Mohd. Tahir vs Mst. Sardar Bano And Anr. on 6 November, 1951

Equivalent citations: AIR1952ALL782, AIR 1952 ALLAHABAD 782

JUDGMENT

Mushtaq Ahmad, J.

1. This is an appeal by the 1st defendant in a suit for possession over a certain land. The plaintiff's allegations were that the two defendants, appellant and respondent 2 respectively, along with others, were co-sharers in this land, that in 1940 the same had been partitioned, that an area of 158 sq. yards had been given to defendant 2 (respondent 2) and that, on 24-8-1943, this defendant had under a registered deed of exchange transferred the same to the plaintiff who, in lieu thereof, had given to him, defendant 2, the property in schedule B of the plaint. The relief claimed was for possession over this 158 sq. yards of land by virtue of this exchange and, in the alternative, over the property in schedule B.

2. The defence of the appellant was that he and not the defendant 2, from whom the plaintiff claimed to have acquired this area, was the owner of the same, having been in long and absolute possession of it and that there had been no partition as alleged by the plaintiff in 1940.

3. The trial court decreed the suit only against defendant 2 in respect of the property in schedule B, but dismissed it as against defendant 1 in respect of the area of 158 sq. yards aforesaid. This was on the findings that defendant 2 and others were joint owners of the plot measuring 158 sq. yards, there having been no legal partition of the same, that for this reason the deed of exchange dated the 24-8-1943, was invalid and that the defendant 1 (appellant) had been in possession of this area only as a co-sharer and not adversely to the other co-sharers.

4. On appeal by the defendant 2, the decree of the trial court was reversed, the learned Judge decreeing the suit in respect of the 158 sq. yards against defendant 1, but dismissing it in respect of the property in schedule B against defendant 2. This was on the finding that the partition alleged by the plaintiff had been proved by legal evidence and that the said area had been allotted to defendant 2 who, therefore, was entitled to transfer it to the plaintiff by exchange.

5. Before I mention the points raised in this Court by the learned counsel for the defendant-appellant I may note that, according to the plaintiff and defendant 2, the plot, of which the disputed area of 158 sq. yards forms part, had been subjected to a partition by the co-sharers. They allege that a writing had been drawn up to evidence this partition, the same having been signed by 11 out of the entire 13 co-sharers, as the remaining two were away in Hyderabad. It was further alleged by them that this writing had been lost in transit on its way to that place, where it had been, sent for the signatures of the absentee co-sharers. The writing, though signed by the eleven co-sharers at home, did not of course bear the signatures of the absentee co-sharers when it was

lost. It was, therefore, for all intents and purposes and taking it as a document embodying an agreement for partition, an unsigned and incomplete document in the sense that it had not been signed by all the co-sharers. The writing having been lost could not and was not of course produced, though a paper marked Ex. B-4 which the defendant 2 described as a copy of the 'fard' prepared at the time of the partition was filed. This copy does not bear anybody's signature.

6. In this state of the record, the trial court held that neither the writing sent to Hyderabad nor the writing Ex. B4 filed by the defendant 2 being signed by the co-sharers, they could not legally prove a partition of the plot in dispute. The court did not consider the oral evidence at all, presumably on the assumption that the alleged partition having been evidenced by a writing and the writing itself not being admissible, no other proof was possible. The lower appellate court on the other hand held that the writing being only evidence of a settlement already made among the co-sharers, if the same was not admissible, the settlement itself could be proved by oral evidence. In this view, the learned Judge, believing that evidence, came to the conclusion that the partition set up by the plaintiff had been established. The main question in this appeal is whether he was legally right in this view.

7. Learned counsel for the defendant-appellant has argued that, where a document had been executed evidencing a partition and the same was not registered as required by Section 17(1)(b) of the Indian Registration Act, so that the same was not admissible in evidence, no proof of partition could be adduced at all. He conceded that, if there was no such document of partition, then, according to the case-law in this country, oral evidence could be produced to prove a partition.

To give effect to this argument it will be necessary to hold or to assume that the writing alleged to have been lost in this case was a document of partition executed by the co-sharers but allowed to remain unregistered. It had to be first of all a 'document' and then to have been 'executed.' The word 'document' is defined in Section 3 of the Evidence Act as:

> " 'Document' means any matter expressed or described upon any substance by means of letters, figures or marks or by more than one of those means, 'intended' to be used, or which may be used, for the purpose of recording that matter."

The words 'intended to be used, or which may be used' necessarily imply that the document has to be used by some party against another. If it is to be so used, then there should be intrinsic evidence in the document itself of some particular party or parties being associated with the same. Where the document bears the signature of the executant, this is undoubtedly evidence of such association. Where there is no such signature and the document stands completely detached from and unconnected with any person or party, there can be no question of the same being used by anybody against another. Again, before a person can be bound by a particular document, he must be proved to have 'executed' it. Surely, if anybody without intending to bind himself by the terms of a writing brings that writing into existence merely as a pastime and for a fun intending to create no obligations upon himself and for that reason does not even append his signature to it, he has not 'executed' that writing.

