

(2007) 08 OHC CK 0039

In the Orissa High Court

Case No : First Appeal No's. 400 of 1980 and 179 of 1983

Binayak Padhi (Dead) after him Basanti Padhi

APPELLANT

Vs

Bipra Ch. Sahu and Others
 Bipra Ch. Sahu Vs
Binayak Padhi (Dead) after him Basanti Padhi and Others

RESPONDENT

Date of Decision : 01-08-2007

Acts Referred:

Hindu Succession Act, 1956 — Section 14

Citation : (2007) CLT 285 Supp : (2007) 2 OLR 589 Supp : (2007) OLR 285 Supp

Hon'ble Judges : A.K. Parichha, J

Bench : Single Bench

Advocate : N.K. Dash, in First Appeal No. 400 of 1980, R.K. Dash, G.K. Mishra and S.K. Padhi, in First Appeal No. 179 of 1983, for the Appellant; G.K. Mishra, S.K. Padhi, in First Appeal No. 400 of 1980, N.K. Dash and N.K. Sahu, in First Appeal No. 179 of 1983, for the Respondent

Final Decision : Dismissed

Judgement

A.K. Parichha, J.—Both the appeals arise out of the judgment and decree passed by the learned Subordinate Judge, Aska in T.S. No. 14 of 1974. The Appellant in F.A. No. 179 of 1983 was the Plaintiff No. 1 and the Appellant in F.A. No. 400 of 1980 was the Defendant No. 2 in that suit.

2. Plaintiffs' case in essence was the Defendant No. 3, Chapadhar Sahu and Sridhar Sahu, husband of Defendant No. 1, were brothers and were living jointly. During the state of jointness, Sridhar died in or around 1933 whereafter his widow Defendant No. 1 also continued to live in jointness. When the matter stood thus, Defendant No. 1 adopted Plaintiff No. 1 in 1959 after performance of necessary rites and ceremonies of adoption and thereafter brought him up, gave him education and got him married to Plaintiff No. 2. In the meantime, Defendant No. 3 and Defendant No. 1 effected partition of the family properties, wherein some lands and houses including the property described in Schedule "C" of the plaint were given to the share of Defendant No. 1 and her adopted son.

Defendant No. 1 out of affection executed a will on 10.7.1964 in favour of Plaintiff No. 1 bequeathing the properties in Schedule "C" to be succeeded by him after her death. The Plaintiffs further pleaded that from their own saving Plaintiff No. 1 purchased Schedule "A" properties and Plaintiff No. 2 acquired Schedule "B" properties as gift from her father and were in enjoyment of the same. At such juncture, Defendant No. 2, who was the adopted brother of Defendant No. 1 poisoned the mind of Defendant No. 1, who was then an old lady of 80 years and exerting undue influence got executed a gift deed initially in favour of Defendant No. 3 and subsequently revoking that gift deed again got it executed in his own favour for the suit property. Further in order to harass the Plaintiffs, the Defendants conspired and got executed a registered deed of cancellation from Defendant No. 1 cancelling the will executed by her earlier in favour of the Plaintiff No. 1 and also forcibly took possession of the houses and removed the good grains and other moveable articles from those houses and did not allow the Plaintiffs to enter into those houses. The Plaintiffs claimed that Schedule "A" and "B" properties being their self acquired properties and Schedule "C" properties being the joint family properties, Defendant No. 1 had no legal right to gift or alienate those properties and therefore, those documents are legally invalid and void documents. With these pleadings, they prayed for declaration that Schedule "A" and "B" properties are their self acquired properties, that Schedule "C" properties could not be alienated by Defendant No. 1 and the gift deed in favour of Defendant No. 2 is void. They also prayed for permanent injunction to restrain the Defendants from coming upon Schedule "A" and "B" properties and disturbing their possession and in alternative for grant of recovery of possession of those properties. They further prayed for damages and mesne profit.

