

(2003) 04 OHC CK 0047
In the Orissa High Court
Case No : Second Appeal No. 108 of 1995

Biswanath Sahu and Others	Vs	APPELLANT
Mrs. Tribeni Mohan (died) by L.Rs. and Others		RESPONDENT

Date of Decision : 10-04-2003

Acts Referred:

Transfer of Property Act, 1882 — Section 43, 54

Citation : AIR 2003 Ori 189 : (2003) 1 OLR 522

Hon'ble Judges : L. Mohapatra, J

Bench : Single Bench

Advocate : G.A. Rao, S.K. Purohit, S.K. Behera, P.K. Sahoo, P. K. Parida, Bidyadhar Mishra and D.P. Sahoo, for the Appellant; Yasobanta Das, N.C. Mohanty, J.M. Mohanty, D. Samal, N.K. Barik and G. Mukherji, for the Respondent

Judgement

L. Mohapatra, J.—Defendants 1/b, 1/c and 1/d are the appellants before this Court against a confirming judgment. Plaintiff-respondent No. 1 having expired during pendency of the appeal, three of her legal heirs have been substituted in her place as respondents 1/a, 1/b and 1/c.

Plaintiff had filed the suit for declaration of her title over the suit property, confirmation of possession and in the alternative for recovery of possession as well as for permanent injunction restraining the defendants from making any construction over the suit land or interfering with her possession in any manner whatsoever.

2. Case of the plaintiff is that the suit land originally belonged to one Ratnakar Chhotaray, Gurudeb Chhotaray and Indramani Chhotaray. The original owners for their legal necessity sold the same in favour of one Amulyanath Mitra, father of defendant No. 3 under a registered sale deed dated 11-8-1947 and after such purchase Amulyanath Mitra took possession of the land. While in possession Amulyanath Mitra for legal necessity sold the land in favour of the plaintiff on 5-12-1957 under a registered sale deed and thereafter the plaintiff remained in possession of the same. Further case of the plaintiff is that 1962 settlement

proceeding was initiated in the year 1952 and plaintiff being a lady and serving outside could not take steps to get her name recorded during settlement and name of Amulyanath Mitra, her vendor, stood recorded in the 1961 settlement. After purchasing the land the plaintiff had constructed a boundary wall and a shed therein and thereafter it was leased out to different companies by the plaintiff. During the current settlement plaintiff applied for getting her name recorded in the settlement record. During this period when daughter of the plaintiff visited the suit land she found that the original defendant No. 1, after trespassing into the land was trying to construct a house over the same and on being questioned he said that the land was purchased by him from defendant No. 3. On verification the plaintiff found that though defendant No. 3 as power of attorney holder had sold the land to the plaintiff on 5-12-1957, he having no right and title over the property, again sold the same in favour of defendant No. 1 on 27-6-1980. It was found that the defendant No. 1 had sold Ac. 0.140 decimals of land from out of the suit land in favour of defendant No. 2 on 13-4-1983 and therefore the plaintiff having no other option filed the suit for the reliefs as indicated earlier.