The question then is what are the elements of a due execution. I should conceive that one of the essential elements is that the document should be signed by the party or parties associated with it. It is not possible to imagine that execution of a document may take any other form than that of the executant putting his signature on it. According to Section 2(12) of the Indian Stamp Act, the words 'executed' and 'execution', used with reference to instruments, mean 'signed' and 'signature' respectively. In 'BHAWANJI HARBHUM v. DEVJI PUNJA', 19 Bom 635, it was observed at page 638 that:

> "execution of deeds is the signing, sealing and delivery of them in the presence of the witnesses."

Again, in 'HARE KRISHNA v. JOGENESHAR' AIR 1939 Cal 688, it was remarked:

> "The word 'execution' as used in the proviso to Section 68 in the case of a mortgage bond which under the law requires attestation, means and includes not only the signature of the executant but the whole series of acts or formalities which are necessary to give the document validity as mortgage....."

This definition was accepted in 'KALI CHARAN v. SURAJ BALI', AIR 1941 Oudh 89. The element of signing in the definition of execution is of course essential whether the deed is a mortgage or any other disposition of property.

8. Learned counsel for the defendant-appellant invited my attention to a large number of cases, in some of which the documents did bear the signatures of the executant and in others it was not clear whether the executant had signed the deeds, although it could be implied from the reports that he had signed them. Of the former class, may be cited the cases of 'NEPALRAI v. PARAS RAM', 1936 All L J 1165 and 'SUBBRAO v. MAHALAKSHAMAMMA', AIR 1930 Mad 883. In 'UPENDRA NATH v. OMESH CHANDRA', 15 Cal W N 375, the deed was stated to have been 'executed by the parties' which I take to mean 'signed by the parties'.

9. In this view of the law, it cannot be said that there was any document of partition in the shape of the writing which was alleged by the plaintiff and defendant 2 to have been lost after it had been sent to Hyderabad for the signatures of two of the co-sharers. The argument is naturally based on the terms of Section 91, Evidence Act. This section itself at several places uses the word 'document', by which, it must be taken, the legislature meant something purporting to have been executed by a party and therefore signed by him in token of execution.

10. There being thus no document, legally so called, none of the provisions relating to the proof of documents, either primary or secondary, in the Evidence Act need be considered, there being no question at all for the plaintiff-respondent to have to prove a 'document' in this case. I say this, as one of the contentions urged by the learned counsel for the appellant was that either a certified copy of the document, if it was registered, or any secondary evidence of the contents of it, as allowed by Section 65 of the Act, could alone be admitted. There, being no 'document', much less a registered document, in this case as evidence of partition, there could be no question of the plaintiff adducing

secondary evidence of the contents of it within the meaning of this section. In such circumstances, obviously, the law does not furnish any bar to the admission of oral evidence to prove the alleged partition. The lower appellate court noticed that evidence and having believed it recorded a finding in favour of partition, and this not being vitiated by any legal error, has to be accepted in second appeal.

11. Learned counsel who argued this case with commendable tenacity urged that this oral evidence, if examined carefully, would be found fundamentally lacking as a proof of partition. He pointed out that the four witnesses referred to by the learned Civil Judge had admitted that at the time the writing, since lost, was drawn up, there were only 11 out of the 13 co-sharers present and that, therefore, they alone in the absence of the remaining two co-sharers could not agree to an effective partition. On this ground he challenged the finding of the lower appellate court as legally unsustainable.

12. In the first place, this point had not been raised in the grounds of appeal in this Court, nor does it appear from the judgment of the lower appellate court to have been raised in that court. For my own satisfaction, I referred to the evidence in the course of the arguments, and I find that, although Mohammad Tayyab, plaintiff's son and witness, stated in cross-examination that all the co-sharers were not present at the time of the partition but only 11, he had already stated in the examination-in-chief that the partition took place 'among the co-sharers' of the plot in question. What the witness obviously meant was that, although when the writing was drawn up only 11 out of the 13 co-sharers were present, the actual partition itself, which must have been a previous proceeding, had been decided upon among all, the co-sharers. The very fact that a writing embodying the terms of the partition was subsequently sent to the absentee co-sharers in Hyderabad would indicate that, so far as partition 'per se' is concerned, those co-sharers had already agreed to it and the writing was sent to them merely for their signatures in token of that agreement. If this was not so, the witness just named would have never used the words 'among the co-sharers'. I am, therefore not inclined to lend my assent to this new argument.

13. For these reasons I am of opinion that the lower appellate court took the right view in holding that there having been no document of partition properly so-called, a finding as to partition could be based on the oral evidence produced by the plaintiff, there being no statutory bar to the adoption of such a proceeding. I, therefore, see no reason to interfere with the judgment of that court, and I, accordingly, dismiss this appeal with costs.

14. Leave to appeal to a Bench is granted.