

NON-REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO(S). 7137 OF 2010

ALI HUSSAIN(D) THROUGH LRS

....APPELLANT(S)

VERSUS

RABIYA & ORS.

....RESPONDENT(S)

J U D G M E N T

Rastogi, J.

1. This appeal is directed against the judgment and decree dated 18th August, 2008 passed by the High Court of Uttarakhand in Second Appeal No. 1341 of 2001.

2. The facts in brief are that the first respondent-plaintiff filed a suit against the defendant-appellant for cancellation of sale deed dated 10th May, 1995 registered in Sub-Registrar Office, Jagadari, Roorkee on 22nd May, 1995. According to the plaint, the plaintiff-first respondent Smt. Rabiya inherited the property

shown in the schedule of property indicated at the foot of the plaint, from her father late Sri Ahamad and is the owner and in possession of the suit property in question. It was further averred that the impleaded defendants in the suit (defendant nos.1 and 3, Ali Hussain and Abdul Hassan) are the sons of her great grandfather and impleaded defendant no. 2 Smt. Raquiba, is the wife of Ali Hussain (impleaded defendant no. 1).

3. It was averred in the plaint that the impleaded defendant no.1 (appellant) in order to grab the suit property of the plaintiff-respondent, got prepared a forged registered power of attorney, in the name of the plaintiff-first respondent on 25th April, 1995 and on the basis of the forged power of attorney, sold the suit property by a registered sale deed for a consideration of Rs. 1,50,000/- on 10th May, 1995 in favour of defendant nos. 2 and 3 (Smt. Raquiba and Abdul Hassan). According to the plaintiff-first respondent, the sale price of the suit property could not be less than Rs. 3,00,000/-. It is also alleged in the plaint that there is no recital as to who had actually received the sale consideration and she is in actual possession of the suit property and the forged sale deed was never acted upon. It was prayed for

the decree for cancellation of power of attorney and the sale deed obtained by playing fraud.

4. Before the trial Court, on the basis of pleadings of the parties, following issues were framed:-

1. Whether the sale deed dated 10.05.1995 executed by defendant no. 1 in favour of defendant nos. 2 and 3 is liable to be cancelled on the grounds set in the plaint?
2. Whether the alleged power of attorney dated 25.04.1995 executed by plaintiff in favour of defendant no. 1 is forged document and the plaintiff did not execute the same? If so, its effect?
3. Whether the plaintiff received the sale consideration in respect of sale deed from defendant no. 1 in favour of defendant nos. 2 & 3.
4. Whether the plaintiff is owner and in possession of the property in dispute?
5. Whether the plaintiff is entitled for any relief?
6. Whether after selling the property in dispute to Mohammad Mateen by the plaintiff, the suit rendered infructuous?
7. Whether the suit is barred by principle of estoppel and acquiescence?
8. Whether the suit rendered infructuous in view of the contention raised in para no. 13-A of the written statement?

5. Both the parties adduced their oral as well as documentary evidence in support of their defence. The trial Judge, after hearing the parties and considering the evidence on record, dismissed the suit filed by the plaintiff-first respondent vide

judgment and decree dated 19th January, 2001 which was further assailed at the instance of the plaintiff-first respondent in first appeal which was dismissed vide judgment and decree dated 27th August, 2001, further assailed in second appeal before the High Court of Uttarakhand.

6. It may be relevant to note that at the time of admission of second appeal, the High Court admitted the appeal on the following substantial questions of law:-

1. As to whether both the courts below were justified placing burden of proof on the plaintiff/appellant to prove negative fact that power of attorney is not executed by her?
2. Whether burden/onus of proof lies on the transferee when transferor totally denies execution of the deed by himself? If so, its effect?

7. The High Court after hearing the parties proceeded on the premise that the plaintiff-first respondent was the pardanasheen illiterate lady and taking note of the judgment of this Court in **Mst. Kharbuja Kuer Vs. Jangbahadur Rai and Others** AIR 1963 SC 1203, relying on the judgment of the Privy Council (*Farid-Un-Nisa(Plaintiff) Vs. Mukhtar Ahmad and Another(Defendants)* AIR 1925 PC 204) held that burden of proof

in such a case rest, not with those who attack, but with those who found upon the deed, and the proof must go so far as to show affirmatively and conclusively that the deed was not only executed by, but was explained to, and was really understood by the grantor.