3. Defendants 1/a to 1/e who are legal heirs of original defendant No. 1 as well as defendant No. 2 contested the suit by filing written statement. While denying the plaintiffs case it was contended that the father of the defendant No. 3 namely Amulyanath Mitra had purchased the land in question from the original recorded tenant on 11-8-1947 and became owner in possession of the same. Though the sale deed executed in favour of the plaintiff on 5-12-1957 is admitted in the written statement it was contended that the said sale deed was executed in order to defraud the creditors of Amulyanath Mitra and was a nominal one. This arrangement was made because Amulyanath Mitra and the plaintiff were known to each other from close quarters and Amulyanath Mitra had implicit faith on the plaintiff. This nominal sale deed was executed in order to avoid suspicion from outsiders though as a matter of fact, Amulyanath Mitra had no intention to sell the suit land at any point of time till his death in 1962. After his death in the year 1962 defendant No. 3 became the owner in possession of the disputed land. Statement of the defendant to the above is said to be acceptable on the ground that in the settlement of 1962 name of Amulyanath Mitra appeared in the record-of-rights. It is also contended in the written statement that due to want of money defendant No. 3 executed an agreement to sell the property in favour of defendant No. 1 on 2-1-1970 for a consideration of Rs. 15,000/- and ultimately the registered sale deed was executed on 27-6-1980. However, it is contended that from the date of execution of agreement for sale defendant No. 1 was in possession of the property. It is also contended in the written statement that defendant Nos. 1/b to 1/e who were in possession of the land also alienated part of the property in favour of defendant No. 2 on 13-4-1983 and since then defendant No. 2 is in possession of that portion of the property. It is also case of the defendants that they have invested huge amount of money to make the land fit for construction and that the plaintiff had no right, title and interest over the

property.

4. On the basis of the pleadings of the parties, learned Subordinate Judge, Bhubaneswar framed six issues and decreed the suit.

Out of six issues, issue Nos. 4 and 5 are the most relevant issues relating to legality and validity of the sale deed dated 5-12-1957 executed by Amulyanath Mitra in favour of the plaintiff as well as the legality and validity of the sale deed executed by the defendant No. 3 in favour of original defendant No. 1 on 27-6-1980.

While answering these two issues the learned Subordinate Judge on consideration of oral and documentary evidence held that defendant No. 3 was never in possession of the suit land after execution of Ext. 2, i.e. sale deed dated 5-12-1957 executed in favour of the plaintiff and therefore question of acquisition of title by way of adverse possession does not arise. The trial Court also held that the original defendant No. 1 was not in possession of the suit land since 1970 and came into possession after 1978. The learned Subordinate Judge further held that the sale deed executed by defendant No. 3 in favour of original defendant No. 1 vide Ext. B dated 27-6-1980 is not a valid document. Question of limitation was also answered in favour of the plaintiff.

Challenging the aforesaid judgment and decree of the learned Subordinate Judge, an appeal was carried to the Court of the 2nd Addl. District Judge, Puri by the legal heirs of original defendant No. 1 and the said appeal having been dismissed on same findings, the present Second Appeal has been filed.

5. At the time of admission of this Second Appeal, this Court formulated the following substantial questions of law.

(a) Whether the suit is governed by Article 65 of the Limitation Act?

(b) Whether any prejudice has been caused to the plaintiff for non-framing of specific issue regarding claim of adverse possession?

During pendency of the appeal a petition was filed for permission to take additional grounds which were also argued at the time of hearing of the appeal and therefore in addition to the substantial questions of law which are quoted above, the following substantial questions of law are also taken into consideration.

(1) Whether both the Courts below are correct in their approach i.e. drawing a presumption of due execution on the absence of any evidence whatsoever by scribe, executant, plaintiff/purchaser or at least one witness to the said execution?

(2) Whether in the absence of the examination of the plaintiff for proving due execution of Ext. 2 known to law, adverse inference ought to have been drawn against the plaintiff?

(3) Whether the plaintiff has proved her own cases or the suit has been decreed on the basis of the alleged admission of the inadmissible evidence. In that view of the matter, whether the plaintiff can succeed because of the weakness in the defence?

6. Both the Courts below having found the suit to be within the period of limitation and having also found that, neither defendant No. 3 nor contesting defendants had perfected title by way of adverse possession, learned counsel for the appellants did not want to press the aforesaid grounds at the time of hearing of the appeal and made his submission on the additional substantial questions of law which have been indicated above.

