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i) Whether approved for reporting in Press/Journal/Media : **Yes**

ii) Whether to be reported in Digest/Journal : **Yes**

Claiming to be the owner of house No. 109 Kucha Acharjian, Dhakki Sarajan, Jammu, Kuldeep Kumar appellant had filed a suit for mandatory injunction directing the respondent-defendant to vacate and hand-over the possession of a room described in the plaint, to him.

Denying the title of the appellant as owner of the house, the respondent, *inter alia*, had pleaded that the document vesting all the rights in the house in the appellant which he had relied upon, was illegal and had been obtained mischievously and fraudulently by the appellant from the father of the parties.

In order to decide the contentions raised by the parties, the trial Court had put them to issues, which read thus:-

1) Whether the suit has not been filed by a competent person? OPD
2) Whether the suit in present form is not maintainable? OPD
3) Whether the suit is misconceived because of non-joinder of parties? OPD
4) Whether the value for purpose of court fee and jurisdiction has not been properly fixed? OPD
5) Whether the plaintiff is the owner of the suit house by virtue of a valid relinquishment deed? OPP
6) Whether the defendant is a licencee in a room measuring 10' x 10' in house no. 109 situate at Mohalla Acharjian Jammu? OPP
7) Whether the licence of the licencee has been terminated by valid notice? OPP
8) Relief.

Deciding all the issues in favour of the appellant, the trial Court accordingly decreed the suit against the respondent.

Trial Court's decree of March 16, 2000 was, however, set aside by the Appellate Court, holding that as the attesting witnesses to the Relinquishment Deed had not been produced in the Court so the deed as such could not be said to have been 'duly proved'. The Ist Appellate Court, while affirming the findings of the trial Court on issue nos. 1 to 4, has upset its findings on issue nos. 5 to 7.

Appellant's Civil Second Appeal against the decree and judgment of the Ist Appellate Court was admitted to hearing by this Court on the following substantial questions of law:-

I) Is it necessary to examine all the attesting witnesses and the author to prove the due execution of a document, though under Section 68 of the Evidence Act only one

attesting witness can prove the execution of the document?

II) Depending upon the findings of above question of law, whether the Relinquishment Deed, said to be executed by the father of parties, has been duly proved in evidence before the trial Court. If it is so, what is its impact on the rights of parties?

I have heard learned counsel for the parties and gone through the records.

Before dealing the questions framed by the Court, regard needs to be had to the real controversy between the parties.

Parties to this appeal are real brothers. House No. 109 Kucha Acharjian, Dhakki Sarajan, Jammu is stated to have been purchased by the father of the parties vide duly executed Sale Deed registered on July 23, 1973.

Appellant-plaintiff had claimed the Sale Deed to be Benami saying that he was the owner of the house as the sale consideration had been paid by him. He had sought respondent's eviction on the ground that respondent's licence to use one of the rooms of the house having been determined, he was liable to vacate and handover the room to him.

In addition to other evidence produced by the appellant, he had relied upon a registered document, styled as Deed of Relinquishment, executed by the father of the parties on August 15, 1984, acknowledging therein that house no. 109 situated at Kucha Acharjian Dhakki Sarajan, Jammu had been purchased by him by virtue of Sale Deed executed and registered on July 23, 1973 for and on behalf of the appellant who had paid the entire consideration for the purchase of the house. The appellant had further relied on Munsiff (Sub-Registrar),

Jammu's decree of September 18, 1984, in terms whereof he had been declared to be the sole and exclusive owner of house in question. This decree had been passed by the Court on the admission of the father of the parties admitting and acknowledging the appellant to be the owner of the house. Although the respondent had not denied the execution of the Relinquishment Deed by his father, yet he had taken the plea that it had been got executed mischievously and fraudulently by the appellant from the father of the parties. He, however, could not produce any evidence to justify this plea. Father of the parties is still stated to be alive. He has not questioned the Relinquishment Deed acknowledging the appellant to be the owner of house in question.