3. Defendants 1 to 3 filed joint written statement denying the allegations of the plaint. According to them, Defendant No. 1 got Schedule "C" land in the year 1963 in the partition between herself and Defendant No. 3 and she acquired Schedule "A" and "B" properties from her own fund in the name of the Plaintiffs by way of benami transaction and hence, she had legal right to alienate those properties. They further pleaded that Plaintiff No. 1 was never the adopted son of Defendant No. 1 and that because he was the son of a poor agnatic relation, he was brought and kept by Defendant No. 1 for domestic help, but out of affection, she gave him education and got him married to her sister's grand daughter. Defendants pleaded that the Plaintiffs had no income or savings enabling them to acquire Schedule "A" and "B" properties. They also pleaded that Plaintiff No. 1 taking advantage of the old age of Defendant No. 1 obtained a will by use of fraud and undue influence and on recovery of such fraud, Defendant No. 1 cancelled the will by registered deed of cancellation. In sum and substance, the plea of Defendants was that Plaintiffs have no manner of right, title over any of the scheduled properties and therefore, they are not entitled to the reliefs prayed for. Considering the pleadings of the parties, learned trial Court framed the following seven issues:

1. Whether the Plaintiff is the adopted son of the 1st Defendant Jema?
2. Whether the properties mentioned in the schedules A and B are the self acquired properties of Plaintiffs 1 and 2 or whether they were purchased benami by the 1st Defendant?
3. Whether the first Plaintiff is entitled to the properties described in the schedule "C" of the plaint?
4. Whether all the documents dt. 4.3.74, i.e., Gift deeds, sale deed, etc. are true, validly executed, attested and registered and are binding?
5. Whether the alleged revocation deed dated 25.2.74 is true, validly executed, attested and registered and are binding?
6. Whether the Plaintiff is entitled to the relief of permanent injunction and delivery of possession of the properties and mesne profits?
7. What relief?

4. The Plaintiffs in support of their case examined 7 witnesses and produced documents, which were marked as Exts. 1 to 14. The Defendants also examined seven witnesses and produced documents marked as Exts. A to J. On consideration of these evidence, learned trial Court came to the following conclusions:

- (i) Plaintiff No. 1 is the adopted son of Defendant No. 1;
- (ii) the properties mentioned in Schedule "A" and "B" are the self-acquired properties of the Plaintiffs;
- (iii) the will is misconceived and inoperative;
- (iv) Schedule "C" property belongs to both Plaintiff No. 1 and Defendant No. 1 and therefore, the gift deed in favour of Defendant No. 2 would be valid and binding to the extent of the share of Defendant No. 1;
- (v) the Plaintiffs are entitled to recover possession of Schedule "A", "B" and half of Schedule "C" properties;
- (vi) the Plaintiffs are entitled to recover Rs. 200/- towards the price of the food grains removed by the Defendants and also to get the mesne profit in respect of Schedule "A" and "B" lands from the Defendants from 1974 till the date of recovery of possession.

With the above findings the trial Court decreed the suit in part with proportionate cost. Both the parties have filed appeal against the above said judgment and decree. The Plaintiffs have challenged the finding of the learned trial Court about the joint right of Defendant No. 1 over Schedule "C" properties. Defendant No. 2 has challenged the findings on the issue of adoption, right, title over Schedule "A" and "B" properties and also right of Plaintiff No. 1 over Schedule "C"

properties.

It is pertinent to note that during pendency of the suit, Defendant Nos. 1 and 3 died and their legal heirs were substituted.