8. The High Court held that the burden to prove that the alleged power of attorney is not a result of fraud and misrepresentation lie on the shoulder of the appellant-defendant because they are the beneficiaries and the trial Court and the first Appellate Court has committed a manifest error in shifting the burden on the shoulders of the plaintiff-first respondent and accordingly set aside the judgment and decree of the Courts below and remitted the matter back to the trial Judge to decide the suit afresh in view of the evidence available on record taking note of the observations made by the High Court in the impugned judgment dated 18th August, 2008 which is a subject matter of challenge at the instance of the appellant-defendant no. 1 before us.

9. This Court, while issuing notice on 14th November, 2008 stayed the operation of the impugned judgment dated 18th August, 2008.

10. Learned counsel for the appellants submits that the very foundation on which the High Court has proceeded that the plaintiff-first respondent was a pardanasheen illiterate lady and shifting the burden of proof on the shoulder of the appellant-first defendant to establish that the document was explained to the plaintiff-first respondent and she understood it and thereafter transaction was entered into, is against the pleadings on record. From the perusal of the copy of the plaint annexure P/1 on record filed by the plaintiff-first respondent, it is nowhere pleaded that she was a pardanasheen illiterate lady and in absence whereof, the very proposition which has been examined by the High Court under the impugned judgment is unsustainable and so far as the issues which are framed by the trial Judge on the basis of the pleadings on record, all have been negated against the plaintiff-first respondent and in the given circumstances, the finding recorded by the High Court in remitting the matter to the

trial Judge to revisit the same on the basis of principles laid down deserves to be interfered by this Court.

11. Per contra, learned counsel for the respondents, while supporting the finding recorded by the High Court under the impugned judgment, submits that it is undisputed fact that the plaintiff-first respondent is a pardanasheen illiterate lady and still the case was proceeded with the burden of proof on her shoulders to establish that the power of attorney executed by the plaintiff in favour of defendant-appellant was a forged document was a patent error of law. In the given circumstances, the burden of proof was upon the defendant no.1-appellant to establish that the registered power of attorney executed on 25th April, 1995 was a genuine document and only thereupon the onus could have been shifted to the plaintiff-first respondent and this is an apparent manifest error which was committed by the trial Judge but noticed by the High Court in the impugned judgment and it needs no further interference by this Court.

12. We have heard learned counsel for the parties and with their assistance perused the material available on record.

13. The plaintiff-first respondent filed a Suit No. 155 of 1996 before the Civil Judge (J.D.), Roorkee. A copy of the plaint has been placed on record (Annexure P/1). On perusal of the plaint, it reveals that it has nowhere been pleaded that the plaintiff-first respondent is a pardanasheen illiterate lady. In the ordinary course the burden of proof rest, on who attack. On the contrary, it was pleaded in the plaint that defendant nos.1 and 3 are the sons of her uncle Mangta and defendant no. 2 is the wife of defendant no. 1 and they hatched a conspiracy to grab the land of the plaintiff-first respondent and with connivance, the power of attorney was prepared & registered on 25th April, 1995 in the registry office, in the name of the plaintiff and pursuant thereto, suit land was sold by a registered sale deed. On the basis of pleadings on record, the above-mentioned eight issues were framed on which both the parties have adduced oral and documentary evidence and the trial Judge, after considering the evidence, dismissed the suit vide judgment and decree dated 19th January, 2001 and that came to be affirmed on dismissal of the appeal filed at the instance of the plaintiff-first respondent dated 27th August, 2001. It reveals from the record that without there being any factual foundation, the High Court, while admitting the

appeal, framed two substantial questions of law in reference to which there was no supporting pleadings on record.

14. We still, for our satisfaction have gone through the plaint placed on record at Annexure P/1 and we are unable to find the pleadings in support that she was a pardanasheen illiterate lady and was entitled for protection of law and the burden was on the defendant-appellant to prove that the alleged power of attorney was the result of fraud.

15. After we have heard the parties, we are of the view that the High Court has committed a manifest apparent error in reversing the concurrent finding of the two Courts below and on this score the impugned judgment is not sustainable.

16. Consequently, the appeal succeeds and accordingly allowed. The judgment of the High Court in second appeal dated 18th August, 2008 is hereby set aside. No costs.

17. Pending application(s), if any, stand disposed of.

.....J.
(N.V. RAMANA)

.....J.
(MOHAN M. SHANTANAGOUDAR)

.....J.
(AJAY RASTOGI)

NEW DELHI
SEPTEMBER 17, 2019