

Neutral Citation No. - 2024:AHC-LKO:46258

Court No. - 19

Case :- MATTERS UNDER ARTICLE 227 No. - 4657 of 2006

Petitioner :- Matadeen @ Mitthu

Respondent :- The Addl. Distt. Judge Ambedkarnagar And Others

Counsel for Petitioner :- R.S.Pande,I.M. Pandey Ist,R.S. Pandey

Counsel for Respondent :- C.S.C.,Surya Kant

along with

Case :- WRIT - C No. - 1001610 of 2010

Petitioner :- Matadeen Alias Mitthu

Respondent :- Additional District Judge Ambedkar Nagar

Counsel for Petitioner :- R.S.Pandey,I.M. Pandey Ist,Saryu Prasad Tiwari

Counsel for Respondent :- C.S.C.,S.P. Tiwari

Hon'ble Manish Kumar,J.

1. Heard learned counsel for the petitioners, learned Standing Counsel for the State and Sri S.P. Tiwari, learned counsel for the private respondents.
2. The writ petition (MATTERS UNDER ARTICLE 227 No. - 4657 of 2006) was reserved by a co-ordinate Bench of this Court on 08.04.2022 and thereafter, it was released on 30.06.2022.
3. Both these writ petitions are being heard together and they are being decided by this common judgment.
4. Learned counsel for the petitioner has submitted that the deceased petitioner in the present writ petition had inherited the property in question i.e. Gata No. 53-Ja, filed a suit for permanent injunction on 10.04.1998 which has been registered as Original Suit No. 256/1998 (Matadeen @ Mitthu vs. B.N.K.V. Mahavidyalaya and Ors.). The respondents after receiving the notice had filed their written statement on 15.02.1998, claiming the property in question on the basis of *sankalp nama* (gift deed) dated 21.01.1957 alleged to be executed by the deceased petitioner's father.
5. It is further submitted that the deceased petitioner moved an application for amendment on 13.03.2000 which was allowed by order dated 24.03.2003 and accordingly the plaint was amended adding paragraph 8A and 8B to the effect that the property in question is ancestral and the deceased petitioner being born on 05.04.1948 was minor at the time of alleged gift deed dated

21.01.1957 and the alleged gift deed was never implemented on account of which the property in question continues in the name of petitioner and in his exclusive possession and that he is not bound by the said gift deed.

6. It is further submitted that the deceased petitioner had also moved an application bearing no. 47-Ga-2 seeking direction against the defendants for producing the original alleged gift deed (*sankalp nama*) which was allowed by order dated 03.09.2001, directing the defendants to produce the original gift deed and sale deed but the defendants did not produce despite repeated direction dated 18.09.2001.

7. It is further submitted that since the defendants failed to produce the original deed after repeated opportunities given by the trial court, hence the photocopies of the alleged gift deed (*sankalp nama*) and sale deed were not acceptable as evidence as per Order 8 Rule 1A which provides that *where the defendant bases his defence upon a document or relies upon any document in his possession or power, in support of his defence or claim for set off or counter claim, he shall enter such document in a list, and shall produce it in court when the written statement is presented by him and shall, at the same time, deliver the document and a copy thereof, to be filed with the written statement.*

8. It is further submitted that the trial court framed issues on 07.05.2004 in absence of the original gift deed (*sankalp nama*) and sale deed. In these circumstances, the deceased petitioner was having an impression that there being no such gift deed/sale deed.

9. The defendants moved an application bearing no. 140-Ga-2 on 04.05.2006 seeking permission to file the original gift deed (*sankalp nama*) and the sale deed, against which the plaintiff filed an objection on 05.05.2006 on the basis of Order 13 Rule 1 read with Order 8 Rule 1-A of C.P.C., but the trial court allowed the application preferred by the respondents dated 04.05.2006 ignoring the objection filed by the petitioner by order dated 05.07.2006 and giving a finding that no prejudice shall be caused to the petitioner.

10. It is further submitted that the said order dated 05.07.2006 was challenged by the petitioner by filing Civil Revision No. 51 of 2006 before the District Judge but the same was also rejected by judgment/order dated 19.08.2006 on the ground of their being no prejudice to the plaintiff as he has opportunity of controverting the defendant's evidence.

11. Against the said orders passed by the trial court dated 05.07.2006 and the revisional order dated 19.08.2006, the writ petition (MATTERS UNDER ARTICLE 227 No. - 4657 of 2006) has been filed by the petitioner with the following amended prayers, which was allowed by this Court by its order dated 07.12.2015:-

"A. An order or direction setting aside the impugned order dated 05.07.2006 passed by O.P. No. 2 contained in Annexure no. 2 and order dated 19.08.2006 passed by O.P. No. 1 as contained in Annexure No. 1 to the writ petition.