5. Mr. N.K. Das, learned Counsel appearing on behalf of M/s. N.K. Sahu and associates challenges the findings of the trial Court basically on the ground that the said Court did not appreciate the evidence properly. He states that when there was no indication in the will, Ext. 1 that Plaintiff No. 1 is the adopted son of Defendant No. 1 and when there was no specific pleading about adoption in the initial plaint, learned trial Court should not have believed the plea of adoption. Regarding Schedule "A" and "B" properties, he submits that when the Plaintiffs could not prove adequate saving for purchase of Schedule "A" and "B" properties, whereas admittedly Defendant No. 1 had adequate income from her properties enabling her to pay the consideration amount and the contents of Ext. 6 shows that Schedule "B" property was purchased by Defendant No. 1 in the name of Plaintiff No. 2, there was no scope for the learned trial Court to hold that Schedule "A" and "B" properties were self acquired properties of the Plaintiffs, Mr. Das further states that after partition in the year 1963, Schedule "C" properties became the stridhan properties of Defendant No. 1 and therefore, she had the legal right to alienate it in favour of any one. In support of his contention, Mr. Das places the relevant portion of the judgment and evidence.

6. Mr. G. Mishra, learned Counsel appearing on behalf of M/s. S.K. Padhi and associates, on the other hand, supports the findings of the trial Court on the issue of adoption and the right and title of the Plaintiffs over Schedule "A" and "B" properties. He, however, challenges the findings of the trial Court that Defendant No. 1 had alienable interest over half of the suit Schedule "C" properties. Mr. Mishra contends that Schedule "C" properties were the joint family properties and Defendant No. 1 had no exclusive right to gift away that property in favour of Defendant No. 2 in view of the bar provided under Article 357 of the Principle of Hindu Law by Mulla and also the ratio laid down in the case of China Sahuani and after her, Kishore Chandra Sahu and Anr. 1988 (I) OLR 309.

7. In view of the submissions of learned Counsel for the parties, it becomes necessary to rescan the evidence and judge the correctness of the findings of the trial Court. On the issue of adoption, Plaintiffs relied on the oral evidence of P.Ws. 1 and 3 to 7 and documents Exts. 1 to 4, 10 and 12. Plaintiff No. 1 as P.W. 1 stated that Defendant No. 1 had no child and to keep her lineage she wanted to adopt him as her son. He said that Defendant No. 1 requested his natural father P.W. 7 to give him in adoption and P.W. 7 agreed to this proposal where after all ceremonies and rites were performed and the adoption took place. He stated that after this adoption, he lived with Defendant No. 1, who gave him education, got him married and every one recognized him as the son of Defendant No. 1. P.W. 7, the natural father of Plaintiff No. 1 supported this statement of P.W. 1 thoroughly. He also spoke about the Sankalpa Puja, i.e., the giving and taking of

the child and other rituals. P.W. 4 the priest, P.W. 5 a relative, P.W. 6, an agnatic relation of Defendant No. 1 also spoke about the adoption ceremony, giving and taking of the child and living of Plaintiff No. 1 with Defendant No. 1 after adoption. P.W. 3, who is the Head Pandit of Sanskrit Toll, where Plaintiff No. 1 studied, also stated that Defendant No. 1 got Plaintiff No. 1 admitted in the school and in the school records, Plaintiff No. 1 was shown as the son of Sridhar, husband of Defendant No. 1. In Exts. 2, 3, 4, 5 and 10, which are school registers and service book, Plaintiff No. 1 has been described as son of Sridhar Sahoo. Even though Defendants denied the fact of adoption, yet in the written statement they admitted that Defendant No. 1 got Plaintiff No. 1 admitted in the school and also got him married. In the sale deed, Ext. 8, which was executed by Defendant No. 2 in favour of Plaintiff No. 1, Defendant No. 2 has described Plaintiff No. 1 as the son of Sridhar Sahoo and he also admitted in his evidence that the said document was scribed on his instruction. Defendant No. 2 as D.W.1 further admitted that in Ext. 12 the words "Dutta Putra O Puri" refer to the Plaintiff Nos. 1 and 2. The letter, Ext.D, dated 6.11.1973 written by Plaintiff No. 1 to Defendant No. 2 shows that Plaintiff No. 1 addressed the latter as "mama" (maternal uncle). The above noted evidence was not discredited in any manner. So, the oral evidence and documents coupled with the admissions of Defendant No. 2 clearly provided that Plaintiff No. 1 was adopted by Defendant No. 1 as her son and he continued as such. Though Defendants pleaded that Plaintiff No. 1 was kept by Defendant No. 1, as a domestic servant there was no evidence to support that plea and the above said conduct of the parties also belie such plea. Therefore, the finding of the trial Court in this regard cannot be questioned.