The question which, therefore, falls for consideration is as to whether the respondent would have any right to question the Deed which had been relied upon by the appellant in support of his ownership over the house in question, when the father of the parties had opted not to question the Deed and had rather admitted and acknowledged the ownership of the appellant over the house on the basis whereof appellant's suit against his father had been decreed by learned Munsiff (Sub-Registrar), Jammu on September 18, 1984 which has not been questioned till date.

It may not be difficult to find answer to this question because it is the father of the parties alone, and none else, who could question the Relinquishment Deed, had he desired so to do. He has, however, opted not to do that.

Respondent, who admittedly doesn't have any right in the property and claims his ownership rights in the house, though under a misconception, that he derives his rights in the house through his father, cannot thus be heard to question plaintiff's declared ownership over the property in question additionally because the father of the parties, in whose favour the original Sale Deed of the house had been executed had, in unequivocal terms, admitted and acknowledged the appellant to be the owner of the house.

In view of the aforementioned factual matrix, although there would not have been any necessity of deciding the questions which have been framed in the case as substantial questions of law, yet I propose to deal these questions because the Ist Appellate Court had non-suited the appellant solely on the ground that the Relinquishment Deed had not been proved by the appellant because the attesting witnesses thereto had not been produced for their evidence.

Law regarding proof of documents is contained in Chapter V of the Evidence Act Svt. 1977 which prescribes various modes of proof of documents. No hard and fast rule as such has been prescribed for proof of documents, other than those, for proof whereof, specific mode is prescribed either in the Evidence Act or in any other law, for the time being in force. It may not thus be necessary to prove those documents, which are not necessarily required to be proved by production of witnesses or requisite number thereof, in the manner prescribed for such proof under law for the time being in force, to produce all the witnesses to the document, in proof

thereof. Execution of these documents may thus be proved even by examining the scribe or in the absence of the scribe, by the executants or one of them, and/or by one or more of the witnesses to the document. It all, therefore, depends on the nature of the evidence which is led to prove such document, that may determine, keeping in view the facts and circumstances of each case as to whether or not the evidence so produced had successfully proved 'due execution' of the document. In other words, therefore, all that may be said in this behalf is that before a document may be said to be 'duly proved', its execution needs to be proved to the satisfaction of the Court, of course guided by the provisions of the Evidence Act providing for such proof in its Chapter V, on the basis whereof it may be said that the document had been duly proved and the proof of execution of the document may be supplied even through one or more witnesses who may be examined for the purpose. Such documents are required to be proved as if these were unattested documents. Such is the mandate flowing from Section 72 read with Sections 61 and 67 of the Evidence Act. These Sections, for facility of reference, are being reproduced hereunder:-

> Section 72: **Proof of document not required by law to be attested.**
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> "An attested document not required by law to be attested may be proved as if it was unattested."

> Section 61: **Proof of contents of documents**.
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> "The contents of documents may be proved either by primary or by secondary evidence."

> Section 67: **Proof of signature and handwriting of person alleged to have signed or written document produced**.
> "If a document is alleged to be signed or to have been written wholly or in part by any person, the signatures or the handwriting of so much of the document as is alleged to be in that person's handwriting must be proved to be in his handwriting."

All the attesting witnesses and the author of a document required by law to be attested need not however be examined to prove the execution of such document, for, suffice it would be, to examine **one of the attesting witnesses to such document**, to prove the document in view of the mandate of law flowing from Section 68 of the Evidence Act, which for facility of reference reads thus:-

> Section 68**: Proof of execution of document required by law to be attested**
> "If a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purposes of proving its execution, and has been examined as a witness if there be an attesting witness alive, and subject to the process of the Court and capable of giving evidence;
> [Provided that it shall not be necessary to call an attesting witness in proof of the execution of any document, not being a will, which has been registered in accordance with the provisions of the Registration Act, 1977, unless its execution by the person by whom it purports to have been executed is specifically denied.]"

Question No.1 is, accordingly, answered by holding that all the attesting witnesses and the author of the document required by law to be attested, need not be

examined to prove its execution and suffice it would be to examine even one of the attesting witnesses to prove the document.

During the Course of hearing of the appeal, learned counsel for the respondent had conceded, and rightly so that the document relied upon by the appellant in his suit was not the one which, under any law for the time being in force, was such which was required to be attested and proved in terms of Section 68 of the Evidence Act. In this view of the matter, Ist Appellate Court's findings, proceeding on the premise that the document in question was required to be attested and proved in terms of Section 68 are thus erroneous.