B. Opposite party nos. 1 & 2 may be directed to reject the application filed by opposite party as contained in Annexure no. 9 & 10 i.e. Paper No. 140Ga & Paper No. 142Ga.

C. An order or direction in the nature of Mandamus commanding the opposite party no. 2 to decide the suit within such time as the Hon'ble Court deems fit and proper in the circumstances of the case."

12. The petitioner thereafter moved an amendment application dated 18.03.2009 seeking amendment for declaring the gift deed and sale deed void and cancellation of the same but the trial court rejected the application for amendment vide order dated 06.04.2009.

13. Against the aforesaid order dated 06.04.2009, a revision was preferred by the petitioner which was dismissed by order dated 05.03.2010 and both the orders have been challenged by the petitioner by filing WRIT - C No. - 1001610 of 2010 with the following amended prayers, which was allowed by this Court by its order dated 11.12.2015:-

"A. An order or direction setting aside the impugned order dated 06.04.2009 passed by O.P. No. 2 contained in Annexure no. 2 and the order dated 05.03.2010 passed by the opposite party no. 1 as contained in Annexure No. 1 to the writ petition.

B. Order or direction directing the opposite party no. 2 to allow the amendment application dated 18.03.2009 contained in Annexure no. 7."

14. In writ petition (MATTERS UNDER ARTICLE 227 No. - 4657 of 2006), a detailed order has been passed by this Court on 08.04.2022, which is quoted hereinbelow:-

"Heard Shri I.M. Pandey for the petitioner and Shri S.P. Tiwari for respondents no. 3 to 5.

Present petition has been filed praying for quashing of order dated 05.7.2006 passed by the Civil Judge (Junior Division), Ambedkar Nagar in Regular Suit No.256/1998 [Mata Deen alias Mitthu vs. BNKV Mahavidyalaya] and the order dated 19.8.2006 by which Civil Revision No.51/2006 filed by the petitioner has been rejected.

It is the case of the petitioner now represented by the legal heirs that the petitioner had filed a suit for permanent injunction in respect of 1/3 rd part of bhumidhari plot no.53 Ja, area 3 bigha, 2 biswa 10 biswansi on 10.4.1998 against opposite parties no.3 and 4. The opposite party no.5 was also

impleaded as defendant no.2 in formal capacity as its name was recorded along with the petitioner over the land in dispute.

The petitioner's suit was filed on the ground that plot no.53 Ja was owned by and in possession of the father of the petitioner and his two brothers Purushottam and Ram Adhar. Purushottam and Ram Adhar had transferred their 2/3rd share of the plot in favour of Gandhi Ashram, Akbarpur, Ambedkarnagar the opposite party no.5. Remaining 1/3rd share of the said plot remained in possession and ownership of Harihar Prasad Mishra. The petitioner inherited said share and was in possession thereof. The opposite parties no.3 and 4, i.e., BNKB Mahavidyalaya and B.N. Inter College, Akbarpur tried to take possession forcibly over the land, therefore, the petitioner filed a suit for permanent injunction against the opposite parties no.3 and 4.

After service of notice the opposite party no.3 filed written statement on 15.9.1998 and alleged that the land in question had been transferred to them through 'sankalpnama' and sale-deed by Shri Harihar Prasad, father of the petitioner. On the basis of such 'sankalpnama' and sale-deed, the defendants were in possession and not the plaintiff, over the land in question.

Although the defendant mentioned about the 'sankalpnama' and the sale-deed in para 15 and 18 of the written statement, they did not file the documents, i.e., 'sankalpnama' and sale-deed dated 21.01.1957 and 15.10.1979 respectively along with the written statement.

The petitioner moved an application paper no. 47 Ga 2 on 17.01.2001 before the learned trial court for a direction to the defendant to file original document, i.e., the alleged 'sankalpnama' and the alleged sale-deed. The trial court by an order dated 03.9.2001 allowed such application paper no.47 Ga 2 and directed the defendant to file the original documents, however, such documents were not filed even on the next date fixed, i.e., 18.9.2001.

