

(1971) 03 GAU CK 0010
In the Gauhati High Court
Case No : Second Appeal No. 147 of 1967

Bhutkani Nath and Others

APPELLANT

Vs

Mt. Kamaleswari Nath and Another

RESPONDENT

Date of Decision : 09-03-1971

Acts Referred:

Evidence Act, 1872 — Section 67
Hindu Widows Remarriage Act, 1856 — Section 2
Hindu Womens Right to Property Act, 1937 — Section 3
Limitation Act, 1963 — Article 142, 144
Registration Act, 1908 — Section 60

Citation : AIR 1972 Guw 15

Hon'ble Judges : P.K. Goswami, C.J.;D.M. Sen, J

Bench : Division Bench

Advocate : P. Choudhuri and S.K. Goswami, for the Appellant; N.M. Dam and A.R. Kalita, for the Respondent

Judgement

P.K. Goswami, C.J.—This second appeal is directed against the decree of the learned Subordinate Judge, Gauhati, reversing that of the Munsiff, who had dismissed the Plaintiff's suit.

2. The Plaintiff's case is that the land measuring 8 Bighas 3 Kathas 1 lessa covered by three different dags in three separate periodic pattas mentioned in the schedule to the plaint originally belonged to one Mania, husband of the Plaintiff. After Mania's death, the name of his son Lakhiram Nath was mutated in place of his father by inheritance on 18th May. 1934. After Mania's death, the Plaintiff took Akoluram Nath as her second husband and he went and lived with the Plaintiff as a "Chapania" (domesticated husband). Akolu was managing the property and it is alleged that without the knowledge of the Plaintiff, he procured a registered sale deed on 10th April, 1934 from Lakhiram Nath conveying the land in suit in favour of Akolu and his uterine brother Pararam Nath (since dead), who was the father of the Defendants 2, 3, 4. The Plaintiff was not aware of the mutation, nor about the sale. Akolu quarrelled with her and drove her away from

the house on 16th January, 1959. Thereafter, on enquiry, she came to know about the alleged sale deed and instituted the present suit on 7th April, 1959. The Plaintiff alleges that the sale deed is invalid and is also void for want of consideration. It is also alleged that the deed was procured by taking undue advantage of the minority of Lakhiram and is tainted with fraud. The Plaintiff asserts that she was a victim of deception practised by Akolu. She has therefore prayed for declaration of right and title to the suit land and also for khas possession and other reliefs.

3. A joint written statement was filed by the Defendants 1, 2, 3, 5 and 6. The Defendant No. 4 neither appeared nor submitted any written statement and the suit proceeded ex parte against him. The Defendants denied the Plaintiff's claim in their written statement dated 17th April, 1960 and averred that the Plaintiff's husband died 29 years back (that is to say, about 1931) and after his death, Lakhiram, who had already married during the life-time of his father conveyed the suit land by a registered sale deed on 10th April, 1934 to Defendant No. 1 and late Pararam for valuable consideration the former left for a place called Kalbari at Tamulpur with his wife and his mother the Plaintiff. Lakhiram died at Kalbari leaving no issue and his widow took a domesticated husband. The Plaintiff, according to the Defendants, is making a false claim in collusion with some of the Defendants' enemies. The Defendants have since been enjoying the possession of the land peacefully and got their names mutated in the revenue records. Akolu in his written statement denies that he lived with the Plaintiff as domesticated husband. He also denies to have driven out the Plaintiff from her house. It is asserted that Akolu had no connection with the Plaintiff. The Plaintiff never resided in her former husband's home. Neither Lakhiram Nath nor the Plaintiff had any possession over the disputed land after its sale by Lakhiram Nath. The Plaintiff's suit was therefore barred by limitation. The Defendant also averred that the suit is bad for non-joinder of parties and particularly the non-joinder of the wife of late Pararam Nath.

4. The trial court framed the following issues:

- (1) "Whether the sale deed dated 10-04-1934 executed by Lakhi Nath in favour of Akolu and another is void for want of consideration and proper execution....?"
- (2) Whether the Plaintiff is entitled to a decree for declaration of title and for khas possession of the land in suit against the Defendants?
- (3) Whether the suit is bad for non-joinder of parties as alleged in the written statement?
- (4) Whether the suit is barred by limitation?
- (5) To what relief?

5. The trial court answered issue No. 1 in favour of the Defendants and issue No. 2 also against the Plaintiff. It did not answer issue Nos. 3 and 4, as these were not pressed and it accordingly dismissed the suit. The matter had come up in

appeal before the Subordinate Judge once earlier and he disagreeing with the court decided both issues 1 and 2 in favour of the Plaintiff. He also held that the suit was not bad for non-joinder of parties nor that it was barred by limitation. He therefore decreed the Plaintiff's suit. The Defendants preferred a second appeal to the High Court (S.A. No. 18 of 1965) against the decree of the Subordinate Judge and the Court set aside the judgment and decree of the Subordinate Judge and remanded the appeal "for disposal according, to law, after considering all the matters which arise for decision in this case." Thereafter, the impugned judgment and decree were passed after remand by the learned Subordinate Judge decreeing the suit.