The deed relied upon by the appellant being not the one which was required to be attested under any law for the time being in force, was not required to be proved in terms of Section 68 of the Evidence Act.

This takes me to Question No. 2 which I propose to deal as follows:

Deed relied upon by the appellant in his plaint, may not, strictly speaking, be a Relinquishment Deed, for all that the Deed contemplates by the phraseology employed therein, is Keshav Dutt Sharma's (the father of the parties) admission and acknowledgment of appellant-plaintiff as the rightful owner of house No. 109 situated at Kucha Acharjian, Dhakki Sarajan, Jammu, which had been purchased by him for appellant-plaintiff in his absence. In other words, the father of the parties did not claim any right in the house and had acknowledged the appellant to be the true owner thereof. This Deed of Relinquishment, signed by Keshav Dutt Sharma and the

appellant has been witnessed, among others by the respondent. Appellant had proved this Deed and his signatures appearing on it.

Respondent-defendant does not deny the execution of this document and his signatures thereon as a witness. He, however, dubs this document as mischievous and obtained by fraud. Whereas respondent-defendant had not produced any evidence on the basis whereof it may be said that the document was obtained mischievously and with fraud, the appellant had, in his statement on oath shown it to have been duly executed by him and his father. Father of the parties has not disowned this document as none of the parties had opted to produce him as a witness in the case. Appellant-plaintiff had however relied upon decree dated September 18, 1984 in a suit between him and his father in terms whereof he had been declared as the sole and exclusive owner of the house in question.

Plea raised by the respondent that the document had been obtained by fraud and mischief could succeed only if the father of the parties had disowned this document. This has, however, not happened and rather to the contrary, there is a decree of the Civil Court passed on the statement of the father of the parties admitting and acknowledging appellant to be the rightful owner of the house in question.

In view of the evidence and material placed on records, I would, accordingly, hold and answer Question No. 2 by saying that the Deed relied upon by the appellant, which was not required under any law for the time being in force to be attested and required to be

proved under Section 68 of the Evidence Act, has been duly proved in evidence. With the proof of the Deed, the necessary consequence that flows therefrom is that appellant succeeds in proving him to be the owner of house No. 109 situated at Kucha Acharjian, Dhakki Sarajan, Jammu.

Finding of the Ist Appellate Court on issue no. 5 is thus unsustainable which needs to be reversed.

I would, accordingly, while upsetting the finding of the Ist Appellate Court on issue no.5, hold that the appellant had proved himself to be the owner of house No. 109 situated at Kucha Acharjian Dhakki Sarajan, Jammu by proving the Deed, which in effect and in essence is a Deed of acknowledgement of appellant's rights in the house in question by his father. Appellant's ownership over the suit property stands further established by the declaratory decree which had been obtained by the appellant against his father.

While deciding issue nos. 6 & 7, the Ist Appellate Court had not recorded its finding as to whether or not the defendant was a licensee in room measuring 10' x 10' in house No. 109 situated at Kucha Acharjian Dhakki Sarajan, Jammu and whether the licence had been terminated by the licensee. He had, on the other hand, reversed the findings of the trial Court on these issues influenced only by his finding on issue no.5 that the appellant had failed to prove himself to be the owner of the property on the basis of the Relinquishment Deed.

Finding of the Ist Appellate Court on issue no.5 having been set aside, its finding on issue nos. 6 & 7 would also be required to be set aside warranting a fresh

finding from it on these issues for deciding the Ist appeal on its merits, in view of what has been held in this judgment and on the findings which it would record while dealing with the findings of the trial court on issues nos. 6 and 7.

This Civil Second Appeal, therefore, succeeds and is, accordingly, allowed. Judgment and decree of Ist Appellate Court is set aside and the case remanded to it for fresh disposal of the Ist appeal in accordance with law.

Parties through their learned counsel are directed to appear before Learned Ist Additional District Judge, Jammu on 11.08.2008.

(J.P.Singh)
Judge

Jammu
14.07.2008
Anil Raina, PS