On the basis of the pleadings of the parties the trial court framed issues on 07.5.2004 and the case was fixed for evidence of the plaintiff. The evidence of the plaintiff was closed on 22.02.2006 and the case was fixed for 20.3.2006 for the evidence of the defendant. The defendants repeatedly took adjournments for giving evidence. The trial court granted at least three opportunities to the defendant to give evidence and later on gave one more opportunity on payment of cost of Rs.40/- fixing 05.5.2006 by its order dated 24.4.2006. On 04.5.2006 the defendants moved an application paper no. 140 Ga (2) praying for permission to file original copies of 'sankalpnama' and sale-deed, and also moved an application paper no. 142 Ga (2) for placing the aforesaid documents under sealed cover. Later on also adjournments were sought and given by the trial court to the defendant.

The petitioner filed separate objections to application no.140 Ga (2) and application no.142 Ga (2) but without considering such objections the trial court allowed the application paper no. 140 Ga (2) and also the application paper no. 142 Ga (2) by the order impugned dated 05.7.2006.

It has been argued that the learned trial court failed to take into account Order 8 Rule 1 A of the CPC as also Order 13 Rule 1 CPC, wherein the defendant, if he proposes to rely on any document in the written statement, has to file it in its original along with the written statement. The trial court also failed to take into account earlier orders passed by it by which the application moved by the petitioner paper no. 47 Ga 2 for direction to the defendant to produce the original 'sankalpnama' and sale-deed had been allowed.

It has also been argued that against the order dated 05.7.2006 the petitioner filed a revision taking specific ground of Order 8 Rule 1 A and Order 13 Rule 1 CPC but the revisional court has rejected the revision on 19.8.2006.

Aggrieved by both such orders Writ Petition No.4657 (MS) of 2006 has been filed.

It has been argued that in pursuance of the observations made by the revisional court in its order dated 19.8.2006 that the plaintiff can at any time produce additional evidence to controvert the documents, i.e., 'sankalpnama' and the sale-deed, the petitioner filed an amendment application paper no.286 ka praying for amendment in the plaint and prayer was thereof for a declaration of the 'sankalpnama' and the sale-deed to be void and praying for their cancellation. Such application paper no. 286 ka was rejected by the learned trial court by its order dated 06.4.2009 on the ground of it being moved belatedly when evidence had been closed and the arguments were being heard of the counsel for both the parties. The petitioner being aggrieved filed civil revision no.22/2009 which revision has also been rejected by order dated 05.3.2010. The petitioner had filed writ petition no.1610(MS) of 2010 challenging the order dated 06.4.2009 and the order passed in revision dated 05.3.2010.

It is the case of the petitioner that the trial court and the revisional court failed to notice that the original documents, i.e., the 'sankalpnama' dated 21.01.1957 and the sale-deed dated 15.10.1979 were not produced by the defendants before the trial court in their original till 2006 and at the time of the case being prepared for arguments the petitioner had been advised that it was necessary to challenge the 'sankalpnama' dated 21.01.1957 and the sale-deed dated 15.10.1979 also. It has been argued that the petitioner had moved an application before the learned trial court on 04.5.2006 for directing the defendants to place on record the alleged original 'sankalpnama' and sale-deed so that the plaintiff may verify the execution thereof. The defendants deliberately delayed placing the original documents on record as a result the amendment application was moved with delay. It has been argued that the finding recorded by the trial court in its order dated 06.4.2009 that for cancellation of 'sankalpnama' and sale-deed were separate causes of action for which separate suit could have been filed but for limitation in challenging the same is completely arbitrary as the written statement was filed on 15.9.1998 with photocopies of the alleged 'sankalpnama' and sale-deed. If the plaintiff can be said to have derived the knowledge in September, 1998 then he had 12 years from the date of such knowledge to challenge.

Learned counsel for the petitioner has placed reliance upon judgment rendered by the Hon'ble Supreme court in the case of State Bank of Hyderabad vs. Town Municipal Council in Civil Appeal No.5294 of 2006 decided on 01.12.2006 and judgment rendered in BKN Pillai vs. P. Pillai and Another in Civil Appeal No.7222-23 of 1999 decided on 13.12.1999 and judgment rendered by this Court in Moti Yadav vs. Bhola Yadav in Second Appeal No.669/2010 decided on 08.7.2010.

Learned counsel for the respondent on the other hand has argued on the basis of judgment rendered in Reevajeetu Builders and Devlopers and Narain Swami and Sons and Others in Civil Appeal No.6921 of 2009 decided by the Hon'ble Supreme Court on 09.10.2009. He has pointed out that Limitation of three years as prescribed in the schedule attached to Limitation Act and argued that once knowledge was derived of 'Sankalpnama' and sale-deed in September, 1998 the plaintiff ought to have filed appropriate amendment application within three years from the date of such knowledge for

cancellation of such instrument. He has referred to the fact that by means of the amendment the entire nature of the suit has been proposed to be changed at a belated stage when all evidence from both the sides had been produced before the learned trial court and the suit was pending at the stage of arguments of the counsel.