6. With regard to the first issue, the first appellate court held that the sale deed Ext. A was not duly executed by the vendor Lakhiram since neither there is the signature nor the thumb impression of Lakhiram indicating that he executed the document. The court found that the scribe of the document, D.W.1 Udit Chandra Das, signed the name of Lakhiram on behalf of the latter, but there was no evidence of authority given by Lakhiram to Udit to sign his name in the sale deed. It therefore held that Udit signed the name of Lakhiram in the deed without any power or authority received from Lakhiram. The court held that the sale deed was void for want of proper execution and passing of consideration. Mr. P. Choudhuri, the learned Counsel for the Appellants, submits that the learned Subordinate Judge erred in law in holding that the sale deed was not properly executed by Lakhiramnath. He submits that since the document was registered, there is a presumption under the law that the same has been duly registered as well as duly executed. He relies upon Section 60 of the Indian Registration Act. It is, however, well-settled that when execution of a document is being challenged the certificate of registration alone will not be sufficient proof of the due execution of the document. Registration does not dispense with the necessity of proof of execution when the same is denied. It is true that a sale deed is not required by law to be attested. Even then, proof of execution of a sale deed, when it is denied, will have to be furnished as in the case of any other document u/s 67 of the Evidence Act.

Mr. Choudhuri has drawn our attention to the endorsement of the Sub Registrar that the document was presented by Lakhiram and that Lakhiram had admitted execution of the same. When we examined the endorsements we find that the document is stated to be presented by Lakhiram, who was not personally known to the Sub Registrar, but was identified by one Jaliram who has not been examined by the Defendants. On the other hand, Udit (D.W.1) in his examination in chief stated that he identified Lakhiram before the Sub Registrar although when pressed in cross- examination he also stated that Jaliram identified the executant before the Sub- Registrar. The learned Counsel also relied upon the thumb impression of Lakhiram given before the Sub Registrar. This thumb impression again has been attested by no other person than Udit (Bakalam Udit Chandra Das). It is Udit who has attested even the thumb impression of Jaliram as well as Lakhiram even before the Sub Registrar. It is intriguing why, If

Lakhiram could put his thumb impression in front of the Sub Registrar, he was not able to put the same on the deed itself in token of execution and owning up the contents. On the other hand, we find on both pages of the sale deed the name of Lakhiram being put by Udit Chandra Das with a Bakalam.

There is a further disturbing feature on the body of the deed. Although the deed is said to have been written on 10th April, 1934, a date which has been clearly inserted by the writer therein, the Sub Registrar had registered it on 9th April, 1934. Mr. Choudhuri also read the evidence of Udit to us and he was the only witness examined to prove the execution of Ext. A. His evidence is very laconic. He merely stated that he wrote out the sale deed "executed by Lakhiramnath in favour of Akolu and Parar". He signed Lakhiram's name on his behalf. In cross-examination he stated that Lakhiram did not put his thumb impression on the document at the time of his execution. The document was executed in 1934. When Udit was examined in 1961 he gave his age as 45 years. He indeed stated that he was a petition writer for the last 25 years. If that is so, he was only a boy of 18 years of age when the sale deed was written.

Besides we must bear it in mind that the sale deed was procured by the husband of the Plaintiff from her son. We are therefore, clearly of opinion that the learned Judge rightly appreciated the evidence of Udit and rejected his testimony. Execution of a document is not mere signing of it. It is a solemn act of the executant who must own up the recitals in the instrument and there must be clear evidence that he put his signature in a document after knowing fully its contents. Udit (D.W.1) in this case even did not state that he had written the sale deed under instructions from Lakhiram, nor did he state that the document was read over to Lakhiram. There is not a little of evidence to show that Udit was authorised by Lakhiram to sign or execute the document on his behalf. That being the position there is no execution of the sale deed in law. The circumstances, which we have noted above, together with the evidence of Udit clearly displace any prima facie presumption, which may, in absence of denial in an appropriate case, arise under the law. The endorsements of the Sub Registrar and certificate of registration u/s 60 may furnish some evidence. But, that evidence can always be rebutted and is not conclusive evidence, when execution of a document is under challenge. Mr. Choudhuri cited a decision of the Privy Council in (1906) 33 Ind. App. 60 (P.C.) Gangamoyi Debi v. Troiluckhya Nath Chowdhry and relied upon the following passage:

The registration is a solemn act, to be performed in the presence of a competent official appointed to act as registrar, whose duty it is to attend the parties during the registration and see that the proper persons are present and are competent to act, and are identified to his satisfaction; and all things done before him in his official capacity and verified by his signature will be presumed to be done duly and in order.