7. So far as the additional grounds relating to execution of sale deed (Ext. 2) are concerned, Shri Mishra, learned counsel for the appellants contended that as provided u/s 61 of the Evidence Act contents of the documents should be proved either by primary or by secondary evidence. Shri Mishra further submitted that as provided u/s 67 of the Evidence Act proof of signature of the person who is said to have signed the document is mandatory and the original mode of proving the signatures of the executant and the contents of the documents is by way of examining someone who saw the executant signing the document or the scribe writing the document or by examining someone who knows signature/thumb impression of the executant or the scribe writing/drafting the document or by comparing the signature of the executant appearing in the document with that of the admitted signature appearing in some other document. Referring to the aforesaid provisions of the Evidence Act it is contended on behalf of the appellants that none of the above procedure had been followed for proving document (Ext. 2) and in absence of such proof it cannot be said that the sale deed (Ext. 2) was duly executed or proved.

The second submission relating to the aforesaid two grounds is that not only due execution is to be proved but also passing of consideration in respect of the said document is to be proved. Learned counsel referring to the evidence available on record submitted that there is practically no evidence available to indicate payment of consideration by the vendee to the vendor. It was also contended that age of the executant Amulyanath Mitra in Ext. 1 has been mentioned as 30 years in the year 1947 and his age in the disputed sale deed (Ext. 2) has been mentioned as 64 years and the said document (Ext. 2) having been executed in the year 1957, entry with regard to age of Amulyanath cannot be correct and therefore evidence led with regard to incapacity of Amulyanath Mitra at the time of execution of the document, cannot be accepted. Referring to Section 90 of the Evidence Act, it was also contended that introduction of such provision in the statute was for a particular purpose to enable admission of the document into evidence where either the executant, attesting witness or identifying witness, or scribe were not found to be alive and mode of proof required under other provisions of law is not possible. Shri Mishra contended that since witnesses were available to prove the document Courts below could not have taken recourse to

Section 90 of the Evidence Act.

So far as other additional ground is concerned, it is contended on behalf of the appellants that since Ext. 2 could not have been admitted into evidence, findings of the Courts below are based on inadmissible evidence and there being no other evidence with regard to claim of title by respondents, the suit should have been dismissed.

8. Shri Ashok Mukherji, learned senior counsel appearing for the plaintiff-respondents, on the other hand, submitted that both the Courts below have taken note of the submissions made before this Court and have concurrently found that Ext. 2 had been duly executed and therefore this Court in exercise of jurisdiction u/s 100 of the CPC should not interfere with the concurrent finding of fact. He further submitted that as provided u/s 43 of the Transfer of Property Act if any person without any title as presentee to any parcel of immovable property, makes any transfer representing to the purchaser that he has a subsisting title to the property and after such transfer if the very same person acquires any title with respect to self-same parcel of immovable property he shall be estopped in view of Section 43 of the Transfer of Property Act to challenge the same. Referring to the evidence of D. W. 3 such a contention was advanced by Sri Mukherji.

9. First submission of the learned counsel for the appellants is that the document (Ext. 2) has not been proved in terms of Section 47 of the Indian Evidence Act. According to the learned counsel Sri Mishra signature of the executant and contents of Ext. 2 could only be proved by calling someone to the witness box to show the executant signing the document or the scribe writing the document or person who is acquainted with the signature or thump impression of the executant or the scribe writing/drafting the document or when such witnesses are not available by comparison of signature appearing in the document with that of signature of the executant appearing on any admitted document through expert. Shri Mishra challenges proof of Ext. 2 on the ground that when witnesses were available none was examined to prove the document (Ext. 2) in accordance with law. In this connection, reference may be made to Sections 61, 62, 63 and 67 of the Evidence Act. Section 51 of the Act prescribes that contents of the document may be proved either by preliminary or by secondary evidence. Section 62 defines preliminary evidence, whereas Section 63 defines secondary evidence. Section 67 prescribes that if a document is alleged to be signed or could have been written wholly or in part by a person, signature or hand written of the so much of the document as is alleged to be in that person's handwriting must be proved. At the time of hearing the learned counsel Sri Mishra referred to the evidence of P.W. 1 and submitted that due execution of Ext. 2 has not been proved in accordance with law. Before analysing the evidence in this regard, I feel it necessary to refer to the document itself first. Ext. 2 is the sale deed wherein Amulyanath Mitra is the vendor and the original plaintiff is the vendee. The deed has been executed by Sailendranath Mitra who is not only son of