Learned counsel for the petitioner says that once the revisional court in its order while rejecting the revision of the petitioner had observed that the petitioner had opportunity to produce additional evidence to challenge the 'Sankalpnama' and the sale-deed the limitation would start running from year 2006 and not from year 1998.

The judgment is reserved. The learned counsel for the parties may take written submission and case laws in support of their arguments within one week."

15. It is further submitted that after passing of the detailed order passed by this Court, the case was adjourned on the issue regarding the period of limitation to challenge the sale deed and the *sankalpnama*. Whether it would be three years as per Article 56 of the Limitation Act or 12 years as per Article 109 of the Limitation Act, 1963 (hereinafter referred to as 'the Act, 1963').

16. It is further submitted that the learned court below had rejected the amendment application preferred by the petitioner treating it as time barred i.e. filed beyond three year's limitation period as provided under Article 56 of the Act, 1963 for the reason that the petitioner had knowledge of this instrument when the photocopies of the *sankalpnama* and sale deed were filed by the respondents along with his written statement in the year 1998 but the same was challenged by the petitioner in the year 2009 i.e. after more than three years.

17. It is further submitted that Article 109 of the Act, 1963 is attracted in the case of the petitioner as the knowledge about the *sankalp patra* and the sale deed had come for the first time when the written statement was filed by the respondents in the year 1998 and the period of 12 years would have expired in the year 2010, whereas the amendment application was moved in the year 2009 well within the period of 12 years.

18. It is further submitted that the property is an ancestral property and the petitioner is governed by Mitakshara law and it could not be alienated by the father of the petitioner and the petitioner is still in possession of the property.

19. On the other hand, Sri S.P. Tiwari, learned counsel for the respondents has submitted that the petitioner is having the knowledge of the *sankalp patra* and the sale deed since the date of filing of the written statement by the respondent in the suit. The petitioner could have challenged the same within a period of three years as per Article 56 of the Act, 1963 but the same was

challenged much after the expiry of three years' period, so the amendment has rightly been rejected by the learned trial court as time barred.

20. The submission of learned counsel for the petitioner that the amendment application could not be filed as the respondent had not filed the original *sankalp patra* and the sale deed despite the application moved by the petitioner till the year 2006 and after filing of the same by the respondent, the amendment application was filed.

21. In reply, learned counsel for the respondent has submitted but for filing the amendment, the petitioner could not have waited for the original document to be brought on record. He could have filed the same merely on the averments made in the written statement supported by the photocopies of the instruments.

22. After hearing learned counsel for the parties and going through the record of the case, the position which emerges out in the present case is that the learned trial court and the revisional court had rejected the amendment application preferred by the petitioner challenging the *sankalp patra* and the sale deed alleged to be executed in favour of the respondent by the father of the petitioner beyond three years' limitation period from the date of knowledge by filing of the written statement by the respondent in the year 1998.

23. Here the suit for permanent injunction was filed by the petitioner against the respondent not to remove the wall on the property of the petitioner in which the written statement was filed by the respondents claiming their rights on the basis of sale deed and the *sankalp patra* alleged to be executed by the father of the petitioner but had not filed the original along with the same. Despite the application given by the petitioner for filing of the original of the instruments as alleged to be executed in favour of the respondent by the father of the petitioner, it was not filed since 1998 till 2006. It was for the first time filed in the year 2006 and thereafter the amendment application was moved in the year 2009 i.e. within 12 years from the date of knowledge for the first time when the alleged original was filed in the year 2006.

24. Hon'ble Supreme Court in the case of **K.C. Laxmana vs. K.C. Chandrappa Gowda and Anr. [2022 SCC Online SC 471]** has held that Article 109 is the special Article to apply where the alienation of father is challenged by his son and the property is ancestral and the parties are governed by Mitakshara

law by fulfilling certain pre-conditions. The relevant paragraph nos. 8 & 9 of the said judgment are quoted hereinbelow:-

"8. Article 58 of the Second Schedule to the Limitation Act provides for the period of limitation to file a suit to obtain any other declaration. The period of limitation under this article is three years from the date when the right to sue first accrues. It is a residuary article governing all those suits for declaration which are not specifically governed by any other articles in the Limitation Act. Article 109 is the special Article to apply where the alienation of the father is challenged by the son and the property is ancestral and the parties are governed by Mitakshara law. Generally, where a statute contains both general provision as well as specific provision, the later must prevail. Therefore, Article 58 has no application to the instant case. Article 109 is as under:

<i>Description of suit</i>	<i>Period of limitation</i>	<i>Time from which period begins to run</i>
<i>109. By a Hindu governed by Mitakshara law to set aside his father's alienation of ancestral property.</i>	<i>Twelve years</i>	<i>When the alienee takes possession of the property.</i>

9. The word 'alienation' in this article includes 'gift'. In order to attract Article 109, the following conditions have to be fulfilled, namely, (1) the parties must be Hindus governed by Mitakshara; (2) the suit is for setting aside the alienation by the father at the instance of the son; (3) the property relates to ancestral property; and (4) the alienee has taken over possession of the property alienated by the father. This article provides that the period of limitation is twelve years from the date the alienee takes possession of the property."

25. Learned counsel for the respondent has only disputed with regard to the possession of property but has not disputed the fact that the petitioner is a Hindu and governed by Mitakshara; the prayer is for setting aside the alienation by the father is moved by his son i.e. the petitioner and the property is an ancestral property but on being asked how the respondents are saying that the property is not in the possession of the petitioner and in support of his submission, learned counsel for the respondent has submitted that in the *sankalp patra*, it has been mentioned that the possession has been handed over to the respondents but it is still not stated whether the respondent is in actual physical possession or not.

26. At this stage, learned counsel for the petitioner has submitted that after the expiry of the father of the original petitioner (Matadeen @ Mitthu), the name of Late Matadeen was mutated in the revenue records and in the Khatauni and after his demise, the names of legal heirs have been mutated in the revenue records as well as in the khatauni and the copy of khatauni of the year 2004, has been enclosed as Annexure no.

15 to the first Writ Petition i.e. MATTERS UNDER ARTICLE 227 No. - 4657 of 2006 and has further submitted that if the *sankalp nama* and the sale deed are of the years 1957 & 1979 respectively, as alleged by the respondents then the name of the respondents would have been mutated in the revenue records.

27. The possession is with the respondents or not, the Court cannot give any finding on this issue as this involves disputed question of fact but *prima facie* the records showing the possession is in favour of the petitioner.

28. Article 56 provides for period of limitation relating to 'suits relating to declaration' whereas the prayer made by moving an amendment application is for prayer relating to miscellaneous matters which includes alienation of the possession of the property governed by Article 109 of the Act, 1963, where the property belongs to a Hindu family governed by Mitakshara law to set aside his father's alienation of ancestral property and the limitation period provided is 12 years, hence the amendment application preferred by the petitioner was within the period of limitation as per Article 109 of the Act, 1963.

29. The application bearing No. 140-Ga-2 dated 04.05.2006 filed by the respondents seeking permission to file the original copy of the gift deed (*Sankalp nama*) and the sale deed after about more than 7 years of filing of the written statement and the same was allowed by the trial court and the order was upheld by the revisional Court on the ground that no prejudice would be caused to the petitioner. Thereafter, the petitioner moved an application for amendment on 18.03.2009 as there was no interim order granted in his favour in writ petition (MATTERS UNDER ARTICLE 227 No. - 4657 of 2006) filed by the petitioner against the orders allowing the application filed by the respondents as mentioned above, ignoring completely that the application preferred by the respondent/defendant as mentioned above was filed with a delay of more than 7 years whereas the amendment application was preferred by the petitioner in three years of filing of the alleged original gift deed and sale deed, which is within limitation.

30. In view of the facts and circumstances discussed hereinabove, the writ petition (WRIT - C No. - 1001610 of 2010) is hereby allowed. The impugned orders dated 06.04.2009 and 05.03.2010 passed by respondent nos. 2 & 1 respectively are hereby quashed. The amendment prayed in the plaint is allowed.

31. In Writ Petition (MATTERS UNDER ARTICLE 227 No. - 4657 of 2006), the application for taking the original documents on record was allowed by the trial court on payment of cost of

Rs.100/- and the revisional court rejected the revision with an observation that it would cause no prejudice to the petitioner since the petitioner would have full opportunity to controvert the documents and the plea of the respondents, this reasoning given by the courts below cannot be faulted with. Merely by bringing the documents on record would not amount to accepting the case of the respondents relating to the documents and the pleas raised thereupon. The petitioner will have full opportunity to rebut the same and challenge the genuineness of the documents. That being the position the impugned orders do not call for any interference. Hence, the Writ Petition (MATTERS UNDER ARTICLE 227 No. - 4657 of 2006) is hereby dismissed.

Order Date :- 8.7.2024

Nitesh