8. Plaintiffs claimed that Plaintiff No. 1 purchased Schedule "A" properties from his own income and the father of Plaintiff No. 2 purchased Schedule "B" properties and gave it to her as nuptial gift. The Defendants, on the other hand, claimed that Defendant No. 1 purchased both Schedule "A" and Schedule "B" properties from her own funds in the names of the Plaintiffs by way of BENAMI transaction. Plaintiff No. 1 as P.W. 1 stated that while he was a student in Sanskrit Toll at Aska, he was taking stipend of Rs. 75/- per month but because lodging and boarding was virtually free in the toll, he was spending only Rs. 6/- per month and was saving the rest part of the stipend. He also stated that after his appointment as Chairman in the Settlement Department, he was getting a salary of Rs. 40/- per month, which was subsequently enhanced to Rs. 60/- per month, and because at that time he was staying with Defendant No. 1 and there was no expenditure, he was saving the entire salary. He claimed that out of his savings, he purchased the Schedule "A" properties for a consideration of Rs. 1500/- and Rs. 2000/- under registered sale deeds and the vendors were none other than Defendant No. 2 and another relative. Although Defendant No. 2 claimed that the consideration money was paid by Defendant No. 1, in the documents, Exts. 7 and 8, it has been clearly mentioned that the consideration money was paid by Plaintiff No. 1 in presence of the Sub-Registrar. The

endorsement of the Sub-Registrar, Ext. 8/A reveals that the entire consideration money was paid to the vendor in his presence. Regarding Schedule "B" lands, the registered sale deed, Ext.6 is there which shows that the said land was purchased from one Bhaskar Roula for Rs. 3,000/-. Plaintiff No. 2 has been named as vendee but because she was minor, Defendant No. 1 has been shown as her guardian. Basing on this entry, Defendants claimed that the land was purchased by Defendant No. 1 by way of benami transaction. But P.W. 5, father of Plaintiff No. 2 clearly stated that he purchased Schedule "B" land for Plaintiff No. 2 and gave it to her as a gift. P.W. 1 supported the statement of P.W. 5. The evidence shows that P.W.5 was a man of means and the endorsement on the document, Ext. 6 shows that he paid the consideration money to the vendor before the Sub-Registrar. The Defendants examined D.W. 4, father-in-law of the vendor, who stated that he negotiated with Defendant No. 1 on behalf of his son-in-law and received advance from her and subsequently, sale deed was executed by her son-in-law in favour of Plaintiff No. 2. The statement of D.W. 4 is countered by the very endorsement of the Sub-Registrar to the effect that the consideration money was paid to the vendor in his presence on the date of registration. If any advance had been paid by Defendant No. 1, the same should have been mentioned in the document, but there is no such indication in Ext. 6. It is the admitted case of the parties that the Plaintiff No. 2 is the grand daughter of the sister of Defendant No. 1 and Defendant No. 1 brought Plaintiff No. 2 as bride of Plaintiff No. 1. Since Plaintiff No. 2 was still minor, it was obvious in the above noted situation to describe Defendant No. 1 as her guardian. P.W. 5 was a man of means and so, it was not unnatural that he purchased a piece of land and gave it to his daughter as a marriage gift. Law is settled that the burden of proving benami transaction lies with the person who asserts that it was such transaction. So, the onus lies on the Defendants to prove that the transactions made through Exts. 6, 7 and 8 were benami transactions. The over all assessment of evidence and circumstances would show that the Defendants failed to discharge such onus. On the contrary, the evidence and circumstances suggest that the plea of the Plaintiffs is more probable and believable. Therefore, the trial Court rightly decided this issue in favour of the Plaintiffs.