Amulyanath Mitra but also agent and special power-of-attorney holder of Amulyanath Mitra. The endorsement made on the back of the first page of the sale deed shows that the deed had been executed by Sailendranath Mitra as special power-of-attorney holder of Amulyanath Mitra. It also shows that the deed was executed in present of the Registering authority and the execution of the document was admitted by Sailendranath Mitra who was identified by an advocate and it also shows payment of consideration of Rs. 1800/- in presence of the registering authority. P.W. 1 who is the power-of-attorney holder of plaintiff-vendee was examined in Court. She is no other than daughter of the plaintiff and in her evidence she has stated that due to old age her parents are not in a position to come to Court for deposition, for which she as power-of-attorney holder of the plaintiff had come to depose and prove the document (Ext. 2). In para 3 of her evidence she has stated that defendant No. 3 was the general power-of-attorney holder of Amulyanath Mitra who is his father. She has further stated that the defendant No. 3 who is an Advocate presented the sale deed before the Sub-Registrar for registration and Dibya-singh Mishra, Advocate also signed the deed as witness. She has further stated that the entire consideration money of Rs. 1800/- was paid to defendant No. 3 in presence of the Sub-Registrar and on that date Ext. 1 as well as parcha in respect of the suit land were handed over to the plaintiff. In para 4 she has stated that two days after execution of the sale deed (Ext. 2) in presence of witnesses Amulyanath Mitra delivered possession of the land after demarcation by Amin to the plaintiff and in January, 1968 the plaintiff raised compound wall around the suit land. However, referring to the statement of witnesses in cross-examination that she was not present when Amulyanath Mitra put his LTI, it is contended by the learned counsel for the appellants that actual execution of Ext. 2 has not at all been proved by the plaintiff in terms of Section 47 of the Evidence Act. In order to answer the question raised by the learned counsel for the appellants, evidence of Sailendranath Mitra who executed sale deed as power-of-attorney holder and examined as D.W. 3 on behalf of defendants should be looked into. In the very first paragraph of the examination-in-chief execution of sale deed (Ext. 2) was admitted by him. Though explanation is given that the document was a nominal one to defraud the creditors, execution of the sale deed has not been disputed by the executant himself. Learned counsel for the appellant on the face of such an admission on the part of the executant of Exhibit 2 submitted that the so-called admission made by defendant No. 3 cannot be taken into consideration as an admission. In support of his contention learned counsel relied upon a decision of the Madhya Pradesh High Court in the case of Chironjilal and Others Vs. Khatoon Bi and Others, . Referring to Section 13 of the Evidence Act the Court observed as follows (at page 241) :

"Coming to the next question that Hassu Khan was a "co-owner" and the plaintiff did not perfect his title by remaining in Continuous long possession of more than 12 years of agricultural fields. In view of Khasra entries wherein Hassu Khan is recorded as co-owner and that entry was never challenged and there is no

evidence of exclusive ownership of plaintiffs predecessors and plaintiff, and the ouster of Hassu Khan. Therefore, it was submitted that any statement or admission made by the defendant Nos. 1 to 3 after parting with interest is no admission u/s 18 of the Evidence Act. The admission of a person could be an admission only if it would be made during the continuance of his interest but once he has parted with his interest in property his admission is not admissible. That would be manifestly unjust that a person who has parted with his interest in property should be empowered to divest a right of another claiming in him by any statement which he may choose to make subsequently, reliance was placed on two decisions of this Court in the case of Dharamsingh v. Jalima 1980 LLJ 738 and Shafiullah Khan v. Abdul Wahab 1963 LLJ 14.