In the Privy Council case the question of execution of a will by one Brojo Nath Chowdhry was in issue. Brojo Nath signed the will which was attested by several

persons including his attending physician, who was examined as a witness in the case. It is also proved in that case that Brojo Nath was taken in a palanquin to the office of the Sub Registrar where he admitted execution of the document. This oral evidence was believed by the court and coupled with the presumption u/s 60 of the Registration Act held that the will was duly executed and properly attested. This decision therefore, will not help the instant case where the document was not signed by the executant nor was the only witness namely, the writer of the document authorised to sign the name of the executant on the latter's behalf. Ext. A in this case is a document entirely written by Udit and even signed by him. Except the alleged thumb impression of Lakhiram on the reverse of the first page of the document before the Sub Registrar identified by one Jaliram who was not even examined in the case, there is nothing to attribute any act to Lakhiramnath. Neither Lakhiram nor Jaliram was known to the Sub Registrar, as is clear from the endorsements. In a case of this nature, the evidentiary value regarding execution of the document from the fact of such a registration is reduced to almost nil. The Privy Council decision will not at all come to the aid of the Defendants in this gravely suspicious case. We are, therefore clearly of opinion, in agreement with the learned Subordinate Judge, that the sale deed Ext. A has not been duly executed by Lakhiramnath. The first issue therefore, has been rightly decided by the court, below.

7. Mr. Choudhuri next contends that at any rate the Plaintiff had no title to the land in suit at any point of time. He submits that the Plaintiff did not inherit the property of her husband Mania on the latter's death in 1930. She was only entitled to maintenance out of her husband's estate. Since her husband had died in 1930. she could not also inherit the property u/s 3 of the Hindu Women's Rights to Property Act, 1937. Besides, on her own admission that she has taken a second husband, she lost even her right to maintenance or inheritance u/s 2 of the Hindu Widows' Remarriage Act, 1856. He further submits that Bagari (D.W.2) is the widow of Lakhiram. Since Lakhiram had inherited the property of Mania in 1930, on the former's death, Bagari will inherit her husband's property after Lakhiram's death. The Defendants, however, in the written statement admitted that Lakhiram had no issue and his wife had taken a domesticated husband. At any rate, the Defendants did not even enter any specific plea in their written statement that Bagari was entitled to inherit the land in suit and that the suit was bad for her non-joinder.

We are, therefore, not required to decide in this suit the issue, if any, that may be raised between Bagari and the Plaintiff. We will, therefore, assume in this suit in view of the pleadings that Kamaleswari, who is not only the widow of Mania but also the mother of Lakhiram, is the only heir to inherit Lakhiram's estate after the latter's death. In this view of the matter, it is not necessary to consider the prior history of her right or title if any. If therefore Lakhiram had not conveyed the property by a duly executed sale deed, as we have already held above, the Defendants cannot have any claim to the property under the sale deed and Kamaleswari alone will be entitled to a decree for declaration of title

and khas possession.

8. Being faced with this position, Mr. Choudhuri contends very strenuously that the suit is barred by limitation. He submits that at no point of time the Plaintiff was ever in possession of the property. The first appellate court held that the Defendant No. 1 Akolu went and lived with the Plaintiff as husband and wife. The Plaintiff in her plaint stated that she was driven away sometime in January, 1959. In the course of her evidence, she stated that she lived with the Defendant No. 1 Akolu for about ten years when she was driven out. She secured a decree for maintenance against Akolu. She further stated that thereafter she was taken back by Akolu. There is no denial of the maintenance decree by Akolu, nor the fact of her being taken back by Akolu after once she had been driven out. It is, therefore, clear that possession of the Defendant Akolu will be possession on behalf of the Plaintiff, the relationship being that of husband and wife. Besides, we do not find in the written statement any clear statement of adverse possession in order that the wife's title to the property can be extinguished by the husband's adverse possession. Very strict proof of open and hostile possession by the husband from a certain definite point of time will be necessary. No case of adverse possession of that nature was at all pleaded in the written statement and none was established in the evidence produced in the case. We do not also give much importance to Ext. "C" relied upon by the learned Counsel showing the entries of mutations at a time when Akolu as the husband of the Plaintiff was, in fact, managing the property enjoying then her complete confidence. The learned Subordinate Judge was, therefore, clearly justified in holding that the suit was not barred under Article 144 or Article 142 of the Limitation Act. The second and the fourth issues have, therefore, been correctly decided by the learned Subordinate Judge.

9. With regard to issue No. 3, Mr. Choudhuri has rightly not pressed it even in view of paragraph 7 of the written statement. No case is made out that any necessary party has been left out in this suit.

10. In the result, the appeal fails and is dismissed. We will, however, make no order as to costs.

D.K. Sen, J.

11. I agree.