9. About the title over Schedule "C" properties, Plaintiffs took the plea that Defendant No. 1 being the widow prior to 1937, had only right of maintenance in Schedule "C" property and had no legal right to alienate that property as of gift to Defendant No. 2 or any other person. On the other hand, Defendants took the plea that in the partition between Defendant Nos. 1 and 3, this Schedule "C" properties fell to the share of Defendant No. 1 and accordingly, she became the exclusive owner thereof and so she had every right to alienate this property by way of gift. It is not disputed that Defendant Nos. 1 and 3 effected partition of the family property in 1963 under registered deed of partition, Ext. 12 and in that partition, Schedule "C" property was given to Defendant No. 1. But it is specifically mentioned in Ext. 12 that this Schedule "C" property was given to Defendant No. 1 not for her exclusive enjoyment but for her enjoyment of the

same with her adopted son or daughter. Existence of this clause is also admitted by Defendant No. 2, who further admitted that words "Dutta Putra O Purti" mentioned in Ext. 12 refer to Plaintiff No. 1. As has been discussed earlier, Plaintiff No. 1 is the adopted son of Defendant No. 1. So, both Defendant No. 1 and Plaintiff No. 1 were co-owners of Schedule "C" properties, each having half share in the same. No doubt, Article 357 of the Principle of Hindu Law by Mullah says that the undivided interest in the coparcenary property cannot be alienated by way of gift, but law is now settled that the undivided interest in the property can be alienated by way of gift with the consent of the co-owners or for legal necessity. Be that as it may, after partition, Schedule "C" property was no more coparcenary property of the family, but was a property held jointly by co-owners, Plaintiff No. 1 and Defendant No. 1. Furthermore, admittedly Defendant No. 1 was in possession of this property, when Hindu Succession Act, 1956 came into force. So, by virtue of Section 14 of the said Act, her limited interest in the property ripened into absolute interest. When Defendant No. 1 had half share in Schedule "C" property as co-owner thereof, she was within her legal rights to alienate her share. In that view of the matter, alienation made by her in favour of Defendant No. 2 through Ext. E would be valid so far as the interest of Defendant No. 1 in that property is concerned. The ratio of *China Sahuanai* (supra) is not applicable to the present case as the facts and circumstances are different. For the aforesaid reason, the finding of the trial Court that the gift deed in favour of Defendant No. 2 is valid in respect of half share of Schedule "C" properties is tenable.

10. Regarding the will, Ext. 1 and the revocation document, Ext. A, it will be sufficient to indicate that a person making a will has a legal authority to revoke the same during his/her lifetime. Defendant No. 1 had executed Ext.1 in favour of Plaintiff No. 1, but later on by Ext.A, she revoked the will. The allegation from the side of the Plaintiffs is that she was not proper state of health and mind and taking advantage of such condition, Defendant No. 2 managed to execute the revocation deed. It is there in the evidence that Defendant No. 1 was undoubtedly old, but was otherwise mentally and physically sound. This is evident from the fact that at the relevant point of time, she had gone on pilgrimage to places like Haridwar and Puri. A person, who is invalid in mind and body would not have undertaken such pilgrimage. Furthermore, it is already seen that Schedule "C" properties belong to only Defendant No. 1 and Plaintiff No. 1. A person, who is the owner of a property, cannot again get that property through will. Therefore, the will was misconceived and inoperative one. By virtue of execution of Ext. A, the same became invalid. So, rightly the trial Court held that no right was acquired by Plaintiff No. 1 through the will.

11. For the aforesaid reasons, the judgment and decree of the trial Court are confirmed and both the appeals are dismissed on contest, but in the peculiar circumstances without any cost.