Referring to the aforesaid decision it was contended by Shri Mishra, learned counsel for the appellants that the defendant No. 3 having parted with the property by way of execution of sale-deed in Ext. 1, admission about execution of the deed cannot be accepted as admission on the part of the defendants. Reliance was also placed on a decision of the Rajasthan High Court in the case of Ramprasad Vs. Smt. Kalyani and Others, and it was contended that admission in order to be binding must be clear, precise and unambiguous. The other decisions referred to by the learned counsel for the appellants in connection with this point appear not to be relevant and, therefore, I have not referred to those decisions.

Now it is to be examined as to what extent the observations made by the Madhya Pradesh High Court is applicable to the facts of the case. Defendant No. 3 who was examined as D. W. 3, in examination-in-chief has stated as follows :

"The suit land originally belong to my father. My father has not sold the suit land to the plaintiff, but he had executed nominal sale deed in favour of the plaintiff as my father was heavily indebted and apprehended attachment of the land by the creditors. So to defraud the creditors my father executed nominal sale deed. I paid consideration amount to the plaintiffs husband and that amount of Rs. 1,800/- was paid back to us in presence of the Sub-Registrar, only to give a colour of the transaction."

The aforesaid statement of the defendant No. 3 (D.W.3) clearly shows that the intention of the execution of the sale deed was not for transfer of the property but for the purpose of defrauding the creditors who were likely to attach the property of father of the defendant No. 3. This witness though admitted execution of the deed, nowhere admitted that he parted with the property or the same was divested. On the other hand, a plea was taken that Amulyanath Mitra never parted with the property and remained in possession of the same. The observation made by the M. P. High Court as quoted above relates to a case where witness had parted with the property and, therefore, his admission with regard to execution of the deed was not taken into consideration. In view of the above, I am of the considered opinion that the observations made by the M. P. High Court are not applicable to the facts of the present case.

10. If the case is looked from another angle, it will be evident that execution of the sale deed has to be upheld as valid. Reference may be made to Section 43 of the Transfer of Property Act. Said Section provides as follows :

"Transfer by unauthorised person who subsequently acquires interest in property transferred -- Where a person (fraudulently or erroneously) represents that he is authorised to transfer certain immovable property and professes to transfer such property for consideration, such transfer shall, at the option of the transferee, operated on any interest, which the transferor may acquire in such property at any time during which the contract of transfer subsists." There is no dispute that after death of Amulyanath Mitra, defendant No. 3 has succeeded to the property. Even if contention of the learned counsel for the appellant is accepted that the deed (Ext. 2) had been executed during lifetime of Amulyanath Mitra by Sailendranath Mitra as Power-of-attorney holder, the sale was not valid because of the reasons stated earlier, the property having devolved on defendant No. 3. Mitra, the provision contained in Section 43 of the Transfer of Property Act comes into operation and, therefore, such sale is not only valid but also binding on defendant, No. 3. Findings arrived at by me as indicated above, answers on additional grounds taken by the learned counsel for the appellants at the time of hearing. The contention of the learned counsel for the appellants that no consideration passed under the deed has no force, The document itself indicates receipt of Rs. 1,800/- by D.W. 3 towards consideration money as power-of-attorney holder of his father Amulyanath Mitra. Moreover, other evidence with regard to payment of consideration has been considered by both the Courts below and they have concurrently found that consideration amount of Rs. 1,800/- had been paid to the executant in presence of the registering authority. In view of the fact that the sale deed, Ext. 2, was executed by the power-of-attorney holder of Amulyanath Mitra, the dispute raised with regard to age of Amulyanath Mitra at the time of execution of the deed becomes irrelevant. Ground on which the appeal had initially been admitted have not been pressed by the learned counsel for the appellants and moreover both the Courts below having discussed the grounds of limitation as well as non-framing of issues in detail and having arrived at the concurrent finding, there is hardly any scope for this Court to interfere with said finding.

11. In view of the discussions made above, I do not find any merit in the appeal and the same stands dismissed.